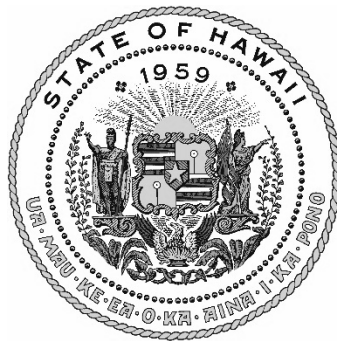


REPORT TO THE THIRTIETH LEGISLATURE
2020 REGULAR SESSION

RELATING TO WATER RIGHTS



Prepared by

Department of Land and Natural Resources
State of Hawaii

In response to Act 126, Session Laws of Hawaii 2016

November 2019

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PURPOSE

Act 126, Session Laws of Hawaii 2016 (Act 126), requires the Department of Land and Natural Resources (DLNR) to provide annual reports to the Legislature no later than twenty days before the convening of each of the regular sessions of 2017, 2018, 2019 and 2020. This report to the 2020 Legislature covers: (1) the status of applications to continue previously authorized dispositions of water rights; (2) actions taken on applications during the Fiscal Years 2016-2017, 2017-2018 and 2018-2019; and (3) relevant recommendations for legislative action or appropriation.

STATUS OF APPLICATIONS

Act 126 took effect on July 1, 2016. On or about July 20, 2016, DLNR sent letters to its eleven permittees holding revocable permits for water use advising them of the enactment of the law and requesting that they submit applications for water leases by August 2016. As of August/September 2016, there were a total of 15 pending applications for water leases submitted to DLNR. Attached is a spreadsheet identifying the current applicants¹, indicating the dates applications were received, the location of the water source including tax map key, the applicants' stated purpose for requesting a water lease, and whether the proposed water use is consumptive or non-consumptive. No additional applications for water leases have been received since then.

Of the 15 original applications, there are currently 10 active applications for water leases, 9 of which are currently diverting water through revocable permits. Those water lease applicants currently holding a revocable permit for water are identified with a revocable permit (RP) number in parentheses after their name in the list attached. Some of the attrition resulted from applicants that were seeking water leases for multiple diversion sources narrowing their requests to a single source. Other applicants have indicated that they no longer desired to pursue a water lease. The most significant of these applicants is the East Kauai Water Users Cooperative (EKWUC). During the 2019 Legislative Session, EKWUC supported passage of Senate Bill 223 which proposed to transfer operational authority of the irrigation system to the Hawaii Department of Agriculture (DOA), as well as provide DOA with staff and funding for management of the system. The bill failed to pass out of conference committee.

As a result, EKWUC voted to not request continuance of the revocable permit. EKWUC has previously stated that they lack the resources to comply with the water lease requirements as well as serve as a long-term operator of the system. EKWUC's intent was to serve as an interim operator of the system until the system could be transferred to DOA. DLNR staff has met with DOA to discuss long term management and operation of the system. DOA has stated firmly that

¹ Applications that have been withdrawn or no longer pursued are indicated by a strikethrough.

without the funding and additional staff provided by the proposed legislation, they do not have the resources to assume management of the system. For the long term, if the management issues cannot be satisfactorily resolved, DLNR intends to permanently shut down the system, including removal of the Wailua and Upper Kapahi Reservoirs.

ACTIONS TAKEN ON APPLICATIONS

Of the 10 pending applications, 9 are for consumptive uses of water, which by statute require the sale of a water lease at public auction once the necessary conditions are satisfied. DLNR wrote to each applicant in September 2016 advising them of the next steps needed to process their applications. Over the last three years, DLNR staff, including its deputy attorney general from the Department of the Attorney General and staff from the Department of Hawaiian Home Lands (DHHL) when appropriate, have met with applicants on multiple occasions to review the statutory requirements for issuing water leases. The purpose of the meetings was to ensure that the statutory requirements will be addressed to the satisfaction of all the agencies involved.

DLNR staff continues to work with permittee applicants at their request on such issues as compliance with Chapter 343, Hawaii Revised Statutes (HRS), and the development and implementation of a watershed management plan pursuant to Section 171-58(e), HRS. Additionally, DLNR is working with DHHL to consult with their beneficiaries to develop a reservation of water rights sufficient to support current and future homestead needs, to be included in any water lease pursuant to Section 171-58(g), HRS. Beneficiary consultations have been completed for the Alexander & Baldwin, Inc./East Maui Irrigation Company, Ltd. (A&B/EMI) water lease application, the Hawaii Electric Light Company, Inc. (HELCO) water lease application and all Ka`u agricultural water lease applications.

For the watershed management plan requirement, DLNR staff and the Attorney General developed the minimum requirements for watershed management plans developed pursuant to a water lease. At its meeting on October 11, 2019, under agenda item D-2, the Board of Land and Natural Resources (Board) approved the minimum requirements for a watershed management plan. DLNR staff will work with the applicants on an individual basis to further develop watershed management plans to determine a fair share contribution for implementation, fulfilled either monetarily or by in kind services.

For environmental review pursuant to Chapter 343, HRS, the applicants pursuing large scale projects with higher volumes of water use have published draft environmental studies. A&B/EMI have published a draft environmental impact statement (DEIS) on September 23, 2019 and can be accessed through the following link:

http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2019-09-23-MA-DEIS-East-Maui-Water-Lease.pdf

This follows the Commission on Water Resource Management's (CWRM) issuance of its Findings of Fact, Conclusions of Law & Decision and Order in the contested case hearing regarding the petition to amend the Interim Instream Flow Standards (IIFS) for the 27 East Maui streams that were subject to the petition. Of those 27 streams, 10 were fully restored, with no

diversion of water allowed. CWRM's Findings of Fact, Conclusions of Law & Decision and Order is available through the following link:

<http://files.hawaii.gov/dlnr/cwrn/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>

The Kauai Island Utility Cooperative (KIUC) published a draft environmental assessment on October 8, 2019 that can be accessed through the following link:

http://oeqc2.doh.hawaii.gov/Doc_Library/2019-10-08-KA-DEA-Waiahi-Hydropower-Long-Term-Water-Lease.pdf

Finally, the Board approved the acceptance of HELCO's Final Environmental Assessment (EA) and the issuance of a Finding of No Significant Impact at its meeting on September 28, 2018. The final EA was then published in the OEQC Environmental Notice on October 23, 2018.

DLNR staff continues to work with the remaining permittees on fulfilling the requirements for the water leasing process. A significant remaining task is for DLNR to develop a methodology for the valuation of water. DLNR is currently working to resolve the issue.

DLNR staff submitted requests to the Board for the holdover of revocable permits for water use currently in place annually since the enactment of Act 126, discussing the public trust issues implicated by such a holdover. The Board approved the holdovers of all permits in 2016, 2017 and 2018. Therefore all permits are currently in holdover until December 31, 2019. At its meeting on October 11, 2019 under agenda item D-1, the Board approved as amended the continuance of all revocable permits, with the exception of EKWUC, for the year 2020, as authorized by the Intermediate Court of Appeals decision of June 18, 2019.

RECOMMENDATIONS FOR ACTION OR APPROPRIATION

DLNR intends to submit proposed legislation for the 2020 Legislative Session to resolve key issues in the disposition of water, such as specifying the Board's role in the allotment of water, allowing a disposition of water by direct negotiation in addition to a public auction, determining factors to be considered in the valuation of water, and providing additional clarity in the development and implementation of watershed management plans.

Applications for Water Leases Statewide as of October 2019

Item Number	Applicant Name	Date Application Received	Location	Proposed Use of Water	Consumptive or Non-consumptive
1	ALEXANDER & BALDWIN, INC. (RPs 7263, 7264 & 7265) and EAST MAUI IRRIGATION CO. LTD. (RP7266)	5/14/2001	Hana, Maui; (2) 1-1-001:044; 1-1-1:50; 2-9-14:various; 1-1-002:002; 1-2-4:5,7	Irrigation and other uses.	Consumptive
	EAST KAUAI WATER USERS COOP. (RP7310)	8/26/2016	Kawaihau, Kauai; (4) 4-1, 2, 4, 6, 7, 8	Irrigation and other uses.	Consumptive
2	HAWAII ELECTRIC LIGHT CO., INC. (RP7463)	8/24/2016	South Hilo, Hawaii; (3) 2-6-009	Hydroelectric power generation.	Non-consumptive, except for system losses
3	KAPAPALA RANCH (RP7054)	8/29/2016	Kau, Hawaii; (3) 9-8-1:3,9,10; 9-7-1:1	Watering livestock and wildlife.	Consumptive
4	KAU MAHI, LLC	8/26/2016	Kau, Hawaii; (3) 9-6-006:010	Irrigation and watering livestock.	Consumptive
	KAU MAHI, LLC	8/26/2016	Kau, Hawaii; (3) 9-7-001:001	Irrigation and watering livestock.	Consumptive
5	KAUAI ISLAND UTILITY COOPERATIVE	9/15/2014	Waimea, Kauai; (4) 1-4-001:002, 014, & 016	Proposed pumped storage renewable energy project	Non-consumptive, except for system losses
6	KAUAI ISLAND UTILITY COOPERATIVE (RP7340)	7/20/2001	Lihue, Kauai; (4) 3-9-001:001	Hydroelectric power generation.	Consumptive. Although this is a hydroelectric project, the water is not returned to the same stream from which it is diverted.
7	KUAHIWI CONTRACTORS, INC. (RP7426)	8/3/2016	Kau, Hawaii; (3) 9-7-1:1,15	Watering livestock.	Consumptive
8	LINDER, JEFFREY S. (RP7088)	9/1/2016	Kawaihau, Kauai; (4) 4-9-001:001	County water supply and irrigation purposes.	Consumptive

Applications for Water Leases Statewide as of October 2019

	MAC FARMS LLC (RP7360 to KAPUA ORCHARD ESTATES, LLC)	8/20/2016	South Kona, Hawaii; (3) 8-9-003:083	Irrigation for macadamia nut orchard.	Consumptive
	MOLOAA IRRIGATION COOPERATIVE	8/26/2016	Kawaihau, Kauai; (4) 4-9-001:001	Public drinking water and irrigation.	Consumptive
9	OLSON, TRUSTEE, EDMUND C. (RP7432)	8/9/2016	Kau, Hawaii; (3) 9-6-6; 9-6-7; 9-6-8; 9-7-1	Irrigation and watering livestock.	Consumptive
	WOOD VALLEY WATER & FARM COOPERATIVE (RP7234)	8/24/2016	Kau, Hawaii; (3) 9-7-001:001	Public drinking water, irrigation and watering livestock.	Consumptive
10	WOOD VALLEY WATER & FARM COOPERATIVE (RP7267)	8/24/2016	Kau, Hawaii; (3) 9-7-001:001	Public drinking water, irrigation and watering livestock.	Consumptive