RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT
2016 APR -7 PM 4:22

ERNEST M. KIMOTO 4120
KOALANI L. KAULUKUKUI 8573
560 N. Nimitz Hwy, Suite 200
Honolulu, Hawai'i 96817
Telephone: (808) 594-1954

SHERRY P. BRODER 1880
Seven Waterfront Plaza, Suite 400
500 Ala Moana Blvd.
Honolulu, Hawai'i 96813
Telephone: (808) 531-1411
sherrybroder@sherrybroder.com

Attorneys for the Office of Hawaiian Affairs

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., Now Refiled as a New Ground Water Use by Molokai Public Utilities, LLC	CCH-MO-97-01 **INTERVENORS OFFICE OF HAWAIIAN AFFAIRS' RESPONSIVE BRIEF RE: MARCH 7, 2016 MINUTE ORDER REGARDING THE POTENTIAL DISMISSAL OF THE CONTESTED CASE; CERTIFICATE OF SERVICE**

INTERVENORS OFFICE OF HAWAIIAN AFFAIRS' RESPONSIVE BRIEF RE: MARCH 7, 2016 MINUTE ORDER REGARDING THE POTENTIAL DISMISSAL OF THE CONTESTED CASE

The Office of Hawaiian Affairs ("OHA"), Department of Hawaiian Homelands ("DHHL"), Maui County, Department of Water Supply ("MDWS"), and Native Hawaiian Practitioners Caparida and Kuahuia all agree that the contested case initially triggered by Kukui (Moloka'i), Inc.'s ("Kukui Moloka'i's") existing use water use application should be dismissed.

The applications apparently at issue are all for new uses and they should not be forced into the existing proceeding.[1] Indeed, the Commission on Water Resource Management ("Water Commission" or "CWRM") staff have provided no information about whether or not specific water use permit applications will be addressed in the existing case, much less which ones. The *sua sponte* caption created by the Water Commission staff last year states that this is a "**New** Ground Water Use by Molokai Public Utilities, LLC." (Emphasis added.) This is entirely different from the original caption in the contested case, "In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc."

The old case began on June 8, 1993, the evidentiary hearing began on November 23, 1998, and the findings of fact ("FOF") and conclusions of law ("COL") were issued on December 19, 2001. The Hawai'i Supreme Court issued its opinion in *In re Contested Case hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Hawai'i 481, 174 P.3d 320 (2007) ("*Kukui Moloka'i*") on December 26, 2007, already more than eight years ago.

---

[1] In October 2015, CWRM staff accepted as complete a **new** water use permit application filed by Molokai Properties affiliate Molokai Public Utilities for use of 1.026 million gallons per day of water from Well 17. According to the application, this water is to be used for the Kaluako'i golf course and Kaluako'i hotel units and landscaping (the application states plans are to open Kaluako'i Golf Course and Resort within 3-5 years), domestic use and landscaping at properties in Kaluako'i and Kualapu'u, and at Papohaku Beach Park.

Also in October 2015, CWRM staff accepted the water use permit applications filed by DHHL and MDWS in the 1990s. According to the public notice, MDWS requested 0.900 mgd from Kualapu'u Mauka Well for county municipal purposes, and DHHL requested 0.637 mgd from Kauluwai Wells 1 & 2 for domestic and agricultural purposes. These applications were not amended prior to acceptance by CWRM; however, DHHL and MDWS have indicated that they likely will amend these applications given the length of time since the applications were initially filed. Again, there was no specific notice of the acceptance of these applications to the parties of this contested case, rather CWRM simply publicly noticed the applications, as it does with all applications that are not the subject of a contested case hearing.

Molokai Public Utilities, LLC ("MPU") makes four weak arguments in support of its position.

I. Dismissing the Contested Case would not violate the Court's order in *Kukui Moloka'i.*

The passage of over eight years since the decision in *Kukui Moloka'i* mandates that the old case be dismissed and a new one opened. It is absurd that Molokai Public Utilities, LLC ("MPU") is trying to continue the old case when Molokai Properties Limited ("Molokai Properties") appeared in the old case and specifically told the CWRM that MPU had no intent to pursue this case. The May 7, 2008 letter was crystal clear that the contested case was over so far as MPU was concerned. "This letter is to inform you that Molokai Public Utilities (MPU) does not intend to pursue this case on remand." There was absolutely no indication in this notice of voluntary and intentional abandonment that MPU would try to preserve some of the case. The CWRM should have dismissed the *Kukui Moloka'i* case at that time.

On May 30, 2008, Molokai Chief Financial Officer Peter Nicholas wrote to the Public Utilities Commission as a director of Wai'ola O Molokai, MPU, and Mosco Inc., advising that the companies intended to terminate services at the end of August unless another operator was found to take over the services. Molokai Properties announced suddenly it was closing all Molokai Ranch operations, and that it could no longer afford to operate the water and sewer utilities. Edwin Tanji, "State agency bars plan to shut down Molokai utilities," ***The Maui News***, June 7, 2008, http://the.honoluluadvertiser.com/article/2008/Jun/07/br/hawaii80607042.html (last accessed April 6, 2016).[2] "The move came months after Molokai Properties, which was

[2] At the time, Consumer Advocate Awakuni advised the PUC that the Division of Consumer Advocacy was "deeply troubled by Molokai Utilities' suggestion that their obligation to serve their customers may be terminated at their discretion, as a result of their declared lack of sufficient revenues to recover the operating costs for Wai'ola and MPUI," and pointed out that

formerly known as Molokai Ranch, ceased its business operations on Molokai after a state commission was about the reject its plans to build luxury homes on Laau Point, which is considered to be a sacred site by Native Hawaiians." Chris Hamilton, "PUC water rate hikes finalized; it's been a long fight — Tavares," ***The Maui News***, September 24, 2010, http://www.mauinews.com/page/content.detail/id/540873/PUC-water-rate-hikes-finalized--it-s-been-a-long-fight---Tavares.html?nav=10 (last accessed April 6, 2016). On June 10, 2008, the state Public Utilities Commission ordered Molokai Properties to continue operation of its utility services for Molokai's West End. Disputes continued regarding the amount of rate hikes and in 2010 a rate hike of 126.25% was approved by the Public Utilities Commission. *Id.*

In the *Kukui Moloka'i* decision, the Hawai'i Supreme Court found that the Water Commission justified its refusal to consider evidence of the closure of the hotel and golf course in issuing the permit based in part on HRS § 174C–58(4) (1993), which authorizes the Water Commission to revoke a permit as to the amount of water not used for a period of four continuous years or more. *Kukui Moloka'i*, 116 Hawai'i at 504–05, 174 P.3d at 343–44. The Hawai'i Supreme Court rejected the Water Commission's reliance on HRS § 174C–58(4) as "misplaced." *Id*. at 506, 174 P.3d at 345. Evidence of the closure of the hotel and golf course was never considered and at this point in time they have been closed for almost eight years.

II. Dismissing the Contested Case would not result in piecemeal appeals that will complicate and delay a final resolution.

In its December 26, 2007 opinion, the Hawai'i Supreme Court did instruct Kukui Moloka'i to apply for a new permit under HRS § 174C–51 to "revive" its expired uses pursuant to HRS § 174C–50(c). Beyond its unequivocal abandonment of the process in the 2008 letter to

---

the utilities, in accepting monopoly rights, the utilities "accepted the corresponding obligation to provide utility services to their customers." *Id.*

the CWRM, MPU's complete failure to take any action since then is and should be considered ample proof of complete abandonment of that contested case.

MPU threatens that, if the old case is dismissed, it will bring an appeal under HRS § 91-14, which will "only complicate and delay a final resolution." *See* MPU Brief, Mar. 24, 2016, at 4. It is ironic that MPU now seems to be concerned about delay since the eight-year delay is due to its abandonment. Moreover, MPU's concerns are unfounded. If the old case is dismissed, the normal procedure would be for an appeal to be taken from the final judgment in the old case. At the same time, the new case can proceed and there will be no delay.

Furthermore, there should be delay in moving forward with this matter in any event because this matter should be deferred until the imminently pending publication of the United States Geological Survey ("USGS") Molokaʻi Groundwater Recharge and Availability in Eastern Molokaʻi Study ("Study"), which will provide information directly relevant to the CWRM's constitutional and statutory duties and responsibilities. The Study will estimate the hydrologic effects of groundwater withdrawal on both salinity and water levels near existing wells and on coastal discharge, for the express purpose of allowing groundwater managers and policymakers – including CWRM – to "effectively manage groundwater withdrawals from central and eastern Molokaʻi." USGS, Groundwater Recharge and Availability in Eastern Molokaʻi website, available at http://hi.water.usgs.gov/studies/molokai/ (last accessed March 22, 2016).

Peer review and final publication of the Study is anticipated to occur by January 2017. A public hearing presenting the draft Study is planned for May 2016 on Molokaʻi. Accordingly, the information provided by the Study will be indispensable to the parties' and the CWRM's evaluation of any Ground Water Use Permit Applications ("GWUPAs") addressed in a contested case, in ensuring the protection of constitutionally protected practices and public trust purposes.

III. While the CWRM did accept the new applications that were submitted, OHA and other parties were not notified of the submittal or acceptance and to proceed without considering OHA's objections is to deny OHA the due process of law.

MPU never served OHA with its new applications in a timely manner. It cannot now try to bootstrap its position in this case by making arguments that the CWRM has already acted in some manner that OHA was not provided with any opportunity to object to. Both MPU and the CWRM treated these applications as if they were not the subject of a contested case hearing.

In October 2015, CWRM staff accepted as complete a **new** water use permit application filed by MPU for use of 1.026 million gallons per day ("mgd") of water from Well 17. According to the application, this water is to be used for the Kaluakoʻi golf course and Kaluakoʻi hotel units and landscaping (MPU's application states Kaluakoʻi Golf Course and Resort may open within 3-5 years), domestic use and landscaping at properties in Kaluakoʻi and Kualapuʻu, and at Papohaku Beach Park.

Also in October 2015, CWRM staff accepted the GWUPAs filed by DHHL and MDWS in the 1990s. According to the public notice, MDWS requested 0.900 mgd from Kualapuʻu Mauka Well for county municipal purposes, and DHHL requested 0.637 mgd from Kauluwai Wells 1 & 2 for domestic and agricultural purposes. These applications were not amended prior to acceptance by CWRM; however, DHHL and MDWS have indicated that they likely will amend these applications given the length of time since the applications were initially filed. Again, there was no specific notice of the acceptance of these applications to the parties of this contested case, rather CWRM simply publicly noticed the applications, as it does with all applications that are not the subject of a contested case hearing.

IV. Dismissing the Contested Case would not be inconsistent with the Commission's handling of other proceedings.

MPU incorrectly attempts to rely on the non-stop proceedings in *In the Matter of the 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*. Unlike *Kukui Moloka'i*, the *Waiāhole* cases were never abandoned but continued to be actively litigated, and for some issues, mediated.

The *Waiāhole* contested cases commenced much the same way they did in *Kukui Moloka'i*. On July 15, 1992, the Commission designated the five aquifer systems of Windward O'ahu as ground water management areas, effectively requiring existing users of the Waiāhole Ditch water to apply for water use permits within one year of that date. In June 1993, the Waiāhole Irrigation Company ("WIC"), the operator of the ditch system, filed a combined water use permit application for the existing users of ditch water. In August 1993, Oahu Sugar Company ("OSCo") announced that it would end its sugar operations, signaling the imminent availability of the ditch water used by OSCo and raising the question of its future allocation. On November 4, 1993, the State Department of Agriculture filed a petition to reserve the ditch flow for agricultural uses. OHA, Waiāhole Waikane Community Association ("WWCA"), Kamehameha Schools Bishop Estate ("KSBE"), and DHHL also filed petitions to reserve water. On December 7, 1993, WWCA petitioned to amend upward the interim instream flow standards ("WIIFS") for the Windward O'ahu streams affected by the ditch; OHA filed a similar petition on February 28, 1995. KSBE and Castle also filed separate water use permit applications specifically requesting water drawn by the ditch system from lands they owned. The petitions to

amend the WIIFS and the permit applications collectively exceeded the entire flow of the ditch.[3] On January 25, 1995, the Commission ordered a combined contested case hearing on the permit applications, reservation petitions, and petitions to amend the WIIFS. *In re Water Use Permit Applications* ("*Waiāhole I*"), 94 Hawai'i 97, 9 P.3d 409 (2000).

The *Waiāhole* contested cases eventually involved twenty-five parties and several consolidated applications and petitions. The contested case hearing commenced on November 9, 1995. The Commission issued its final decision and order on December 24, 1997. *Id.*

In *Waiāhole I,* the Hawai'i Supreme Court issued its final decision on November 29, 2000 and remanded to the CWRM. The court vacated the CWRM's designation of the WIIFSs and held that "the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams. In the meantime, the Commission shall designate an interim standard **based on the best information presently available**." (Emphasis added). *Id.* at 156, 9 P.3d at 468.

The Hawai'i Supreme Court did criticize the CWRM for the delay in its processing of the *Waiāhole* case. "We take this opportunity, however, to remind the Water Commission that seventeen years have passed since the Water Code was enacted requiring the Water Commission to set permanent instream flow standards by investigating the streams. HRS § 174C–71. In addition, four years have passed since this court held that 'the Commission shall, with utmost

[3] In May 1994, the Commission received complaints that, with the close of OSCo's sugar operations, WIC was discharging unused ditch water into Central O'ahu gulches. After holding an investigation and several meetings and considering an order to show cause regarding WIC's continuing waste of water, the Commission requested the parties involved to enter into mediation. The mediation agreement and the Commission's subsequent order dated December 19, 1994 provided that WIC would continue to supply 8 mgd to the ditch, as measured at the North Portal, and release the surplus into the windward streams.

haste and purpose, work towards establishing permanent instream flow standards for windward streams.'" *Id.*

On the first remand, the Water Commission determined the seven issues and issued on December 28, 2001 its findings of fact and decision and order ("D & O II"). On appeal of the D & O II, the Hawai'i Supreme Court partly affirmed and partly vacated the decision and remanded six issues for further findings and conclusions. *In re Use Permit Applications* ("*Waiāhole II*"), 105 Hawai'i 1, 93 P.3d 643 (2004).

On the second remand, the CWRM determined the six issues and issued on July 13, 2006 its third set of findings of fact, conclusions of law, and decision and order ("D & O III").

On the first and second remands, the CWRM decided that the evidence from the prior proceedings could be used and further hearings were conducted. The *Kukui Moloka'i* case is entirely different. In the *Kukui Moloka'i* case, interim instream flow standards are not involved, the USGS will provide relevant new scientific evidence, and new permits are required and were submitted outside of normal contested case procedures, including service on all parties. Many of the new uses applied for by MPU are in fact uses that were discontinued eight years ago. In all cases, the CWRM has the duty to use the "best evidence available" - "the Water Commission must continue making decisions based on the best information available." *Waiahole II* at 665, 23.

Moreover, in the *Kukui Moloka'i* case, there are new prospective parties – MDWS and Native Hawaiian practitioners. Their fundamental due process rights will be violated if these parties are bound by the findings of fact and conclusions of law from the prior proceeding, or are not in fact able to participate in the process at all. Due process encompasses the opportunity to be heard at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *Sandy Beach Defense Fund v. City Council*, 70 Hawai'i 361, 378, 773 P.2d 250, 261 (1989).

MPU appears to be planning to rely on the past use of water before Molokai Ranch operations were closed. In *Waiāhole I*, the Hawai‘i Supreme Court was very clear that "Although past water use is a good indication of actual water needs, it is not the only means of determining actual water needs. An applicant must be able to present evidence of, and the Water Commission may consider, projected water needs that are real and supported by evidence." *Id*. at 664, 22.

The remand was immediately acted upon and the CWRM issued its D & O II on December 28, 2001, and addressed the seven issues remanded in *Waiāhole I.* It was a one-year time frame between the remand and the D & O II. In the second remand, CWRM determined the six issues and issued its D & O III on July 13, 2006. It was a two-year time frame between the remand and the D & O III. There was no intentional and voluntary abandonment by any of the main parties in *Waiāhole*. In the *Kukui Moloka‘i* matter, it is already more than eight years since the remand and there has been a complete abandonment not only of the case but also of most of the activities that form the basis of MPU's request for new permits.[4]

V. Conclusion.

Clearly too much has changed since the original contested case hearings to continue with those findings of fact and conclusions of law. Moreover, besides the fact that MPU

---

[4] The Hawai‘i Intermediate Court of Appeals in an unpublished opinion decided an appeal from the 2006 D&O II pursuant to the second remand on Oct. 13, 2010. Significantly the court did note the importance of and required that the CWRM consider "**changed circumstances**":

> We vacate PMI's water use permit because we conclude that the Water Commission erred in refusing to consider the Windward Parties' motion on the merits before deciding PMI's permit application, and we remand the case for further proceedings consistent with this Memorandum Opinion. On remand, **the Water Commission shall consider whether changed circumstances** since the issuance of D & O II have affected PMI's need for the requested 0.75 mgd of Waiahole Ditch water under the State Water Code's reasonable-beneficial use standard. We express no opinion on the merits of this remanded issue. In all other respects, we affirm D & O III.

(emphasis added). *In Re Water Permit Applications*, 130 Hawai‘i 346, 310 P.3d 1047 (Hawai‘i App.) (2010).

unequivocally abandoned the process in a letter to CWRM in 2008, there has been unreasonable delay by MPU in seeking to move on the remand. OHA urges that the CWRM vacate its December 19, 2001 findings of fact and conclusions of law of 51 pages and dismiss this contested case. The Hawai‘i Supreme Court has already vacated the Decision and Order.

The CWRM must take an active role as the protector of the public trust and "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*." *Waiāhole I*, 94 Hawai‘i at 143, 9 P.3d at 455 (emphases added) (quotations omitted).

"[A]n applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes," such as the exercise of Native Hawaiian and traditional and customary rights. *Kukui Moloka‘i*, 116 Hawai‘i at 507-9, 174 P.3d at 346-8.

The CWRM cannot meet its constitutional and statutory duties and responsibilities based on a record that was developed over 20 years ago for entirely different applications.

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

Sherry P. Broder

ERNEST M. KIMOTO
KOALANI L. KAULUKUKUI
SHERRY P. BRODER
Attorneys for the Office of Hawaiian Affairs

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., Now Refiled as a New Ground Water Use by Molokai Public Utilities, LLC	)	CCH-MO-97-01 **INTERVENORS OFFICE OF HAWAIIAN AFFAIRS' CERTIFICATE OF SERVICE**

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 or hand-delivery and email:

Kathy Yoda
Commission on Water Resource Management
1151 Punchbowl St # 227
Honolulu, HI 96813

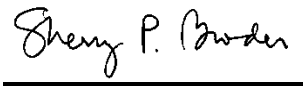
David Frankel
David Kopper
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813
Attorneys for Intervenors Judy Caparida and Georgina Kuahuia

David Shulmeister
Cades Schutte LLP
1000 Bishop St. Suite 1200
Honolulu, Hawaii 96813
Attorney for Molokai Public Utilities LLC

Patrick Wong
Jennifer Oana
200 High Street
Wailuku, Hawaii 96793
Attorneys for Maui Department of Water Supply

Diane Taira
Matthew Dvonch
425 Queen Street
Honolulu, Hawaii 96813
Attorneys for Department of Hawaiian Home Lands

DATED: Honolulu, Hawaii, April 7, 2016



ERNEST M. KIMOTO
KOALANI L. KAULUKUKUI
SHERRY P. BRODER
Attorneys for the Office of Hawaiian Affairs