

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: October 16, 2018  
TIME: 10:00 am  
PLACE: DLNR Board Room  
Kalanimoku Bldg.

Commissioner Michael Buck temporarily presided and called the meeting of the Commission on Water Resource Management to order at 10:05 a.m.

The following were in attendance:

**MEMBERS:** Mr. Michael Buck, Mr. Keith Kawaoka, Mr. William Balfour, Mr. Neil Hannahs, Mr. Paul Meyer

**STAFF:** Jeffrey Pearson, Dean Uyeno, Ayrton Strauch, Ryan Imata, Rebecca Alakai, Roy Hardy, Malie Beach-Smith

**COUNSEL:** Colin Lau

**OTHERS:** David Day, Tautua Howell-Reed, Lu'ukia Nakanelua, K. Mitchell, Kaleo Manuel, Katie Ersbak, Leinaala Ley, Debra Lee-Jackson, Hope Kallai, Beth Tokioka, Dawn Huff, Paul Nihipali, Jonathan Scheuer, Bianca Isaki

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

**A. APPROVAL OF MINUTES**

August 21, 2018

**MOTION: (BALFOUR/HANNAHS)**

**To approve the minutes.**

**UNANIMOUSLY APPROVED (Balfour, Hannahs, Kawaoka, Meyer, Buck)**

September 18, 2018

Commissioner Meyer pointed out on page 3 of the September 18 minutes, paragraph 8 should be Kapalua Water Company, Hawaii Water Service Company and the municipal water company.

**MOTION: (MEYER/KAWAOKA)**

**To approve the minutes as amended.**

**UNANIMOUSLY APPROVED AS AMENDED (Hannahs, Meyer, Kawaoka, Buck, Balfour)**

Amended and approved at the Commission on Water Resource Management at the meeting held on November 20, 2018. See page 4 for amendment.

**B. ACTION ITEMS****3. Ohana Water, LLC Application for a Ground Water Use, Well Construction and Pump Installation Permits Ohana Water Well (Well No. 3-3856-010), TMK (1) 5-5-008:055, GWUP No. 1053 New Domestic and Agricultural Use for 0.471 mgd**

PRESENTATION OF SUBMITTAL: Ryan Imata, Ground Water Regulation Branch

Commissioner Buck asked if we approved this quantity for taro loi from a well?

Mr. Imata answered yes.

Commissioner Buck stated that they're asking for 200,000 mgd for taro. We understand that the temperature for the water is critical in how to grow. Commissioner Buck asked if he could describe the difference between what we would, factors we should consider in taro requirements from a well versus taro requirements from a flow through stream.

Mr. Imata could not speak to what is required. I can just site the studies that I took a look at that describe what standard flow through would be for surface water. I don't know if the temperature is comparable. I think it would be a lot colder because taking deep fresh water. As far as the flow through, it's a huge range, 150, 100 thousand. They are asking for something in the middle. I think it may also be one of those things where in practice they will use what they need to irrigate the loi and I don't know that they will use more. I'm not sure. That's a question that you can ask the applicant.

Commissioner Hannahs asked what exactly goes into the tilapia pond. Does it recharge? Usually on the surface it will go back to the stream, but what happens in this case?

Mr. Imata said that he did ask the applicant to answer questions the Commission may have.

TESTIMONY BY APPLICANT: Paul Nihipali

Commissioner Beamer arrived at 10:14 am and presided as Vice-Chair.

Mr. Nihipali answered that the difference between the stream and the well is families that are connected to the stream where in the local area there is a well that was there which we did water testing on and compared the two. It really wasn't a comparison because where we sit into the valley, there are farmers, whenever they use the fertilizer it does affect the stream, henceforth comes to the snails and that affects the root rot, etc. We've had it, throughout the history of our property that we have. The problem that we still have now was originally conveyed to Queen Emma III and King Kalakaua deeded the well patent to us April 9, 1879. We still have that property today. What we did is that there is a total of 6 different apana we had in Laie. We consolidated everything because as you know the church of Jesus Christ of Latter-Day Saints are in that area and throughout the history between our family and church they gobble up a lot of the property so we are talking with them and are more comfortable with each other. We're making a point where, I spoke to the president of HRI and let them know what we are doing. This is what we've been allowed to do. The tilapia ponds are being diverted to actual water. I guess we never stuck a meter to it

but we do know that the temperature does affect it. If you are going to yield to an acre of kalo and take 2/3 of it or half of it just because of those outside influences. We're just trying to yield about 85 to 90 percent of it.

Commissioner Buck asked if his experience of well water is colder and doesn't have some of those contaminants?

Mr. Nihipali said yes, absolutely. Contaminants that the stream water has is like night and day.

Vice-Chair Beamer asked if taro is being farmed, how much is in production and is kalo commercial?

Mr. Nihipali answered right now it's in the water resource that we have is probably 1.13 acres. Kalo is commercial and goes to poi. Our family work the loi and take according to what their work contributes. The rest goes to farmer's market, etc.

Vice-Chair Beamer asked if right now it's from a stream or is there a spring too?

Mr. Nihipali answered that there is a spring there but it is minimal and we don't have a pump on it. To get a pump to move the water, the flow rate is not really minimal.

Commissioner Anderson arrived at 10:25 am.

Commissioner Hannahs went back to his question on the tilapia ponds. You put it back into the tilapia pond, it sinks back in?

Mr. Nihipali answered that's the way it's been doing that.

Commissioner Buck asked if he ever fallow the loi and still pump the same amount for the tilapia?

Mr. Nihipali answered that the water for the tilapia pond would be lower because it's just sitting there. We do fallow, but we do try to stagger where once fallow the other 3 will be in production and so forth.

Commissioner Buck stated that staff recommendation is 200 mgd focusing on the loi. How does that sound to you? Do you have a good feel of what 200 mgd looks like when you pump it through?

Mr. Nihipali said that it would be in comparison to an Olympic swimming pool. 0.471 would be considered 1-1/2 so visually in comparison to the loi that we do have there would be more than a few that would be fallow because of the source of water.

Commissioner Beamer asked if they are planning a residential development?

Mr. Nihipali answered that we do have farmers that are one there but they are consistent with the DPP.

Commissioner Beamer asked if there is a substantial amount of water available in the existing sustainable yield.

Vice-Chair Beamer asked for any testimony for Item B-3. There were none.

Commissioner Buck made one comment. This is a learning experience for us. This is a first time that we are approving a taro loi from a well. We encourage you to help us and so we could find out that this doesn't set a precedent that we want to be aware of and dealing with this statewide. We encourage you to work with staff and learn about kalo farming with well water.

Vice-Chair Beamer added to reflect in the minutes that we are looking at kalo and kalo is growing regionally in different varieties, water qualities, temperatures. Everything must be on a case by case basis. Please do work with our staff; I don't know how this vote will turn out but if it is approved and it turns out that 200,000 isn't enough, I think staff can come back to the Commission and revisit that. It may be hard to tell from an Olympic swimming pool how much is needed but certainly traditional and customary rights and taro cultivation is a big part in the public trust.

Commissioner Hannahs posed a question to Mr. Imata. There is surface water there but I get the problem that it needs to be treated ~~and~~ for anyone to use it because of what it's carrying. Does this put us on alert for things we should be looking at in terms of how the neighboring farmers are treating that asset, their stewardship, their practice? Is that within our purview?

Someone in the audience commented and questioned – NRCS (Natural Resources Conservation Service)?

Commissioner Hannahs asked if are they aware of the issue? We're accessing the ground water because the surface water can't be used for this purpose. It undermines this purpose. Why don't we bring their attention to the problems in the uses on that system?

Mr. Nihipali said that he is not a professional but we are getting more snails than usual from the springs.

Vice-Chair Beamer added that it is under the purview of the Commission, but we have the Department of Health (DOH) here. I think you should be flagged and understand the quality of the surface water.

**MOTION: (MEYER/BEAMER)  
To approve the submittal.  
UNANIMOUSLY APPROVED.**

## **C. PRESENTATIONS AND UPDATES**

### **Red Hill Update by the Department of Health**

PRESENTATION OF UPDATE: Mr. Keith Kawaoka, Deputy Director, Department of Health

Mr. Kawaoka's presentation can be viewed on the Commission's website at <http://files.hawaii.gov/dlnr/cwrm/submittal/2018/sb20181016C1.pdf>.

Commissioner Buck asked he read recently that the impact of corrosion were more than what people thought. Is that just preliminary?

Mr. Kawaoka said it is anecdotal at this point. You might have seen pictures. We're having a field task force meeting to discuss this. As far as the actual corrosion studies, non-destructive testing evaluation, that is being done in a lab on the mainland right now so we have not seen any official results. Officially, we cannot comment on whether that is correct or not.

Commissioner Buck asked where did those stories come from?

Mr. Kawaoka answered that it's been in the media quite a bit and we did debrief certain organizations about the situation, what we need and the extrapolation.

Vice-Chair Beamer asked about the detection site.

Mr. Kawaoka answered the middle (showed on screen) these are the ones that are in line with the tanks. We continue to monitor and identify any new or old releases. That's the importance of the monitoring to determine whether it is moving in various directions. The flow of the ground water is very unpredictable. The issue becomes whether the Halawa Shaft, Moanalua wells, are the Honolulu Board of Water Supply (HBWS) concerns.

Vice-Chair Beamer asked what was detected was levels that were over a certain threshold?

Mr. Kawaoka added or action levels. I don't have those numbers now, but can get it to you.

Commissioner Buck asked if this was after the 27,000-gallon leak?

Mr. Kawaoka answered this was a new release detection level. Whether this came from the release in 2014 we are not sure.

Vice-Chair Beamer asked, so we're seeing increased levels and we don't know if it came from the initial leak or could be from some new releases?

Mr. Kawaoka answered that it could be from some old releases and were not able to identify or some past leaks.

Commissioner Buck said on the ground water, I heard there are some disagreement, but there is not agreement on the actual subgroup that is doing the modelling, especially the Navy release their own model that they were using and the water is going to flow uphill. I'm curious that if it does leak, where does the oil go.

Mr. Kawaoka answered, I've been sitting on those technical meetings. You can imagine an intense discussion amongst the experts in the field.

Commissioner Buck asked, is there some common agreement where the water flow downhill?

Mr. Kawaoka answered, it depends on what data are being entered into the model, how accurate the data is to determine what the modelling grid will show. That has been a bone of contention of what should go into the model, how you interact with the model in terms of what is going to show as far as what specific flow is taking transport is going to detect.

Commissioner Buck asked if the Navy is going to build up and get rid of the underground tanks and build brand new ones.

Mr. Kawaoka answered that they looked into alternative options besides improving the tanks, single wall or double wall. They did a study of alternative locations on Red Hill. They looked at other parts of the Pacific, other parts of Hawaii and the conclusion they reached is that, if they were to build a new facility, state of the art, the location was at Red Hill, possibly somewhat mauka or even right over the existing Red Hill facility. The scenario they put out was instead of the 20 tanks, they would build 40 new tanks, double walled, partially above ground, partially below ground, providing fuel for the Pacific fleet and aircraft. When the option was briefed before the higher levels of the Department of Defense (DOD) and the Navy, they said that they rather not spend a whole lot of money at this point because that would be the most expensive option, a new facility. That decision at this point in time for the initial tanks, the 4 tanks will be coming out in a report at the end of the year. They are forwarding either option 1a or 1b. The new facility is still possible either over Red Hill or even possibly other parts of the Navy property that they have. But that is probably a longer-term option in case they feel Red Hill is not a facility they envision. I should also mention that DOD is doing a global-wide fuel management study to look at strategically where they are going to place their gas stations throughout the world. Red Hill is one of those facilities. Based on those studies, which will come sometime next year, that could definitely determine how Red Hill is going to be managed. At this point it could be less than what it is, it could be the same or it could be more. I think that is what the military folks are seriously determining what the future fate of Red Hill is. We have been telling the Navy here that this report for the recommended option for the tank upgrade, you better be sure that you not only look at your recommended option but also look at those other options as well. And make sure that you provide that information for us to make a decision. We have to make the ultimate decision on what the recommended option is. At this point we've enumerated several times before the admiral and his technical staff that this is what we are looking for.

Chair Suzanne Case arrived at 10:51 am.

Commissioner Buck asked what happens in December if it is option 1a or 1b, the DOH is one of the parties in the Administrative Order on Consent (AOC) and you say that doesn't work for us. How does that work?

Mr. Kawaoka answered, once we get the recommended report at the end of the year, the regulators will review the information, we will probably hold public meetings as well to get the public input. If we feel the report is not adequate or recommendations not acceptable, it would go back to the Navy and re-do whatever we recommended to substantiate their gaps information, for example, whatever that could be. Should it not recess stage or we just flat out say no, it would go into a dispute resolution or change to the AOC. From there, it's anybody's guess at one point. We're in a very crucial stage right now, entering into that crucial stage. A lot of information are coming in from various tasks, lot of information coming in to upgrade the situation. We're bracing for that point and at this point, even though we speculate what the Navy is going to recommend, at this point, we want to make sure that they provide that substantiation for the recommendation that they make. If it is not adequate, then we will reject it.

Commissioner Hannahs asked how to do that. Sounds like we have an independent review but it's going to be reliant upon the information provided us by a party with its own interest. What's to prevent them from just stacking the material to really point to the recommendation that they like, rather than really be a more objective analysis of all options.

Mr. Kawaoka – That's correct but also, we have been working with the Navy through these decision-making meetings, technical meetings all this time. It's not as if we'll get some report and looking at it for the first time. We have seen information that we have seen before and comfortable with. We hope we don't get any surprise but we mentioned to both the management as well as technical people that you better make sure that you dot the i-s and cross the t-s when you provide that report to us. Not just for the recommended option, but all the other options that says why or why not you recommend this particular option. The crucial decision to be made, not just for this initial set of tanks, it's all the future tanks we are going to consider, 3 years, 8 years from now, all the way to the end. But as our current director has mentioned, it's not just looking at the AOC peer, it's a long time, 20 years. We are also looking beyond that period. What is the Navy's plan to look at on a long-term basis, beyond 20 years? We mentioned that to the Navy, I've mentioned, technical staff and EPA mentioned to the Navy. All suggested that the Navy think about the long-term situation, not just within the AOC.

Commissioner Anderson elaborated on that because of its important for the Commission to know. These tanks were built during WWII and things have changed since then. Their needs for fuel have changed dramatically. Most of it were for fuel jets. It used to be Bunker C where battleships needed that fuel. The facility was built with that in mind. Given the circumstances today, most of the fuel needs are for aircraft. Given the changes that have occurred potentially there would be a more efficient way of providing fuel to those facilities, including building tanks closer to the facilities and not above the aquifer. To Keith's point, these tanks are 70-75 years and in some arguments, already have exceeded their lifetime. Realistically, it's going to take 10 or 20 years more for them to design and get permitting, etc. for a new tank field, which they are going to have to do at some point. There is no way these tanks are going to be lasting forever. We have urged that they start that process now so that we know what we are dealing with. This isn't the "forever" kind of situation. I certainly don't see that being the case. We'll see what the corrosion studies essentially what the condition of the tanks is. This isn't the golden gate bridge, not something you can keep repainting and hoping it will last for a long, long time. I hope that they would start that

planning process now. They have identified a couple of spots including one of the golf courses, other places where they might be able to put a tank field in the future. To get the land use permitting, to assure that that area is preserved for the tank fields, whatever they decide to do, they need to start that process and identify the locations now to protect and preserve those for the future. In addition to looking at these tanks and trying to figure out what best available practical technology is for maintaining those tanks in the short run, in our view, they need to start planning, looking out 10, 20 years. What are you going to do then? I think it would be reassuring for people to know that those tanks will not be there forever and they need to start thinking about what their planning is. So far, as Keith pointed out, they seem receptive to that, but we haven't seen any active effort to evaluate some of these other options that he's eluded to, including moving the tank field somewhere else besides Red Hill.

Commissioner Balfour had 2 comments. It's my distinct impression that there is not a sense of urgency that is new in this situation. The Navy will get there so forth and so on. Every time they change the commanding officer, a new set of circumstances come up. You don't start from scratch, but you have a different perspective. The other thing is you have 27,000 gallons sitting in the ground over the aquifer. I had the distinct pleasure meeting with Admiral Fuller and if there anything I said was not possible. It was all never happened. I'd know for a fact because it happened to me in my other life. I had spillage of diesel in the aquifer in Waipahu and was given instructions to get every drop out. I hired someone (can't remember) to pump it out. Every morning I would check. Until that was completely cleaned I paid the price of pumping it out. I said why don't you do that. They said the strata below the tanks does not heal itself. The scary thing is, once the thing gets in the aquifer, then the problem is devastating. Up until now, we have been skating on thin ice. When that ice cracks, I'm glad I'm on that side of Halawa Valley because, my water is good. It took 2 years. We have been at this for 3-4 years. It goes on and on. We hear the same old song and dance. The Navy does not have the sense of urgency. I'm absolutely convinced.

Commissioner Meyer – I echo Commissioner Balfour's comments as well. Your department is trying to do your best and is certainly a difficult situation to be in. I've had personal experiences in the late 80's remediating some petroleum spills and it is absolutely your worst night mare. Once the petroleum products are in the aquifer they spread across the top like crazy and regardless of how many skimming wells you put in, you simply have a night mare situation of removing that. Even the smallest quantities can taint and affect or ruin the drinking water source. The only way to deal with this situation, in my opinion, is to do your very very best to prevent any releases and your department knows statewide that a mandated double wall construction for any UST with detection and here we are today, with what is clearly a very scary situation. I would highly recommend, as Commissioner Balfour said, use our best efforts to try and get this resolved, fixed in a timely fashion because it seems apparent that more leak is eminent at this point.

Commissioner Balfour to Mr. Kawaoka – I'm not picking on you, I'm picking on the Navy. We're from the government, we know better. I have a difficult time trusting them because every time the story is a little different.

Commissioner Beamer – Our Commission has a history. We actually voted against the AOC because we were concerned about our staff having to sign a non-disclosure agreement

and we weren't sure about the accountability. It's been several years that we have been involved in this process.

Commissioner Buck – We were also not happy with the 20-year contract.

Commissioner Beamer – Yes, we were extremely disappointed, with the last update that we had from the Navy officer. This is the first that I'm hearing from you, Keith. There may have been another leak or it's filtered through and it took 3-4 years for us to find it. There is a lot that is still going on here and I deeply appreciate your work and how complex this is. As well as what we are hearing from the head of the DOH so I would like to applaud your efforts. I also continue to feel flabbergasted. This is the most frustrating issue that have to sit with on the Commission and the fact that we're talking about another 20 years, replaced or maybe can choose alternatives 1a or 1b and it buys another 5 years for us to have to negotiate with them. Commissioner Meyer's point is a minimum that it has to be double lined. I just hope there isn't another leak and something serious occurs. We have been dancing around for the last 3 years. I know you face this everyday but what more can we do.

Commissioner Buck to Mr. Kawaoka. We know you are representing the State's interest. You might be a voice in one, AOC. How can the Commission help and support you? When the reports come in, you may or may not agree with what they say.

Mr. Kawaoka answered. It starts from the technical level. The best minds and experience in all those areas that I went through, he appreciates the staff's involvement in this. The staff has been involved a lot. It's somewhat of a magnitude that is not like a corner gas station. It's a one of a kind tank system that but it does contribute to National security as well. But there is serious concern about the environmental quality parts of it. there are 2 opposite ends that deal with bulk. That's why it's taking so long. Navy insisted that they wanted to keep operations going; they could not stop and fix the tanks, get rid of the tanks. They had to maintain operational readiness. As far as the pace of this concern, this is the first set we are dealing with, best available practical technology so it does take a little more time to determine what is appropriate technology to employ for these upgrading of these tanks. Certainly, we call it a wrinkle but the global fuel studies certainly affecting this and it seem reasonable they want to look at this from a broader perspective. It doesn't impinge upon our decision making for Red Hill. I'm sure it's going to affect all the other tank systems throughout the country throughout the world. I did mention also that we have also been in the courts. We've been sued by Sierra Club. The court order from last year is that we complete our tank rules by July 2017, way earlier than what expected to complete it at. Working with staff, we did it. the new tank rules are in place, which include tanks like Red Hill and other fuel constructed tanks. All those things are in motion. I sense and realize your concerns and share them to a large extent, but there is a balance that we have to deal with, certainly with the Navy, National Security, but also with environmental protection and quality.

Commissioner Anderson – Keith and I certainly share your concerns. Our focus and main priority is to protect our drinking water aquifers. With all due respect to the Navy, I think there are national interests at stake but they need to start planning for the future. Can't just kick the can down the road like they are. The process does require as you may recall that

the EPA and the DOH both agree to make these options. We've had some preliminary discussions with EPA and first of all we haven't seen a justification for the Navy's decision on this. The only thing that I saw on this was somewhat disingenuous reply to "we're saving the tax payers money" by this option. That is unacceptable to us. They have got to be able to justify why a double lined tank is impractical or can't be built there in the short one. Let me emphasize that. My opinion, we're not going to shut that tank field down immediately. We can't do it even if we wanted to for national defense purposes but over the next few years, they need to start making sure that their tanks aren't going to leak while they look at alternatives. I urge that maybe the Water Commission could help reinforce this, that they look at alternatives besides maintaining those tanks and start doing that right away. They actually have, their staff have been tasked with that, but it's not been publicized. I think they're reluctant to speak about their interest in looking at that. Personally, I'd like to see those tanks converted to water tanks. It would be wonderful to have an asset like that in the event of a catastrophic event, those tanks are an engineering marvel and I can see why they don't want to back away from that. It's a huge investment but having said that there could be higher uses for those facilities than storing fuel. If we had a nuclear war which is probably what we're looking at if there is any war, I think safe drinking water is going to be a higher demand than fuel. There is not going to be any vessels to fuel, airplane to fuel. But having said that, regardless, they need to start looking at that as an alternative down the line and I think we would all feel more comfortable and try to aggressively do that. So, we'll see what happens. As Keith pointed out, if we don't agree and we are fully prepared to say we don't agree that your option has been supported. This is going to be elevated and if the situation is out of our hands, the fuels process does not involve the State of Hawaii. Who does?

Mr. Kawaoka - It goes back to the assistant secretary for water and EPA and assistant secretary for defense for environment.

Commissioner Anderson – So you have the EPA and defense department making the final decision on this. And of course, there is always the option of the President declaring that this is an interest of national security and then everyone else's opinion is worthless.

Mr. Kawaoka – I'm sure some of you are thinking about that, yes there is a presidential exemption.

Commissioner Beamer – For having some honesty if that is potential, it's not national defense or national security to poison an aquifer. You can't just say we're going to poison it a little bit but we're going to protect you. We should be clear on that in negotiating. \$17 billion budget.

Commissioner Anderson – Even imposing a significant risk is unacceptable. Remember Commissioner Balfour mentioned that he lives a long way and it is not a problem. That aquifer feeds the water system that goes all the way out to Hawaii Kai. Waianae to Hawaii Kai. If there is mixing of course, and everything else, that's the most important aquifer we have in the state. As pointed out, petroleum is almost impossible to clean up once it's in the ground. It's not a question, can we clean it up. If there is a spill, it's not going to be able to get cleaned up. The question is how far can we go to prevent it. In my opinion, it has to be. There is an inherent risk to have the tanks there that is unacceptable. I don't think that that

is a long term option that is status quo, maintaining those tanks. We need to move them. We should get them moved as soon as we can. Again, that's going to be 10-20 years out even if we started today and say we want to put them somewhere else. It's going to take them that long to build a new facility.

Commissioner Buck stated, one of my suggestions is, in December when we receive data and update, the Commission needs to be public on what our thoughts are. We need to make sure our state legislature, congressional delegation is aware of our thoughts directly. November 3 is the fuel tank meeting?

Mr. Kawaoka answered, that's for the fuel constructed tanks. It does include Red Hill, but there are others.

Commissioner Buck commented that he doesn't don't have the same trust in EPA like he used to.

Commissioner Anderson – The EPA and staff share our concerns. We'll keep hammering away at this but as the month goes on, before the end of the year, we will have to make a decision on the situation.

Commissioner Buck asked if there is anything we can do to help.

Commissioner Anderson – I think the Commission expressing the concern about the situation is about the best that can happen.

Mr. Kawaoka – On behalf of my hard-working staff, we certainly appreciate your concerns, your help and kokua in all this. It's probably the most complex, difficult, technical project that I have every worked on and its multifaceted long term. There are no easy solutions.

Chair Case asked for public testimony; there were none.

## **B. ACTION ITEMS**

### **1. Department of Hawaiian Home Lands' Reservation of 0.513 Million Gallons per Day of Surface Water from the Wailua River, Wailua Surface Water Hydrologic Unit, Kaua'i**

PRESENTATION OF SUBMITTAL: Dr. Ayron Strauch, Stream Protection and Management Branch

Commissioner Buck asked if the South Fork is 30 mgd?

Dr. Strauch answered that the Q90 flows estimate to be about 30 mgd. This is based on a period around World War I when there was no water being transferred from North Fork to South Fork, there was gaging on the Upper Lihue and Hanamaulu ditches as well as the South Fork, so we have about 1500 days of overlapping gage data to extrapolate from. That

is not perfect information but the best we have. Based on the changes in climate, that data was converted to present day statistics in Table 5.

Commissioner Buck asked if this is not historically including the water that is being diverted from the North Fork.

Dr. Strauch – The 58 mgd and the 30 mgd, Q50 and Q90 flows, that is estimated natural flows without any augmentation from the North Fork.

Commissioner Buck asked if that's just assuming the hydro usage flow.

Dr. Strauch answered. That's assuming that no transfer of water from the North Fork to the South Fork. The way to get water to the DHHL lands is, at the moment, as the plantation designed the system is through the Hanamaulu Ditch, not necessarily through the reservoir, although the reservoir can transfer water to Reservoir 21, the final reservoir before Kalepa Ridge. There is also potential to pump water directly from Wailua River. That infrastructure is not there, but that is available.

Commissioner Beamer asked, granting DHHL reservations request for ground water, have we done a lot of surface water?

Dr. Strauch – I believe only the Waimea surface water, as part of the Waimea Watershed Agreement and DHHL put in a request for 6.9 mgd.

Since there were no other questions, Chair Case asked for public testimony.

#### TESTIMONIES:

Mr. Kaleo Manuel, Acting Planning Program Manager, DHHL. Our chair is on Maui at their Commission meeting. They sent me to say thank you for taking up this item. It's been a long process, but we are happy to be where we are at today. We support staff's recommendation as drafted for DHHL's reservation of surface water from Wailua. I did want to add one comment that we did send to staff, but just for the record, one of the recommendations for this that the reservation would be codified in the Water Resource Protection Plan (WRPP) as well as document it as authorized planned use in the Water Use and Development Plan (WUDP). However, in the action taken by Commission last month on the ground water reservations, immediately the month after, the water bulletin withdrew all of those petitions for reservations. That's the document that the larger public accesses to understand what is going on with water, without having to read the volumes of pages in these large plans. So, one of our recommendations we made from the department is, if there is a way within the Water Bulletin to highlight and lift up and identify just those reservations that the Commission has taken action on and have that documented in the Water Bulletin, that would be greatly appreciated. That way the public agencies and others that access the bulletin would know that the Commission set reservations for these types of uses in these aquifers throughout the state. If there is some way that that could happen, that's a recommendation so that way the public doesn't have to go dig in the WRPP and find that. It should be in there but it hasn't been updated. The bulletin may be a more beneficial tool for

both our agency and the public to access that. That's just a friendly recommendation and we look forward to working with staff on that.

Deputy Director Pearson said we will work with staff and find a way to communicate that.

Chair Case – Since there were no other public testimonies, she asked for a motion to approve Item B-1 as submitted.

**MOTION: (BEAMER/MEYER)**

**To approve the submittal.**

**UNANIMOUSLY APPROVED.**

**2. Action on the Petitions for a Contested Case Hearing Before the Commission on Water Resource Management Filed By Kaua'i Island Utility Cooperative, Earthjustice on Behalf of Hui Ho'opulapula Nā Wai O Puna, James Torio, Department of Hawaiian Home Lands, and Grove Farm Company, Inc. Regarding Agenda Item B-2, August 21, 2018: Amended Interim Instream Flow Standards For the Surface Water Hydrologic Unit of Wailua (2040): Waikoko Stream and North Fork Wailua River (Wai'ale'ale Stream), East Kaua'i, Island of Kaua'i, State of Hawai'i; and Delegation of Authority to the Chairperson to Appoint a Hearings Officer**

**The Commission may go into executive session pursuant to HRS §§ 92-4 and 92-5(a)(4), to consult with its attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities.**

PRESENTATION OF SUBMITTAL: Dean Uyeno, Program Manager for Stream Protection and Management Branch

Commissioner Hannahs asked what is the practical difference between being a party and having one's contested case petition granted?

Mr. Uyeno answered the petition is what starts the hearing process and to petition, you have to have a property interest. For those who may not have a property interest, they may be admitted as a party.

David Day – Deputy AG – For purposes of a contested case hearing, Dean hit the main point which is that the contested case can only be initiated by a petitioner and the petitioner has to be someone who has legal entitlement to a contested case hearing. Once the contested case hearing is underway, however, the rules provide that certain individuals may be parties. Among those are the petitioners. So, the petitioner is a party. Other people may be admitted as parties, depending on what their interests are, they can assert their interest as parties. Basically, as far as the contested case hearing is concerned, being a petitioner is no different than being any other party except obviously it is someone who has some sort of interest that we have already recognized.

Commissioner Beamer – Building off of that, we are essentially saying that KIUC (Kaua‘i Island Utility Cooperative) doesn’t have a property interest so they couldn’t be eligible as a petitioner for a contested case hearing?

Deputy AG Day – That is correct.

Commissioner Beamer – So where does that leave us? We were in the middle of deliberations and they requested a contested case. Now, we’re saying they don’t have the property interest to be an eligible requestor. So, the other parties do want to file a contested case?

Deputy AG Day – So basically the normal practice that we have is that when a contested case petition is filed and basically not patently without merit on its face, that we based on the supreme court decisions that we have is that we halt the proceedings, and especially in the case of a big meeting like the one we had on Kaua‘i, that we request that other people also state whether or not they are requesting a contested case hearing. In this case, we had 4 who requested it. The analysis in the recommendation here is that ultimately KIUC was not entitled to be a petitioner in a contested case hearing was carefully considered based on the analysis that was presented in the petition itself. That basically lays out its full the extent of the property interest that claims are being affected. Where that leaves us now is where the recommendation is, which is that two of the petitions should be granted. KIUC and DHHL (Department of Hawaiian Home Lands) could be admitted as parties and Grove Farm would need to do additional work.

Commissioner Anderson – Just to be clear, if Grove Farm did effectively argue that they should be a party to the contested case hearing, then they would be allowed? And perhaps other property owners if they want to join?

Deputy AG Day – The rules provide sort of a checklist for the things that need to be satisfied for the person to be considered a party along with the application. So, the proper legal analysis would need to be provided in the petition. If it merits party status, then normally if the contested case is granted, it would be, I believe, the hearing officer who would make the determination if there is a party. With respect to other individuals who may petition, I have no idea who those might be, there are provisions in there as well about subsequent people who have similar interests who might be parties. So, it’s just speculation at that point who would be admitted. Basically, anyone could ask to be a party. The question is whether they would be entitled to be.

Commissioner Anderson – There is a process that allows that?

Deputy AG Day – Yes, it’s in the rules.

Commissioner Meyer pointed out on page 7, third paragraph from the bottom, fifth line, “the additional consequential effect of increasing greenhouse gases, is many degrees too far removed to constitute a property right.” And yet, it seems very similar to me to the supreme court case involving a power purchase agreement on Maui. The water allows a reduction in greenhouse gases or an increase in greenhouse gases. Could you “slice” that for me?

Deputy AG Day – I think that there's a key distinction. Maui Electric is an interesting case. It's the only case that applies that particular idea of a clean and healthy environment, as being a property interest. The key aspect of that case, we believe, is that basically in that case it was dealing with the Public Utilities Commission (PUC) and in the PUC chapter, there was a specific...only of the things that they were specifically intending to deal with was greenhouse gas emissions, air pollutions, etc. It was directly an issue. What we are dealing with here is water flow. It so happens that KIUC run the hydroelectric plant. So basically, what we would be doing is then, their contention is that if the water flow is lessened then that would basically hurt their ability to create this hydropower which in turn would lead to the necessity that additional fossil fuels would be required to do this. I would say this is several degrees removed from what was in PUC where it was, basically, that was the issue in PUC about greenhouse gas emissions from these power purchase agreements. What we have here, where it just so happens that this individual, their business would be harmed and they wouldn't be able to produce as much not renewable energy which in turn, theoretically would mean that additional greenhouse gases would be admitted to make up for the difference.

Commissioner Meyer – Perhaps the availability of other alternatives, to produce greenhouse gases.

Commissioner Beamer – Essentially, it's a business decision.

Commissioner Buck – One beauty of the Water Code is that we have a finale in the argument, but many roads to get there, contested case is one. Sometimes it's not the most efficient in time frame, but the data will be collected. One advantage is we get to talk amongst ourselves about the actual, which we normally don't do, only in public. My question is, I am convinced that when I look at this map and all the different streams, there is plenty water. This is the wettest place on earth. If we have an opportunity and take a half step back and collect data on some of these streams. I have great confidence that we would be able to come up with something that would be satisfactory. I am concerned about a very narrow contested case on 2 streams. We have 30 mgd flowing to the other side and we are going to argue this false argument between 1 mgd and renewable energy. I think we can figure this out. My question is the recommendation asks for a hearings officer. By rules, the Commission can appoint a mediator instead of a hearings officer. Maybe we can discuss this at a larger scale and we can put the whole system together. One reason East Maui was successful is we had a chance to step back; we expanded the investigations to all the streams and we really could look at them all from an ecological and economic basis. How come we are not asking for a mediator on this one, but we're asking for a hearings officer? The rules provide that and I think that the people, once they get a handle on all this water and all these streams, they can come up with something. There is plenty of water here. To have this kind of false argument of renewable energy versus 1 mgd from a certain stream, that is very spiritual to me was a false argument that I don't think was productive for anyone. One of my questions is, I'm curious if the staff even considered mediation because we do have the rules that allow us to do that after a contested case. I'm going to ask all the parties who come up subsequently if that is something they would be interested in. I'm curious at the staff level, why we didn't go that direction.

Mr. Uyeno – That is certainly within your purview to recommend that or to take it up as an option. Internally, as staff looking at the two main viewpoints were KIUC being in support with the submittal and the understanding that Earthjustice, representing the Hui, was seeking full restoration. It seemed to be a little too far opposed at that point to bring mediation to the table. It is certainly within their ability. In Na Wai Eha that's how it happened, right before we were about to go into a contested case hearing on the Supreme Court returning their decision on appeal, the parties decided to go into mediation. It's always an option, but at this point I don't think we looked at that as viable option in this case.

Commissioner Buck – Question for the Deputy AG, does the same rules apply to parties; say we went through the mediation phase of the contested case and the mediator, after collecting data, was recommending that other people are important to join the process, but the rules still apply. Let's say concerning Grove Farm. I have a tough time thinking we can solve this unless Grove Farm is part of the equation somehow.

Deputy AG Day – To be honest, I haven't considered the implications of that, whether there would be a mediator within the context of a contested case or in lieu of a contested case.

Commissioner Buck – I'm looking at 13-167-55, HAR, that says, "After the parties to a contested case hearing have been determined, the commission may appoint a mediator in accordance with these rules to seek a solution," then it goes on and on about the different ways.

Deputy AG Day – Within the contested case proceedings, I don't know your exact answer. I assume that because we would be in a contested case, that the parties would still be admissible at any time.

Chair Case asked for public testimony.

Leinaala Ley – Earthjustice, representing Hui Ho'opulapula Nā Wai o Puna – To follow up on some of the questions that were just being asked, we agree with the ultimate conclusion of the staff as to which parties that have petitioned have the right to invoke the contested case hearing procedure. As you all know the primary purpose of the interim instream flow standard is to set a stream flow standard that protects wildlife, instream uses, public trust purposes which are the exact rights that the Hui is ready to vindicate through participation in the contested case hearing. As stated in our petition the way that the request developed at the August 21 meeting was that the Commission was in the process of deliberating the staff recommendations on the interim instream flow standards level and KIUC made the initial request for a contested case hearing and then the Hui, along with the other parties, made their own request in order to protect their interest as part of any proceeding that might take place in the future. However, having been determined that KIUC does not in fact have the right in this particular situation and under these tasks to invoke a contested case hearing. We would like to put it before the Commission that the most appropriate avenue for resolution in this particular instance would be for the Commission to go back to Kaua'i to reconvene its deliberations, to consider the public testimony that was before the Commission in August and was complete as to many of the concerns the community has with diversion from these particular streams because again of their cultural and spiritual significance. To see if that can be the first and primary way for the Commission to fulfill its

duties on instream flow standard is through the public hearing process. This suggestion is of course with the reservation of our right to request a contested case hearing ultimately. Also, if the Commission doesn't agree with staff recommendation as to who can invoke the rights to a contested case hearing, we of course would like to be party to any proceeding. Along the line, Commissioner Buck, of your question for the potential for mediation as a more efficient resolution or some other way to get at the information and to have a decision made. That would be the first request of the Hui as to the best avenue to deal with the interim instream flow standards in this particular situation.

Commissioner Beamer – That was my question earlier was where we were at. I wasn't sure if other parties wanted to still hold a contested case.

Ms. Ley – As was mentioned by the staff, we did talk to Mr. Torio because he was also recognized as a party with the right to invoke a contested case hearing and he understands the idea of having the Commission come back to Kaua'i and participate in that forum as potentially the best way to deal with this particular interim instream flow standards.

Chair Case – You didn't mention it, but Mr. Torio did. If we don't re-open the discussion or if we decide not to amend the staff's submittal to restore more than a third of the natural stream flows, then you want a contested case hearing. First of all, is that your position also?

Ms. Ley answered yes.

Chair Case – So you are basically saying you want the Commission to go back and decide this in a regular public meeting, but if we don't agree on the staff submittal, you are going to ask for a contested case?

Ms. Ley said yes, we read the rules to allow that.

Chair Case – If we agree on the staff submittal then you are going to ask for a contested case?

Ms. Ley said yes.

Deputy Attorney General Colin Lau – Is your testimony that you are withdrawing your request for a contested case at this time, pending this future determination of the interim instream flow standard?

Ms. Ley – The request is a conditional withdrawal based on if the Commission is going to reconvene its deliberations and then we would attend of course and reserve the right to request a contested case hearing.

Deputy AG Lau – And you understand that Mr. Torio also has the same position, and you've already spoken with him about this?

Ms. Ley – That is our understanding and he provided a letter to clarify because we do not represent him.

Ms. Beth Tokioka – KIUC, communications manager. Joined here today by Allan Smith, Board chair; Dawn Huff, hydrology consultant; and Yvonne Izu, counsel. Reacting to some of the commentary, want to express that KIUC agrees with your comments, Commissioner Buck especially in terms of more data gathering. We feel strongly that more data is needed before we take on this very important decision. We agree with staff recommendations; we encourage you to adopt the staff recommendations and move to contested case. In terms of mediation, I think we would want to know more what that would look like. In general, at this point, any vehicle that would get us more data gathering would be important, helpful and useful in this conversation. Also, the issue with the argument with the environmental concerns are not important here, we feel they are very important here. We have spoken in the past and will continue to do so about the fact that just shutting down the hydro plants. There is no easy way to replace that with a renewable source that is going to feed us 24 hours a day with firm energy. Certainly not at the affordability factor that these hydros offer to our members. So, to us the environmental issues are very much at play here. We are under a mandate to be 100% renewable by the year 2045. But that is decades away at this point. So, certainly if we are compliant with the state mandate by 2045, yes, the power supply by the Waiahi hydros will be supplanted by some other renewable source, but at this point is not as easily done in the near term. So, there are certainly environmental concerns to consider here. Also, in our request for the contested case we did other than economic issues which really are not, it's not an economic argument to benefit KIUC, per se, but our member/owners in delivering power at the lowest possible cost. To say that this is an economic issue for KIUC, in our view it's much more than that. It's in the best interest of our members which are basically all the residents of Kaua'i and insuring that they have power that they can afford. I was made aware of a study that was done by Aloha United Way last year which found that 43% of the households on Kaua'i are living under a living wage. So, every dollar does count to our members. When we have replacement fuel that costs 3 times the cost of the energy that we can produce out of Waiahi that is a very important consideration for us. A couple of other points that we want to point out again further explaining why we asked for the contested case hearing because that all happened very quickly at the end of the meeting after a very long day in August. It is important to remember at this point the mauka to makai flow which is really the central issue here, has been restored for almost 2 years. The mauka to makai flow has been restored. We have been enhancing it recently with modifications that we've been making to the ditches. In the staff recommendation that you were considering at the August meeting there was a mention of a minimal amount of a million gallons a day that should be flowing through the diversion, but the staff recommendation was 4 mgd. So, it was actually quadrupled, what the staff found to be, what would be minimal. We continue to do cultural studies. To date our cultural studies have not found any cultural practices that have been inhibited. We continue to conduct those cultural studies and we will, but at this point the question is what is being harmed at this point. Again, I think it is important to remember that hydro is recognized as a beneficial use of these waters by the state and by your own rules. Again, we would support the staff recommendation today to move to contested case hearing or a similar path that would allow for additional information gathering.

Commissioner Buck – on the Waimea mediation. Basically, we would appoint a mediator. Hopefully someone that everyone trusts and respects. Then we set up some broad guidelines of expectations of what the Commission would like to see but not get into the nitty gritty and then the parties meet many times. The Commission would get updates and

eventually the mediator would report back to us. The big difference is on a contested case, all the parties don't sit down together. You advocate for your own position. Hearings officer compiles all that and gives us the data and we make the final decision. The hard part of mediation is that you have to be at the table with people you might not agree with and you have to compromise somewhat and have to explain to your own stakeholders why you are making those decisions. I'm a firm believer that mediation will be a much more value-added decision because it comes from the people and stakeholders there. It is a different scenario that you have to participate, looking face-to-face at people you might not agree with and then you have to deal with your own stakeholders about how much room you have, versus contested case, where you are just going to advocate for your positions, someone is going to take the deposition, then the hearings officer makes that decision and then we review it. Those are the big differences between a mediation and contested case hearing.

Commissioner Hannahs had a question of page 3-3, #14 of KIUC's petition. You said when asked what is the disagreement, denial, or grievance which you are contesting. Read the first sentence, "During deliberations on action item Commissioners were proposing to revise staff recommendation without supporting data or understanding of impacts of such revisions." How did you come to that conclusion; we had barely started the discussion and you cut it off by filing for the contested case.

Ms. Tokioka – Well it's my recollection of the discussion was that actual numbers were being considered such as 50% moving it up and when staff was called to the stand to ask whether or not that would have an impact. It seemed as though the response was, well probably not. We felt that that was a pretty big swing on numbers and really should be considered. There are a lot of considerations and a lot of impacts when a number is moved to that degree. We felt that to make a decision on the spot like that without further consideration really was not doing justice to all of the interests that were to be balanced.

Commissioner Hannahs – Since there was no motion, there is really no suspension of that discussion so there might be more. There might have been additional information brought by staff or even the Commissioners to the table based on the experience with other streams and other decisions that we made. It could have been brought forth in a manner that was very public to all the stakeholders who represent a broad range of interests. It seems like that's what you want but that's also what you terminated in filing for the contested case.

Ms. Tokioka – The staff proposal, we thought, the staff recommendation that was being considered in August, we felt that we could live with that, we could deal with that. The lost productivity in the hydros is something we could absorb. Beyond that it is very questionable as to whether or not we could really continue to operate the hydros in a way that is cost effective and beneficial to our members. Going beyond the staff recommendation at that point was very problematic for us. We were not in the position on the spot to be able to react any new numbers that were being considered. So, we just felt that at that point in time there was a danger in moving on to a position that we felt needed more study and more data gathering.

Chair Case – That was my recollection also which the whole afternoon was about the staff submittal. We were close to taking action on it and then an idea was put out, 50%, which didn't have any analysis behind it. I was reluctant to, all of a sudden, throw out a number

that was arguably random. The question is that you do more analysis through another staff submittal and go back to a public meeting forum or you sort of have a contested case.

Commissioner Hannahs added, which might have unfolded in the discussion had it continued. Another question I have regarding waiting for more data. My understanding is that we will have better data but in a while. This is really precipitated by the Land Board need for a decision on this for a leasing matter.

Ms. Tokioka said yes, our long-term lease is pending before the Board of Land and Natural Resources (BLNR). How this position of this item will play into the closure on that process is yet to be seen. I think we were hopeful that if the Commission could come to a decision in August that we would be able to forward with the BLNR we're in the process of closing out our environmental studies and getting ready to go before them for the long-term lease. But I think without closure on the interim instream flow standards, it's questionable whether or not they would act on the long-term lease. We don't know at this point.

Commissioner Hannahs – Does that harm you or harm the interest of your shareholders and the public if its delayed?

Chair Case – modified question – Right now there is basically no interim instream flow standards or is the standard that was set in 1988. If you were to move forward with your petition, your application for a lease would be based on existing interim instream flow standards. The question would be if the interim instream flow standards were to change in the future, what's the impact? If you get a lease for a certain amount of water based on the Land Board decision and the interim instream flow standards is changed in the future, what then is the impact?

Ms. Tokioka – I don't know for sure. I would think that the lease application would likely have to be revisited. We would have to comply with the interim instream flow standards.

Chair Case – I don't know the answer to that. I know that is the question which is why this proceeding tries to get that clarity now. On the other hand, it seems if we were able to wait a couple of years, the rest of the data that everyone would find so useful would be available.

Commissioner Hannahs – It is my understanding is that proxy information was used to calculate median flow and based on methodologies that are really going to be improved by USGS (U.S. Geological Survey), better data in a year, end of 2019.

Commissioner Buck – With all due respect we just approve a reservation based on proxy data and historical. I don't think we are totally dependent on a federal USGS study to get exactly what we need to make some really good decisions.

Commissioner Beamer – I would like to understand your testimony. I thought I heard you say that mauka to makai flow has been restored? Can you explain KIUC's involvement in that restoration process?

Ms. Tokioka – Part of that was the vandalism that occurred in October 2016 which allows much greater amount of water to flow through. Beyond that KIUC has been working on short-term modifications to the ditch system to release flow back into the stream.

Commissioner Beamer – So you are arguing on one hand it's vandalism but you're also saying that you restored it?

Ms. Tokioka – It's both, vandalism and restoration.

Chair Case asked for any more testimonies.

DHHL – no comments

Grove Farm – no comments; not present.

Since there were no public testimonies, Deputy Director Jeff Pearson presided.

Mr. Pearson – By sitting here and listening to the testimony from Earthjustice and written testimony from James Torio and understanding the concerns that KIUC have, just to do some quick paraphrasing. Sounds like Earthjustice and James Torio, the two petitioners are willing to go back to Kaua'i to get a number to return to the stream greater than what the recommendation of 3.5 mgd. KIUC stated earlier and in August that their amount that they could live with was what was in the recommendation, which is 3.5. So, if we are going to make any efforts to go back to Kaua'i and do any of this discussion, if you call me the mini mediator right now, we have to look at a number that is somewhat greater 3.5 to satisfy the two petitioners and something that is not much greater than 3.5 to satisfy KIUC. That is what seems to be proposed right now. So, I'm not telling you what to do, but I'm just paraphrasing from what I heard from the testimonies that just took place.

Commissioner Buck asked so what would you recommend?

Mr. Pearson – I abhor contested cases. So, what I would recommend is I would probably sit down and try to talk to the parties myself on the side and see where is the opportunity to get to the point that I just described to you. So, I already thought about after this meeting, depending upon your decision or even if you decide on a contested case, I would try to talk to the parties and see where their toleration is. Dean was clearly correct at the time of the August meeting, the two sides were, everything in the stream and 3.5 which was what KIUC can tolerate and still run their business. They were too far away and to consider mediation at that point seemed unheard of; it was just too far away. Times have already changed. Today Earthjustice and James Torio both didn't say complete restoration of the stream. They said something greater than a third of the stream. So, they have already thought to themselves or come forward in something that is less than the ultimate. There is always hope; time helps get you towards that hope.

Commissioner Buck – would you prefer a mediator in this process rather than a hearings officer?

Mr. Pearson – Yes, I would. With the experience of Waimea, the trouble with a mediator, is back then you all know the same issue is, lack of information you have to work with while you are mediating. I think we have enough information here. I think we have more or at least as much information as we had in the Waimea issue. Mediation is always a better way to go. It's faster and cheaper. Talking to some of the people on Kaua'i in August when they heard the contested case they were all excited, we said that nothing is going to take place now with this diversion until the contested case is resolved. Some of them were floored saying that "you mean it's going to stay the same?" He replied that it could stay the same for 8 years or however long that process takes. Nobody wants that. Maybe prior to mediation, if there can be discussions on the side, I think that's within my purview.

Chair Case – The structure of the mediation in the Waimea case was such that, and maybe there were multiple parties and very complicated, when it came back to us it was either take it or leave it. I'm not sure if it's necessary here. Maybe this is a 3-step process which is that we approve the contested case request as submitted but ask Deputy Director Pearson to move forward with some discussions before we actually appoint a hearings officer or mediator. We can decide that now.

Commissioner Meyer – That sounds great to me. We can ask Jeff to come back to us with his findings in two weeks or a month. That would be great.

Commissioner Beamer – I have a question about Mike's looking at the broader system and going back to Kaua'i. How hard would it be to look at multiple streams and have another meeting on Kaua'i? I really agree with your point. If we are just looking at two of these streams and there are multiple streams that are feeding into that ditch system.

Mr. Pearson – That's going to add to the lack of information. So, you're going to not have good information to make decisions on. I don't want to wait a year from now to make a decision on this. I agree with Commissioner Buck that decisions can be made. That's what the Commission is tasked to do, to make decisions with the best information you have in front of you.

Commissioner Buck – We heard there are 16 mgd on the bottom of the ditch here already, which is a huge volume compared to the amount we were talking about. Waialeale, like it or not, is a very special stream. It's a false choice by taking a million gallons or more from the most sacred stream versus supporting renewable energy on Kaua'i. There is enough water in here to do both. Look at the whole system. There is a difference between private land and public land. We're talking here about public streams and we don't do allocation, we do instream flow, but we're talking about moving water out of this watershed and putting it in this watershed, which is more of the private streams. Any rational person would say, can we take a half a step back and look at the system and then just put all the pieces together?

Mr. Pearson – Another part is this could also entail discussions and of course it is up to DHHL to decide, but one of the premise they made for coming forth and asking for contested case was these reservations. These last two Commission meetings we have satisfied their concerns. So, there is a good possibility that DHHL will be moved out. I'm not speaking for DHHL, but that is a good possibility of that.

Commissioner Hannahs – You characterized the positions of the parties including KIUC’s position that their economic analysis for the hydro led them to believe that they could tolerate a certain amount. Staff is saying that’s not relevant to setting an instream flow standard.

Mr. Pearson – It is relevant because staff also looks at offstream uses and economic values. That was part of the process through the decision-making to try to accommodate offstream uses while still meeting the needs for the instream uses.

Commissioner Meyer – Presumably, if we ask Jeff to intervene and act as a mediator among the parties and he reported back, would that still leave open the opportunity to mediate this matter at some point in the future?

Mr. Pearson – I don’t think I’m intervening, because it’s my job. I think if you granted a contested case and the recommendation here and we work with the petitioners, it can come forth and drop the contested case. Once the contested case is granted can the petitioners choose to not proceed with a contested case?

Commissioner Beamer – I just want to say one thing building off of Commissioner Hannahs’s question. I think you are right in that we have to evaluate offstream uses but public trust uses and principles are different. A company has an economic interest in water; we can’t look at it the same.

Mr. Pearson said he agrees. Public trust uses are the priority. The petitioners think that the public trust uses aren’t met fully, and that’s why they are asking for contested case.

Commissioner Anderson – Looking at the process and the merits of the case, if Deputy Pearson were to talk to the parties involved and the petitioners for the contested case were to withdraw their request for contested case as a result of that, would the recommendation then be made from the staff to the Commission and then we would take public comment again on that recommendation and basically approve, assuming that everyone has agreed and there are no other parties that are involved.

Mr. Pearson – Would we likely end up going back with an instream flow standard number whatever the agreement was between the petitioners? I assume we go back to Kaua‘i and we revise the submittal, put it on the agenda again. It would seem to be due process. Otherwise you would be making decisions behind the scenes, etc. That sounds right.

Commissioner Anderson – That would certainly be easier than a contested case hearing.

Commissioner Buck – I could support the staff submittal. I would rather appoint a mediator rather than a hearings officer.

Chair Case – What if we removed Item 6 from the recommendation and hold off on that until Jeff has a chance to report back. Officially grant the request but we are not moving forward in appointing a hearing officer at this time.

Commissioner Beamer – One question I have. I think if we accept the contested case, we can't go out and have a hearing before we resolve the contested case.

Chair Case – We can't have another agenda item.

Mr. Pearson – We have to check with counsel. Assuming the petitioners are happy to drop the contested case.

Commissioner Beamer – We're not going to have anything to deliberate because we need a case record.

Chair Case – Counsel is suggesting that rather than approving the contested case, that we continue it.

Mr. Pearson – The only thing is to ask the petitioners.

Chair Case – We do need to because we have a timeline to deal with the contested case. We have to get a stipulation to that effect.

Deputy AG Lau – I have a problem with one of the guys who request a contested case and is not present.

Mr. Pearson – If you read his letter it seems like he is echoing Earthjustice.

Deputy AG Lau – That's why I asked Earthjustice when they came forward to testify whether they heard from him and were in agreement.

Chair Case – So would it be sufficient, right now we have one party?

Deputy AG Lau – Do you have anything you want to suggest?

Chair Case – So actually the petitioner, who is represented here would be Earthjustice or the Hui, and we would have to get your consent to continue because we would effectively delay the decision on the contested case. Do we have a deadline for deciding on a contested case request?

Deputy AG Lau – There is no deadline for deciding when a contested case, not to my knowledge.

Chair Case – If so, if there is no deadline then we don't have to ask you guys to agree; we can just do it.

Chair Case – Is there a recommendation to continue this discussion until a future meeting. Can someone make a motion to that effect?

Commissioner Buck – I move that we continue the discussion of Item B-2 at a later date.

Chair Case – Is there a second to that? Commissioner Meyer seconded.

Chair Case – Asked for any further discussion.

Commissioner Beamer – So, if we are going to continue, can we add or bring it up at our next meeting?

Chair Case – I think what we would like to say is that we'd like to ask the Deputy Director for Water to have discussions with the parties.

Mr. Pearson – I would hope that if there are any discussions, any movement, it will take place prior to the next Commission meeting. That way, I can put a deadline on the petitioners also. It would have to be for the December meeting.

Chair Case – So, we would bring this matter in some form back in the December meeting.

Chair Case – Asked for a motion to adjourn.

**MOTION: (BUCK/MEYER)**  
**To amend and defer the submittal to a later date.**  
**UNANIMOUSLY APPROVED AS AMENDED**

**D. NEXT COMMISSION MEETINGS (TENTATIVE)**

November 20, 2018 (Tuesday)  
December 18, 2018 (Tuesday)

**MOTION TO ADJOURN: (BEAMER/HANNAHS)**  
**UNANIMOUSLY APPROVED TO ADJOURN.**

The October 16, 2018 Commission meeting was adjourned at 12:17 pm.

Respectfully submitted,

FAITH CHING  
Secretary

APPROVED AS SUBMITTED:

JEFFREY T. PEARSON, P.E.  
Deputy Director