

**PETITION FOR A CONTESTED CASE HEARING
BEFORE THE COMMISSION ON WATER RESOURCES MANAGEMENT**

NOTE: THIS PETITION IS TO BE FILED IN PERSON OR MAILED AND POSTMARKED WITHIN 10 DAYS OF THE PUBLIC HEARING OR COMMISSION MEETING AT WHICH THE REQUEST FOR CONTESTED CASE HEARING WAS MADE

(Please submit an original and 3 copies, pursuant to HAR 13-167-25(c)).

IF MAILED, SEND TO: Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai'i 96809
Phone: (808) 587-0225 Fax: (808) 587-0219

IF DELIVERED: Commission on Water Resource Management
1151 Punchbowl St., Rm. 227, Kalanimoku Bldg.
Honolulu, Hawaii 96813

Please provide the following information:

(If there is not sufficient space to fully answer any of the items noted below, please use additional sheets of paper)

1. **NAME:** Nā Moku `Aupuni O Ko`olau Hui ("Nā Moku")
Please see attached documentation of Native Hawaiian Legal Corporation's authority to represent Nā Moku.

(If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.)

2. **ADDRESS:** c/o Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813

3. **ATTORNEY OR CONTACT PERSON:**
Native Hawaiian Legal Corporation
Alan T. Murakami
Moses K. N. Haia III
Camille K. Kalama

4. **ADDRESS:** Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
PHONE: (808) 521-2302
FAX: (808) 537-4268

RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT
2010 JUN -4 PM 3:31

5. **SUBJECT MATTER:** The subject matter for this contested case is the protection of adequate stream flows in East Maui streams to support and promote public trust purposes. Specifically, this matter relates to the Interim Instream Flow Standards for the following streams: Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi.

6. **DATE OF PUBLIC HEARING/COMMISSION MEETING:** May 25, 2010.

7. **WHAT IS THE LEGAL AUTHORITY UNDER WHICH THE PROCEEDING, HEARING OR ACTION IS TO BE HELD OR MADE (CITE APPLICABLE SECTION OF CONSTITUTION, STATUTES, OR ADMINISTRATIVE RULES):**

HRS § 91-9 (Contested cases; notice; hearings; records.), HRS Chapter 174C (Water Code), HAR Title 13 (Department Of Land And Natural Resources) Subtitle 7 (Water Resources), Chapter 167 (Rules Of Practice And Procedure for the Commission on Water Resource Management) Subchapter 4 (Contested Case Proceedings), Hawai'i Const. Art. XI, §§ 1 & 7, Art. XII, §7, the Hawaiian Homes Commission Act secs. 213(i) and 221, HRS § 10-13.5, Section 5(f) of the Hawaii Admission Act, 42USC § 1983, and the public trust doctrine.

8. **ARE YOU HAWAIIAN?**

Members of Nā Moku are Native Hawaiian.

9. **WHAT IS THE TAX MAP KEY OF THE PROPERTY ON WHICH YOU RESIDE?**

Members of Na Moku Aupuni O Ko`olau Hui reside, own, farm, and gather on various properties in and around the subject streams, including, but not limited to the following parcels: 1-1-01:44; 1-1-02: Portion 02; 1-1-04:28; 1-1-04:30; 1-1-05:16; 1-1-05:20; 1-1-05:22; 1-1-05:52; 1-1-06:8; 1-1-06:39; 1-1-06:46; 1-2-02:09; 1-2-04:05; 1-2-04:07.

10. **WHAT IS THE TAX MAP KEY OF THE PROPERTY CONSIDERED IN THIS ISSUE?**

The properties considered in this issue are identified by hydrologic units assigned by the Commission, including the following units and the surrounding properties:

WAIKAMOI (6047): Waikamoi Stream, Alo Stream, and Wahinepee Stream

PUOHOKAMOA (6048): Puohokamoa Stream

HAIPUAENA (6049): Haipuaena Stream

PUNALAU (6050): Punalau Stream and Kolea Stream

HONOMANU (6051): Honomanu Stream

WEST WAILUAIKI (6057): West Wailuaiki Stream

EAST WAILUAIKI (6058): East Wailuaiki Stream

KOPILIULA (6059): Kopiliula Stream and Puakaa Stream

WAIOHUE (6060): Waiohue Stream
PAAKEA (6061): Paakea Stream
KAPAUOLA (6063): Kapaula Stream
HANAWI (6064): Hanawi Stream

11. WHAT IS THE TAX MAP KEY OF THE PROPERTY OR PROPERTIES WHICH YOU OWN IN THE VICINITY OF THE PROPERTY CONSIDERED IN THIS ISSUE?

Members of Na Moku Aupuni O Ko`olau Hui own various parcels in the vicinity of the hydrologic units in the Ko`olau watershed, including the following parcels: 1-1-01:44; 1-1-02: Portion 02; 1-1-04:28; 1-1-04:30; 1-1-05:16; 1-1-05:20; 1-1-05:22; 1-1-05:52; 1-1-06:8; 1-1-06:39; 1-1-06:46; 1-2-02:09; 1-2-04:05; 1-2-04:07. They also have the right to engage in constitutionally protected activities in and around each of the petitioned streams.

12. WHAT, IF ANY, ACTIVITIES HAVE YOU ENGAGED IN ON THE PROPERTY CONSIDERED IN THIS ISSUE?

The activities that members of Nā Moku have engaged in on the properties impacted by this contested case are detailed in item 13, below. Nā Moku previously provided information to the CWRM included as part of its petitions to amend the Interim Instream Flow Standards (IIFS) for the subject streams.

13. WHAT IS THE NATURE AND EXTENT OF YOUR INTEREST THAT MAY BE AFFECTED?

Rights protected under HRS § 1-1, HRS § 7-1, Hawaii Const. Art. XI, secs. 1& 7, Art. XII, sec. 7, HRS §§ 174C-63, 71, & 101, Hawaiian Homes Commission Act secs. 213(i) and 221, HRS § 10-13.5, Section 5(f) of the Hawaii Admission Act, 42USC § 1983 and the public trust doctrine.

More specifically, Petitioners' right to sufficient stream flow to support the exercise of their traditional and customary native Hawaiian rights to growing kalo and gathering in, among, and around East Maui streams and estuaries and the exercise of other rights for religious, cultural, and subsistence purposes. Specifically, the rights of members to engage in such practices in, on, and near Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi streams from HRS § 1-1 and HRS § 7-1 and protected under HRS §174-101.

Sections 1 and 7 of Article XI of the Hawaii Constitution also recognize the application of the public trust doctrine to all water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawai'i, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property. Article XII, section 7 of the Hawaii

Constitution places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights including appurtenant rights (appurtenant rights also receive protection in the Water Code at HRS § 174C-63), and confers upon the State and its agencies the power to protect these rights and prevent any interference with the exercise of these rights. In effect, the exercise of such rights is a public trust purpose. The exercise of these rights by Petitioners is threatened by the interim instream flow standards set by the Commission on Water Resources Management on May 25, 2010.

Petitioners are also beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act. The proposed disposition of public lands subject to the trust provisions of Section 5(f) for the development, diversion, and use of water implicate Petitioners rights as beneficiaries of said trust.

14. WHAT IS THE DISAGREEMENT, DENIAL, OR GRIEVANCE WHICH YOU ARE CONTESTING?

Nā Moku disagrees with the May 25, 2010 interim instream flow standards set by the Commission which fail to restore sufficient water to the subject streams to adequately protect and promote instream public trust uses of the streams, including Native Hawaiian traditional and customary rights and practices. Nā Moku has detailed its concerns, objections, and other disagreement with the Interim Instream Flow Standards referenced in item 5, via numerous objections and oral and written testimony provided to the Commission between May 24, 2001, the filing of the original petitions to amend Interim Instream Flow Standards for the subject streams, and the latest decision on May 25, 2010. Nā Moku will not repeat all of its arguments except to state that the IIFSs set for the 19 streams at issue fail to satisfy the requirements of the law (including Haw. Rev. Stat. §§ 174-71(1), 101, & 174C-63, and this Commission has failed to hold the diverter to its burden.

In *In Re Water Use Permit Applications*, 94 Haw. 97, at 160 (“*Waiahole I*”), the Hawai’i Supreme Court noted that:

[T]he Commission has an affirmative duty under the public trust to protect and promote instream trust uses. In accordance with this duty, the Commission must establish permanent instream flow standards of its own accord ‘whenever necessary to protect the public interest in the waters of the State.’ HRS 174C-71(1)...The Code also obligates the Commission to ensure that it does not ‘abridge or deny’ traditional and customary rights of native Hawaiians. *See* HRS 174C-101(c)(1993); *see also* HRS 174C-63 (1993) (preserving appurtenant rights)[.]

Id. at 153-154.

In carrying out its obligations under the public trust, the Commission is duty-bound to require Hawaiian Commercial & Sugar and East Maui Irrigation to affirmatively prove: (1) their actual need, (2) that there are no feasible alternative sources of water to

accommodate that need, and (3) the amount of water diverted to accommodate such need does not, in fact, harm a public trust purpose, or “any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial.” *In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai) Inc.*, 116 Haw. 481, 499 (2008).

If the diverter fails or refuses to provide any one of the above, the Commission must end its inquiry as it cannot determine whether such use is a reasonable-beneficial use. *See Waiahole II*, 105 Haw. at 16 (“The Water Commission’s analysis should have ceased when [the applicant] failed to meet its burden of establishing that no practicable alternative water sources existed.”)

Finally, prior to making any decisions, the Commission must also make specific findings and conclusions as to: (1) the identity and scope of “valued cultural, historical, or natural resources” in the ... 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 . . . to reasonably protect native Hawaiian rights if they are found to exist. *Ka Pa`akai o Ka `Aina v. Land Use Commission*, 94 Haw. 31, 53 (2000).

The Commission has failed to hold A&B to its burden of proof and failed to make the required findings and conclusions regarding native Hawaiian traditional and customary practices prior to setting the IIFSs for the subject streams.

East Maui is not a designated water management area. Therefore, and with respect to these out of watershed diversions, the applicable common law applies and the burden of demonstrating that any transfer of water is not injurious to the rights of others rests wholly upon A&B/HC&S. *Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 694 (1904). Thus, in order to obtain any ultimate judicial sanction to a transfer of water away from the lands of ancient application, A&B/HC&S must 1) have defined all the potentially affected interests in a watercourse, and 2) have demonstrated that no aspect of these rights would be detrimentally affected. A&B/HC&S have clearly not met its burden.

15. WHAT ARE THE BASIC FACTS AND ISSUES?

The members of Petitioner Nā Moku Aupuni O Ko`olau Hui reside and exercise, have exercised, or desire to exercise their traditional and customary native Hawaiian rights to grow kalo and gather plants and stream species in and along East Maui streams. Specifically, the members seek sufficient water to be restored to the following streams to support such practices: Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi streams. Members of Petitioner Na Moku Aupuni O Ko`olau Hui and other Petitioners own kuleana land and enjoy constitutionally protected traditional and customary native Hawaiian rights. The established Interim Instream Flow Standards for the above streams set by the Commission on May 25, 2010 fail to protect the statutory

and constitutionally protected instream values violates their rights as Native Hawaiians and as beneficiaries of the public trust.

More detail regarding the basic facts and issues are detailed in Nā Moku's various communications to the Commission and are incorporated by reference, including:

May 24, 2001, Petitions to Amend IIFS for the subject streams
September 24, 2008 oral and written testimony
December 16, 2009 oral and written testimony
May 25, 2010 oral testimony

Nā Moku can provide further information regarding the basic facts or issues upon request.

16. WHAT IS THE RELIEF THAT YOU SEEK OR THAT YOU DEEM YOURSELF ENTITLED?

Nā Moku seeks the restoration of the subject streams to levels adequate and sufficient to protect and promote public trust purposes. Nā Moku has detailed its requested relief regarding the IIFSs referenced in item 5, via numerous written and oral correspondence already on file with this Commission. The relief requested will not be repeated here except to state that Nā Moku, as beneficiaries of the public trust, are entitled to have their rights and interests protected by this Commission in adhering to its duties to ensure adequate protection of the subject streams and instream values and uses as well as in holding all diverters to their burden of establishing that their water use satisfy the requirements of the State Constitution and Water Code and ratified by the Hawai'i Supreme Court. Specifically for this contested case petition, Nā Moku seeks the restoration of an amount of stream flow in each diverted and dewatered stream within the Waikamoi, Puohokamoa, Haipuaena, Punalau, Honomanu, West and East Wailuaiki, Kopiliula, Waiohue, Waiaaka, Kapaula, and Hanawi hydrologic units that will ensure the protection and preservation of instream public trust purposes, including Petitioners' traditional and customary native Hawaiian rights.

Nā Moku also seeks the following monitoring and enforcement measures:

- (1) A systematic study and monitoring of the impacts of any allowed diversion on stream and estuarine habitats.
- (2) Specific deadlines and requirements for all diverters to report to the Commission the amounts of system losses and measures to reduce or eliminate such losses.
- (3) Specific deadlines and requirements for all diverters to implement measures to reduce and/or eliminate the use of streams for conveyance and to reduce or eliminate commingling of stream waters.

(4) Any and all other relief deemed necessary to ensure adequate protection of Nā Moku members' rights.

Nā Moku hereby incorporates earlier communications by reference, including:

May 24, 2001, Petitions to Amend IIFS for the subject streams
September 24, 2008 oral and written testimony
December 16, 2009 oral and written testimony
May 25, 2010 oral testimony

Nā Moku can provide further information regarding the relief that they seek upon request.

17. IDENTIFY ANY AND ALL OTHER PERSONS WHO MAY OR WILL BE AFFECTED BY THE RELIEF WHICH YOU SEEK:

The relief sought herein will impact all beneficiaries of the water resources trust, especially the people of Maui, individuals who live within or near the subject hydrologic units, Alexander & Baldwin and its subsidiaries, Hawaiian Commercial & Sugar and East Maui Irrigation, and Maui County Department of Water Supply and its subscribers.

The above-named person hereby requests and petitions the Commission on Water Resources Management for a Contested Case Hearing in the matter described above.

DATED: Honolulu, Hawaii, June 4, 2010

CAMILLE K. KALAMA
Name (Print)


Signature

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, a courtesy copy of the foregoing document was served upon the following parties by U.S. Mail, postage prepaid, to their last known address:

Elijah Yip, Esq.
David Schulmeister, Esq.
Cades Schutte
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
For Alexander & Baldwin, Inc., and East Maui
Irrigation Co., Ltd.

Isaac Hall, Esq.
2087 Wells Street
Wailuku, Maui, Hawaii 96793
For Maui Tomorrow

Robert H. Thomas, Esq.
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, Hawaii 96813
For Hawaii Farm Bureau Federation

Greg Garneau, Esq.
444 Hana Hwy, Suite 204
Kahului, Hawaii 96732
For Maui Land & Pineapple

Jane Lovell, Esq.
Deputy Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793

Linda L. Chow, Esq.
Deputy Attorney General
465 S. King Street, Room 300
Honolulu, Hawaii 96813

DATED: Honolulu, Hawai'i, June 4, 2010.



CAMILLE K. KALAMA
Attorneys for Petitioners
Na Moku Aupuni o Ko'olau Hui, et al.

Civil No. 19-1-0019-01 (JPC)

Defendant A&B/EMI's Exhibit AB-129

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____