July 11, 2005
To: State of Hawaii
Commission on Water resource Management;
All other interested parties.

From: Randy Gentry, Project Coordinator;
County of Maui
Department of Parks and Recreation
Planning and Development Division

Subject: Existing Use Applications
- Maui War Memorial Stadium Well (Well No. 5329-04) WUPA No. 709
- Baldwin High School Well (Well No. 5329-05) WUPA No. 710
- Papohaku Park Well (Well No. 5429-02) WUPA No. 712
- Waiehu Golf Course Well 2 (Well No. 5529-02) WUPA No. 711

New Use Applications
- Maui War Memorial Football Stadium Well (Well No. 5329-14) WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04) WUPA No. 714

In the matters concerning the new well applications for Maui Stadium Well (Well No. 5329-14) and the Waiehu Golf Course Well 2 (Well No. 5530-04) both of the Water Use Permit Applications for these wells were in error. In the case of the Maui Stadium Well it was confused with the War Memorial Stadium Well (Well No. 5329-04). According to the IAO AND WAIHEE AQUIFER SYSTEMS STATE AQUIFER CODES 60102 and 60103 GROUND WATER MANAGEMENT AREA DESIGNATION FINDINGS OF FACT dated November 14, 2002 as noted on page 21 the Maui Stadium Well does not belong to the Department of Parks and Recreation. The reference on that page notes that this well was put into service in 1970 as an irrigation well by the Maui Department of Public Works. The well is numbered as 5329-14 with an average production 12-MAV (mgd) of 0.100 with and initial chloride level of (mg/l) 285 and an elevation at the bottom of the
The County of Maui Department of Parks and Recreation and Department of Public Works, as well as A&B Commercial Company and Mr. Charles Ice from the State of Hawaii Commission on Water Resources Management have worked in a cooperative effort to locate this well and its current status. This well is no longer in use and a follow-up will be made to the files to show that it has been correctly taken out of use and capped to protect the water supply. The name for the War Memorial Stadium Well will be changed to War Memorial Football Stadium Well to more correctly identify and help to separate the name from the Maui Stadium Well in the future should the Maui Stadium Well ever be brought back into use. The 2 (Two) irrigation wells at the War Memorial Complex location are 5329-04 and 5329-05 as shown.

**War Memorial Location of Wells**

![War Memorial Location of Wells](image_url)
Charley:

As I mentioned the second well which is noted as a "new well" at the golf course is in reality a set of two new frequency generated booster pumps (written testimony will have details, pictures and notes on operating software). This would be well #5530-04. While doing the written part of the testimony I noticed that we also have another "new well" that does not exist and this would most likely be my paperwork foul-up. This well would be located at the War Memorial Complex. I am not sure which number would be the non existent one- The Baldwin High School well is situated on the War Memorial Complex Grounds and is near Kaahamanu Avenue at the front of the complex by our offices, and is number 5329-05. The only other well at this complex is located in the Maintenance Area at the rear of the physical football stadium. I am not sure which number has been assigned to it through the years but it looks like it is well # 5329-04. In the New use applications we show Maui Stadium Well as 5329-14 which would be the same well. If you have a idea on this I could really use your help. I am still having a problem with the well at Maui Community College and if you have the paper work that will help me to transfer the well that is on their property to the college I would appreciate it if you could send it as an attachment to an e-mail and I will take care of it right away. I know that we have a well at Maui Central Park (Keopuolani Park) but I do not know what number it is and it is still inoperative. Pacific Excavation and water wells is at the present time trying to get it in operation and also 2 other wells at Maui Central Park that are on the Kahului Aquifer. Once these wells are in operation they will make a state of the art computer controlled frequency pump, radio frequency weather station to controller interrupt water conservation system. (explanation and pictures as well as specifications will be in written testimony.)

Now that I have given you your headache for the day, I can tell you that all of our pumpage rates have been brought down to about 70% of what they have been in the past by new equipment and software as well as plain old conservation.....Randy

You are quite correct in that thought Charlie. I am working on the written presentation at this time> The wells upgrade at the Waiehu Golf Course was for a water conserving type of booster pump and not for a new well. We are working on the new pumpage figure as this time as well as a written presentation as to how the system operates. At this time it is turning out that the new booster pumps along with the Maxi 5 software and the RainBird ESP_MC controller are realizing us a savings of about 126,000 gallons of water per day that the system is run. This will be documented along with conservation methods for other caprock wells in the Iao Aquifer System.....Randy Gentry

We are awaiting corrected/updated pumpage figures for Parks & Rec wells, as well as some details on the system upgrade work done at various locations. I understand from a phone conversation that the "replaced pumps" were in fact boosters from the storage pond, rather than well pumps. It would be easier for filing to have these information bits transmitted by email rather than by phone, is that's agreeable. Also, you had some beautiful exhibits at the hearing, and I believe you hung on to them to send with the complete packet. If possible, we'd like to transmit available information to interested parties prior to the follow-up meeting, so they can be prepared for comments or questions. We look forward to that. Thanks, Randy.
May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director

SUBJECT: Request for Comments

Water Use Permit Application

Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), HRS, transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications

War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
Baldwin High School Well (Well No. 5329-05), WUPA No. 710
Papohaku Park Well (Well No. 5429-02), WUPA No. 712
Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications

Maui Stadium Well (Well No. 5329-14), WUPA No. 713
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

CL:ss
Attachment(s)

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person D. Kapua Sproat

Signed

Phone: 599-2436, ext: 64
Date: June 20, 2005
June 20, 2005

BY U.S. MAIL & FACSIMILE TRANSMITTAL
Fax: (808) 587-0219

Peter T. Young, Chairperson
Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to the County of Maui’s Water Use Permit Applications for Well No. 5329-04, Well No. 5329-05, Well No. 5429-02, Well No. 5529-02, Well No. 5329-14, and Well No. 5530-04; ʻĪao Ground Water Management Area, Maui

Dear Chair Young and Acting Deputy Director Nakano:

On behalf of Hui o Nā Wai ʻEhā and Maui Meadows Homeowners Association, Earthjustice submits the following comments and objections regarding Maui County Department of Parks and Recreation’s (“MDPR’s”) water use permit application (“WUPA”) numbers 709-714 for the War Memorial Stadium Well (Well No. 5329-04), Baldwin High School Well (Well No. 5329-05), Papohaku Park Well (Well No. 5429-02), Waiehu Golf Course Well (Well No. 5529-02), Maui Stadium Well (Well No. 5329-14), and Waiehu Golf Course Well 2 (Well No.

1 Hui o Nā Wai ʻEhā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai‘i’s natural and cultural resources and the practices that depend on them. The Hui strives to protect and restore streams, oceans, estuaries, native flora and fauna, and the activities that rely on these resources, especially the perpetuation of traditional and customary Native Hawaiian practices. Hui members live, work, and play in the ʻĪao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from ʻĪao, Waiheʻe, Waiehu, and Waikapū streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

2 Maui Meadows Homeowners Association is an association of homeowners from the Maui Meadows subdivision in Kihei. The association’s filing of a July 2001 petition resulted in the designation of the ʻĪao aquifer in July of 2003. Maui Meadows has been active in water and land use issues on Maui for many years and its members rely on the ʻĪao aquifer to satisfy their water needs. Additionally, the association’s members have been working to ensure appropriate management of the ground water resources in the ʻĪao and Waiheʻe aquifers.
Earthjustice’s Objection to the County of Maui Department of Parks and Recreation’s Water Use Permit Applications
June 20, 2005
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5530-04). These applications seek permits from the ʻĪao Ground Water Management Area to irrigate various MDPR facilities. For all of the reasons detailed herein, these applications fail to establish that the proposed new and existing uses comply with the requirements of the law. The Hui and Maui Meadows therefore urge this Commission to require MDPR to complete its applications before holding any meetings or public hearings regarding these WUPAs. If the missing information is provided in a timely fashion, we remain hopeful that the communities’ concerns and objections can be resolved via the mediated discussions between the parties, alleviating any need for a contested case hearing.

In their current state, MDPR’s permit applications fail to provide the factual and other basis necessary for this Commission to complete the analysis and make the findings required by the State Constitution and Water Code, and ratified by the Hawai‘i Supreme Court. The applications are insufficient for the following reasons:

1. MDPR failed to establish that the water source would accommodate its proposed uses, pursuant to Haw. Rev. Stat. § 174C-49(a)(1).

   The Code requires each applicant to establish that a water source can accommodate its proposed use. Haw. Rev. Stat. § 174C-49(a)(1). MDPR’s applications neglect even to mention the condition of ʻĪao aquifer or assess how its proposed uses will be supported, if at all. For years now, Commission staff and United States Geological Survey have warned that water is being extracted from the ʻĪao aquifer at rates that jeopardize the quality and viability of this important resource. Despite indications that the aquifer is threatened by existing and proposed withdrawals of water, the application lacks any analysis regarding whether the water source can accommodate MDPR’s total requested allocation of 455,750 gallons per day. See generally State of Hawai‘i Commission on Water Resource Management, ʻĪao and Waihe‘e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) (detailing the condition of the ʻĪao aquifer). MDPR must provide the information necessary to satisfy this criterion.

2. MDPR failed to establish that its proposed uses are consistent with the public interest and will not interfere with existing legal uses of water, pursuant to Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).

   The Hawai‘i Supreme Court affirmed that this Commission is “duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes and weigh competing public and private water uses on a case-by-case basis.” In re Waiāhole Ditch Combined Contested Case Hearing 105 Haw. at 1, 16, 93 P.3d at 643, 658 (2004) (quotations omitted). Moreover, the Code mandates that an applicant establish that its proposed use “will not interfere with any existing legal use of water” and “is consistent with the public interest.” Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).
Earthjustice’s Objection to the County of Maui Department of Parks and Recreation’s Water Use Permit Applications
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When allocating water, this Commission must consider the impact of all proposed uses on: (1) the maintenance of waters in their natural state, (2) resource protection, (3) water for domestic purposes, and (4) the protection of traditional and customary Native Hawaiian rights and practices. In re Wai‘ola O Moloka‘I, Inc. (“Wai‘ola”), 103 Haw. 401, 429 (2004) (citing In re Waiahole Ditch Combined Contested Case Hearing (“Waiahole I”), 94 Haw. 97, 136-138, 142, 9 P.3d 409, 448-450, 454 (2000)). Analyzing potential impacts on each of these public trust uses is especially important in ñao, where the condition of the aquifer has long been in question and studies are currently underway to better quantify the aquifer’s true sustainable yield. MDPR’s applications fail even to identify, let alone analyze, any public trust uses or any existing legal uses of water. Indeed, this Commission cannot and should not issue permits to MDPR absent additional information demonstrating that MDPR’s proposed uses are consistent with known existing and yet to be identified uses.

3. MDPR failed to establish that its proposed uses are “reasonable-beneficial,” pursuant to Haw. Rev. Stat. § 174C-49(a)(2).

   a. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by detailing actual water needs.

      The law requires that permit applicants such as MDPR demonstrate, at a minimum, that their requested allocations reflect actual need. See Waiahole I, 94 Haw. at 162, 9 P.3d at 474 (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.”); Haw. Rev. Stat. § 174C-50(f) (“A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use.”). MDPR neglected to provide any basis for its requested allocations, and must provide this information before the Commission takes any further action on its applications.

   b. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by analyzing alternative sources of water.

      Assuming, arguendo, that 455,750 gallons per day reflects MDPR’s actual water needs, the applications fail to examine alternative sources of water. This analysis is necessary to fulfill the Commission’s duty as trustee of Hawai‘i’s water resources and MDPR’s burden of proof.

      Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement

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3 Maui Meadows and the Hui acknowledge that MDPR’s burden regarding this criterion may be easier to satisfy for MDPR’s caprock sources. Still, some effort must be made to fulfill the necessary requirements.
reasonable measures to mitigate this impact, including the use of alternative sources.

Waiahole I, 94 Haw. at 143, 9 P.3d at 455. This analysis is essential for this Commission and the community at large to evaluate whether an applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Hawai’i Supreme Court ruled:

It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit.

Waiahole I, 94 Haw. at 162 n.65, 9 P.3d at 474 n.65. Accordingly, alternative sources and other physical solutions such as the potential modification of project operations must be set forth by the applicant and examined by this Commission. The Code, the Commission’s prior decisions and orders, and the Hawai’i Water Plan contain numerous examples of such alternatives. Because MDPR’s applications fail to include the required alternatives analysis, Commission approval of these WUPAs in their present state would be wrong as a matter of law.


The Code also requires that MDPR establish that its proposed uses are consistent with state and county general plans, land use designations, plans, and policies, and will not interfere with the rights of the Department of Hawaiian Home Lands. Haw. Rev. Stat. § 174C-49(a)(5)-(7). MDPR’s applications fail even to address these issues, let alone establish that its proposed uses are consistent with them. Given the high level of scrutiny required by the state constitution, Water Code, and public trust principles, MDPR must affirmatively demonstrate compliance with these necessary requirements.

5. Conclusion.

In conclusion, MDPR’s applications fail to meet the minimum requirements necessary to protect the `Īao aquifer, to safeguard the public interest, and to facilitate meaningful participation by interested parties and reasoned decisionmaking by this Commission. Because MDPR failed to satisfy each of the conditions for a water use permit, Maui Meadows and Hui o Nā Wai `Ehā respectfully urge this Commission to deny the applications in their present state. In the alternative, we ask this Commission to order MDPR to immediately provide information detailed in this objection, so that the community and this Commission can review and analyze this data before any mediated discussion by the parties or the continuation of any public hearing. At the latest, we request that all additional information be provided at least one week prior to any scheduled meeting of the parties. We finally request that any meetings or hearings be held on Maui to facilitate participation by our clients and other affected parties.
Earthjustice's Objection to the County of Maui Department of Parks and Recreation's Water Use Permit Applications
June 20, 2005
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Please do not hesitate to contact us for further information.

Me ke aloha,

[Signature]

D. Kapua Sproat

cc: Randy Gentry, Maui Parks and Recreation (via First Class U.S. Mail)
John V. Duey, Hui o Nā Wai ʻEhā (via email)
Jim Williamson, Maui Meadows Homeowners Association (via email)
Dr. Jonathan Likeke Scheuer, OHA (via email)
Deputy Corp. Counsel Jane Lovell, Maui County Dept. of Water Supply (via email)
George Tengan, Maui County DWS (via email)
Ellen Kraftsow, Maui County DWS (via email)
Linnel Nishioka, HC&S and Kehalani Mauka (via email)
Garrett Hew, HC&S (via email)
Avery B. Chumbley, Wailuku Agribusiness Co., Inc. (via email)
Clayton Suzuki, Wailuku Agribusiness Co., Inc. (via email)
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\[\text{Basically, objective is not enough info -> go CSH then}\]
June 20, 2005

Peter Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Water Use Permit Applications in the ʻIao Ground Water Management Area, Maui.¹

Dear Mr. Young and Commissioners,

The Office of Hawaiian Affairs (OHA) appreciates the opportunity to comment on these permits. OHA objects to these applications because they were accepted by the Commission despite being incomplete and for other reasons specified herein.

Before offering our comments, we would like to note a few relevant points:

1. We are here offering essentially the same comments and objections we have for all of the other applications submitted and circulated for the ʻIao Ground Water Management Area.
2. It is our understanding that our objection means that these permits will be considered in the ongoing proceedings on these other permits before the Commission, which is acceptable to OHA.
3. As our objections are the same and the hearings are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.
4. We note that last two of these applications listed below have been deemed by the Commission to be for “new uses” under the Code, and as such may only be considered after allocations have been made for the permit applications for existing uses.
5. OHA has been working with Maui County officials to resolve our earlier objections and we believe that the County is making good faith efforts to address our concerns. Because

¹ Applications by County of Maui, Department of Parks and Recreation, for:
War Memorial Stadium Well (Well No. 5329-04, WUPA No. 709, TMKs 3-8-07:55, 93, and 94)
Baldwin High School Well (Well No. 5329-05, WUPA No. 710, TMKs 3-8-07:55, 93, and 94)
Pāpōhaku Park Well (Well No. 5329-04, WUPA No. 712, TMK 3-4-30:Portion 1)
Waiehu Golf Course Well (Well No. 5529-02, WUPA No. 711, TMK 3-2-13:6, 19, 28, 29)
War Memorial Stadium Well (Well No. 5329-14, WUPA No. 713, TMKs 3-8-07:55, 93, and 94)
Waiehu Golf Course Well (Well No. 5330-04, WUPA No. 714, TMK 3-2-13:6, 19, 28, 29)
of this progress, we have reason to believe that this applicant, a division of the county
government, has more relevant information available than has been submitted in these
applications. However, because that information, especially specific to the source they
use, has not been provided, we must object.

6. Finally, we will note that because these permits are for withdrawals from the caprock
aquifer, it may be easier for the applicant in this instance to meet their constitutional and
statutory burdens that we have outlined in this and previous letters.

OHA’s interests in these matters
As you are all well aware, the Office of Hawaiian Affairs was established at the same time and
by the same body as the Water Commission, at and by the 1978 Constitutional Convention. Not
only do the two organizations share the same origin, but many of our concerns overlap. The
Commission is directed in its enabling statute that it “Shall cooperate with federal agencies, other
state agencies, county or other local governmental organizations, and all other public and private
agencies created for the purposes of utilizing and conserving the waters of the State...” (HRS
§174C-5 (6)). Importantly, the Water Code also strongly states that any provision of the Code or
its implementation shall not amend, modify, diminish, extinguish, abridge, or deny Native
Hawaiian Water Rights (HRS §174C-101).

Concurrently, in OHA’s enabling statute it is directed that “It shall be the duty and responsibility
of all state departments and instrumentalities of state government providing services and
programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this
chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs” (HRS
§10-1 (b)). Moreover, in order to achieve our primary purposes of the betterment of conditions of
native Hawaiians and Hawaiians (HRS §10-3 (1) & (2)), OHA was also created for “Assessing
the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and
conducting advocacy efforts for native Hawaiians and Hawaiians (HRS §10-3 (4)).

Water, both ground and surface, has many historic, legal, cultural, economic, and other important
values to native Hawaiians and Hawaiians, and as such both to OHA and the future Hawaiian
Nation. OHA’s interest in water is both general across the islands and specific to this area and
island. It is in light of the interests OHA has in water, and existing legal mandates outlined
above, that OHA objects to these WUPA.

OHA’s primary objection

OHA has one central objection to these WUPAs as filed by the applicant and accepted by the
commission. The applicant has utterly failed in their applications to establish that the proposed
use of water meets the seven conditions for water use in a designated ground water management
area. In each application, the applicant only provides two sentences that vaguely address these
issues, under application item 13.

This failure raises issues for OHA that are among the bases for our objection. First, OHA is
concerned that the Commission has even accepted the application as complete. As the
Commission’s own diagram entitled “WATER USE PERMIT PROCESS” relates, acceptance of
an application (and the consequent beginning of the time limits for action) should only occur
when the above referenced requirements are addressed.
Secondly, the lack of information makes it difficult and burdensome for OHA to comment on whether the use will impact on protected Native Hawaiian Water Rights. This is a problem because the Code, the WUPA form, and the Hawaii Supreme Court make it clear to the Commission (Waiahole 94 Haw. 97, 161) that “Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.” The applicant bears the burden of showing these conditions are met; this burden does not lie with the Commission or with any party objecting to the issuance of the permit. OHA notes that the absence of any meaningful information will make evaluation of the permit by the Commission also difficult and burdensome.

Mahalo for your attention to these matters. We acknowledge the hard work that the Commission and the County have been undertaking for the 'Iao Aquifer, and we look forward to working together to protect these resources. If you have further questions, please contact Dr. Jonathan Likeke Scheuer at (808) 594-1946 or email him at jonathans@oha.org.

Sincerely,

Clyde Nāmu‘o
Administrator

cc: Randy Gentry, Maui Parks and Recreation (via First Class U.S. Mail)  
George Tengan, Ellen Kraftsow, and Jane Lovell, Maui County (via email)  
John V. Duey, Hui o Nā Wai `Ehā (via email)  
Jim Williamson, Maui Meadows Homeowners Association (via email)  
Kapua Sproat, Earthjustice (via email)  
Linnel Nishioka, HC&S and Kehalani Mauka (via email)  
Avery B. Chumbley and Clayton Suzuki, Wailuku Agribusiness (via email)  
Garrett Hew, HC&S (via email)
May 13, 2005

TO: Honorable Micah Kane, Director
   Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
   Department of Health
Mr. Clyde W. Namuo, Administrator
   Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable Dain P. Kane, Chairperson
   County Council
   County of Maui
Mr. George Y. Tengan, Director
   Department of Water Supply
   County of Maui
Mr. Michael W. Foley, Director
   Planning Department
   County of Maui

FROM: Peter T. Young, Chairperson
       Commission on Water Resource Management

SUBJECT: Water Use Permit Application
         Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications
   • Maui
     War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
     Baldwin High School Well (Well No. 5329-05), WUPA No. 710
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New Use Applications
   • Maui
     War Memorial Football Stadium Well (Well No. 5529-14), WUPA No. 713
     Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl: ss
Attachment(s)

Response:

We have no objections or comments
Objections attached
Only comments attached

Contact person: Jonathan Likeke Scheuer
Phone: (808) 594-1946
Date: 06/20/05

Signed:
May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Ion Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), HRS, transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications
War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
Baldwin High School Well (Well No. 5329-05), WUPA No. 710
Papohaku Park Well (Well No. 5429-02), WUPA No. 712
Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications
Maui Stadium Well (Well No. 5329-14), WUPA No. 713
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

CI:ss
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: O. Kapua Sproat
Phone: 599-2436, ext. 16
Date: June 20, 2005

Signed: [Signature]
June 20, 2005

BY U.S. MAIL & FACSIMILE TRANSMITTAL
Fax: (808) 587-0219

Peter T. Young, Chairperson
Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to the County of Maui’s Water Use Permit Applications for Well No. 5329-04, Well No. 5329-05, Well No. 5429-02, Well No. 5529-02, Well No. 5329-14, and Well No. 5530-04; 'Iao Ground Water Management Area, Maui

Dear Chair Young and Acting Deputy Director Nakano:

On behalf of Hui o Nā Wai 'Ehā and Maui Meadows Homeowners Association, Earthjustice submits the following comments and objections regarding Maui County Department of Parks and Recreation’s (“MDPR’s”) water use permit application (“WUPA”) numbers 709-714 for the War Memorial Stadium Well (Well No. 5329-04), Baldwin High School Well (Well No. 5329-05), Papohaku Park Well (Well No. 5429-02), Waiehu Golf Course Well (Well No. 5529-02), Maui Stadium Well (Well No. 5329-14), and Waiehu Golf Course Well 2 (Well No. 5530-04).

1 Hui o Nā Wai Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai‘i’s natural and cultural resources and the practices that depend on them. The Hui strives to protect and restore streams, oceans, estuaries, native flora and fauna, and the activities that rely on these resources, especially the perpetuation of traditional and customary Native Hawaiian practices. Hui members live, work, and play in the ‘Iao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from ‘Iao, Waiehu, and Waikapū streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

2 Maui Meadows Homeowners Association is an association of homeowners from the Maui Meadows subdivision in Kihei. The association’s filing of a July 2001 petition resulted in the designation of the ‘Iao aquifer in July of 2003. Maui Meadows has been active in water and land use issues on Maui for many years and its members rely on the ‘Iao aquifer to satisfy their water needs. Additionally, the association’s members have been working to ensure appropriate management of the ground water resources in the ‘Iao and Waiehu aquifers.
Earthjustice’s Objection to the County of Maui Department of Parks and Recreation’s Water Use Permit Applications
June 20, 2005
Page 2 of 5

5530-04). These applications seek permits from the ʻIao Ground Water Management Area to irrigate various MDPR facilities. For all of the reasons detailed herein, these applications fail to establish that the proposed new and existing uses comply with the requirements of the law. The Hui and Maui Meadows therefore urge this Commission to require MDPR to complete its applications before holding any meetings or public hearings regarding these WUPAs. If the missing information is provided in a timely fashion, we remain hopeful that the communities’ concerns and objections can be resolved via the mediated discussions between the parties, alleviating any need for a contested case hearing.

In their current state, MDPR’s permit applications fail to provide the factual and other basis necessary for this Commission to complete the analysis and make the findings required by the State Constitution and Water Code, and ratified by the Hawai’i Supreme Court. The applications are insufficient for the following reasons:

1. MDPR failed to establish that the water source would accommodate its proposed uses, pursuant to Haw. Rev. Stat. § 174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate its proposed use. Haw. Rev. Stat. § 174C-49(a)(1). MDPR’s applications neglect even to mention the condition of ʻIao aquifer or assess how its proposed uses will be supported, if at all. For years now, Commission staff and United States Geological Survey have warned that water is being extracted from the ʻIao aquifer at rates that jeopardize the quality and viability of this important resource. Despite indications that the aquifer is threatened by existing and proposed withdrawals of water, the application lacks any analysis regarding whether the water source can accommodate MDPR’s total requested allocation of 455,750 gallons per day. See generally State of Hawai’i Commission on Water Resource Management, ʻIao and Waihe’e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) (detailing the condition of the ʻIao aquifer). MDPR must provide the information necessary to satisfy this criterion.

2. MDPR failed to establish that its proposed uses are consistent with the public interest and will not interfere with existing legal uses of water, pursuant to Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).

The Hawai’i Supreme Court affirmed that this Commission is “duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes and weigh competing public and private water uses on a case-by-case basis.” In re Waiāhole Ditch Combined Contested Case Hearing 105 Haw. at 1, 16, 93 P.3d at 643, 658 (2004) (quotations omitted). Moreover, the Code mandates that an applicant establish that its proposed use “will not interfere with any existing legal use of water” and “is consistent with the public interest.” Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).
When allocating water, this Commission must consider the impact of all proposed uses on: (1) the maintenance of waters in their natural state, (2) resource protection, (3) water for domestic purposes, and (4) the protection of traditional and customary Native Hawaiian rights and practices. In re Wai‘ola o Moloka‘i, Inc. ("Wai‘ola"), 103 Haw. 401, 429 (2004) (citing In re Waiahole Ditch Combined Contested Case Hearing ("Waiahole I"), 94 Haw. 97, 136-138, 142, 9 P.3d 409, 448-450, 454 (2000)). Analyzing potential impacts on each of these public trust uses is especially important in Kau, where the condition of the aquifer has long been in question and studies are currently underway to better quantify the aquifer’s true sustainable yield. MDPR’s applications fail even to identify, let alone analyze, any public trust uses or any existing legal uses of water. Indeed, this Commission cannot and should not issue permits to MDPR absent additional information demonstrating that MDPR’s proposed uses are consistent with known existing and yet to be identified uses.

3. MDPR failed to establish that its proposed uses are “reasonable-beneficial,” pursuant to Haw. Rev. Stat. § 174C-49(a)(2).

a. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by detailing actual water needs.

The law requires that permit applicants such as MDPR demonstrate, at a minimum, that their requested allocations reflect actual need. See Waiahole I, 94 Haw. at 162, 9 P.3d at 474 (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.”); Haw. Rev. Stat. § 174C-50(f) (“A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use.”). MDPR neglected to provide any basis for its requested allocations, and must provide this information before the Commission takes any further action on its applications.

b. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by analyzing alternative sources of water.

Assuming, arguendo, that 455,750 gallons per day reflects MDPR’s actual water needs, the applications fail to examine alternative sources of water. This analysis is necessary to fulfill the Commission’s duty as trustee of Hawai‘i’s water resources and MDPR’s burden of proof.

Specifically, the public trust compels the state duty to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement

2 Maui Meadows and the Hui acknowledge that MDPR’s burden regarding this criterion may be easier to satisfy for MDPR’s caprock sources. Still, some effort must be made to fulfill the necessary requirements.
reasonable measures to mitigate this impact, including the use of alternative sources.

Waianhole I, 94 Haw. at 143, 9 P.3d at 455. This analysis is essential for this Commission and the community at large to evaluate whether an applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Hawai‘i Supreme Court ruled:

It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit.

Waianhole I, 94 Haw. at 162 n.65, 9 P.3d at 474 n.65. Accordingly, alternative sources and other physical solutions such as the potential modification of project operations must be set forth by the applicant and examined by this Commission. The Code, the Commission’s prior decisions and orders, and the Hawai‘i Water Plan contain numerous examples of such alternatives. Because MDPR’s applications fail to include the required alternatives analysis, Commission approval of these WUPAs in their present state would be wrong as a matter of law.


The Code also requires that MDPR establish that its proposed uses are consistent with state and county general plans, land use designations, plans, and policies, and will not interfere with the rights of the Department of Hawaiian Home Lands. Haw. Rev. Stat. § 174C-49(a)(5)-(7). MDPR’s applications fail even to address these issues, let alone establish that its proposed uses are consistent with them. Given the high level of scrutiny required by the state constitution, Water Code, and public trust principles, MDPR must affirmatively demonstrate compliance with these necessary requirements.

5. Conclusion.

In conclusion, MDPR’s applications fail to meet the minimum requirements necessary to protect the ‘Iao aquifer, to safeguard the public interest, and to facilitate meaningful participation by interested parties and reasoned decisionmaking by this Commission. Because MDPR failed to satisfy each of the conditions for a water use permit, Maui Meadows and Hui o Nā Wai ‘Ehā respectfully urge this Commission to deny the applications in their present state. In the alternative, we ask this Commission to order MDPR to immediately provide information detailed in this objection, so that the community and this Commission can review and analyze this data before any mediated discussion by the parties or the continuation of any public hearing. At the latest, we request that all additional information be provided at least one week prior to any scheduled meeting of the parties. We finally request that any meetings or hearings be held on Maui to facilitate participation by our clients and other affected parties.
Earthjustice’s Objection to the County of Maui Department of Parks and Recreation’s Water Use Permit Applications
June 20, 2005
Page 5 of 5

Please do not hesitate to contact us for further information.

Me ke aloha,

D. Kapua Sproat

cc: Randy Gentry, Maui Parks and Recreation (via First Class U.S. Mail)
John V. Ducey, Hui o Nā Wai `Ehā (via email)
Jim Williamson, Maui Meadows Homeowners Association (via email)
Dr. Jonathan Likeke Scheuer, OHA (via email)
Deputy Corp. Counsel Jane Lovell, Maui County Dept. of Water Supply (via email)
George Tengan, Maui County DWS (via email)
Ellen Kraftsow, Maui County DWS (via email)
Linnel Nishioka, HC&S and Kehalani Mauka (via email)
Garrett Hew, HC&S (via email)
Avery B. Chumbley, Wailuku Agribusiness Co., Inc. (via email)
Clayton Suzuki, Wailuku Agribusiness Co., Inc. (via email)
We are awaiting corrected/updated pumpage figures for Parks & Rec wells, as well as some details on the system upgrade work done at various locations. I understand from a phone conversation that the "replaced pumps" were in fact boosters from the storage pond, rather than well pumps. It would be easier for filing to have these information bits transmitted by email rather than by phone, is that's agreeable. Also, you had some beautiful exhibits at the hearing, and I believe you hung on to them to send with the complete info packet. If possible, we'd like to transmit available information to interested parties prior to the follow-up meeting, so they can be prepared for comments or questions. We look forward to that. Thanks, Randy.
We have set July 11, 2005, a Monday, from 1:00 - 5:00 pm, for our meeting at Cameron Center. All who responded indicated that was an agreeable date. We hope it works for the others. We may not need that much time, but hope to sort things out comprehensively within that time. This will be your only notice. We will still conduct another full session of the public hearing, yet to be determined, which we anticipate would be the last.
May 13, 2005

TO: Harry M. Yada, Acting Administrator
   Land Division

FROM: Dean A. Nakano, Acting Deputy Director
   Commission on Water Resource Management

SUBJECT: Request for Comments
   Water Use Permit Application
   Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

**Existing Use Applications**
- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**
- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:

( ) A water lease/permit is required of this applicant and an application for such will be requested by our division.

XX A water lease/permit is not required of this applicant.

( ) A water lease/permit has been obtained by the applicant through lease no.

XX This well project ( ) requires ( ) does not require a CDUP. If a CDUP is required it ( ) has ( ) has not been approved and ( ) is ( ) is not currently active.

( ) No objections

XX Other comments: County of Maui owned lands.

Contact person: Gary Martin
Phone: 587-0421
Signed: Gary Martin
Date: June 6, 2005
May 13, 2005

TO: Honorable Micah Kane, Director
    Department of Hawaiian Home Lands
    Honorable Chiyome L. Fukino, M.D., Director
    Department of Health
    Mr. Clyde W. Namuo, Administrator
    Office of Hawaiian Affairs
    Attn: Mr. Jonathan Scheuer
    Honorable Dain P. Kane, Chairperson
    County Council
    County of Maui
    Mr. George Y. Tengan, Director
    Department of Water Supply
    County of Maui
    Mr. Michael W. Foley, Director
    Planning Department
    County of Maui

FROM: Peter T. Young, Chairperson
      Commission on Water Resource Management

SUBJECT: Water Use Permit Application
         Iao Ground Water Management Area, Maui

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New Use Applications

- WUPA No. 713
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We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:
- We have no objections or comments
- Objections attached
- Only comments attached

Contact person: George Y. Tengan, Director
Signed: ____________________________
Date: 05/14/05

Phone: 270-7816
June 6, 2005

TO: Dean A. Nakano, Acting Deputy Director
   Commission on Water Resource Management

FROM: Skippy Hau, Aquatic Biologist

SUBJECT: Water Use Permit Application Comments
   War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
   Baldwin High School Well, (Well No. 5329-05), WUPA No. 710
   Papohaku Park Well, (Well No. 5429-02), WUPA No. 712
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   Maui Stadium Well (Well No. 5329-14), WUPA No. 713
   Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

I reviewed the applications and found the total amount of water declarations are more than 166.3 million gallons per year or roughly 455,750 gallons per day.

Shade (1997) estimated natural recharge for the lao watershed was about 24 million gallons per day with sugar cane production adding an additional 27 to 12 MGD.

c: DAR - Oahu
May 13, 2005

TO: Aquatic Resources
Forestry and Wildlife/Natural Area Reserve System
Historic Preservation
State Parks

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Iao Ground Water Management Area, Maui

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If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: Skippy Han
Phone: 243-5834
Signed: Skippy Han
Date: 6/6/05
TO:  
Honorable Micah Kane, Director  
Department of Hawaiian Home Lands  
Honorable Chiyome L. Fukino, M.D., Director  
Department of Health  
Mr. Clyde W. Namuo, Administrator  
Office of Hawaiian Affairs  
Attn: Mr. Jonathan Scheuer  
Honorable Dain P. Kane, Chairperson  
County Council  
County of Maui  
Mr. George Y. Tengan, Director  
Department of Water Supply  
County of Maui  
Mr. Michael W. Foley, Director  
Planning Department  
County of Maui

FROM:  
Peter T. Young, Chairperson  
Commission on Water Resource Management

SUBJECT:  
Water Use Permit Application  
Iao Ground Water Management Area, Maui

May 13, 2005

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We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. **Please respond by returning this cover memo form by June 6, 2005.** If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Iice at 587-0251.

CI: ss  
Attachment(s)

Response:  
- We have no objections or comments  
  - Objections attached  
  - Only comments attached

Contact person:  
George Y. Tengan, Director

Phone: 270-7816  
Date: 6/6/05
May 13, 2005

TO: Aquatic Resources  
Forestry and Wildlife/Natural Area Reserve System  
Historic Preservation  
State Parks

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

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Iao Ground Water Management Area, Maui

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If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response: 
( ) We have no objections or comments 
( ) Objections attached 
( ) Only comments attached 

Contact person: 
Signed:
TO: Peter T. Young, Chairperson  
Commission on Water Resource Management  
Department of Land and Natural Resources

FROM: Anthony J. H. Ching, Executive Officer

SUBJECT: Existing Water Use Permit Applications  
War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709  
Baldwin High School Well (Well No. 5329-05), WUPA No. 710  
Papohaku Park Well (Well No. 5429-02), WUPA No. 712  
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New Use Applications  
War Memorial Stadium Well (Well No. 5329-14), WUPA No. 713  
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

We have reviewed the subject applications forwarded by your transmittal dated May 13, 2005. Based on the representation of the well sites on the various location maps, we have determined that they are located within the respective State land use districts (SLUD) as follows:

Existing Well  
War Memorial Stadium Well  
Baldwin High School Well  
Papohaku Park Well  
Waiehu Golf Course Well  

SLUD  
Urban  
Urban  
Agricultural¹  
Conservation

New Well  
Maui Stadium Well  
Waiehu Golf Course Well 2  

SLUD  
Urban  
Agricultural²

¹ In the application, the well is incorrectly stated as being located in the Urban District.  
² In the application, the well is incorrectly stated as being located in the Conservation District.
With respect to your request as to whether the current designation is appropriate for the proposed project, please be advised that pursuant to section 205-2(b), Hawaii Revised Statutes (HRS), activities or uses within the Urban District are the jurisdiction of the respective counties as provided by their ordinances or regulations. As such, we suggest that you contact the County of Maui Department of Planning directly for their comments on this matter.

With respect to the wells that are located in the Agricultural District, please be advised that although sections 205-2(d) and 205-4.5(a), HRS, do not explicitly list wells as permissible activities or uses within the district, we have in the past noted that when the requested water was directly accessory to the uses specified in the aforementioned sections, the activities appeared to be appropriate uses within the district. To the extent that the water requested from these wells would be used for municipal use, we would defer to the County zoning designation of the respective parcel, which we understand permits water wells as minor utility facilities.

With respect to the well that is located in the Conservation District, inasmuch as the establishment of permitted activities or uses within the district is under the jurisdiction of the Department of Land and Natural Resources pursuant to chapter 183C, HRS, we have no comments to offer on this matter.

Thank you for the opportunity to comment on the subject applications. As requested, we are returning the cover memo for the subject applications.

Please feel free to contact Bert Saruwatari of my office at 587-3822 should you require clarification or any further assistance.

Enclosure
May 13, 2005

TO: Mr. Anthony Ching, Executive Officer
   Land Use Commission

FROM: Peter T. Young, Chairperson
       Commission on Water Resource Management

SUBJECT: WATER USE PERMIT APPLICATION
         Iao Ground Water Management Area, Maui

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Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1). Specifically, we request that you inform us of the current state land use designation for the TMK parcel, or portion thereof, for the proposed use area(s) and, secondly, whether the current state land use designation is appropriate for the proposed project.

We have attached a TMK map(s) that covers the proposed use area(s). Where water is proposed for use on only a portion of a TMK parcel, or on parcels with multiple zoning, the proposed use area(s) has been clearly delineated on the attached map. Please respond by returning this cover memo along with your review comments by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:

☐ We have no objections or comments
☐ Objections attached
☐ Only comments attached

Contact person: DEAN A. NAKANO
Phone: 587-3822

Signed: DEAN A. NAKANO
Date: MAY 25, 2005
May 13, 2005

TO: Honorable Micah Kane, Director
Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
Department of Health
Mr. Clyde W. Namuo, Administrator
Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable Dain P. Kane, Chairperson
County Council
County of Maui
Mr. George Y. Tengan, Director
Department of Water Supply
County of Maui
Mr. Michael W. Foley, Director
Planning Department
County of Maui

FROM: Peter T. Young, Chairperson
Commission on Water Resource Management

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- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**
- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:
- [ ] We have no objections or comments
- [ ] Objections attached
- [ ] Only comments attached

Contact person: Phone: 270-7814
Signed: Date: 5-30-05
PUBLIC NOTICE

Applications for Water Use Permit
loa Ground Water Management Area, Maui

The following applications for water use permit have been received by the Commission on Water Resource Management, and are hereby made public in accordance with Section 13-171, Hawaii Administrative Rules, "Designation and Regulation of Water Management Areas." These applications are subject to a continuing public hearing, which commenced October 28, 2004 and continued on April 22, 2005. The hearing remains open and will be reconvened at a later date.

1. Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

The following applications are for Existing Uses as of July 21, 2003 and completed applications submitted by the July 21, 2004 deadline.

WUPA No. 681 Waikapu Tunnel 1, Well No. 5132-01
WUPA No. 682 Waikapu Tunnel 2, Well No. 5132-02
WUPA Nos. 684 & 686 lao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02
WUPA No. 685 Black Gorge Tunnel, Well No. 5332-01

Date Application Received/Filed: January 2, 2004
Date Application Acknowledged as Complete: March 16, 2004
Aquifer Area: lao System Area, Wailuku Sector, Maui
Quantity Requested: Natural tunnel flow amounts unknown, augmenting lao and Waikapu Stream flows, from high-level aquifers, not counted against basal sustainable yield.
Existing/New Water Use: Existing
Place of Water Use: Various in Wailuku and Waikapu; WUPAs 684-686 TMKs: 3-3,4,5,&6 (contribute to ditch diversions for agriculture)

2. County of Maui
Department of Parks and Recreation
700 Halia Nakoa Street, Unit 2
Wailuku, HI 96793

The following applications are for Existing Uses as of July 21, 2003 and completed applications submitted by the July 21, 2004 deadline.

WUPA No. 709 U. M. Stadium Well (Well No. 5329-04)
WUPA No. 710 Baldwin High School Well (Well No. 5329-05)
WUPA No. 712 Papohaku Park Well (Well No. 5429-02)
WUPA No. 711 Waiehu Golf Course Well (Well No. 5529-02)

Date Application Received/Filed: July 21, 2004
Date Application Acknowledged as Complete: July 21, 2004
Aquifer: lao System, Wailuku Sector, Maui
Quantity Requested: Currently uncertain; estimates total 340,000 gpd from caprock, not counted against basal sustainable yield.
Existing/New Water Use: Existing
Place of Water Use: Parks in Wailuku, Kahului, and Waiehu; TMKs: 3-8-7:55, 3-4-30:15, 3-2-13:6

The following applications were received after the one-year filing deadline and are therefore being considered as New Uses.

WUPA No. 713 Maui Stadium Well (Well No. 5329-14)
WUPA No. 714 Waiehu Golf Course Well 2 (Well No. 5530-04)

Date Application Received/Filed: August 4, 2004
Date Application Acknowledged as Complete: August 4, 2004
Aquifer: lao System, Wailuku Sector, Maui
Quantity Requested: Currently uncertain; estimates total 78,000 gpd from caprock, not counted against basal sustainable yield.
Existing/New Water Use: New
Place of Water Use: Parks in Kahului and Waiehu; TMKs: 3-8-7:55, 3-2-13:29

Written objections or comments on the above application may be filed by any person who has property interest in any land within the hydrologic unit of the source of water supply, any person who will be directly and immediately affected by the proposed water use, or any other interested person. Written objections shall: (1) state property or other interest in the matter (provide TMK information); (2) set forth questions of procedure, fact, law, or policy, to which objections are taken; and (3) state all grounds for objections to the proposed permit. Written objections must be received by June 6, 2005. Objections must be sent to 1) the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809 and
2) the applicant at the above address. The continuing public hearing for these applications will be duly noticed.

COMMISSION ON WATER RESOURCE MANAGEMENT

DEAN A. NAKANO, Acting Deputy Director for
PETER T. YOUNG, Chairperson

Dated: May 10, 2005

Publish in: Maui News issues of May 13, 2005 and May 20, 2005
May 13, 2005

Mr. Randy Gentry
County of Maui
Department of Parks and Recreation
700 Halia Nakoa Street, Unit 2
Wailuku, HI 96793

Dear Mr. Gentry:

Existing Use Applications
- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications
- War Memorial Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

We acknowledge the acceptance of your completed water use permit applications, as captioned, as of July 21, 2004. This late notice is due to efforts to clarify application information inconsistent with Commission information. WUPA Nos. 713 and 714 are considered new uses as they were filed on August 4, 2004, after the deadline for existing uses.

We are voiding and returning your application for Waiehu Golf Course Well No. 5530-03, WUPA 708, as you have indicated that it is capped and is not intended for future use. Enclosed is an application to seal the well, to prevent potential contamination of the aquifer.

Enclosed is a copy of the public notice for your water use permit applications which will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

If you have any questions, please contact Charley Ice at 587-0251.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

Enclosures
May 13, 2005

TO: Aquatic Resources
    Forestry and Wildlife/Natural Area Reserve System
    Historic Preservation
    State Parks

FROM: Dean A. Nakano, Acting Deputy Director

SUBJECT: Request for Comments

Water Use Permit Application
Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications
War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
Baldwin High School Well (Well No. 5329-05), WUPA No. 710
Papohaku Park Well (Well No. 5429-02), WUPA No. 712
Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications
Maui Stadium Well (Well No. 5329-14), WUPA No. 713
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Lee at 587-0251.

Cl: ss
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ___________________________ Phone: ___________________________
Signed: ___________________________ Date: ___________________________
Transmitted for your review and comment are copies of water use permit applications:

**Existing Use Applications**
- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**
- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. **Please respond by returning this cover memo form by June 6, 2005.** If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl:ss
Attachment(s)

Response:

( ) A water lease/permit is required of this applicant and an application for such will be requested by our division.

( ) A water lease/permit is not required of this applicant.

( ) A water lease/permit has been obtained by the applicant through lease no.

( ) This well project ( ) requires ( ) does not require a CDUP. If a CDUP is required it ( ) has ( ) has not been approved and ( ) is ( ) is not currently active.

( ) Other relevant Land Division rules/regulations, information, or recommendations are attached.

( ) No objections

( ) Other comments:

Contact person: ______________________________ Phone: ______________________________

Signed: ______________________________ Date: ______________________________
May 13, 2005

TO: Mr. Anthony Ching, Executive Officer
   Land Use Commission

FROM: Peter T. Young, Chairperson
       Commission on Water Resource Management

SUBJECT: WATER USE PERMIT APPLICATION
         Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications
War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
Baldwin High School Well (Well No. 5329-05), WUPA No. 710
Papohaku Park Well (Well No. 5429-02), WUPA No. 712
Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications
Maui Stadium Well (Well No. 5329-14), WUPA No. 713
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1). Specifically, we request that you inform us of the current state land use designation for the TMK parcel, or portion thereof, for the proposed use area(s) and, secondly, whether the current state land use designation is appropriate for the proposed project.

We have attached a TMK map(s) that covers the proposed use area(s). Where water is proposed for use on only a portion of a TMK parcel, or on parcels with multiple zoning, the proposed use area(s) has been clearly delineated on the attached map. Please respond by returning this cover memo along with your review comments by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl:ss
Attachment(s)

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ___________________________ Phone: ___________________________

Signed: ___________________________ Date: ___________________________
TO:  
Honorable Micah Kane, Director  
Department of Hawaiian Home Lands  
Honorable Chiyome L. Fukino, M.D., Director  
Department of Health  
Mr. Clyde W. Namuo, Administrator  
Office of Hawaiian Affairs  
Attn: Mr. Jonathan Scheuer  
Honorable Dain P. Kane, Chairperson  
County Council  
County of Maui  
Mr. George Y. Tengan, Director  
Department of Water Supply  
County of Maui  
Mr. Michael W. Foley, Director  
Planning Department  
County of Maui

FROM:  
Peter T. Young, Chairperson  
Commission on Water Resource Management

SUBJECT: Water Use Permit Application  
Iao Ground Water Management Area, Maui

May 13, 2005

Transmitted for your review and comment are copies of water use permit applications:

Existing Use Applications  
War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709  
Baldwin High School Well (Well No. 5329-05), WUPA No. 710  
Papohaku Park Well (Well No. 5429-02), WUPA No. 712  
Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

New Use Applications  
Maui Stadium Well (Well No. 5329-14), WUPA No. 713  
Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:  
( ) We have no objections or comments  
( ) Objections attached  
( ) Only comments attached

Contact person:  
Phone:  
Date: 

Signed:  
Date: 
Honorable Alan M. Arakawa, Mayor  
County of Maui  
200 South High Street  
Wailuku, HI 96793

Dear Mayor Arakawa:

Notice of an Application for a Water Use Permit  
Iao Ground Water Management Area, Maui

In accordance with the Department of Land and Natural Resources Administrative Rules, Section 13-171-17(a), we are transmitting for your review and comment copies of water use permit applications:

**Existing Use Applications**
- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**
- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

In addition, Section 13-171-13(b) of our Administrative Rules states:

"Within sixty days after receipt of notice of a permit application, the county shall inform the commission if the proposed use is inconsistent with the county land use plans and policies."

We have attached copies of the applications for your review and would appreciate receiving your comments, within the next sixty (60) days, on whether this water use is consistent with county plans and policies.

If you have any questions, please call Dean A. Nakano, Acting Deputy Director, at 587-0214 or toll-free at 984-2400, extension 70214.

Sincerely,

[Signature]

Peter T. Young  
Chairperson

Cl:ss  
Enclosures
May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director Department of Land and Natural Resources Commission on Water Resource Management

SUBJECT: Request for Comments

Water Use Permit Application

Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), HRS, transmitted for your review and comment are copies of water use permit applications:

**Existing Use Applications**

- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**

- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl: ss
Attachment(s)

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ___________________________ Phone: ___________________________

Signed: ___________________________ Date: ___________________________
PUBLIC HEARING NOTICE

Applications for Water Use Permits
Iao Ground Water Management Area, Maui

The following applications for water use permits to continue uses existing as of July 21, 2003, and applications for new uses have received objections and are subject to public hearing. The Commission on Water Resource Management, at its regular meeting on September 22, 2004, approved a public hearing originally commenced on October 28, 2004. This public hearing will be the second session and continuation of the original October 28, 2004 hearing and will be held:

April 22, 2005, 5:00-9:00 p.m.
J. Walter Cameron Center
95 Mahalani Street, Wailuku, Hawaii 96793

The Hearing Officers will gather further testimony and information on basal aquifer and caprock wells. Testimony on the high-level dike sources will also be received, but these sources affect stream flow and will be combined with a pending petition to amend the interim instream flow standard of four Wailuku District streams: Waihe'e, Waiehu, Iao, and Waikapū. Testimony should focus on practicable alternatives, water duties, Hawaiian rights, and definitions of public trust uses.

• Basal Sources:

<table>
<thead>
<tr>
<th>Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Amount (mgd)</th>
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<td>Mokuhau Well 1</td>
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<td>Waiehu Heights Well 1</td>
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• Caprock Sources:

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<th>Name</th>
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<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Amount (mgd)</th>
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<td>Pauhakū Stadium 5329-14</td>
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</table>

**New Uses** arising after July 21, 2003 or completed applications submitted after the July 21, 2004 deadline

None
• **High-level Dike Sources** (impacting stream flows, to be later combined with the IIFS petition proceedings)

<table>
<thead>
<tr>
<th>Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Amount (mgd)</th>
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</table>

**New Uses** arising after July 21, 2003, or applications submitted by or after July 21, 2004

None

Applicants: County of Maui, Department of Water Supply (MDWS)
County of Maui, Department of Parks & Recreation (MP&R)
Kehalani Mauka, LLC (Kehalani)
Living Waters Land Foundation (LWLF)
Hawaiian Commercial and Sugar (HC&S)
Wailuku Agribusiness Company, Inc., (WACI)

Materials related to the noticed items are available for review at the Kahului Library, 90 School St., Kahului, Maui and at the Commission office located at 1151 Punchbowl St., Rm 227, Honolulu and will also be available at this public hearing.

The Hearing Officers will close the public hearing at the end of this session. Commission staff recommendations on these applications will be forwarded to the Commission at a later date based on the available information.

Any person may testify or present additional information on the public hearing subject matter. If you have a legal interest that may be adversely affected by a proposed application, you have a right to request an administrative contested case hearing (Hawaii Administrative Rules (HAR) §13-167-52(a)). However, you must make the request for such a hearing either orally or in writing by the close of public hearing and file (or mail and postmark) a written petition for a contested case with the Commission within ten (10) days after the close of the public hearing. Petition forms are available from the Commission.

If you do not make a request or fail to file a timely written petition for contested case hearing on a particular application noticed herein with the Commission, the consequence is that you will be precluded from later obtaining a contested case hearing and seeking judicial review of any adverse decision (HAR Chapter 13-167).

Disabled individuals planning to attend the public hearing are asked to contact the Commission at the above address or phone (Kauai) 274-3141 ext. 70214, (Maui) 984-2400 ext. 70214, (Hawaii) 947-4000 ext. 70214, (Molokai or Lanai) 1-800-GOV-INHI ext. 70214 or 587-0214 at least three days in advance of the public hearing to indicate if they have special needs that require accommodation.

**COMMISSION ON WATER RESOURCE MANAGEMENT**

DEAN A. NAKANO, Acting Deputy Director for
PETER T. YOUNG, Chairperson

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Fax: (808) 587-0219

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P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Burdens Of Proof And Legal Standards Regarding: (1) Traditional And Customary Native Hawaiian Rights And Practices; And (2) Municipal Uses

Dear Deputy Director Izu:

Mahalo for this opportunity to respond to the Commission’s November 15, 2004 letter requesting comments on Commissioner Miike’s questions and analyses on the burdens of proof and legal standards regarding: (1) traditional and customary Native Hawaiian rights and practices; and (2) municipal uses. We have addressed the issues in detail and are hopeful that our comments will assist the Commission in its water use permitting for the ʻĪao aquifer.

I. Traditional & Customary Native Hawaiian Rights & Practices.


Pursuant to Hawai‘i’s constitution, statutes, and case law, this Water Commission is “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians[]” Ka Pa’akai o ka ʻAina v. Land Use Comm’n, 94 Haw. 31, 45 (2000) (“Ka Pa’akai”); see also Haw. Const. Art. XII § 7. These rights include, but are not limited to: (1) traditional and customarily exercised rights and practices (e.g., gathering rights for limu, fish, crustaceans, and shellfish in springs, streams, and nearshore marine waters, use of springs and streams for religious and spiritual purposes, water for kalo cultivation); and (2) entitlements to water pursuant to the Hawaiian Homes Commission Act of 1920.1 See, e.g., Haw. Const. Art. XI § 7; Haw. Rev. Stat. §§ 1-1, 7-1, 174C-63, 174C-101.

1 Native Hawaiians may also possess appurtenant, riparian, or correlative rights, which may be used for traditional and customary purposes, such as the appurtenant, riparian, or correlative right to water for kalo cultivation on one’s own kuleana. See generally Lawrence H. Miike, M.D., J.D. Water and the Law in Hawai‘i 118 (University of Hawai‘i Press 2004).
Moreover, as trustee of the state’s water resources trust established under the state constitution, this Commission bears the ultimate burden of identifying and protecting Native Hawaiians’ traditionally and customarily exercised rights and practices in the context of water use permit applications for the ‘Iao Aquifer. See generally In re Waiahole Combined Contested Case, 94 Haw. 97, 141 (2000) (“Waiahole I”) (“The state also bears an ‘affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses.”); id. at 137 (“uphold[ing] the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose”).

In addition to the constitutional mandates above, the state Water Code includes independent requirements for this Commission, working in partnership with affected Native Hawaiian practitioners, to identify traditional and customary rights and practices supported by ground water and related surface water in ‘Iao. In fact, the Code contemplated completion of this process many years ago through the declaration of water uses and issuance of certificates for such uses. Haw. Rev. Stat. §§ 174C-26, 27.

The Code required any person using water in any area of the state, including uses of water for traditional and customary practices, to file a declaration of use by April 1989. Id. § 174C-26(a). Once those declarations were filed, the Code required the Commission to scrutinize identified uses to determine if they were reasonable and beneficial. Id. § 174C-27(a). The Code further required this Commission to “act upon a declaration within six months after its filing.” Id. § 174C-26(e). Unfortunately, the Commission never completed this process, and it is our understanding that no certificates of water use were ever issued. This is particularly regrettable because the Code contemplated use of these certificates to “resolv[e] claims related to existing water rights and uses including appurtenant rights, riparian and correlative uses[,]” which is precisely the dilemma faced by this Commission in permitting water uses in the ‘Iao aquifer. Id. § 174C-27(a).

Other sections of the Water Code also mandated this Commission to inventory the scope and existence of traditional and customary Native Hawaiian rights and practices throughout Hawai‘i, including ‘Iao. As part of the Hawai‘i Water Plan, this Commission was charged with developing a water resources protection plan, including: (1) “study[ing] and inventory[ing] the existing water resources of the state and the means and methods of conserving and augmenting such water resources”; and (2) “study[ing] the quantity and quality of water needed for existing and contemplated uses[,]” Id. §174C-31(c) (emphasis added). Other requirements of the Hawai‘i Water Plan mandate the Commission to “describe and inventory: (1) all water resources and systems in each hydrologic unit; (2) all presently exercised uses; (3) the quantity of water not presently used within that hydrologic unit; and (4) potential threats to water
resources, both current and future." Id. §174C-31(h) (emphasis added). If the Commission had completed meaningful inventories and established (1) an instream use and protection program and (2) sustainable yields based on numerical or other models lacking the shortcomings of the Robust Analytical Model, the Commission, together with affected practitioners, would have identified many of the traditional and customary rights and practices historically and currently exercised in the areas affected by the 'Iao permit applications. Id. § 174C-31(i).

The Hawai‘i Supreme Court confirmed the Commission’s planning mandate:

The Code planning provisions mandate the Commission to ‘study and inventory the existing water resources of the state and the means and methods of conserving and augmenting such water resources,’ in formulating a ‘water resources protection and quality plan,’ which must include, among other information, ‘requirements for beneficial instream uses and environmental protection’. The Code also obligates the Commission to ensure that it does not ‘abridge or deny’ traditional and customary rights of Native Hawaiians.

Waiahole I, 94 Haw. at 153 (citations omitted). If these requirements had been implemented, the work necessitated by the Commission’s and the water use permit applicants’ burden would have been significantly reduced. This ongoing failure to comply with the letter and spirit of the Code, however, does not justify improperly shifting this burden to practitioners of Native Hawaiian customs and traditions.

"[A]n applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes; likewise, the Commission is duty bound to hold an applicant to its burden." In re Wai‘ola o Moloka‘i, Inc., 103 Haw. 401, 441 (2004) ("Wai‘ola"). Wai‘ola presented nearly identical issues: this Commission was tasked with considering the impact of a water use permit application for ground water withdrawals for municipal and other purposes on traditional and customary rights and practices. The Hawai‘i Supreme Court vacated this Commission’s order because the Commission "failed adequately to discharge its public trust obligation to protect native Hawaiians’ traditional and customary gathering rights[.]” Id. at 443. In so doing, the Court placed “the burden of proving, inter alia, that the proposed water use would not abridge or deny traditional and customary native Hawaiian rights” squarely on the applicant’s and the Commission’s shoulders. Id. at 442. The Court also admonished the Commission for “erroneously plac[ing] the burden on the [practitioners] to establish that the proposed use would abridge or deny their traditional and customary gathering rights.” Id. In no uncertain terms the Court
held that the applicant “was obligated to demonstrate affirmatively that the proposed well would not affect native Hawaiians’ rights; in other words, the absence of evidence that the proposed use would affect native Hawaiians’ rights was insufficient to meet the burden imposed upon [the applicant] by the public trust doctrine, the Hawai‘i Constitution, and the Code.” Id. (emphases in original).

In light of the Code’s mandates and Wai‘ola’s clear language, the burden of establishing that traditional and customary Native Hawaiian rights exist in the first instance rests with this Commission as trustee of Hawai‘i’s water resources trust and with any permit applicant who covets public trust resources. “[T]he 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 public rights in the resource at every stage of the planning and decisionmaking process.” Wai‘ahole I, 94 Haw. at 143. Again, the Code devised the Hawai‘i Water Plan (especially the Water Resources Protection Plan) as the framework for managing one of Hawai‘i’s most precious resources. See Miike, supra, at 234-35. The challenges and burdens that continue to arise from the failure to adequately fund and implement this framework should not and indeed cannot be laid at the feet of practitioners of Native Hawaiian customs and traditions.

B. Assertions Of Traditional & Customary Rights & Practices Are Sufficient.

Hawai‘i case law is unambiguous that even an assertion of traditional and customary rights and practices, without a conclusive showing that specified individuals have such rights, requires private commercial users and this Commission to gather information necessary to analyze potential impacts and ensure that any traditional and customary rights and practices are not abridged or denied. See Ka Pa‘akai, 94 Haw. at 51 n.35 (noting that “neither the boundaries of the Resource Zones... nor the specific [traditional and customary] uses in each zone have been established”); id. at 37 (acknowledging general testimony regarding cultural practices including fishing, picking limu, and gathering ‘opihi and other resources); Public Access Shoreline Hawai‘i v. Hawai‘i Cty. Planning Comm’n, 79 Haw. 425, 450 (1995) (“the right of each ahupua`a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site”).

The Hawai‘i Supreme Court further ruled that state agencies, such as this Commission, “may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” Ka Pa‘akai, 94 Haw. at 46 (emphasis added). The Court went on to specifically detail an “analytic framework in an effort to effectuate the state’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]” Id. at 46-47. “Indeed,
the promise of preserving and protecting customary and traditional rights would be
illusory absent findings on the extent of their exercise, their impairment, and the
feasibility of their protection.” Id. at 50.

Pursuant to Ka Pa‘akai, given the information already provided to this
Commission in objections to water use permit applications for ‘Īao, at the October 28,
2004 public hearing on Maui, and in the petition to restore stream flow in Waihe‘e,
North and South Waiehu, ‘Īao and Waikapū streams and their tributaries (“Nā Wai
‘Ehā”) filed by Earthjustice on June 25, 2004, this Commission is tasked with
investigating and making specific findings regarding: (1) the identity and scope of
cultural, historical and natural resources in the area affected by the permit applications
for ‘Īao, including the extent to which traditional and customary rights and practices
are exercised in that area; (2) the extent to which those resources, rights, and practices
will be affected by the proposed action; and (3) feasible action, if any, to reasonably
protect Native Hawaiian rights and practices. 94 Haw. at 52. In particular, we note that
the IIFS petition detailed some cultural practices supported by ground and surface
water in the Nā Wai ‘Ehā area. If the Commission determines that such rights exist, all
water use permit applicants must overcome the presumption in favor of such protected
public trust purposes.

Given the limitations of the outdated declarations of water use and Hawai‘i
Water Plan, we understand the enormity of the task facing this Commission and the
applicants seeking water use permits for ‘Īao. Although the Hawai‘i Supreme Court
has made clear that this burden lies with the Commission and permit applicants, not the
practitioners, several workable avenues are available to help provide the necessary
information. The Commission, in partnership with the permit applicants, could, for
example: (1) review declarations of water use for all TMKs and uses within the affected
area; (2) request from plantation interests including Wailuku Agribusiness and HC&S, a
list of all individuals who receive kuleana water; (3) publish notices in local papers and
broadcast on local TV (Akaku) and radio stations requests for information from
practitioners from the affected area; (4) locally notice and hold public meetings in
Central Maui for practitioners who may be affected by the pending applications; (5)
contact Hawaiian agencies with offices or representatives in the affected area, including
the Office of Hawaiian Affairs, Queen Lili‘uokalani Children’s Center, and Alu Like for
lists of local practitioners or contacts; (6) contact elected representatives at the county,
state, and federal levels for recommended contacts; (7) contact cultural consultants or
experts from the area, including those listed in state Office of Environmental Quality
Control’s list of cultural consultants and others potentially available through the Bailey
House for contact information for local practitioners or other resources; (8) contact
culturally-based groups from the area including hula hālau, Hawaiian Civic Clubs,
‘Onipa’a Nā Hui Kalo, Maui Cultural Lands, Maui Cultural Resources Commission and
the like for information and recommendations; (9) contact state agencies, including the historic preservation division and Island Burial Councils for lists of local practitioners or contacts; and (10) contact schools and organizations of higher learning, including the University of Hawai‘i and Maui Community College for lists of Hawaiian organizations, clubs, local practitioners, and other contacts from the area. These are just a sampling of potential sources of information; many more are available to this Commission and the permit applicants.

C. This Commission Has The Authority And Duty To Recognize And Uphold Traditional & Customary Rights & Practices.

Finally, this Commission has both the authority and the duty to recognize traditional and customary Native Hawaiian rights in the context of water use permitting, contested case hearings, and other matters under its jurisdiction. The Hawai‘i Supreme Court has never imposed any requirement for those asserting such rights to obtain a court ruling before the Commission or any other agency could consider them. Rather, as detailed above, state agencies including this Commission “may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” Ka Pa‘akai, 94 Haw. at 46. In Ka Pa‘akai, the Hawai‘i Supreme Court specifically detailed an “analytical framework in order to effectuate the state’s obligation to protect native Hawaiian customary and traditional practices[.]” Id. at 46-47. The Court placed this burden squarely on agencies such as this Commission, going on to rule that “[t]he power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated[.]” Id. at 52.

We again note that in Wai‘ola, the Court vacated this Commission’s issuance of water use permits for proposed ground water uses not unlike those at issue in ‘Iao because the Commission “failed adequately to discharge its public trust obligation to protect native Hawaiians’ traditional and customary gathering rights[.]” 103 Haw. at 443. More specifically, the Court ruled that “an applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes; likewise, the Commission is duty bound to hold an applicant to its burden during a contested-case hearing.” Id. at 441-42 (emphasis added).

II. Municipal Uses.

A. “Municipal” Use Is Not A Public Trust Use.

At the October 28, 2004 public hearing, Commissioner Miike stated that “municipal” use was not a “domestic” use recognized under Waiāhole as a public
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trust purpose, citing the Water Code's definition of "domestic use" as support. Commissioner Miike later modified this position in correspondence dated November 3 and 15, 2004, opining that Waiahole I suggested domestic uses could extend to municipal uses. We respectfully submit that the Commissioner's first inclination was correct. In sum, although municipal use may serve the general public interest and partially (but not exclusively) includes many aggregate domestic uses, it constitutes a large-scale, consumptive, and diversionary use that differs, both qualitatively and quantitatively, from the uses that the public trust, both in Hawaii and elsewhere, has traditionally protected. Thus, notwithstanding the "important public benefits" of municipal uses, long-established public trust precedent "stops short" of including such use as a public trust purpose. Waiahole I, 94 Haw. at 138.

"Domestic" and "municipal" are legal terms of art in water law that have carried distinct meanings under the common law for ages. As the plain meaning suggests, "domestic" use denotes individual water use "for household purposes, i.e., for drinking, washing, cooking, and watering domestic animals." Carter v. Territory, 24 Haw. 47, 66 (1917). Historically, in Hawaii and elsewhere, the priority for domestic use has arisen in connection with riparian principles, such that the use cannot "materially diminish the supply of water or render useless its application by others." Peck v. Bailey, 8 Haw. 658, 662 (1867). See also id. (recognizing the "sound distinction" under riparian law between "the right to enjoy water in its natural state, and that which is created by artificial means"); Carter, 24 Haw. at 66 (affirming the riparian distinction between "natural" and "artificial" uses and stating, "we have no doubt that such is the law in [Hawaii]").

"Municipal" use, in contrast, denotes bulk water uses of large population entities. This may include the aggregate domestic uses of the population, but also includes many other kinds of uses, including commercial, agricultural, and industrial purposes. Maui Department of Water Supply's ("MDWS's") applications, for example, concede that single-family use comprises about only 16% of the total use in Central Maui. See, e.g., MDWS's Water Use Permit Application for Mokuha 1. MDWS has also admitted that it transports potable water from Iao to Central and South Maui and Pa'ia for both potable and non-potable needs. MDWS, however, is unable to provide calculations or even estimates of its non-domestic uses, including water for commercial, agricultural, industrial and other purposes. As MDWS's applications establish, municipal uses, by nature, are large-scale and consumptive, and involve diversions

2 This Commission determined that while potable water is delivered through the Central Maui system to provide for both potable and non-potable needs, the County was unable to "differentiate between these major categories of use." State Commission on Water Resource Management, Iao and Waie'e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) at 66.
away from the water source. Moreover, although municipal use is not “commercial” per se, it does involve the sale of water or water services by a utility (in some places, a private entity), as opposed to a domestic user who takes water for his or her own personal use.

The Code incorporates these common law distinctions between domestic and municipal uses. As Commissioner Miike noted, § 174C-3 assigns separate meanings to each. Domestic use “means any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.” Municipal use “means the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term ‘domestic use.’”

Lumping domestic and municipal together contradicts this well-settled distinction. Courts have consistently declined to make such a leap. Thus, as the eminent treatise on water law (cited repeatedly in Waiahole I) observes, “[c]ities generally cannot invoke the domestic preference [under riparian law] to acquire land and water rights to supply their inhabitants and to claim an immunity from liability by injured riparians.” A. Dan Tarlock, Law of Water Rights & Resources § 3:59 at 3-97 (2004 rev. ed.) (footnote omitted) (citing cases); see also Union Water Supply Corp. v. Vaughn, 355 F. Supp. 211, 214 (S.D. Tex 1972) (seeing a “clear distinction between general municipal use and domestic and livestock use” and rejecting collective appropriation on behalf of individual domestic users as “domestic” use).4 Similarly, the seminal treatise on eminent domain explains that “[t]he doctrine that a riparian town

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3 The Code underscores the distinction between domestic and municipal uses by exempting only domestic uses from water use permitting requirements. “No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water.” Haw. Rev. Stat. § 174C-48(a) (emphasis added). In areas such as the lao aquifer where municipal systems comprise the vast majority of existing uses, exempting municipal uses from water use permitting requirements would nullify this Commission’s primary tool for managing water resources. Clearly, domestic and municipal uses were never meant to be one in the same.

4 We note that, although this case involves ground water, similar principles apply, and the Commission should avoid any artificial distinctions between ground and surface water. See Waiahole I, 94 Haw. at 177 n.90 (analogizing correlative rights to ground water to riparian rights in surface water); id. at 172-73 (rejecting artificial ground-surface distinction). See also id. at 180 n.95 (citing ground water statues from other states preserving the right of landowners to withdraw water for “domestic” uses, which would not extend to municipal uses).
may take from a private stream all the water it needs for the domestic use of its inhabitants is not generally accepted and is expressly denied in a number of cases.” 2 J. Sackman, Nichols on Eminent Domain § 5.05[2][a][vii], at 5-247 (rev. 3d ed.) (citing cases). “A private riparian proprietor has no right at common law to divert water . . . for purposes of sale, and it would seem that a municipal or a public service corporation should stand in no better position.” Id.

The reason for this differential treatment of domestic and municipal uses is not hard to discern. As the renowned jurist Roscoe Pound explained:

The law does not regard the needs and desires of the person taking the water solely to the exclusion of all riparian proprietors, but looks rather to the natural effect of his use of water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes.


The Commission’s November 15 letter focuses on several points in the Waiāhole I decision as potential support for the idea of municipal uses being a public trust purpose. The letter emphasizes Waiāhole I’s recognition of the “vital domestic uses of the general public.” Id. at 2 (citing 94 Haw. at 137) (emphasis in letter). This excerpt, however, cannot be removed from its context. The Court used this phrase in the context of extending the trust’s purpose from its “original intent” of preserving Native Hawaiian traditional and customary uses to its “broader sense” of protecting analogous uses of the public at large, i.e., non-Hawaiians and non-traditional users. 94 Haw. at 137. This does not establish that the Court meant to expand domestic uses to include municipal uses. On the contrary, the Court’s actual holding simply states, in unmodified terms: “we recognize domestic water use as a purpose of the state water resources trust.” Id. (emphasis added). We again note that Wai‘ola involved municipal-type uses, yet the Supreme Court did not treat them as domestic, public trust uses.

The November 15 letter also examines the Court’s citations, but again, these should not be read out of context and proportion. The Court cited this authority for general examples, not definitive rules. See 94 Haw. at 137 (citing the California and Minnesota statues with “see, e.g.,” for the general proposition of domestic preference,
and using "cf." (compare) in citing the Clifton case.\(^5\) The imagined implications of these generalized references do not control. Far more telling, and ultimately controlling, are the Court's citations to Haw. Rev. Stat. § 7-1, the McBryde case, which the Court described as "comparing [§ 7-1] with authority in other jurisdictions recognizing riparian rights to water for domestic purposes," and the Carter case, which the Court described as "granting priority to domestic use based on riparian principles and [§ 7-1]." Id. (emphasis added).

Analysis of Waiahole I must not lose sight of the forest for the trees. A larger view of the public trust purposes recognized in Hawaii and other jurisdictions makes clear that these uses all involve maintaining the water source either in its natural state or without substantial impairment. See, e.g., 94 Haw. at 136-37. As explained above, the common definition of domestic use conforms to this unifying principle. Municipal uses, such as those proposed by MDWS for Tao, may include aggregate domestic uses, but are otherwise qualitatively and quantitatively different because of their large-scale, consumptive, and diversionary nature. Inclusion of such uses (which include many other uses besides domestic, including commercial uses, and in most cases would drain a water source dry) as a public trust purpose would constitute an unprecedented, fundamental deviation from long-standing public trust principles.

Moreover, equating domestic and municipal uses would essentially resurrect the argument rejected by the California Supreme Court "Mono Lake" case that the public trust encompassed "all public uses," including the municipal uses of the City of Los Angeles (termed "domestic" under California statute and in that case). See National Audubon Soc'y v. Superior Ct. of Alpine Cty., 658 P.2d 709, 723-24 (Cal. 1983) (cited in Waiahole I, 94 Haw. at 138). The National Audubon court declined to adopt such a "broad concept of trust uses," maintaining that the "public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands[.]" Id. The Waiahole I decision adopted this reasoning without qualification. 94 Haw. at 138. Indeed, Waiahole I specifically acknowledged that "National Audubon involved diversions for a public purpose, the domestic uses of the City of Los Angeles." Id. at 140. Yet, these "domestic"/municipal uses in National Audubon did not lead the Court to limit its embrace of that case in any

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\(^5\) The substance of the Clifton court's holding was that the state held potable drinking water reserves in trust, 539 A.2d at 765; in other words, the court focused on the "scope" of the trust, and not the "uses" it protects. Cf. Waiahole I, 94 Haw. 133-35 (analogous section holding that the public trust doctrine applies to "all water resources," including ground water). Clifton in no way suggested that a state could drain a stream, lake, or aquifer dry to serve municipal purposes.
way. Notably, the court described these municipal uses as a “public purpose,” not a “public trust purpose.”

In short, Wai‘ahole I came no closer than National Audubon to acknowledging municipal uses as a public trust purpose. Such a ruling would, indeed, eviscerate the public trust doctrine, reducing it to a generalized “public use” doctrine with no more meaning and effect than the clause of the Fifth Amendment of the same name. There is simply “no authority [that] supports this view of the public trust.” Id. at 138 (quoting National Audubon).

The ultimate point of all the foregoing is that, notwithstanding any general “public purpose” served by municipal uses, Wai‘ahole I and other public trust precedent do not support including municipal uses as a “public trust purpose.” The reasoning of the Hawai‘i Supreme Court in Wai‘ahole I applies with equal force here: “while the state water resources trust acknowledges that [public] use for [municipal purposes] may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing [such] use as a protected ‘trust purpose.’” 94 Haw. at 138.


The November 15 letter also points out that municipal uses are not “private commercial uses” discussed in Wai‘ahole I. Of course, the only uses at issue in Wai‘ahole I were private commercial uses,” so claiming that Wai‘ahole I’s rulings refer only to those kinds of uses says little. Rather, the relevant categories that the Court identified were: (1) public trust uses; and (2) other uses, whether public or private. This dichotomy is fundamental to public trust law. See Wai‘ahole I, 94 Haw. at 139 (“As commonly understood, the trust protects public waters ... against ... substantial impairment, whether for private or public purposes.” (citation and internal quotation marks omitted) (emphasis added)). As discussed above, municipal use is a public use, but not a public trust use. “Thus, insofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm, or ‘default’ condition,” municipal uses, just as with any other publicly beneficial non-public trust uses like the agricultural uses in Wai‘ahole I, are subject to a “higher level of scrutiny.” Id. at 142 (emphasis added). “In practical terms, this means that the burden lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.” Id.; see also Wai‘ola, 103 Haw. at 441 (“An applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes; likewise, the Commission is duty bound to hold an applicant to its burden[].”).
The November 15 letter suggests that, although the Court declined to differentiate among public trust uses, it would differentiate between non-public trust uses, i.e., between private commercial and public uses. Nothing in the Court's case law supports this notion, and Waiahole I effectively disposes of it. 94 Haw. at 142 (maintaining that "the Commission inevitably must weigh competing public and private water uses on a case-by-case basis").

This does not mean, of course, that the Commission cannot consider the "definite interest" of the public in uses for municipal, agricultural, or any other publicly beneficial purposes and give such uses their due weight in decisionmaking. Id. at 141-42, 138. It does mean applicants for municipal use such as MDWS must show that their use will not interfere with any public trust purposes, and the Commission must hold such applicants to their burden. Wai'ola, 103 Haw. at 441.

This understanding, it may be noted, comports with the underlying policies of the public trust doctrine. Scholarship on the doctrine has recognized that the public trust serves to protect uses of the "diffuse public" against the immediate desires of "tightly organized groups with clear and immediate goals." J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 556 (1970); cf. Waiahole I, 94 Haw. at 190 n.108 (recognizing the Code's instream flow provisions as a protection of "the inchoate public, including generations unborn"). Municipal users have dedicated agencies to account and advocate for their needs. The efforts of a handful of volunteer community members and public interest groups notwithstanding, the same cannot be said for public trust resources and uses. Holding municipal uses to the same requirements as other non-public trust uses thus makes imminent sense.

Even if municipal uses could be differentiated from other non-public trust uses, or municipal uses could be deemed a public trust use, nothing would effectively change. The Commission would still bear an "affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible." Waiahole I, 94 Haw. at 141. Even between public trust uses, it "must still ensure that all trust purposes are protected to the extent feasible." Id. at 142 n.43 (emphasis added). Thus, however municipal uses were categorized, it would have to "consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources." Id. at 143.

It must be emphasized that the foregoing addresses only the requirements of the constitutional public trust. Apart from these requirements, the Code imposes a burden on applicants for municipal uses such as MDWS. The Code does not grant municipal
uses any allocation priority, but requires municipal users to apply for water use permits like any other user. See also footnote 3, supra. Permit applicants “have the burden of justifying their proposed uses in light of protected public rights in the resource.” Id. at 160. Moreover, the Commission “is duty bound to hold [applicants] to its burden under the Code[.]” Waialua, 104 Haw. at 426. The standards for a permit under Haw. Rev. Stat. § 174C-49(a), particularly the requirement of “reasonable-beneficial use,” requires applicants, first, “to prove their own actual water needs.” Waiahole I, 94 Haw. at 161. Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of any practicable mitigating measures, including the use of alternative water sources” -- a requirement that the Court deemed “intrinsic to ... the definition of ‘reasonable-beneficial use’” and “an essential part of any balancing between competing interests.” Id.; see also In re Waiahole Combined Contested Case, 105 Haw. 1, 16 (2004) (reiterating these standards). These requirements essentially parallel those of the public trust and would likewise apply however “municipal” uses were categorized under the public trust.

Again, mahalo for this opportunity to share our mana`o on these important issues. Please don’t hesitate to contact us if you have any questions or require additional information.

Me ke aloha,

cc: Dr. Jonathan Likeke Scheuer
Office of Hawaiian Affairs
(via U.S. Mail)

Mr. Jim Williamson,
Maui Meadows Homeowners Association
(via U.S. Mail)

Mr. John V. Duey,
Hui o Nā Wai `Ehā
(via U.S. Mail)
Yvonne Izu, Deputy Director  
Commission on Water Resource Management  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, Hawai`i 96809

RE: Questions raised regarding objections to Water Use Permit Applications in the Iao Ground Water Management Area, Maui.

Dear Ms. Izu,

The Office of Hawaiian Affairs appreciates the opportunity to reply to your letter regarding issues raised at the hearing for the above referenced permits. We are also grateful to you for allowing us additional time beyond your requested response date to contemplate and react to your provocative questions. The issues raised are of significance to all the people of Hawai`i, and to our beneficiaries and the people of Maui in particular. We are encouraged that the Commission wishes to engage in a thoughtful discussion of how each of us should shoulder our particular kuleana to protect the resources on which we all depend.

1 Applications by:

Hawaiian Commercial and Sugar Company for:
-Iao Tunnel (Well No. 5330-02, WUP No. 691, source TMKs 3-4-033:029 and 3-4-34, location of use TMKs 3-8,5,6,7: various);

Maui County for:
-Waihele Wells 1 & 2 (Well Nos. 5431-02 & 03, WUP Nos. 695 & 696, source TMK 3-3-17:31, location of use TMKs unspecified and multiple);
-Waiehu Heights Wells 1 & 2 (Well Nos. 5430-011 & 002, WUP Nos. 697 & 698, source TMK 3-3-2:28, location of use TMKs unspecified and multiple);
-Kepaniwai Well (Well No. 5332-05, WUP No. 699, source TMK 3-3-3:5, location of use TMKs unspecified and multiple);
-Mokuhau Wells 1 & 3 (Wells Nos. 5330-09 & 11, WUP Nos. 700 & 701 source TMK 3-3-2:24, location of use TMKs unspecified and multiple);
-Iao Tunnel (Well No. 5332-02, WUP No. 680, source TMK 3-3-3:3, location of use TMKs unspecified and multiple);
-Waihele Well 3 (Well No. 5431-04, WUP 703, source TMK No. 3-2-17:018, location of use TMKs unspecified and multiple); and

Kehalani Mauka LLC for:
-Wailuku Shaft 33 (Well No. 5330-05, WUP 707, source TMK No. 3-5-1-1, location of use TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, and 66.)
We have styled our analysis as responses to the assertions made and questions posed. For each issue, we first give the quote we are responding to, and then offer our analyses and answers as applicable.

1. **Hawaiian Water Rights**

A. "At the public hearing, Commissioner Miike opined that, while such rights are public trust purposes, they accrue to individuals."

We begin our responses by noting that a key underlying assumption of Commissioner Miike's line is correct, but only partially so. We are referring to the idea that traditional and customary rights solely "accrue to individuals." This opinion of Commissioner Miike is key because it supports an implied line of reasoning that an individual holder of these rights must come forward, bear the burden of showing that they have these rights, and only then would a private commercial user and the Commission have the need to (or even be empowered to) consider these rights. The assumption is only partially correct, and therefore the line of reasoning is false in assuming that an individual must demonstrate their rights for the Commission to consider the issue. This is the case for the following reasons.

i. In Hawaiian tradition and custom, individual rights are integral with the rights of larger groups of Hawaiians; individuals do not hold rights solely or separately from the larger group. We first note that, self-evidently, traditional and customary rights exist in these islands because kanaka maoli developed these traditions and practices prior to the coming of any other group of people in the islands. Thus to meaningfully understand the basis for which later guarantees of traditional and customary rights were made, one must have an understanding of how these rights originated, were held, and were exercised prior to outside influence in the islands.

We do not here have the space or time to offer a full explanation of the background that supports such an understanding. What we will note is the fundamental point that individual and group traditional and customary rights are integral to each other. While it is unarguable that individual Hawaiians in ancient times exercised traditional and customary rights, most if not all practices, including practices around water such as building and maintaining 'auwai, depended upon exercising the practices as part of a group. Indeed those practices could not be undertaken or the resource effectively managed without group effort. It would be meaningless to consider one individual's right to a practice without examining the rights of that person's extended family and community.

ii. The Hawai'i State Constitution does not guarantee or assign traditional and customary rights solely to individuals. The state constitutional provision that provides a guarantee of these rights implies in its wording that these rights are possessed by a whole group as well as individuals. Namely, the rights are possessed by at least the groups of ahupua'a tenants who are the descendants of native Hawaiians:

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Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

We first note that the wording of this section does not explicitly mention individuals and emphasizes the groups’ status. Compare it, for instance, to the specific heading of Article I, Section ii: “Rights of individuals.” Secondly and more importantly, we point out that these rights could not logically be held solely by individuals for the purposes said rights are exercised. The language acknowledges that the exercise of such rights are not only for subsistence purposes, but for cultural purposes. By definition, cultural purposes are related to the entire group of native Hawaiians.

iii. *The Kuleana Act does not guarantee these rights solely to individuals.* It is our observation that the most relevant law to our understanding of the guarantee of traditional and customary rights does not state that these rights only accrue solely to individuals. The language from the Kuleana Act of 1850, as it is incorporated into the Hawai‘i Revised Statutes (HRS 7-1), is key:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, alo cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

We note that the translation of the Kuleana Act chosen by the legislature for incorporation into the HRS does not say, for instance, “…each individual person on their own land shall not be deprived of the right…,” but rather says “the people on each of their lands.” Later in the section the word “individuals” is used in reference to wells and watercourses, where they could have again used the word “the landlords” or “the people” if they meant to discuss wells or watercourses developed by a group. If traditional and customary rights were solely held by individuals, the language in this law would not make sense.

If these rights, however, are best understood as belonging *both* to individuals and the people, the language in the Kuleana Act makes sense. Individuals may exercise such rights, but the guarantee is in the Act so that the practices *and* the group of people who perpetuate those practices could continue into the future. Flowing from that intent is the need to guarantee these rights to individuals as part of the larger group.

This view is, of course, consistent with the overall purpose behind the passages of the acts collectively known as the Māhele, which was to benefit the commoner class as a group and the Nation as a whole, as well as give all citizens, including the King, clear title to land.3

Because traditional and customary rights are not solely held by individuals, the Commission or any other administrative agency can not and should not require a showing that any such rights

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accrue to individuals. Referring to our discussion above when necessary, we now continue with our response.

B. "He believes it is clear that, when such rights exist, private commercial uses must overcome the presumption in favor of trust purposes. But who has the burden of showing that such rights exist in the first place? And does only an assertion that such rights exist, without a showing that specified individuals have such rights, require private commercial uses to overcome a presumption in favor of such asserted rights?"

i. Traditional and customary rights to water must be assumed to exist throughout 'Iao and everywhere in the islands as a matter of fact and law. To begin our examination of this section of your letter, we need to highlight the phrase "when such rights exist." Not only do such rights accrue to more than individuals, but such rights as a matter of law and fact, clearly exist throughout the 'Iao Ground Water Management Area. In the recent petition by Earthjustice on behalf of Hui o Nā Wai 'Eha seeking amendment of the interim instream flow standards for streams including those that fall in this area, information has already been provided to the Commission that details the cultural and historical significance of water in this area, including information on population, heiau, and springs. Beyond that evidence, the fact that thousands of Hawaiians lived in this area for hundreds of years developing and practicing custom and tradition is generally known and does not need citation.

Beyond the specific area considered with these WUP A, we must note that the proper question when the Commission considers a WUPA is not to ask whether these rights exist. These rights exist across the islands as a matter of tradition and custom. They were later guaranteed by the state constitution (Article XII, Section 7) and law (HRS 1-1, HRS 7-1, and in specific relation to water, in HRS 174C-101). Indeed, because of the obligation placed on state agencies by this constitutional provision and statutes cited, there is a burden on agencies to demonstrate in any area that these rights do not exist if that is the position they desire to pursue.

ii. Not even assertion is necessary. Because traditional and customary rights must be assumed to exist in all areas of the island as a matter of fact and law, the idea that specific rights need to be "asserted" in order to be considered in the water use permitting process is, to us, nonsensical. While we at OHA are compelled by our kuleana to remind the Commission and applicants of their duties, we or any individual or group need not "assert" rights which clearly exist as a matter of law.

iii. An individual showing of rights is not necessary. As noted above, traditional and customary rights do not accrue solely to individuals or exist only in places where proven. Therefore, while showing that "specified individuals have such rights" can be useful understand some interests involved, it is not a required trigger for having the Commission and applicant(s) assume their burden. However, if an individual who also possesses such rights appeared before the Commission on a WUPA, they would have standing to do so.

iv. The Commission and the Applicant have an affirmative duty to determine the extent of these rights. Given the above points, we feel there are other questions which would better guide all of us to understanding our own particular kuleana in protecting rights and the resource during the WUPA process. Some of these questions are: Who has the burden of inventorying the traditional and customary Hawaiian rights in an area? How would having an updated Hawai‘i Water Plan
aid applicants in undertaking the work they have to meet their burden? What kind of efforts and evidence should the Commission consider as adequate when an applicant submits required information?

In response to these questions, two recent Hawai‘i Supreme Court cases rule.

In Wai‘ola (re Wai‘ola o Moloka‘i, Inc. 103 Haw. 401 (2004)), which addressed an issue quite similar to that in ‘Iao, the court bound the Commission and the applicant to actively search for information regarding the impact of the proposed use on traditional and customary rights. The court ruled (442) that "the absence of evidence that its [the applicant’s] proposed use would affect native Hawaiians' rights was insufficient to meet the burden imposed by the public trust doctrine, the Hawai‘i Constitution, and the Code."

As to what specific findings would prove sufficient, the Hawai‘i Supreme Court offers binding guidance in Ka Pa‘akai. There they addressed the need of the Land Use Commission (LUC) to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible. The court noted (Ka Pa‘akai o ka ‘Aina et al. v. Land Use Commission et al., 94 Haw, 47-49 (2000) (footnotes omitted)):.

Article XII, section 7 of the Hawai‘i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible when granting a petition for reclassification of district boundaries. See PASH, 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43 (emphasis added). In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed. Such an analytical framework must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other...

We therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests: In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must -- at a minimum -- make specific findings and conclusions as to the following: (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 the LUC to reasonably protect native Hawaiian rights if they are found to exist.

We have no reason to conclude that the constitutional burden on CWRM to consider these rights is any less than that held by the LUC, or that the analytical framework offered is inapplicable.

So what might be adequate in this case as a response to the requirements set forth in Ka Pa‘akai and Wai‘ola? Here we note that in Earthjustice’s response to these same questions we address here in this letter, they point out that the work of the applicant would be greatly reduced if the Commission had by this point fully completed the duties assigned to them by the Code. They also suggest a number of ways the applicant and the Commission could undertake such a study. We agree with the points they raise and will not restate them here.
C. "Does the Commission have the authority to recognize traditional and customary and Native Hawaiian rights in a water use permit application or in a contested case hearing, or do those asserting such rights have to obtain a ruling from the state courts before the Commission can consider them in the water permitting process?"

Because of all of the reasons we mention above, drawing special attention to the language cited in Ka Pa’akai and Wai’ola, we feel it is clear that the Commission has the authority and duty to examine the extent to which these rights exist and are practiced in the ʻIao Ground Water Management Area. We hope that the Commission begins to affirmatively do so; it will be of great assistance not only to us but to all WUP Applicants who desire a greater level of certainty in the process.

2. "Domestic Use”, “Public Trust”

Commissioner Miike also asked whether uses by the MDWS are public trust purposes? If so, then there is no presumption in favor of other trust purposes. If it is not a public trust purpose (or only partly so; ie., drinking water) it is also not a private commercial use. Then what level of scrutiny should its water use permit applications be subject to?"

While we appreciate that our objections to these permits has raised the general issue of municipal v. domestic use, we believe in general the issue has already been asked and answered in Hawai‘i law. We here again join in the discussions of this issue raised by Earthjustice in their response to these same questions. We also offer the following observations.

i. Maui County’s Department of Water Supply does not and apparently can not separate out domestic and non-domestic uses, but they should be required by the Commission to do so. We are unaware of any means the MDWS currently has to distinguish in detail and amount the kinds of uses encompassed by their municipal applications. Because this is the case, it would be illogical to let their industrial and commercial uses “piggyback” on their provision of domestic supplies when considering their WUPA. Carried to its logical extent, such an argument would allow any private commercial user avoid their evidentiary burdens simply by providing a little domestic water as part of their development.

What would be more appropriate in this case would be to require MDWS to provide some estimate of the different uses in their system. They also would then need to show how, in the case of shortage, they would protect domestic, public trust uses before serving their non-public trust uses. Indeed, in their letters to us and in their WUPA, they seem to indicate they desire to understand better their different system uses. We however must note that over 120 years ago, absent of an ability to separately meter domestic and non-domestic use, the city of Honolulu was able to create a legally acceptable management and regulatory scheme to protect domestic uses in its system while curtailing non-domestic uses and respecting other water claimants in their source area. We consider this example below.

ii. A municipal purveyor has the authority and duty to restrict its non-public trust uses when its supplies are restricted due the competing and superior demands of other uses. We believe Hawaii’s courts have already distinguished between the different kinds of uses in municipal systems, discussed how they weigh against competing demands of others outside the municipal
system, and the affirmed duty and authority of municipal purveyors to manage in this kind of environment. We draw your attention to Riemenschneider v. Wilson 6 Haw. 375 (1882).

In this case the plaintiff, Riemenschneider, was a Honolulu municipal water user. A scarcity of water in Honolulu had led the government to restrict the times when individual households could irrigate landscaping. The plaintiff continued to irrigate in a manner afoul of the restrictions, and his service was suspended. Riemenschneider subsequently filed a writ of mandamus to the Hawai‘i Supreme Court to order the city to turn his water on again.

The plaintiff lost, and the court’s ruling and reasoning is particularly applicable to the situation in ʻIao. The court found the city had a legitimate need and a right to restrict water usage and could restrict the non-domestic uses of the plaintiff (379):

I have indicated that the Government has a right to make reasonable rules and regulations in respect to the water works and the supply of water to the inhabitants. The exercise of this authority is necessary for the public benefit, and in order to enable the Government properly to fulfil [sic] its obligations in distributing the water as fairly as may be possible. In times of water famine all [municipal users] must suffer reduction alike, and the Government then has the right to restrict the use of water by ratepayers, commencing the reduction with the least necessary use of water, i.e. irrigation [of residential landscaping].

Part of the court’s reasoning that justified this decision was that other protected uses outside of the City’s control restricted the City’s municipal water supply. Referring to the lower and upper Nu‘uanu reservoirs that supplied the system and the superintendent (Wilson) who controlled the City’s system, the court noted (378):

Moreover, he [Wilson] could not fill the lower reservoir nights because it interfered with the gas machines run by the water from the upper reservoir, and he had further difficulty in drawing off the water from the upper reservoir, as certain persons having kalo patches and lands between the two reservoirs, which had the privilege of riparian proprietors from the stream which supplies both reservoirs, would become short of water, unless the overflow from the upper reservoir was allowed to pass back into the stream for their benefit.

In other words, the municipal system in this case did not respond to the competing demands for use within its own system and the outside, superior claims to water itself competed with, by claiming it had a protected right and ignoring those with superior claims. Rather (and uncontested by the court), the purveyor properly restricted its own diversion and subsequently restricted the non-domestic, non public trust uses of its ratepayers. Furthermore, the court upheld the enforcement of these restrictions, even when that enforcement resulted in the cutting off of domestic water use by the plaintiff, because the system was not set up to cut off only irrigation.

Today, of course, we understand that kalo would be entitled to water as a traditional and customary use protected by the public trust, in addition to having riparian and appurtenant rights. We see this case as illustrative of what the County needs to do in this instance: understand the protected uses it is affecting and restrict its deliveries if necessary, prioritizing the public trust uses over non-public trust uses. The Commission should order it to do so.
Once again, we appreciate the creation of an open discussion on these issues and thank you for the opportunity to offer these comments. If you have further questions, please contact Dr. Jonathan Scheuer at 594-1946 or email him at jonathans@oha.org.

Sincerely,

Clyde W. Nāmu‘o
Administrator

Cc: Kapua Sproat Esq.
Earthjustice
223 South King Street, Suite 400
Honolulu, Hawai‘i 96813
December 15, 2004

Ms. Jane E. Lovell, Esq.
County of Maui
Department of the Corporation Counsel
200 South High Street
Wailuku, HI 96793

Dear Ms. Lovell:

Transmission of Water Use Permit Files
Iao Water Management Area, Maui

Thank you for your help in providing the Commission with public access to our files concerning water use permit documentation for existing users in the Iao ground water management area.

The copying of the captioned files has been completed, and is up-to-date as of November 30, 2004. There are 11 folders weighing about 12 pounds, which would be expensive to ship, so we are arranging for a department staff person to convey them to Wailuku Public Library as soon as possible.

Items of the record from December 1, 2004 will be separated in our files, and may be compiled by interested parties, or may be arranged for shipment as may be convenient.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

YVONNE Y. IZU
Deputy Director

CI:ss
Mr. George Y. Tengan, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Dear Mr. Tengan:

Central Maui Ground Water Production – Summary of Recent Findings

Thank you for your letter dated October 7, alerting the Commission to inaccuracies in water use reporting from the Central Maui Service Area from around January 2001, with a maximum discrepancy in November 2003 overstating the total production for the Central System at about 1.3 mgd.

We appreciate your efforts to correct the pumpage data. At this point, the Commission does not wish to separately examine the evidence of inaccuracies, but to rely upon your professional judgment in correcting them. We will look forward to a timeline of receiving corrected information.

We are deeply concerned that this proceeds in a timely way, as significant resources have been invested in developing a ground water model for this area by yourselves and the U.S. Geological Survey. The study absolutely depends on accurate information. Furthermore, your applications for water use permits are absolutely dependent upon accurate information. Finally, requests for use of surface water are also dependent upon accurate ground water information, either from potential interactions (from a source development perspective) or combinations (from an end use perspective) with ground water.

Please call on us if we can assist in any way. If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

YVONNE Y. IZU
Deputy Director
November 15, 2004

Ms. Kapua Sproat
Earthjustice
223 South King St., Ste. 400
Honolulu, HI 96813

Dear Ms. Sproat:

Water Use Permit Applications, Iao Aquifer, Maui
Public Trust Burden

Following adjournment of the still-open public hearing convened on October 28, 2004, the Commissioners appointed to conduct the hearing are requesting additional information from objectors as well as applicants.

Hawaiian Water Rights

Your objections to water use permit applications for ground water from Iao Aquifer on Maui raised the issue of addressing traditional and customary and Native Hawaiian water rights, specifically saying that the applications had failed to provide information sufficient to evaluate the requirements of the Supreme Court’s ruling in Waiahole concerning these matters.

At the public hearing, Commissioner Miike asked the various parties for their opinion on who has the burden of proof as to whether or not traditional and customary and Native Hawaiian rights exist. Commissioner Miike opined that, while such rights are public trust purposes, they accrue to individuals. He believes it is clear that, when such rights exist, private commercial uses must overcome the presumption in favor of trust purposes. But who has the burden of showing that such rights exist in the first place? And does only an assertion that such rights exist, without a showing that specified individuals have such rights, require private commercial uses to overcome a presumption in favor of such asserted rights? Does the Commission have the authority to recognize traditional and customary and Native Hawaiian rights in a water use permit application or in a contested case hearing, or do those asserting such rights have to obtain such a ruling from the state courts before the Commission can consider them in the water permitting process?
“Domestic Use”, “Public Trust”

Commissioner Miike also asked whether uses by the MDWS are public trust purposes? If so, then there is no presumption in favor of other trust purposes. If it is not a public trust purpose (or only partly so; i.e., drinking water), it is also not a private commercial use. Then what level of scrutiny should its water use permit applications be subject to?

The Code defines “municipal use” as “the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term ‘domestic use.’”

At the public hearing, Commissioner Miike commented that “domestic use” was personal use, relying on the definition in the Water Code (“any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation”).

However, in reviewing the Court’s Waiahole I decision, he noted that the Court refers to “the vital domestic uses of the general public (emphasis added)” (94 Haw. 97, 137) as a public trust purpose of the use of the state’s freshwater resources. The Court cited the California and Minnesota water codes, as well as Clifton v Passaic Valley Water Comm’n, 539 A.2d 760,765 (1987). The California code states that “domestic use is the highest use,” while the Minnesota code states that “first priority (is) domestic water supply, excluding industrial and commercial uses of municipal water supply.” Neither code defines “domestic use.” Clifton states: “Potable water, then, is an essential commodity which every individual requires in order to sustain human existence...residents in urban and suburban areas are dependent upon the agency or institution which supplies potable water...the public trust doctrine applies with equal impact upon the control of our drinking water reserves.” The Court in Waiahole I “prescribes a ‘higher level of scrutiny’ for private commercial uses (emphasis added)” (94 Haw. 97, 142).

We look forward to your comments to the above analyses and responses to the questions posed. We would appreciate receiving a response by December 10, 2004.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251.

Sincerely,

YVONNE Y. IZU
Deputy Director

CI:ss

c: Clyde Namuo, Office of Hawaiian Affairs
November 15, 2004

Mr. Clyde Namuo, Administrator
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Ste. 500
Honolulu, HI 96813

Dear Mr. Namuo:

Water Use Permit Applications, Iao Aquifer, Maui
Public Trust Burden

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Mr. Clyde Namuo  
Page 2  
November 15, 2004

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We look forward to your comments to the above analyses and responses to the questions posed. We would appreciate receiving a response by December 10, 2004.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251.

Sincerely,

YVONNE Y. IZU
Deputy Director

CI:ss

c: Kapua Sproat, Earthjustice
November 4, 2004

To: Attendees of October 28, 2004 Public Hearing on Water Use Permits in the Iao Ground Water Management Area

Dear Attendee:

Clarification of by Hearing Officer Lawrence Miike Regarding Domestic Use

Attached for your perusal is a memo from the hearing officer to those parties in attendance at the public hearing.

If you have any questions, please do not hesitate to call Roy Hardy at 587-0274 or toll-free at 984-2400, extension 70274.

Sincerely,

YVONNE Y. IZU
Deputy Director

RH:ss
Attachments
November 3, 2004

Roy/Charlie:

Could you send this on to the parties as a correction of what I said about the definition of “domestic use” at the public hearing?

At the public hearing, I made a comment that “domestic use” was personal use, relying on the definition in the Water Code (“any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation”).

However, in reviewing the Court’s Waiāhole I decision, it refers to “the vital domestic uses of the general public (my emphasis)”\(^1\) as a public trust purpose of the use of the state’s freshwater resources.

The Code defines “municipal use” as “the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term ‘domestic use.’”\(^2\)

So it could be argued that a municipal water system is a public trust purpose, or at the least, that municipal uses include a public trust purpose or that they collectively have higher priority than other uses because they are being provided “through public services available to persons of a county.”

As for remedies, in Reppun v Board of Water Supply, the Court concluded that “the public use of water, once that use has clearly attached, should be continued in order to avoid the harsh consequences of interruption.”\(^2\) There can be remedies if the water was improperly diverted, but they would not include stopping the diversion (e.g., if the diversion was improper, perhaps monetary damages would be relevant).

Larry Miike

---

\(^1\) 94 Hawai‘i 97, 137; 9 P.3d 409, 449.
\(^2\) 65 Hawai‘i 531, 560; 656 P.2d 57 (1982).
public trust uses of waters in their natural state, courts have recognized the distinct public interest in resource protection. As explained by the California Supreme Court:

(0)ne of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

National Audubon, 658 P.2d at 719 (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)) (emphasis added). Thus, with respect to the lake ecosystem involved in that case, the court held that the public trust protected values described as "recreational and ecological -- the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds." Id.

This court has likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust. See Robinson, 65 Haw. at 674-76, 658 P.2d at 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state). The people of our state have validated resource "protection" by express constitutional decree. See Haw. Const. art. XI, §§ 1 & 7. We thus hold that the maintenance of waters in their natural state constitutes a distinct "use" under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as "waste." See Reppun, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20 (citing article XI, section 1 as an acknowledgment of the public interest in "a free-flowing stream for its own sake").

Whether under riparian or prior appropriation systems, common law or statute, states have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources. See, e.g., Restatement (Second) of Torts § 850A cmt.
c (1979) [hereinafter Restatement (Second)] (preference for domestic, or "natural," uses under riparian law); Cal. Water Code § 1254 (West 1971) ("domestic use is the highest use"); Minn. Stat. Ann. § 103G.261(a)(1) (West 1997) (domestic use given first priority). This jurisdiction presents no exception. In granting individuals fee simple title to land in the Kuleana Act, the kingdom expressly guaranteed: "The people shall . . . have a right to drinking water, and running water . . . ." Enactment of Further Principles of 1850 § 7, Laws of 1850 at 202 (codified at HRS § 7-1 (1993)). See also McBryde, 54 Haw. at 191-98, 504 P.2d at 1341-44 (comparing section 7 of the Kuleana act with authority in other jurisdictions recognizing riparian rights to water for domestic uses); Carter v. Territory, 24 Haw. 47, 66 (1917) (granting priority to domestic use based on riparian principles and section 7 of the Kuleana Act). And although this provision and others, including the reservation of sovereign prerogatives, evidently originated out of concern for the rights of native tenants in particular, we have no doubt that they apply today, in a broader sense, to the vital domestic uses of the general public. Accordingly, we recognize domestic water use as a purpose of the state water resources trust. Cf. Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (holding that the public trust "applies with equal impact upon the control of drinking water reserves").

In acknowledging the general public's need for water, however, we do not lose sight of the trust's "original intent." As noted above, review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property. Before the Māhele, the law "Respecting Water for Irrigation" assured native tenants "their equal proportion" of water. See Laws of 1942, in Fundamental Laws of Hawaii 29 (1904).

Subsequently, the aforementioned Kuleana Act provision ensured
Public Hearing

Applications for Water Use Permits
Iao Ground Water Management Area, Maui

The following applications for water use permits to continue uses existing as of July 21, 2003 have received objections and are subject to public hearing. The Commission on Water Resource Management, at its regular meeting on September 22, 2004, approved a hearing now scheduled to begin:

October 28, 2004, 10:00 a.m.
J. Walter Cameron Center
95 Mahalani Street, Wailuku, Hawaii 96793

The hearing will be conducted in two parts: first, applications accepted as complete by the July 21, 2004 one-year filing deadline.

Well Name | Well No. | Applicant | WUPA No. | TMK | Requested amount (mgd)
---|---|---|---|---|---
Wailuku Shaft 33 | 5330-05 | Kehalani | 707 | 3-5-1:1 | 5.771
Mokuhaul Well 1 | 5330-09 | MDWS | 700 | 3-3-2:24 | 1.994
Mokuhaul Well 3 | 5330-11 | MDWS | 701 | 3-3-2:24 | 2.221
Waiehu Heights Well 1 | 5430-01 | MDWS | 697 | 3-3-2:28 | 0.165
Waiehu Heights Well 2 | 5430-02 | MDWS | 698 | 3-3-2:28 | 1.415
Waiehu Well 1 | 5431-02 | MDWS | 695 | 3-3-17:31 | 1.480
Waiehu Well 2 | 5431-03 | MDWS | 696 | 3-3-17:31 | 2.439
Waiehu Well 3 | 5431-04 | MDWS | 703 | 3-3-17:31 | 1.513
Iao Tunnel | 5332-02 | DWS | 669 | 3-3-3:3 | 1.389
Kepaniwai Well | 5332-05 | MDWS | 699 | 3-3-3:5 | 1.042
Iao Tunnel | 5330-02 | HC&S | 691 | 3-4-34:34 | 0.100

Total from all sources | | | | | 19.499

Second, the hearing will entertain applications to continue known existing uses that were filed incomplete by the July 21, 2004 one-year filing deadline, and an application for a new use* that was completed by the July 21, 2004 deadline for existing uses:

Well Name | Well No. | Applicant | WUPA No. | TMK | Requested amount (mgd)
---|---|---|---|---|---
Iao Tunnel (Mauli) | 5332-03 | MDWS | 702 | 3-5-1:1 | 5.771
Waiehu Golf | 5529-02 | MP&R | 709 | 3-8-7:55 | 0.038
Waiehu Golf | 5529-02 | MP&R | 710 | 3-8-7:55 | 0.010
Waiehu Golf | 5530-03 | MP&R | 711 | 3-8-7:55 | 0.010
Waiehu Golf 2 | 5530-04 | MP&R | 714 | 3-2-13:29 | 0.032
Papahaku Park | 5429-02 | MP&R | 712 | 3-2-13:29 | 0.324
Waiehu Golf | 5529-02 | MP&R | 711 | 3-2-13:6 | 0.039
Waiehu Golf | 5530-03 | MP&R | 708 | 3-2-13:29 | 0.324
Waiehu Golf 2 | 5530-04 | MP&R | 714 | 3-2-13:29 | 0.324
Black George Tunnel | 5332-01 | HC&S | 685 | 3-3-3:3 | not identified
Iao Needle Tunnel 1 | 5333-01 | HC&S | 684 | 3-5-3:1 | not identified
Iao Needle Tunnel 2 | 5333-02 | HC&S | 686 | 3-3-3:3 | not identified
Living Waters #1 | 5631-01 | LWLF | 704 | 3-2-13:15 | 0.020

Total from all sources | | | | | >6.890

**Competing applications – do not double count.

Applicants: Maui County Department of Water Supply (MDWS)
Maui Department of Parks & Recreation (MP&R)
Hawaiian Commercial & Sugar (HC&S)
Kehalani Mauka, LLC (Kehalani)
Living Waters Land Foundation (LWLF)

The hearing may be left open to allow for additional information as may be requested by Commissioners. If, during the course of the hearing, a contested case hearing is requested, the requester will be required to complete a written request, identifying HRS §174C-50(b) for existing uses or §174C-49(a) for new uses as the authority under which the action is to be made. The following may be admitted as a party to a contested case hearing: persons within the Iao Water Management Area with a property interest, who reside on the land, or can otherwise demonstrate that they will be so directly and immediately affected by the proposed water uses that their interest is clearly distinguishable from that of the general public; others who can show a substantial interest in the matter and can substantially assist the Commission in its decision making; agencies whose jurisdiction includes the land or water in question.

Commission on Water Resource Management

Dated: October 7, 2004

Publish in: Maui News issue of October 12, 2004
August 25, 2004

Mr. Randy Gentry  
County of Maui  
Department of Parks and Recreation  
700 Hali'a Nakoa Street, Unit 2  
Wailuku, HI 96793

Dear Mr. Gentry:

Supreme Court Directions for Water Use Permit Applications

Thank you for completing your applications to the best of your abilities and the directions provided by staff. We have been advised to alert you to directions of the Supreme Court in adjudicating the Waiahole Contested Case on remand, as they pose additional information requirements for water use permit applications, namely discussion of practicable alternatives and the calculation of per-unit amounts of water ("duties").

As we have received objections to the applications submitted to-date for continuing the existing use of ground water from the loa Aquifer, please be informed that additional information is advised for the hearing on Maui that is being scheduled tentatively for late October.

The Supreme Court's opinion is summarized as follows:

1. Practicable Alternatives

"Under the public trust doctrine and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource" (Waiahole 1, 94 Hawai'i at 160, 9 P.3d at 472). The Water Code requires, inter alia, that the applicant prove that the proposed use of water is a "reasonable-beneficial use" and is consistent with the public interest (HRS § 174C-49(a)(2 & 4). "Reasonable-beneficial use" is defined as "the use of water in such a quantity as is necessary for economic and efficient use (sic) for a purpose and in a manner both reasonable and consistent with state and county plans and the public interest" (HRS § 174C-3, emphasis added.

"Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is ... an essential part of any balancing between competing interests." (Waiahole 1 94 Hawai'i at 161, 9 P.3d at 473, emphasis added)
2. Calculating per-unit amounts of water ("duties")

The Court found that some calculations done for the Waiahole case were not clearly erroneous while others were erroneous. It is typical for planners to project reasonable ballpark numbers to be used by each household, each business, or each acre of crop, based on experience. The Court has opined that such ballpark numbers are inadequate when public resources are being contested, and that more careful, detailed examination of factors must be specified when projecting need. The court made distinctions between type of crop, location, and other factors, and we surmise the same may be applied to different businesses and households.

We urge you to review the Hawaii Supreme Court's Waiahole I and Waiahole II decisions in formulating your response to this request for additional information.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

YVONNE Y. IZU
Deputy Director
Charley, fyi - and I think you have the hard copies already printed for you. Randy, Charley's email above.

"Randy Gentry" <Randy.Gentry@co.mau.hi.us>

08/19/2004 07:13 AM

To <Roy.Hardy@hawaii.gov> cc bcc
Subject Iao Aquifier WUPA

Roy: I do not have Charlie's e-mail address, can you forward this to him? Thank You Randy Gentry

Charlie: I had sent the e-mails below to Roy Hardy to try and figure out what I did wrong and the first e-mail below pretty much sums it up. I had put the wrong numbers for the well at War Memorial Stadium (should be 5329-14) 5329-04 is a wrong number and at the Golf Course I had also given a wrong number it should be 5530-04 (5530-03 is in error and not used by us). Randy Gentry- I will review all of the applications again and then give you a call...Thank you for your Patience....Randy Gentry

Roy: I had put the wrong numbers for the wells and needed to correct the information that I had sent you- The War Memorial Stadium Well is 5329-14 (I had given it the wrong number of 5329-04 when I first sent in the applications) the Waiehu Golf Course is the same way the correct number should be 5530-04 and( 5530-03 was in error). I will try and find out when these wells started pumping but that may take a few days because it has been at least 20 years ago as the Parks Personell that has been here for years has told me. Sorry that I could not get back to you sooner ,my wife has been in hospital since last Thursday and is home now an we are waiting on doctors-I took the days off to be a support to her. I will look into your matters today and keep checking until I come up with the answers. Mahalo...Randy

>>> <Roy.Hardy@hawaii.gov> 8/9/2004 10:28:59 AM >>>

Randy,

Some further follow-up. Please clarify as soon as possible. Thanks

----- Forwarded by Roy Hardy/DLNR/StateHiUS on 08/09/2004 10:25 AM -----

Roy Hardy/DLNR/StateHiUS
no problem. Hope your wife has a quick and full recovery.

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>

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maui parks & rec wupas.doc

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--- Forwarded by Roy Hardy/DLNRIStateHiUS on 08/06/2004 09:07 AM ---

Randy, got them in yesterday but in my intray today! Thanks

--- Forwarded by Roy Hardy/DLNRIStateHiUS on 08/05/2004 03:18 PM ---

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Still haven't received the updated applications. Need to have them soon.
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"Randy Gentry" <Randy.Gentry@co.mau.hi.us>
07/28/2004 01:14 PM

Subject: Re: Maui Parks and Recreation Water Use Permits

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08/05/2004 03:19 PM

To
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cc
Lenore Y Nakama/DLNR/StateHiUS@StateHiUS, Charley F
Ice/DLNR/StateHiUS@StateHiUS
Subject
Fw: Maui Parks and Recreation Water Use Permits

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Roy Hardy/DLNR/StateHiUS
08/03/2004 02:47 PM

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>>> <Roy.Hardy@hawaii.gov> 7/22/2004 11:41:35 AM >>>
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5330-03 Field 63 well owned by Wailuku AG (but attached map shows 5530-03)
5329-02 Alelo Place owned by the county and not in the Iao aquifer system area (but attached map shows 5529-02)

typos?

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Commission on Water Resource Management
808-587-0274
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typos?

Roy Hardy
Commission on Water Resource Management
808-587-0274
PERMITTEE INFORMATION

1. (a) APPLICANT
Firm/Name County of Maui Department of Parks and Recreation
Contact Person Randy Gentry
Address 700 Halfa Nakoa Street Unit 2, Waikuku, Hawaii 96793
Phone (808) 270-5953 Fax (808) 270-7162
E-mail Randy.Gentry@co.mau.hi.us

(b) LANDOWNER OF SOURCE
Firm/Name County of Maui
Contact Person Glenn T. Correa /Director Parks and Recreation
Address 700 Halfa Nakoa Street Unit 2, Waikuku, Hawaii 96793
Phone (808) 270-7626 Fax (808) 270-7634
E-mail Glenn.Correa@co.mau.hi.us

SOURCE INFORMATION

2. WATER MANAGEMENT AREA: lao Aquifer

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: War Memorial Stad Well# 5329-04 CE.
(b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME:

(c) LOCATION: Address 201 Kaniola Avenue Waikuku, Hawaii
Tax Map Key: 3-8-07:55:93:94
(Attach and show source on a USGS map, scale 1"=2000", and a property tax map.

4. SOURCE TYPE (check one): □ Stream □ Basal □ Dike-confined □ Perched □ Caprock
5. METHOD OF TAKING WATER (check one): □ Artesian □ Well & Pump □ Diverted Surface □ Other (explain)

USE INFORMATION

6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps)
(a) □ PUC-Regulated Private System □ Intended Dedication to Dept./Board of Water Supply □ Non-PUC-Regulated Private System
(b) Tax map Key: Please complete table 1 on back of application and shade applicable portion of property tax map.

7. QUANTITY OF WATER REQUESTED: 38,500 gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
□ Flowmeter □ Open-pipe □ Weir □ Orifice □ Other (explain)

9. QUALITY OF WATER REQUESTED:
□ Fresh □ Brackish □ Salt □ Potable □ Non-Potable

10. PROPOSED USE:
□ Municipal (including hotels, stores, etc.) □ Individual Domestic □ Irrigation
□ Industrial □ Military □ Other Explain

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:
Nite time 10:00 P.M. - 3:30 A.M.
(daytime hours of operation: example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:
(a) Can be accommodated with the available water source
(b) Is a reasonable-beneficial use.
(c) Will not interfere with any existing legal use.
(d) Is consistent with the public interest.
(e) Is consistent with state and county general plans and land use designations.
(f) Is consistent with county land use plans and general policies.
(g) Will not interfere with the rights of the Department of Hawaiian Home Lands.

* Section 13-171-2, Hawaii Revised Statutes
"Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

13. REMARKS, EXPLANATIONS: This is an irrigation well that is owned and operated by the County of Maui Department of Parks and Recreation. TMK: 3-8-07:55.93.94 (New TMK Numbering System: 238007550000,930000,940000). Other information is included in application.

NOTE: Signing below indicates that the signatories understand and swear that: 1) the information provided on this application is accurate and true to the best of their knowledge; 2) Item 14 is the responsibility of the applicant prior to Commission approval; If necessary, further information may be be required before the application is considered complete; 4) If a water use permit is granted by the Commission, this permit is subject to prior existing permitted uses, changes in sustainable yields and instream flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) Upon permit approval, a water shortage plan must be submitted by the applicant should the Commission require one.

Applicant (print) Parks and Recreation
Signature ____________________________
Date 7/9/07

Landowner (print) County of Maui
Signature ____________________________
Date 7/20/07

WUAP FORM (4/29/03)
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<tr>
<td><strong>PROJECT NAME &amp; PHASES</strong> (Include address if applicable) <strong>Identify project no. on TMK Map</strong></td>
<td><strong>EXISTING or NEW USE (if existing, fill in date of first use)</strong></td>
<td><strong>POTABLE or NONPOTABLE</strong></td>
<td><strong>TMK</strong></td>
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<td><strong>4-YEAR CUMULATIVE PROJECTED DEMAND</strong></td>
<td><strong>YEAR 1&lt;br&gt;(2004)</strong></td>
<td><strong>YEAR 2&lt;br&gt;(2005)</strong></td>
<td><strong>YEAR 3&lt;br&gt;(2006)</strong></td>
<td><strong>YEAR 4&lt;br&gt;(2007)</strong></td>
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<tr>
<td>1. War Memorial Stadium Pump - 201 Kanaloa Avenue Wailuku, Hawaii 96793</td>
<td>No. 5329-04</td>
<td>Nonpotable 3-8-07:55,93,94</td>
<td>Urban Parks</td>
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**TOTAL GPD** 38,500

(For Oahu only) DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE __________________________ DATE __________

*Instructions for completing Table 1: Individual projects and phases must be listed separately and numbered sequentially on Table 1. Copy Table 1 and attach additional sheets if necessary. Please indicate individual projects and phases on TMK maps by clearly delineating project areas and indicating sequential number within delineated areas to coincide with Table 1. Please attach a separate sheet giving the address and a brief description of each project and phase listed above. In addition, if the proposed use is existing, please provide the WUP No. or indicate when the existing use was initiated. Also, the Department of Planning and Permitting (DPP) must sign before application is acceptably complete. Please consult with DPP at 650 South King Street, 7th Floor, Honolulu, HI 96813.*
COUNTY OF MAUI
DEPARTMENT OF PARKS
AND RECREATION
Irrigation Wells 5329-04 and 5329-05
<table>
<thead>
<tr>
<th>Well No.</th>
<th>Well Name</th>
<th>Aquifer Code</th>
<th>Year Drilled</th>
<th>Latitude</th>
<th>Longitude</th>
<th>Type</th>
<th>Total Depth ft.</th>
<th>Bottom Case Dia in.</th>
<th>Bottom Solid Casing</th>
<th>Bottom Perf Casing</th>
<th>Bottom Head</th>
<th>Static Head</th>
<th>C- Temp</th>
<th>Specific Capacity</th>
<th>Installed Capacity Use</th>
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<tr>
<td>5329-04</td>
<td>Maui Stadium Well</td>
<td>60102</td>
<td>1971</td>
<td>205333</td>
<td>1562933</td>
<td>ROT</td>
<td>8</td>
<td>110</td>
<td>80</td>
<td>-30</td>
<td>0.360</td>
<td></td>
<td>UNU</td>
<td>0.36 Mgd</td>
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</table>

Total Number of Wells in Aquifer: [redacted]
Total Island Installed Capacity: 0.36 Mgd
Total Number of Wells on Island: [redacted]

Handwritten note: for Mel-Lima 10.30.89
To abc@aloha.net, u.guava@verizon.net, 
randy.gentry@co.mau.hi.us, ellen.kraftsow@co.mau.hi.us, 
jane.lovell@co.mau.hi.us, lhmiike@hawai.rr.com, 
cc Roy Hardy/DLNR/StateHiUS@StateHiUS, Susan G 
Subia/DLNR/StateHiUS@StateHiUS 
bcc

Subject follow up meeting

We have set July 11, 2005, a Monday, from 1:00 - 5:00 pm, for our meeting at Cameron Center. All who responded indicated that was an agreeable date. We hope it works for the others. We may not need that much time, but hope to sort things out comprehensively within that time. This will be your only notice. We will still conduct another full session of the public hearing, yet to be determined, which we anticipate would be the last.
Charley, fyi - and I think you have the hard copies already printed for you. Randy, Charley's email above.  
"Randy Gentry" <Randy.Gentry@co.mauLhLus>

Roy: I do not have Charlie's e-mail address, can you forward this to him? Thank You  Randy Gentry

Charlie: I had sent the e-mails below to Roy Hardy to try and figure out what I did wrong and the first e-mail below pretty much sums it up. I had put the wrong numbers for the well at War Memorial Stadium (should be 5329-14) 5329-04 is a wrong number and at the Golf Course I had also given a wrong number it should be 5530-04 (5530-03 is in error and not used by us.  Randy Gentry- I will review all of the applications again and then give you a call...Thank you for your Patience....Randy Gentry

Roy: I had put the wrong numbers for the wells and needed to correct the information that I had sent you- The War Memorial Stadium Well is 5329-14 (I had given it the wrong number of 5329-04 when I first sent in the applications) the Waiehu Golf Course is the same way the correct number should be 5530-04 and( 5530-03 was in error). I will try and find out when these wells started pumping but that may take a few days because it has been at least 20 years ago as the Parks Personell that has been here for years has told me. Sorry that I could not get back to you sooner ,my wife has been in hospital since last Thursday and is home now an we are waiting on doctors-I took the days off to be a support to her. I will look into your matters today and keep checking until I come up with the answers. Mahalo...Randy

>>> <Roy.Hardy@hawaii.gov> 8/9/2004 10:28:59 AM >>>

Randy,

Some further follow-up. Please clarify as soon as possible. Thanks

----- Forwarded by Roy Hardy/DLNR/StateHiUS on 08/09/2004 10:25 AM
no problem. Hope your wife has a quick and full recovery.

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>

Roy: I had put the wrong numbers for the wells and needed to correct the information that I had sent you- The War Memorial Stadium Well is 5329-14 (I had given it the wrong number of 5329-04 when I first sent in the applications) the Waiehu Golf Course is the same way the correct number should be 5530-04 and (5530-03 was in error). I will try and find out when these wells started pumping but that may take a few days because it has been at least 20 years ago as the Parks Personell that has been here for years has told me. Sorry that I could not get back to you sooner, my wife has been in hospital since last Thursday and is home now an we are waiting on doctors-I took the days off to be a support to her. I will look into your matters today and keep checking until I come up with the answers. Mahalo...Randy

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----- Forwarded by Roy Hardy/DLNR/StateHiUS on 08/09/2004 10:25 AM
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Randy, in reviewing for completeness:

1) are the new applications backup wells? Specifically, is Waiehu
Randy,

Some further follow-up. Please clarify as soon as possible. Thanks

maui parks & rec wupas.doc

----- Forwarded by Roy Hardy/DLNRIStateHIUS on 08/09/2004 10:25 AM ----­

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1) are the new applications backup wells? Specifically, is Waiehu golf course 5530-04 a backup to 5530-03 (requested amount is the same for both)? Is War Memorial Stadium 5329-14 a backup 5329-04 (requested amount is the same for both)? Also, do you know the date when the wells started pumping these amounts?

----- Forwarded by Roy Hardy/DLNRIStateHIUS on 08/06/2004 09:07 AM ----­

Randy, got them in yesterday but in my intray today! Thanks

----- Forwarded by Roy Hardy/DLNRIStateHIUS on 08/05/2004 03:18 PM ----­

Randy,

Still haven’t received the updated applications. Need to have them soon.

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>
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>>> <Roy.Hardy@hawaii.gov> 7/22/2004 11:41:35 AM >>>
Following up on my phone message to you, we have received your water use permit applications (WUPA) and are reviewing them for completeness. However, there were a couple wells we expected to receive a WUPA for, but did not. These are:

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pumping these amounts?
-----  Forwarded by Roy Hardy/DLNR/StateHiUS on 08/06/2004 09:07 AM
-----

Roy Hardy/DLNR/StateHiUS
08/05/2004 03:19 PM

To
Randy.Gentry@co.maui.hi.us
cc
Lenore Y Nakama/DLNR/StateHiUS@StateHiUS, Charley F
Ice/DLNR/StateHiUS@StateHiUS
Subject
Fw: Maui Parks and Recreation Water Use Permits

Randy, got them in yesterday but in my intray today! Thanks
-----  Forwarded by Roy Hardy/DLNR/StateHiUS on 08/05/2004 03:18 PM
-----

Roy Hardy/DLNR/StateHiUS
08/03/2004 02:47 PM

To
"Randy Gentry" <Randy.Gentry@co.maui.hi.us>
cc
Lenore Y Nakama/DLNR/StateHiUS@StateHiUS
Subject
Re: Maui Parks and Recreation Water Use Permits

Randy,

Still haven't received the updated applications. Need to have them
soon.

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>
07/28/2004 01:14 PM

To
<Roy.Hardy@hawaii.gov>
cc
Subject
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5330-03 Field 63 well owned by Wailuku AG (but attached map shows 5530-03)
5329-02 Alelo Place owned by the county and not in the Iao aquifer system area (but attached map shows 5529-02)

typos?

Roy Hardy
Commission on Water Resource Management
808-587-0274
ok. That 9/17 letter from Peter Young is from us. It was a notice about filing for these water use permits for the wells we have registered to your dept, so it should clear matters up. Don't need to return Lenore Nakama's phone call on this, this email string will suffice. Thanks and look forward to the updated applications.

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>

"Randy Gentry" <Randy.Gentry@co.maui.hi.us>

To "Randy Gentry" <Randy.Gentry@co.maui.hi.us>

To <Roy.Hardy@hawaii.gov>

cc

Subject Re: Maui Parks and Recreation Water Use Permits

Subject Re: Maui Parks and Recreation Water Use Permits

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808-587-0274
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typos?

Roy Hardy
Commission on Water Resource Management
808-587-0274
Charley:

As I mentioned the second well which is noted as a "new well" at the golf course is in reality a set of two new frequency generated booster pumps (written testimony will have details, pictures and notes on operating software). This would be well #5530-04. While doing the written part of the testimony I noticed that we also have another "new well" that does not exist and this would most likely be my paperwork foul-up. This well would be located at the War Memorial Complex. I am not sure which number would be the non existant one- The Baldwin High School well is situated on the War Memorial Complex Grounds and is near Kaahamanu Avenue at the front of the complex by our offices, and is number 5329-05. The only other well at this complex is located in the Maintenance Area at the rear of the physical football stadium. I am not sure which number has been assigned to it through the years but it looks like it is well # 5329-04. (In the New use applications we show Maui Stadium Well as 5329-14 which would be the same well. If you have a idea on this I could really use your help. I am still having a problem with the well at Maui Community College and if you have the paper work that will help me to transfer the well that is on their property to the college I would appreciate if you could send it as an attachment to an e-mail and I will take care of it right away. I know that we have a well at Maui Central Park (Keopuolani Park) but I do not know what number it is and it is still inoperative. Pacific Excavation and water wells is at the present time trying to get it in operation and also 2 other wells at Maui Central Park that are on the Kahului Aquifer. Once these wells are in operation they will make a state of the art computer controlled frequency pump, radio frequency weather station to controller interrupt water conservation system. (explanation and pictures as well as specifications will be in written testimony.)

Now that I have given you your headache for the day , I can tell you that all of our pumpage rates have been brought down to about 70% of what they have been in the past by new equipment and software as well as plain old conservation.....Randy

You are quite correct in that thought Charlie. I am working on the written presentation at this time> The wells upgrade at the Waiehu Golf Course was for a water conserving type of booster pump and not for a new well. We are working on the new pumpage figure at this time as well as a written presentation as to how the system operates. At this time it is turning out that the new booster pumps along with the Maxi 5 software and the RainBird ESP_MC controller are realizing us a savings of about 125,000 gallons of water per day that the system is run. This will be documented along with conservation methods for other caprock wells in the Iao Aquifer System.....Randy Gentry
TO: Randy Gentry  
FROM: Charley Ice  

Hope this helps ID wells. Technically both 5329-15 and 5329-20 need wupa. Transfer of well ownership can be notifed by simple letter, jointly signed, in addition to any deed you may require.

Return Fax: 587-0219  
Return Post: P.O.Box 621, Honolulu 96809
May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director  
Commission on Water Resource Management

SUBJECT: Request for Comments  
Water Use Permit Application  
Ian Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), HRS, transmitted for your review and comment are copies of water use permit applications:

**Existing Use Applications**
- War Memorial Stadium Well (Well No. 5329-04), WUPA No. 709
- Baldwin High School Well (Well No. 5329-05), WUPA No. 710
- Papohaku Park Well (Well No. 5429-02), WUPA No. 712
- Waiehu Golf Course Well (Well No. 5529-02), WUPA No. 711

**New Use Applications**
- Maui Stadium Well (Well No. 5329-14), WUPA No. 713
- Waiehu Golf Course Well 2 (Well No. 5530-04), WUPA No. 714

The latter applications are being treated as new uses because they were filed after the statutory deadline for existing use applications.

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:  
( ) We have no objections or comments  
( ) Objections attached  
( ) Only comments attached

Contact person: Kapua Sproat  
Phone: 599-2436, ext. 16

Signed: [Signature]  
Phone: 599-2436, ext. 16

Date: June 20, 2005
June 20, 2005

By U.S. Mail & Facsimile Transmittal
Fax: (808) 587-0219

Peter T. Young, Chairperson
Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to the County of Maui’s Water Use Permit Applications for Well No. 5329-04, Well No. 5329-05, Well No. 5429-02, Well No. 5529-02, Well No. 5329-14, and Well No. 5530-04; ‘Iao Ground Water Management Area, Maui

Dear Chair Young and Acting Deputy Director Nakano:

On behalf of Hui o Nā Wai ‘Ehā and Maui Meadows Homeowners Association, Earthjustice submits the following comments and objections regarding Maui County Department of Parks and Recreation’s (“MDPR’s”) water use permit application (“WUPA”) numbers 709-714 for the War Memorial Stadium Well (Well No. 5329-04), Baldwin High School Well (Well No. 5329-05), Papohaku Park Well (Well No. 5429-02), Waiehu Golf Course Well (Well No. 5529-02), Maui Stadium Well (Well No. 5329-14), and Waiehu Golf Course Well 2 (Well No. 5530-04).

1 Hui o Nā Wai ‘Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai‘i’s natural and cultural resources and the practices that depend on them. The Hui strives to protect and restore streams, oceans, estuaries, native flora and fauna, and the activities that rely on these resources, especially the perpetuation of traditional and customary Native Hawaiian practices. Hui members live, work, and play in the ‘Iao ground water management area. They rely on and routinely use ground water from the ‘Iao, Waiehu, and Waikapū streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

2 Maui Meadows Homeowners Association is an association of homeowners from the Maui Meadows subdivision in Kihei. The association’s filing of a July 2001 petition resulted in the designation of the ‘Iao aquifer in July of 2003. Maui Meadows has been active in water and land use issues on Maui for many years and its members rely on the ‘Iao aquifer to satisfy their water needs. Additionally, the association’s members have been working to ensure appropriate management of the ground water resources in the ‘Iao and Waiehu aquifers.
Earthjustice's Objection to the County of Maui Department of Parks and Recreation’s Water Use Permit Applications
June 20, 2005
Page 2 of 5

5530-04). These applications seek permits from the `Iao Ground Water Management Area to irrigate various MDPR facilities. For all of the reasons detailed herein, these applications fail to establish that the proposed new and existing uses comply with the requirements of the law. The Hui and Maui Meadows therefore urge this Commission to require MDPR to complete its applications before holding any meetings or public hearings regarding these WUPAs. If the missing information is provided in a timely fashion, we remain hopeful that the communities’ concerns and objections can be resolved via the mediated discussions between the parties, alleviating any need for a contested case hearing.

In their current state, MDPR’s permit applications fail to provide the factual and other basis necessary for this Commission to complete the analysis and make the findings required by the State Constitution and Water Code, and ratified by the Hawai‘i Supreme Court. The applications are insufficient for the following reasons:

1. MDPR failed to establish that the water source would accommodate its proposed uses, pursuant to Haw. Rev. Stat. § 174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate its proposed use. Haw. Rev. Stat. § 174C-49(a)(1). MDPR’s applications neglect even to mention the condition of `Iao aquifer or assess how its proposed uses will be supported, if at all. For years now, Commission staff and United States Geological Survey have warned that water is being extracted from the `Iao aquifer at rates that jeopardize the quality and viability of this important resource. Despite indications that the aquifer is threatened by existing and proposed withdrawals of water, the application lacks any analysis regarding whether the water source can accommodate MDPR’s total requested allocation of 455,750 gallons per day. See generally State of Hawai‘i Commission on Water Resource Management, `Iao and Waihe‘e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) (detailing the condition of the `Iao aquifer). MDPR must provide the information necessary to satisfy this criterion.

2. MDPR failed to establish that its proposed uses are consistent with the public interest and will not interfere with existing legal uses of water, pursuant to Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).

The Hawai‘i Supreme Court affirmed that this Commission is “duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes and weigh competing public and private water uses on a case-by-case basis.” In re Wai‘aleole Ditch Combined Contested Case Hearing 105 Haw. at 1, 16, 93 P.3d at 643, 658 (2004) (quotations omitted). Moreover, the Code mandates that an applicant establish that its proposed use “will not interfere with any existing legal use of water” and “is consistent with the public interest.” Haw. Rev. Stat. §§ 174C-49(a)(3)-(4).
When allocating water, this Commission must consider the impact of all proposed uses on: (1) the maintenance of waters in their natural state, (2) resource protection, (3) water for domestic purposes, and (4) the protection of traditional and customary Native Hawaiian rights and practices. In re Wai‘ola o Moloka‘i, Inc. ("Wai‘ola"), 103 Haw. 401, 429 (2004) (citing In re Waiahole Ditch Combined Contested Case Hearing ("Waiahole I"), 94 Haw. 97, 136-138, 142, 9 P.3d 409, 448-450, 454 (2000)).

Analyzing potential impacts on each of these public trust uses is especially important in ‘Iao, where the condition of the aquifer has long been in question and studies are currently underway to better quantify the aquifer’s true sustainable yield. MDPR’s applications fail even to identify, let alone analyze, any public trust uses or any existing legal uses of water. Indeed, this Commission cannot and should not issue permits to MDPR absent additional information demonstrating that MDPR’s proposed uses are consistent with known existing and yet to be identified uses.

3. MDPR failed to establish that its proposed uses are “reasonable-beneficial,” pursuant to Haw. Rev. Stat. § 174C-49(a)(2).

a. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by detailing actual water needs.

The law requires that permit applicants such as MDPR demonstrate, at a minimum, that their requested allocations reflect actual need. See Waiahole I, 94 Haw. at 162, 9 P.3d at 474 (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.”); Haw. Rev. Stat. § 174C-50(f) (“A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use.”). MDPR neglected to provide any basis for its requested allocations, and must provide this information before the Commission takes any further action on its applications.

b. MDPR failed to demonstrate that its proposed uses are reasonable and beneficial by analyzing alternative sources of water.

Assuming, arguendo, that 455,750 gallons per day reflects MDPR’s actual water needs, the applications fail to examine alternative sources of water. This analysis is necessary to fulfill the Commission’s duty as trustee of Hawai‘i’s water resources and MDPR’s burden of proof.

Specifically, the public trust compels the state duty to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement

3 Maui Meadows and the Hui acknowledge that MDPR’s burden regarding this criterion may be easier to satisfy for MDPR’s caprock sources. Still, some effort must be made to fulfill the necessary requirements.
reasonable measures to mitigate this impact, including the use of alternative sources.

Waiāhole I, 94 Haw. at 143, 9 P.3d at 455. This analysis is essential for this Commission and the community at large to evaluate whether an applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Hawai‘i Supreme Court ruled:

It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit.

Waiāhole I, 94 Haw. at 162 n.65, 9 P.3d at 474 n.65. Accordingly, alternative sources and other physical solutions such as the potential modification of project operations must be set forth by the applicant and examined by this Commission. The Code, the Commission’s prior decisions and orders, and the Hawai‘i Water Plan contain numerous examples of such alternatives. Because MDPR’s applications fail to include the required alternatives analysis, Commission approval of these WUPAs in their present state would be wrong as a matter of law.


The Code also requires that MDPR establish that its proposed uses are consistent with state and county general plans, land use designations, plans, and policies, and will not interfere with the rights of the Department of Hawaiian Home Lands. Haw. Rev. Stat. § 174C-49(a)(5)-(7). MDPR’s applications fail even to address these issues, let alone establish that its proposed uses are consistent with them. Given the high level of scrutiny required by the state constitution, Water Code, and public trust principles, MDPR must affirmatively demonstrate compliance with these necessary requirements.

5. Conclusion.

In conclusion, MDPR’s applications fail to meet the minimum requirements necessary to protect the ‘Īao aquifer, to safeguard the public interest, and to facilitate meaningful participation by interested parties and reasoned decisionmaking by this Commission. Because MDPR failed to satisfy each of the conditions for a water use permit, Maui Meadows and Hui o Nā Wai ‘Ehā respectfully urge this Commission to deny the applications in their present state. In the alternative, we ask this Commission to order MDPR to immediately provide information detailed in this objection, so that the community and this Commission can review and analyze this data before any mediated discussion by the parties or the continuation of any public hearing. At the latest, we request that all additional information be provided at least one week prior to any scheduled meeting of the parties. We finally request that any meetings or hearings be held on Maui to facilitate participation by our clients and other affected parties.
Please do not hesitate to contact us for further information.

Me ke aloha,

D. Kapua Sprost

cc: Randy Gentry, Maui Parks and Recreation (via First Class U.S. Mail)  
John V. Duey, Hui o Nā Wai ʻEhā (via email)  
Jim Williamson, Maui Meadows Homeowners Association (via email)  
Dr. Jonathan Likeke Scheuer, OHA (via email)  
Deputy Corp. Counsel Jane Lovell, Maui County Dept. of Water Supply (via email)  
George Tengan, Maui County DWS (via email)  
Ellen Kraftsow, Maui County DWS (via email)  
Linnel Nishioka, HC&S and Kehalani Mauka (via email)  
Garrett Hew, HC&S (via email)  
Avery B. Chumbley, Wailuku Agribusiness Co., Inc. (via email)  
Clayton Suzuki, Wailuku Agribusiness Co., Inc. (via email)
June 20, 2005

Peter Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Water Use Permit Applications in the 'Iao Ground Water Management Area, Maui.

Dear Mr. Young and Commissioners,

The Office of Hawaiian Affairs (OHA) appreciates the opportunity to comment on these permits. OHA objects to these applications because they were accepted by the Commission despite being incomplete and for other reasons specified herein.

Before offering our comments, we would like to note a few relevant points:

1. We are here offering essentially the same comments and objections we have for all of the other applications submitted and circulated for the 'Iao Ground Water Management Area.
2. It is our understanding that our objection means that these permits will be considered in the ongoing proceedings on these other permits before the Commission, which is acceptable to OHA.
3. As our objections are the same and the hearings are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.
4. We note that last two of these applications listed below have been deemed by the Commission to be for "new uses" under the Code, and as such may only be considered after allocations have been made for the permit applications for existing uses.
5. OHA has been working with Maui County officials to resolve our earlier objections and we believe that the County is making good faith efforts to address our concerns. Because

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1 Applications by County of Maui, Department of Parks and Recreation, for:
   War Memorial Stadium Well (Well No. 5329-04, WUPA No. 709, TMKs 3-8-07:55, 93, and 94)
   Baldwin High School Well (Well No. 5329-05, WUPA No. 710, TMKs 3-8-07:55, 93, and 94)
   Pāpōhaku Park Well (Well No. 5329-04, WUPA No. 712, TMK 3-4-30:Portion 1)
   Waiehu Golf Course Well (Well No. 5529-02, WUPA No. 711, TMK 3-2-13:6, 19, 28, 29)
   War Memorial Stadium Well (Well No. 5329-14, WUPA No. 713, TMKs 3-8-07:55, 93, and 94)
   Waiehu Golf Course Well (Well No. 5530-04, WUPA No. 714, TMK 3-2-13:6, 19, 28, 29)
of this progress, we have reason to believe that this applicant, a division of the county government, has more relevant information available than has been submitted in these applications. However, because that information, especially specific to the source they use, has not been provided, we must object.

6. Finally, we will note that because these permits are for withdrawals from the caprock aquifer, it may be easier for the applicant in this instance to meet their constitutional and statutory burdens that we have outlined in this and previous letters.

**OHA’s interests in these matters**

As you are all well aware, the Office of Hawaiian Affairs was established at the same time and by the same body as the Water Commission, at and by the 1978 Constitutional Convention. Not only do the two organizations share the same origin, but many of our concerns overlap. The Commission is directed in its enabling statute that it “Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purposes of utilizing and conserving the waters of the State...” (HRS §174C-5(6)). Importantly, the Water Code also strongly states that any provision of the Code or its implementation shall not amend, modify, diminish, extinguish, abridge, or deny Native Hawaiian Water Rights (HRS §174C-101).

Concurrently, in OHA’s enabling statute it is directed that “It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs” (HRS §10-1(b)). Moreover, in order to achieve our primary purposes of the betterment of conditions of native Hawaiians and Hawaiians (HRS §10-3(1) & (2)), OHA was also created for “Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians (HRS §10-3(4)).

Water, both ground and surface, has many historic, legal, cultural, economic, and other important values to native Hawaiians and Hawaiians, and as such both to OHA and the future Hawaiian Nation. OHA’s interest in water is both general across the islands and specific to this area and island. It is in light of the interests OHA has in water, and existing legal mandates outlined above, that OHA objects to these WUPA.

**OHA’s primary objection**

OHA has one central objection to these WUPAs as filed by the applicant and accepted by the commission. The applicant has utterly failed in their applications to establish that the proposed use of water meets the seven conditions for water use in a designated ground water management area. In each application, the applicant only provides two sentences that vaguely address these issues, under application item 13.

This failure raises issues for OHA that are among the bases for our objection. First, OHA is concerned that the Commission has even accepted the application as complete. As the Commission’s own diagram entitled “WATER USE PERMIT PROCESS” relates, acceptance of an application (and the consequent beginning of the time limits for action) should only occur when the above referenced requirements are addressed.
Secondly, the lack of information makes it difficult and burdensome for OHA to comment on whether the use will impact on protected Native Hawaiian Water Rights. This is a problem because the Code, the WUPA form, and the Hawaii Supreme Court make it clear to the Commission (Waiahole 94 Haw. 97, 161) that “Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.” The applicant bears the burden of showing these conditions are met; this burden does not lie with the Commission or with any party objecting to the issuance of the permit. OHA notes that the absence of any meaningful information will make evaluation of the permit by the Commission also difficult and burdensome.

Mahalo for your attention to these matters. We acknowledge the hard work that the Commission and the County have been undertaking for the 'Iao Aquifer, and we look forward to working together to protect these resources. If you have further questions, please contact Dr. Jonathan Likeke Scheuer at (808) 594-1946 or email him at jonathans@oha.org.

Sincerely,

Clyde W. Nāmu'o
Administrator

cc: Randy Gentry, Maui Parks and Recreation (via First Class U.S. Mail)
   George Tengan, Ellen Kraftsow, and Jane Lovell, Maui County (via email)
   John V. Duey, Hui o Nā Wai ʻEhā (via email)
   Jim Williamson, Maui Meadows Homeowners Association (via email)
   Kapua Sproat, Earthjustice (via email)
   Linnel Nishioka, HC&S and Kehalani Mauka (via email)
   Avery B. Chumbley and Clayton Suzuki, Wailuku Agribusiness (via email)
   Garrett Hew, HC&S (via email)
November 21, 1968

Wilson, Okamoto & Associates
1150 S. King St.
Honolulu, Hawaii

Attn: Mr. Wallace Miyahira

Dear Mr. Miyahira:

In regard to the proposed construction at the Memorial Gymnasium grounds, Wailuku, we are well equipped to drill the required water well and furnish a Berkeley turbine of the capacity and pressures needed.

As you may already know, there are two wells and pumps nearby. The one for the Memorial Gymnasium is approximately 110 feet deep and 72 feet to water. There is a 30 H.P. Layne turbine in this well, which has given considerable trouble. Nearby is the Baldwin High School well on about a 30 ft. higher level with a 30 H.P. Berkeley turbine installed in it. This is an 8 stage 6K2AH model, 5-3/8" O.D. bowls and 4" X 1-1/2" X 1" riser column. This unit pumps 300 gal. per minute at 90 lbs. pressure. The setting is 125 ft. Depth of well 138 ft., static water level 105 ft. The inside diameter of both these wells is six inches.

We have installed a good number of Berkeley turbines on Maui and they have given excellent service. Their construction is simple but well-made and any repairs are readily available as they are made at Berkeley, California. I would recommend a Berkeley Unit be installed as the County will then have more pumping equipment, which is sold and serviced on Maui.

If I can be of any further service in regard to water wells and pumping equipment for this project, please let me know.

Very truly yours,

Bev C. Sarasin

BCS/ias
October 24, 1967

Mr. Shizuo Inouye  
Maui Dept. of Parks, Playgrounds and Recreation  
1500 Kaahumanu Avenue  
Wailuku, Maui 96793

Dear Poisin:

Attached are the chemical analyses of the water from the Waiehu Golf Course and Maui War Memorial Gym wells. The delay in getting these reports to you is because the Health Department inadvertently sent them to the Board of Water Supply.

The results appear to be as expected and you will note that no significant increase in chlorides occurred in pumping the Golf Course well for 24 hours.

Thanks for your cooperation in obtaining these chemical data.

Very truly yours,

Daniel Lum
Geologist

dh
Enc.
Dear,

We're eager to

message you

Transmit on.

Take a "Waichu

Get... much

50% off, and more

Call for more information and Gym

Best,

[Signature]

[Signature]
To: Supervisor, Sanitary Engineering Section (Through Official Channels)
From: Public Health Chemist, Laboratories Branch
Subject: WATER, CHEMICAL ANALYSIS: Maui War Memorial Gym, Maui, 9/19/67

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FT:jsy
cc: San. Eng. Sec. (3)
Asst. Ch., Lab. Br.
Mau (2)