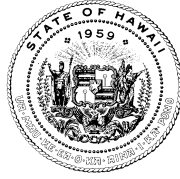


DAVID Y. IGE  
GOVERNOR  
STATE OF HAWAII



WILLIAM J. AILA, JR.  
CHAIRMAN  
HAWAIIAN HOMES COMMISSION

JOSH GREEN  
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DEPUTY TO THE CHAIRMAN

**STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS**

P. O. BOX 1879  
HONOLULU, HAWAII 96805

May 16, 2021

MEMORANDUM

TO: Ms. Suzanne Case, Chairperson  
Commission on Water Resource Management (CWRM)

FROM: Andrew H. Choy, Acting Planning Program Manager *AC*  
Department of Hawaiian Home Lands

SUBJECT: **CWRM Agenda for May 18, 2021, Item B-2 (Reservations of water and Amendment of Interim Instream Flow Standards (IIFSs) for Honokōhau and Kaluanui Streams, West Maui) .**

The Department of Hawaiian Home Lands (DHHL) is grateful for and offers the following testimony in strong support of the staff's recommendation to the Commission on Water Resource Management's (CWRM) in Agenda Item B-2 "Approve Surface Water Reservation of 2.00 Million Gallons per Day for the Department of Hawaiian Home Lands and Amend Interim Instream Flow Standards for Honokōhau and Kaluanui Streams in the Surface Water Hydrologic Unit of Honokōhau (6014) and Honolua Stream in the Surface Water Hydrologic Unit of Honolua (6013), West Maui."

Specifically, DHHL supports the proposed reservation of water for DHHL being explicitly included in the CWRM action today, and supports the amount recommended. We believe it is legally required and also appropriate that the reservation for DHHL and the IIFSs be approved at the same time.

DHHL has been actively involved in the consideration of these issues on West Maui for a number of years, and has offered comment and testimony on these matters as they have been

considered in public meetings on the Instream Flow Standard Assessment Report and before the Commission. Because we recognize there were comments made at your April 2021 meeting that could indicate a lack of familiarity by some regarding the rights of DHHL, we do offer some background information supporting our testimony and the proposed action.

***The legal basis for DHHL water reservations***

DHHL thanks the Commission for taking action today to protect public trust uses of water in this area. We note that the CWRM should not privilege one public trust use over another, and reservations of water for and use of water by DHHL are, like instream uses, by definition a public trust use afforded the full panoply of constitutional protections enjoyed by other public trust uses of water. See Kukui at 491, 174 P.3d at 330.<sup>1</sup>

The Water Code makes it clear that Reservations for DHHL should be made during all allocation decisions whenever legally permissible, if they have not been already taken into account. Specifically, HRS 174C-101(a) notes in part that "Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act." Your action today is such a decision.

We further note that the Hawai'i Supreme Court has held that the Commission must take DHHL's reservation into account when planning and allocating water resources, "and to protect it whenever feasible," insofar as its status as a public trust resources renders it "superior to the prevailing private interests in the resources at any given time." In re Waiola O Molokai, Inc., 103 Hawaii 401, 429, 83 P.3d 664, 692 (2004). Accordingly, the Commission must apply a "higher level of scrutiny" to proposed private commercial uses of water where public trust uses will be impacted. Id.

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<sup>1</sup> DHHL's uses of water from its reservations would also be entitled to those same constitutional protections.

Not only is DHHL's water reservation (and any use of water from that reservation) protected by the public trust doctrine, but the Hawaii Supreme Court has held that the Commission itself must take a proactive role in protecting DHHL's interests:

...the Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the initiative in considering, protecting, and advancing the public rights in the resource at every available stage of the planning and decision making process...In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state. Id. at 162, 9 P.3d at 474.

### ***Calculation of DHHL water needs***

DHHL utilizes a three-tiered planning system to guide development and management of its land holdings for the benefit of current and future beneficiaries. The planning system includes an over-arching General Plan, a second tier of Strategic Program Plans and Island Plans (which includes our Water Policy Plan<sup>2</sup>), and a third tier of more specific Regional and Development Plans.

DHHL uses documents developed in this planning system, along with county and other appropriate water system standards, to determine its reservation needs. We are pleased by the explicit incorporation of DHHL's calculations into the staff's recommendation for a reservation amount.

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<sup>2</sup> See Hawaiian Homes Commission Water Policy Plan, adopted July 22, 2014 available at: <http://dhhl.hawaii.gov/wp-content/uploads/2013/09/HHC-Water-Policy-Plan-140722.pdf>.

***Conclusion***

As a public trust user of water, DHHL recognizes that we have a priority of water greater than private commercial uses. We also realize and acknowledge, in accordance with our Water Policy Plan, that we are not going to take so much water that other public trust uses, such as those in Honokōhau Stream, should be inappropriately impacted. We are pleased that this solution, if followed by supportive actions from Maui County, will allow for the use of R1 water, to minimize such impacts.

**Signature:** 

**Email:** andrew.h.choy@hawaii.gov



May 16, 2021

Via Electronic Mail

Commission on Water Resource Management  
Kalanimoku Building  
1151 Punchbowl Street, Room 227  
Honolulu, Hawai'i 96813  
dlmr.cwrmm@hawaii.gov

Re: Agenda Item B.2  
Approve Surface Water Reservation of 2.00 Million Gallons per Day for the  
Department of Hawaiian Home Lands and  
Amend Interim Instream Flow Standards for  
Honokōhau, Kaluanui, and Honolua Streams, West Maui  
Tuesday, May 18, 2021, 9 a.m.  
Via Remote Video Conferencing

Dear Chair Case and Commissioners:

Mahalo for the opportunity to comment on (1) the numerical interim instream flow standards ("IIFSs") proposed for Honokōhau, Kaluanui, and Honolua streams, and (2) the surface water reservation requested by the Department of Hawaiian Home Lands ("DHHL").

At the outset, and as an organization with experience advocating on behalf of communities seeking restoration of healthy waters and waterways throughout the pae 'āina, we appreciate the Commission's initiative in recent years to more proactively address water resource management. We likewise support DHHL's request for a surface water reservation, which—like the natural flow and traditional/customary uses many of our clients depend on—is a constitutionally protected public trust use of fresh water resources under Hawai'i law.

After discussions with the Honokōhau community, and hearing their willingness to accept this IIFS as a workable compromise, we support the 8.6 million gallons per day ("mgd") allotted to natural flow in Honokōhau Stream in Phase One of the IIFS, to the extent that it will provide suitable water—at least in the foreseeable future—for the ongoing lo'i kalo cultivation in the valley and for further lo'i restoration. However, we are concerned with that ongoing threat of waste given that offstream uses have been shown to be 4.3 mgd but the proposed IIFS

allows for much higher diversion levels under most flow conditions.<sup>1</sup> To the extent that reservoir capacity in the area is limited, the only way to prevent waste of these millions of gallons daily is to leave them in the stream. We encourage the continued exploration of methods to best utilize diverted stream water, including through improved storage capacity. Under no conditions should stream water be dumped due to poor planning and management on the part of the diverter.

Phase Two of the IIFS, incorporating a surface water reservation for DHHL's projected demand of 2 mgd, sets a variable IIFS allowing diversion of 50% of stream flow at diversion 770 during all flow conditions.<sup>2</sup> Earthjustice supports variable IIFS levels in order to best protect instream uses while allowing for reasonable beneficial offstream uses. However, we respectfully suggest that the Commission should not regard 50% of natural stream flow as a *de facto* starting point for low-flow stream restoration. In most streams, much higher rates of stream restoration are necessary to protect instream uses and healthy watersheds (including habitat for native fauna). As the Commission continues to evaluate and amend stream flow standards in other 'āina, we encourage a practice of restoring as much water as possible to natural flows and instream users, with off-stream diversions limited to those reasonable-beneficial uses that meet a demonstrable need. Furthermore, and as with Kaluanui and Honolulu Streams, any streams with derelict or unnecessary diversion works should likewise have stream flow fully restored, and the diversion works formally abandoned and removed.

Regarding DHHL's surface water reservation, we support reserving 2 mgd for homestead use at Honokōwai. We also support DHHL's proposal to use its surface water allotment to dilute the salinity of R-1 treated wastewater from Maui County's Lahaina Wastewater Reclamation Facility ("LWRF") for agricultural use. The County's current practice of discharging its nutrient-laden R-1 into the groundwater below the treatment plant results in damage to corals and other marine life as the effluent flows into the ocean via nearshore submarine springs. While this treated sewage wreaks havoc on reefs, its high nitrogen content makes it ideal for terrestrial irrigation, so long as salinity (chloride) levels are suitable to the plants being irrigated. DHHL's willingness to allow use of its surface water reservation to dilute LWRF R-1 water for reuse presents Maui County with an opportunity to reduce its pollution of

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<sup>1</sup> Subtracting the 4.3 mgd off-stream demand from the "amount available off stream" under Phase One on Table 2, Staff Submittal at 8, the amount of water diverted out of the stream *in excess of* estimated demand are: 3.3 mgd at Q70; 7.9 mgd at Q50; and 14.5 mgd based on mean daily flow.

<sup>2</sup> For example, as indicated in Table 2 of the Staff Submittal, during low-flow (Q90) periods, 11 million gallons are estimated to be in Honokōhau stream above the diversion. Of those 11 mgd, 5.4 will flow past the diversion, and be augmented by 1.4 mgd of groundwater gains, resulting in 6.8 mgd by the time the stream reaches the IIFS gage at McDonald's Dam. See Staff Submittal at 3.

nearshore waters at Hā‘enanui (Kahekili Beach Park), for which we and our clients have long advocated.

While Honokōhau’s water future looks promising on paper, implementation and enforcement of IIFS are legitimate concerns for the community. As the Staff Submittal notes, Maui Land & Pineapple (“MLP”) is responsible for preventing any wasting of stream water, including by upgrading its diversion intake to prevent un-needed stream water from entering the ditch during high-flow periods or events. Staff Submittal at 3. Thus far, those upgrades (ordered by the Commission on November 19, 2019) have not, to our knowledge, been completed. It also remains unclear how the new IIFS will be implemented, or when. Given the delay in complying with the Commission’s directives regarding waste, there is justifiable concern that MLP, which is also responsible for modifying diversion 770 to meet the Phase One IIFS, will not do so within the 120 days required in the Staff Submittal. We urge the Commission to establish a clear timetable for implementation of the IIFS to ensure that the IIFS will be met on schedule.

The section of the Staff Submittal titled “ENFORCEMENT” discusses how an IIFS violation is defined and how the IIFS will be monitored, but provides no information on how the IIFS will be enforced if violated. MLP is required to meet the IIFS “100% of the time,” and presumably, real-time in-stream monitoring will show whether stream levels fall below IIFS requirements. Of immediate and pressing concern to kalo farmers during any reduction of flow, however, is maintaining sufficient flow to their lo‘i, and healthy flow mauka to makai. Please provide clarity on what specific recourse or actions are available to the Honokōhau community if flow levels fall below the IIFS, including detail regarding what immediate steps will be taken to protect instream uses if the IIFS is violated.

Respectfully submitted,

/s/ Mahesh Cleveland

Mahesh Cleveland

Leinā‘ala L. Ley

EARTHJUSTICE

Aloha, my name is Lopaka Wilson.

I am a Keiki 'Ohana Noho Papa of Honokohau which means I am a multigenerational lineal descendant of this specific place. My grandparents Aimoku and Lehua Pali came back to Honokohau Valley in the 1970's after years of being forced out due to have to leave and their parents being forced to work for the plantations. My grandparents came back for the purpose of restoring kalo patches and to try to help bring back the water that had been taken and mismanaged for years. The restoration of the water not only brings back the kalo, but also ensures the ability to continue cultural practices that my great grandparents were not allowed to pass on due to the plantations' greed over the water. My grandparents helped create awareness about the water issues Hawaiians were facing through the State of Hawaii Legal System in the 1980's. They started this battle and have both passed on without ever getting closure. Although they are not here in body, they are here in spirit to watch myself and my children see this struggle though and restore the water that has been taken for far too long.

In our valley, if our neighbor is using too much water for their patches, it has a direct negative impact on the patches below. As neighbors we try to work together so everyone can succeed. In the same way, we have to work as a cohesive unit in our neighborhood, we would like to work with other off stream users as a community. I want to encourage DHHL, DHS and MLP to emulate the compromise we have shown and to not take more water than they need and work together in this small community.

I support the current IIFS and DHHL reservation at this time. Mahalo for your time.

Lopaka Wilson



# Plantation Estates Lot Owners Association

10 Hoohui Road, Suite 302

Lahaina, Hawaii 96761

(808) 669-9030

May 14, 2021

Ms. Suzanne Case, Chairperson  
Mr. M. Kaleo Manuel, Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, HI 96809

Dear Ms. Case and Mr. Manuel,

My name is Jonathan Kindred, and this testimony is offered in my capacity as President of the Plantation Estates Lot Owners Association (PELOA). PELOA is part of Kapalua Resort and is a community comprised of residential homesites, family farms, and one commercial agricultural operation. The agricultural, landscape irrigation, and fire protection water sources for PELOA have been provided by Kapalua Water Company through the Honokohau Ditch since our community was initially developed in 1990.

During the course of 2019 PELOA connected actively with CWRM staff and I truly appreciate the open and constructive engagement they offered to us. We also submitted both oral and written testimony in public hearings (please see attached the written testimony from September 9, 2019).

As the Commission is now set to act on the Interim IFS for the Honokohau Stream we are testifying again to seek some assurance as to the availability of this critical water source to fulfill our existing uses. While we are pleased that non-instream uses such as ours have been deemed to be reasonable and beneficial, we are concerned that the recommendations presented to you contain the acknowledgment that..."It is understood that during extreme drought (<Q90; <11.0 mgd at Aotaki Weir), 100% of the off-stream uses may not be met".

We are concerned because it is precisely during these periods of extreme drought when we will be most in need of accessing non-potable water from the Honokohau Stream. Most importantly, we are concerned that those portions of our neighborhood which are serviced by fire hydrants with non-potable water will not have water available to fight fires which may

occur. We are alarmed that the Commission would contemplate and adopt a plan which would give rise to such a scenario.

We acknowledge the statement in the Staff Submittal as follows..."However, Kapalua Water Company (KWC) has plenty of capacity in its drilled wells to utilize groundwater as a backup supply for its non-potable needs when insufficient water is available in the ditch". Further, we are aware of the state of the wells being referenced, but we think it is important to note that these wells are owned and operated by Maui Land and Pineapple Company, Inc. (MLP) which is no longer the owner of KWC. MLP sold KWC to Hawaii Water Service Company (HWSC) effective May 1, 2021. We are unaware of any agreement between MLP and HWSC which requires MLP to make this groundwater available to ensure no interruptions in our non-potable water supply.

We are sure it is not the intent of the CWRM, in addressing the long-standing need for a new IIFS for Honokohau, to create a potential threat to life and property in our community. To address the issue that could arise, however, we thus respectfully request the Commission, if you decide to adopt the new IIFS as recommended, require MLP and HWSC to enter into an agreement that ensures uninterrupted supply of water in our non-potable system to PELOA in the course of compliance with your IIFS decision.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'JB Kindred', written over a horizontal line.

Jonathan B. Kindred

Aloha kākou,

My name is Sanna Ka'uhane, my family and I live in Honokōhau valley where we currently farm dryland kalo.

We definitely support this DHHL reservation of 2 MGD.

Now that we are on the tail end of the pandemic we are all very eager to see Maui Land and Pine follow through with the commissions 2019 order to improve their intake to ensure that no more water than what has been dictated in the off-stream demand is diverted from the stream. Over a centuries worth of water has already been taken away from stream life and from the generational lo'i kalo farmers whose families still reside in the valley today. Its time for action by Maui Land and Pine, to develop a simple diversion that doesn't require extensive permitting and get it installed. There needs have been established. The longer the upgrades take the longer the waste continues. We'd like to ask the commission to establish enforcement guidelines so that our community here in the valley can keep a watchful eye on our off-stream neighbors to make certain that no more than what has been set as their off-stream demand is being taken.

Lastly, I do support these IFS numbers however I do have some concern with the Q90 flow in Phase 2 which is only 6.8 MGD. There are a couple of large islands inside of Honokōhau stream, the one right in front of where we live is 2.85 acres. It's not very wide but it is very long. These islands split the stream flow in these areas and I can assure you it's definitely not a 50/50 split. Ultimately, the river decides where it's going to go and it's not uncommon to see 80% of the flow on one side of the island. I feel that this 6.8 MGD flow during these "drought" periods will not be sufficient enough to sustain stream life in these areas. Maui Land and Pine has access to both surface water and ground water during these drought periods, the stream doesn't. Maui Land and Pine has three wells on their property, two of them already have operating pumps. These wells are far enough apart that they are able to be pumped simultaneously, producing 2 MGD. These two wells alone are enough to meet their 1.8 MGD demand. They could also pump from the third well as well to help lessen the burden on the other two wells, and they would easily be able to meet their demand. They could also cut back irrigation to gentleman's estates, luxury homes resorts and golf courses during these drought periods where we should all be more mindful of our water consumption. If in this second Q90 period, Maui Land and Pine is required to use this back up water source that they already posses, then an extra 1.6 MGD could remain in the stream bringing the IFS up to 8.4 during these low periods. We, out here in the valley, we know what 6.8MGD looks like. It's not much. An IFS of 8.4 MGD looks much more promising for sustaining the native habitats of stream life through these low flow periods, while still providing for off-stream public trust users. Like Ayron said in the last meeting, the stream doesn't have a back up. Mahalo nui for taking the time to listen to all of us today!

Sanna Ka'uhane

Aloha,

May 12, 2021

My name is William Wood. My family and I are Honokohau Valley residents. We support the proposed IIFS for Honokohau, along with the DHHL's future reservation of two MGD .

My family, along with the community, restore lo'i and raise kalo in Honokohau Valley. The majority of what is grown is donated to the community for school fundraising and family events.

There have been many occasions when our entire crop has been destroyed due to lack of water in the stream, which could have been avoided with proper management of taro gate by ML&P.

There was a period of years when I had to call ML&P every few days to encourage them to clean the taro gate so that flow would be restored to the stream and auwai systems in a timely manner. Unfortunately, it could sometimes take them over ten days and at that point, the damage is done. Not only to our resident's crops and livestock, but also to our native stream life.

After the flood of September 2018, the flow in the stream was greatly diminished. We repeatedly tried to contact ML&P to restore the water flow but did not receive a response. Meanwhile, ML&P was wasting the water which was overflowing into the ocean at Hanakao'o and is documented in the 2019 wastewater complaint. Currently, we are still uncertain who to contact when there are problems with low stream flow.

In a Maui News article dated Nov 22, 2019 it states:

When asked by commissioner Michael Buck how much water will be back in the stream after the intake is fixed and ML&P is getting only what it needs, state Department of Land and Natural Resources hydrologist Ayrton Strauch replied that it fluctuates.

*"The amount that they're taking varies over time based on flows available," Strauch said. **"Their end use, even with system losses and inefficiencies, are probably no more than 5 or 6 mgd. . . . Last night, they were taking 40 mgd. There is a lot more water that should be in the stream."***

This is the reason we believe it is extremely important that the new system put in place allows the water to stay in the stream regardless of the state of the diversion or the response time of ML&P. We would encourage the commission and ML&P to consider using a similar system that is currently used at Kahoma Valley's intake rather than using an electronic gate. An electronic gate takes power, regular maintenance and could easily malfunction, while a permanent pipe would take basic maintenance like cleaning taro gate after high water. This would ensure the water would stay in the stream while giving ML&P time to respond.

Mahalo for your consideration and time,

William Wood