

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: July 20, 2021
TIME: 9:00 am
PLACE: DLNR-Board Room
1151 Punchbowl Street, 1st Floor
& online via Zoom
Meeting ID: 925 6379 1811

Chairperson Suzanne D. Case called the meeting of the Commission on Water Resource Management to order at 9:10 a.m. and stated it is also being held live and remotely, and live streamed via YouTube for public viewing due to the ongoing Covid-19 pandemic; Chairperson Case welcomed aboard new Commissioner Dr. Aurora Kagawa-Viviani; It was noted the meeting was set to take live oral testimony and any written testimony would be acknowledged when the submittal items come up. Chairperson Case also read the standard contested case statement.

MEMBERS: Chairperson Suzanne Case, Mr. Michael Buck, Mr. Neil Hannahs,
Dr. Aurora Kagawa-Viviani, Mr. Wayne Katayama, Ms. Joanna Seto,
Mr. Paul Meyer

COUNSEL: Ms. Lauren Chun

STAFF: Deputy M. Kaleo Manuel, Mr. Dean Uyeno, Mr. Neal Fujii,
Dr. Ayron Strauch, Mr. Ryan Imata, Ms. Rae Ann Hyatt

OTHERS: Mr. William J. Aila, Jr. (Dept. of Hawaiian Home Lands);
Mr. Michael Fujimoto (DLNR-Div. of Aquatics); Ms. Renee Kamisugi
(DLNR-State Parks); Mr. Russell Kumabe (DLNR-State Parks)

All copies of written testimonies submitted will be included at the end of the minutes and is filed in the Commission office and are available for review by interested parties.

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A. APPROVAL OF MINUTES

June 15, 2021

PUBLIC TESTIMONY – None

Deputy Manuel – noted minor edits/corrections per DOH, Ms. Seto.

MOTION: (HANNAHS/KATAYAMA)

To approve the minutes as amended.

APPROVED: BUCK/CASE/HANNAHS/KATAYAMA/MEYER

072021 00:04:00

B. ACTION ITEMS

1. Request to Enter Into a Contract for Goods and Services with the University of Hawai‘i for Expanding the Collection of Climate Data by Implementing the Pilot Phase of the Hawai‘i Mesonet Network of Telemetered Climate Stations

PRESENTATION GIVEN BY: Dr. Ayron Strauch, CWRM Stream Protection & Management Branch

Dr. Strauch stated that comments were received from DLNR Attorneys regarding language for the scope of work and the Chapter 343 exemptions. He explained it's a resubmittal but with technical clarification. Essentially it's to provide funding for the University of Hawai‘i to establish the infrastructure and quality control procedures for an installation of four climate monitoring stations, to gather real time climate data to develop the Hawai‘i Mesonet.

Similar programs are established at other states that are gathering real time climate data, but there is no program like this in Hawai‘i.

QUESTIONS

Commissioner Kagawa-Viviani stated her recusal from item B-1.

Commissioner Hannahs – commended on the title of the submittal.

Commissioner Katayama – asked for a refresher on subject

Dr. Strauch – to add to the background, the USGS in cooperation with the University of Hawai‘i and water Commission recently released the state monitoring needs assessment which identified the four locations in which climate related monitoring data is needed and focused on areas where we have drastically lower rates of monitoring (*explained the funding process and data needs*). It will help us achieve real-time data monitoring across the State.

Commissioner Katayama – asked regarding the number of monitoring stations and maintaining the technicians in relation to funding.

Dr. Strauch – answered its funding the pilot phase to develop a small portion of it. UH is building upon the cyber-infrastructure developed as part of the ‘Ike Wai project and have proposals for long term funding. This is just to kick-start the project.

Commissioner Buck – asked on the establishment of the selected sites of monitoring

Dr. Strauch – noted the four sites were based on the water monitoring needs assessment; which UH still needs to secure easements and access.

Commissioner Buck – commented that (CWRM) research program needs to be “framed” and to budget the “off” years and as a Commissioner, they could help communicate to potential fundraisers as well as to other potential partners who are willing to contribute.

Dr. Strauch – noted that staff has been working for the past three to four months to push forward its long term plans and bring it to the Commission in the future. The 2019 water resource protection plan outlines our 5-year goals for addressing data gaps and implementing different phases of that plan. We can bring the Planning Branch to the Commission to discuss how these monitoring needs fit within specific goals of the Water Resource Protection Plan.

Commissioner Meyer – appreciated the comments with respect to its long term plans and goals.

Mr. Uyeno - in response to Commissioner Buck’s comment, maybe one thing that is missing from this submittal is where this project fits into the goals and objectives that is outlined in the Water Resource Protection Plan which we can provide in future submittals.

MOTION: (BUCK/KATAYAMA)

To approve B-1 as submitted

UNANIMOUS

RECUSED: KAGAWA-VIVIANI

072021 00:16:50

B. ACTION ITEMS (CONT’D)

- 2. Approval of Department of Hawaiian Home Lands Application for a Water Use Permit Modification and Reduction of Reservation for Kualapu‘u, Kauluwai 1 and 2 wells (Well Nos. 4-0801-001 and -002), TMK (2) 5-2-010:003, WUP No. 1100, New and Existing Uses per Section 221 of the Hawaiian Homes Commission Act and Non-Homestead Municipal Uses for 0.595mgd, Kualapu‘u Ground Water Management Area, Moloka‘i**

PRESENTATION GIVEN BY: Mr. Ryan Imata, Groundwater Regulation Branch

Mr. Imata stated the summary of request and touched on the background information with timelines. Table 1 on page #4 of the submittal was explained giving details of the water use permits and allocations within the Kualapu‘u Aquifer System Area in relation to its sustainable yield. Thus, this criteria (water availability) is satisfied as there is sufficient allocation within the DHHL reservation.

The second criteria of reasonable and beneficial use was explained in relation to Table 3, DHHL’s requested water allocations on page 6 of the submittal. The Water System Standards of the County Boards of Water Supply provides guidance regarding reasonable estimates for demand per units or acres and because the requested amounts are less than the demands based on the Water System Standards, staff’s assessment is that the quantities requested are reasonable. The graphs of the pumpage of Kauluwai 1 & 2 were shown and explained.

Commission staff is aware and confirms efforts being made by DHHL to address system losses and to address the anomalies in reported system efficiency.

Analysis of practical alternatives and interference with other existing legal uses were summarized in page 8 of the submittal. In the map of scenario 3 on page 9, relating to pumpage and existing wells, the salinity all remained less than 100 mg/l in that scenario, which is acceptable for potable uses. The proposed well B in the scenario represents a potential future well that can supply additional DHHL needs.

There were no general public comments or objections to the application and none received from state or county agencies. This action is also in compliance with Chapter 343 HRS and a Ka Pa‘akai analysis was conducted, noted and explained. The staff recommendations were stated.

QUESTIONS

Commissioner Hannahs – thanked Ryan and asked on table #1 of the basis of reliability in sustainable yield.

Mr. Imata – noted the sustainable yield is always subject to revision and deferred to Neal Fujii (DLNR Planning Branch) for comment on establishing of sustainable yield but noted that the estimates for recharge are always looked at.

Mr. Fujii – explained there were no revisions on the SY for the island of Moloka‘i between the 2008-2019 Water Resource Protection Plan Update but have not gone back to reevaluate. The RAM is a simplistic model and works for most applications and is the most practical approach. Some view the RAM as outdated however the Commission approved the Sustainable Yields in the WRPP in 2019 and can always revisit as more definitive data becomes available.

Deputy Manuel – explained the 5.0 mgd is a conservative amount and there are different recharge estimates and did approve the USGS to look at recharge estimates based on climate models and can revisit the SY numbers based upon that report when it’s received. It’s a conservative approach to not over allocate our water resources in Kualapu‘u. It is also consistent with the policies of the Commission’s plan of approval.

Commissioner Hannahs – commented on the 9/15/20 USGS study and in relation to chlorides.

Deputy Manuel – noted the USGS study did evaluate various pumping scenarios from these three wells as well as potential coastal discharge impacts. Being consistent with our adaptive management approach throughout the state as we continue to implement and permit wells and manage resources, we need to continuously monitor the impacts of water withdrawal on groundwater dependent ecosystems, traditional and customary practices as well as adjacent wells within this aquifer.

Commissioner Hannahs – do our standard conditions with permits allow that adaptive management foreseen that we can please go back and revisit the amounts allocated?

Deputy Manuel – yes, the permit conditions always allow the opportunity to revise upwards or downwards the water use permit allocations, if there is harm or interference in the wells; the Commission always has the authority to do so.

Commissioner Hannahs – commended Chairman Ailā and the Department for self-imposing conditions that reflect worldviews and values of reciprocity that if you're going to withdraw from the system, that we're going to do something to promote that existence. I heard Ryan comment that this is something we should consider of all applicants who withdraw from the system not just DHHL; it's a great idea and something we should do.

Commissioner Kagawa-Viviani – (to CWRM staff) commented on the fixation of model numbers; sustainable yields is a model number but not a basis of reality especially with the concentration of these wells being close proximity to each other. What is the active monitoring data plan? Is there real time data on chlorides? How are you knowing when there's interference and what is the workflow?

Mr. Imata - we do have real time data on salinity and water levels that's submitted through the requirements of each well that is reporting. There's connection between the two but separate in a sense that sustainable yield looks at the entire aquifer. Yes, there is competition between the two wells for the remainder of the SY, but it really looks at what the issues are pertaining to well interference being so close to each other. In general, GW Branch encourages spreading pumpage out to avoid localized well interference, in this case dealing with infrastructure. There are options in which the USGS were looking at as in the scenario map/graphs shown.

Commissioner Kagawa-Viviani – noted her comment was probably not meant for the current situation however for the broader solution in dealing with community concerns and knowing there's a process within CWRM to identify a problem quickly and have a holistic plan to deal with it.

Deputy Manuel – a lot of the monitoring will happen once we get through these allocations and permitting; we haven't reviewed or have a complete understanding of the needs and uses of the ranch and county; and based on the approved permits if the Commission decides, and per the water code, we will still need to develop a water-shortage plan. Between Nā Wai 'Ehā and Molokai, these are areas we know we need to develop it (*explained the process of the monitoring and actions thereafter and that it's an important step in this process and that the Commission has an obligation to this long-term monitoring of the users of the resource*).

Commissioner Katayama – ask for a follow up on Commissioner Hannahs question on the approach of methodology – why don't we address the top number rather than approving something that'll push us into a deficit, that may or may not endanger the SY?

Chairperson Case – asked if the reservation comes first?

Deputy Manuel – reservation is separate from the allocation; for the SY, the Commission does set the maximum amount of withdrawal. This 5 mgd is based on analysis and recharge. The Commission also adopted a policy when there is a range, to always adopt the lowest number; and the "5" is at the lower range which the range goes between 7-8. DHHL set that 5 number as a safe space to allocate to. It is consistent to what the Commission has done. In this context, we're protecting it by saying "5" is a conservative number, then we're allocating uses based on

that cap. If data indicates for us to revisit or allow for a buffer, it's something the Commission could review.

Commissioner Katayama – asked on the comfort of “5” being conservative that another 10% is okay, why not adjust the number higher than process the water use permits to avoid the deficit?

Deputy Manuel – replied, the challenge is the comfort on the data if it's allowing for that; right now, the “5” is sufficient. We did not include climate change projections into the modeling of the WRPP of 2019. The Commission can evaluate when it updates the WRPP and can amend if its justifiable. At this time based on current data, there's no justification to increase that number; we can consider it for future WUP by the County and Moloka'i Ranch however they've not gone through this analysis we've articulated.

Commissioner Katayama – from a fiduciary responsibility of the Commission, is it prudent to approve permits that exceed the SY total?

Deputy Manuel – no, it would go against the Commission's policy. The current action before you now is not exceeding the reservation; it's within the amount that's set aside out of the 5 mgd.

Chair Case – clarified that the application that is taken over, is not up for decision.

Deputy Manuel – no.

Commissioner Katayama – I thought we said we'll consider all of those in totality?

Chair Case – noted its not a new one (application) it's within the existing reservation.

Commissioner Katayama – reducing it?

Chair Case – increasing the actual allocation and reducing the reservation by that much; its consistent with the original reservation.

Deputy Manuel – the way we looked at it is, we have the SY number that we've established and take off the top the DHHL reservation of the needs for DHHL; so we don't consider that as “available”. So what's available to allocate is the remaining of the 5.0 mgd.

Commissioner Katayama – referred to Table-1 and noted at some point need to address the other two (permits).

Deputy Manuel – correct; there are some gaps and the (7) criteria we need to go through as Ryan and pointed out which are reasonable and beneficial, and once we get that (data) we can work through these issues and evaluate, do we award them the full amount and revisit the SY number? Are the uses reasonable and beneficial? I think we should focus on DHHL's application and we're recommending it now is because the increase in the modification from this WUPA will come from their existing reservation amount which has already been set aside for DHHL.

Commissioner Kagawa-Viviani – the reservation is within their allocation

Commissioner Katayama – the challenge is if you're first in line, do you get your full bite? And if you're last, do you get whatever is leftover?

Deputy Manuel – as stated, the Commission can always evaluate, even at the end of the line of all water uses if there's a need to rebalance. At this point in time, we're recommending moving forward with this so DHHL can continue to provide water for their homesteads, while also working with the County and the Ranch.

Commissioner Katayama – I'm sympathetic to the applicant, because once we give them the water use permit, they're making investments and for us to hold back on that may impact their analysis of affordability.

Commissioner Kagawa-Viviani – clarified on the reservation allocation amounts regarding their needs in relation to the total SY which is a conservative amount and if they were asking for the full reservation, it would be more of a concern.

(Commission discussion on reservation amount in relation to SY and DHHL's investments. Commissioner Kagawa-Viviani noted on fluctuating environmental conditions, more USGS data, and surface water resources as baselines are always changing and to ensure there are systems attentive to those environmental changes. Appreciated DHHL's application and thought to improve recharge and mitigate those factors as servicing a public trust as well as commercial uses)

Commissioner Meyer – thanked Commissioner Katayama for his questions and felt a great deal of wisdom in the letter the Commission wrote in November 2018 to the (3) PUC's providing water to Moloka'i; that these three cases were increased given the effect of over allocation we're facing today and potential which exists and take place for interference among these wells, to consider these three increases together. We've known these increases were coming from 1992-93, and that this water was spoken for, for the Moloka'i community.

It seems premature to move ahead with this without having the other applications in front of us and know there is a fair amount of interference between these wells right now. It's something we should be concerned about and believe the Commission was correct when it wrote that letter in 2018.

Commissioner Seto – question regarding the analysis of the practical alternatives; wastewater reuse was taken off the table as a viable alternative at this time; is it possible for DHHL to consider that for the future? And wasn't sure on the timeline for this limitation is but wondered if it's possible to add a recommendation to consider the viability of wastewater reuse?

Mr. Imata – we do have a standard condition for non-potable needs should an alternative resource become available, the Commission has the authority to reduce their allocation to accommodate that. We could amend the recommendation to speak of just the non-potable portion of that to continue to explore that alternative. The question is: does DHHL have the infrastructure to provide the non-potable separately? We could impose that requirement now or approve, but I don't have the data for the separation proportion of potable versus non potable use; but if the non-potable use has its own separate line, you could approve the potable use and not the non-potable, should the Commission decide, then ask DHHL whether there's

infrastructure or impose that they supply the non-potable use infrastructure, but where does it fall into feasibility?

Commissioner Meyer – noted there are dual systems on Maui which has non-potable for irrigation use and residential and business has two service meters.

Chair Case – asked if it's the volume to justify the capital investment of the system?

Deputy Manuel – at this point it would be great to hear from DHHL; and we concur at this time from staff's analysis, it's (non-potable) a small amount of their overall water use within their current application. They've identified the MIS as an alternative for their agricultural lots. In similar conversations, I do agree that we should look at different alternatives and should be applied to all applications.

Commissioner Hannahs – noted the wastewater facility in Kaunakakai is County.

Deputy Manuel concurred on the County system's usage

Commissioner Buck – understood commissioner Myers concern that the decision made today will affect the future, but don't believe it's premature as it's a small component of the existing reservation that we have already made. It's obvious we're in a situation of competing public trust uses in the future and the bar for reasonable and beneficial uses will be higher. We do have priorities in-line we need to follow and like the conditions stated in #4.

PUBLIC TESTIMONY

Chairman William Aila, (Dept. of Hawaiian Home Lands) – Aloha Chair Case, Commission members, staff, Kaleo, and Rae. We are grateful not only for the staff recommendation but also the analysis and the discussion going around the table now. I would highlight some things for you to be aware of. Our request to have additional water for homestead was filed with our first WUPA in 1993, 28 years ago. Delays for various reasons including a contested case request, later withdrawn, by the Moloka'i Ranch. This delay has caused suffering by beneficiaries in terms of not using their best years of their lives to accomplish their farm plans, to become productive citizens in our society; and so, the delay has caused real harm. I would ask that you not delay this request to increase our allocation within our reservation, any longer.

We cannot homestead without water period. The State Admissions Act, requires taking the HHCA and its program, as a condition of statehood. We're having a hard time getting the Counties to understand that and hope that you, Commission members, look inwards as this program and the support of this program, is a condition of the State of Hawai'i being in existence. We have the support of the water code but I needed to make that statement so you can understand the context in which the delay will cause additional suffering of this program which the entire state is responsible for in assisting with its success.

The department has put in monies along with other agencies. We funded with USGS the baseline water study for the establishment of the baseline information. DHHL, USGS and Maui County funded the construction of the Kualapu'u Monitoring Well to provide real time monitoring levels on salinity variations and along with OHA funded a more complex 3 year

study to provide updated groundwater recharge estimates and quantify hydrological impacts on groundwater. This study has now been published and is available to all. I don't think there is an aquifer that has been more studied than the Kualapu'u aquifer.

We recognize there are four public trust uses of water. We've conducted our own study using trusted local interviewers to assess our impact on traditional and customary practices related to groundwater dependent ecosystems that will be impacted by this use, which comes at the direction of our beneficiaries who continue to practice those traditions on a daily basis on Moloka'i.

We have proposed conditions in our application to address our impact and believe we have gone beyond what's required on a State agency end are promoting and requesting consideration for a program that everyday relies on the blood and sweat of our beneficiaries, to try to make their lives better, and can't do it without the additional water. We've allocated and work with USDA to provide upwards of \$37 million to replace our main lines, water meters, most of the infrastructure, and repair the water tanks, in order to be good stewards of the water you grant us; resulting in the reduction of system losses and increase efficiency.

The evidence as presented by staff is clear; the reservation and allocation are conservative. If you're concerned about adjustments that need to be made later, the department is open to that; but not ask that you put off this request for an allocation that is already in the scientific studies and within the reservation we already have. Our people on Moloka'i are dependent on you in making this decision and not delaying this in trying to understand the impact within the three (3) applications.

You have the ability to adjust once the two applications come forward so I would respectfully ask the Commission approve the staff recommendation and allow us to provide more water so we can do more homesteading on the island of Moloka'i, and produce more crops to hopefully add to the sustainable agriculture that is sorely needed in the State of Hawai'i; Thank you Commissioners.

PUBLIC TESTIMONY (CONT'D)

Dr. Jonathan Likeke Scheuer, (for Dept. of Hawaiian Home Lands) – Aloha mai kākou Commissioners. I'm here primarily and will stay on throughout to answer any technical questions about our Water Use Application and wanted to add a few comments based on the discussion today and staff's presentation.

I appreciate Commissioner Meyer's and other Commissioners long-term view; I want you to keep in mind that we are asking for an increase of 0.228 mgd. If you look at what is legally authorized by permits to be withdrawn in this aquifer, its 0.618 versus the SY of 5 mgd. While these questions on the long-term future are important, I don't think they're impacted by today's actions.

I wanted to highlight a few points in Ryan's graph which showed pumping by DHHL had some high peaks; one was a notable leak in which we have found and plugged. The other major peaks is that despite the 20-years of legal wrangling between the Ranch, County and DHHL over this water, on the island the three entities cooperate. Whenever there were any system failures within the three, all are always willing to assist each other. Some peaks

represented DHHL heavily pumping their wells to provide for the County and would see similar peaks in the counties graph for when DHHL system went down.

I also appreciated Ryan's analysis particularly distinguishing the difference of well interference versus legal competition between uses. There certainly is interference when all three are pumped heavily and it shows in practice and in the USGS model. DHHL had their wells in this area first, then other entities jumped on. With that, interference is an issue if the Ranch starts to pump their well hard, we can see chlorides increasing.

The word competition has specific legal meaning under the code. Wells are considered to be competing under Section 174C-54 (of the Water Code) (*stated that portion of the code*); as the one entity that is a public trust use of water, we don't believe we are actually competing with the Ranch or County's application in a legal meaning because for them to be competing, they would need to meet the requirements of said portions of the Water Code.

I'm glad that the Commission has recognized that we did this study not with outside consultants, but with local highly-trusted people in the community who were willing to talk about their traditional and customary practices and proposed in the idea to not only talk about taking water out of the cup, but refilling the cup and conditions to fulfill that kūleana.

I agree with Commissioner Hannahs in the issues that surround sustainable yield should be looked at but don't think it should be right now. It is something we encourage and are happy to participate in discussions on that in the future. Based on staff submittal, we do have concern with the first condition (*stated condition #1*). As Chair Aila mentioned, we are spending millions through USDA funding and loans to improve the system. If we improve efficiency, we want to be able to re-allocate within what we're asking for today, to provide for additional homesteading opportunities. I certainly would not want our permit to be revoked if we become more efficient. I'd be happy to answer any specific questions of my testimony or Chair Aila's or our application; Thank you very much for your time.

RECESS: 10:24 AM

RECONVENE: 10:30 AM

PUBLIC TESTIMONY (CONT'D)

Mr. Wayne Tanaka, (Office of Hawaiian Affairs) – Good Morning Chair Case and members of the Commission. You have our testimony in support of the application before you today. I'd like to Mahalo the Commission and DHHL staff for bringing us for what could be a historic moment. As you know the Hawaiian Homes Commission Act was passed 100-years ago and per the submittal, 30 of those 100-years, DHHL beneficiaries has been waiting for expanded homesteading opportunities on Moloka'i, which is what this water use application would provide for.

I do want to emphasize that water for DHHL reservation use is for a recognized public trust purpose which it does merit for a high priority and consideration when you're allocating water. Despite this law, competing uses on Moloka'i including non-public trust purposes has historically prevented DHHL from accessing the water it needs for nearly three decades.

Now that this competing entity is no longer in business, has no foreseeable quantified need for this water, and if you want to wait for them to get their act together, there is no telling how long the wait will be.

On another note where the Commission has not made a water management area designation, in a lot of cases the well construction pump installation permit are regularly issued without consideration of how it may impact DHHL's needs or other public trust purposes. To make DHHL wait even longer for the reservation it already has and allowing others to get "first dibs", would be an example of systemic bias and injustice to native Hawaiian beneficiaries of the HHCA.

Your approval today would allow the Commission to further uphold the State's Constitution and moral obligations and provide greater housing opportunities that would certainly go to the state's residents while allowing native Hawaiian wait-listers to return to their ancestral lands. We've seen proposals recently to authorize 99-year leases of public lands to build housing which OHA has concerns about because of the impact to ceded lands but also how these proposals will not benefit residents. This WUPA will provide an alternative approach by creating nearly 400 homesteading opportunities that will be affordable and used by residents.

Finally, I've been reviewing WUPAS for nearly a decade and this is one of the most detailed applications in terms of justification analysis. We appreciated the community centered outreach that DHHL engaged in with trusted members of the community, to get a full picture of the practices and resources that cultural practitioners rely upon; and developing creative ways to minimize impacts to traditional and cultural practices.

I'd like to respectfully urge the Commission to ensure a commensurate level of due diligence for WUPA applications that its consistent with responsibilities, mandates and the State Water Code. I'd like to reiterate our support of the application before you today and be happy to answer any questions; thank you.

Chairperson Case noted that she called upon Ann Ka'uhane for oral testimony however it was a submitted written testimony (on behalf of Ms. Sylvia Hussey, Ka Pouhana of OHA). Also, Ms. Luana Alapa, OHA Trustee submitted written testimony.

PUBLIC TESTIMONY (CONT'D)

Councilmember Keani Rawlins-Fernandez – Aloha Chair Case and Commission members. Mahalo for this opportunity to testify. I'm testifying on my own behalf as the councilmember from Moloka'i. I testify in strong support of B2 of the CWRM staff recommendation to approve the application of DHHL. There are several things I'd like to touch upon.

I would hope the Commission would consider changing it's policy to allow testimony to allow testifiers to sign-up the morning of instead of requiring a 24-hour advance sign-up. The Maui County Council does this and don't have any problems and strongly urge the Commission to take that into consideration to allow to testify just as if people would sign up to testify in person.

I wanted to echo the comments shared by DHHL Chair Aila as well as Mr. Wayne Tanaka from OHA. I want to Mahalo Delwyn Oki for completing the water availability study and echo of the harm expressed by Chair Aila; that DHHL provides water to Moloka'i High School, the Fire Department, and the Airport which aren't DHHL kuleana. I support them having water however it takes away from their true kuleana of providing water to the beneficiaries and hope the Commission take that into consideration. As Chair Aila stated, "stop the harm that has been occurring for the last few decades...and provide our beneficiaries water."

I also echo Mr. Scheuer's analysis on competition and thought it was on-point and want to share an idea that I'm proposing to our Council which is similar to carbon neutrality; which is water use neutrality – having water users invest in the protection and restoration of our watershed to increase aquifer recharge. If CWRM could consider a water use neutrality policy, I think would be helpful state-wide so that we all take ownership and have a stake in the kuleana to ensure the sustainable yield has abundance and how do we create abundance. The SY is the opposite in that we take as much as we can until we break the system which is a long-term problematic approach. I would encourage CWRM to have a discussion and encourage a policy of abundance.

I will close by reiterating my full and strong support of DHHL's water use permit; Mahalo.

PUBLIC TESTIMONY (CONT'D)

Mr. Walter Ritte – Aloha Commissioner's. It's been very interesting attending your meetings. We had a hard time in the past, getting airplane tickets and trying to get to meetings. I think it's important the bulk of the community is heard and I've been a longtime advocate in our community and wanted to share some views from the community point of view.

On Moloka'i we started to try grow sugar but that didn't work; the water became salty. We tried pineapple and got cheaper raising pineapple in other countries. We tried ranching and it didn't work as they took away our forests trying to raise cows. Right now, we're dealing with a foreign country on Moloka'i that has the biggest water use plans on the island. 35,000 homes were to be built on West Moloka'i using sea-flight for people to work on O'ahu; schemes of hotel plans that fell through and foreigners saying they're going to take 5-miles of our coast line that wanted 1.0 mgd to put "rich" people on our fishing grounds – all these didn't work.

What we support as a community on Moloka'i is the MIS and farming; we support the (3) county wells and DHHL wells, and really support this application. We support having two economies, one for subsistence and one for cash. What we like about DHHL's proposal is the consideration of our subsistence economy; that it means protecting our reefs and fishponds along the shorelines, and how ground and surface water is impacted this part of our economy.

We also support what's happening in our valleys and forest areas and the idea of how DHHL is setting a great example of "if you're taking water out of this glass", to try and figure out how to mitigate some of the negative impacts of withdrawal, especially if you have three straws in this glass.

Those areas they're speaking of trying to have a positive impact on by figuring out what are the invasive species along the shoreline and trying to stop the soil from coming down are positive things towards mitigating the idea of them taking more water. Hopefully, this sets an example for everyone else, especially the foreigners that own Moloka'i Ranch, trying to get more water. I got nervous when Mr. Meyer spoke of this being premature; if you (he) only knew how long we've waited for us to get our water meters in order to be homesteaders...I'm a homesteader...he wouldn't be making that observation.

We're talking about a foreign country on Moloka'i that has put us into a water war for the past 40 -years and has blocked DHHL trying to get more water in the past; and to say let's wait for them... they don't even have a water permit for their well. It sets a terrible example for residents who get their water meters removed because they can't pay their bill, and yet this company is allowed years and years to operate without a permit.

I'm here to support DHHL, they've allowed us to have Zoom meetings and did let them know we wanted them to reforest Pala'au and many more things; but we're satisfied with the proposal and support them and hope in the future there be more ways to mitigate the negative impacts of people taking water out of our glass. Mahalo for this opportunity.

PUBLIC TESTIMONY (CONT'D)

Mr. Glenn Teves – Aloha Commissioners I'm a Ho'olehua homesteader and farmer and been involved in the State Water Code since its implementation; I support this request. To be frank, since the implementation of the water code, CWRM has discriminated against the Hawaiian Homes Act, you can see it in all their decisions; results of contested case hearings, interpretations of hearing officers, and appeals to the State Supreme Court overturning their decision.

This has tied up our water rights for ten years. Even if we won in court, we actually lost because time is money and homesteaders have land they cannot occupy without water. As Chair Aila eluded, CWRM doesn't understand DHHL's superior rights to water and that the Hawaiian Homes Act is a condition of Statehood. The question now is, "does CWRM understand what reservation means?" Does it mean we wait a generation over 25 years to draw down on our reservation? There's absolutely no rationale for this; what's the solution from preventing this from happening again?

Time limits on request by DHHL for additional water from existing reservations; automatic approval after 90-days. If a reservation has been approved, there must've been some understanding of sustainable yield and how much water in the aquifer is available for Hawaiian Homes to draw-down; so due diligence is complete.

Hawaiian Homes has 18,000 acres surrounding the Kualapu'u aquifer. In 1993, CWRM failed to determine the needs of homesteaders at the time and only approved 0.367 mgd. The daily use had already reached 0.5 mgd. We can't just come up with a number as these are homesteads with an average lot size of 15-acres with the smallest at half an acre and the largest at 50-acres. Many don't have access to the agricultural water from the Moloka'i irrigation system. They use this water to care for their animals and large gardens with fruit trees. Because of CWRM's failure to allocate a fair amount of water to DHHL, DHHL

denied access to water to homesteaders because of the minimal allocation; my guess is about 1,000 homesteaders were impacted.

I hope CWRM understands this, and we don't have to wait another 25-years to increase that number. Also, CWRM needs to look at designating Moloka'i as a surface water management area to have a better idea of the true water use on the island. In closing, I believe what's happening is a sequel to the song "broken promise" by (Henry) Kapono. Sonny Kaniho was waiting for a homestead until he died and now doesn't have to wait anymore; Thank you.

PUBLIC TESTIMONY (CONT'D)

Ms. Barbara Kalipi – Aloha Commissioners. I've submitted written testimony and will briefly go over that as my points have been well covered by previous testimony and by the department.

The whole notion of having to wait since 1993, for the use of the actual need and use of the water that was needed back then, and 20-years later, we're still trying to accomplish that. Some of the comments talked about our combative history with the previous Commission in the sense of distrust from past decisions which have ultimately been overturned by the Hawai'i Supreme Court, based on the public trust status of the Department.

I also commented on the efforts of homesteaders and native Hawaiian community to try to understand these complex water laws and be able to have our voices heard, and back then it was often a disappointment with some of the decisions that were made and to get attorneys to advocate for our position, and in the end, it (ours) was the right position we had.

I'm encouraged today about the thorough report your staff made. I don't understand the scientific details, but their explanation was clear in what they concluded in their studies and it was consistent. I'm also encouraged with the Department's advocacy for its beneficiaries to help us better understand the complexities of all the water issues on Moloka'i by helping in supporting workshops for the community and for us to provide input.

On a personal note, my husband gave our Kamali'i their first names; Kawaiola (life giving water) and Kawaipuna (the water springs {often found makai and which feeds our lo'i kalo}) also gave our daughter her middle name, Lihau (a wind that brings the cool gentle rain that's favored by fishermen). My husband as a fisherman, hunter and farmer of lo'i kalo had traditions which were passed down by his 'ohana, understood the fragility of our island environment and kuleana we all have to our 'āina and to each other. He was a conservationist for many years in the roles he had and shared his philosophy with the younger generation and in turn, they shared it back to me. I'd like to quote that young man what he learned from my husband; "we are all stewards of these islands from mauka to makai; from the streams to our rainforests that breed life into our ocean and coastal areas; they are all intertwined in a complex ecosystem chain and any break in that chain, could cause detrimental effects on the environment. As such, it's our kuleana to protect, preserve and teach the value of these natural resources that are the foundation of our cultural and sustains our way of life, for the generation of today and future generations to come."

I commend the Department for taking the additional step to self-imposing those conditions to ensure that attitude in taking care of our 'āina. There was a reference made regarding the

three water systems that they work well together which is true between the County, DHHL and in some instances, Moloka'i Ranch. However, the Ranch in our history was not transparent at the way they're using the MIS system. I'm sure you know the distrust with the Ranch - as anytime you have a small rural community and others that have business interest, there'll be concerns.

Thank you for the time; Mahalo for allowing us to have our voices heard.

PUBLIC TESTIMONY (CONT'D)

Ms. Mahina Poepoe – Good morning. There was one part specifically that I was interested in, on page 12, parenthesis 3 the DHHL proposes conditions that are positive and help to set precedence for kuleana for future water development. I generally believe that all water development at this point, should find water savings or contribute to recharge of a 1:1 ratio and to maintain the status quo. I'm into the water neutrality idea shared by Councilmember Rawlins-Fernandez, as well as surface water management area from Uncle Glenn.

The DHHL's proposing conditions (*read part of the conditions stated in the submittal*); these read like policies but are great conditions and am curious as to what specific actions the DHHL envision taking and being able to satisfy this condition and want to encourage the Commission in clarification. Some ideas I had were: establishing a native tree nursery for reforestation, identify lands not usable for ag or residents, committing some of those lands to reforestation, help with well 17 issues, land to be used to compost the gorilla ogo, other specific community groups efforts they've identified in working with, installing a weather station. I encourage the Commission to dig a bit deeper on these conditions and perhaps the applicant could make representations on the record today that speak on the specifics of how they will be satisfied.

I am grateful for this opportunity to be able to testify online because without this option, I would not be able to speak to you; and also to be able to testify with such knowledgeable people from Moloka'i is a privilege; thank you.

PUBLIC TESTIMONY (CONT'D)

Ms. Liko Wallace – Aloha, I'm a homesteader in Ho'olehua, Moloka'i. I'd like to ditto what councilmember Rawlins-Fernandez said and Mr. Walter Ritte, and all those that spoke in favor. I'm in favor of the water being allowed to DHHL and am very thankful I had the opportunity to speak today. I'm in strong support of this long overdue process to allow DHHL to get the waters that are needed to continue developing our lands for our people.

Thank you so much for giving me this time I will submit written testimony; Mahalo.

DISCUSSION/COMMENTS

Commissioner Kagawa-Viviani referred to the open question posed by testifier Ms. Poepoe of the conditions of the WUPA.

Deputy Manuel referred to DHHL to discuss that further relating to DHHL's discussions with the cultural practitioners. Noted if the Commission wants, it could amend to request an update in a year on the specifics relating to the posed conditions and meeting those needs.

Mr. Scheuer added that DHHL recognize the proposed conditions are stated broadly as DHHL was trying to provide some specifics to the Commission in relaying some sense of plans, but not to suggest specific actions without deeper consultation with community. Hoping over the next year, if this permit is granted, to work closely with CWRM staff and beneficiaries to identify and implement the specific actions; and would report back the Commission.

Commissioner Hannahs noted DHHL to identify impacts of the aquifer and recharge as a resource stewardship. In supporting this measure noted, 1) this is a public trust status of the Department and our duty to uphold that; 2) the urgent need of the Hawaiian Homes beneficiaries who've been waiting a longtime; and want to thank all the beneficiaries and community who came forward to testify as your voice is passionate and heard; 3) the level of use is reasonable and not being squandered; the use has been demonstrated by staff's analysis.

We need to reward and commend the work of the Department (DHHL) in being a good player. They've reasonably sought community engagement and co-invested in data collection, invested infrastructure which has been part of our D&O's, and commit themselves in resource stewardship. Noted on the last meeting where the Commission had to force the private landowner to allow USGS onto their lands for a monitoring station.

Any concerns about the long-term view can be recalibrated in the future and something to consider, as it's 2.67 mgd; for these few reasons I hope we all support the submittal before us.

Commissioner Kagawa-Viviani asked on the staff recommendation #1 if it was standard language. Deputy Manuel replied that it was as a way to ensure balanced usage of the resource and if a change occurs, the Commission has the authority to reevaluate that. The intent of that condition to ensure the Commission has reviewed and approved with the authority to rescind, modify or revoke as necessary in the future.

Chairperson Case noted it's not intended to penalize the applicant. Deputy Manuel added for clarification purposes, to add an amendment noting if there are any changes, to notify the Commission, as part of that condition.

Chairperson Case asked DHHL if they're satisfied with the discussion as reflected in the minutes as that's the intent or looking for something more specific?

Chairperson Aila replied that DHHL is willing to play fair and make adjustments in spite of the past 28-years of not having adjustments made for DHHL. Request to leave the conditions broad so that DHHL can adjust as it moves forward and noted it's only fair when the two other applicants come before the Commission, they have similar conditions and put on notice that should conditions arise, to review the allocation or reservation transparently.

Chairperson Case asked for a motion. Deputy Manuel also added to include Mahina Poepoe's request to report back noting DHHL's support of that. Chairperson Case reiterated the motion: to approve staff submittal with amendment (clarified by Deputy Manuel): to provide an update to the Commission in a year with the specifics and approach to meet those special conditions related to protecting the groundwater dependent ecosystems and traditional and customary practices.

MOTION: (HANNAHS/BUCK)
To approve B-2 with added amendment.
UNANIMOUSLY APPROVED

RECESS: 11:10 PM

RECONVENE: 11:26 PM

072021 02:36:05

C. INFORMATIONAL BRIEFINGS

1. Draft Amended Interim Instream Flow Standards for the Surface Water Hydrologic Unit of Ki'iki'i (3082), Kaukonahua Stream, Waialua, O'ahu

PRESENTATION GIVEN BY: Dr. Ayron Strauch, CWRM Stream Protection & Management Branch

Dr. Strauch gave a PowerPoint presentation on the submittal item. The list of establishing an instream flow standard (IFS) and the process was stated. CWRM also consulted with other DLNR agencies and City & County of Honolulu with this information (presentation) provided at the Wahiawā Neighborhood Board meeting as well as with community consultation, noting this action item will be coming before the Commission in the future.

The maps of the Ki'iki'i hydrologic unit topography, land use areas and cultural sites were shown and noted. Biological surveys were conducted in the lower Kaukonahua area. Because of water quality issues with R1 & R2 water being discharged into Wahiawā Reservoir and being released downstream, a highdef video as well as throw-net surveys was conducted with DLNR-Division of Aquatic Resources (DAR). In three locations, only non-native species were found. In two locations, native species like 'o'opu nākea and 'ōpae 'ula were found concluding that the stream is able to support native biota.

A summary of the instream uses of the water were noted. There are a few active USGS gaging stations located within the hydrologic unit. There is a distinct wet and dry season that makes the Wahiawā Reservoir and Dam a critical piece of infrastructure to support agricultural needs on the North Shore. The flow duration graphs were shown and explained. There is an abundance of diversified agricultural within Ki'iki'i which requires between 14--20 mgd; which also comes from other sources in the nearby area.

QUESTIONS

Chair Case – referred to the low-flow period; asked if there's a calculation to make that zero "0" go away in reference to the reservoir elevation.

Dr. Strauch – replied, the operation of the reservoir is modeled to meet the proposed 12 mgd of ditch flow and 3 mgd of an IIFS and during these dry periods the reservoirs will drop no matter what, and the additional 3 mgd shouldn't have an adverse negative impact. The balancing act is capturing wet season flow while complying with dam safety concerns. The current spillway does not meet the dam safety requirements. There is a timeline for which the operator would need to propose modifications and are looking to sell the reservoir and dam.

The question becomes: does the reservation drop below the elevation that'll possibly negatively harm the fishery? The fishery will benefit from elevation that are above the current dam safety constraints. The added IIFS is not the primary concern, it's the dam safety constraints that are affecting the fishery.

Chair Case – asked if consulting with DLNR Engineering regarding the dam safety?

Dr. Strauch – replied yes; the 65-foot goal that dam safety has, is to provide additional capacity in the reservoir in the event of a rainstorm event. There are options the operator are looking at to comply with, which includes lowering the reservoir dam down to the 65-foot elevation; however, that'll remove a lot of the historic storage capacity that exists.

Chair Case – asked if the potential for pump storage hydro been a part of the info gathering?

Dr. Strauch – we had conversations with the various agencies, but the issue is it's a privately owned dam and they're not in the business of developing hydropower. They are looking to sell to someone who would be, whether it's the State or private entity. There's potential, if the dam were to be rebuilt with a hydropower component; the generation of the electricity will support the funding of the reconstruction of the dam while meeting dam safety standards and provide for IFS below the dam and fishery above the dam.

Commissioner Hannahs – referenced the three water quantity and quality issues in relation to the wastewater, ag and soil run-off; also invasive aquatic species compromising our native species; how are we dealing with that?

Dr. Strauch – (regarding the discharge of wastewater into the reservoir) ADC is proposing and has a preliminary engineering plan to pipe the wastewater to a new reservoir and will use that as part of their irrigation needs for the newly acquired ADC and OHA lands. Schofield Barracks Treatment facility was recently upgraded to an R-1 facility with most of that water going to the Kunia Ag Park and very little being discharged into the ditch below the reservoir.

Once the ADC project completes, the reservoir water quality should drastically improve but doesn't address the legacy cultural soil contamination issues.

Non-native species issue is a problem in O'ahu streams. There is a small fishery in the reservoir that's a valuable resource in the community. However, there the primary non-native species in lower Kaukonahua is the armored catfish and eradication is challenging.

Wahiawā Freshwater State Recreation Area, Wahiawā, Oahu

PRESENTATION GIVEN BY: Ms. Renee Kamisugi, DLNR, State Parks

Ms. Kamisugi touched on the history of the Wahiawā Freshwater State Recreation Area which is located within a residential area. It has multiple recreational value uses and is currently the only public freshwater fishing on O‘ahu and has many outdoor recreational uses as well. There are lots of community events and participation such as fishing tournaments, lake volunteer cleanup, fish hatchery and Day at the Lake event.

Some community concerns are the current water levels which prevents fishing in some areas of the lake and also pose a safety threat for boats to launch at the ramp. Future plans include the vision of the 2019 UH CDC Conceptual plan, current park improvements, community outreach, and additional parking.

(VERBAL) PRESENTATION GIVEN BY: Mr. Michael Fujimoto, DLNR, Div. of Aquatics

In Wahiawā, we manage the fisheries in that reservoir and have an agreement with Dole Foods. As Ayron stated, there are limitations because of the dam safety issues. Management is largely federally funded and generate monies from sales from fishing licenses. The fish hatchery is built at Wahiawā Middle School and run by its faculty and students. This was important to have at the time especially when the pond was at maximum levels, there were a lot of fish and predators and recruitment of large-mouth bass was a limiting factor. The middle school receives a lot from operating the hatchery that produce the bass and is then released back into the pond.

DISCUSSION

Commissioner Hannahs referred back to his original question of native and non-native biota.

Mr. Fujimoto answered that the pond is man-made and that you wouldn’t find normal native stream organisms. The large-mouth bass was bought in the early 1900s. Importation is regulated by the Department of Agriculture and like other agencies, comment on the ill effects the sport-fishers want to bring in. We comment on those we feel won’t have a lasting effect. One thing we bring up every year is the Rainbow Trout; the Hawai‘i habitat is not acceptable and reproduction in the fishery is nil. DAR has an alien invasive species program that works to prevent and eliminate invasives.

Commissioner Hannahs appreciated Mr. Fujimoto’s answer and noted how some invasive species do not transform a habitat but basically “occupy” it and gave an example of the plumeria tree which is not native to Hawai‘i, but is grown and occupy lots of areas. Also appreciated DAR’s invasive species program and its efforts. Mr. Fujimoto noted that in the aquatic world, most invasives are introduced accidentally, non-intentional.

Commissioner Hannahs asked on the collaboration by DAR or State Parks to help educate the Middle School on native systems and species. Mr. Fujimoto noted that DAR has an aquatic education program that is also funded by the sport fish funds and has done work in schools across the island.

Chairperson Case asked if there is a risk of invasive species in the reservoir escaping downstream. Mr. Fujimoto acknowledged that those in the pond have gone downstream but don't like the habitat; there's armored catfish and tilapia.

Commissioner Hannahs and Chair Case discussed the invasive bass in a Kaua'i stream.

Chairperson Case asked if we will be exacerbating the invasive problem with a higher inflow stream standard. Mr. Fujimoto replied it will not as this stream is typical of many streams on O'ahu. If you have low-flow you're favoring one type of invasive and vice versa.

Chairperson Case asked if the invasive species in the reservoir that have gone down stream, if they migrate back up another stream where it connects. Mr. Fujimoto noted the type of fish in the reservoir that survive the stream habitat are also downstream. Dr. Strauch noted that 70% of the time this stream is discharging a substantial amount of water to comply with dam safety. The IIFS is far exceeded most of the time by current operations.

Chairperson Case noted that she sits on the Board of Ag and there's been requests to import largemouth bass for the reservoir with the assertion that it would stay there. Mr. Fujimoto acknowledged it's still there. Asked if they're going up another tributary. Dr. Strauch added the other nearby streams are already invaded and they will not get far up.

Commissioner Kagawa-Viviani noted on the intercepting issues with the reservoir noting that for dam safety reasons we want it lowered but it means there's less surface area for the fishery. Asked to what extent does the effluent contribute to what's DAR managing and how is ADC uptake of that effluent effecting those levels. Dr. Strauch responded that the effluent contributes to a substantial amount of nitrogen and phosphorus to the reservoir which supports phytoplankton growth that feeds the base of the food chain; but is a water quality hazard for recreational usage and if you want to consume the fish, which right now is not allowed from the reservoir.

Dr. Strauch also noted the reservation elevation problem is not just a surface area capacity to support a number of fish problem, but also an oxygenation problem. Explained that when reservoir levels get too low, the fish concentrate in the deepest end, which is fairly close to the dam, and this poses a threat to the fish dying off because of oxygenation. The proposal for ADC to utilize R1 water from the treatment facility probably won't have an impact of reservoir elevation but may impact water quality which will have implications for the ecosystem. In consulting with DAR, the fisheries benefit from high water elevation during peak spawning periods as the fish utilize the vegetation along the riparian zone for protection; thus when it is low, they don't get that protection. The dam safety issue we can't get around until the dam gets modified.

Commissioner Kagawa-Viviani asked will a minimum IIFS at the driest part of the year translate to a desired flow but still improve passage at the mouth of the stream. Dr. Strauch replied the benefit is that we're going to maintain habitat for native aquatic species below the

reservoir during the dry period. It's a gaining stream so whatever is released will make it to the mouth and likely benefit the estuary. The goal is to provide that minimum flow during the dry period to sustain our native fauna and value that the stream provides.

Commissioner Kagawa-Viviani asked about the spawning during high or low flows. Dr. Strauch answered the big problem with recruitment of native biota at Kaukonahua is the reservoir dam because the downstream flow is not over the reservoir spillway but via a pipeline through a tunnel that is released out into the stream. We do know in higher flow events we see recruitment into the reservoir and upstream and we have found native species above the dam; but the current design of the reservoir wasn't for fish passage. If/when the new operator comes aboard and rebuilds it to meet dam safety standards, we will put a clause to provide for fish passage.

Mr. Fujimoto added that traditional fish ladder/passages would be a negative in our native streams as the 'o'opu and 'ōpae go up vertical walls which are good barriers for the alien species.

Commissioner Buck appreciated the presentation as this is the longest stream on O'ahu with the some of the best native forest mauka. We have conflicting mandates and the ability for the community to engage in the non-native sport fishing; it's an incredible opportunity for education. With these complexities, if there's opportunity for a CIP project to redo the dam and increase storage, it has benefits for agriculture and stream health. I'm in support of starting this conversation of how we can redefine what the stream is going to look like.

Commissioner Hannahs asked how close and engaged is Department of Agriculture on this planning process. Dr. Strauch noted working with the consultants for ADC and ADC reps and its ADC that is focused on developing this as a resource.

Chairperson appreciated the presentation, information and discussion and look forward to hearing back as it moves forward.

D. ANNOUNCEMENTS

Deputy Manuel noted the passing of former Commissioner Mr. Bob Nakata who served for eight (8) years as one of the first members of the Commission who also helped to establish the Water Code.

E. NEXT COMMISSION MEETINGS (TENTATIVE)

August 17, 2021 (Tuesday)

September 21, 2021 (Tuesday)

This meeting was adjourned at 12:28 p.m.

Respectfully submitted,



RAE ANN HYATT
Secretary

OLA I KA WAI:



M. KALEO MANUEL
Deputy Director

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Written Testimonies Received:



Administrative Testimony
Testimony of Sylvia M. Hussey, Ed.D.
Ka Pouhana, Chief Executive Officer

Commission on Water Resources Management

Item B-2

APPROVAL OF DEPARTMENT OF HAWAIIAN HOME LANDS APPLICATION FOR A WATER USE PERMIT MODIFICATION AND REDUCTION OF RESERVATION FOR KUALAPU‘U, KAULUWAI 1 AND 2 WELLS (WELL NOS. 4-0801-001 AND -002), TMK (2) 5-2-010:003, WUP NO. 1100, NEW AND EXISTING USES PER SECTION 221 OF THE HAWAIIAN HOMES COMMISSION ACT AND NON-HOMESTEAD MUNICIPAL USES FOR 0.595 MGD, KUALAPU‘U GROUND WATER MANAGEMENT AREA, MOLOKA‘I

July 20, 2021

The Administration of the Office of Hawaiian Affairs (OHA) **SUPPORTS** the recommended approval of a modified Water Use Permit Application (WUPA) for the Department of Hawaiian Home Lands (DHHL), to provide additional homesteading opportunities on Moloka‘i.

As an initial matter, OHA notes that both OHA and the state of Hawai‘i have a significant and longstanding interest in the implementation of the Hawaiian Homes Commission Act (HHCA), and the realization of its vision to return native Hawaiians to the land. Unfortunately, there have been numerous historical challenges to the implementation of the HHCA, including the longstanding failure of the state to fulfill its responsibilities under the Admission Act and state Constitution to adequately support DHHL, and DHHL’s lack of access to critical resources including and in particular to water. **Notably, DHHL has endeavored for over 30 years to secure access to the water necessary to expand homesteading opportunities on Moloka‘i, and both OHA and DHHL have invested significantly in legal interventions, hydrologic studies, and advocacy to secure DHHL’s water rights while also protecting other public trust purposes in Moloka‘i’s water resources.**

OHA accordingly urges the Commission’s favorable consideration of the WUPA now before it, which would enable DHHL to utilize an additional 0.228 million gallons of water per day (mgd) from the Kualapu‘u aquifer. **OHA understands that this additional water would enable DHHL to establish 171 new homestead service connections as well up to 210 new service connections for subdivided homestead lots – significantly increasing the amount of homesteads available to return native Hawaiians to the land on Moloka‘i.** OHA further understands that approximately 70 mgd of this additional water has already been reserved for use on Hawaiian Home Lands, and OHA notes that both the reservation and use of water by DHHL beneficiaries is a recognized public trust purpose –thus requiring the highest priority in consideration and protection in the administration and allocation of our public trust water resources.

As a final note, OHA expresses its appreciation for the conscientious and thoughtful accounting and analysis submitted in support of this WUPA, including a detailed and carefully prepared cultural impacts memo, and proposed conditions that would mitigate any potential impacts to valued natural and cultural resources and associated Native Hawaiian traditional and customary practices also protected under the public trust. OHA urges both DHHL and the Commission to ensure that these conditions are implemented in good faith and in a timely manner. Accordingly, OHA urges the Commission to **APPROVE** the requested WUPA for DHHL. Mahalo nui for the opportunity to comment on this matter.



Trustee Luana Alapa *Molokai, Lanai* Board of Trustees 560 North Nimitz Highway Na Lama Kukui Building Suite 200 Honolulu, Hawaii 96817

July 19, 2021

TESTIMONY IN SUPPORT OF THE REQUESTED WUPA FOR DHHL **SENT VIA E-MAIL**

I submit this written testimony as a resident of Ho`olehua Hawaiian Homestead, as a potential farm business owner and a elected OHA Trustee representing the beneficiaries of Molokai. It is highly ironic that we are faced today with this hearing in which the very notice reads the applicant for permission to have access to water and the land owner of this water source is the same entity, that of Department of Hawaiian Home Lands.

I echo the written testimony submitted by the Chief Executive Officer of the Office of Hawaiian Affairs Sylvia Hussey and the verbal testimony of OHA Advocate Wayne Tanaka but I felt it important to share my personal support and advocacy for my island home of Molokai.

In the spirit of the Hawaiian Homestead Commission Act which turned 100 years old on July 9, 2021, **I support the approval of the requested WUPA for DHHL application for modification of the existing water use permit no. 267 to the Department of Hawaiian Homelands (DHHL).**

Please consider the HHCA of July 9, 1921 item (4) under its purpose reads as follows; *[TITLE 1A: PURPOSE]*

*[\$101. Purpose.] [Text of section subject to consent of Congress.] (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the selfdetermination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians. (b) The principal purposes of this Act include but are not limited to: (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act; (2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors; (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity; (4) **Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible; and** (5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians **shall be forever** self-sustaining*

Barbara Kalipi
P.O. Box ____
Hoolehua, Hawaii 96729

Commission on Water Resource Management
State of Hawai'i Department of Land and Natural Resources
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813

Email: raeann.p.hyatt@hawaii.gov

Re: Agenda Item No. B.2, Water Use Permit Application
1100, Kualapu'u Ground Water Management Area, Moloka'i

Aloha Chair Case and members of the Commission on Water Resource Management,

Mahalo for the opportunity to share my mana'o on the Department of Hawaiian Home Lands Water Use Permit Application 1100. I am a life-long homesteader, raised on homestead lot# 68, raised my 2 kamali'i on a portion of the same lot that was subdivided by my dad, started a farm of kalo and avocado trees on our lot with my late spouse, and my son now carries on the family mahiai tradition.

I am in support of the department's application for an increase in their permitted use from .367 mgd to .595 mgd from Kauluwai wells 1 and 2 which will allow for continuing service to its current users and expand services to other lessees in Hoolehua, Na'iwa, and Kalamaula mauka. Your approval of this permit will remedy an unjust decision that has created a sense of distrust in the integrity of the decision-making process. When the department initially applied for permitted use in 1993 from the Commission, they were approved for only .367 mgd of the .5 mgd they requested based on their actual use at the time. As a public trust established under the Hawaiian Homes Commission Act of 1920, the department's request should have been approved. Subsequently, in 1995 the CWRM did approve an amended reservation of 2.905 mgd from the original .905 mgd for the department for future use which was incorporated into their administrative rules.

Molokai's island community, particularly homesteaders and native Hawaiian rights advocates, has had a combative history with the Commission regarding its past decisions approving water use applications by Molokai Ranch which were subsequently overturned by the Hawaii Supreme Court. In 2004, the Court determined that CWRM did not protect DHHL priority use as a public trust and traditional and customary rights (Waiola case) and in 2007, a decision to approve a water use permit was reversed by the Court for wrongfully placing the burden on the department to show how their water quality would be impaired by the Ranch's permitted use (Kukui case). As an island community, we have been made consistent efforts since the 1990's to learn about and understand the complex issues about our water resources in order to have our voices heard, often meeting with disappointment. The Hawaii Supreme Court's decisions reaffirming public trust and traditional and customary rights are to be celebrated.

Regarding the current DHHL application, I am encouraged by the thorough submittal by your staff that clearly documents the facts, honors the Hawaii Supreme Court decisions, and concludes rightfully to recommend approval of DHHL's request. I am also encouraged that the Department of Hawaiian Home Lands recognizes the fragility of our single source aquifer by taking a proactive role in "self-imposing" conditions for the approval of their application to address the potential impacts of increase withdrawals from their wells on our coastal resources. I support these conditions and I also support your staff's recommendation for the Commission to consider imposing these conditions to the other users (both current legal and illegal users). This will hopefully set the course for expecting future applicants to have some responsibility for the stewardship of our precious water resources.

Your approval of this request will provide water for existing lessees, for current non-homestead uses of water including our airport, our intermediate and high school, state facilities, churches, and for the service connection for new residential lots. The pono decision is yours to make.

Mahalo,
Barbara Kalipi



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July 17, 2021

Via Electronic Mail

Commission on Water Resource Management

Kalanimoku Building

1151 Punchbowl Street, Room 227

Honolulu, Hawai‘i 96813

dlnr.cwrn@hawaii.gov

Re: Agenda Item B.2

Approval of Department of Hawaiian Home Lands Application for a Water Use Permit Modification and Reduction of Reservation for Kualapu‘u, Kauluwai 1 and 2 (Well Nos. 4-0801-001 and -002), TMK (2) 5-2-010:003, WUP No. 1100, New and Existing Uses per Section 221 of the Hawaiian Homes Commission Act and Non-Homestead Municipal Uses for 0.595 mgd, Kualapu‘u Ground Water Management Area, Moloka‘i

Dear Chair Case and Commissioners:

On behalf of Moloka‘i Nō Ka Heke, Earthjustice submits the following comments supporting approval of the ground water use permit application of the Department of Hawaiian Home Lands (DHHL) for its Kauluwai 1 and 2 wells in the Kualapu‘u aquifer on Moloka‘i.

Moloka‘i Nō Ka Heke’s members include DHHL beneficiaries, non-beneficiary Native Hawaiians, and residents of makai areas where nearshore freshwater discharge plays an important role in the health and vitality of the reefs, estuaries, and fishponds of the Moloka‘i coast. Moloka‘i Nō Ka Heke urges this Commission to regulate Moloka‘i’s water resources holistically according to established public trust principles, ensure that non-public trust uses are reasonable and beneficial, and address each proposed use with due regard to the inevitable effects of well withdrawals or stream diversions on the surrounding environment—particularly the impacts to nearshore freshwater flow.

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I Moloka‘i Nō Ka Heke is an unincorporated association of community members who in 2019 filed a combined petition and complaint regarding four central Moloka‘i streams (CDR.5310.4), as referenced by staff on page 3 of the staff submittal.

DHHL’s proposed withdrawal rate of 0.595 million gallons a day (mgd) is well within DHHL’s current reservation of 2.905 mgd from the Kulapu‘u aquifer, despite representing a small increase from previous rates to provide for additional homesteading. Reservations of water for current and foreseeable future use on DHHL lands “constitutes a public trust purpose,” *In re Waiola O Moloka‘i*,

103 Hawai‘i 401, 431, 83 P.3d 664, 694 (2004), and “is an essential mechanism by which to effectuate the State’s public trust duty” to protect water sources for present and future generations. *Id.* Thus, DHHL reservations of water are entitled to the “full panoply of constitutional protections” afforded public trust purposes and take precedence over non-public trust groundwater uses. *Id.* Non-public trust uses and purposes, conversely, do not enjoy these constitutional protections; thus, the Commission must ensure DHHL’s current and foreseeable future water needs are met before considering other proposed uses of the Kualapu‘u aquifer.

DHHL also complied with its obligations under *Ka Pa‘akai O Ka ‘Āina v. Land Use Commission*, 94 Hawai‘i 31, 7 P.3d 1068 (2000), to make specific findings and conclusions regarding:

- (1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by [DHHL] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084.

DHHL conducted a survey of Kalama‘ula residents with experience and expertise in the exercise of traditional and customary Native Hawaiian practices such as subsistence harvesting of ocean resources and use of shoreline plants. Based on the survey results, which indicated the community’s concerns about protection of reefs and other nearshore environments and the feared loss of traditional knowledge to the passing of the older generations, DHHL proposed three permitting conditions in an attempt to mitigate the community’s concerns with respect to traditional and customary practices: (1) implementation of community-led efforts to replace invasive species with native species to improve the health of coastal ecosystems; (2) efforts to reduce erosion and restore native vegetation in mauka areas—which, Moloka‘i Nō Ka Heke notes, will provide the additional benefits of reducing reef-smothering sediment runoff and promoting aquifer recharge; and (3) engagement of schoolchildren in outdoor classrooms, to help perpetuate groundwater-dependent traditional and customary practices and resource management.

Granting DHHL’s permit application will allow DHHL to meet existing needs, provide for expansion of homesteading opportunities for wait-listed beneficiaries, and supply water for other reasonable-beneficial uses. Moloka‘i Nō Ka Heke also fully supports the permit conditions DHHL proposed based upon its *Ka Pa‘akai* analysis, and Staff incorporated into the permit conditions. Permit conditions that support watershed restoration are a vital and important tool for aquifer recharge and resource protection that have been underutilized in the past and should be adopted as a best practice moving forward.

With that in mind, Moloka‘i Nō Ka Heke urges this Commission to ensure that other applications for water uses from the same aquifer propose and abide by similar conditions, in accordance with properly-conducted *Ka Pa‘akai* analyses and public trust protections. Indeed, because non-public trust uses are subject to *heightened* scrutiny under our constitutional public trust doctrine, DHHL’s GWUPA package should be regarded as a basic starting point for private water-users’ analysis and consideration of measures to mitigate the effects of water withdrawals on public trust uses. This developing dialogue between the Commission and groundwater users is also important in light of

changing climatic conditions, and the need to ensure beneficial long-term management of Moloka‘i’s water resources.

Mahalo for considering our testimony on this important matter, which Moloka‘I Nō Ka Heke views as an important step toward addressing Moloka‘i’s many unresolved water resource issues.

Respectfully submitted,
/s/ Mahesh Cleveland
Mahesh Cleveland
Leinā‘ala L. Ley
EARTHJUSTICE
Attorneys for Moloka‘i Nō Ka Heke

Glenn I. Teves
P.O. Box _____
Ho‘olehua, HI 96729

July 16, 2021

TO: State of Hawaii Department of Land and Natural Resources,
Commission on Water Resource Management

FROM: Glenn I. Teves
Ho‘olehua Homesteader

RE: DHHL’s Application for a Water Use Permit Modification – Kualapu‘u

Aloha. I’m a Hoolehua homesteader who has been involved in water issues on Molokai for 40 years now, which includes following the enactment of the State Water Code. One of the highest responsibilities of a Hawaii state agency is to affirm and uphold provisions of the Hawaiian Homes Act, which is a condition of statehood. Instead, it seems that CWRM has put a lot of energy into creating obstacles and roadblocks for the Department of Hawaiian Home Lands (DHHL) in securing water for their lands on Molokai. You have succeeded in preventing hundreds of homesteaders from occupying their lands and also subdividing their lots for their children, and I believe this is a violation of the Hawaiian Homes Act.

In 1993, DHHL requested .5 mgd from Kauluwai Wells 1 and 2, which was the existing use at that time. Instead, CWRM approved only .367 mgd and stated that this request would be ‘revisited’ later. Is this the revisit? As a result of CWRM’s decision, the Department of Hawaiian Home Lands had refused to issue new water meters to homesteaders until they can be assured of an allocated supply of domestic water for these lots. If I was one of the homesteaders prevented from occupying my awarded homestead lot over the last 26+ years, I would sue CWRM.

CWRM also underestimated the commercial uses, including Molokai Intermediate and High School, Kualapu‘u Charter School, Molokai Airport, Hoolehua Fire Station, Lanikeha Community Center, Molokai Electric, several churches, and non-homestead farms supplied by the DHHL water system.

DHHL is saying the only new uses will be 171 meters, but this number is conservative and doesn't take into account those homesteaders who have expressed their interest to DHHL in subdividing their lots for their children. With a total of 522 lots in Hoolehua, including 130 35-acre lots, if only 10% of homesteaders subdivided their lots this would increase the number of domestic water connections by over 50.

What does a reservation mean? Can I just request to draw down water from my reservation based on need, or do I have to go through an Act of Congress? Based on CWRM's long overdue decision, a reservation of water now means nothing. What it now means is that it's OK to reserve water but we'll let you know in 26+ years when you can draw down from your 2.905 mgd reservation.

On November 27, 2018, CWRM sent letters to DHHL, Maui DWS, and Molokai Public Utilities stating that modifications to water use permit applications are being requested by March 1, 2019 so that applications can be evaluated together. This action appears to give all parties the same standing and fails to acknowledge DHHL's reservation of 2.905 mgd and also its prior right to water.

Contrast this with Molokai Ranch, who has been drawing 800,000 - 1 MGD WITH NO WATER USE PERMIT FOR OVER 26 YEARS!!! Where's the enforcement? CWRM has established a new normal, and this tells us how DHHL and the homesteaders must act in the future:

1. It's better to ask for forgiveness than to ask for permission.
2. DHHL should drawdown whatever water they need for homesteading without asking CRWM for permission. If there's any opposition by CWRM, we can determine the outcome in court as to who has the higher right.

The Commission on Water Resource Management (Commission) is the entity who is supposed to 'fulfill the responsibility of managing the state's water resources through administration of the State Water Code, Chapter 174C' and has failed to do this, including upholding provisions of the Hawaiian Homes Act. It's time the Hawaiian Homes Commission takes action to assure that homesteaders have adequate water to occupy their lands now and in the future. We cannot and do not trust that CWRM will affirm DHHL's superior rights to water. The least you can do is approve this revised water use permit and don't belabor this more than you already have.

In closing, DLNR can put out a press release acknowledging the successes of resolving Maui water issues, but at the same time they should acknowledge the dismal failure of their water management on Molokai. Thank you for the opportunity of share my mana'o on this critical issue affecting the Hawaiian Homes Act.

VIA EMAIL TRANSMITTAL

July 18, 2021

Commission on Water Resource Management
State of Hawai'i Department of Land and Natural Resources
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813
Email: raeann.p.hyatt@hawaii.gov

Re: Agenda Item B.2. Water Use Permit Application 1100, Kualapu'u Ground Water Management Area, Moloka'i

Aloha Chair Case and Members of the Commission on Water Resource Management:

As a Hawaiian Homestead Association identified under the Hawaiian Homes Commission Act of 1920 (HHCA), the Kalama'ula Mauka Homestead Association strongly SUPPORTS the Department of Hawaiian Home Lands' ("DHHL's") Water Use Permit Application ("WUPA") for Kauluwai Wells 1 and 2. I respectfully request that you grant this application to partially fulfill DHHL's reservation and honor its status as a public trust purpose. Doing so would also help to maintain the wide range of important community uses supplied by these wells.

Our Water Code requires the Commission to "protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands." HAW. REV. STAT. § 174C-101(a). It is disappointing that after so many years, DHHL's requests to increase its permitted use and partially utilize its water reservation within the Kualapu'u Aquifer System have yet to be realized.

Over 25 years ago this Commission issued Water Use Permit ("WUP") 267 for Kauluwai Wells 1 and 2, which allowed only for existing uses at that moment, and not the full .5 mgd requested. In addition to homestead service connections, DHHL has and continues to support vital community uses by supplying water to, for example, Moloka'i Intermediate and High School, the County Fire Department, and the Moloka'i Airport. WUPA 1100 hopes to rectify the errors with WUP 267 by increasing the permitted amount for Kauluwai 1 and 2 to include uses at the time of designation.

The only "new use" request is for about 170 new residential service connections for homesteads in Ho'olehua, Nā'iwa, and Kalama'ula Mauka, which are public trust purposes and therefore have priority over other uses. *See Wai'ola O Molokai, Inc.*, 103 Hawai'i 401 (2004).

Granting this request will provide for the water needs and security of both homesteaders in need of water meters, and 'ohana who are still on DHHL's waitlist. On this centenary of the passage of the Hawaiian Homes Commission Act, we implore you to approve WUPA 1100 and provide some of the water necessary to bring Prince Kūhiō's vision to life on Moloka'i.

Sincerely,

Sybil K. Lopez
President, Kalama'ula Mauka Homestead Association

Aloha:

As a lessee of Naiwa Agriculture Subdivision on Molokai, I am in support of approving the water use permit for DHHL so that they are able to service additional DHHL agriculture and residential lots with water usage.

Mahalo,

Liliana KI Napoleon, MBA CTE Grant Coordinator UH Maui College, Molokai (808) xxx-3465

Hoolehua Homestead Agriculture Association
Commission on Water Resource Management
State of Hawai'i Department of Land and Natural Resources
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Email: raeann.p.hyatt@hawaii.gov

Re: Agenda Item No. B.2, Water Use Permit Application
1100, Kualapu'u Ground Water Management Area, Moloka'i

Aloha Chair Case and members of the Commission on Water Resource Management,

On behalf of our organization, I am writing in support of the Department of Hawaiian Home Lands Water Use Permit Application 1100. We have a current membership of approximately 40 lessees.

We support the department's application to increase their permitted use from .367 mpg to .595 mpg from Kauluwai Wells 1 and 2 based on the following:

- As a public trust purpose, DHHL has priority status over other types of uses and can apply for water reservations for future use from the CWRM
- DHHL did not receive approval from the CWRM for the .5 mgd on their initial permit application in 1993, and was approved for only .367 mgd even though .5 mgd was their actual amount of water use at the time
- DHHL was approved for a water reservation of 2.905 mgd in 1995
- Competing interests for water with Molokai Ranch resulted in contested case hearings before CWRM; they approved water use permits for the Ranch but their decisions were overturned by the Hawaii Supreme Court based in part on DHHL's priority use as a public trust
- With the affirmation of DHHL's priority use as a public trust, their request for an increase from .367 mgd to .595 mgd should be approved as it will allow continuing services to existing users that include non-homestead uses as well as for expansion of services to more lessees.

Mahalo for the opportunity to share our position.

Aloha,
Kilia Purdy-Avelino
Ho'olehua Homestead Agriculture Association, Secretary