| | | BAUER, G. | | NAKAMA, L. | | Signature | Review & Comment |
| | | CHING, F. | | NAKANO, D. | | Information | Take Action |
| | | DANBARA, S. | | OHYE, M. | | | Type Draft |
| | | FUJII, N. | | SAKODA, E. | | | Type Final |
| | | GOODING, K. | | SUBIA, S. | | | File |
| | | HARDY, R. | | SWANSON, S. | | | Xerox ___ copies |
| | | HIGA, D. | | UYENO, D. | | | |
| | | ICE, C. | | YODA, K. | | | |
| | | IMATA, R. | | YOSHINAGA, M. | | | |
July 8, 2005

Peter T. Young, Chairperson
Dean Nakano, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Objection to application for Water Use Permit for Maui Department of Water Supply for the Wailuku Shaft # 33 (Well No. 5330-05, source TMK 3-5-001:017)

Dear Chairperson Young and Deputy Director Nakano:

This is in response to the Office of Hawaiian Affairs objection of June 29, 2005 to the above-mentioned Water Use Permit Application - which was received in hard copy by our Department on July 5, 2005. We request that we be allowed to supplement our response within ten working days of receipt. We will make every effort to finalize our response by July 19, 2005. We respond to the stated objections in the order in which they were posed.

1. We are here offering essentially the same comments and objections we have for all the other applications submitted and circulated for the "Lao Ground Water Management Area.

2. As our objections are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.

The Office of Hawaiian Affairs notes that they are offering and including by reference essentially the same comments as those offered on other applications submitted and circulated for water use in the Lao aquifer. We hereby offer and include by reference our responses to same.

3. We also note that the County has publicly announced that they plan to abandon Shaft 33 ("Key Central Maui Water Source Closing", June 5, 2005 Maui News) Because the permitting process for this aquifer is already highly complex, we request the Commission to clarify with the Applicant what their plans are for this well.

The Office of Hawaiian Affairs quotes a June 5, 2005 article from the Maui News indicating that the County has publicly announced that they plan to abandon Shaft 33. While the County does have plans to improve distribution of withdrawals currently taken from this well, the article seems to have given some people the erroneous impression that the well will be abandoned absent a replacement. The Wailuku Shaft, aka Shaft 33, is our largest and most productive source, with a moving average withdrawal as of June 30, 2005 of 4.84 MGD, and which was noted as 5.792 MGD at the time of existing use permit application. The Department has plans to distribute this withdrawal among two or three new wells, and will only abandon the Shaft once such distribution is accomplished through drilling and installation of the necessary wells. Two of the wells planned for this purpose have been explicitly identified and capital projects have started: the Lao Tank Site Well and the Waikapu Well. A third well
or pair of wells is anticipated between the latter two, and site selection and plans for this last are not yet firm. Pumpage on Wailuku Shaft would be gradually diminished until all three (or four) wells are in place and functioning satisfactorily. In the mean time, the source is too important to abandon until this can be accomplished.

4. 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 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.

We appreciate OHA's acknowledgment of our good faith efforts. The Department has done its best to provide and supply all information that seems relevant. As we are in the midst of an in-depth planning process for preparation of our Water Use & Development Plan, occasionally additional information may become available during the process which was not available at the time of submittal. However, we have in no case willfully withheld relevant information.

5. OHA's Interests in These Matters
The Department has not questioned OHA's standing in these matters, and welcomes constructive involvement and coordination, particularly in terms of guidance regarding traditional and cultural uses and rights.

6. OHA's Primary Objection
OHA has one central objection to this WUDP as filed by the applicant and accepted by the commission. The applicant has failed in their application to establish that the proposed use of water meets the seven conditions for water use in a designated ground water management area.

The seven conditions listed in State Water Code §174C-49 Conditions for a Permit are delineated and addressed below. However, we note that these have been addressed as well both in our application and in our letter of Sept 17, 2004, attached and incorporated.

(1) Proposed use can be accommodated with the available water source
The requested use permits are based on existing uses as of the date of designation, and are well within the Commission's established sustainable yield. The available water source was already accommodating these uses, although we do acknowledge concern regarding rising chlorides. The Department's efforts to further distribute withdrawals, described previously herein, are meant to improve the impact of such withdrawals on the aquifer. We refer also to our response to this criteria on pages 4 and 5 of our Sept 17, 2004 letter, attached.

(2) Proposed use is a reasonable-beneficial use as defined in section 174C-3
"Reasonable-beneficial use" is defined in § 174C3 of the Water Code as "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 both reasonable and consistent with the state and county land use plans and the public interest." Hawaii law, as well as the law in other jurisdictions, has consistently placed the highest priority on domestic use, which DWS serves in the Central Maui area from the lao aquifer. Water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waiahole I"), 94 Hawa. 97, 137, citing, inter alia, Restatement (Second)

CENTRAL MAUI DEMAND BY CUSTOMER CLASS - WUDP PROJECTION 22MH

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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<tr>
<td>COMM</td>
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<td>2.611</td>
<td>2.864</td>
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<td>1.741</td>
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<td>0.159</td>
<td>0.173</td>
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<td>0.091</td>
<td>0.103</td>
<td>0.126</td>
<td>0.130</td>
<td>0.172</td>
<td>0.203</td>
<td>0.225</td>
<td>0.243</td>
</tr>
</tbody>
</table>

As shown on the table above, residential use constitutes the lion's share of current and projected metered use.

Another element of reasonable and beneficial is that water not be wasted. The following tables are consultant evaluation of unaccounted-for water in recent years. These have not yet been updated to reflect 2005 pumpage, however the trend does indicate active improvement in water conservation. National average unaccounted-for water tends to range from 10% to 15%.

Further description of our conservation and resource protective efforts was provided in our letters of Sept 17, 2004 and April 12, 2005. These letters are attached and incorporated by reference. We also note that a broad list of both supply side and demand side options is under consideration in the ongoing Water Use & Development Plan process. A preliminary list of such options from the fourth meeting of the Water Advisory Committees of the Central Maui and Upcountry districts is attached.
(3) Proposed use will not interfere with any existing legal use of water
As described in our letter of September 17, 2004 attached, DWS is by far the major user of water from the lao aquifer. DWS uses rank high among public trust concerns. DWS systems do serve Hawaiian Homelands projects, as well as hospitals, schools and homes. Nor does the subject existing use water permit application for Wailuku Shaft seem to interfere in any way with traditional or customary uses.

(4) Proposed use is consistent with the public interest
As stated above, water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waiahole") 94 Hawai. 97, 137, citing, inter alia, Restatement (Second) of Torts § 850A cmt. c (1970); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-198 (1973); Carter v Territory, 24 Haw. 47, 66 (1917). DWS is by far the major user of water from the lao aquifer. DWS uses rank high among public trust concerns. DWS systems do serve Hawaiian Homelands projects, as well as hospitals, schools and homes. Nor does the subject existing use water permit application for Wailuku Shaft seem to interfere in any way with traditional or customary uses.

(5) Proposed use is consistent with state and county general plans and land use designations

(6) Proposed use is consistent with county land use plans and policies
OHA seems to acknowledge in its earlier letter that the County has established in its application that the proposed use is consistent with State and County general plans, land use plans, designations and policies. However we reiterate here that the proposal is to permit existing use of the aquifer which was developed in order to serve existing demand as built in accordance with State and County plans, approvals, designations and policies.

(7) Proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in section 221 of the Hawaiian Homes Commission Act.
The proposed use will not interfere with the rights of the Department of Hawaiian Homelands. There are no DHHL wells withdrawing water from the lao aquifer area. However DHHL does have projects served by the system in question. Removal of such a major source as Wailuku Shaft as a source could adversely impact other areas of the system, potentially including the system areas serving Hawaiian Homelands.

In terms of traditional and customary rights, while the subject permit does not seem likely to have any impact on surface water, determination of such impacts requires scientific study of whether pumpage from particular wells impacts flow in particular streams, and if so, to what extent. DWS anticipates that it will be contributing funding to such studies in FY 2007, and that the County will do so in FY 2006. DWS concurs that an inventory and assessment of traditional and customary Native Hawaiian rights dependent on surface water, including kalo cultivation and traditional use of springs would be useful, and is undertaking to have a simple assessment performed. However, DWS does not have the level of expertise in these areas that OHA itself has, and would appreciate guidance and information along these lines. Finally we note that CWRM has not designated the lao as a surface water management area. Many surface water issues, have been raised in the Petition to Amend Interim Instream Flow Standards for Waie' e, North & South Waiehu, lao, and Waikapu Streams and Their Tributaries recently filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc., and will no doubt be...
addressed in that proceeding.

7. OHA is concerned that the Commission accepted the application as complete DWS made a good faith effort to provide all the information requested in the application form, as well as to address the seven criteria specified in the State Water Code with its application. We believe that the application is complete.

8. Lack of information makes it difficult and burdensome for OHA to comment on whether the use will impact on protected Native Hawaiian Water Rights. DWS has undertaken to issue a contract for review of kuleana parcels documents and traditional uses. The results of such studies will be provided to CWRM and other interested parties upon completion. We are not aware of other any agency or private entity undertaking such an effort to justify an existing use permit in the past. This is clearly a good faith effort to identify and address any possible concerns, not only for the proposed approval of existing uses, but for future decisions. That may require such information. For the mean time, we see no reason to believe that the proposed existing use permit for Wailuku Shaft will impact such uses. We reiterate that the expertise of an agency such as OHA should certainly exceed our own in such matters, and that it would be appreciated if OHA could provide such information and guidance to us.

DWS thanks OHA for its comments. However, we ask OHA to recognize our sincere and ongoing efforts to address such concerns, and to see that these should not serve as a basis for objecting to DWS's applications. Disrupting the ability of the County of Maui to deliver domestic water to its customers to such a degree would not serve any public trust purpose, and would lead to a public health calamity. DWS notes that members of the Hawaiian community, along with thousands of other Central and South Maui residents and businesses, would be left without a supply of domestic water if our permits were denied. DWS respectfully requests that OHA withdraw its objections.

Should you have further questions or comments regarding any of these matters, please do not hesitate to contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Uenung
Director

attachments:
Sept 17, 2004 letter to Peter Young in response to objections to Waihee Wells
April 12, 2005 letter to Peter Young in response to questions regarding Water Use Permit applications
Supply Resource Option Characterization - PRELIMINARY DRAFT ESTIMATES from WAC Mtg 4
Resource Option & Objectives Matrix - DRAFT WORK IN PROGRESS - from WAC Mtg 4

CC:
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Mr. Dean Nakano  
Page 6  
July 08, 2005

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Key Words: All Things End Life
September 17, 2004

Peter T. Young, Chairperson
Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Objection to application for Water Use Permit for Maui Department of Water Supply for the Waihee Well 3 (Well No. 5431-04, source TMK 3-2-17:018)

Dear Chairperson Young and Deputy Director Izu:

This is in response to Earthjustice’s objection of September 2, 2004 to the above-mentioned Water Use Permit Application. We received the objection on September 7, 2004. We request that we be allowed to supplement our response as needed within ten days of receipt. We will make our best efforts to finalize our response by September 21, 2004.

Earthjustice Objection 1. The applications fail to establish that the proposed uses are consistent with the public interest and will not interfere with existing legal uses of water, pursuant to HRS §§ 174C-49(a)(3) and 174C-49(a)(4)

Water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waiahole P"), 94 Haw. 97, 137, citing, inter alia, Restatement (Second) of Torts § 850A cmt. c (1970); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-198 (1973); Carter v. Territory, 24 Haw. 47, 66 (1917). There is not much danger that the Department of Water Supply’s (DWS’s) proposed uses will interfere with existing legal uses of the water, as DWS is by far the major user. Moreover, other proposed legal users include public parks and schools. Existing legal users of groundwater, public and private wells and tunnels developed within lao aquifer, according to CWRM data, are listed below.

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Owner/User</th>
<th>Use Type</th>
<th>Drilled</th>
<th>12 MAY POF DWS</th>
<th>12 MAY POF NON-DWS</th>
<th>Est Draft In CWRM DB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Walkupu 1</td>
<td>S130-01</td>
<td>ICWALD</td>
<td>unused</td>
<td>1981</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Walkupu 2</td>
<td>S130-02</td>
<td>ICWALD</td>
<td>unused</td>
<td>1974</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Walkupu Mauka</td>
<td>S191-01</td>
<td>Maui DWS</td>
<td>municipal</td>
<td>1999</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waiaku Prototype</td>
<td>S229-01</td>
<td>A&amp;B Maui Lani</td>
<td>lost</td>
<td>1978</td>
<td>0.000</td>
<td></td>
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<tr>
<td>Ka Hale A Ke Ola</td>
<td>S230-01</td>
<td>Maui Elson Con</td>
<td>irrigation</td>
<td>1967</td>
<td>0.006</td>
<td>0.331</td>
<td></td>
</tr>
<tr>
<td>Memorial Gym</td>
<td>S239-04</td>
<td>Maui Parks &amp; Rec</td>
<td>irrigation</td>
<td>&lt;1971</td>
<td>0.080</td>
<td>0.380</td>
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<tr>
<td>Baldwin High School</td>
<td>S329-06</td>
<td>Maui Parks &amp; Rec</td>
<td>irrigation</td>
<td>&lt;1971</td>
<td>0.070</td>
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<td></td>
</tr>
<tr>
<td>Baldwin High TH</td>
<td>S329-06</td>
<td>Maui County</td>
<td>unused</td>
<td>1939</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maui Stadium</td>
<td>S329-14</td>
<td>Maui Dept Pub Wks</td>
<td>irrigation</td>
<td>1970</td>
<td>0.100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wailuku Army</td>
<td>S329-17</td>
<td>U.S. Army</td>
<td>unused</td>
<td>1968</td>
<td>0.000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

"By Water All Things Find Life"
a. Maui County Department of Water Supply (MDWS) failed to address any impacts of its proposed uses on resource protection.

The Department of Water Supply (DWS) recognizes that the maintenance of water in their natural state constitutes a distinct use. We also recognize that public and private uses of surface water within the lao aquifer area include all the purposes and activities listed in the objection on behalf of Hui o Na Wai Eha (the Hui) and Maui Meadows Homeowners Association (MMHA). To identify uses dependent on surface water, including the maintenance of surface water in their natural state, the impact (if any) from groundwater withdrawals on surface water in the area would first have to be scientifically established. The potential for discharge from the lao basal aquifer to streams has not been extensively studied using modern technology and methodology. Studies by United States Geological Service under contract with DWS are ongoing to quantify any discharge from the lao basal and dike impounded aquifer to streams. Seepage runs performed at five gaging stations of Waihee stream on June 16, 2004 showed an insignificant gain to the stream from groundwater in the study area. USGS plans to perform seepage runs for the lao and Waikapu streams within the next six months.

DWS has documented resource protection measures in the application, including distribution of withdrawals within the lao aquifer, relocation of withdrawals outside of the aquifer, development of alternative sources, conservation and resource protection programs. DWS manages and contributes to a number of resource protection programs: DWS funds and participates in four watershed partnership programs throughout Maui County. The programs provide shared expertise and resources, leverage outside funds and provide for
Early awareness and action. DWS identified and manages a Wellhead Protection Program for Maui County designed to protect the wells and groundwater from contamination.

CWRM designated lao aquifer after pumpage from the aquifer on a 12 month moving average (MAV) exceeded 18 MGD. Pumpage may exceed 18 MGD for individual months due to low precipitation and high demand. The 12 month MAV pumpage exceeded 18 MGD since designation: In December 2003 the 12 month MAV pumpage was 18.028 MGD. The 12 month MAV for August 2004 was 17.093 MGD.

DWS would be happy to assist MMHA in implementing a water conservation program to reduce demand in the Maui Meadows area and thereby alleviate peak demand stress on the lao aquifer. Average water use for single-family services in Maui Meadows is about 31% higher than Kihei single-family services, and about 70% higher than single-family services in Waikapu. The Department provides free material on appropriate climate-adapted native plant landscaping, water conserving irrigation techniques and other in- and out-door conservation measures.

b. MDWS failed to address traditional and customary Native Hawaiian rights & practices.

As discussed under objection 1(a), determining impact on uses dependent on surface water requires scientific study of whether pumpage from particular wells impacts flow in particular streams, and if so, to what extent. While Earthjustice's letter alleges that Waiola spring is now dry as a result of ground and surface water conditions in the aquifer, it does not cite to any scientific studies supporting this claim. DWS concurs that an inventory and assessment of traditional and customary Native Hawaiian rights dependent on surface water, including kalo cultivation and traditional use of springs, would be useful. However, DWS notes that CWRM has not designated the lao as a surface water management area. Many of these surface water issues, including the issues specifically relating to the spring named Waiola, have been raised in the Petition to Amend Interim Instream Flow Standards for Waihe'e, North & South Walahu, lao, and Waikapu Streams and Their Tributaries recently filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc., and will no doubt be addressed in that proceeding.

Earthjustice Objection 2. MDWS' applications fail to establish that its proposed uses of water are "reasonable-beneficial", pursuant to HRS § 174C-49(a)(2).

"Reasonable-beneficial use" is defined in § 174C3 of the Water Code as "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 both reasonable and consistent with the state and county land use plans and the public interest." As stated above, Hawaii law, as well as the law in other jurisdictions, has consistently placed the highest priority on domestic use, which DWS serves in the Central Maui area from the lao aquifer. DWS's use of this water will not interfere with public trust uses because it is a public trust use. Indeed, members of the MMHA receive their domestic water supply from this source.

Estimated cumulative demand for Waihee 3 well is based on the requested amount of water as a fraction of the 12-month MAV for the Central system at the time of designation. The demand exceeding the requested amount of water for this source is expected to be met by sources outside the lao aquifer, including Waihee aquifer and surface water sources. Thus, there is no conflict with state and county land use plans and the public interest.

The requested amount for Waihee 3 well differs from June and July 2004 MAV pumpage since requested amounts reflect MAV at the time of designation. June 2004 pumpage may have been significantly lower than June 2003 for several reasons, including demand effects from rainfall and redistribution of pumpage. July is typically a dry month with high demand and pumpage. Precipitation for the year 2003 was well below the mean with the exception of two wet months (January and February).

An analysis of water usage by customer classification and district, including irrigation use, will be addressed in the update to the Central Maui Water Use and Development Plan. Preliminary use class breakdown of consumption data indicate that single-family use consumption is about 43% of total use in Central Maui, not
16% as DWS incorrectly stated in the application. Preliminary use class break down for 2003 consumption for the Central Maui system is provided below:

<table>
<thead>
<tr>
<th>Use</th>
<th>Consumption (1,000 gal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single Family</td>
<td>3,382,741</td>
</tr>
<tr>
<td>Multi-Family</td>
<td>1,530,930</td>
</tr>
<tr>
<td>Commercial</td>
<td>849,847</td>
</tr>
<tr>
<td>Hotel</td>
<td>842,122</td>
</tr>
<tr>
<td>Industrial</td>
<td>347,580</td>
</tr>
<tr>
<td>Government</td>
<td>627,089</td>
</tr>
<tr>
<td>Agriculture</td>
<td>186,823</td>
</tr>
<tr>
<td>Religious</td>
<td>51,026</td>
</tr>
<tr>
<td>Central Maui Total: 7,818,158</td>
<td></td>
</tr>
</tbody>
</table>

To provide further information regarding DWS's alternate source development, below is an update and (where available), expected production estimates for the Central system:


Development of new sources outside lao aquifer: Camp Maluhia well: Acquisition of well site. Production estimated at 768,000 GPD. Kupaa 1: Anticipated on-line end 2005. Production estimated at 768,000 GPD. The full pump capacity of Kupaa well may not be utilized, but rather as needed to redistribute withdrawals within Waihee aquifer as well. lao Surface Water Treatment Plant expansion: Anticipated on-line end 2004. Production capacity: 2.4 - 3.2 MGD. New Central Maui Surface Water Treatment Plant and raw storage: Anticipated study by end 2005. Estimated production capacity: 2 MGD, subject to change. East Maui source development, temporary use of existing well. Anticipated on-line by March 2005. Production capacity 640,000 GPD.

Alternate sources are currently considered, including desalination plant. A full range of options will be reviewed with extensive public process in the preparation of the Water Use and Development Plan.

**Earthjustice Objection 3. MDWS failed to establish that the water source will accommodate its proposed uses, pursuant to HRS § 174C-49(a)(1).**

In response to the Commission staff finding that in 2002 "authorized planned uses exceed the sustainable yields", DWS has clarified to the CWRM in a letter dated November 4, 2002, that actual authorized planned use should be adjusted to reflect water commitments only. No commitment of water is granted or implied as a result of any DWS approval other than a water meter or water meter reservation. DWS has not been utilizing the lao aquifer to provide for additional demands. Instead, it has been serving new demands from the Waihee wells, and has been advising new developments of the need to develop additional source. Current pumpage does not exceed 26 MGD on a monthly or a 12-month MAV basis. 12-month MAV pumpage from the Waihee aquifer as of August 2004 is 3.691 MGD for a total pumpage from lao and Waihee aquifers of 20.784 MGD. Additional sources serving the Central system are the lao Tunnel and lao treatment plant with a combined capacity of 2.7 MGD. The landowner of the existing source Wailuku Shaft 33 signed the Department's application for existing use of the source on September 9, 2004. There is therefore no additional withdrawal requested from this source. DWS stopped issuing meter reservations for future meters in Central Maui in September of 2003. The 800,000 GPD allocation was based on the capacity and withdrawals as of the time of designation. The 800,000 GPD was allocated in addition to reservations as a policy to what should till be given out, considering uncertainties and that availability would be continually re-examined. It did not reflect actual estimated available capacity. As of August 2004, although meters exceeding 800,000 GPD were issued, about 200,000 GPD of capacity remained after accounting for outstanding reservations.

DWS has also set specific criteria to prevent overdraft and exceeding critical chloride levels in the lao Groundwater Management Rule. (Board of Water Supply Rules and Regulations Title 16 Chapter 9). The
rule specifies caution, alert and critical stages when chlorides at two well fields exceed given set points, or pumpage exceeds 95%, 98% and 100% of sustainable yields, respectively. The rule further specifies that if and when MAV pumpage equals or exceeds 95% and pumpage plus outstanding commitments equal or exceed 98%, no new meter applications will be accepted, and a waiting list will be maintained.

In addition to development of new sources, distribution of withdrawals within the aquifer, conservation measures, watershed and groundwater protection programs and monitoring and modeling of aquifer status, DWS proposed eight additional suggestions for protecting the long-term viability and sustainability of the aquifer:

1. Approval of well permits at County level: Benefits could include setting an allocation based on proposed use and reporting requirements and would better enable the county to track and monitor resource use, as to pace the growth of demand.

2. Community agreements regarding resource availability and development of an availability policy: The Water Use and Development Plan process could be utilized to establish availability policies that could help assure aquifer stability over the long term.

3. County permit conditions: Requiring private water uses to submit regular reports to DWS would improve tracking resource use.

4. Improved enforcement of reporting and monitoring requirements: Improved enforcement by CWRM would help address outstanding questions.

5. Expedite inspection of existing wells of unknown status: Identifying status would ensure proper reporting and unused wells that need to be properly sealed.


7. Inclusion of operational guidelines and policies in the Water Use and Development Plan: In depth investigation could result in a program or rule.

8. CWRM support for DWS published plans: Reserving water or setting conditions on proposals conflicting with municipal needs.

EarthJustice Objection 4. Although MDWS’ applications indicate that the proposed uses are in accordance with State and Maui County general plans, land use designations, and policies, this is insufficient for the Commission to determine whether the proposed uses are reasonable-beneficial, pursuant to HRS §§ 174C-49(a)(5) & 174C-49(a)(8).

HRS § 174C-49(5) requires a permit applicant to establish that the proposed use of water "[is] consistent with state and county general plans and land use designation." DWS has done so in its application. DWS further notes that entities other than the applicant, such as the Maui Planning Commission, the Maui County Council, and the State Land Use Commission, have ultimate authority over land use decisions and priorities on the island of Maui. As clarified above in DWS’s response to Objection 3, no commitment of water is granted or implied as a result of any DWS approval other than a water meter or water meter reservation. DWS intends to meet additional demand from sources outside of the Iao aquifer.

EarthJustice Objection 5. MDWS failed to establish that its proposed uses will not interfere with the rights and needs of the Department of Hawaiian Home Lands, pursuant to HRS § 174C-49(a)(7).

DWS agrees that applications should consider whether the proposed use of water might interfere with the rights of the Department of Hawaiian Home Lands ("DHHL"). Unlike the situation in In re Wai’ele a
Moloka'i, Inc., 103 Haw. 401 (2004), however, there are no wells owned or used by DHHL that potentially could be affected by the applicant's wells. Water service to DHHL properties is provided by DWS. Demand for proposed DHHL project Waiehu Kou Phase IV from the Central system is 57,600 gallons per day, according to DHHL. DWS approved meter reservations for the Waiehu Kou Phase III development totaling 97,000 gallons per day in estimated demand. According to DHHL, no other outstanding demand is anticipated. We therefore conclude that the proposed withdrawals would not interfere with the rights of DHHL. The objection to Kehalani Mauka's application for Shaft 33 stated that any additional withdrawal requested by Kehalani Mauka from Shaft 33 would potentially impact DHHL demand to be served by the DWS Central system.

Earthjustice Objection 6. MDWS integrated water management plan should be completed prior to issuance of any water use permits.

DWS recognizes that the Water Use and Development Plan process is crucial in planning effectively for future water use. DWS pledges its willingness to work cooperatively with the Hui and MMHA to resolve issues of mutual concern in this process. However, the public interest will not be served by holding up the permit process while awaiting a final Water Use and Development Plan.

DWS thanks Earthjustice for its comment on behalf of the Hui and MMHA. However, the concluding request that DWS's applications be denied is neither practical nor helpful. Disrupting the ability of the County of Maui to deliver domestic water to its customers to such a degree would not serve any public trust purpose, and would lead to a public health calamity. DWS notes that members of the Hui and MMHA, along with thousands of other Central and South Maui residents and businesses, would be left without a supply of domestic water if this request were granted. DWS respectfully requests that the Hui and MMHA withdraw this demand.

Should you have further questions or comments regarding any of these matters, please do not hesitate to contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Tengan
Director

enclosures:
DWS letter of November 4, 2002

cc.
Kapua Sproat, Esq.
Mayor Alan M. Arakawa, County of Maui
Jane Lovell, Esq., County of Maui
Edward Kushi, Esq., County of Maui
Dain Kane, Council Chair, County of Maui
Danny Mateo, WRC Chair, County of Maui
April 12, 2005

Honorable Dean Nakano, Acting Deputy Director
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Water Use Application Information: Waihee Wells (5431-02 to 04); Waiehu Heights Wells (5430-01 & 02); Mokuhau Wells (5330-09 & 11); Kepaniwai Well (5332-05) and Iao Tunnel (5332-02)

Dear Mr. Nakano,

Thank you for your inquiry dated November 18, 2004, pertaining to the subject Water Use Application Information. We answer your questions in the order in which they were posed. To facilitate understanding, we have repeated your questions in bold.

Accommodating Need with Available Resource

One objection to your water use permit applications is the lack of an estimate of the effectiveness of conservation or alternative source development would have on reducing demand from the aquifer.

As part of the evaluation of the reasonable and beneficial criteria, we request the following:

1) Has your department evaluated the impact of its conservation program on individual and overall demand?

The Department implements various conservation measures. Our preliminary estimate of savings is about 1/8 MGD. Conservation measures include the following:

Supply Side
Flow & pressure monitoring
Leak Detection
Automated Meters
Preventive and Predictive Maintenance
Backup Sources
Reclaimed Water Use

Demand Side
Fixture Distribution
Conservation Pricing / Rate Structure
Regulations Prohibiting Water Waste,
Retrofit Pilots
Education and Marketing
  Media and Handouts
  Permit Review
  Activities and Events
  Demonstration Gardens
  Participatory Learning

P.O. Box 7833  •  Fax (808) 270-7833
The graph below shows our current estimate of the effect of conservation programs of the Department. Additional empirical data will be gathered and estimates will be re-visited during the WUDP process.

As part of the preparatory work for the Water Use & Development Plan process, our consultant has been gathering data and compiling a model for evaluation of costs and benefits of potential conservation programs. Enhanced conservation funding was requested in the FY06 budget proposal in anticipation of some of this work.

Other measures undertaken to help prepare for escalated conservation efforts include development of improved consumption history and forecasts by use class, efforts to better tie consumption to locations, and pressure and flow measurements within the system to enable establishment of diurnal curves and peaking factor information. These measures are not quantified in terms of effectiveness, but they lay the necessary groundwork for development of a more effective conservation program.

2) Does your department have a budget schedule of identified alternative (non-lao groundwater) source development that shows a probable meeting of projected demand - (which currently exceeds projected supply) by a given date?

Yes. Our Central Maui Source schedule is attached as Attachment A. A graph indicating how this source schedule compares to anticipated demand is attached as Attachment B.

The Commission is aware that the designation process has unfolded in large part due to the concentration of pumpage in a limited area rather than to exceedence of the sustainable yield, and that a current study being conducted by the USGS is intended to improve understanding of the aquifer to the benefit of optimal pumping operations management.

Public Trust for Domestic Use
On a related subject, the definition of "domestic use" as used by the Supreme Court is subject to clarification. It could conceivably mean general public use of potable water for drinking and sanitation, which could extend beyond household use to municipal activities at parks and schools, as well as sanitation throughout the panoply of municipal uses. Have your analyses achieved any insight on what proportion might represent basic potable requirements versus
irrigation or industrial requirements?

Aside from the breakdown of estimated and projected use by customer class provided in Attachment C, probable domestic use portions can be estimated by looking at demand curves. While not 100% attributable to outdoor use, still the lion’s share of seasonal peaks tend to represent the difference between indoor domestic and outdoor use. Another way to get at this can be to compare Water Supply demands versus wastewater system demands where these can be evaluated in comparable periods. Historical reviews of this type indicate that the answer varies with location. Kahului tends to use 70% of its water indoors, whereas South Maui uses 40%-60% of its water outdoors.

Public Trust Purposes and Hawaiian Rights

Commissioner Milks asked for opinions from various parties concerning who may bear the burden of proof concerning public trust purposes, such as the traditional and customary and other Native Hawaiian water rights. These fall within what may be generally called the public interest, defined by the Water Code to include additional purposes. Your initial application addressed the public interest by identifying the public utility service area, a municipal system that includes probably most, if not all of the public interests in the water code. It does not address Native Hawaiian rights per se, but you have commented to OHA that OHA was in a better position to assess this issue. Does the County feel it bears no responsibility for addressing potential Native Hawaiian water rights that may be affected by the County’s use of ground water supplying its service system?

As stated, DWS serves most if not all of the public interest uses identified in the State Water Code, including those of Hawaiian Homelands and other Hawaiians.

With regard to Native Hawaiian Water Rights, the Department is prepared to make a fair and good faith effort to identify and address Native Hawaiian rights. Toward that effect, staff made an effort to identify all LCAW (land commission awards) and Kuleana parcels using existing GIS data. This was followed by research at the Bailey House Museum & Bureau of Conveyances to gather information and acquire copies of the Hawaiian language documents pertaining to these historical awards. The Department has negotiated a proposal with a Hawaiian language expert to translate these. The proposal to translate and provide additional evaluation of some of this data is provided as Attachment D. However, the fact remains that a means or mechanism to address these rights has never been spelled out in the Code. OHA has better access to the relevant information, and better understanding of how to properly research Hawaiian rights and traditional uses than the Department does. That is why we proposed in our response to OHA to work with them in this regard.

DHHL Reservations

We understand that your Department not only serves existing Department of Hawaiian Home Lands residential projects but has also issued water meter reservations for projects not yet served by the County system. The DHHL request for a groundwater reservation from the lao aquifer does not distinguish between project already served, projects with meter reservations and other projects yet to receive discretionary approvals. Your reply to the notice of the reservation request notes the meter reservations and indicates that future needs will be given priority. While the Commission has not yet acted on the request for groundwater reservations from lao, we would be inclined to recommend that such reservations would apply only to projects not yet served. Our question is whether the County’s commitment to issue meters is revocable or otherwise subject to further decision making.

The Department places a high priority on Hawaiian Homes. We are also making a good faith effort to limit withdrawals from the lao & Waihee aquifers. We were not expressing a lack of willingness to serve the existing DHHL projects, but rather a reluctance to specify the source from which future projects would draw water, given other water development efforts.
Water commitments are valid for a period of two years. They are revocable in the limited sense that *any event, occurrence or condition not caused by the Department which prevents the Department from performing its obligations excuses the Department from those obligations except to refund the fee.*

The Water System Development Fee rule §16-8-9 (b) *Applicant not ready for water service*

Upon payment of the fee by an applicant who, to the Director’s satisfaction, is unable to accept water service immediately, the Department may reserve an allocation of service capacity available at that time. The duration of any such reservation shall not exceed one year plus two six-month extensions, each for good cause shown and approved by the Department if water service is available. The Department and the applicant shall agree in writing on the amount of any allocation.

If within one year, or longer with extensions, the applicant is not able to accept installation of water service, unless for good cause shown and approved by the Department, the application and the reservation of the allocation shall expire and the fee paid shall be deemed a penalty and forfeited, to be applied to the Department’s operating fund with no credit of any kind toward any future application.

*Any event, occurrence or condition not caused by the Department which prevents the Department from performing its obligations excuses the Department from those obligations except to refund the fee.* 
*(emphasis added)*

Please feel free to contact our Water Resources & Planning Division at (808) 270-7199, should you have any questions.

Sincerely,

George Y. Jaman, Director

Attachments:
A Central Maui Source Schedule (tentative pending WUDP process)
B Central Maui Demand vs. Source Schedule Graph
C Demand Projections by Customer Class
D Proposal for translation of Hawaiian Documents

c: Ed Kushi, Corporation Counsel
    Jane Lovell, Corporation Counsel
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*THIS ASSUMES FAST TRACK SCHEDULE*

Assuming OOH approvals & CT adjustments can be made, installation of filter can be designed & constructed together.

If tank enlargement required - could take longer.

Standford Garr & Maul Lani are adding 2nd Tank.

Assumes all of this is to be done by private developers and re-imbursed upon acceptance.
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SCHEDULE PENDING RESULTS OF FEASIBILITY STUDY
Source Projects are Unscheduled Beyond 2013 at this time Pending WUDP Update in Progress
### Metered Consumption: Historical and Econometric Projection with Class Share by Class Share Trend Projection

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<td>0.803</td>
<td>0.913</td>
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### Notes
- The data represents historical and econometric projections for different classes within the central and east central districts.
- The share by class indicates the proportion of consumption attributed to each class.
- Econometric projection values are derived from statistical models.
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<th>Resource Option</th>
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<td>Well Sys - N. Wailua (HDA per N. Seattle 1996)</td>
<td>4,000</td>
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<td>Well Sys - Paikahi (per N. Seattle 1990)</td>
<td>6,700</td>
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<td>Well Sys - Paikahi (per SPSR 1,000 gal/min GMC)</td>
<td>6,011</td>
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<td>Well Sys - Paikahi (HDA per SCA 1965)</td>
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<td>Well - Makaha (withdrawal, trans, per DWS (3P))</td>
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<td>$1.93</td>
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<td>Well - Perched (Generic)</td>
<td>1,000</td>
<td>$1.05</td>
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<td>Protection Tunnel - Perched (Generic)</td>
<td>1,000</td>
<td>$1.42</td>
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<td>Stream Diversion (withdrawal, treatment) (Generic)</td>
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<td>Dich Withdrawal (withdrawal, treatment) (Generic)</td>
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<td>Desalination (Seawater)</td>
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<td>Desalination (Brackish)</td>
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<td>HP/ASO connect wells to Cent.Sys (39 Yr Exem. Life)</td>
<td>1,000</td>
<td>$4.12</td>
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<td>HP/ASO connect wells to Cent.Sys (4 Yr Exem. Life)</td>
<td>1,000</td>
<td>$7.90</td>
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<td>HP/ASO close or use wells for emergency service only</td>
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<td>HP/ASO pump &amp; trade for ditch water (add pump &amp; infra)</td>
<td>+$1.22</td>
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<td>Piholo 30MG Reservoir Expansion (incremental)</td>
<td>2,530</td>
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<td>Long-term Water Storage Reservoir</td>
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<td>Supply-side Leak Detection / Reduction</td>
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<td>Cistern</td>
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<td>Upcountry to Central System Interconnection</td>
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<td>Aerator Replacement Equipment</td>
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- a = to be determined by system analysis

DRAFT - WORK IN PROGRESS - JULY 6, 2005 - DRAFT
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<th>Resource Option</th>
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<th>Efficiency</th>
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<th>Sustainability</th>
<th>Quality</th>
<th>Reliability</th>
<th>Stream</th>
<th>Resources</th>
<th>Culture</th>
<th>Viability</th>
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<tbody>
<tr>
<td>DPW Recycled Water - Waipulani St. Line Extension</td>
<td>0.159</td>
<td>$1.76</td>
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<td>DPW Recycled Water - Liloa Dr. Line Extension</td>
<td>0.086</td>
<td>$2.14</td>
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<td>DPW Recycled Water - Transmission Line to N Kibi</td>
<td>0.309</td>
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<td>Stream Restoration Options</td>
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<td>Provide minimum streamflows on some streams</td>
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<td>Provide minimum streamflows on all streams</td>
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<td>Restore natural streamflows on some or all streams</td>
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<td>Eliminate some or all stream diversions</td>
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<td>Watershed Protection and Restoration</td>
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<td>Adopt watershed protection ordinance</td>
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<td>Scored watershed protection partnerships and areas</td>
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<td>Watershed restoration projects</td>
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<td>Use native species</td>
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<td>Wastewater Management Policies</td>
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<td>Wells provided by developers at non-planned sites</td>
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<td>Wells provided by developers at planned sites</td>
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<td>Land developer participation in well dev. programs</td>
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<td>New wells provided by DWS installed</td>
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<td>Hydroelectric generation - run of the river</td>
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<td>Hydroelectric generation - storage dam</td>
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<td>Hydroelectric generation - filling micro-hydro</td>
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<td>Wind power for water pumping</td>
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<td>Pumped storage hydro systems</td>
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<td>Water storage for utility energy management</td>
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<td>Motor and pump efficiency improvements</td>
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<td>System operation efficiency improvements</td>
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**Planning Objectives**

**Detail**

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<td>Viability</td>
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<td>Economy</td>
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<td>Quality</td>
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<td>Cost</td>
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<td>Availability</td>
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## Supply Resource Option Characterization (Preliminary Draft Estimates)

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<th>Option Name</th>
<th>Option Description</th>
<th>Plant Capacity</th>
<th>Average Output</th>
<th>Capital Cost</th>
<th>Plant Operating Cost</th>
<th>Vehicle Operating Cost</th>
<th>Plant Life Economic</th>
<th>Economic Life Total Discounted Cost</th>
<th>Notes</th>
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<tbody>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Wells - North Wales</strong></td>
<td>Per 1982 WUCP dataset per N. Wales August 1990 (3) 2 MGD wells, storage, 100%</td>
<td>14,000</td>
<td>8,000</td>
<td>8,243</td>
<td>132,925</td>
<td>532,428</td>
<td>0.70</td>
<td>30</td>
<td>$8,015</td>
</tr>
<tr>
<td><strong>Wells - North Wales</strong></td>
<td>Per 1992 WUCP dataset per N. Wales August 1990 (3) 1 MGD wells @ 60% storage, 55% transmission incl. Keppelmoor units</td>
<td>8,000</td>
<td>4,000</td>
<td>4,000</td>
<td>139,359</td>
<td>32,419</td>
<td>0.76</td>
<td>30</td>
<td>$11,629</td>
</tr>
<tr>
<td><strong>Wells @ Pala Hikote Area</strong></td>
<td>Per 1992 WUCP dataset per N. Wales August 1990 (3) 1 MGD wells @ 60% storage, 55% transmission incl. Keppelmoor units</td>
<td>13,986</td>
<td>6,970</td>
<td>8,011</td>
<td>533,454</td>
<td>52,753</td>
<td>0.99</td>
<td>30</td>
<td>$11,653</td>
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<tr>
<td><strong>Wells @ Pala Hikote Area</strong></td>
<td>Per 1992 WUCP dataset per N. Wales August 1990 (3) 1 MGD wells @ 60% storage, 55% transmission incl. Keppelmoor units</td>
<td>26,000</td>
<td>23,000</td>
<td>38,256</td>
<td>513,095</td>
<td>35,014</td>
<td>0.81</td>
<td>30</td>
<td>$12,755</td>
</tr>
<tr>
<td><strong>Wells @ Pala Hikote Area</strong></td>
<td>Per 1992 WUCP dataset per N. Wales August 1990 (3) 1 MGD wells @ 60% storage, 55% transmission incl. Keppelmoor units</td>
<td>29,000</td>
<td>37,000</td>
<td>85,945</td>
<td>593,765</td>
<td>35,874</td>
<td>0.81</td>
<td>30</td>
<td>$15,028</td>
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<tr>
<td><strong>Wells @ Mulahiti</strong></td>
<td>2 MGD well per DWEH CIP, includes storage, transmission</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>5,365</td>
<td>5,365</td>
<td>0.41</td>
<td>30</td>
<td>$16,523</td>
</tr>
<tr>
<td><strong>Wells @ Wadi</strong></td>
<td>2 MGD well per DWEH CIP, includes storage, transmission</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>5,766</td>
<td>5,766</td>
<td>0.41</td>
<td>30</td>
<td>$18,946</td>
</tr>
<tr>
<td><strong>Paradosei Wall</strong></td>
<td>Inceptional development following Mulahiti Well Wall at Paradosei site per construction speed</td>
<td>0.900</td>
<td>0.900</td>
<td>0.900</td>
<td>5,266</td>
<td>5,266</td>
<td>0.41</td>
<td>30</td>
<td>$19,223</td>
</tr>
<tr>
<td><strong>Wells @ Central Perched Ground</strong></td>
<td>Genetic hypothetical project, speculative location (3) 2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>3,265</td>
<td>3,265</td>
<td>0.11</td>
<td>30</td>
<td>$30,394</td>
<td>$3.98</td>
</tr>
<tr>
<td><strong>Tunnel @ Central Perched Generic</strong></td>
<td>Genetic hypothetical project, speculative location</td>
<td>1,000</td>
<td>1,000</td>
<td>1,000</td>
<td>5,825</td>
<td>5,825</td>
<td>0.11</td>
<td>30</td>
<td>$37,139</td>
</tr>
<tr>
<td><strong>Underground H implications to Central System</strong></td>
<td>Genetic (3) existing wells to Central system</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>5,890</td>
<td>5,890</td>
<td>0.11</td>
<td>30</td>
<td>$39,692</td>
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<tr>
<td><strong>Conway H implications to Central System</strong></td>
<td>Genetic (3) existing wells to Central system</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>5,900</td>
<td>5,900</td>
<td>0.11</td>
<td>30</td>
<td>$40,735</td>
</tr>
<tr>
<td><strong>Central Treatment and Storage</strong></td>
<td>Genetic surface water source system of ditch source including 1.2 MGD. maintenance, 55% transmission</td>
<td>8,000</td>
<td>8,000</td>
<td>8,000</td>
<td>632,789</td>
<td>632,789</td>
<td>0.51</td>
<td>4</td>
<td>$58,235</td>
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<tr>
<td><strong>P-Weh 3300 W Reservoir Expansions</strong></td>
<td>New 3300 Worphat for the 12 MGD (Lower Rate) incremental capacity increase per 10 MGD max flow rate</td>
<td>2,000</td>
<td>2,000</td>
<td>2,000</td>
<td>680,000</td>
<td>680,000</td>
<td>0.00</td>
<td>30</td>
<td>$53,866</td>
</tr>
<tr>
<td><strong>EPW Recycled Water - WadiYatla &amp; Line</strong></td>
<td>Shaft existing 3.6 MGD line to WadiYatla Rte. at costs per KGD based on displaced potable water only</td>
<td>0.960</td>
<td>0.960</td>
<td>0.960</td>
<td>3,000</td>
<td>3,000</td>
<td>0.30</td>
<td>30</td>
<td>$5,432</td>
</tr>
<tr>
<td><strong>EPW Recycled Water - UbdOa &amp; Line</strong></td>
<td>Shaft existing 3.6 MGD line to Oubiso Rte. at costs per KGD based on displaced potable water only</td>
<td>0.960</td>
<td>0.960</td>
<td>0.960</td>
<td>3,000</td>
<td>3,000</td>
<td>0.30</td>
<td>30</td>
<td>$5,432</td>
</tr>
</tbody>
</table>

**Notes:**
- Levelized costs are calculated based on 3.0% inflation, 6.0% DWR cost of capital and 6.0% discount rate. Operating costs are FDA estimates.
- All estimates, calculated costs and impacts should be considered preliminary draft approximations for purposes of initial resource characterization and review.
- Costs from prior studies are calculated to year 2002 dollars according to Consumer Price Index for Honolulu (all goods, urban).
- **Abbreviations:**
  - MPV = net present value (NPV) = millions of dollars per day
  - NCO = net cost of capital
  - MCO = millions of dollars per year
  - $/Unit = capital costs
  - $/Unit = operating costs
  - Years
Candidate DSM Program Characterization (Preliminary Draft Estimates)

<table>
<thead>
<tr>
<th>Program Name</th>
<th>Delivery Mechanism</th>
<th>Measure Cost</th>
<th>Utility Cost</th>
<th>Program Cost</th>
<th>Savings Efficiency</th>
<th>Measure Life Years</th>
<th>Leveled Unit Cost</th>
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</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Equip Cost per unit</td>
<td>Instal Cost per unit</td>
<td>Total Cost per unit</td>
<td>Rebate Admin per unit</td>
<td>Total Cost per unit</td>
<td>TRC per unit</td>
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<tr>
<td>Toilets Retro Rebate</td>
<td>Retrofit Application based on Hohokum program</td>
<td>$60</td>
<td>$100</td>
<td>$160</td>
<td>$0</td>
<td>$150</td>
<td>$230</td>
</tr>
<tr>
<td>Toilets Retro Rebate</td>
<td>Energy for old systems brought to depot (30%) and destroyed.</td>
<td>$60</td>
<td>$100</td>
<td>$160</td>
<td>$0</td>
<td>$150</td>
<td>$230</td>
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<tr>
<td>Toilets Targeted Retro</td>
<td>Direct installation of Kohler in targeted buildings with existing 1-2 gpf fixtures</td>
<td>$80</td>
<td>$100</td>
<td>$180</td>
<td>$0</td>
<td>$255</td>
<td>$255</td>
</tr>
<tr>
<td>Toilets Flapper Install</td>
<td>Per SPU CPA</td>
<td>$8</td>
<td>$0</td>
<td>$8</td>
<td>$0</td>
<td>$20</td>
<td>$20</td>
</tr>
<tr>
<td>Showerhead Giveaway</td>
<td>Showerheads distributed at public events or by mail.</td>
<td>$0</td>
<td>$10</td>
<td>$10</td>
<td>$0</td>
<td>$10</td>
<td>$10</td>
</tr>
<tr>
<td>Showerhead Canvas</td>
<td>Showerheads distributed by door to door cause of type of home</td>
<td>$0</td>
<td>$20</td>
<td>$20</td>
<td>$0</td>
<td>$20</td>
<td>$20</td>
</tr>
<tr>
<td>Showerhead Direct Install</td>
<td>Showerheads installed by selected techniques</td>
<td>$0</td>
<td>$30</td>
<td>$30</td>
<td>$0</td>
<td>$30</td>
<td>$30</td>
</tr>
<tr>
<td>Showerhead Mass Mail</td>
<td>Showerheads mailed to all customers</td>
<td>$0</td>
<td>$15</td>
<td>$15</td>
<td>$0</td>
<td>$15</td>
<td>$15</td>
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<tr>
<td>Urinal Retro Rebate</td>
<td>Retrofit Application similar to Hohokum toilet rebate program</td>
<td>$250</td>
<td>$100</td>
<td>$350</td>
<td>$150</td>
<td>$50</td>
<td>$200</td>
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<tr>
<td>Water Eff Clothes Wash</td>
<td>Retrofit Application with purchase documentation</td>
<td>$350</td>
<td>$0</td>
<td>$350</td>
<td>$150</td>
<td>$70</td>
<td>$220</td>
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<tr>
<td>Water Eff Dish Washer</td>
<td>Retrofit Application with purchase documentation</td>
<td>$50</td>
<td>$0</td>
<td>$50</td>
<td>$150</td>
<td>$70</td>
<td>$120</td>
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<tr>
<td>Auto Rain Shut Off</td>
<td>Per SPU CPA - Installs automatic shut-off on automatic irrigation systems</td>
<td>$55</td>
<td>$0</td>
<td>$55</td>
<td>$50</td>
<td>$9</td>
<td>$59</td>
</tr>
<tr>
<td>Soil Moisture Sensor</td>
<td>Per SPU CPA - Installs soil moisture sensors on automatic irrigation systems</td>
<td>$150</td>
<td>$0</td>
<td>$150</td>
<td>$50</td>
<td>$9</td>
<td>$59</td>
</tr>
<tr>
<td>Improve Perf. of Irr. Sys.</td>
<td>Per SPU CPA - replaces, replacement, adjustment of flow in irrigation system</td>
<td>$188</td>
<td>$0</td>
<td>$188</td>
<td>$9</td>
<td>$197</td>
<td>$197</td>
</tr>
<tr>
<td>Improve Irr. Scheduling</td>
<td>Per SPU CPA - Improves irrigation efficiency by better scheduling</td>
<td>$25</td>
<td>$0</td>
<td>$25</td>
<td>$9</td>
<td>$34</td>
<td>$34</td>
</tr>
<tr>
<td>Graywater for Irrigation</td>
<td>Per SPU CPA - Installs grey water collection system - new and removal.</td>
<td>$2,000</td>
<td>$0</td>
<td>$2,000</td>
<td>$2,000</td>
<td>$0</td>
<td>$2,000</td>
</tr>
<tr>
<td>Rain Barre Collection</td>
<td>Per SPU CPA - Installs 50 gallon barrels to gutter downspouts for irrigation</td>
<td>$50</td>
<td>$0</td>
<td>$50</td>
<td>$9</td>
<td>$59</td>
<td>$59</td>
</tr>
<tr>
<td>Low Water Use Plantings</td>
<td>Per SPU CPA - Replace 300 sq ft. lawn with low water use plants</td>
<td>$25</td>
<td>$0</td>
<td>$25</td>
<td>$9</td>
<td>$34</td>
<td>$34</td>
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<tr>
<td>Xeriscaping</td>
<td>Per SPU CPA - Replace irrigated landscaping with xeriscape</td>
<td>$600</td>
<td>$1,000</td>
<td>$1,600</td>
<td>$500</td>
<td>$300</td>
<td>$800</td>
</tr>
</tbody>
</table>

Notes:
- Shaded cells are data entry cells; other numerical cells are calculated.
- SPU CPA = Seattle Public Utilities Conservation Potential Assessment Final Project Report, May 1998. Delivery mechanisms were not explicitly identified for several programs.
- Levelized costs are calculated according to the identified measure life assuming a 3.0% inflation rate, 6.0% cost of capital, 6.0% discount rate.
- All estimates and calculated costs and savings impacts should be considered rough approximations for purposes of initial measure and program assessment.

Abbreviations:
- gpd = gallons per day
- ggdpl = gallons per day per retrofit
- $/kcap = thousand gallons
- TRC = Total Resource Cost Test
- HDA = Haave Design & Analysis (Carl Freedman)
<table>
<thead>
<tr>
<th>FROM: ROY</th>
<th>DATE: JUL 19 2005</th>
<th>SUSPENSE DATE:</th>
</tr>
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<tbody>
<tr>
<td>TO:</td>
<td>INIT.</td>
<td>TO:</td>
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<tr>
<td>ANAKALEA, P.</td>
<td>___________</td>
<td>KUNIMURA, I.</td>
</tr>
<tr>
<td>BAUER, G.</td>
<td>___________</td>
<td>NAKAMA, L.</td>
</tr>
<tr>
<td>CHING, F.</td>
<td>___________</td>
<td>NAKANO, D.</td>
</tr>
<tr>
<td>DANBARA, S.</td>
<td>___________</td>
<td>OHYE, M.</td>
</tr>
<tr>
<td>FUJII, N.</td>
<td>___________</td>
<td>SAKODA, E.</td>
</tr>
<tr>
<td>GOODING, K.</td>
<td>___________</td>
<td>SUBIA, S.</td>
</tr>
<tr>
<td>HARDY, R.</td>
<td>___________</td>
<td>SWANSON, S.</td>
</tr>
<tr>
<td>HIGA, D.</td>
<td>___________</td>
<td>UYENO, D.</td>
</tr>
<tr>
<td>ICE, C.</td>
<td>___________</td>
<td>YODA, K.</td>
</tr>
<tr>
<td>IMATA, R.</td>
<td>___________</td>
<td>YOSHINAGA, M.</td>
</tr>
</tbody>
</table>

MDWS response to Earthjustice, OHA objections to WUPA for Wailuku Shaft (5330-05)
Roy, unless advised otherwise, we should send Peter a copy of the attached with a short note as to where we are in the process (eg, reconvened P.H. scheduled for 8-3-05, etc.) Please advise. Thanks, Dean
Re: Objection to application for Water Use Permit for Maui Department of Water Supply for the Wailuku Shaft # 33 (Well No. 5330-05, source TMK 3-5-001:017)

Dear Chairperson Young and Deputy Director Nakano:

This is in response to the Office of Hawaiian Affairs objection of June 29, 2005 to the above-mentioned Water Use Permit Application - which was received in hard copy by our Department on July 5, 2005. We request that we be allowed to supplement our response within ten working days of receipt. We will make every effort to finalize our response by July 19, 2005. We respond to the stated objections in the order in which they were posed.

1. We are here offering essentially the same comments and objections we have for all the other applications submitted and circulated for the "lao Ground Water Management Area.

2. As our objections are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.

The Office of Hawaiian Affairs notes that they are offering and including by reference essentially the same comments as those offered on other applications submitted and circulated for water use in the lao aquifer. We hereby offer and include by reference our responses to same.

3. We also note that the County has publicly announced that they plan to abandon Shaft 33 ("Key Central Maui Water Source Closing", June 5, 2005 Maui News) Because the permitting process for this aquifer is already highly complex, we request the Commission to clarify with the Applicant what their plans are for this well.

The Office of Hawaiian Affairs quotes a June 5, 2005 article from the Maui News indicating that the County has publicly announced that they plan to abandon Shaft 33. While the County does have plans to improve distribution of withdrawals currently taken from this well, the article seems to have given some people the erroneous impression that the well will be abandoned absent a replacement. The Wailuku Shaft, aka Shaft 33, is our largest and most productive source, with a moving average withdrawal as of June 30, 2005 of 4.84 MGD, and which was noted as 5.792 MGD at the time of existing use permit application. The Department has plans to distribute this withdrawal among two or three new wells, and will only abandon the Shaft once such distribution is accomplished through drilling and installation of the necessary wells. Two of the wells planned for this purpose have been explicitly identified and capital projects have started: the lao Tank Site Well and the Waikapu Well. A third well

By Water All Things Find Life
or pair of wells is anticipated between the latter two, and site selection and plans for this last are not yet firm. Pumpage on Wailuku Shaft would be gradually diminished until all three (or four) wells are in place and functioning satisfactorily. In the mean time, the source is too important to abandon until this can be accomplished.

4. 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 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.

We appreciate OHA's acknowledgment of our good faith efforts. The Department has done its best to provide and supply all information that seems relevant. As we are in the midst of an in-depth planning process for preparation of our Water Use & Development Plan, occasionally additional information may become available during the process which was not available at the time of submittal. However, we have in no case willfully withheld relevant information.

5. OHA's Interests in These Matters
The Department has not questioned OHA's standing in these matters, and welcomes constructive involvement and coordination, particularly in terms of guidance regarding traditional and cultural uses and rights.

6. OHA's Primary Objection
OHA has one central objection to this WUDP as filed by the applicant and accepted by the commission. The applicant has failed in their application to establish that the proposed use of water meets the seven conditions for water use in a designated ground water management area.

The seven conditions listed in State Water Code §174C-49 Conditions for a Permit are delineated and addressed below. However, we note that these have been addressed as well both in our application and in our letter of Sept 17, 2004, attached and incorporated.

(1) Proposed use can be accommodated with the available water source
The requested use permits are based on existing uses as of the date of designation, and are well within the Commission's established sustainable yield. The available water source was already accommodating these uses, although we do acknowledge concern regarding rising chlorides. The Department's efforts to further distribute withdrawals, described previously herein, are meant to improve the impact of such withdrawals on the aquifer. We refer also to our response to this criteria on pages 4 and 5 of our Sept 17, 2004 letter, attached.

(2) Proposed use is a reasonable-beneficial use as defined in section 174C-3
"Reasonable-beneficial use" is defined in § 174C3 of the Water Code as "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 both reasonable and consistent with the state and county land use plans and the public interest." Hawaii law, as well as the law in other jurisdictions, has consistently placed the highest priority on domestic use, which DWS serves in the Central Maui area from the lao aquifer. Water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waiahole I"), 94 Hawa. 97, 137, citing, inter alia, Restatement (Second)

**CENTRAL MAUI DEMAND BY CUSTOMER CLASS - WUDP PROJECTION 22MH**

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<th></th>
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<tbody>
<tr>
<td>HOT/MOT</td>
<td>1.958</td>
<td>2.175</td>
<td>2.124</td>
<td>2.363</td>
<td>2.611</td>
<td>2.864</td>
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<tr>
<td>IND</td>
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<td>GOV</td>
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<td>1.778</td>
<td>1.741</td>
<td>1.698</td>
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<tr>
<td>AG</td>
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<td>0.871</td>
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<tr>
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<td>0.133</td>
<td>0.126</td>
<td>0.150</td>
<td>0.175</td>
<td>0.200</td>
<td>0.225</td>
<td>0.251</td>
</tr>
</tbody>
</table>

As shown on the table above, residential use constitutes the lion's share of current and projected metered use.

Another element of reasonable and beneficial is that water not be wasted. The following tables are consultant evaluation of unaccounted-for water in recent years. These have not yet been updated to reflect 2005 pumpage, however the trend does indicate active improvement in water conservation. National average unaccounted-for water tends to range from 10% to 15%.

![Central Maui Unaccounted-for Water](chart.png)

Further description of our conservation and resource protective efforts was provided in our letters of Sept 17, 2004 and April 12, 2005. These letters are attached and incorporated by reference. We also note that a broad list of both supply side and demand side options is under consideration in the ongoing Water Use & Development Plan process. A preliminary list of such options from the fourth meeting of the Water Advisory Committees of the Central Maui and Upcountry districts is attached.
(3) **Proposed use will not interfere with any existing legal use of water**

As described in our letter of September 17, 2004 attached, DWS is by far the major user of water from the Loa aquifer. DWS uses rank high among public trust concerns. DWS systems do serve Hawaiian Homelands projects, as well as hospitals, schools and homes. Nor does the subject existing use water permit application for Wailuku Shaft seem to interfere in any way with traditional or customary uses.

(4) **Proposed use is consistent with the public interest**

As stated above, water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waiahole I"), 94 Hawaii. 97, 137, citing, *inter alia*, Restatement (Second) of Torts § 850A cmt. c (1970); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-198 (1973); *Carter v Territory*, 24 Haw. 47, 66 (1917). DWS is by far the major user of water from the Loa aquifer. DWS uses rank high among public trust concerns. DWS systems do serve Hawaiian Homelands projects, as well as hospitals, schools and homes. Nor does the subject existing use water permit application for Wailuku Shaft seem to interfere in any way with traditional or customary uses.

(5) **Proposed use is consistent with state and county general plans and land use designations**

(6) **Proposed use is consistent with county land use plans and policies**

OHA seems to acknowledge in its earlier letter that the County has established in its application that the proposed use is consistent with State and County general plans, land use plans, designations and policies. However we reiterate here that the proposal is to permit existing use of the aquifer which was developed in order to serve existing demand as built in accordance with State and County plans, approvals, designations and policies.

(7) **Proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in section 221 of the Hawaiian Homes Commission Act.**

The proposed use will not interfere with the rights of the Department of Hawaiian Homelands. There are no DHHL wells withdrawing water from the Loa aquifer area. However DHHL does have projects served by the system in question. Removal of such a major source as Wailuku Shaft as a source could adversely impact other areas of the system, potentially including the system areas serving Hawaiian Homes.

In terms of traditional and customary rights, while the subject permit does not seem likely to have any impact on surface water, determination of such impacts requires scientific study of whether pumpage from particular wells impacts flow in particular streams, and if so, to what extent. DWS anticipates that it will be contributing funding to such studies in FY 2007, and that the County will do so in FY 2006. DWS concurs that an inventory and assessment of traditional and customary Native Hawaiian rights dependent on surface water, including kalo cultivation and traditional use of springs would be useful, and is undertaking to have a simple assessment performed. However, DWS does not have the level of expertise in these areas that OHA itself has, and would appreciate guidance and information along these lines. Finally we note that CWRM has not designated the Loa as a surface water management area. Many surface water issues, have been raised in the Petition to Amend Interim Instream Flow Standards for Waihe’e, North & South Waiehu, Loa, and Waikapu Streams and Their Tributaries recently filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc., and will no doubt be
addressed in that proceeding.

7. **OHA is concerned that the Commission accepted the application as complete**

DWS made a good faith effort to provide all the information requested in the application form, as well as to address the seven criteria specified in the State Water Code with its application. We believe that the application is complete.

8. **Lack of information makes it difficult and burdensome for OHA to comment on whether the use will impact on protected Native Hawaiian Water Rights.**

DWS has undertaken to issue a contract for review of kuleana parcels documents and traditional uses. The results of such studies will be provided to CWRM and other interested parties upon completion. We are not aware of other any agency or private entity undertaking such an effort to justify an existing use permit in the past. This is clearly a good faith effort to identify and address any possible concerns, not only for the proposed approval of existing uses, but for future decisions. That may require such information. For the mean time, we see no reason to believe that the proposed existing use permit for Wailuku Shaft will impact such uses. We reiterate that the expertise of an agency such as OHA should certainly exceed our own in such matters, and that it would be appreciated if OHA could provide such information and guidance to us.

DWS thanks OHA for its comments. However, we ask OHA to recognize our sincere and ongoing efforts to address such concerns, and to see that these should not serve as a basis for objecting to DWS’s applications. Disrupting the ability of the County of Maui to deliver domestic water to its customers to such a degree would not serve any public trust purpose, and would lead to a public health calamity. DWS notes that members of the Hawaiian community, along with thousands of other Central and South Maui residents and businesses, would be left without a supply of domestic water if our permits were denied. DWS respectfully requests that OHA withdraw its objections.

Should you have further questions or comments regarding any of these matters, please do not hesitate to contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Sengan
Director

attachments:
Sept 17, 2004 letter to Peter Young in response to objections to Waihee Wells
April 12, 2005 letter to Peter Young in response to questions regarding Water Use Permit applications
Supply Resource Option Characterization - PRELIMINARY DRAFT ESTIMATES from WAC Mtg 4
Resource Option & Objectives Matrix - DRAFT WORK IN PROGRESS - from WAC Mtg 4

CC: D. Kapua Sproat
Earthjustice
223 South King Street, Suite 400
Honolulu, HI 96813-4501
Mr. Dean Nakano  
Page 6  
July 08, 2005  

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September 17, 2004

Peter T. Young, Chairperson
Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Objection to application for Water Use Permit for Maui Department of Water Supply for the Waihee Well 3 (Well No. 5431-04, source TMK 3-2-17:018)

Dear Chairperson Young and Deputy Director Izu:

This is in response to Earthjustice’s objection of September 2, 2004 to the above-mentioned Water Use Permit Application. We received the objection on September 7, 2004. We request that we be allowed to supplement our response as needed within ten days of receipt. We will make our best efforts to finalize our response by September 21, 2004.

Earthjustice Objection 1. The applications fail to establish that the proposed uses are consistent with the public interest and will not interfere with existing legal uses of water, pursuant to HRS §§ 174C-49(a)(3) and 174C-49(a)(4)

Water served to the public for domestic uses has long been recognized as being not only consistent with, but the highest and best use of public resources. See In re Water Use Permit Applications ("Waihale I"), 94 Hawa. 97, 137, citing, inter alia, Restatement (Second) of Torts § 850A cmt. c (1970); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-198 (1973); Carter v Territory, 24 Haw. 47, 66 (1917). There is not much danger that the Department of Water Supply's (DWS's) proposed uses will interfere with existing legal uses of the water, as DWS is by far the major user. Moreover, other proposed legal users include public parks and schools. Existing legal users of groundwater, public and private wells and tunnels developed within lao aquifer, according to CWRM data, are listed below.

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Owner/User</th>
<th>Use Type</th>
<th>Drilled</th>
<th>12 MAV FOI DWS</th>
<th>12 MAV FOI NON-DWS</th>
<th>Est Draft In CWRM DB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waikapu 1</td>
<td>5130-01</td>
<td>DOWALD</td>
<td>unused</td>
<td>1961</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Waikapu 2</td>
<td>5130-02</td>
<td>DOWALD</td>
<td>unused</td>
<td>1974</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Waikapu Mauka</td>
<td>5131-01</td>
<td>Maui DWS</td>
<td>unused</td>
<td>1999</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Waiola Prototype</td>
<td>5229-01</td>
<td>A&amp;B Maui Lani</td>
<td>lost</td>
<td>1976</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Ka Hale A Ke Oia</td>
<td>5230-01</td>
<td>Maui Econ Con</td>
<td>irrigation</td>
<td>1997</td>
<td>0.006</td>
<td>0.331</td>
<td></td>
</tr>
<tr>
<td>Memorial Gym</td>
<td>5329-04</td>
<td>Maui Parks &amp; Rec</td>
<td>irrigation</td>
<td>&lt;1971</td>
<td>0.060</td>
<td>0.360</td>
<td></td>
</tr>
<tr>
<td>Baldwin High School</td>
<td>5329-05</td>
<td>Maui Parks &amp; Rec</td>
<td>irrigation</td>
<td>&lt;1971</td>
<td>0.070</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Baldwin High TH</td>
<td>5329-06</td>
<td>Maui County</td>
<td>unused</td>
<td>1939</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
<tr>
<td>Maui Stadium</td>
<td>5329-14</td>
<td>Maui Dept Pub Wks</td>
<td>irrigation</td>
<td>1970</td>
<td>0.100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wailuku Armory</td>
<td>5329-17</td>
<td>U.S. Army</td>
<td>unused</td>
<td>1969</td>
<td>0.000</td>
<td>0.000</td>
<td></td>
</tr>
</tbody>
</table>

"By Water All Things Find Life"
The Department of Water Supply (DWS) recognizes that the maintenance of water in their natural state constitutes a distinct use. We also recognize that public and private uses of surface water within the lao aquifer area include all the purposes and activities listed in the objection on behalf of Hui o Na Wai Eha (the Hui) and Maui Meadows Homeowners Association (MMHA). To identify uses dependent on surface water, including the maintenance of surface water in their natural state, the impact (if any) from groundwater withdrawals on surface water in the area would first have to be scientifically established. The potential for discharge from the lao basal aquifer to streams has not been extensively studied using modern technology and methodology. Studies by United States Geological Service under contract with DWS are ongoing to quantify any discharge from the lao basal and dike-impounded aquifer to streams. Seepage runs performed at five gaging stations of Waihee stream on June 16, 2004 showed an insignificant gain to the stream from groundwater in the study area. USGS plans to perform seepage runs for the lao and Waikapu streams within the next six months.

DWS has documented resource protection measures in the application, including distribution of withdrawals within the lao aquifer, relocation of withdrawals outside of the aquifer, development of alternative sources, conservation and resource protection programs. DWS manages and contributes to a number of resource protection programs: DWS funds and participates in four watershed partnership programs throughout Maui County. The programs provide shared expertise and resources, leverage outside funds and provide for
early awareness and action. DWS initiated and manages a Wellhead Protection Program for Maui County designed to protect the wells and groundwater from contamination.

CWRM designated lao aquifer after pumpage from the aquifer on a 12 month moving average (MAV) exceeded 18 MGD. Pumpage may exceed 18 MGD for individual months due to low precipitation and high demand. The 12 month MAV pumpage exceeded 18 MGD once since designation: In December 2003 the 12 month MAV pumpage was 18.028 MGD. The 12 month MAV for August 2004 was 17.093 MGD.

DWS would be happy to assist MMHA in implementing a water conservation program to reduce demand in the Maui Meadows area and thereby alleviate peak demand stress on the lao aquifer. Average water use for single-family services in Maui Meadows is about 31% higher than Kihei single-family services, and about 70% higher than single-family services in Waikapu. The Department provides free material on appropriate climate-adapted native plant landscaping, water conserving irrigation techniques and other in- and out-door conservation measures.

b. MDWS failed to address traditional and customary Native Hawaiian rights & practices.

As discussed under objection 1(a), determining impact on uses dependent on surface water requires scientific study of whether pumpage from particular wells impacts flow in particular streams, and if so, to what extent. While Earthjustice’s letter alleges that Waiola spring is now dry as a result of ground and surface water conditions in the aquifer, it does not cite to any scientific studies supporting this claim. DWS concurs that an inventory and assessment of traditional and customary Native Hawaiian rights dependent on surface water, including kalo cultivation and traditional use of springs, would be useful. However, DWS notes that CWRM has not designated the lao as a surface water management area. Many of these surface water issues, including the issues specifically relating to the spring named Waiola, have been raised in the Petition to Amend Interim Instream Flow Standards for Waihe'e, North & South Waiehu, lao, and Waikapu Streams and Their Tributaries recently filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc., and will no doubt be addressed in that proceeding.

Earthjustice Objection 2. MDWS’ applications fail to establish that its proposed uses of water are “reasonable-beneficial”, pursuant to HRS § 174C-49(a)(2).

“Reasonable-beneficial use” is defined in § 174C3 of the Water Code as “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 both reasonable and consistent with the state and county land use plans and the public interest.” As stated above, Hawaii law, as well as the law in other jurisdictions, has consistently placed the highest priority on domestic use, which DWS serves in the Central Maui area from the lao aquifer. DWS’s use of this water will not interfere with public trust uses because it is a public trust use. Indeed, members of the MMHA receive their domestic water supply from this source.

Estimated cumulative demand for Waihee 3 well is based on the requested amount of water as a fraction of the 12-month MAV for the Central system at the time of designation. The demand exceeding the requested amount of water for this source is expected to be met by sources outside the lao aquifer, including Waikapu aquifer and surface water sources. Thus, there is no conflict with state and county land use plans and the public interest.

The requested amount for Waihee 3 well differs from June and July 2004 MAV pumpage since requested amounts reflect MAV at the time of designation. June 2004 pumpage may have been significantly lower than June 2003 for several reasons, including demand effects from rainfall and redistribution of pumpage. July is typically a dry month with high demand and pumpage. Precipitation for the year 2003 was well below the mean with the exception of two wet months (January and February).

An analysis of water usage by customer classification and district, including irrigation use, will be addressed in the update to the Central Maui Water Use and Development Plan. Preliminary use class breakdown of consumption data indicate that single-family use consumption is about 43% of total use in Central Maui, not
16% as DWS incorrectly stated in the application. Preliminary use class breakdown for 2003 consumption for the Central Maui system is provided below:

<table>
<thead>
<tr>
<th>Use</th>
<th>Consumption (1,000 gal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single Family</td>
<td>3,382,741</td>
</tr>
<tr>
<td>Multi-Family</td>
<td>1,530,930</td>
</tr>
<tr>
<td>Commercial</td>
<td>849,847</td>
</tr>
<tr>
<td>Hotel</td>
<td>842,122</td>
</tr>
<tr>
<td>Industrial</td>
<td>347,580</td>
</tr>
<tr>
<td>Government</td>
<td>627,089</td>
</tr>
<tr>
<td>Agriculture</td>
<td>186,823</td>
</tr>
<tr>
<td>Religious</td>
<td>51,026</td>
</tr>
<tr>
<td>Central Maui Total:</td>
<td>7,818,158</td>
</tr>
</tbody>
</table>

To provide further information regarding DWS's alternate source development, below is an update and (where available), expected production estimates for the Central system:


Development of new sources outside lao aquifer: Camp Maluhia well: Acquisition of well site. Production estimated at 768,000 GPD. Kupaa 1: Anticipated on-line end 2005. Production estimated at 768,000 GPD. The full pump capacity of Kupaa well may not be utilized, but rather as needed to redistribute withdrawals within Waihee aquifer as well. lao Surface Water Treatment Plant expansion: Anticipated on-line end 2004. Production capacity: 2.4 - 3.2 MGD. New Central Maui Surface Water Treatment Plant and raw storage: Anticipated study by end 2005. Estimated production capacity: 2 MGD, subject to change. East Maui source development, temporary use of existing well. Anticipated on-line by March 2005. Production capacity 640,000 GPD.

Alternate sources are currently considered, including desalination plant. A full range of options will be reviewed with extensive public process in the preparation of the Water Use and Development Plan.

Earthjustice Objection 3. MDWS failed to establish that the water source will accommodate its proposed uses, pursuant to HRS § 174C-49(a)(1).

In response to the Commission staff finding that in 2002 "..authorized planned uses exceed the sustainable yields", DWS has clarified to the CWRM in a letter dated November 4, 2002, that actual authorized planned use should be adjusted to reflect water commitments only. No commitment of water is granted or implied as a result of any DWS approval other than a water meter or water meter reservation. DWS has not been utilizing the lao aquifer to provide for additional demands. Instead, it has been serving new demands from the Waihee wells, and has been advising new developments of the need to develop additional source. Current pumpage does not exceed 26 MGD on a monthly or a 12-month MAV basis. 12-month MAV pumpage from the Waihee aquifer as of August 2004 is 3.691 MGD for a total pumpage from lao and Waihee aquifers of 20.784 MGD. Additional sources serving the Central system are the lao Tunnel and lao treatment plant with a combined capacity of 2.7 MGD. The landowner of the existing source Wailuku Shaft 33 signed the Department's application for existing use of the source on September 9, 2004. There is therefore no additional withdrawal requested from this source. DWS stopped issuing meter reservations for future meters in Central Maui in September of 2003. The 800,000 GPD allocation was based on the capacity and withdrawals as of the time of designation. The 800,000 GPD was allocated in addition to reservations as a policy to what should till be given out, considering uncertainties and that availability would be continually re-examined. It did not reflect actual estimated available capacity. As of August 2004, although meters exceeding 800,000 GPD were issued, about 200,000 GPD of capacity remained after accounting for outstanding reservations.

DWS has also set specific criteria to prevent overdraft and exceeding critical chloride levels in the lao Groundwater Management Rule. (Board of Water Supply Rules and Regulations Title 16 Chapter 9). The
rule specifies caution, alert and critical stages when chlorides at two well fields exceed given set points, or pumpage exceeds 95%, 98% and 100% of sustainable yields, respectively. The rule further specifies that if and when MAV pumpage equals or exceeds 95% and pumpage plus outstanding commitments equal or exceed 98%, no new meter applications will be accepted, and a waiting list will be maintained.

In addition to development of new sources, distribution of withdrawals within the aquifer, conservation measures, watershed and groundwater protection programs and monitoring and modeling of aquifer status, DWS proposed eight additional suggestions for protecting the long-term viability and sustainability of the aquifer:

1. Approval of well permits at County level: Benefits could include setting an allocation based on proposed use and reporting requirements and would better enable the county to track and monitor resource use, as to pace the growth of demand.

2. Community agreements regarding resource availability and development of an availability policy: The Water Use and Development Plan process could be utilized to establish availability policies that could help assure aquifer stability over the long term.

3. County permit conditions: Requiring private water uses to submit regular reports to DWS would improve tracking resource use.

4. Improved enforcement of reporting and monitoring requirements: Improved enforcement by CWRM would help address outstanding questions.

5. Expedite inspection of existing wells of unknown status: Identifying status would ensure proper reporting and unused wells that need to be properly sealed.


7. Inclusion of operational guidelines and policies in the Water Use and Development Plan: In depth investigation could result in a program or rule.

8. CWRM support for DWS published plans: Reserving water or setting conditions on proposals conflicting with municipal needs.

Earthjustice Objection 4. Although MDWS' applications indicate that the proposed uses are in accordance with State and Maui County general plans, land use designations, and policies, this is insufficient for the Commission to determine whether the proposed uses are reasonable-beneficial, pursuant to HRS §§ 174C-49(a)(5) & 174C-49(a)(6).

HRS § 174C-49(5) requires a permit applicant to establish that the proposed use of water "[is] consistent with state and county general plans and land use designation." DWS has done so in its application. DWS further notes that entities other than the applicant, such as the Maui Planning Commission, the Maui County Council, and the State Land Use Commission, have ultimate authority over land use decisions and priorities on the island of Maui. As clarified above in DWS's response to Objection 3, no commitment of water is granted or implied as a result of any DWS approval other than a water meter or water meter reservation. DWS intends to meet additional demand from sources outside of the lao aquifer.

Earthjustice Objection 5. MDWS failed to establish that its proposed uses will not interfere with the rights and needs of the Department of Hawaiian Home Lands, pursuant to HRS § 174C-49(a)(7).

DWS agrees that applications should consider whether the proposed use of water might interfere with the rights of the Department of Hawaiian Home Lands ("DHHL"). Unlike the situation in In re Wai'ola o
However, there are no wells owned or used by DHHL that potentially could be affected by the applicant's wells. Water service to DHHL properties is provided by DWS. Demand for proposed DHHL project Waiehu Kou Phase IV from the Central system is 57,600 gallons per day, according to DHHL. DWS approved meter reservations for the Waiehu Kou Phase III development totaling 97,000 gallons per day in estimated demand. According to DHHL, no other outstanding demand is anticipated. We therefore conclude that the proposed withdrawals would not interfere with the rights of DHHL. The objection to Kehalani Mauka's application for Shaft 33 stated that any additional withdrawal requested by Kehalani Mauka from Shaft 33 would potentially impact DHHL demand to be served by the DWS Central system.

Earthjustice Objection 6. MDWS integrated water management plan should be completed prior to issuance of any water use permits.

DWS recognizes that the Water Use and Development Plan process is crucial in planning effectively for future water use. DWS pledges its willingness to work cooperatively with the Hui and MMHA to resolve issues of mutual concern in this process. However, the public interest will not be served by holding up the permit process while awaiting a final Water Use and Development Plan.

DWS thanks Earthjustice for its comment on behalf of the Hui and MMHA. However, the concluding request that DWS's applications be denied is neither practical nor helpful. Disrupting the ability of the County of Maui to deliver domestic water to its customers to such a degree would not serve any public trust purpose, and would lead to a public health calamity. DWS notes that members of the Hui and MMHA, along with thousands of other Central and South Maui residents and businesses, would be left without a supply of domestic water if this request were granted. DWS respectfully requests that the Hui and MMHA withdraw this demand.

Should you have further questions or comments regarding any of these matters, please do not hesitate to contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Tengan
Director

enclosures:
DWS letter of November 4, 2002

cc.
Kapua Sproat, Esq.
Mayor Alan M. Arakawa, County of Maui
Jane Lovell, Esq., County of Maui
Edward Kushi, Esq., County of Maui
Dain Kane, Council Chair, County of Maui
Danny Mateo, WRC Chair, County of Maui

April 12, 2005

Honorable Dean Nakano, Acting Deputy Director
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Water Use Application Information: Waihee Wells (5431-02 to 04); Waiehu Heights Wells (5430-01 & 02); Mokuhau Wells (5330-09 & 11); Kepaniwai Well (5332-05) and Iao Tunnel (5332-02)

Dear Mr. Nakano,

Thank you for your inquiry dated November 18, 2004, pertaining to the subject Water Use Application Information. We answer your questions in the order in which they were posed. To facilitate understanding, we have repeated your questions in bold.

**Accommodating Need with Available Resource**

One objection to your water use permit applications is the lack of an estimate of the effectiveness of conservation or alternative source development would have on reducing demand from the aquifer.

As part of the evaluation of the reasonable and beneficial criteria, we request the following:

1) Has your department evaluated the impact of its conservation program on individual and overall demand?
The Department implements various conservation measures. Our preliminary estimate of savings is about ½ MGD. Conservation measures include the following:

**Supply Side**
- Flow & pressure monitoring
- Leak Detection
- Automated Meters
- Preventive and Predictive Maintenance
- Backup Sources
- Reclaimed Water Use

**Demand Side**
- Fixture Distribution
- Conservation Pricing / Rate Structure
- Regulations Prohibiting Water Waste,
- Retrofit Pilots
- Education and Marketing
  - Media and Handouts
  - Permit Review
  - Activities and Events
  - Demonstration Gardens
  - Participatory Learning
The graph below shows our current estimate of the effect of conservation programs of the Department. Additional empirical data will be gathered and estimates will be re-visited during the WUDP process.

As part of the preparatory work for the Water Use & Development Plan process, our consultant has been gathering data and compiling a model for evaluation of costs and benefits of potential conservation programs. Enhanced conservation funding was requested in the FY06 budget proposal in anticipation of some of this work.

Other measures undertaken to help prepare for escalated conservation efforts include development of improved consumption history and forecasts by use class, efforts to better tie consumption to locations, and pressure and flow measurements within the system to enable establishment of diurnal curves and peaking factor information. These measures are not quantified in terms of effectiveness, but they lay the necessary groundwork for development of a more effective conservation program.

2) Does your department have a budget schedule of identified alternative (non-lao groundwater) source development that shows a probable meeting of projected demand - (which currently exceeds projected supply) by a given date?

Yes. Our Central Maui Source schedule is attached as Attachment A. A graph indicating how this source schedule compares to anticipated demand is attached as Attachment B.

The Commission is aware that the designation process has unfolded in large part due to the concentration of pumpage in a limited area rather than to exceedence of the sustainable yield, and that a current study being conducted by the USGS is intended to improve understanding of the aquifer to the benefit of optimal pumping operations management.

Public Trust for Domestic Use
On a related subject, the definition of "domestic use" as used by the Supreme Court is subject to clarification. It could conceivably mean general public use of potable water for drinking and sanitation, which could extend beyond household use to municipal activities at parks and schools, as well as sanitation throughout the panoply of municipal uses. Have your analyses achieved any insight on what proportion might represent basic potable requirements versus
irrigation or industrial requirements?

Aside from the breakdown of estimated and projected use by customer class provided in Attachment C, probable domestic use portions can be estimated by looking at demand curves. While not 100% attributable to outdoor use, still the lion's share of seasonal peaks tend to represent the difference between indoor domestic and outdoor use. Another way to get at this can be to compare Water Supply demands versus wastewater system demands where these can be evaluated in comparable periods. Historical reviews of this type indicate that the answer varies with location. Kahului tends to use 70% of its water indoors, whereas South Maui uses 40%-60% of its water outdoors.

Public Trust Purposes and Hawaiian Rights

Commissioner Mlike asked for opinions from various parties concerning who may bear the burden of proof concerning public trust purposes, such as the traditional and customary and other Native Hawaiian water rights. These fall within what may be generally called the public interest, defined by the Water Code to include additional purposes. Your initial application addressed the public interest by identifying the public utility service area, a municipal system that includes probably most, if not all of the public interests in the water code. It does not address Native Hawaiian rights per se, but you have commented to OHA that OHA was in a better position to assess this issue. Does the County feel it bears no responsibility for addressing potential Native Hawaiian water rights that may be affected by the County's use of ground water supplying its service system?

As stated, DWS serves most if not all of the public interest uses identified in the State Water Code, including those of Hawaiian Homelands and other Hawaiians.

With regard to Native Hawaiian Water Rights, the Department is prepared to make a fair and good faith effort to identify and address Native Hawaiian rights. Toward that effect, staff made an effort to identify all LCAW (land commission awards) and Kuleana parcels using existing GIS data. This was followed by research at the Bailey House Museum & Bureau of Conveyances to gather information and acquire copies of the Hawaiian language documents pertaining to these historical awards. The Department has negotiated a proposal with a Hawaiian language expert to translate these. The proposal to translate and provide additional evaluation of some of this data is provided as Attachment D. However, the fact remains that a means or mechanism to address these rights has never been spelled out in the Code. OHA has better access to the relevant information, and better understanding of how to properly research Hawaiian rights and traditional uses than the Department does. That is why we proposed in our response to OHA to work with them in this regard.

DHHL Reservations

We understand that your Department not only serves existing Department of Hawaiian Home Lands residential projects but has also issued water meter reservations for projects not yet served by the County system. The DHHL request for a groundwater reservation from the lao aquifer does not distinguish between project already served, projects with meter reservations and other projects yet to receive discretionary approvals. Your reply to the notice of the reservation request notes the meter reservations and indicates that future needs will be given priority. While the Commission has not yet acted on the request for groundwater reservations from lao, we would be inclined to recommend that such reservations would apply only to projects not yet served. Our question is whether the County's commitment to issue meters is revocable or otherwise subject to further decision making.

The Department places a high priority on Hawaiian Homes. We are also making a good faith effort to limit withdrawals from the lao & Waihee aquifers. We were not expressing a lack of willingness to serve the existing DHHL projects, but rather a reluctance to specify the source from which future projects would draw water, given other water development efforts.
Water commitments are valid for a period of two years. They are revocable in the limited sense that *Any event, occurrence or condition not caused by the Department which prevents the Department from performing its obligations excuses the Department from those obligations except to refund the fee.*

The Water System Development Fee rule §16-8-9 (b) *Applicant not ready for water service*
Upon payment of the fee by an applicant who, to the Director's satisfaction is unable to accept water service immediately, the Department may reserve an allocation of service capacity available at that time. The duration of any such reservation shall not exceed one year plus two six-month extensions, each for good cause shown and approved by the Department if water service is available. The Department and the applicant shall agree in writing on the amount of any allocation.
If within one year, or longer with extensions, the applicant is not able to accept installation of water service, unless for good cause shown and approved by the Department, the application and the reservation of the allocation shall expire and the fee paid shall be deemed a penalty and forfeited, to be applied to the Department's operating fund with no credit of any kind toward any future application.

*Any event, occurrence or condition not caused by the Department which prevents the Department from performing its obligations excuses the Department from those obligations except to refund the fee.* (emphasis added)

Please feel free to contact our Water Resources & Planning Division at (808) 270-7199, should you have any questions.

Sincerely,

[Signature]

George Y. Tengan, Director

Attachments:
A Central Maui Source Schedule (tentative pending WUDP process)
B Central Maui Demand vs. Source Schedule Graph
C Demand Projections by Customer Class
D Proposal for translation of Hawaiian Documents

c: Ed Kushi, Corporation Counsel
   Jane Lovell, Corporation Counsel
<table>
<thead>
<tr>
<th>Source Schedule</th>
<th>Source Transmission Schedule</th>
<th>On Line</th>
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<th>Comments</th>
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<td>assumes all of this is to be done by</td>
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<td>private developers and re-imbursed</td>
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## Metered Consumption: Historical and Econometric Projection with Class Share by Class Share Trend Projection

**Millions of Gallons per Day**  
**Calendar Year**  
**Consumption based on projections in "Hist and Econ FY CV Proj 18.qpw"**

### District Name

|-----------|-------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|

### Class Share by Class Share Trend Projection

|-----------|-------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|

### Total

|-----------|-------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|
## New Potable Water Sources

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<th>Efficiency</th>
<th>Environment</th>
<th>Equity</th>
<th>Sustainability</th>
<th>Quality</th>
<th>Reliability</th>
<th>Streams</th>
<th>Resources</th>
<th>Culture</th>
<th>Viability</th>
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<tr>
<td>Well Sys - North Waihee (HDA per N.Saito 1990)</td>
<td>4.000</td>
<td>$2.37</td>
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<td>Well Sys - Paia/Halu (per N.Saito 1990)</td>
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<td>Well Sys - Paia/Halu (per SEIS; 1000'el w/o GAC)</td>
<td>8,011</td>
<td>$2.37</td>
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<td>$3.09</td>
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<td>Well - Maluhi (w/storage, trans per DWS,CIP)</td>
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<td>$1.63</td>
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<td>$1.58</td>
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<td>Well - Paokela (per contracts)</td>
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<td>$9.95</td>
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<td>Well - Piholoin</td>
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<td>Well - Perched (Generic)</td>
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<td>ditch Withdrawal (w/storage, treatment) (Generic)</td>
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<td>Desalination (Seawater)</td>
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<td>Desalination (Brackish)</td>
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<tr>
<td>HPoko connect wells to Cent Sys (30 Yr Econ. Life)</td>
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<td>$4.10</td>
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<td>HPoko connect wells to Cent Sys (4 Yr Econ. Life)</td>
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<td>$7.30</td>
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<td>HPoko close or use wells for emergency service only</td>
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<td>HPoko pump &amp; trade for ditch water (addl) pump &amp; tre</td>
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<td>+$1.22</td>
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<td>Long-term Water Storage Reservoir</td>
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<td>Supply-side Leak Detection / Reduction</td>
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<td>Catchment</td>
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<td>Aquifer Recharge Strategies</td>
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Note: a = to be determined by system analysis

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DRAFT - WORK IN PROGRESS - JULY 6, 2005 - DRAFT
## Planning Objectives

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<th>Availability</th>
<th>Cost</th>
<th>Efficiency</th>
<th>Environment</th>
<th>Equity</th>
<th>Sustainability</th>
<th>Quality</th>
<th>Reliability</th>
<th>Streams</th>
<th>Resources</th>
<th>Culture</th>
<th>Viability</th>
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<td>$/kgal</td>
<td>+/-</td>
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<tr>
<td>DPW Recycled Water - Lilos Dr. Line Extension</td>
<td>0.086</td>
<td>$2.34</td>
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<td>DPW Recycled Water - Transmission Line to N. Kihei</td>
<td>0.300</td>
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<td>Stream Restoration Options</td>
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<td>Provide minimum streamflows on some streams</td>
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<tr>
<td>Provide minimum streamflows on all streams</td>
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<tr>
<td>Restore natural streamflows on some or all streams</td>
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<td>Eliminate some or all stream diversions</td>
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<td>Watershed Protection and Restoration</td>
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<td>Adopt wellhead protection ordinance</td>
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<td>Support watershed protection partnerships and programs</td>
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<td>Use native species</td>
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<td>Wells provided by developers at subdivision sites</td>
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<td>Wells provided by developers at planned sites</td>
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<tr>
<td>Land developer participation in well dev. program</td>
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<td>New well provided by DWS financing</td>
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<td>Energy Production and Efficiency Options</td>
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<td>Hydroelectric generation - run of the river</td>
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<td>Hydroelectric generation - storage dam</td>
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<tr>
<td>Hydroelectric generation - inline micro-hydro</td>
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<td>Wind power for water pumping</td>
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<tr>
<td>Water storage for utility energy management</td>
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<td>electrical utility system benefit</td>
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<tr>
<td>Motor and pump efficiency improvements</td>
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<td>System operation efficiency improvements</td>
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DRAFT - WORK IN PROGRESS - JULY 6, 2005 - DRAFT
<table>
<thead>
<tr>
<th>Resource Option</th>
<th>Planning Objectives</th>
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<tbody>
<tr>
<td></td>
<td>Availability</td>
</tr>
<tr>
<td>MGD $/kgal</td>
<td>+/-</td>
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<tr>
<td>Average 2015 Lev.</td>
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</tbody>
</table>

### Demand-Side Management Options

#### Domestic indoor uses
- Toilet replacement rebate program: $2.16
- Toilet replacement targeted direct install: $1.44
- Urinal replacement rebate program: $2.03
- Efficient dishwasher rebate program: $44.84
- Efficient clothes dryer rebate program: $9.24

#### Landscape irrigation
- Greywater for landscape/crop irrigation: $35.17
- Irrigation timers and controls: $1.74
- Low water-use plantings: $1.23
- Xeriscaping: $1.34
- Replace spray with drip irrigation

#### Agricultural Uses
- Irrigation timers and controls
- Untreated water distribution and use
- Recycled water distribution and use
- Replace spray or flood with drip irrigation

#### Codes, Regulations, Incentives
- Drought restriction policies
- Water rate design and pricing policies
- Education and public awareness programs
- Enforcement of codes and ordinances

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**DRAFT - WORK IN PROGRESS - JULY 6, 2005 - DRAFT**
<table>
<thead>
<tr>
<th>Resource Option</th>
<th>Planning Objectives</th>
<th>Detail</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Availability</td>
<td>Cost</td>
</tr>
<tr>
<td>MOD $ / kgal</td>
<td>+/-</td>
<td>+/-</td>
</tr>
<tr>
<td>Average</td>
<td>20YR Lev.</td>
<td>+/-</td>
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</table>
### Supply Resource Option Characterization (Preliminary Draft Estimates)

<table>
<thead>
<tr>
<th>Option Name</th>
<th>Option Description</th>
<th>Plant Capacity</th>
<th>Average Output</th>
<th>Capital Cost</th>
<th>Fixed Operating</th>
<th>Variable Operating Cost</th>
<th>Plant Life</th>
<th>Economic Life</th>
<th>Total Discounted Cost</th>
<th>Notes</th>
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<tbody>
<tr>
<td></td>
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<td>Installed</td>
<td>Effective</td>
<td>Output</td>
<td>Cost</td>
<td>Unit Cost</td>
<td>Cost</td>
<td>Unit Cost</td>
<td>Economic</td>
<td>NPV ($2002)</td>
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<tr>
<td></td>
<td></td>
<td>MGD</td>
<td>MGD</td>
<td>MGD</td>
<td>$M</td>
<td>$M/MGD</td>
<td>$/year</td>
<td>$/year/MGD</td>
<td>$/kcal</td>
<td>Years</td>
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<tr>
<td>Wells - North Waiehea</td>
<td>Per 1992 WUDP Update per N. Saito August 1990 (5) 2 MGD wells, storage, transmission. Costs include some transmission already installed. HDA Modification of 1992 Update Configuration.</td>
<td>14,000</td>
<td>8,000</td>
<td>8,000</td>
<td>$24,343</td>
<td>$3,043</td>
<td>$235,405</td>
<td>$29,426</td>
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<td>Wells - North Waiehea</td>
<td></td>
<td>8,000</td>
<td>4,000</td>
<td>4,000</td>
<td>$19,359</td>
<td>$4,840</td>
<td>$129,596</td>
<td>$32,399</td>
<td>$0.78</td>
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<tr>
<td>Wells @ Paia/Haiku Area</td>
<td>Per 1992 WUDP Update per N. Saito August 1990 (3) 1 MGD wells @ 600', storage, transmission. Includes Hamakua Poho well.</td>
<td>14,000</td>
<td>13,000</td>
<td>8,700</td>
<td>$69,505</td>
<td>$7,989</td>
<td>$219,396</td>
<td>$25,218</td>
<td>$0.80</td>
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<tr>
<td>Wells @ Paia/Haiku Area</td>
<td>Per EMPLAN SEIS, Related well depth 100'. (8) Wells 1 MGD, storage, transmission.</td>
<td>13,680</td>
<td>11,970</td>
<td>8,011</td>
<td>$23,846</td>
<td>$2,952</td>
<td>$278,337</td>
<td>$34,496</td>
<td>$1.00</td>
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<tr>
<td>Wells @ Paia to Honopou</td>
<td>Per 1992 WUDP Update per Bell Collins &amp; Asso., Oct 1996 (25) Wells 1 MGD, storage, transmission. HDA modification of 1992 WUDP Update configuration. Costs adjusted for even comparison to N. Saito estimate.</td>
<td>25,000</td>
<td>23,000</td>
<td>15,392</td>
<td>$80,272</td>
<td>$5,215</td>
<td>$531,243</td>
<td>$34,514</td>
<td>$0.81</td>
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<tr>
<td>Wells @ Paia to Honopou</td>
<td></td>
<td>25,000</td>
<td>23,000</td>
<td>15,392</td>
<td>$99,345</td>
<td>$6,454</td>
<td>$693,743</td>
<td>$38,574</td>
<td>$1.01</td>
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<tr>
<td>Well @ Makuha</td>
<td>2.0 MGD Well per DPS CIP; includes storage, transmission</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>$4,525</td>
<td>$4,525</td>
<td>$15,114</td>
<td>$15,114</td>
<td>$0.41</td>
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<tr>
<td>Well @ Wacole</td>
<td>2.0 MGD Well per DPS CIP; includes storage, transmission. Incremental development following Makuha Well.</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>$4,300</td>
<td>$4,300</td>
<td>$15,114</td>
<td>$15,114</td>
<td>$0.41</td>
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<tr>
<td>Pookula Well</td>
<td></td>
<td>0.900</td>
<td>0.900</td>
<td>0.900</td>
<td>$3,786</td>
<td>$4,206</td>
<td>$33,399</td>
<td>$37,110</td>
<td>$1.80</td>
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<tr>
<td>Well @ Central Perched Generic</td>
<td>Generic hypothetical project, unspecified location.</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>$4,325</td>
<td>$4,325</td>
<td>$7,614</td>
<td>$7,614</td>
<td>$0.11</td>
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<tr>
<td>Tunnel @ Central Perched Generic</td>
<td>Generic hypothetical project, unspecified location.</td>
<td>1,000</td>
<td>1,000</td>
<td>1,000</td>
<td>$6,825</td>
<td>$6,825</td>
<td>$5,364</td>
<td>$5,364</td>
<td>$0.03</td>
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<tr>
<td>Connect Haamakaukopio to Central System</td>
<td>Connect (2) existing wells to Central system. Costs presume later use for system expansion.</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>$6,900</td>
<td>$6,900</td>
<td>$63,798</td>
<td>$63,798</td>
<td>$1.51</td>
<td>30</td>
</tr>
<tr>
<td>Connect Haamakaukopio to Central System</td>
<td>Connect (2) existing wells to Central system. Costs as contingency w/ no later use for system expansion.</td>
<td>2,000</td>
<td>2,000</td>
<td>1,000</td>
<td>$6,900</td>
<td>$6,900</td>
<td>$63,798</td>
<td>$63,798</td>
<td>$1.51</td>
<td>30</td>
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<tr>
<td>Central Treatment and Storage</td>
<td>Generic surface water source system w/ drip source. Includes T/P, storage, engineering; no specific transmission.</td>
<td>9,000</td>
<td>6,000</td>
<td>6,000</td>
<td>$64,900</td>
<td>$10,617</td>
<td>$350,000</td>
<td>$58,333</td>
<td>$0.28</td>
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<tr>
<td>Piholi 300MG Reservoir Expansion</td>
<td>New 300MG reservoir for Piholi TP (Lower Kula). Incremental capacity increase per HDA mass flow analysis.</td>
<td>2,530</td>
<td>2,530</td>
<td>2,530</td>
<td>$64,500</td>
<td>$25,494</td>
<td>$60,000</td>
<td>$23,705</td>
<td>$0.00</td>
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<tr>
<td>DPW Recycled Water - Waikupila St. Line</td>
<td>Connect existing &quot;12&quot; Waikupila line to S.Kihei Rd. line. Costs per kgal based on displaced potable water only.</td>
<td>0.156</td>
<td>0.156</td>
<td>0.156</td>
<td>$1,600</td>
<td>$6,410</td>
<td>$0</td>
<td>$0</td>
<td>$0.30</td>
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<tr>
<td>DPW Recycled Water - Liloa Dr. Line</td>
<td>Connect existing &quot;12&quot; Line Dr. line to S.Kihei Rd. line. Costs per kgal based on displaced potable water only.</td>
<td>0.086</td>
<td>0.086</td>
<td>0.086</td>
<td>$8,800</td>
<td>$9,302</td>
<td>$0</td>
<td>$0</td>
<td>$0.30</td>
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</table>

**Notes:**
- Levelized costs are calculated based on 3.0% inflation, 6.0% DWS cost of capital and 6.0% discount rate. Operating costs are HDA estimates.
- All estimates, calculated costs and impacts should be considered preliminary draft approximations for purposes of initial resource characterization and review.
- Costs from prior studies are escalated to year 2002 dollars according to Consumer Price Index for Honolulu (all goods, urban).

**Abbreviations:**
- NPV = net present value
- MGD = millions of gallons per day
- kgal = one thousand gallons
- $2002 = constant (real) dollars
- HDA = Hamaiki Design & Analysis (Carl Freedman)
## Candidate DSM Program Characterization (Preliminary Draft Estimates)

<table>
<thead>
<tr>
<th>Program Name</th>
<th>Delivery Mechanism</th>
<th>Measure Cost</th>
<th>Utility Cost</th>
<th>Program Cost</th>
<th>Savings Efficacy</th>
<th>Measure Life Years</th>
<th>Levelized Unit Cost</th>
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<tbody>
<tr>
<td>Toilet Retro Rebate</td>
<td>Rebate Application based on Honolulu program</td>
<td>$80</td>
<td>$100</td>
<td>$180</td>
<td>$100</td>
<td>$150</td>
<td>$150</td>
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<td>Toilet Flapper Install</td>
<td>Per SPU CPA</td>
<td>$50</td>
<td>$50</td>
<td>$100</td>
<td>$25</td>
<td>$255</td>
<td>$120</td>
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<td>Showershead Giveaway</td>
<td>Showerheads distributed at public events or by request</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$10</td>
<td>$10</td>
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<tr>
<td>Shwrhd Canvass</td>
<td>Showerheads distributed by door to door canvase with choice of type</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$20</td>
<td>$20</td>
</tr>
<tr>
<td>Shwrhd Direct Install</td>
<td>Showerheads installed by trained technicians</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$30</td>
<td>$30</td>
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<tr>
<td>Shwrhd Mass Mail</td>
<td>Showerheads mailed to customers</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$15</td>
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<tr>
<td>Urinal Retro Rebate</td>
<td>Rebate Application similar to Honolulu toilet rebate program</td>
<td>$250</td>
<td>$150</td>
<td>$350</td>
<td>$50</td>
<td>$200</td>
<td>$200</td>
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<tr>
<td>Water Eff Clothes Wash</td>
<td>Rebate Application with purchase documentation</td>
<td>$350</td>
<td>$150</td>
<td>$350</td>
<td>$50</td>
<td>$220</td>
<td>$220</td>
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<tr>
<td>Water Eff Dish Wash</td>
<td>Rebate Application with purchase documentation</td>
<td>$50</td>
<td>$0</td>
<td>$50</td>
<td>$0</td>
<td>$120</td>
<td>$120</td>
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<td>Auto Rain Shut Off</td>
<td>Per SPU CPA - Install automatic rain shut-off on automatic irrigation systems</td>
<td>$50</td>
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<td>$50</td>
<td>$5</td>
<td>$159</td>
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<td>Soil Moisture Sensor</td>
<td>Per SPU CPA - Install soil moisture sensors on automatic irrigation systems</td>
<td>$150</td>
<td>$150</td>
<td>$150</td>
<td>$9</td>
<td>$159</td>
<td>$159</td>
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<tr>
<td>Improve Perf. of Irr. Sys.</td>
<td>Per SPU CPA - repair, replacement, adjustment of in-ground ir. system</td>
<td>$188</td>
<td>$188</td>
<td>$188</td>
<td>$9</td>
<td>$197</td>
<td>$197</td>
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<td>Improve Irr. Scheduling</td>
<td>Per SPU CPA - Improve irrigation efficiency by better scheduling</td>
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<td>$25</td>
<td>$25</td>
<td>$9</td>
<td>$34</td>
<td>$34</td>
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<tr>
<td>Greywater for Irrigation</td>
<td>Per SPU CPA - install grey water collect/dist. system -new and remod.</td>
<td>$2,000</td>
<td>$2,000</td>
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<td>Rain Barrel Catchment</td>
<td>Per SPU CPA - Install 50 gallon barrels to gutter downspouts for irrigation</td>
<td>$50</td>
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<td>$50</td>
<td>$9</td>
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<td>Low Water Use Plantings</td>
<td>Per SPU CPA - Replac 300sq ft. lawn with low water req. plants</td>
<td>$25</td>
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<td>$9</td>
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<td>Xeriscaping</td>
<td>HDA per SPU CPA - Replace irrigated landscaping with xeriscape</td>
<td>$500</td>
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<td>$800</td>
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</table>

**Notes:**
Shaded cells are data entry cells; other numerical cells are calculated.

SPU CPA = Seattle Public Utilities Conservation Potential Assessment Final Project Report, May 1998. Delivery mechanisms were not explicitly identified for several programs.

Documentation, calculations of estimates and sources are identified on a more detailed source spreadsheet.

Levelized costs are calculated according to the identified measure life assuming a 3.0% inflation rate, 6.0% cost of capital, 6.0% discount rate.

All estimates and calculated costs and savings impacts should be considered rough approximations for purposes of initial measure and program assessment.

**Abbreviations:**
gpd = gallons per day; gpdpf = gallons per day per fixture; kgal = thousand gallons; TRC = Total Resource Cost Test; HDA = Haiku Design & Analysis (Carl Freedman)
Mr. Dean Nakano, Acting Deputy Director  
Department of Land and Natural Resources  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, Hawaii 96813

Re: Water Use Application Information, Wailuku Shaft (Shaft 33), Well No. 5330-05

Dear Mr. Nakano:

This letter is a follow-up to your staff's request for additional information concerning Water Use Permit Application No. 707 for Kehalani Mauka, LLC ("Kehalani Mauka" or "the project"), use of the Wailuku Shaft on the portion of the Kehalani Mauka project that had actual water service from Shaft 33 (State Well No. 5330-05).

To clarify, Kehalani Mauka is seeking an existing use permit for a municipal use. The project is within the service area for the Central Maui Water System and Shaft 33. Therefore, given our request is seeking an existing use, we do not believe that it should be limited to the units in service on July 21, 2003. We do not think the Commission would limit such municipal use of the County of Maui or other municipal users. However, to respond to your inquiry, as of July 21, 2003, 320 units were in service with an additional amount for irrigation of the common areas for that portion of the project. Enclosed is Table 1 detailing the portion of the project under DWS service and a Map indicating the location of that portion of the project.

Thank you for your patience as we try to come to some agreement with the Maui County under the Department of Water Supply ("MDWS") on the use of Shaft 33 and a joint application with MDWS.

Sincerely,

Linnel T. Nishioka

Enclosures

LTN:ai
cc w/encls: Mr. Jay Nakamura  
Mr. David Blane  
Jane Lovell, Esq., Maui Corporation Counsel
Portion of Kehalani Project on the DWS Water System as of 7/21/03*

<table>
<thead>
<tr>
<th>TABLE 1. TMKs TO USE REQUESTED WATER</th>
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<tr>
<td>PROJECT NAME: &amp; DMWS Water System Address</td>
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<tr>
<td>--------------------------------------</td>
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<td>A portion of Kehalani</td>
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<td>Project: (See Attached Map)</td>
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<tr>
<td>Kaimana (179 Units)</td>
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<tr>
<td>Halemalu (30 Units)</td>
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<tr>
<td>Nanea (80 Units)</td>
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<tr>
<td>Olena I (31 Units)</td>
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<tr>
<td>Subtotal (gpd)</td>
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<td>Irrigation of common areas in Kaimana,</td>
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<td>non-potable pending</td>
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<td>Subtotal (gpd)</td>
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<tr>
<td>(15% of potable use)</td>
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<tr>
<td>Subtotal (gpd)</td>
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<td>TOTAL GPD</td>
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</table>

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

Only for verification that: 1) TMKs listed are consistent with zoning and development plans; and 2) projects listed are allowed with respect to zoning and development plans.

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

*Kehalani Mauka continues to assert that its entire application for shaft 33 (State Well No. 5330-05) is for an existing use.
Primary Permit #: LTR 20051644

Mail Log: | Location Code: | Applicant Name: | DLNR.COMMISSION ON WATER RESOURCE MNGMNT
---|---|---|---

Assigned Planner: Robyn Loudermilk | Project Name: | IAO GROUND WATER
---|---|---

TMK#: | Project Description: | MANAGEMENT AREA (WATER USE PERMIT APP) 5330-05
---|---|---

Retrieve File for Planner?

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Schedule

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<tr>
<td>More Info Received:</td>
<td></td>
<td>To County Council:</td>
</tr>
<tr>
<td>Sent to Agency:</td>
<td></td>
<td>Completed:</td>
</tr>
</tbody>
</table>

Comments:
June 7, 2005

TO: Honorable Micah Kane, Director
Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
Department of Health
Mr. Clyde W. Namu’o, Administrator
Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable G. Riki Hokama, Chairperson
County Council
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 is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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.

Contact person: Robyn L. Londermilk
Phone: 270-7735
Signed: Pernell J. Foucher
Date: 7/1/05
DEPARTMENT OF THE CORPORATION COUNSEL 205

BRIAN T. MOTO 5421
Corporation Counsel
JANE E. LOVELL 7551
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No. (808) 270-7740
S:\ALL\Jel\WaterIssues\PetContCase.wpd

Attorneys for COUNTY OF MAUI

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the WATER USE PERMIT APPLICATIONS
for the Iao Aquifer

Docket No. _________________

PETITION FOR A CONTESTED CASE; CERTIFICATE OF SERVICE

PETITION FOR A CONTESTED CASE

COMES NOW, COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("DWS"), by and through its attorneys BRIAN T. MOTO, Corporation Counsel, and JANE E. LOVELL, Deputy Corporation Counsel, and formally requests a contested case, pursuant to Rule § 13-167-52(a) of the Hawaii Administrative Rules ("HAR"), and Hawaii Revised Statutes ("HRS") § 174C et seq., as follows:

I. WATER USE PERMITS AT ISSUE

A. Wailuku Shaft 33

DWS requests a contested case as to Wailuku Shaft 33 (Well No. 5330-05, WUP No. 702 filed by County of Maui, Department of Water Supply) and on the competing application, WUP No. 707, filed by Kehalani Mauka, LLC.
B. **DWS's Remaining Water Use Permit Applications**

If any other person or entity requests a contested case as to any or all of the following sources and water use permit applications, then DWS also requests a contested case as to each and every application set forth below that forms the basis of another entity's request for a contested case:

- Waihee Wells 1, 2, and 3 (Well Nos. 5431-02, 5431-03, and 5431-04), WUP Nos. 695, 696, and 703 filed by County of Maui, Department of Water Supply;

- Waiehu Heights Wells 1 and 2 (Well Nos. 5430-01 and 5430-02, WUP Nos. 697 and 698 filed by County of Maui, Department of Water Supply);

- Mokuhau Wells 1 and 3 (Well Nos. 5330-09 and 5330-11, WUP Nos. 700 and 701 filed by County of Maui, Department of Water Supply);

- Kepaniwai Well (Well No. 5332-05, WUP No. 699 filed by the County of Maui, Department of Water Supply); and

- Iao Tunnel (Well No. 5332-02, WUP No. 680 filed by the County of Maui, Department of Water Supply.

II. **LEGAL AUTHORITY**

DWS brings this petition pursuant to Rule § 13-167-52(a) of the HAR, and HRS §§ 91 et seq. and 174C et seq.

III. **PETITIONER'S INTEREST**

DWS manages and operates all water systems owned by the County of Maui for the benefit of the people of Maui. DWS is the applicant for all but one of the water use permit applications referenced in Section I., above. Kehalani Mauka's application for Wailuku Shaft 33 directly competes with DWS's application for the
same source. DWS cannot adequately serve the individual homeowners, businesses, churches, government offices, and other customers in Central Maui if DWS's Water Use Permit applications are denied, or if the amounts requested by DWS from each of the above-referenced sources are reduced.

IV. DISAGREEMENTS CONTESTED BY PETITIONER/BASIC FACTS AND ISSUES RAISED

DWS is requesting a contested case because Kehalani Mauka has filed a water use application for DWS's major source for Central Maui, namely, Wailuku Shaft 33. As to DWS's remaining water use permit applications, objections have been lodged by Earthjustice on behalf of Maui Meadows Homeowners Association and Hui o Nā Wai ʻEhā, and by the Office Hawaiian Affairs to all of the water use permit applications referenced in Section I, above.

A. Kehalani Mauka's Application For Wailuku Shaft 33


HRS § 174C-49(a)(1) requires applicants for water use permits to establish that the proposed use of water "[c]an be accommodated with the available water source." Kehalani Mauka LLC did not meet this burden. Kehalani Mauka LLC wants to use Wailuku Shaft 33 for its Kehalani Mauka project, a 550-acre master planned community of approximately 2,400 homes, as well as a mixture of commercial properties. According to the application, when completed, the project "will be one of the largest planned developments on the island." Kehalani Mauka LLC stated that it was "in the process of negotiating a lease with the County Department of Water Supply," but acknowledged that if no such lease were
concluded, Kehalani Mauka LLC would use Wailuku Shaft 33 for its own purposes. To date, no lease with DWS has been concluded.

The entire amount of water pumped from Wailuku Shaft 33 is currently being used by DWS to serve existing users within the County's municipal system. If Kehalani Mauka LLC's water use permit application for the Wailuku Shaft were approved, the consequence, of necessity, would be a reduction of the amount of water available to DWS for existing municipal uses.

Kehalani Mauka LLC did not provide any calculation of the demand for the Kehalani Mauka project at full build out. On this basis alone, Kehalani Mauka LLC failed to demonstrate that its proposed use of water for its project can be accommodated with the existing output of Wailuku Shaft 33.


HRS § 174C-49(a)(2) requires applicants for water use permits to establish that the proposed use of water "[i]s a reasonable-beneficial use as defined in section 174C-3." Kehalani Mauka LLC did not meet this burden. Its application mentioned certain programs instituted by the County of Maui to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water sources, development of new sources in Waihee, conservation programs, use of reclaimed water, and the like. The application did not mention that DWS also plans to develop Waikapu Mauka and Iao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. All of these programs, which have been instituted by DWS to protect the aquifer and to use Wailuku
Shaft 33 in an economic and efficient manner, are dependent on DWS's continued control of the source. However, no agreement between DWS and the Kehalani Mauka LLC has been reached to date. If Wailuku Shaft 33 is used to accommodate Kehalani Mauka LLC's additional 2,400 homes and up to 22 acres of commercial development, additional strain will be placed on the aquifer or water service to existing DWS customers may be seriously impacted. Kehalani Mauka LLC's proposed use is neither reasonable nor beneficial.


HRS § 174C-49(a)(3) provides that applicants for water use permits must establish that the proposed use "[w]ill not interfere with any existing legal use of water."

Although Kehalani Mauka LLC tried to gloss over a key jurisdictional fact, Kehalani Mauka LLC is not the existing user of water from Wailuku Shaft 33.

DWS continues to maintain that it is the existing user of this source, notwithstanding this Commission's ruling on DWS's petition for a declaratory ruling. Since August 1991, DWS has been the only user of the shaft. DWS has installed distribution appurtenances and has kept up maintenance of the shaft since that time. Kehalani Mauka LLC stated that it did "not anticipate that pumpage at this level [5.771 MGD] will interfere with any other existing legal uses. . . ." However, Kehalani Mauka LLC did not provide any factual or scientific foundation for that assertion. Kehalani Mauka LLC did not explain how the DWS is supposed to supply an additional 2,400 new homes from this source, and up to 22
acres of new commercial development, while at the same time, maintaining service to DWS's existing customers in Central and South Maui. Kehalani Mauka LLC did not meet its burden under HRS § 174C-49(a)(3).


HRS § 174C-49(a)(4) requires applicants to establish that the proposed use is "consistent with the public interest." Kehalani Mauka LLC did not do so.

In support of its application, Kehalani Mauka LLC stated that "Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest." DWS agrees. However, Kehalani Mauka LLC further claimed that: "Serving municipal uses in the Kehalani project would similarly be in the public interest." Kehalani Mauka LLC has not explained how these additional new uses could be accommodated without either overpumping the aquifer or taking water away from existing users. Neither of those outcomes would be in the public interest.


HRS § 174C-49(a)(7) requires that the applicant must demonstrate that its proposed use "[w]ill not interfere with the rights of the department of Hawaiian home lands." Kehalani Mauka LLC did not do so. Kehalani Mauka LLC stated that "Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL." However, Kehalani Mauka LLC acknowledged that
"DHHL currently receives water from the County water system that includes this source . . . ." If the output of Wailuku Shaft 33 must accommodate 2,400 additional homes, and up to 22 acres of new commercial development, then existing DHHL users who depend on this source could be harmed if the end result is rationing of water to existing users or overpumping of the Iao aquifer.

6. **Kehalana Mauka LLC's Application Is Not Consistent With State And County General Plans And Land Use Designations.**

As the Planning Director of the County of Maui advised this Commission in a letter dated October 8, 2004, Kehalani Mauka's proposed use is not consistent with state and county general plans and land use designations, as required by HRS § 174C-49(a)(6), nor is the proposed use consistent with County land use plans and policies as required by HRS § 174C-49(a)(7).

The Wailuku-Kahului Community Plan, adopted in 2002, provides at page 30 for several objectives and policies with respect to water and utilities. Among these are coordinating "water system improvement plans with growth areas to ensure adequate supply . . . ." That Community Plan also provides that "[f]uture growth should be phased to be in concert with the service capacity of the water system." However, the Kehalani Mauka application seeks to use a source currently serving the Central Maui system for 2,400 additional homes and 22 acres of additional commercial development. As the County's Planning Director advised the Commission on October 8, 2004, adding 2,400 homes and 22 acres of commercial development to the already taxed Central Maui system, which is served by the Iao Aquifer, is not consistent with the Community Plan's objectives and policies.
Maui’s General Plan, adopted in 1990, provides for monitoring "growth activities throughout Maui County in order that development of new water sources is concurrent with approval of new developments." (General Plan, p. 11) Director Foley advised that allowing for 2,400 new houses and 22 acres of commercial development without developing any new water sources would not be consistent with this aspect of the General Plan.

The General Plan also provides for supporting the Department of Water Supply (previously, the Board of Water Supply) in its determination of "future water needs consistent with the General Plan, Community Plans, and the growth management strategy." Id. County of Maui's Department of Water Supply noted in its objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft that "[t]he current average pumpage of 5.771 MGD is in its entirety serving the County's municipal system" and that "additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the Iao aquifer in order to avoid overpumpage of the aquifer." The Planning Director agreed and concurred with that assessment.

B. Earthjustice And OHA Objections

DWS responded to the objections of Earthjustice and OHA, which were similar. In that process, many of the objections were addressed. However, OHA and Earthjustice continue to assert that DWS has not provided sufficient information to meet its statutory burden. Other outstanding issues between the parties include Native Hawaiian water rights, traditional and customary rights, the nature
and extent of DWS's conservation efforts, the relationship between the public trust doctrine and DWS's mission, the effect (if any) of DWS's wells on surface water flows, practicable alternatives, and DHHL reservations.

V. RELIEF REQUESTED

DWS requests that all of its water use permit applications be granted; that Kehalani Mauka LLC's application for Wailuku Shaft 33 be denied; and that all objections to DWS's applications be overruled.

VI. OTHER AFFECTED PARTIES

DWS believes that the other parties whose interests may be affected by the relief requested in Section V, above, are Kehalani Mauka LLC, Earthjustice on behalf of Maui Meadows Homeowners Association and Hui o Nā Wai ʻEhā, and the Office Hawaiian Affairs.


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By JANE E. LOVELL
Deputy Corporation Counsel
STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the
WATER USE PERMIT APPLICATIONS
for the Iao Aquifer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly
duly served TODAY upon the following counsel in the manner indicated,
addressed as follows:

METHOD OF SERVICE:
MAIL  HAND DELIVERY

Peter T. Young, Chairperson  X
State of Hawaii
Dept. of Land & Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Dean Nakano, Deputy Director  X
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Mark J. Bennett, Attorney General  X
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu HI 96813

Gary Phillips, Esq.  X
Hawaii Land and Farming, Inc.
745 Fort Street
Honolulu HI 96813

Linnell T. Nishioka, Esq.  X
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Honolulu HI 96813
Kapua Sproat, Esq.
EarthJustice
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Honolulu, HI 96813

Clyde W. Namu'o
Jonathan L. Scheuer, Ph.D.
State of Hawaii
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, HI 96813


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By JANE E. LOVELL
Deputy Corporation Counsel
CONFIDENTIALITY

The information contained in this FAX transmittal is intended only for the personal and confidential use of the designated recipient(s) named below. This message may be an attorney-client communication and, as such, is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, dissemination, distribution or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us by mail. Thank you.

TO: Peter T. Young, Chairperson
    Dean A. Nakano, Acting Deputy Director
    Commission on Water Resource Management

FAX NO.: (808) 587-0219
FROM: Kapua Sproat
DATE: June 29, 2005
Re: Objection to Maui County’s Water Use Permit Application No. 702 for Wailuku Shaft 33 (Well 5330-05); Iao Ground Water Management Area, Maui

Number of pages (including this cover memo): 1

If there are any problems with transmission, please call (808) 599-2436.

ATTACHMENT:

Letter of this date re the above-referenced matter. A hard copy is also being mailed to you. Thank you.
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

June 7, 2005

In addition to serving you notice as required by 174C-52 (a), HRS, we transmit for your review and comment a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005 deadline, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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 587-0231.

Chas
Attachment(s)

Response:

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

Contact person: Kapua'ala Sproat
Phone: (808) 599-2436

Signed: [Signature]
Date: June 29, 2005
June 29, 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 Maui County's Water Use Permit Application No. 702 for Wailuku Shaft 33 (Well 5330-05); ʻIao 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 provides the following comments and objections regarding Maui County Department of Water Supply's ("MDWS's") water use permit application ("WUPA") number 702 for Wailuku Shaft 33 (Well No. 5330-05). This application seeks a permit for 5.771 mgd from the ʻIao aquifer to help satisfy the Central Maui Service Area's municipal water demand.

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 ‘Iao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from ʻIao, Waiheʻe, Waiehu, and Waikapā 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 ʻIao 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 ʻIao 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 ʻIao and Waiheʻe aquifers.
Earthjustice's Objection to MDWS's Water Use Permit Application for Wailuku Shaft 33
June 29, 2005
Page 2 of 5

At the outset, the Hui and Maui Tomorrow commend MDWS, as its application is significantly more complete than other WUPAs submitted for the 'Iao Ground Water Management Area. Despite this effort, however, MDWS's WUPA still lacks the information necessary to establish that its use complies with all of the requirements of the law. In its current state, MDWS's application fails 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 Hui and Maui Meadows, therefore, must object to MDWS's WUPA.

MDWS's application is insufficient for the following reasons:

1. MDWS failed to establish that the water source would accommodate its use, 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). MDWS's application failed to establish that either Shaft 33 or the 'Iao aquifer in general can support its municipal use, especially given MDWS's increasing demands and the fact that Shaft 33 may be closed. See Maui News, Key Central Maui Water Source Closing (June 5, 2005) (available at: http://www.mauinews.com/story.aspx?id=9453). In the 'Iao aquifer, MDWS's pumpage alone is 18.4 mgd, more than 90 percent of the estimated sustainable yield for this water source. See Maui News, Demand on Water Remains Too High (June 26, 2005) (available at: http://www.mauinews.com/story.aspx?id=10010). MDWS's current pumpage for the Central Maui Service Area has also increased to 26.21 mgd, well over its average pumpage for June 2004, which was 24.76 mgd. Id. MDWS is also pumping the Waihe'e aquifer at 4.8 mgd, even though this Commission ordered MDWS to limit such pumpage to 4 mgd, given MDWS's concentration of wells and pumpage in only one-half of that aquifer. Id.

Given MDWS's current pumpage and the fact that Shaft 33 may be closed, this Commission cannot simply assume that the 'Iao aquifer can support MDWS's current or future use. Moreover, USGS's ongoing studies may necessitate reducing the sustainable yield for 'Iao, further impacting the aquifer's ability to satisfy MDWS's and other uses. In short, MDWS must provide the information necessary to satisfy this criterion before any further action is taken on its application.

2. MDWS failed to establish that its use is 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 Water Code mandates that an applicant establish that its proposed use
Earthjustice’s Objection to MDWS’s Water Use Permit Application for Wailuku Shaft 33
June 29, 2005
Page 3 of 5

“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 Waiāhole Ditch Combined Contested Case Hearing ("Waiāhole I"), 94 Haw. 97, 136-138. 142, 9 P.3d 409, 448-450, 454 (2000)). Analyzing potential impacts on each of these public trust purposes is especially important in Tao, 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.

Although MDWS’s application lists wells and tunnels included in this Commission’s database, it fails to identify, let alone analyze, any impacts on public trust purposes or existing uses. This Commission cannot and should not issue permits to MDWS absent additional information demonstrating that its use is consistent with known existing and yet to be identified uses.


a. MDWS failed to demonstrate that its use is reasonable and beneficial by detailing actual water needs.

The law requires that permit applicants such as MDWS demonstrate, at a minimum, that their requested allocation reflects actual need. See Waiāhole 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.”). MDWS neglected to provide any basis for its requested allocation, and must provide this information before this Commission takes any further action on its application.

b. MDWS failed to demonstrate that its use is reasonable and beneficial by demonstrating the absence of practicable alternatives, including system repairs and alternative sources of water.

Assuming, arguendo, that 5.771 mgd reflects MDWS’s actual water need, the application fails to demonstrate the absence of practicable alternatives, including conservation measures and alternative sources of water. This analysis is necessary to fulfill MDWS’s burden of proof and this Commission’s duty as trustee of Hawai’i’s water resources.
Specifically, the public trust compels the state duty 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.

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 will 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. Although MDWS identified potential conservation measures, the application did not quantify potential water savings that could be realized, or explain whether any of the conservation measures would be implemented or alternative sources utilized. Because MDWS's application failed to include this required analysis, Commission approval of this WUPA in its present state would be wrong as a matter of law.


The Code also requires that MDWS establish that its proposed use is 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). MDWS's applications fail to satisfy these criteria. Given the high level of scrutiny required by the state Constitution, Water Code, and public trust principles, MDWS must affirmatively demonstrate compliance with these necessary requirements.

5. Conclusion.

In conclusion, MDWS's application fails to meet the minimum requirements necessary to protect the `Iao aquifer, safeguard the public interest, and facilitate meaningful participation by interested parties and reasoned decisionmaking by this Commission. Because MDWS 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 this application if no additional information is forthcoming. In the alternative, we ask this Commission to order MDWS to immediately provide the 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
Earthjustice’s Objection to MDWS’s Water Use Permit Application for Wailuku Shaft 33
June 29, 2005
Page 5 of 5

submitted at least one week prior to the July 11, 2005 meeting of the parties. If this information is provided, we remain hopeful that the communities’ concerns and objections can be resolved via the mediated discussions, alleviating any need for a contested case hearing.

Please do not hesitate to contact us for further information.

Me ke aloha,

D. Kagawa Sproat

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

To: Charley Ice  From: Jonathan Scheuer

Company: Commission on Water Resource Mgmt. Date: 6/29/05

Phone Number:  Phone Number: 594-1946
Fax Number: 587-0219 Fax Number: 594-1765

Notes/Comments:

(4 pages including cover page)
June 29, 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 Application in the 'Iao Ground Water Management Area, Maui.¹

Dear Mr. Young and Commissioners,

The Office of Hawaiian Affairs (OHA) appreciates the opportunity to comment on this permit. As we have for all but one of the other existing use and new use Water Use Permit Applications (WUPA) that have been submitted in response to the designation of the 'Iao Ground Water Management Area, OHA objects to this application because it was 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. As our objections are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.
3. We also note that the County has publicly announced that they plan to abandon Shaft 33 ("Key Central Maui Water Source Closing," June 5, 2005, Maui News). Because the permitting process for this aquifer is already highly complex, we request the Commission to clarify with the Applicant what their plans are for this well.
4. 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 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.

¹ Applications by County of Maui, Department of Water Supply, for:
Walluku Shaft 33 (Well No. 5330-05, WUPA No. 702, source TMK 3-5-1:1, place of use TMKs multiple and various)
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 this WUPA.

OHA’s primary objection
OHA has one central objection to this WUPA as filed by the applicant and accepted by the commission. The applicant has failed in their application to establish that the proposed use of water meets the seven conditions for water use in a designated ground water management area.

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. Namu'o
Administrator

cc: George Tengan, Ellen Kraftsow, & Jane Lovell, Maui County (via First Class U.S. Mail)
Randy Gentry, Maui Parks and Recreation (via email)
John V. Duey, Hui o Nā Wai ʻEhā (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)
June 16, 2005

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

FROM: Anthony J. H. Ching, Executive Officer

SUBJECT: Water Use Permit Application
Iao Groundwater Management Area, Maui (Well No. 5330-05)

We have reviewed the subject application forwarded by your transmittal dated June 7, 2005, and have no additional comments to offer to our previous comments on the original application dated August 26, 2004.

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

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

Enclosure
Transmitted for your review and comment is a copy of a water use permit application (WUPA No.702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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.
June 7, 2005

TQ: Honorable Micah Kane, Director  
Department of Hawaiian Home Lands

Honorable Chiyome L. Fukino, M.D., Director  
Department of Health

Mr. Clyde W. Namu'o, Administrator  
Office of Hawaiian Affairs  
Attn: Mr. Jonathan Scheuer

Honorable G. Riki Hokama, Chairperson  
County Council  
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 is a copy of a water use permit application (WUPA No.702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: Rebecca Alakai  
Phone: 587-3952

Signed: Rebecca Alakai  
Date: 6/17/05
June 15, 2005

To: Peter T. Young, Chairperson  
    Board of Land and Natural Resources

From: Micah A. Kane, Chairman  
      Hawaiian Homes Commission

Subject: Water Use Permit Application  
Maui Department of Water Supply Well No. 5330-05  
Iao Ground Water Management Area, Maui

Thank you for the opportunity to provide comments on the Maui Department of Water Supply's (DWS) water use permit application in the Iao Groundwater Management Area. The Department of Hawaiian Home Lands (DHHL) supports the subject application for water use by the DWS.

The DHHL has significant landholdings in Wailuku and Puunene as stated in our memo to you dated July 21, 2004. Since the 1960's, the DWS has provided water to a five-acre park, community center, preschool, and over 440 homes in our existing subdivision in Paukukalo and Waiehu Kou. Additionally, the subject well may provide water to 213 future homes in Waiehu Kou and commercial plans in design for our land in Puunene.

The DHHL appreciates this opportunity to provide comments. If you have any questions, please call Rebecca Alakai at 587-3952.
Transmitted for your review and comment is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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.
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.
June 7, 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

Transmitted for your review and comment is a copy of a water use permit application (WUPA No.702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: Nelson L. Ayers  

Signed: PAUL J. CONRY, ADMINISTRATOR  
DIVISION OF FORESTRY AND WILDLIFE  
Phone: 7-4175  
Date: JUN - 9 2005
June 7, 2005

TO: Harry Yada, 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 is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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.

( ) 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: Original source of private title is Grant 483 issued prior to Statehood in 1959.

Contact person: Gary Martin Phone: 587-0421

Signed: Gary Martin Date: JUN 9 2005
FROM: **Charley**  
DATE: **06 June 05**

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Is it appropriate to copy anyone else?  
Only [redacted], others NO need. This is an individual app issue.
June 8, 2005

Mr. Brian T. Moto, Corporation Counsel
Ms. Jane E. Lovell, Deputy Corporation Counsel
County of Maui
Department of the Corporation Counsel
200 South High Street
Wailuku, HI 96793

Dear Mr. Moto and Ms. Lovell:

Notice of Commission Action
Petition for Declaratory Ruling
Water Use Permit Application No. 702 for Wailuku Shaft (Well No. 5330-05)

This letter serves as your official notice of action taken by the Commission on Water Resource Management (Commission) on the subject application. By a unanimous vote of the Commission at their meeting on April 20, 2005, the Commission:

A. Denied the petition by Maui Department of Water Supply (DWS) which sought to declare that:

1. DWS’s water use permit application (WUP No. 702) for Wailuku Shaft 33/Well No. 5330-05 ("Wailuku Shaft") received by the Commission on July 2, 2004, was timely filed, and should be considered as an application for an existing use, rather than for a "new" use.

2. Any presumption of abandonment of DWS’s existing use of the Wailuku Shaft, pursuant to Hawaii Revised Statutes (HRS) § 174C-50(c), is conclusively rebutted by DWS’s application for a water use permit for this source, received by the Commission on or about July 2, 2004. Any presumption of abandonment is further rebutted by DWS’s submission, on September 9, 2004, of the same application, bearing the landowner’s signature, received by the Commission on or about September 14, 2004.
3. The Commission is equitably estopped from deeming DWS’s application for the Wailuku Shaft “late” and from denying that DWS is, and for the past 13 years, has been the sole existing user of the Wailuku Shaft.

B. Adopted the following declaratory ruling:

DWS’s water use permit application for Wailuku Shaft, as submitted on July 2, 2004, was incomplete because it lacked the co-applicant landowner’s signature. By the time a complete application was filed on September 14, 2004, the one-year period allowed for filing applications for existing uses had elapsed. Pursuant to the Hawaii Supreme Court’s ruling in the Waiahole Ditch case, the Commission lacks the authority to accept any late filing of an existing use permit application. Because of this lack of authority, the issues of abandonment and estoppel are irrelevant. Further, that HAR §13-167-27 cannot be used to amend two applications to change the status of timely or untimely filing as the one-year deadline for applying for existing uses had expired.

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

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

CI:ss

c: Kehalani Mauka, LLC
Maui Department of Water Supply
Public hearing notices have already incorporated the MDWS WUPA-702 Format follows WAC/MPCA letters rather than current merge, with highlighted additions similar to those.

Please See Me
Mr. George Tengan  
County of Maui  
Department of Water Supply  
200 South High Street  
Wailuku, HI 96793  

Dear Mr. Tengan:

We acknowledge receipt, on September 10, 2004, of your completed water use permit application (WUPA No. 702) for the Wailuku Shaft, Shaft 33 (Well No. 5330-05). You can expect your application to be processed within ninety (90) days from the date of receipt unless there are objections to your application.

Those ninety days were suspended during processing of a Petition for a Declaratory Ruling received October 28, 2004. A declaratory ruling was issued April 20, 2005 denying the petition and finding that the application filed on September 10, 2004 must be processed as an application for new water use.

Enclosed is a copy of the public notice for your water use permit application which will be published in the Maui News issues of June 8, 2005 and June 15, 2005.

Please be aware that there may be objections to your application. If objections are made, the objector is required to file such objections with the Commission and is also required to send you a copy of the objections.

You, or any other party, may respond to objections by filing a brief in support of your application with the Commission within ten (10) days of the filing of an objection. You, or the other party, must also send a copy of the response to the objector.

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

Sincerely,

DEAN A. NAKANO  
Acting Deputy Director

CI:ss  
Enclosure
PUBLIC NOTICE

Application for Water Use Permit
Iao Ground Water Management Area, Maui

The following application for water use permit has been received by the Commission on Water Resource Management, and is hereby made public in accordance with Section 13-171, Hawaii Administrative Rules, "Designation and Regulation of Water Management Areas."

Wailuku Shaft 33 (Well No. 5330-05), WUPA No. 702

Applicant: County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Date Application Filed as Complete: September 10, 2004
Hydrologic Unit Aquifer Areas: Iao System, Wailuku Sector, Maui
Water Source: Wailuku Shaft 33 (Well No. 5330-05) at Wailuku Heights, Maui, Tax Map Key 3-5-1:1
Quantity Requested: 5.771 million gallons per day.
Existing/New Use: New
Place of Water Use: Central Maui Service Area at Tax Map Key: 3-2 through 3-9

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 29, 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.

COMMISSION ON WATER RESOURCE MANAGEMENT

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

Dated: June 2, 2005

Publish in: Maui News issues of June 8, 2005 and June 15, 2005
June 7, 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

Transmitted for your review and comment is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: _________________________ Phone: _________________________

Signed: _________________________ Date: _________________________
June 7, 2005

TO: Harry Yada, 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 is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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.
( ) 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: ________________________________
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 is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: __________________________
Signed: __________________________ Date: __________________________
June 7, 2005

TO: Honorable Micah Kane, Director
    Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
    Department of Health
Mr. Clyde W. Namu'o, Administrator
    Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable G. Riki Hokama, Chairperson
    County Council
    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 is a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: ___________________________
Signed: ___________________________ Date: ___________________________
June 7, 2005

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 sending you a copy of the public notice for the water use permit application (WUPA No.702) for the Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 a copy of the application 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.

Sincerely,

W. Roy Handy

Peter T. Young
Chairperson

Cl:ss
Enclosures
June 7, 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
Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), HRS, we transmit for your review and comment a copy of a water use permit application (WUPA No. 702) for Maui Department of Water Supply for Well No. 5330-05. By a declaratory ruling April 20, 2005, this application is being treated as a new use because it was filed as complete after the statutory deadline for existing use applications.

Public notice of this application will be published in the Maui News issues of June 8, 2005 and June 15, 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 29, 2005 deadline, which is the legal deadline for objections. If we do not receive your comments by this date, we will assume you have no objections to this application.

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: ____________________________ Phone: ____________________
Signed: ____________________________ Date: ____________________
INTERESTED OTHERS LIST

ADDITIONAL STANDARD CORRESPONDENCE

Kapua Sproat  
EarthJustice  
223 South King Street 4 Fl  
Honolulu, HI 96813

Jane Lovell  
County of Maui  
Corp Council  
200 South High St.  
Wailuku, HI 96793

IF FOR AQUACULTURE  
Leonard Young  
Aquacultural Development Program

James Williamson, Vice-President  
Maui Meadows Homeowners Association  
PO Box 1935  
Kihei, HI 96753

ADDITIONAL STANDARD MAILING LIST FOR MOLOKAI
June 1, 2005

Mr. George Tengan
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Dear Mr. Tengan:

Meeting Confirmation
Information on Reasonable and Beneficial Use

Our public meeting to discuss information requested regarding water use permits in the Iao Ground Water Management Area is confirmed for the J. Walter Cameron Center, Room 1, in Kahului on June 8, 2005, from 2:30 to 6:30 p.m.

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

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

CI:ss
May 25, 2005

Mr. George Tengan  
County of Maui  
Department of Water Supply  
200 South High Street  
Wailuku, HI 96793

Dear Mr. Tengan:

Information on Reasonable and Beneficial Use

The hearing officers sent questions to all applicants and additional questions to individual objecting parties, dated August 25, November 15, and November 18, 2004. Without evaluating the adequacy of the responses, we have tabulated the response results (enclosed). Some of the questions have not been addressed at all by various applicants.

The interested public at the public hearing has expressed confidence that we are making progress in receiving better information to address their objections, and we are tentatively scheduling an informal meeting on June 8, 2005 at the Cameron Center in Kahului to offer the public the opportunity to review the latest responses before moving to a final session of the public hearing (public notice to be sent when confirmed).

The accompanying table for the applicants show three columns on the right-hand side that indicate (Yes or No) whether issues have been directly addressed, without evaluating the quality or adequacy of the response. These three issues were raised by the Supreme Court June 21, 2004 remand of the Waiahole case: whether alternatives have been explored, whether amounts per unit of use (“duties”) are prescribed, and whether there are valued cultural, historical, or natural resources that are related to the water source for which you have a water use permit application.

If there are such resources, there are public trust presumptions in favor of maintenance of the water source in its natural state and for the practice of traditional and customary native Hawaiian rights related to those resources. Applicants must identify the extent to which those resources will be affected or impaired by their water uses, and the feasible actions, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist. The hearing officers have opined that it is the responsibility of individuals who claim such rights to provide evidence of their claims.

There is a higher level of scrutiny for private commercial uses in the balancing between public and private purposes. As for municipal uses, at least part of those uses—domestic use—is also a public trust purpose.

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,

DEAN A. NAKANO  
Acting Deputy Director

C: Ellen Kraftsow, County of Maui, Department of Water Supply  
Garret Hew, Hawaiian Commercial & Sugar Co.  
Linnel T. Nishioka, Ishikawa Morihara Lau & Fong LLP  
Clayton Suzuki, Wailuku Agribusiness Company, Inc.  
Randy Gentry, County of Maui, Department of Parks and Recreation  
Megan Wells, Living Waters Land Foundation, LLC
PUBLIC HEARING NOTICE

Applications for Water Use Permits
Lao 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, Lao, and Waikapu. Testimony should focus on practicable alternatives, water duties, Hawaiian rights, and definitions of public trust uses.

- **Basal Sources:**
  - **Existing Uses** as of July 21, 2003 and completed applications submitted by the July 21, 2004 deadline
    - Mokuhau Well 1 5330-09 MDWS 700 3-3-2:24 1.994
    - Mokuhau 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
    - Waihee Well 1 5431-02 MDWS 695 3-3-17:31 1.480
    - Waihee Well 2 5431-03 MDWS 696 3-3-17:31 2.439
    - Waihee Well 3 5431-04 MDWS 703 3-3-17:31 1.513
  - **New Uses** arising after July 21, 2003, or completed applications submitted after the July 21, 2004 deadline
    - Wailuku Shaft 33 5330-05 MP&R 709 (3-5-1:1) 5.771
    - Wailuku Shaft 33 5330-05 MP&R 709 (3-5-1:1) 5.771 not to be double-counted
    - Living Waters #1 5531-01 LWLF 704 3-2-13:15 0.020

- **Caprock Sources:**
  - **Existing Uses** as of July 21, 2003 and accepted as completed applications submitted by the July 21, 2004 deadline
    - War Memorial Stadium 5329-04 MP&R 709 3-8-7:55 0.038?
    - Baldwin High School 5329-05 MP&R 710 3-8-7:55 0.010
    - Maui Stadium 5329-14 MP&R 713 3-8-7:55 0.039?
    - Papohaku 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 1 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?
  - **New Uses** arising after July 21, 2003 or completed applications submitted after the July 21, 2004 deadline
    - None
MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: April 20, 2005
TIME: 9:00 a.m.
PLACE: KALANIMOKU BUILDING
CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

CALL TO ORDER

Chairperson Peter Young called the meeting of the Commission on Water Resource Management to order at 9:05 a.m.

ROLL CALL

The following were in attendance:

MEMBERS

Mr. Peter Young
Ms. Meredith Ching
Mr. Clayton Dela Cruz

Mr. James Frazier
Dr. Chiyome Fukino
Dr. Lawrence Miike
Ms. Stephanie Whalen

STAFF

Ed Sakoda, Roy Hardy, Glenn Bauer, Dean Nakano, Dean Uyeno, David Higa, Kevin Gooding, Lenore Nakama and Charley Ice

COUNSEL

Linda Chow, Esq.

OTHERS

Rebecca Alakai, Dick Cox, Manabu Tagomori, George Tengan, Kapua Sproat, Dave Penn, Teresa Dawson, Chester Lao, Gordon Tribble, Bill Tam, Charlie Reppun, Yvonne Izu, Linnel Nishioka, Denise Antolini, Ed Kushi, June F. Harrigan-Lum, Pete Olson, Dr. Jonathan Likeke Scheuer, Sandra Wilhide, Joseph Sax, and Paul Berry

All written testimonies submitted at the meetings are filed in the Commission's office and are available for review by interested parties.

Approved by Commission on Water Resource Management
at the meeting held on
MAY 25 2005
APPROVAL OF MINUTES

1. March 16, 2005

MOTION: (Ching/Whalen)
To approve the minutes
UNANIMOUSLY APPROVED

SUBMITTALS

Acting Deputy Director, Dean Nakano requested withdrawal of Item #2 regarding the Watershed Coding System as a Management Tool.

Motion: To amend the agenda noting the withdrawal of submittal Item #2.
(Frazier/Dela Cruz)
UNANIMOUSLY APPROVED

1. Application for a Stream Channel Alteration Permit (SCAP-OA-378), Construct Bridge for Subdivision Access & Replace Culvert, The Woods at Ahuimanu, LLC, Kahaluu Stream, Ahuimanu, Oahu (TMK (1) 4-7-05:60)

Presentation of Submittal: Ed Sakoda

DISCUSSION:

The overall objective of the project is to develop The Woods at Ahuimanu, which is a 46-lot subdivision. The two components of this project are: 1) the construction of a new bridge crossing and 2) the modification of an existing culvert that crosses Ahuimanu Road, to better convey the stream flow for flood control purposes. An important secondary consideration is its effect on the migration of the stream animals.

The construction is expected to take approximately 8 months, 4 months for each component. After completion it will be turned over to the City and County of Honolulu.

Commissioner Frazier asked where the Corps of Engineers fit in the permitting sequence. Mr. Sakoda stated that together with the Department of Health (DOH) Clean Water Act, Section 401 Water Quality Certification and the Corps of Engineers, Clean Water Act Section 404 permit, we have the best management practices that are enforced by the DOH.
Dave Penn from the DOH participated in a site visit with the Department of Land and Natural Resources' Division of Aquatic Resources and Commission staff. The culvert has to be enlarged to meet the City's drainage requirement in conjunction with building this subdivision. The bridge is for the road passage and not necessarily for any flooding, as the subdivision is located at a high elevation.

RECOMMENDATION:

That the Commission approve a stream channel alteration permit for construction of the vehicular bridge and installation of a 10' by 24' box culvert at Kahaluu Stream (TMK (1) 4-7-05:60), Ahuimanu, Oahu. The permit shall be valid for two years subject to the standard conditions for stream channel alteration permits in Exhibit 7 and the following special condition:

"The applicant shall revegetate and landscape Kahaluu Stream channel at the project site. The landscaping plan shall be designed by a competent landscape architect in consultation with Oceanit Laboratories, Inc., or an equivalent stream consultant and shall be implemented by the applicant at his expense. A copy of the landscaping plan shall be submitted to the Commission prior to construction work. Upon completion of the project, the landscape architect shall notify the Commission, in writing, that the landscaping plan was properly implemented."

MOTION: (Miike/Frazier)
To approve as recommended by staff
UNANIMOUSLY APPROVED

3. Maui Department of Water Supply Petition For Declaratory Ruling

Presentation of Submittal: Roy Hardy

Discussion:

Mr. Hardy explained that this is a resubmittal of the October 28, 2004 petition that was initially submitted to the Commission on December 15, 2004.

The two issues that were stated by Jane Lovell, Deputy Corporation Counsel, representing the petitioner, County of Maui, Department of Water Supply (MDWS), at the time were: 1) That HAR §13-167-25, Filing of Documents, does not require signature of all parties, and 2) a possible solution to this would be to invoke HAR §13-167-27 whereby the Commission could allow amendments to complete applications.
Regarding the first issue, staff reiterated that the landowner’s signature is and always has been required for water use permits and. The Department of the Attorney General (AG) has concurred with staff. For the second issue, staff argued that it pertained to contested case hearings to the December 15, 2004 meeting. The AG concurred that the specific rule is not applicable as argued by the petitioner. The AG further stated that the Commission risks an amendment action subject to being struck down upon challenge. Although the Commission has the authority and discretion to allow amendment of documents that are not in substantial conformance with rules or are insufficient, the Commission also has the discretion to refuse those same documents. This discretion cannot be exercised where to do so would contravene Hawaii Revised Statutes (HRS) §174C-50(c), which is the one-year deadline to apply for existing uses.

Ms. Lovell raised three major points in the staff submittal. The first was that the MDWS’s water use permit application was received and acknowledged by the Commission on July 2, 2004, well in advance of the deadline and was timely filed. Ms. Lovell stated that the statute, HRS §174C-51(c) does not require signatures. The statute says that an application for a permit shall contain the following: the name and address of the applicant and the landowner. Ms. Lovell stated that the application filed before the deadline had all of the information that was required by the statute. The statute also requires that the landowner be stated as a joint applicant and our (MDWS) application stated the landowner as a joint applicant.

The second point made is whether an application that is not complete affects its timeliness. If every incomplete application is treated as untimely then none of the applications were timely. Ms. Lovell urged that all applicants be treated the same way, if their applications are incomplete, that they also be deemed untimely. Ms. Lovell urged the Commission not to equate incomplete with untimely because the statute does not require that.

Ms. Lovell further stated that staff members Charley Ice and Lenore Nakama, dispute the statements that were made under oath by their (MDWS) staff Ellen Kraftsow and Eva Blumenstein. The correspondence between the Commission and the MDWS staff indicated that if they (MDWS) could not get the landowner’s signature, they (MDWS) should submit the application without it and do their (MDWS) best to get the landowner’s signature as soon as possible.

Ms. Lovell stated that if the Commission denied MDWS’ declaratory ruling, they would have to appeal that decision.

Dr. Jonathan Likeke Scheuer from the Office of Hawaiian Affairs (OHA) expressed concern that the enforcement of this requirement on this issue seems to be selective, because OHA has objected to a large number of water use permit applications in this case as well as on the Island of Oahu because they
are incomplete. They are not incomplete because there were no signatures; they are incomplete because the applicants wholly failed to respond to the application form.

Commissioner Whalen asked about the 1-year deadline. Staff stated that the present statute basically states that all existing uses have a 1-year deadline to file from the date of the public notice. In this case it was exceeded. However, there were further provisions in the statute to allow late filings.

Commissioner Ching asked for a better understanding from the AG why HAR §13-167-27 is not applicable and what our exposure is if we were to allow amendments to permits.

Deputy Attorney General, Linda Chow stated that the Commission has the authority to allow amendments; however, where there is a specific statutory provision that says that you cannot allow late filings past the 1-year deadline, it is our (AG) opinion that you cannot allow an amendment that would contravene a specific statute on that issue, a rule cannot be used to override a statutory prohibition. Ms. Chow also clarified that if the application is not complete by the deadline then it cannot be considered as having met the requirements for that filing. Any amendment or change to that application that would make it complete would not have met that filing deadline, so it cannot be timely.

Commissioner Ching asked if there was a way to take action if a request was not complete and timely. Ms. Lovell stated that if an incomplete application is late, there's no question, but the MDWS application was filed before the deadline. It was according to staffs' interpretation of the rule that it was incomplete because it lacked the second signature. If an incomplete application is automatically deemed a late application, then every other application that is incomplete must be deemed late. Ms. Lovell also stated that had they known that staff was going to take a position that an application that was missing the second signature was going to be deemed late, that the interpretation was going to be "incomplete", and always and invariably equals "late", they (MDWS) could have condemned the property and become the landowner. The signature then would have been sufficient and they could have gone forward.

Mr. Hardy stated in his recollection that staff has never accepted water use permit applications without complete signatures. Commissioner Whalen asked if there was any request accepted without a signature by the deadline. Mr. Hardy stated that those that came in without the signature, were acknowledged and returned as incomplete but never came back with the signature to complete the application at a later time. Staff is consistent in their process.

Commissioner Whalen asked if the condemnation were to take place would it have been completed in a timely manner. Ms. Lovell stated that they would have
had to have an emergency meeting and it would have taken about 3-4 weeks, and that we (MDWS) would have had that opportunity had we been told that without the second signature on our application that it was going to be deemed late.

Commissioner Miike agreed with the AG’s opinion that if MDWS wants to appeal that is their right.

Mr. Scheuer clarified that all applications are deemed complete as long as all blanks are filled in.

Mr. Hardy cleared up the distinction on completeness of the application. He also stated that the form would be updated.

RECOMMENDATION:

Based on the foregoing, staff recommends that the declaratory ruling requested by MDWS be denied. Instead, staff recommends that the following declaratory ruling be adopted:

MDWS’s water use permit application for Wailuku Shaft, as submitted on July 2, 2004, was incomplete because it lacked the co-applicant landowner’s signature. By the time a complete application was filed on September 14, 2004, the one-year period allowed for filing applications for existing uses had elapsed. Pursuant to the Hawaii Supreme Court’s ruling in the Waiahole Ditch case, the Commission lacks the authority to accept any late filing of an existing use permit application. Because of this lack of authority, the issues of abandonment and estoppel are irrelevant. Further, that HAR §13-167-27 cannot be used to amend two applications to change the status of timely or untimely filing as the one-year deadline for applying for existing uses had expired.

MOTION: (Miike/Dela Cruz)
To approve as recommended by staff
UNANIMOUSLY APPROVED

NON-ACTION ITEMS

Professor Denise Antolini introduced Professor Joseph L. Sax, Professor of Environmental Regulation at Boalt Hall Law School, University of California Berkeley. He has a distinguished career that includes teaching and scholarships in many fields and is known as the expert in environmental law and has written many articles on water law. Professor Sax also authored an article in 1970 on Public Trust Doctrine, the issue of which became the cornerstone of the Waiahole Ditch Contested Case Hearing.
1. Presentation by Professor Joseph L. Sax, "Living with and Implementing the Public Trust Doctrine."

ANNOUNCEMENTS

Mr. Sakoda stated that the second remand of the Waiahole Contested Case Hearing was held on April 5, 2005. Written closing arguments are due April 26, 2005, followed by oral closing arguments before the hearing officer on May 3, 2005. May 17, 2005 is the deadline for the parties to file the Findings of Fact, Conclusions of Law, and Decision and Order to the Commission. Staff will then put together the proposed Findings of Fact followed by another hearing before the Commission.

Mr. Sakoda reported that some questions regarding Central Maui streams, from Waihee to Waikapu, would be answered after additional information is received, and that staff is continuing investigation on this matter.

Next Commission Meeting (Tentative)

1. May 25, 2005
2. June 15, 2005

The meeting was adjourned at 11:07 a.m.

Respectfully submitted,

PAULYNE ANAKALEA
Secretary

Approved as submitted:

DEAN A. NAKANO
Acting Deputy Director
BACKGROUND:

On October 28, 2004, the County of Maui, Department of Water Supply (DWS), through its attorneys, petitioned (Exhibit 1) the Commission on Water Resource Management (Commission) for declaratory rulings as follows:

1. DWS’s water use permit application (WUP No. 702) for Wailuku Shaft 33/Well No. 5530-05 ("Wailuku Shaft") received by the Commission on July 2, 2004, was timely filed, and should be considered as an application for an existing use, rather than for a "new" use.

2. Any presumption of abandonment of DWS’s existing use of the Wailuku Shaft, pursuant to Hawaii Revised Statutes (HRS) § 174C-50(c), is conclusively rebutted by DWS’s application for a water use permit for this source, received by the Commission on or about July 2, 2004. Any presumption of abandonment is further rebutted by DWS’s submission, on September 9, 2004, of the same application, bearing the landowner’s signature, received by the Commission on or about September 14, 2004.

3. The Commission is equitably estopped from deeming DWS’s application for the Wailuku Shaft “late” and from denying that DWS is, and for the past 13 years, has been the sole existing user of the Wailuku Shaft.

On December 15, 2004, staff recommended that the Commission deny the petition for the requested declaratory rulings, and, instead, issue a declaratory order declaring that:

DWS’s water use permit application for Wailuku Shaft, as submitted on July 2, 2004, was incomplete because it lacked the landowner’s signature. By the time a complete application was filed on September 14, 2004, the one-year period allowed for filing...

Item 3
applications for existing uses had elapsed. Pursuant to the Hawaii Supreme Court's ruling in the Waiahole Ditch case, the Commission lacks the authority to accept any late filing of an existing use permit application. Because of this lack of authority, the issues of abandonment and estoppel are irrelevant.

Based on arguments presented at the December 15, 2004 meeting, the Commission deferred action and directed staff to consult with the Attorney General on points brought up by the petitioner.

ANALYSIS:

Relevant Statutes

HRS § 174C-50(a) provides:

All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with § 174C-51, 174C-52, and 174C-53(b).

Pursuant to HRS § 174C-50(c), “[a]n application for a permit to continue an existing use must be made within a period of one year from the effective date of designation.”

HRS § 174C-51 sets for the requirements for a permit application.

Application for a permit. All permit applications filed under this part shall contain the following:

1. The name and address of the applicant and landowner, provided that:
   (A) In the event the applicant is an association, organization, partnership, trust, corporation, or any other legal entity doing business in Hawaii, the address of its principal place of business shall be stated in the application; and
   (B) In the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit;

2. The date of application;
3. The water source of the water supply;
4. The quantity of water requested;
5. The use of the water and any limitations thereon;
6. The location of the use of water;
7. The location of the well or point of diversion; and
8. Such other relevant information that the commission may request from time to time.

The commission in its discretion may allow a person to apply for several related withdrawals in the same application for a water permit.
HRS § 174C-52 deals with the publication of notices that such applications have been filed and 174C-53(b) relates to objections to applications.

**MDWS's Application Was Not Timely Filed**

The Iao Aquifer area was designated as a water management area on July 21, 2003. To be timely, a complete application for an existing use permit had to have been filed by July 21, 2004.

**Landowner Signature Required**

MDWS submitted an application for Wailuku Shaft on July 2, 2004. MDWS is not the landowner of the Wailuku Shaft. However, its application lacked the signature of the landowner. An application containing the landowner’s signature was not filed until September 14, 2004, clearly beyond the one-year period.

Commission staff deemed the application submitted on July 2, 2004 as incomplete on the basis that the landowner's signature is a necessary component of a complete application.

MDWS, to the contrary, contends that the application filed on July 2, 2004 was complete, and, therefore, its application for an existing use permit was timely filed within the one-year period following designation. In support of its argument, MDWS argues that the signature of the landowner is not a requirement for a complete application. MDWS points to the wording of HRS § 174C-51(1), which merely requires the name and address of the applicant and the landowner, and makes no mention of any signature requirement.

It must first be noted that when the applicant is not the landowner of the water source, the landowner must be a joint applicant to the application. HRS § 174C-51(1)(B). As a joint applicant, the landowner is required to sign the application pursuant to § 13-167-25, Hawaii Administrative Rules (HAR), which expressly requires applications submitted to the Commission to be signed by parties. The rule, in pertinent part, provides:

(a) All pleadings, applications, submittals, petitions, reports, maps, exceptions, briefs, memoranda, and other papers required to be filed with the commission in any proceeding shall be filed with the chairperson.

(b) All papers shall be written, typewritten, or printed and signed in ink by the party or the party's authorized agent or attorney. The individual's name in block or typed letters shall appear beneath all signatures. An individual's signature on a document shall constitute a certification that the person has read the document, that to the best of that person's knowledge, information, and belief every statement contained in the document is true and no statements are misleading, and that it is not interposed for delay. ¹ [Emphases added.]

¹ The standard application form prepared by the Commission for permit applications implements this rule by carrying the following NOTE concerning what the signatures mean:
Reading HRS § 174C-51 together with HAR § 13-167-25, it is clear that a landowner’s signature is required on an application for an existing use permit.

**Estoppel**

MDWS asserts that the Commission should be estopped from concluding that the application filed on July 2, 2004 was incomplete because Commission staff “advised DWS on more than one occasion that if it could not obtain the landowner’s signature, it should submit the water use application without it and CWRM would contact the landowner to attempt to resolve the situation” and because “CWRM staff also advised that since DWS’s application was for a continued use of an existing source, the CWRM would likely process the application without the landowner’s signature.” MDWS Memorandum in Support of Petition at 13.

First, Charlie Ice and Lenore Nakama of the Commission staff dispute both the statements quoted above and the statements contained in Ellen Kraftsow’s affidavit, to wit:

I spoke to Charlie Ice of the CWRM’s staff, who verbally informed me that DWS should submit the application without the landowner’s signature, and that it should be okay, even if we had to send the signed copy later. Subsequently, Eva Blumenstein of my staff came to me with the same question. I informed her what I understood from Charlie, but suggested that she also speak with CWRM to be sure. Eva spoke with Lenore Nakama of CWRM and reported back to me. We had both independently received similar information.

Both Ice and Nakama suggested to Kraftsow and Blumenstein, respectively, that the application be submitted in order to have evidence on the record indicating the problem that MDWS was having and to show MDWS’s good faith effort in attempting to comply with the deadline. Ice indicated that the signature page alone could be submitted later and that the Commission staff would be watching out for submittal of a signature page at the time of the filing deadline. Nakama helpfully suggested

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**NOTE:** Signing below indicates that the signatories understand and swear that:
1) the information provided on this applicant is accurate and true to the best of their knowledge; 2) item 14 is the responsibility of the applicant prior to Commission approval; 3) if necessary, further information may 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) ___________________  Landowner (print) ___________________
Signature __________________________ Signature __________________________
Date _______________________________ Date _______________________________
that Commission staff might be able to serve in some kind of a facilitating role between MDWS and
the landowner. However, neither Ice nor Nakama advised MDWS that the application would be
processed without the landowner’s signature. Nor would they have given such advice. Indeed,
Commission staff commonly send letters to prospective applicants informing them that an
application will not be processed without the landowner’s signature.

Additionally, and more conclusively, the doctrine of equitable estoppel is inapplicable here because

estoppel cannot be applied to actions for which the agency or agent of the
government has no authority. Courts have taken great pains to distinguish those acts
which were ultra vires from those which were irregular for some reason in their
execution.


The statute and rules clearly require the landowner’s signature on a water use permit application
since the landowner is a co-applicant. Neither the staff nor the Commission has the authority to
dispense with that requirement. Thus, even if staff made the representations claimed by MDWS
(which staff did not), the Commission could not be estopped on that basis from applying the law as it
is written.

Commission Lacks Authority to Accept Late Existing Use Permit Applications

The CWRM does not have authority to allow a late filing under HRS § 174C-50(c), which, in
relevant part, provides:

An application for a permit to continue an existing use must be made within a period
of one year from the effective date of designation. Except for appurtenant rights,
failure to apply within this period creates a presumption of abandonment of the use,
and the user, if the user desires to revive the use, must apply for a permit under §
174C-51. If the commission determines that there is just cause for the failure to file,
it may allow a late filing. However, the commission may not allow a late filing more
than five years after the effective date of rules implementing this chapter.

This provision was interpreted by the Hawaii Supreme Court in the Waiahole Ditch case as follows:

HRS § 174C-50(c) allows the Commission to accept late filings based on
“just cause,” but precludes the Commission from accepting late applications
“more than five years after the effective date of rules implementing this
chapter.” The Commission promulgated the rules implementing the Code on
May 27, 1988 and, thus, could not accept any late applications after May 27,
1993.

In Re Water Use Permit Applications, 94 Haw. 97, 166, 9 P.3d 409, 478 (2000).
The fact that the "grace period" for late filings ended prior to designation of the water management area (which triggers the requirement for applying for permits) did not alter the Supreme Court's interpretation of HRS § 174C-50(c).

Significant in the Supreme Court's holding are the statements that the Commission is precluded from accepting late applications after May 27, 1993. It was reinforced by the statement that the Commission "could not" accept late applications after that date.

In short, the Commission lacks the authority to accept a late application for an existing use permit regardless of the reason for the late filing.

Abandonment of Use

In support of its petition for declaratory ruling, MDWS puts forth evidence rebutting the presumption that it had, at any point, abandoned its use. Having established that it had not abandoned its use, MDWS argues that its application for an existing use permit should be accepted, even though late.

The issue of abandonment of use would be relevant if the Commission had the authority to exercise discretion in accepting late applications. Under such circumstances, the Commission would delve into whether, in fact, the use had been abandoned, and, if not, whether the late filing was excusable. However, based upon the Supreme Court's ruling that the Commission, at this point in time, lacks authority to exercise discretion to accept late filings, the fact that MDWS has not abandoned its use is irrelevant. Such a fact cannot alter the outcome.

Further Attorney General Review

At the December 15, 2004 meeting, MDWS had focused on two issues and the Commission requested further review of the following:

1) That HAR § 13-167-25, filing of documents, does not require signature of all parties.
2) A possible solution to their dilemma would be that the Commission invoke HAR § 13-167-27 whereby the Commission may require an applicant to amend any document filed with the Commission that is not in substantial conformity with the rules of the Commission as to the contents thereof, or is otherwise insufficient. Ms. Lovell stated that the Commission could find based on HAR § 13-167-27, the applicant filed on time, although there was a missing piece and the missing piece was cured by amendment.

For issue 1), staff reiterates that HAR § 13-167-25 is a general rule and must be read in conjunction with the more specific HRS § 13-174C-51(1)(B) and HAR § 13-171-(b)(1)(B), which state that landowners for water use permit have co-applicant status. Therefore, the landowner signature is, and always has been, required.

For issue 2), staff argued that it pertains to contested case hearings only, which is presently not the case for this application. Staff consulted with the Attorney General, who concurs that HAR § 13-167-27 is not applicable as argued by the petitioner. However, the Attorney General went further to state that the Commission risks an amendment action subject to being struck down upon challenge. Although the commission has the authority and discretion to allow amendment of documents that are
not in substantial conformance with rules or are insufficient, the commission also has the discretion to refuse to accept those same documents. This discretion cannot be exercised where to do so would contravene HRS §174C-50(c), the one-year deadline to apply for existing uses.

RECOMMENDATION:

Based on the foregoing, staff recommends that the declaratory ruling requested by MDWS be denied. Instead, staff recommends that the following declaratory ruling be adopted:

DWS's water use permit application for Wailuku Shaft, as submitted on July 2, 2004, was incomplete because it lacked the co-applicant landowner's signature. By the time a complete application was filed on September 14, 2004, the one-year period allowed for filing applications for existing uses had elapsed. Pursuant to the Hawaii Supreme Court's ruling in the Waiahole Ditch case, the Commission lacks the authority to accept any late filing of an existing use permit application. Because of this lack of authority, the issues of abandonment and estoppel are irrelevant. Further, that HAR § 13-167-27 cannot be used to amend two applications to change the status of timely or untimely filing as the one-year deadline for applying for existing uses had expired.

Respectfully submitted,

DEAN A. NAKANO
Acting Deputy Director

Exhibit(s): 1. MDWS Petition

APPROVED FOR SUBMITTAL:

PETER T. YOUNG
Chairperson
In the Matter of the WATER USE PERMIT APPLICATIONS for the Iao Aquifer

PETITION FOR A DECLARATORY RULING

COMES NOW, COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("DWS"), by and through its attorneys BRIAN T. MOTO, Corporation Counsel, and JANE E. LOVELL, Deputy Corporation Counsel, and petitions the Commission on Water Resource Management ("CWRM") for a declaratory ruling, pursuant to the Commission's administrative rules, § 13-167-81, as follows:

1. DWS' water use permit application for Wailuku Shaft 33/Well No. 5330-05 ("Wailuku Shaft"), received by CWRM on or about July 2, 2004, was timely filed, and should be considered as an application for an existing use, rather than for a "new" use.
2. Any presumption of abandonment of DWS' existing use of the Wailuku Shaft, pursuant to Hawaii Revised Statutes ("HRS") § 174C-50(c), is conclusively rebutted by DWS' application for a water use permit for this source, received by CWRM on or about July 2, 2004. Any presumption of abandonment is further rebutted by DWS's submission, on September 9, 2004, of the same application, bearing the landowner's signature, received by CWRM on or about September 14, 2004.

3. CWRM is equitably estopped from deeming DWS' application for the Wailuku Shaft "late" and from denying that DWS is, and for the past 13 years, has been, the sole existing user of the Wailuku Shaft.

This petition is brought pursuant to § 13-167-81 of the Hawaii Administrative Rules and Hawaii Revised Statutes § 174C et seq., and is supported by the memorandum of points and authorities filed concurrently herewith, by the Affidavit of George Y. Tengan and all exhibits thereto, by the Affidavits of Ellen Kraftsow, Edward S. Kushi, Jr., and Eva Blumenstein; by the records on file in this matter, and by such argument of counsel as may be had at the hearing on this petition.

DATED: Wailuku, Maui, Hawaii, OCT 26 2004

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By JANE E. LOVELL
Deputy Corporation Counsel
STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the WATER USE PERMIT APPLICATIONS for the Iao Aquifer

MEMORANDUM IN SUPPORT OF PETITION

MEMORANDUM IN SUPPORT OF PETITION

I. STATEMENT OF FACTS

For the past thirteen years, County of Maui has relied on water from Wailuku Shaft 33/Well No. 5330-05 (hereafter "Wailuku Shaft") to supply more than one quarter of the water required to meet the needs of the people and businesses served by the County's Central Maui system. (Affidavit of George Y. Tengan at ¶ 3, (hereafter "Tengan Aff."); Affidavit of Ellen Kraftsow at ¶ 3, (hereafter, "Kraftsow Aff.") The Central Maui system extends from Paia to Maalaea, and from Waihee to Makena, serving those communities as well as Waikapu, Waiehu, Wailuku, Kahului, Kihei, and Wailea, among others. (Tengan Aff. at ¶ 4.) The County's Department of Water Supply (hereafter "DWS") takes, on a yearly average basis, 5.771 million gallons per day from Wailuku Shaft to serve these communities. (Id.) The Iao aquifer is one of the primary sources of water for the Central Maui system. (Id. at ¶ 5.) DWS is by far the largest existing user of groundwater originating in the Iao aquifer. (Id. at ¶ 6.)

On July 21, 2003, the Commission on Water Resource Management (hereafter "CWRM") gave public notice that the Iao aquifer system had been designated as a groundwater management
area. \(\text{Id. at } \|7.\) As a result, existing users of groundwater from the Iao aquifer had to apply for water use permits within one year of the designation date, or before July 21, 2004. (Hawaii Revised Statutes (hereafter "HRS") § 174C-50(c).) The Wailuku Shaft draws ground water from the Iao aquifer, and thus, is subject to the water use permitting system. (\text{Id. at } \| 8.\)

As the existing user of the Wailuku Shaft, DWS completed the water use permit application for that source and forwarded it on February 4, 2004 to Kehalani Mauka, LLC, as landowner, for signature. (\text{Id. at } \| 8\text{ and Exhibit "A" thereto.}) The landowner's representative, Jay Nakamura, was contacted by telephone and fax on March 24, 2004 to follow up on DWS's request for a signature. However, the landowner did not respond. (Affidavit of Eva Blumenstein (hereafter, "Blumenstein Aff.") at \| 3.\)

Therefore, DWS staff contacted CWRM in May, inquiring how to proceed in the event that DWS could not obtain the landowner's signature. (Kraftsow Aff. at \| 4.\) Lenore Nakama and Charlie Ice of CWRM's staff verbally informed DWS staff members Ellen Kraftsow and Eva Blumenstein on more than one occasion that if the landowner refused to sign, DWS should submit the application without the landowner's signature, and that CWRM would contact the landowner to attempt to resolve the situation. (Kraftsow Aff. at \| 4; Blumenstein Aff. at \| 4.) Ms. Nakama also indicated that since DWS's application was for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature. (Blumenstein Aff. at \| 4.)
Therefore, DWS submitted its application for a water use permit for the Wailuku Shaft to CWRM without the landowner's signature. (Tengan Aff. at ¶ 9 and Exhibit "B" thereto; Kraftsow Aff. ¶ 5.) The application was received by CWRM on or about July 2, 2004, well in advance of the July 21, 2004 deadline. (Tengan Aff. at ¶ 9 and Exhibit "C" thereto.) Although the application did not contain the landowner's signature, it did contain all of the information required by § 174C-51, HRS, and by § 13-171-12(b), Hawaii Administrative Rules (hereafter "HAR").

On July 19, 2004, CWRM wrote to DWS, acknowledging receipt of DWS's application for the Wailuku Shaft on July 2, 2004. That letter advised that CWRM could not "accept the application as complete for processing without the landowner's signature." It further advised that DWS's "failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either [DWS's] or the landowner's part." (emphasis added.) (Tengan Aff.; Exhibit "C" thereto.)

Maui County Corporation Counsel Edward Kushi, Jr., had contacted the landowner's representative on July 8, 2004 to remind it of DWS's request to sign the application, but received no response. (Affidavit of Edward S. Kushi, Jr. at ¶ 4.) On July 20, 2004, Kehalani Mauka LLC, the landowner, submitted its own application for a water use permit for the Wailuku Shaft, despite
the fact that it was not the existing user, and that its application proposed to use at least some of the water produced by the Wailuku Shaft for some 2,400 homes and 22 acres of commercial development that had not yet been built. Kehalani Mauka LLC's application was not signed by the existing user, DWS. (See, Tengan Aff., Exhibit "F" thereto.)

On August 10, 2004, DWS wrote to CWRM, requesting information regarding the status of its application. (Tengan Aff. ¶ 10 and Exhibit "D" thereto.) CWRM's reply was dated August 18, 2004 (although it was not received by DWS until August 25, 2004). (Id., ¶ 11 and Exhibit "E" thereto.) That letter advised that DWS's application for the Wailuku Shaft was "in limbo." (Id.) The letter did not advise that DWS's application had been denied or that it had been deemed "late." (Id.)

On August 27, 2004, DWS filed a timely objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft, noting (among other things) that Kehalani Mauka LLC was not the existing user of the source and that the application for water to serve 2,400 homes and 22 acres of commercial development that had not yet been constructed was not an "existing use." (Tengan Aff. at ¶ 12 and Exhibit "F" thereto.)

On September 8, 2004, the landowner finally signed DWS's Water Permit Application for the Wailuku Shaft, and DWS transmitted it to CWRM the next day. (Tengan Aff. at 13 and Exhibit "G" thereto.) By letter dated September 16, 2004, the Deputy Director of CWRM acknowledged receipt, but advised that if CWRM "were to
accept the application now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." The Deputy Director's letter further advised that "[E]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." (Tengan Aff. at ¶ 14 and Exhibit "H" thereto.)

The Deputy Director's letter dated September 16, 2004 was not received by DWS until September 21, 2004. On September 22, 2004, DWS responded, strenuously disagreeing with the Deputy Director's analysis. (Tengan Aff. at ¶ 15 and Exhibit "I" thereto.) CWRM followed up with two letters, one dated September 23, 2004 and the other, September 24, 2004. (Tengan Aff. at ¶ 16 and Exhibits "J" and "K" thereto.) The September 24, 2004 letter advised that DWS's application for the Wailuku Shaft was "deemed complete as of September 14, 2004." It invited DWS to file a petition for declaratory relief if DWS disagreed with the Deputy Director's legal analysis. (Tengan Aff., Exhibit "K" thereto.)

DWS does disagree with the Deputy Director's legal analysis, and therefore files this petition.

II. ARGUMENT

A. DWS's Water Use Permit Application For Wailuku Shaft Was Timely Filed

CWRM has acknowledged that it received DWS's application for the Wailuku Shaft on July 2, 2004. (Exhibit "C" to the Tengan Aff.) Yet, the CWRM Deputy Director has advised that DWS's
application will be considered filed as of September 14, 2004, because prior to that date, the application was "incomplete." (Exhibit "K" to the Tengan Aff.)

The Deputy Director did not cite to any legal authority allowing her to equate "incomplete" with "late," and our research has not revealed any provision of the Water Code or the Hawaii Administrative Rules that would support the Deputy Director's position. However, no such semantic exercise is necessary because even lacking the landowner's signature, DWS's application contained all of the information required by HRS § 174C-51 and HAR § 13-171-12(b).

1. DWS's Application Complied With The Express Requirements of the Water Code and Hawaii Administrative Rules

Chapter 174C-51(1) of the HRS provides in pertinent part that all permit applications must contain the "name and address of the applicant and landowner. . . ." (emphasis added.) Nothing in HRS § 174C-51 requires the application to contain the landowner's signature.

The DWS application received by the CWRM on July 2, 2004 had all of the required information. The application was signed and submitted by the applicant, George Tengan, on behalf of the County of Maui Department of Water Supply. The application also contained the name and address of the landowner of the source, namely, Kehalani Mauka LLC, 745 Fort St., Suite 2110 Topa Financial Center, Fort Street Tower, Honolulu, Hawaii. Thus, the
application, even without a signature on behalf of Kehalani Mauka LLC, met the literal requirements of HRS § 174C-51(1). (Tengan Aff., Exhibit "B".)

The application also complied with the requirements of the Hawaii Administrative Rules. HAR § 13-171-12(b) tracks the language of HRS § 174C-51, providing in subsection § 13-171-12(b)(1) that all applications shall contain "[t]he name and address of the applicant and landowner..." (emphasis added.) Nothing in HAR § 13-171-12(b) requires the landowner's signature. By providing the name and address of the landowner, DWS's application complied with HAR § 13-171-12(b).

If the drafters of HRS § 174C-51 and HAR § 13-171-12(b) had wanted to require the landowner's signature, rather than merely the landowner's name, they presumably would have known how to ask for it. See, In the Matter of Water Use Permit Applications ("Waianole II"), 105 Hawaii 1, 15 (2004) [Campbell Estate and BWS "complied with the plain language of HRS §§ 174C-57 and 174C-59. Thus, because the language of these statutes is unambiguous, this court has no choice but to affirm the transfer. We leave it to the legislature to amend the language if it did not intend this result."] (footnote omitted)

Elsewhere in the Water Code and the HAR, signatures are expressly required. For example, § 174C-26(c) provides that declarations of water use must be "signed and sworn to by the person required to file the declaration..." (emphasis added)
HAR § 13-167-7(c) requires all CWRM orders to be "authenticated or signed by the chairperson." (emphasis added) HAR § 13-167-25(b) requires pleadings to be "written, typewritten, or printed and signed in ink by the party or the party's authorized agent or attorney." (emphasis added) Yet, there is no such express instruction in HRS § 174C-51 and HAR § 13-171-12(b).

It is a well-established rule of statutory construction that where a law includes particular language in one section of a statute, but omits it in another section of the same act, the legislature is presumed to have acted intentionally and purposely in its choice of words. See, In re Water Use Permit Applications ("Waiahole I"), 94 Hawai'i 97, 151 (2000); see also, Parr v. L & L Drive-Inn Restaurant, 96 F. Supp.2d 1065, 1077 (D. Haw. 2000). According to the maxim expressio unius est exclusio alterius, a provision of the Water Code or Chapter 13 of the HAR requiring the "name" of the landowner should not be interpreted as requiring the landowner's "signature."

Because neither the Water Code nor the HAR required DWS to provide the landowner's signature on DWS's application for a water use permit, the CWRM cannot deem an application without the landowner's signature "incomplete" and therefore, "late."

2. Procedural And Punitive Statutes Are To Be Strictly Construed

Procedural provisions of statutes, as well as punitive statutes, must be interpreted strictly. See, State Sav. & Loan
Ass'n v. Kauaiian Development Co., 50 Hawai'i 540, 561 (1968); see also, In re Aloha Motors, Inc., 56 Hawai'i 321, 326 (1975). If the Deputy Director's determination that DWS's application was "incomplete," and therefore, "late," were to be upheld, the thousands of Maui businesses and citizens who depend on water from the Wailuku Shaft would be severely penalized. Given the potentially harsh consequences, the CWRM should construe the language of HRS § 174C-51 and HAR § 13-171-12(b) strictly and literally. The statute and the rule specifically require the landowner's name and address, which DWS's application provided. Neither the statute nor the rule require the landowner's "signature." Therefore, DWS's application should have been accepted as complete upon its receipt by the CWRM on or about July 2, 2004.

3. There Were No Permit Applications Deemed "Late" In The Waiahole Ditch Case Due To Failure To Provide The Landowner's Signature

Nothing in the Hawaii Supreme Court's decision in Waiahole I, 94 Hawai'i 97 (2000) supports, let alone compels, the conclusion that an "incomplete" application, received by the CWRM less than one year from the date of designation, must be deemed "late." In Waiahole I, the Hawaii Supreme Court held that an application filed by PMI was untimely. The date of designation was July 15, 1992. PMI was first mentioned in an amendment to a joint application filed on June 14, 1994. PMI eventually filed its own application on February 3, 1995. Under these facts, the court
found that PMI could not be deemed an "existing user." Waiahole I, supra, 94 Hawai'i at 166. PMI's case did not present the issue of whether a timely-filed, but allegedly "incomplete," application would subject the applicant to being treated as a "new," rather than "existing" user. The permits denied in Waiahole I had errors, such as claiming the wrong landowner, or a landowner was inadvertently omitted. That is not the case with DWS's application for the Wailuku Shaft. The Hawaii Supreme Court was not faced with the fact pattern of the instant case, and accordingly, has not issued any binding pronouncements on the subject.

Here, there can be no question that on July 2, 2004 when CWRM received DWS's application DWS was (and for that matter, for the past 13 years has been) the sole "existing user" of the Wailuku Shaft. DWS's application was received by CWRM before expiration of the one-year anniversary of the date of designation. Nothing in Waiahole I requires a finding that under these facts, DWS's application was late.

B. County of Maui Has Condemnation Power

The CWRM's stated purpose for requiring the landowner's signature on a water use permit application is to demonstrate that the landowner approves of the existing user's application. While that rationale may make sense when applied to applications filed on behalf of private users, it has less persuasive effect when the applicant is a governmental body with the power to condemn the property on which the source is located. While DWS eventually
obtained the property owner's signature, DWS had a powerful tool at
its disposal if the owner had continued to withhold its approval.
Under the circumstances, it makes little sense for CWRM to deem
DWS's timely-filed application for the Wailuku Shaft "incomplete"
and therefore, "late," merely because the landowner was dilatory in
providing a signature.

C. Any Presumption Of Abandonment Has Been Conclusively
Rebutted

According to § 174C-50(c), the penalty for failing to
file an application before the statutory deadline is a "presumption
of abandonment of the use."¹

Neither the Water Code nor Chapter 13 of the HAR define
the term "presumption." However, the term is clearly defined in
the Hawaii Rules of Evidence ("HRE") Rule 301(1) defines
"presumption" as "a rebuttable assumption of fact . . . . ."
Subsection (2) of Rule 301 provides that the term "presumption"
does not mean "conclusive presumption." HRE Rule 302 provides that
"a presumption imposes on the party against whom it is directed
either (1) the burden of producing evidence, or (2) the burden of

¹ If an existing user wishes to "revive" the use, it "must
apply for a permit under section 174C-51." Section 174C-51 does
not distinguish between "new" and "existing" uses, and the
companion administrative rule, HAR § 13-171-12, by its title and by
its terms, clearly relates to applications for both "new" and
"existing" uses. Thus, the procedure for "reviving" the use is
precisely the same as for applying for an existing use permit,
which DWS did prior to the expiration of the July 21, 2004
deadline.
ed. 1998) observes that "[p]resumptions can be defeated by evidence contradicting the basic facts, or by evidence contradicting the presumed fact."

If CWRM believes that it must "presume" that DWS "abandoned" its existing use of the Wailuku Shaft, DWS has already produced more than enough evidence to rebut any such presumption. DWS's initial application received on July 2, 2004 by the CWRM, the correspondence sent by DWS to CWRM inquiring about the status of its application, and the updated application bearing the landowner's signature all provide conclusive evidence rebutting any presumption of "abandonment." DWS's course of conduct has been consistent. In the face of this uncontroverted evidence, CWRM must find that any presumption imposed by § 174C-50(d) has been conclusively rebutted. Accordingly, CWRM should consider DWS's application for a water use permit for the Wailuku Shaft to be an application for an "existing" use.

D. CWRM Is Estopped From Deeming DWS's Application "Late"

Under the doctrine of judicial estoppel,

...
occasion that if it could not obtain the landowner's signature, it should submit the water use application without it and CWRM would contact the landowner to attempt to resolve the situation. (Kraftsow Aff. at ¶ 4; Blumenstein Aff. at ¶ 4.) CWRM staff also advised that since DWS's application was for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature. (Id.) DWS relied on this advice. (See, id. at ¶ 5.) DWS's reliance was reasonable, particularly in view of the fact that neither § 174C-51 nor HAR § 13-171-12(b) expressly require the landowner's signature. Under the circumstances, it would be manifestly unjust to allow CWRM to change its position to DWS's detriment.

E. A Conclusion That DWS Is Not The Sole Existing User Would Be Clearly Erroneous

The CWRM's factual findings are reviewed under the clearly erroneous standard to determine if its decision was "clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." Waiahole II, 105 Hawaii 1, 7 (2004) A finding of fact is clearly erroneous when the record "lacks substantial evidence to support the finding." (Id.)

DWS has been the sole user of water from the Wailuku Shaft for the past 13 years. (Kraftsow Aff. at ¶ 3.) At present, DWS is the sole user of water from the Wailuku Shaft. (Id.) There is no evidence in the record that would support a finding that DWS has ceased to use or abandoned its use of this source. Any
conclusion that DWS is not the sole existing user of the Wailuku Shaft would be clearly erroneous, and subject to reversal on appeal.

III. CONCLUSION

DWS filed a timely application for the Wailuku Shaft. Its application, filed before the expiration of the statutory deadline, contained all information required by the Water Code and the Hawaii Administrative Rules. Any presumption that DWS abandoned its use of the Wailuku Shaft is rebutted by the application filed by DWS, its conversations and correspondence with CWRM staff, and the undisputed fact that DWS is the sole existing user of this source. Given the advice of CWRM staff, on which DWS relied, CWRM is estopped from concluding that DWS is not the existing user. Finally, any finding that DWS is not an "existing user" would be clearly erroneous.

Therefore, DWS respectfully requests this Commission to issue a declaratory ruling that DWS's water use permit application for the Wailuku Shaft was timely filed, and that DWS is an (and indeed, the only) existing user of this source.


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

By

JANE E. LOVELL
Deputy Corporation Counsel
AFFIDAVIT OF GEORGE Y. TENGAN IN SUPPORT OF COUNTY OF MAUl'S PETITION FOR A DECLARATORY RULING

GEORGE Y. TENGAN, being first duly sworn upon oath, deposes and says that:

1. I am the Director of the County of Maui's Department of Water Supply ("DWS"). I have provided this Affidavit in support of the County of Maui's petition for a declaratory ruling. I have personal knowledge of the matters stated herein, except for matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.
2. I have served as Director of the DWS since January, 2003. Prior to becoming DWS's Director, I served as the Deputy Director of DWS from 1995 through 2002. I have also worked for the Department of Water Supply on the Big Island, serving as Fiscal Officer and as Deputy Director. I was born and raised on Maui, and am a graduate of Baldwin High School. I received my degree in accounting from the University of Hawaii.

3. During my entire tenure with DWS, and continuing at the present, the County of Maui has relied on water from Wailuku Shaft 33/Well No. 5330-05 ("Wailuku Shaft") to supply more than one quarter of the water required to meet the needs of the people and businesses served by the County's Central Maui system.

4. The Central Maui system extends from Paia to Maalaea, and from Wailuku to Makena, serving those communities as well as Waikapu, Waiehu, Waihee, Kahului, Kihei, and Wailea, among others. DWS takes, on a yearly average basis, 5.771 million gallons per day from Wailuku Shaft to serve these communities.

5. The Iao aquifer is one of the primary sources of water for the Central Maui system.

6. DWS is by far the largest existing user of groundwater originating in the Iao aquifer.

7. On July 21, 2003, the Commission on Water Resource Management ("CWRM") gave public notice that the Iao aquifer system had been designated as a groundwater management area. As an existing user of groundwater, DWS had to apply for water use
permits for each of its groundwater sources in the Iao aquifer on or before July 21, 2004.

8. The Wailuku Shaft draws groundwater from the Iao aquifer. Therefore, as the existing user of the Wailuku Shaft, DWS completed the water use permit application for that source and forwarded it on February 4, 2004 to the landowner for signature. A true and correct copy of my transmittal letter dated February 4, 2004 to Mr. Jay Nakamura is attached hereto as Exhibit "A".

9. A true and correct copy of the application for a water use permit for the Wailuku Shaft is attached hereto as Exhibit "B". I have been informed by Deputy Director Yvonne Izu that DWS's application was received by CWRM on or about July 2, 2004. (See letter dated July 19, 2004 from Yvonne Izu to me, a true and correct copy of which is attached hereto as Exhibit "C".) Although DWS's application did not contain the landowner's signature, it did contain the landowner's name and address.

10. On August 10, 2004, I wrote to CWRM, requesting information regarding the status of our water use application for the Wailuku Shaft. A true and correct copy of that letter is attached hereto as Exhibit "D".

11. CWRM's reply to my letter of August 10, 2004, was dated August 18, 2004 (although we did not receive it until August 25, 2004). That letter advised that DWS's application for the Wailuku Shaft was "in limbo." The letter did not advise that DWS's application had been denied or that it had been deemed "late." A
true and correct copy of CWRM's reply dated August 18, 2004 is attached hereto as Exhibit "B".

12. On August 27, 2004, DWS filed a timely objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft, noting (among other things) that Kehalani Mauka LLC was not the existing user of the source and that the application for water to serve 2,400 homes and 22 acres of commercial development that had not yet been constructed was not an "existing use." A true and correct copy of DWS's objections is attached hereto as Exhibit "F".

13. On September 8, 2004, the landowner finally signed DWS's Water Permit Application for the Wailuku Shaft, and I transmitted it to CWRM the next day. A true and correct copy of my transmittal letter is attached hereto as Exhibit "G".

14. By letter dated September 16, 2004, the Deputy Director of CWRM acknowledged receipt of the application on September 14, 2004. She advised that if CWRM "were to accept the application now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." The Deputy Director's letter further advised that "[E]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." A true and correct copy of the Deputy Director's letter dated September 16, 2004 is attached hereto as Exhibit "H".

15. DWS did not receive the Deputy Director's letter dated September 16, 2004 until September 21, 2004. On September
22, 2004. I responded, noting DWS's disagreement with the Deputy Director's analysis. A true and correct copy of my response is attached hereto as Exhibit "I".

16. CWRM followed up with two letters, one dated September 23, 2004 and the other, September 24, 2004, true and correct copies of which are attached hereto as Exhibits "J" and "K", respectively. The latter letter (Exhibit "K") advised that DWS's application for the Wailuku Shaft was "deemed complete as of September 14, 2004." It invited DWS to file a petition for declaratory relief if DWS disagreed with the Deputy Director's legal analysis.

17. DWS does disagree with the Deputy Director's legal analysis. DWS is the existing user of Wailuku Shaft. DWS has never "abandoned" that existing use.

Further affiant sayeth naught.

Subscribed and sworn to before me this 26th day of October, 2004.

Jerry Ann Wells
NOTARY PUBLIC, State of Hawaii.

Name Printed: Jerry Ann Wells
My commission expires: 4/19/06
State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources

FAX: Transmitting 5 pages, including this one; call 587-0251 with any reception problems.

TO: Miles
FROM: Charles Ice

Date: 18 April 05

Transmitting info on Wailuku Shaft.

In our view, you might see some drawdown at Wailuku Shaft while pumping an Iao Tank Site well, but the long-term prospect may already be obvious. Chlorides have been steadily rising, so spreading the pumpage is advised. If Iao T.S. comes on line, it only makes sense to back off pumpage from the Shaft.

Looking at the Wailuku Shaft, it bears more relation to Moku’uaua than to a strictly Maui-type shaft — 3 wells drilled to ~300 ft. below msl.
GEOLOGY

Fig. 26 Portal of Waikuku shaft on Maui. (Photo by A. K. Jim.)

Waikuku Shaft Produces Irrigation Water

A shaft with three drilled wells has been completed by the Waikuku Sugar Company at Waikuku, Maui and has been successfully tested at maximum pump capacity of 15 mgd.

The well was originally designed as a shaft and sinking tunnel or "Maul-type" well, with the tunnel a little below sea level for about 30 feet below static water level. The wells which were drilled from a chamber at the bottom of the shaft, are about 300 feet deep and are 25 inches in diameter at the top and 17½ or 22 inches in diameter at the bottom.

They are equipped with deep-well pumps set at 60-foot depth with 20-foot suction pipes.

Wells Nos. 1 and 2 were first tested on December 8, 1947, and well No. 3 was pumped January 21, 1948. So far, the longest pumping period has been 72 hours. At the end of this period the maximum drawdowns from the original 24-foot head were 11.8, 15.1 and 15.2 feet measured, respectively. In the three wells, the specific capacities of the wells, figured from these drawdowns, are the very large amounts of 350,000 to

400,000 gallons per day per foot of drawdown.

Kuhlwe Well Proves Unsuccessful

A wildcat well has been sunk into the 1100-foot head perched artesian water at Nahiku, Maui by Comay Drilling Company for East Maui Irrigation Company. Air-lift pumping has demonstrated a specific capacity of only 1200 gallons per day per foot drawdown, too low to be economical.

The well was drilled from an altitude of 1800 feet to a total depth of 1600 feet. It was cased for 910 feet, and the casing was sealed into the upper confining bed. When the well was 1940 feet deep it was tested with an air-lift pump. The water stood at a depth of about 300 feet or an altitude of about 1140 feet. With a drawdown of 200 feet the well yielded a quarter of a million gallons per day.

The addition drawdown of the main hole was drilled deliberately to perforate the pervious bed in order to increase, if possible, the drawdown so as to wash any possible mud from the walls of the well.
December 17, 2004

BY U.S. MAIL & FACSIMILE TRANSMITTAL

Fax: (808) 587-0219

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
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 'Iao 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 ‘Aina 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 ‘Īao Aquifer. See generally In re Waiāhole Combined Contested Case, 94 Haw. 97, 141 (2000) (“Waiāhole 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 (“upholding 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 ‘Īao. 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 “resolve[] 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 ‘Īao 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 ‘Īao. 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." Waiāhole, 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 ‘Iao, at the October 28, 2004 public hearing on Maui, and in the petition to restore stream flow in Waihe‘e, North and South Waiehu, ‘Iao 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 ‘Iao, 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 ‘Iao. 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 (Akakū) 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
Letter to Yvonne Izu Re: Burdens Of Proof And Legal Standards Regarding: (1) Traditional & Customary Native Hawaiian Rights & Practices; & (2) Municipal Uses

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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 Waiahole I as a public
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 Hawai‘i 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 Hawai‘i 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 [Hawai‘i]”).

“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 Mokuhau 1. MDWS has also admitted that it transports potable water from Iao to Central and South Maui and Pā‘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

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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 Waihe‘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 § 8:59 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). Similarly, the seminal treatise on eminent domain explains that “[t]he doctrine that a riparian town

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).
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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 Wa‘ihole decision as potential support for the idea of municipal uses being a public trust purpose. The letter emphasizes Wa‘ihole 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 Wa‘iala 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,
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and using "cf." (compare) in citing the Clifton case. 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 Hawai‘i 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 Lāo, 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

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.
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way. Notably, the court described these municipal uses as a “public purpose,” not a “public trust purpose.”

In short, Waiahole 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, Waiahole 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 Waiahole 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.

B. Waiahole I States The Standard For Municipal Use Applicants Under The Public Trust And Code.

The November 15 letter also points out that municipal uses are not “private commercial uses” discussed in Waiahole I. Of course, the only uses at issue in Waiahole I were private commercial uses,” so claiming that Waiahole 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 Waiahole 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 Waiahole 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[,]” Wai`ola, 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.” Waiāhole 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 Waiāhole 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.

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)
December 16, 2004

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.¹

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:
Waiehu 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);
Mokuahau 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);
Waiehu 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, aho 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

accrete 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 ʻĪao 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 ʻĪao Ground Water Management Area. In the recent petition by Earthjustice on behalf of Hui ʻo Nā Wai ʻEha 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 WUPA, 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 Hawaiʻi 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 ‘lao, 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 ‘Āina 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 ‘Iao 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; 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?"

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 WUP. 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 WUP, 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 'Iao. 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 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,

[Signature]

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
**COMMISSION ON WATER RESOURCE MANAGEMENT**

**FROM:** ROY

**TO:**

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**FOR:** Approval

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11/6/07 - Thanks for finding Faith.

Charley, if we don't have in draft 33 file already (this appears to be a copy) then ple file.
November 22, 2004

Yvonne Y. Izu, Deputy Director - Water
Peter Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Ms. Izu and Mr. Young,

The Office of Hawaiian Affairs (OHA) is in receipt of Ms. Izu’s November 4, 2004, invitation to comment and respond to Maui County’s above referenced petition dated October 26. OHA offers the following comments and responses in support of the petition.

OHA first reiterates the point we have raised in response to every Water Use Permit Application (that has been submitted and circulated) seeking water from the ʻĪao Ground Water Management Area: none of the applications were complete in addressing, among other things, the impact of continued withdrawals on protected Native Hawaiian Water Rights. We continue to contend that the Commission erred in accepting any of the applications as complete.

In light of that oft-repeated point, OHA feels that the rejection of the County’s referenced application as complete due to the lack of a signature further undermines the intent of the Water Code and the application process. As was raised by the County’s counsel, the legal authority for the Commission to so reject an application is questionable. More importantly to our interests, however, is that rejecting an application on this basis alone sends an incorrect message to those who seek to use public trust resources. The incorrect message sent is that the code only requires superficial compliance with rules, rather than an active engagement with the requirements of the code.

Without abandoning our position that all of the applications were substantively incomplete, we support the petition by Maui County. Thank you for the opportunity to comment. If you have
any further questions or concerns please contact Dr. Jonathan Likeke Scheuer at 594-1946 or e-mail him at jonathans@oha.org.

Sincerely,

Clyde W. Nāmu'o
Administrator

CC: Brian T. Moto, Corporation Council
Jane E. Lovell, Deputy Corporation Council
County of Maui
200 South High Street
Wailuku, Maui, Hawai‘i 96793
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- copy for you please send
- where are we filing this
- what then, does 0123 thinks is basis for “incomplete”? only “their” interpretation?
November 22, 2004

Yvonne Y. Izu, Deputy Director - Water
Peter Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Ms. Izu and Mr. Young,

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Sincerely,

[Signature]

Clyde W. Nāmu‘o
Administrator

CC: Brian T. Moto, Corporation Council
Jane E. Lovell, Deputy Corporation Council
County of Maui
200 South High Street
Wailuku, Maui, Hawai‘i 96793
FYAX TRANSMITTAL MEMO

TO: Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management

FAX #: (808) 587-0219

FROM: D. Kapua`ala Sproat

DATE: November 22, 2004

RE: Response To Comments On Petition To Amend The Interim Instream Flow Standards for Waihe`e, North & South Waiehu, ʻĪao, & Waikapu Streams

TOTAL PAGES (including cover memo): -2-

Attachment: Letter re Maui County's Petition for a Declaratory Ruling re Wailuku Shaft 33.
November 22, 2004

BY FACSIMILE TRANSMITTAL

Fax: (808) 587-0219

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawai‘i 96813

Re: Maui County’s Petition for a Declaratory Ruling re Wailuku Shaft 33

Dear Yvonne:

Mahalo for the opportunity to comment on Maui County’s Petition for a Declaratory Ruling regarding Wailuku Shaft 33 (Well No. 3330-05). We have no comments at this time, but please keep us apprised of any Water Commission meetings, public hearings, or other proceedings where this matter may be addressed. We expect to participate in any such proceeding and will provide comments at that time.

Me ke aloha,

[Signature]

Kapua Sproat

cc: Jane Lovell Esq.,
Maui County Deputy Corporation Counsel
(via U.S. Mail)

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

John V. Duey,
Hui o Na Wai ‘Ehā
(via U.S. Mail)
November 18, 2004

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,

[Signature]

VONNE Y. IZU
Deputy Director

Cl:ss
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

C: Clyde Namuo, Office of Hawaiian Affairs
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  

“Domestic Use”, “Public Trust”  

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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  

Cl:ss  
c: Kapua Sproat, Earthjustice
Mr. Gary Philip  
Hawaii Land and Farming, Inc.  
745 Fort Street  
Honolulu, Hawaii 96813  

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33  

Dear Mr. Phillips,  

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.  


Please feel free to call me if you have any questions at (808) 587-0214.  

Sincerely,  

Yvonne Y. Izu  
Deputy Director-Water
November 4, 2004

Ms. Kapua Sproat, Esq.
EarthJustice
223 South King Street, Suite 400
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Kapua,

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.


Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

[Signature]
Yvonne Y. Izu
Deputy Director-Water
November 4, 2004

Mr. Clyde W. Namu‘o
State of Hawaii
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Clyde,

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.


Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director - Water
Oshima Chun Foun & Chung LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Linnell,

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Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director-Water

November 4, 2004
November 4, 2004

To: Attendees of October 28, 2004 Public Hearing on Water Use Permits in the lao 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
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.’”

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:

[O]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.
(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
October 28, 2004

Honorable Peter T. Young, Chairperson
and Members of the State of Hawaii
Department of Land & Natural Resources
COMMISSION ON WATER RESOURCE MANAGEMENT
P. O. Box 621
Honolulu, Hawaii 96809

Dear Chairperson Young and Members:

My name is George Tengan. I have served as Director of the Department of Water Supply since January of 2003. I formally served as Deputy Director for the Department from 1995 through 2002. I have also worked for the Department of Water Supply on the Big Island as its Fiscal Officer and for 10 years as Deputy Manager. I was born and raised here on Maui. I attended Kahului School and am a graduate of Baldwin High School. Following three years in the U.S. Army, I attended and graduated from the University of Hawaii-Manoa campus with a degree in accounting.

During my tenure here at the Department of Water Supply and continuing to the present, the County of Maui has relied on the Wailuku Shaft as a major source of water for the central Maui area. The central Maui area is interconnected with a water system that extends from Maalaea to Paia and from Waihee to Makena. On a yearly average basis, the system depends on the Wailuku Shaft in the amount 5.771 million gallons per day. This amount represents about 25% of the daily requirements for the Central Maui water system.

Due to the consequences which could result from the loss of use of the Wailuku Shaft, we ask that the Commission on Water Resource Management grant our application for the Wailuku Shaft.

In my mind, the County of Maui, and the Department under the Board of Water Supply, have demonstrated that we have been and continue to be good stewards of our water resources. We have purchased watershed lands and are heavily involved in watershed protection programs and partnerships on all three islands of the county. We are also developing new wells in the Iao aquifer.

"By Water All Things Find Life"
to spread pumping. We are engaged in the educational aspects by making presentations at schools and at civic organization meetings. We are also engaged in water conservation programs by distributing low flow fixtures and with advertisements in the newspaper, on the radio stations and in the movie theaters. We also contribute to the Maui Botanical Gardens where one of its major programs is to encourage the use of native Hawaiian and drought tolerant plants.

With that, I thank the Commission for the opportunity to present this testimony and once again ask that our application be given its appropriate consideration.

Sincerely,

George Y. Tehan, Director
Department of Water Supply
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.

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Requested amount (mgd)</th>
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</thead>
<tbody>
<tr>
<td>Wailuku Shaft 33</td>
<td>5330-05</td>
<td>Kehalani**</td>
<td>707</td>
<td>3-5-1:1</td>
<td>5.771</td>
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<tr>
<td>Mokuhau Well 1</td>
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<td>MDWS</td>
<td>697</td>
<td>3-3-2:28</td>
<td>0.165</td>
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<tr>
<td>Iao Needle Tunnel</td>
<td>5332-02</td>
<td>DWS</td>
<td>680</td>
<td>3-3-3:3</td>
<td>1.389</td>
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<tr>
<td>Kepaniwai Well</td>
<td>5332-05</td>
<td>MDWS</td>
<td>689</td>
<td>3-3-3:5</td>
<td>1.042</td>
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<td>Iao Tunnel</td>
<td>5330-02</td>
<td>HC&amp;S</td>
<td>691</td>
<td>3-4-34:34</td>
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<td><strong>Total from all sources</strong></td>
<td></td>
<td></td>
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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:

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
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<th>WUPA No.</th>
<th>TMK</th>
<th>Requested amount (mgd)</th>
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<td>5329-04</td>
<td>MP&amp;R</td>
<td>709</td>
<td>3-8-7:55</td>
<td>0.038</td>
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<tr>
<td>Baldwin High School</td>
<td>5329-05</td>
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<td>710</td>
<td>3-8-7:55</td>
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<td>MP&amp;R</td>
<td>713</td>
<td>3-8-7:55</td>
<td>0.039</td>
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<td>Papohaku Park</td>
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<td>712</td>
<td>3-2-13:29</td>
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<tr>
<td>Waiehu Golf 2</td>
<td>5530-04</td>
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<td>714</td>
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<td>Black George Tunnel</td>
<td>5332-01</td>
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<td>685</td>
<td>3-3-3:3</td>
<td>not identified</td>
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<tr>
<td>Iao Needle Tunnel 1</td>
<td>5333-01</td>
<td>HC&amp;S</td>
<td>684</td>
<td>3-5-3:1</td>
<td>not identified</td>
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<tr>
<td>Iao Needle Tunnel 2</td>
<td>5333-02</td>
<td>HC&amp;S</td>
<td>686</td>
<td>3-3-3:3</td>
<td>not identified</td>
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<tr>
<td>*Living Waters #1</td>
<td>5631-01</td>
<td>LWLF</td>
<td>704</td>
<td>3-2-13:15</td>
<td>0.020</td>
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<td></td>
<td></td>
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<td>&gt;6.890</td>
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**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

[Signature]

Dated: October 7, 2004

Publish in: Maui News issue of October 12, 2004
<table>
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<th>DATE: OCT 28 2004</th>
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<td>INIT.</td>
<td>TO:</td>
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<td>MATHIAS, T.</td>
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<td>FUJII, N.</td>
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<td>GOODING, K.</td>
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<td>HARDY, R.</td>
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<td>IZU, Y.</td>
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<td>YODA, K.</td>
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<tr>
<td>KUNIMURA, I.</td>
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<td>YOSHINAGA, M.</td>
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**PLEASE:**
- See Me
- Review & Comment
- Take Action
- Type Draft
- Type Final
- File
- Xerox ____ copies

*Handwritten note:*
Charley, pls file in Swift 33 folder and letters from venue
DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI  
200 SOUTH HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
TELEPHONE: (808) 270-7740  

TRANSMITTAL  
October 27, 2004  

TO: Department of Land and Natural Resources  
Commission on Water Resource Management  
P. O. Box 621  
Honolulu HI  96809  

FROM: Jane E. Lovell, Deputy Corporation Counsel  

SUBJECT: In the Matter of the Water Use Permit Applications for the Iao Aquifer  

TRANSMITTED IS THE FOLLOWING FOR FILING AND RETURN OF COPIES:  

<table>
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<th>Original + 14</th>
<th>10/26/04</th>
<th>Petition for a Declaratory Ruling; Memorandum in Support of Petition; Affidavit of George Y. Tengan and Exhibits &quot;A&quot; through &quot;K&quot;; Affidavit of Edward S. Kushi, Jr.; Affidavit of Ellen Kraftsow; Affidavit of Eva Blumenstein; Certificate of Service</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

Enclosures  
S:CLERICAL\EX \TRANSMITTALwaterissues.wpd
In the Matter of the
WATER USE PERMIT APPLICATIONS
for the Iao Aquifer

PETITION FOR A DECLARATORY RULING
COMES NOW, COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY
("DWS"), by and through its attorneys BRIAN T. MOTO, Corporation
Counsel, and JANE E. LOVELL, Deputy Corporation Counsel, and
petitions the Commission on Water Resource Management ("CWWM") for
a declaratory ruling, pursuant to the Commission's administrative
rules, § 13-167-8", as follows:

1. DWS' water use permit application for Wailuku Shaft
33/Well No. 5330-05 ("Wailuku Shaft"), received by CWWM on or about
July 2, 2004, was timely filed, and should be considered as an
application for an existing use, rather than for a "new" use.
2. Any presumption of abandonment of DWS' existing use of the Wailuku Shaft, pursuant to Hawaii Revised Statutes ("HRS") § 174C-50(c), is conclusively rebutted by DWS' application for a water use permit for this source, received by CWRM on or about July 2, 2004. Any presumption of abandonment is further rebutted by DWS's submission, on September 9, 2004, of the same application, bearing the landowner's signature, received by CWRM on or about September 14, 2004.

3. CWRM is equitably estopped from deeming DWS' application for the Wailuku Shaft "late" and from denying that DWS is, and for the past 13 years, has been, the sole existing user of the Wailuku Shaft.

This petition is brought pursuant to § 13-167-81 of the Hawaii Administrative Rules and Hawaii Revised Statutes § 174C et seq., and is supported by the memorandum of points and authorities filed concurrently herewith, by the Affidavit of George Y. Tengan and all exhibits thereto, by the Affidavits of Ellen Kraftsow, Edward S. Kushi, Jr., and Eva Blumenstein; by the records on file in this matter, and by such argument of counsel as may be had at the hearing on this petition.

DATED: Wailuku, Maui, Hawaii, __________________________

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By __________________________
JANE E. LOVELL
Deputy Corporation Counsel
MEMORANDUM IN SUPPORT OF PETITION

I. STATEMENT OF FACTS

For the past thirteen years, County of Maui has relied on water from Wailuku Shaft 33/Well No. 5330-05 (hereafter "Wailuku Shaft") to supply more than one quarter of the water required to meet the needs of the people and businesses served by the County's Central Maui system. (Affidavit of George Y. Tengan at ¶ 3, (hereafter "Tengan Aff."); Affidavit of Ellen Kraftsow at ¶ 3, (hereafter, "Kraftsow Aff.") The Central Maui system extends from Paia to Maalaea, and from Waihee to Makena, serving those communities as well as Waikapu, Waiehu, Wailuku, Kahului, Kihei, and Wailea, among others. (Tengan Aff. at ¶ 4.) The County's Department of Water Supply (hereafter "DWS") takes, on a yearly average basis, 5.771 million gallons per day from Wailuku Shaft to serve these communities. (Id.) The Iao aquifer is one of the primary sources of water for the Central Maui system. (Id. at ¶ 5.) DWS is by far the largest existing user of groundwater originating in the Iao aquifer. (Id. at ¶ 6.)

On July 21, 2003, the Commission on Water Resource Management (hereafter "CWRM") gave public notice that the Iao aquifer system had been designated as a groundwater management
area. (Id. at ¶ 7.) As a result, existing users of groundwater from the Iao aquifer had to apply for water use permits within one year of the designation date, or before July 21, 2004. (Hawaii Revised Statutes (hereafter "HRS") § 174C-50(c).) The Wailuku Shaft draws groundwater from the Iao aquifer, and thus, is subject to the water use permitting system. (Id. at ¶ 8.)

As the existing user of the Wailuku Shaft, DWS completed the water use permit application for that source and forwarded it on February 4, 2004 to Kehalani Mauka, LLC, as landowner, for signature. (Id. at ¶ 8 and Exhibit "A" thereto.) The landowner's representative, Jay Nakamura, was contacted by telephone and fax on March 24, 2004 to follow up on DWS's request for a signature. However, the landowner did not respond. (Affidavit of Eva Blumenstein (hereafter, "Blumenstein Aff.")) at ¶ 3.)

Therefore, DWS staff contacted CWRM in May, inquiring how to proceed in the event that DWS could not obtain the landowner's signature. (Kraftsow Aff. at ¶ 4.) Lenore Nakama and Charlie Ice of CWRM's staff verbally informed DWS staff members Ellen Kraftsow and Eva Blumenstein on more than one occasion that if the landowner refused to sign, DWS should submit the application without the landowner's signature, and that CWRM would contact the landowner to attempt to resolve the situation. (Kraftsow Aff. at ¶ 4; Blumenstein Aff. at ¶ 4.) Ms. Nakama also indicated that since DWS's application was for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature. (Blumenstein Aff. at ¶ 4.)
Therefore, DWS submitted its application for a water use permit for the Wailuku Shaft to CWRM without the landowner's signature. (Tengan Aff. at ¶ 9 and Exhibit "B" thereto; Kraftsow Aff. ¶ 5.) The application was received by CWRM on or about July 2, 2004, well in advance of the July 21, 2004 deadline. (Tengan Aff. at ¶ 9 and Exhibit "C" thereto.) Although the application did not contain the landowner's signature, it did contain all of the information required by § 174C-51, HRS, and by § 13-171-12(b), Hawaii Administrative Rules (hereafter "HAR").

On July 19, 2004, CWRM wrote to DWS, acknowledging receipt of DWS's application for the Wailuku Shaft on July 2, 2004. That letter advised that CWRM could not "accept the application as complete for processing without the landowner's signature." It further advised that DWS's "failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either [DWS's] or the landowner's part." (emphasis added.) (Tengan Aff.; Exhibit "C" thereto.)

Maui County Corporation Counsel Edward Kushi, Jr., had contacted the landowner's representative on July 8, 2004 to remind it of DWS's request to sign the application, but received no response. (Affidavit of Edward S. Kushi, Jr. at ¶ 4.) On July 20, 2004, Kehalani Mauka LLC, the landowner, submitted its own application for a water use permit for the Wailuku Shaft, despite
the fact that it was not the existing user, and that its application proposed to use at least some of the water produced by the Wailuku Shaft for some 2,400 homes and 22 acres of commercial development that had not yet been built. Kehalani Mauka LLC's application was not signed by the existing user, DWS. (See, Tengan Aff., Exhibit "F" thereto.)

On August 10, 2004, DWS wrote to CWRM, requesting information regarding the status of its application. (Tengan Aff. ¶ 10 and Exhibit "D" thereto.) CWRM's reply was dated August 18, 2004 (although it was not received by DWS until August 25, 2004). (Id., ¶ 11 and Exhibit "E" thereto.) That letter advised that DWS's application for the Wailuku Shaft was "in limbo." (Id.) The letter did not advise that DWS's application had been denied or that it had been deemed "late." (Id.)

On August 27, 2004, DWS filed a timely objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft, noting (among other things) that Kehalani Mauka LLC was not the existing user of the source and that the application for water to serve 2,400 homes and 22 acres of commercial development that had not yet been constructed was not an "existing use." (Tengan Aff. at ¶ 12 and Exhibit "F" thereto.)

On September 8, 2004, the landowner finally signed DWS's Water Permit Application for the Wailuku Shaft, and DWS transmitted it to CWRM the next day. (Tengan Aff. at 13 and Exhibit "G" thereto.) By letter dated September 16, 2004, the Deputy Director of CWRM acknowledged receipt, but advised that if CWRM "were to
accept the application now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." The Deputy Director's letter further advised that "[E]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." (Tengan Aff. at ¶ 14 and Exhibit "H" thereto.)

The Deputy Director's letter dated September 16, 2004 was not received by DWS until September 21, 2004. On September 22, 2004, DWS responded, strenuously disagreeing with the Deputy Director's analysis. (Tengan Aff. at ¶ 15 and Exhibit "I" thereto.) CWRM followed up with two letters, one dated September 23, 2004 and the other, September 24, 2004. (Tengan Aff. at ¶ 16 and Exhibits "J" and "K" thereto.) The September 24, 2004 letter advised that DWS's application for the Wailuku Shaft was "deemed complete as of September 14, 2004." It invited DWS to file a petition for declaratory relief if DWS disagreed with the Deputy Director's legal analysis. (Tengan Aff., Exhibit "K" thereto.)

DWS does disagree with the Deputy Director's legal analysis, and therefore files this petition.

II. ARGUMENT

A. DWS's Water Use Permit Application For Wailuku Shaft Was Timely Filed

CWRM has acknowledged that it received DWS's application for the Wailuku Shaft on July 2, 2004. (Exhibit "C" to the Tengan Aff.) Yet, the CWRM Deputy Director has advised that DWS's
application will be considered filed as of September 14, 2004, because prior to that date, the application was "incomplete." (Exhibit "K" to the Tengan Aff.)

The Deputy Director did not cite to any legal authority allowing her to equate "incomplete" with "late," and our research has not revealed any provision of the Water Code or the Hawaii Administrative Rules that would support the Deputy Director's position. However, no such semantic exercise is necessary because even lacking the landowner's signature, DWS's application contained all of the information required by HRS § 174C-51 and HAR § 13-171-12(b).

1. DWS's Application Complied With The Express Requirements of the Water Code and Hawaii Administrative Rules

Chapter 174C-51(1) of the HRS provides in pertinent part that all permit applications must contain the "name and address of the applicant and landowner. . . ." (emphasis added.) Nothing in HRS § 174C-51 requires the application to contain the landowner's signature.

The DWS application received by the CWRM on July 2, 2004 had all of the required information. The application was signed and submitted by the applicant, George Tengan, on behalf of the County of Maui Department of Water Supply. The application also contained the name and address of the landowner of the source, namely, Kehalani Mauka LLC, 745 Fort St., Suite 2110 Topa Financial Center, Fort Street Tower, Honolulu, Hawaii. Thus, the
application, even without a signature on behalf of Kehalani Mauka LLC, met the literal requirements of HRS § 174C-51(1). (Tengan Aff., Exhibit "B".)

The application also complied with the requirements of the Hawaii Administrative Rules. HAR § 13-171-12(b) tracks the language of HRS § 174C-51, providing in subsection § 13-171-12(b)(1) that all applications shall contain "[t]he name and address of the applicant and landowner. . . ." (emphasis added.) Nothing in HAR § 13-171-12(b) requires the landowner's signature. By providing the name and address of the landowner, DWS's application complied with HAR § 13-171-12(b).

If the drafters of HRS § 174C-51 and HAR § 13-171-12(b) had wanted to require the landowner's signature, rather than merely the landowner's name, they presumably would have known how to ask for it. See, In the Matter of Water Use Permit Applications ("Waiahole II"), 105 Hawaii 1, 15 (2004)[Campbell Estate and BWS "complied with the plain language of HRS §§ 174C-57 and 174C-59. Thus, because the language of these statutes is unambiguous, this court has no choice but to affirm the transfer. We leave it to the legislature to amend the language if it did not intend this result."](footnote omitted)

Elsewhere in the Water Code and the HAR, signatures are expressly required. For example, § 174C-26(c) provides that declarations of water use must be "signed and sworn to by the person required to file the declaration . . . ." (emphasis added)
HAR § 13-167-7(c) requires all CWRM orders to be "authenticated or signed by the chairperson." (emphasis added) HAR § 13-167-25(b) requires pleadings to be "written, typewritten, or printed and signed in ink by the party or the party's authorized agent or attorney." (emphasis added) Yet, there is no such express instruction in HRS § 174C-51 and HAR § 13-171-12(b).

It is a well-established rule of statutory construction that where a law includes particular language in one section of a statute, but omits it in another section of the same act, the legislature is presumed to have acted intentionally and purposely in its choice of words. See, In re Water Use Permit Applications ("Waiahole I"), 94 Hawai'i 97, 151 (2000); see also, Parr v. L & L Drive-Inn Restaurant, 96 F. Supp.2d 1065, 1077 (D. Haw. 2000). According to the maxim expressio unius est exclusio alterius, a provision of the Water Code or Chapter 13 of the HAR requiring the "name" of the landowner should not be interpreted as requiring the landowner's "signature."

Because neither the Water Code nor the HAR required DWS to provide the landowner's signature on DWS's application for a water use permit, the CWRM cannot deem an application without the landowner's signature "incomplete" and therefore, "late."

2. Procedural And Punitive Statutes Are To Be Strictly Construed

Procedural provisions of statutes, as well as punitive statutes, must be interpreted strictly. See, State Sav. & Loan
Ass'n v. Kauaiian Development Co., 50 Hawai'i 540, 561 (1968); see also, In re Aloha Motors, Inc., 56 Hawai'i 321, 326 (1975). If the Deputy Director's determination that DWS's application was "incomplete," and therefore, "late," were to be upheld, the thousands of Maui businesses and citizens who depend on water from the Wailuku Shaft would be severely penalized. Given the potentially harsh consequences, the CWRM should construe the language of HRS § 174C-51 and HAR § 13-171-12(b) strictly and literally. The statute and the rule specifically require the landowner's name and address, which DWS's application provided. Neither the statute nor the rule require the landowner's "signature." Therefore, DWS's application should have been accepted as complete upon its receipt by the CWRM on or about July 2, 2004.

3. There Were No Permit Applications Deemed "Late" In The Waiahole Ditch Case Due To Failure To Provide The Landowner's Signature

Nothing in the Hawaii Supreme Court's decision in Waiahole I, 94 Hawai'i 97 (2000) supports, let alone compels, the conclusion that an "incomplete" application, received by the CWRM less than one year from the date of designation, must be deemed "late." In Waiahole I, the Hawaii Supreme Court held that an application filed by PMI was untimely. The date of designation was July 15, 1992. PMI was first mentioned in an amendment to a joint application filed on June 14, 1994. PMI eventually filed its own application on February 3, 1995. Under these facts, the court
found that PMI could not be deemed an "existing user." Waiahole I, supra, 94 Hawai'i at 166. PMI's case did not present the issue of whether a timely-filed, but allegedly "incomplete," application would subject the applicant to being treated as a "new," rather than "existing" user. The permits denied in Waiahole I had errors, such as claiming the wrong landowner, or a landowner was inadvertently omitted. That is not the case with DWS's application for the Wailuku Shaft. The Hawaii Supreme Court was not faced with the fact pattern of the instant case, and accordingly, has not issued any binding pronouncements on the subject.

Here, there can be no question that on July 2, 2004 when CWRM received DWS's application DWS was (and for that matter, for the past 13 years has been) the sole "existing user" of the Wailuku Shaft. DWS's application was received by CWRM before expiration of the one-year anniversary of the date of designation. Nothing in Waiahole I requires a finding that under these facts, DWS's application was late.

B. County of Maui Has Condemnation Power

The CWRM's stated purpose for requiring the landowner's signature on a water use permit application is to demonstrate that the landowner approves of the existing user's application. While that rationale may make sense when applied to applications filed on behalf of private users, it has less persuasive effect when the applicant is a governmental body with the power to condemn the property on which the source is located. While DWS eventually
obtained the property owner's signature, DWS had a powerful tool at its disposal if the owner had continued to withhold its approval. Under the circumstances, it makes little sense for CWRM to deem DWS's timely-filed application for the Wailuku Shaft "incomplete" and therefore, "late," merely because the landowner was dilatory in providing a signature.

C. Any Presumption Of Abandonment Has Been Conclusively Rebutted

According to §174C-50(c), the penalty for failing to file an application before the statutory deadline is a "presumption of abandonment of the use."¹

Neither the Water Code nor Chapter 13 of the HAR define the term "presumption." However, the term is clearly defined in the Hawaii Rules of Evidence ("HRE") Rule 301(1) defines "presumption" as "a rebuttable assumption of fact . . . ." Subsection (2) of Rule 301 provides that the term "presumption" does not mean "conclusive presumption." HRE Rule 302 provides that "a presumption imposes on the party against whom it is directed either (1) the burden of producing evidence, or (2) the burden of proof." The Hawaii Rules of Evidence Manual (A.M. Bowman, ed., 2d

¹ If an existing user wishes to "revive" the use, it "must apply for a permit under section 174C-51." Section 174C-51 does not distinguish between "new" and "existing" uses, and the companion administrative rule, HAR §13-171-12, by its title and by its terms, clearly relates to applications for both "new" and "existing" uses. Thus, the procedure for "reviving" the use is precisely the same as for applying for an existing use permit, which DWS did prior to the expiration of the July 21, 2004 deadline.
ed. 1998) observes that "[p]resumptions can be defeated by evidence contradicting the basic facts, or by evidence contradicting the presumed fact."

If CWRM believes that it must "presume" that DWS "abandoned" its existing use of the Wailuku Shaft, DWS has already produced more than enough evidence to rebut any such presumption. DWS's initial application received on July 2, 2004 by the CWRM, the correspondence sent by DWS to CWRM inquiring about the status of its application, and the updated application bearing the landowner's signature all provide conclusive evidence rebutting any presumption of "abandonment." DWS's course of conduct has been consistent. In the face of this uncontroverted evidence, CWRM must find that any presumption imposed by § 174C-50(c) has been conclusively rebutted. Accordingly, CWRM should consider DWS's application for a water use permit for the Wailuku Shaft to be an application for an "existing" use.

D. CWRM Is Estopped From Deeming DWS's Application "Late"

Under the doctrine of judicial estoppel,

a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him [or her], at least where he [or she] had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his [or her] action.

Torres v. Torres, 100 Hawai'i 397, 408 (as amended 2003) (brackets in original). Here, CWRM staff advised DWS on more than one
occasion that if it could not obtain the landowner's signature, it should submit the water use application without it and CWRM would contact the landowner to attempt to resolve the situation. (Kraftsow Aff. at ¶ 4; Blumenstein Aff. at ¶ 4.) CWRM staff also advised that since DWS's application was for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature. (Id.) DWS relied on this advice. (See, id. at ¶ 5.) DWS's reliance was reasonable, particularly in view of the fact that neither § 174C-51 nor HAR § 13-171-12(b) expressly require the landowner's signature. Under the circumstances, it would be manifestly unjust to allow CWRM to change its position to DWS's detriment.

E. A Conclusion That DWS Is Not The Sole Existing User Would Be Clearly Erroneous

The CWRM's factual findings are reviewed under the clearly erroneous standard to determine if its decision was "clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." Waiahole II, 105 Hawaii 1, 7 (2004). A finding of fact is clearly erroneous when the record "lacks substantial evidence to support the finding." (Id.)

DWS has been the sole user of water from the Wailuku Shaft for the past 13 years. (Kraftsow Aff. at ¶ 3.) At present, DWS is the sole user of water from the Wailuku Shaft. (Id.) There is no evidence in the record that would support a finding that DWS has ceased to use or abandoned its use of this source. Any
conclusion that DWS is not the sole existing user of the Wailuku Shaft would be clearly erroneous, and subject to reversal on appeal.

III. CONCLUSION

DWS filed a timely application for the Wailuku Shaft. Its application, filed before the expiration of the statutory deadline, contained all information required by the Water Code and the Hawaii Administrative Rules. Any presumption that DWS abandoned its use of the Wailuku Shaft is rebutted by the application filed by DWS, its conversations and correspondence with CWRM staff, and the undisputed fact that DWS is the sole existing user of this source. Given the advice of CWRM staff, on which DWS relied, CWRM is estopped from concluding that DWS is not the existing user. Finally, any finding that DWS is not an "existing user" would be clearly erroneous.

Therefore, DWS respectfully requests this Commission to issue a declaratory ruling that DWS's water use permit application for the Wailuku Shaft was timely filed, and that DWS is an (and indeed, the only) existing user of this source.


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

By
JANE E. LOVELL
Deputy Corporation Counsel
AFFIDAVIT OF GEORGE Y. TENGAN IN SUPPORT OF COUNTY OF MAUI'S PETITION FOR A DECLARATORY RULING

STATE OF HAWAII )
COUNTY OF MAUI ) SS.

GEORGE Y. TENGAN, being first duly sworn upon oath, deposes and says that:

1. I am the Director of the County of Maui's Department of Water Supply ("DWS"). I have provided this Affidavit in support of the County of Maui's petition for a declaratory ruling. I have personal knowledge of the matters stated herein, except for matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.
2. I have served as Director of the DWS since January, 2003. Prior to becoming DWS's Director, I served as the Deputy Director of DWS from 1995 through 2002. I have also worked for the Department of Water Supply on the Big Island, serving as Fiscal Officer and as Deputy Director. I was born and raised on Maui, and am a graduate of Baldwin High School. I received my degree in accounting from the University of Hawaii.

3. During my entire tenure with DWS, and continuing at the present, the County of Maui has relied on water from Wailuku Shaft 33/Well No. 5330-05 ("Wailuku Shaft") to supply more than one quarter of the water required to meet the needs of the people and businesses served by the County's Central Maui system.

4. The Central Maui system extends from Paia to Maalaea, and from Wailuku to Makena, serving those communities as well as Waikapu, Waiehu, Waihee, Kahului, Kihei, and Wailea, among others. DWS takes, on a yearly average basis, 5.771 million gallons per day from Wailuku Shaft to serve these communities.

5. The Iao aquifer is one of the primary sources of water for the Central Maui system.

6. DWS is by far the largest existing user of groundwater originating in the Iao aquifer.

7. On July 21, 2003, the Commission on Water Resource Management ("CWRM") gave public notice that the Iao aquifer system had been designated as a groundwater management area. As an existing user of groundwater, DWS had to apply for water use
permits for each of its groundwater sources in the Iao aquifer on or before July 21, 2004.

8. The Wailuku Shaft draws groundwater from the Iao aquifer. Therefore, as the existing user of the Wailuku Shaft, DWS completed the water use permit application for that source and forwarded it on February 4, 2004 to the landowner for signature. A true and correct copy of my transmittal letter dated February 4, 2004 to Mr. Jay Nakamura is attached hereto as Exhibit "A".

9. A true and correct copy of the application for a water use permit for the Wailuku Shaft is attached hereto as Exhibit "B". I have been informed by Deputy Director Yvonne Izu that DWS's application was received by CWRM on or about July 2, 2004. (See letter dated July 19, 2004 from Yvonne Izu to me, a true and correct copy of which is attached hereto as Exhibit "C".) Although DWS's application did not contain the landowner's signature, it did contain the landowner's name and address.

10. On August 10, 2004, I wrote to CWRM, requesting information regarding the status of our water use application for the Wailuku Shaft. A true and correct copy of that letter is attached hereto as Exhibit "D".

11. CWRM's reply to my letter of August 10, 2004, was dated August 18, 2004 (although we did not receive it until August 25, 2004). That letter advised that DWS's application for the Wailuku Shaft was "in limbo." The letter did not advise that DWS's application had been denied or that it had been deemed "late." A
true and correct copy of CWRM's reply dated August 18, 2004 is attached hereto as Exhibit "E":

12. On August 27, 2004, DWS filed a timely objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft, noting (among other things) that Kehalani Mauka LLC was not the existing user of the source and that the application for water to serve 2,400 homes and 22 acres of commercial development that had not yet been constructed was not an "existing use." A true and correct copy of DWS's objections is attached hereto as Exhibit "F".

13. On September 8, 2004, the landowner finally signed DWS's Water Permit Application for the Wailuku Shaft, and I transmitted it to CWRM the next day. A true and correct copy of my transmittal letter is attached hereto as Exhibit "G".

14. By letter dated September 16, 2004, the Deputy Director of CWRM acknowledged receipt of the application on September 14, 2004. She advised that if CWRM "were to accept the application now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." The Deputy Director's letter further advised that "[E]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." A true and correct copy of the Deputy Director's letter dated September 16, 2004 is attached hereto as Exhibit "H".

22, 2004, I responded, noting DWS's disagreement with the Deputy Director's analysis. A true and correct copy of my response is attached hereto as Exhibit "I".

16. CWRM followed up with two letters, one dated September 23, 2004 and the other, September 24, 2004, true and correct copies of which are attached hereto as Exhibits "J" and "K", respectively. The latter letter (Exhibit "K") advised that DWS's application for the Wailuku Shaft was "deemed complete as of September 14, 2004." It invited DWS to file a petition for declaratory relief if DWS disagreed with the Deputy Director's legal analysis.

17. DWS does disagree with the Deputy Director's legal analysis. DWS is the existing user of Wailuku Shaft. DWS has never "abandoned" that existing use.

Further affiant sayeth naught.

Subscribed and sworn to before me this 26th day of October, 2004.

Jerry Ann Wells
NOTARY PUBLIC, State of Hawaii.

Name Printed: Jerry Ann Wells

My commission expires: 4/19/06
Under Application for a permit (§174C-51), is the statement "All permit applications filed under this part shall contain the following: (1) The name and address of the applicant and land owner..." The import of this is that without a signature of the landowner, the Commission cannot be certain that the application has the landowner's express permission, and quite clearly in this case, this was at issue. Thus, without the landowner's signature, we cannot deem the application to be complete.

Notice of these requirements was initially sent to the Maui Department of Water Supply (MDWS) July 28, 2003, followed by a registered copy of the same letter. At the same time, staff made representations to all existing users that, because water management areas were a new experience on Maui, staff was prepared to assist in completing the applications in a timely way. Other than friendly oral reminders during the normal course of work between MDWS and us (where there were verbal promises of getting the applications in by February 2004), we had no specific written communications on this application until around June 2004. At this time, the concern was expressed that some difficulty was encountered getting the landowner signature. At that point our advice was to transmit the application anticipating getting a signature page by the deadline. Your application for Wailuku Shaft was initially received July 2, 2004. The landowner signature was finally transmitted September 14, 2004. Meanwhile, Kehalani Mauka, LLC, the owner of the Wailuku Shaft, had filed its own application on July 20, 2004, deemed complete by the standards of §174C-51 and before the July 21, 2004 deadline.

One may argue that the Commission is being too strict in applying the one-year filing deadline in this case. We are guided, however, by the Supreme Court's ruling in the Waiahole contested case. The Court opined that the Commission had no choice but to not accept applications whose equally innocent apparent discrepancies or incompleteness were not reconciled prior to the deadline date. You may argue that there is a distinction with a difference that makes the court's ruling inapplicable to this case, and we invite you to do so by filing an appropriate action with the Commission (e.g., petition for declaratory action).

In any case, please bear in mind that all complete applications for existing use, which includes all those transmitted by the MDWS and the incomplete ones transmitted by the Department of Parks and Recreation, must go through a process of review and consideration on their merits, which may take months. As indicated in the beginning of this letter, this does not preclude the continuation of existing use while that process is underway as is provided under the Code §174C-48(a).

Finally, we are cognizant that the existing uses identified in Kehalani Mauka, LLC's complete application are those serving the Department of Water Supply's Central Maui Service Area.

If you have any questions, please do not hesitate to call me at 587-0214 or toll-free at 984-2400, extension 70214.

Sincerely,

Y vene Y. Izu
Deputy Director

Cl:ss

c: County of Maui, Department of Water Supply
Honorable Alan Arakawa, Mayor  
Office of the Mayor  
200 South High Street  
Wailuku, HI 96793

Dear Mayor Arakawa:

Further Clarification of September 16, 2004 Letter  
Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05)

Your phone call on September 22, 2004, expressed concern over our September 16, 2004 letter in which we indicated that the captioned application, having been completed on September 14, 2004, would not be treated as an "existing use application." This seems to be a very sensitive issue, and we hope that this letter will alleviate some of your concerns.

First, please be aware that de facto existing uses will be allowed to continue. (Existing uses are those uses in effect as of the date of designation, in this case July 21, 2003, as measured by the twelve-month average (12-MAV) as of that date.) This understanding was expressed by the Commissioners at the September 22, 2004 Commission meeting. The Commissioners all very clear that the existing use of the Wailuku Shaft as of July 21, 2003 are the municipal uses of Maui County.

Second, please note that at its September 22, 2004 meeting, the Commission amended staff’s recommendation to go to public hearing on the existing use applications, by including all applications transmitted by the deadline that are either incomplete applications for existing uses or complete applications for new uses (those arising or proposed after July 21, 2003). In other words, the County’s application for Wailuku Shaft 33 qualifies under this amendment and will have a public hearing on the same day that a public hearing is held on the existing use applications.

Finally, a brief explanation of the reasons underlying our September 16 letter is in order.

Water Code §174C-50(c) (Existing uses) states:

“An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation. Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use....”

EXHIBIT "J"
the very least, DWS is entitled to due process before being stripped of existing user status in favor of another party. Please be advised that DWS requests, and due process considerations require, a hearing on this matter. See In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 119 n. 15 (2000) and authorities cited therein.

We respectfully remind you that "the state may compromise public rights in water resources pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 143 (2000). Moreover, "the state water resources trust stops short of embracing private commercial use as a protected 'trust purpose.'" Id. at 138. These principles should guide the Commission in resolving the competing water use permit applications for the Wailuku Shaft.

We look forward to receiving your prompt attention and response to these matters.

Sincerely,

George Y. Tengan, Director
County of Maui
Department of Water Supply

cc: Honorable Alan M. Arakawa, Mayor
    Honorable Keith A. Regan, Managing Director
    Honorable Dain P. Kane, Council Chair
    Honorable Danny A. Mateo, WRC Chair
    Brian T. Moto, Corporation Counsel
    Jane E. Lovell, Deputy Corporation Counsel
    Edward S. Kushi, Jr., Deputy Corporation Counsel
    Jeffrey T. Pearson, DWS Deputy Director
    Ellen Kraftsow, DWS Planning Program Manager
    Stanford S. Carr, Manager, Kehalani Mauka, LLC
Furthermore, your apparent legal conclusion that DWS's application "must" be considered as a "new" use conflicts with advice previously given to us by members of your staff, including Charlie Ice; the State Water Code; the Commission's administrative rules; and with Mr. Young's letter to us dated July 19, 2004, which stated that "[y]our failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use . . . " (emphasis supplied). The State Water Code, HRS § 174C-50(c) and § 13-171-15 of the Commission's administrative rules clearly provide for filing by existing users up to five years from the date of designation if the Commission determines that there is "just cause" for the failure to file on time. See, in addition, In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 166 (2000) [where date of designation was May 27, 1988, Commission could not accept any late applications after May 27, 1993]. We deny that our application was late. Mr. Young acknowledged receiving it on July 2, 2004. However, even if it had been filed after July 21, 2004, the Commission could and should accept it. At a minimum, DWS is legally entitled to a hearing on the subject of "just cause" before the Commission enters any conclusion of law on this subject. If you stand by your apparent legal conclusion that the Commission "must" treat DWS's application as one for a "new use," please consider this letter our formal request for a hearing on this issue.

Finally, the wording of your letter is unclear with respect to Kehalani Mauka LLC's competing application for the same source. Your letter states that "[e]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." This language suggests that the Commission has made findings that Kehalani Mauka's application is complete, and that its proposed use of the Wailuku Shaft for a development that has not yet been built, and which was not in existence as of the date of designation, is an existing use. As you know, DWS and others have filed timely, written objections to Kehalani Mauka's application. Among our objections were that Kehalani is not an "existing user" and that its application is incomplete. There can be no question that DWS is currently, and for 13 years has been, the sole existing user of this source. At
September 22, 2004

Ms. Yvonne Y. Izu  
Deputy Director  
State of Hawaii  
Department of Land and Natural Resources  
Commission on Water Resource Management  
P. O. Box 621  
Honolulu, HI 96809

Re: County of Maui Application for Water Use Permit  
Wailuku Shaft 33 (Well No. 5330-05)

Dear Ms. Izu:

On September 21, 2004, County of Maui Department of Water Supply ("DWS") received your letter dated September 16, 2004 regarding DWS's application for a water use permit for the Wailuku Shaft.

In that letter, you advised that "[i]f we were to accept [DWS's application for the Wailuku Shaft] now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." Due to your use of the subjunctive tense, we cannot determine whether you have in fact accepted our application as complete. Please advise, in clear, unambiguous language, whether the Commission has accepted DWS's application for Wailuku Shaft 33 (Well 5330-05), and if so, the date of acceptance. If, on the other hand, the Commission has rejected DWS's application, please advise us of that fact in clear, unambiguous language, and provide us with a detailed description of the legal basis for that decision. In addition, please tell us who made the decision, and when that determination became effective, so that DWS can file the appropriate legal challenge to it.
Mr. George Y. Tengan, Director  
County of Maui  
Department of Water Supply  
200 South High Street  
Wailuku, HI 96793

Dear Mr. Tengan:

County of Maui Application for Water Use Permit  
Wailuku Shaft 33 (Well No. 5330-05)

Thank you for your letter dated September 9, 2004, transmitting a copy of your application for the captioned Wailuku Shaft with landowner signature. This would resolve the incompleteness of your prior application, but comes after the deadline (July 21, 2004) for existing use applications. Existing use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such.

If we were to accept the application now, we must do so with the proviso that the shaft’s use is a new use, to be considered after existing uses are acted upon.

In any case, we are recommending that, prior to decision-making, all applications consider the Supreme Court’s directions in their Waiahole opinion, exploring alternative sources for the identified uses and explaining the “duties” applied per unit of development. This was the subject of our August 25, 2004 letter (attached).

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. EZU  
Deputy Director

CI:ss  
Attachment

EXHIBIT "H"
APPLICATION FOR WATER USE PERMIT

1. (a) APPLICANT
   Maui County Dept of Water Supply
   George Tengan, Director

   (b) LANDOWNER OF SOURCE
   Kehalani Mauka, LLC
   Jay Nakamura

2. WATER MANAGEMENT AREA:
   Island: Maui

3. (a) EXISTING WELLS/STREAM DIVERSION NAME AND STATE NUMBER:
   Wailehua Sh 33 5330-05

4. SOURCE TYPE (check one):
   (c) LOCATIONS
   Aquifer
   Sump
   Drain
   Surface
   Generally

5. METHOD OF TAKING WATER:
   (c) LOCATIONS
   Well & Pump
   Diverted Surface
   Other (explain)

6. LOCATION OF PROPOSED WATER USE:
   (a) PUC-Regulated Private System
   (b) Tax Map Key

7. QUANTITY OF WATER REQUESTED: 5,771 million
   gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   (c) LOCATION
   Open Pipe
   Meter
   Other

9. QUALITY OF WATER REQUESTED:
   (c) LOCATION
   Potable
   Non-Potable
   Other

10. PROPOSED USE:
    (c) LOCATION
       Municipal (including hotels, stores, etc.)
       Individual Domestic
       Irrigation
       Industrial
       Military

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:
    (c) LOCATION
    7:00 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.

13. REMARKS, EXPLANATIONS:

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) that it is the responsibility of the applicant prior to Commission approval; 3) if necessary, further information may be requested before the application is approved; 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 current flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) upon Commission approval, a water shortages plan must be submitted by the applicant should the Commission require one.

Applicant (print) George Tengan
Signature
Date

Landowner (print) Kehalani Mauka, LLC
Signature
Date

By Milwaukee Homes, its member

Stanford S. Car, its manager

Date: September 8, 2004

WUPAFORM 1412M3)
Peter T. Young, CWRM Chairperson
Page Two
September 9, 2004
Re: County of Maui's Application for Water Use Permit
for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

copy w/enc: Stanford S. Carr
Edward S. Kushi, Jr., Deputy Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel
Jeffrey T. Pearson, DWS Deputy Director
Ellen Kraftsow, DWS Png Pgm Mgr

copy w/o enc: Alan M. Arakawa, Mayor
Keith A. Regan, Managing Director
Dain P. Kane, Council Chair
Danny A. Mateo, WRC Chair
September 9, 2004

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

Subject: County of Maui's Application for a Water Use Permit for Wailuku Shaft 33, State Well No. 5330-05 Iao Ground Water Management Area, Maui

Dear Chairperson Young:

You previously acknowledged receipt, on July 2, 2004, of our water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You indicated to us, by letter dated August 18, 2004, that our application was "in limbo" because it was incomplete due to the absence of the landowner's signature.

We have now obtained the landowner's signature, and enclose a copy of our application, with the original signature of Stanford Carr. Mr. Carr signed as manager of Milwaukee Holdings, LLC, a member of Kehalani Mauka, LLC, on September 8, 2004.

We trust that our application will now be deemed complete, and that it will be processed without further delay.

If you have any questions, please do not hesitate to call.

Sincerely,

George Y. Tengan, Director

Enclosure

"By Water All Things Find Life"
accommodated without either overpumping the aquifer or taking water away from existing users. Neither of these outcomes would be in the public interest. DWS developing new sources outside the lao aquifer, including treatment of surface water in order to alleviate pressure on the lao aquifer and to provide for additional demand from new projects in Central Maui. The Applicant could better serve the public interest by participating in new source development, and by timing the proposed project so that it can be served from the Central Maui System once new sources outside the lao aquifer come on-line.

DWS Objection 5. Applicant has not established that its proposed use will not interfere with the rights of the Department of Hawaiian Home Lands.

H.R.S. § 174C-49(a)(7) provides that the applicant must demonstrate that its proposed use "[w]ill not interfere with the rights of the department of Hawaiian home lands..." Applicant has not done so. Applicant states that "Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL." However, Applicant acknowledges that "DHHL currently receives water from the County water system that includes this source..." DHHL has outstanding meter reservations for the Waiehu Kou Phase III development totaling 97,000 gallons per day in estimated demand from the Central Maui system. Additional demand of 57,600 gallons per day is estimated by DHHL for the proposed Waiehu Kou Phase IV project. If the output of Wailuku Shaft 33 must accommodate 2,400 additional homes, and up to 22 acres of new commercial development, then existing DHHL users who depend on this source will be harmed by either receiving less water, or through overpumping of the lao aquifer.

Additional County Comments:

The County of Maui will comment separately on whether the proposed use is consistent with state and county general plans and land use designations (H.R.S. § 174C-49(a)(6)) and whether the proposed use is consistent with County land use plans and policies (H.R.S. § 174C-49(a)(7)). By letter dated August 9, 2004 addressed to Mayor Alan M. Arakawa, the Commission on Water Resource Management asked for the County's response within 60 days. County calculates that its response is due on or before October 8, 2004.

Relief Requested:

DWS urges the Commission to deny the application of Kehalani Mauka LLC for the reasons stated above. DWS requests the Commission to grant DWS's competing application for the same source. In the alternative, DWS asks that Kehalani Mauka's Water Use Permit application be denied, and that DWS be allowed to revise DWS's applications for other sources within the lao aquifer in order to make up for the 5.771 mgd that DWS is presently using from Wailuku Shaft 33 to serve existing municipal users in Central Maui.

Should you have any questions, please contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Tengan
Director

cc: Hon. Alan M. Arakawa, Mayor, County of Maui
Hon. Dain P. Kane, Chair, Maui County Council
Hon. Danny Mateo, WRC Chair, Maui County Council
Jane Lovell, Esq., Deputy Corporation Counsel, County of Maui
Edward Kushi, Esq., Deputy Corporation Counsel, County of Maui

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proposed use of water for the project can be accommodated with the existing output of Wailuku Shaft 33.

DWS Objection 2. The Applicant has not established that the proposed use of water is a reasonable-beneficial use as defined in section 174C-3.

H.R.S. § 174C-49(a)(2) requires applicants for water use permits to establish that the proposed use of water "[is] a reasonable-beneficial use as defined in section 174C-3." Applicant has not met this burden, and cannot do so. The application mentions certain programs instituted by the County of Maui to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water sources, development of new sources in Waihee, conservation programs, use of reclaimed water, and the like. The application does not mention that DWS also plans to develop Waikapu Mauka and lalao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. All of these programs, which have been instituted by DWS to protect the aquifer and to use Wailuku Shaft 33 in an economic and efficient manner, are dependent on DWS's continued control of the source. However, no agreement between DWS and the Applicant has been reached to date. If Wailuku Shaft 33 is used to accommodate Applicant's additional 2,400 homes and up to 22 acres of commercial development, additional strain will be placed on the aquifer or water service to existing DWS customers must be curtailed. In short, Applicant's proposed use is neither reasonable nor beneficial.

DWS Objection 3. The Applicant has failed to establish that the proposed use of the water will not interfere with any existing legal use.

H.R.S. § 174C-49(a)(3) provides that applicants for water use permits must establish that the proposed use "will not interfere with any existing legal use of water."

Although Applicant tries to gloss over a key jurisdictional fact, Applicant is not the existing user of water from Wailuku Shaft 33. Applicant's predecessor in interest, Wailuku Sugar Co aka Wailuku Agribusiness, last used the shaft and pumps in 1985, although it continued to maintain the pumps at three-month intervals until June of 1990. Power to the pumping stations was cut off in February 1991.

The existing user, as it mentioned in its own competing application for this source, is DWS. Since August 1991, DWS has been the only user of the shaft. DWS has installed distribution appurtenances and has kept up maintenance of the shaft since that time. The Applicant states that it "does not anticipate that pumpage at this level [5.771 MGD] will interfere with any other existing legal uses. ..." However, the Applicant does not provide any factual or scientific foundation for this assertion. The Applicant does not explain how the DWS is supposed to supply an additional 2,400 new homes from this source, and up to 22 acres of new commercial development, while at the same time, maintaining service to DWS's existing customers. In fact, to serve Applicant's new developments, on top of its already existing customers, DWS would have to either increase pumpage from Wailuku Shaft 33 or some other groundwater source in the aquifer, or decrease service to existing customers. Applicant cannot meet its burden under H.R.S. § 174C-49(a)(3).

DWS Objection 4. The Applicant has not established that the proposed use of the water is consistent with the public interest.

H.R.S. § 174C-49(a)(4) requires applicants to establish that the proposed use is "consistent with the public interest." Applicant has not done so.

In support of its application, Applicant notes that its development will provide affordable housing and that "a component of the request is for domestic use." Applicant states that "Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest." DWS agrees. However, Applicant goes further: "Serving municipal uses in the Kehalani project would similarly be in the public interest." Applicant has not explained how these additional new uses can be
August 27, 2004

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

Re: Objection to application for Water Use Permit for Kehalani Mauka, LLC for the Wailuku Shaft 33 (Well No. 5330-05, source TMK 3-5-01:067)

Dear Chairperson Young and Commissioners:

As the existing user, the Maui County Department of Water Supply ("DWS") applied for a Water Use Permit for the subject source, Wailuku Shaft 33 (Well No. 5330-05) on July 2, 2004. DWS objects to the competing application filed by Kehalani Mauka LLC on or about July 20, 2004 for the same source on the following grounds:

DWS Objection 1. The Applicant has not established that the proposed use of water can be accommodated with the available water source.

H.R.S. § 174C-49(a)(1) requires applicants for water use permits to establish that the proposed use of water "[c]an be accommodated with the available water source." Applicant has not met this burden, and cannot do so.

Applicant proposes that Wailuku Shaft 33 be used for Applicant's Kehalani Mauka project, a 550-acre master planned community of approximately 2,400 homes, as well as a mixture of commercial properties. According to the application, when completed, the project "will be one of the largest planned developments on the island." The Applicant states that it is "in the process of negotiating a lease with the County Department of Water Supply," but acknowledges that if no such lease is concluded, Applicant intends to use all of the water produced by Wailuku Shaft 33 for its own purposes. To date, no lease with DWS has been concluded.

The average pumpage of 5.771 MGD from Wailuku Shaft 33 is currently being used by DWS to serve existing users within the County's municipal system. The County has advised the Applicant that it needs to develop additional source for its Kehalani Mauka project. If the Kehalani Mauka project were served from Wailuku Shaft 33, the result, of necessity, would be either a reduction of the amount of water available to DWS, the existing user, for municipal uses, or harmful overpumping of the aquifer to provide for the additional 2,400 homes and up to 22 acres of commercial development to be constructed by Applicant.

To make matters worse, Applicant has not provided any calculation of the demand for the Kehalani Mauka project at full build out. On this basis alone, Applicant has failed to demonstrate that its
July 19, 2004

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

Dear Mr. Tengan:

We acknowledge receipt, on July 2, 2004, of your water use permit applications for the Wailuku Shaft 33 (Well No. 5330-05) and Waihee Well 3 (Well No. 5431-04). However, please be aware that we cannot accept the application as complete for processing without the landowner's signature.

Your failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either your or the landowner's part.

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

Sincerely,

YVONNE Y. IZU
Deputy Director

Cl: ss
continue existing municipal use, or to use it for existing and new uses if such a lease is not concluded. Objections (or comments) to the Kehalani Mauka LLC application are due by September 2, 2004, and we urge you to take advantage of this opportunity to identify the County's interest in this source in more detail.

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,

Peter T. Young
Chairperson
August 18, 2004

Mr. George Tengan, Director
Maui Department of Water Supply
200 South High Street
Wailuku HI 96973

Dear Mr. Tengan:

Status of Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05)

Thank you for your letter dated August 10, 2004, inquiring about the status of this application. As specified in our July 19, 2004 acknowledgement letter (enclosed) the application cannot be accepted as complete due to the absence of the landowner’s signature.

Our staff is in no position to advise that a water use permit application can be processed without the landowner’s knowledge or acceptance as evidenced by signature.

The Code is clear on this point under water use permits:

"All permit applications filed under this part shall contain the following:
(1) The name and the address of the applicant and landowner, provided that
(A) (you use the principal address of a legal entity)
(B) In the event a lessee, licensee, developer, or any other person with a
terminable interest or estate in the land, which is the water source of the
permitted water, applies for a permit, the landowner shall also be stated as a
joint applicant for the water use permit.” (HRS 174C-51, emphasis added)

Attached is our July 19, 2004 letter also, reflected this position.

Staff has, in fact, urged the DWS to file the application before the July 21, 2004 deadline, with the expectation that incomplete aspects might be handled before the deadline. As the deadline has passed with your application still incomplete, your application might be considered "in limbo" with respect to continuing existing uses.

As you know, a separate water use permit application for this source has been filed by the well owner and landowner, Kehalani Mauka LLC, and has been accepted as complete. We understand that their interest is to negotiate a lease with the County to

EXHIBIT "E"
landowner's signature might raise the issue of whether application could be treated as a continuing existing use.

Maui County Corporation Counsel sent yet another letter to the landowner on July 22, 2004, questioning a separate permit application filed by Kehalani Mauka LLC for the same source.

DWS's Water Use Permit for the subject source is not listed in the August 2004 Water Resource Bulletin. DWS staff Eva Blumenstein contacted CWRM staff Lenore Nakama and was informed verbally that DWS's application was not accepted because the landowner's signature was absent.

This state of affairs leaves DWS in the unenviable position of not knowing whether a major source of the Maui public water supply will be available to the public. Therefore, DWS asks that CWRM explicitly state whether DWS's application for Wailuku Shaft has been accepted, rejected, or is in limbo. If the latter, DWS asks that CWRM clarify what steps DWS needs to take to rectify the situation. DWS also requests that CWRM clarify whether the competing application for the same source has been accepted, and if so, what the impact of acceptance of the competing application will be (if any) on DWS's continued ability to provide water to the public from this source.

As objections to the Kehalani Mauka LLC permit application are due no later than September 2, 2004, we would appreciate a formal, written response no later than August 24, 2004.

Sincerely,

[Signature]
Director

cc.
Mayor Alan M. Arakawa, County of Maui
Jane Lovell, Esq., County of Maui
Edward Kushi, Esq., County of Maui
Danny Mateo, WRC Chair, County of Maui

By Water All Things Find Life
August 10, 2004

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Status of application for Water Use Permit for the Wailuku Shaft 33 Well (Well No. 5330-05)

Dear Ms. Izu:

The Department of Water Supply respectfully requests that the Commission on Water Resource Management (CWRM) clarify its position and verify the status of the Department of Water Supply (DWS) application for Wailuku Shaft 33 Well, Well No. 5330-05. The following is the chronology of relevant events for the subject application.

As you know, while DWS is not the landowner, DWS is the user of the water produced by Wailuku Shaft 33. As the user, DWS completed the subject application and provided it on February 4, 2004 to the landowner, Kehalani Mauka LLC, for signature. DWS contacted the landowner's representative, Jay Nakamura, by telephone and fax on March 24, 2004 to follow up on its request for a signature. However, the landowner did not respond.

Therefore, DWS staff contacted CWRM in May, inquiring how to proceed in the event that DWS could not obtain the landowner's signature. CWRM staff Charlie Ice and Lenore Nakama verbally informed DWS staff Ellen Kraftsow and Eva Blumenstein on different occasions that if the landowner refused to sign, DWS should submit the application without the landowner's signature, and the CWRM would contact the landowner to attempt to resolve the situation. CWRM staff Lenore Nakama also indicated that since DWS's application is for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature.

Maui County Corporation Counsel contacted the landowner on July 8, 2004 to remind it of DWS's request to sign the application. However, no signature was provided.

Following CWRM's advice, DWS submitted its application to CWRM for a Water Use Permit for Wailuku Shaft 33 without the landowner's signature on July 9, 2004.

CWRM wrote to DWS on July 19, 2004, advising that CWRM could not accept the application as complete for processing without the landowner's signature, and that DWS's failure to obtain the

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EXHIBIT "D"
Mr. George Tengan, Director  
Department of Water Supply  
County of Maui  
200 South High Street  
Wailuku, HI 96793

Dear Mr. Tengan:

We acknowledge receipt, on July 2, 2004, of your water use permit applications for the Wailuku Shaft 33 (Well No. 5330-05) and Waihee Well 3 (Well No. 5431-04). However, please be aware that we cannot accept the application as complete for processing without the landowner’s signature.

Your failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either your or the landowner’s part.

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

Sincerely,

YVONNE Y. IZU  
Deputy Director

EXHIBIT "C"
Wailuku Shaft 33 Service Area "B"
12(f) The proposed use of water is consistent with county general plans and general policies. During the WUDP update process, the Department's ongoing source development and capital improvement programs support the General Plan objectives "to provide an adequate supply of potable and irrigation water to meet the needs of Maui County's residents" and "to make more efficient use of our ground, surface and recycled water sources".

12(g) The proposed use of water will not interfere with the rights of the Department of Hawaiian Home Lands. There are no DHHL wells withdrawing from the lao aquifer. The Central Maui System services Hawaiian Home Land areas.
12(d) The proposed use of water is consistent with the public interest
The Wailuku Shaft source is mixed with Iao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Waiehu, through Wailuku, Kahului, Puunene, Sprecklesville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

12(e) The proposed use of water is consistent with state and county general plans and land use designations
Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in consistence with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.
Low flow fixtures required in new developments. Code sets flow limits. Free fixture distribution
Outdoor conservation
Public education: targeted conservation checklists, media, activities and events, demonstration gardens, participatory learning.

f. Conservation rules: forestall water shortage, negligent or wasteful use
g. Resource protection: watershed, surface water and wellhead protection programs
h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use
The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985. The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is located on land owned by Kehalani Mauka LLC and is currently zoned Wailuku Kahului Project District 1. This portion of the parcel has long been used for public-quasi public municipal water supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following wells and tunnels are listed in the CWRM database as developed within the lao aquifer:

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APPLICATION FOR WATER USE PERMIT –
Use Information

12(a) The proposed use of water can be accommodated with the available water source: Proposed water use of 5.771 million gallons per day (MGD) is the moving average withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75 MGD, according to the CWRM database. Average annual draft is according to the same database 6.4 MGD.

Wailuku Shaft 33 along with Iao and Waihee aquifer sources and surface water treated by the Iao Treatment Plant serve the Central Maui System. MAV from these sources combined were from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:
Iao aquifer 18.063 MGD
Waihee aquifer 4.536 MGD
Iao Tunnel 1.359 MGD
Iao Treatment Plant 0.489 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved meters total 25,109 MGD. Average yearly consumption for Central Maui during the period July 1, 2002 to June 30, 2003 was 20,955 MGD. System losses and unaccounted-for water makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use
MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from Iao aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer designation. MAV from Iao aquifer have remained lower throughout the year than at the time of designation.

Consumption for single-family use, which represents 16 % of total use in Central Maui, average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial manner:

a. Distribute the withdrawals within Iao aquifer; development of new sources:
   Iao well. Currently in design. Development anticipated by end 2005
   Waikapu Mauka – developed and pump installed. On hold until foreclosure of additional land required resolved

b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee aquifer:
   Well planned by private developer to be dedicated to the County.
   Kupaa 1: On-line by end 2004

c. Provide additional surface water sources:
   Iao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004

d. Alternative sources: East Maui source development, temporary use of existing well

e. Conservation:
   Leak detection, in-house repairs
   Automated radio-read meters replace old, under-registering meters
   Reclaimed water use at commercial properties within 100 ft of R-1 distribution systems.
   Reclaimed water use encouraged for dust control
   Conservation pricing and rate structures
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**TOTAL GPD**

**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 defining 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 Attn: Arthur G. Challecombe
APPLICATION FOR WATER USE PERMIT

Groundwater or Surface Water

PERMITTEE INFORMATION

1. (a) APPLICANT
   Maui County Dept of Water Supply
   George Tengan, Director
   Address: 200 S. High St, Wailuku HI 96793
   Phone: (808)270-7814
   Email: george.tengan@co.maui.hi.us

   (b) LANDOWNER OF SOURCE
   Kealani Mauka LLC
   Jay Nakamura
   Address: 245 Fort St., Suite 2110, Toma Financial Ce
    Fort Street Tower, Honolulu, HI
   Phone: (808)537-5220
   Email: jaynak@geo.llc

SOURCE INFORMATION

2. WATER MANAGEMENT AREA: Iao aquifer
   ISLAND: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33 5330-05
   (b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME: See map
   (c) LOCATION: Address: ____________________________
      Tax Map Key: 3-5-01-601
      (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

4. SOURCE TYPE (check one): Stream
   (a) Artesian
   (b) Well & Pump
   (c) Diverted Surface
   (d) Other (explain)

5. METHOD OF TAKING WATER (check one):潜水
   (a) Artesian
   (b) Well & Pump
   (c) Diverted Surface
   (d) 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
   (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: 5,771 million gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   (a) Floormeter
   (b) Open-pipe
   (c) Well
   (d) Orifice
   (e) Other (explain)

9. QUALITY OF WATER REQUESTED:
   (a) Fresh
   (b) Brackish
   (c) Salt
   (d) Potable
   (e) Non-Potable

10. PROPOSED USE:  
    (a) Municipal (including hotels, stores, etc.)
    (b) Individual Domestic
    (c) Irrigation
    (d) Industrial
    (e) Military
    (f) Other (explain)

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours (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:

   ________________________________________________________
   ________________________________________________________

_________________________ ___________________________
Applicant (print)         Landowner (print)  Jay Nakamura
_________________________ ___________________________
Signature                Signature
_________________________ ___________________________
Date                     Date

EXHIBIT "B"

NOTE: Signing below indicates that the signatories understand and agree to: 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; 3) if necessary, further information may 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 intrusion 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 to the applicant to the Commission for review.
February 4, 2004

Mr. Jay Nakamura  
Kehalani Mauka LLC  
745 Fort Street, Suite 2110  
Honolulu, Hawaii 96813

Re: Wailuku Shaft Water Use Permit

Dear Mr. Nakamura:

Please find attached the Department’s water use application for Wailuku Shaft 33, State Number 5330-05. We kindly request that you review the landowner contact information, sign and return it to the Department of Water Supply.

Thank you very much for your assistance. Should you have any questions regarding this request, please call me at: (808) 270-7816.

Sincerely,

[Signature]

George Y. Tengan  
Director

enclosure

EXHIBIT "A"
Mr. George Y. Tengan
Director
Department of Water Supply
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793-2155

Dear Mr. Tengan,

Thank you for your letter of September 22, 2004 regarding the County of Maui’s application for water use permit for Wailuku Shaft 33. I believe that my letter dated September 23, 2004, to Mayor Arakawa, a copy of which was sent to you, addressed most of the issues raised in your letter.

This letter addresses your specific requests and questions.

1) Your application is deemed complete as of September 14, 2004. This allows us to proceed with processing your application. Public notice will follow.

2) As noted in our letter to Mayor Arakawa, our determination that your application must proceed as an application for a new use was guided by the Hawaii Supreme Court’s decision in the Waiahole Ditch case. More specifically, the Supreme Court stated:

HRS section 174C-50(c) allows the Commission to accept late filings based on “just cause,” but precludes the Commission from accepting late applications “more than five years after the effective date of rules implementing this chapter.” The Commission promulgated the rules implementing the Code on May 27, 1988 and, thus, could not accept any late applications after May 27, 1993. [Emphasis added.]

Waiahole I, 94 Haw. 97, 166, 9 P.3d. 409, 478 (2000).

We read the above-quoted paragraph as leaving the Commission today without any discretion to allow a late filing, no matter how just the cause for late filing may be. If you disagree with our
interpretation of the Court's ruling, or if you disagree with our interpretation of the statute that the landowner's signature is required for a complete application, those are legal issues that should be addressed to the Commission by way of a petition for declaratory ruling. We enclose the administrative rule, HAR section 13-167-81, relating to proceedings for declaratory rulings.

If you or your staff misunderstood some of the communications from our office, we regret that. No one on the Commission staff ever intended to convey a message that an incomplete or a late filing would be without potential adverse consequences. Our advice to transmit the application by the deadline was in the context of your continuing to try to obtain the landowner's signature. We believed that transmitting what was within your power to do in a timely way would show good faith on the part of the County, and our mutual hope that the signature would be forthcoming by the deadline. Additionally, after the deadline had passed, we were sincerely trying to be helpful to the County by encouraging you to complete the application as soon as possible. It was our belief that if there is any room for a legal interpretation contrary to the one the Commission has been working with, the County would be in a better position to make that argument if the application was completed sooner rather than later. Again, because we are dealing with legal interpretations of the statute and of the supreme court opinion, we invite you to file a petition for declaratory ruling if you believe that the Commission's current interpretation is erroneous.

3) Our acceptance of Kehalani Mauka LLC's application as complete is merely a determination that the application met the requirements of HRS section 174C-51. It is not an indication of any assessment of the veracity or merits of the application. The issues you raise with respect to this application will be addressed in the Commission's review of the application.

I hope this responds to your questions. Should you have further questions, please feel free to contact me.

Sincerely,

Yvonne Y. Izu
Deputy Director
(1) New information not previously available would affect the result; or
(2) That a substantial injustice would occur.
(b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 174C-8) (Imp: HRS §§91-11, 91-12)

§13-167-65 Appeals. (a) Parties to proceedings who are aggrieved by the decision of the commission may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of the evidence.

(b) Any other law to the contrary notwithstanding, including chapter 91, HRS, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision. [Eff. MAY 27, 1988] (Auth: HRS §§91-2, 91-14, 174C-8) (Imp: HRS §§91-14, 91-15, 174C-60).

Subchapter 5
Special Proceedings

(a) On petition of an interested person or on its own motion, the commission may issue a declaratory order regarding the applicability of any statutory provision of the state water code, or of any rule or order of the commission thereunder, or any question of law, fact, or mixed question of law and fact within the jurisdiction of the commission. Petitions for the issuance thereof shall state clearly and concisely the controversy or uncertainty, shall cite the statutory authority involved, shall include a complete statement of the facts, reasons, or grounds prompting the petition together with full disclosure of petitioner's interest, and shall conform to the requirements of §13-167-25.

(b) The commission, upon receipt of the petition, may require the petitioner to file additional data or a memorandum of legal authorities in support of the position taken by the petitioner.
(c) The commission may, without notice or hearing, dismiss a petition for declaratory ruling which fails in any material respect to comply with the requirements of this section.

(d) After review of the information filed pursuant to this section the commission may order a hearing on the petition. Any petitioner or interested party who requests a hearing on the petition shall set forth in writing the reasons why the information filed will not permit a fair and expeditious disposition of the petition. If the request for hearing is dependent upon factual assertion, affidavits establishing those facts shall accompany the request. If a hearing is ordered by the commission, the proceeding shall be conducted in accordance with chapter 91, HRS. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§91-8, 92-16)

§13-167-82 Citizen complaints. If any person files a complaint with the commission that any other person is wasting or polluting water, or is making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring within or outside of a water management area, not expressly exempted under this code, without a permit where one is required, the commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof. All complaints related to water quality shall be filed directly with the department of health. [Eff. MAY 27, 1988] (Auth: HRS §174C-8) (Imp: HRS §§92-17, 174C-13)

§13-167-83 Request for mediation. (a) The commission may employ mediation on its own motion or on the written petition of any government agency or affected party. Mediation may be applied in contested case hearings after parties to the proceedings have been determined. Mediation may also be used prior to the initiation of formal proceedings upon the agreement of affected persons.

(b) The party or agency requesting mediation must file a written petition with the commission.

(c) A petition requesting mediation shall contain concise statements of:

1. The legal authority under which the proceeding, hearing or action is to be held or made;
2. The petitioner's interest that may be affected;
3. The disagreement, denial, or grievance which the petitioner requests mediation thereof;
4. The basic facts and issues raised; and
AFFIDAVIT OF EDWARD S. KUSHI, JR. IN SUPPORT OF COUNTY OF MAUI'S PETITION FOR A DECLARATORY RULING

STATE OF HAWAII )
COUNTY OF MAUI ) SS.

EDWARD S. KUSHI, JR., being first duly sworn upon oath, deposes and says that:

1. I am a Deputy Corporation Counsel in the County of Maui's Department of the Corporation Counsel. I am providing this Affidavit in support of the County of Maui's petition for a declaratory ruling. I have personal knowledge of the matters stated herein, except for matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.
2. I have served as a Deputy Corporation Counsel since January, 1999. One of my assignments is to advise the Department of Water Supply ("DWS"). Prior to joining the Department of the Corporation Counsel, I was in private practice. I received my law degree from Washburn University School of Law. I have practiced law in Hawaii since 1979.

3. As the existing user of the Wailuku Shaft, DWS completed a water use permit application for that source and forwarded it on February 4, 2004 to the landowner for signature.

4. I contacted the landowner's representative again on July 8, 2004 to remind it of DWS's request to sign the application, but received no response.

Further affiant sayeth naught.

EDWARD S. KUSHI, JR.

Subscribed and sworn to before me this 26th day of October, 2004.

NOTARY PUBLIC, State of Hawaii.

Name Printed: Jerry Ann Wells
My commission expires: 4/19/06
ELLEN KRAFTSOW, being first duly sworn upon oath, deposes and says that:

1. I am employed by the County of Maui in the Department of Water Supply ("DWS"). My job title is Planning Program Manager. I have been employed by the Department of Water Supply since 1991. I am providing this Affidavit in support of the County of Maui's petition for a declaratory ruling. I have personal knowledge of the matters stated herein, except for matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.

2. I have worked for the Department of Water Supply since 1991, and serving as Planning Program Manager since 1996 and Acting Chief Planner from 1992 until that time. Prior to that I worked for the Hawaii State Department of Health as an Environmental Planner. My educational background includes a
Masters Degree in Public Health with Environmental Health focus from Yale University.

3. For the past thirteen years, County of Maui has relied on water from Wailuku Shaft 33/Well No. 5330-05 (hereafter, "Wailuku Shaft") to supply more than one quarter of the water required to meet the needs of the people and businesses served by the County's Central Maui system. During that time period, and continuing at present, DWS is and has been the sole existing user of water from the Wailuku Shaft.

4. Although DWS sent its water use permit application for the Wailuku Shaft to the landowner for signature in early February, 2004, we did not receive any response. Therefore, I contacted the Commission on Water Resource Management ("CWRM"), to obtain advice on how we should proceed in the event that DWS could not obtain the landowner's signature on time. I spoke to Charlie Ice of the CWRM's staff, who verbally informed me that DWS should submit the application without the landowner's signature, and that it should be okay, even if we had to send the signed copy later. Subsequently, Eva Blumenstein of my staff came to me with the same question. I informed her what I understood from Charlie, but suggested that she also speak with CWRM to be sure. Eva spoke with Lenore Nakama of CWRM and reported back to me. We had both independently received similar information.

5. Relying on this advice, in late June 2004, DWS submitted its application for a water use permit for the Wailuku Shaft to CWRM. The application was received by CWRM on or about
July 2, 2004, well in advance of the July 20, 2004 deadline. Although the application did not contain the landowner's signature, it did contain all of the information required by § 174C-51, Hawaii Revised Statutes, and by § 13-171-12(b), Hawaii Administrative Rules.

6. On September 8, 2004, Mr. Stanford Carr signed our application Water Use permit for Wailuku Shaft as the representative for Kehalani Mauka. Upon receiving the landowner's signature, a signed copy of the water use permit application was transmitted to CWRM, on September 10, 2004.

Further affiant sayeth naught.

ELLEN KRAFTSOW

Subscribed and sworn to before me this 26th day of October, 2004.

EVELYN I. KINOSHITA
NOTARY PUBLIC, State of Hawaii.

My commission expires: 02/14/07
EVA BLUMENSTEIN, being first duly sworn upon oath, deposes and says that:

1. I am employed by the County of Maui in the Department of Water Supply ("DWS") as a water resource planner. I am providing this Affidavit in support of the County of Maui's petition for a declaratory ruling. I have personal knowledge of the matters stated herein, except for matters stated on information
and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.

2. I have been employed by the Department of Water Supply ("DWS") for the past six years. For a year before I was hired by the County of Maui, I worked for DWS on a contract basis. My educational background includes a master's degree in law and a bachelor's degree in environmental studies. I studied law in my native country, Sweden, and environmental studies at University of Hawaii, Manoa.

3. In connection with DWS's application for a water use permit for the Wailuku Shaft, I contacted the landowner's representative, Jay Nakamura, by telephone on March 24, 2004 to follow up on DWS's request for a signature. I also faxed Mr. Nakamura a copy of the application on the same date, along with a letter requesting his signature. However, Mr. Nakamura did not respond, and we did not receive his signature on our application.

4. I spoke to Lenore Nakama of CWRM staff about DWS's application for the Wailuku Shaft before we submitted it. I asked her what we should do if the landowner would not sign our application before July 21. Lenore responded that perhaps CWRM could assist with getting the landowner's signature. She also advised that we should submit the application on time, even if we couldn't get the landowner's signature. She said that either with
or without the landowner's signature, it should not be a problem, and that CWRM would likely process our application.

Further affiant sayeth naught.

EVA BLUMENSTEIN

Subscribed and sworn to before me this 26\textsuperscript{th} day of October, 2004.


day of \textsuperscript{26}\textsuperscript{th} of \textit{October}, 2004.

NOTARY PUBLIC, State of Hawaii.

Name Printed: \textit{Jerry Ann Wells}

My commission expires: 4/19/06
STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the
WATER USE PERMIT APPLICATIONS
for the Iao Aquifer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly served TODAY upon the following counsel in the manner indicated, addressed as follows:

METHOD OF SERVICE:
MAIL	HAND DELIVERY

Peter T. Young, Chairperson
State of Hawaii
Dept. of Land & Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Mark J. Bennett, Attorney General
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu HI 96813

Gary Phillips, Esq.
Hawaii Land and Farming, Inc.
745 Fort Street
Honolulu HI 96813

Oshima Chun Fong & Chung LLP
841 Bishop Street, Suite 400
Honolulu HI 96813
METHOD OF SERVICE:
MAIL   X
HAND DELIVERY

Kapua Sproat, Esq.
EarthJustice
223 S. King Street, Suite 400
Honolulu, HI 96813

Clyde W. Namu'o
State of Hawaii
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, HI 96813

DATED: Wailuku, Maui, Hawaii, OCT 27 2004

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By JANE E. LOVELL
Deputy Corporation Counsel
Ms. Yvonne Izu, Deputy Director  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, Hawaii 96813

Re: Kehalani Mauka, LLC’s Application for Wailuku Shaft 33,  
Well No. 5330-05, WUPA No. 707, TMK No. 3-5-1:1

Dear Deputy Director Izu:

On behalf of our client, Kehalani Mauka, LLC, this letter is in response to your letter dated August 25, 2004. In that letter, the Commission asked applicants seeking ground water use permits in Iao aquifer to review the Supreme Court directions in its latest Waiahole case, *In re Water Use Permits*, 105 Hawai‘i 1, 93 P.3d 643 (2004), and to provide information on practicable alternatives and per unit amounts of water use. We understand that this letter was sent to all applicants for the use of ground water in Iao aquifer.

*Kehalani Mauka LLC provided information that addresses your August 25, 2004 letter in its original application.*

Kehalani Mauka, LLC submitted its water use permit application on July 20, 2004. In that application, we submitted information to supplement the original application. In that letter, we addressed the issues discussed in your August 25, 2004 letter. A copy of that July 20, 2004 application is enclosed for your convenient reference.

Additionally, although not required by the Commission, Kehalani Mauka, LLC would like to provide additional information to address some of the objections filed against its application concerning: (1) its existing use application, (2) providing water to the Department of Hawaiian Homelands (“DHHL”), and (3) potential effect on traditional and customary practices of native Hawaiians.
Kehalani Mauka, LLC's application for Shaft 33 is an existing use for 5.771 mgd.

Kehalani Mauka, LLC is applying for an existing use for Shaft 33. Several commentators to this application have alleged that only the existing user may file for a water use permit for an existing use. The statute, however, is clear that the water use permit is for an existing use regardless of the actual user at the effective date of designation.

Section 174C-50, Hawaii Revised Statutes, states, in relevant part:

(a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).

(b) After publication as provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.

(Emphasis added).

There is no dispute that on July 21, 2003, the date of designation for Iao Aquifer, Well No. 5330-05 ("Shaft 33") was an existing use for 5.771 mgd. based on a 12-month moving average. Shaft 33 was used and continues to be used as part of the Central Maui municipal system that supplies water to Central and South Maui. Kehalani Mauka, LLC is the owner of Shaft 33 that is currently being used by the County of Maui for its Central Maui municipal system. Kehalani Mauka, LLC has continues to seek an agreement with the County of Maui and has did meet with the County on October 22, 2004 and is hopeful that some agreement will be reached.

Kehalani Mauka, LLC will continue to provide water to DHHL projects that directly use water from Shaft 33.

In its comments dated August 27, 2004, the County of Maui Department of Water Supply ("MDWS") has indicated that two DHHL projects have water meter reservations for Shaft 33, Waiehu Kou Phases III and IV for a total projected water use of 154,600 gpd. Kehalani Mauka, LLC has no objection to DHHL receiving water from Shaft 33 for its Waiehu Kou Phases III and IV from the MDWS system.
Ms. Yvonne Izu, Deputy Director  
Commission on Water Resource Management  
October 27, 2004  
Page 3

Kehalani Mauka, LLC does not believe that traditional and customary practices of native Hawaiians will be impacted.

The traditional and customary practices alleged in the objections raised center on taro cultivation and other surface water uses of water. It is important to note that this application concerns ground water and does not involve the use of surface water from either Iao or Waikapu streams. Based on investigative work done by Kehalani Mauka, LLC, no natural streams or other natural surface water features are contained on the Kehalani Mauka property and the water table is at least 25 feet below the surface. Kehalani Mauka, LLC is unaware of any traditional and customary practices related to its application.

Please contact the undersigned at 528-4200 should you require further information or have any questions on this matter.

Very truly yours,

[Signature]

Linnet T. Nishioka

LTN:jhy
Enclosure
State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
APPLICATION FOR WATER USE PERMIT

**PERMITTEE INFORMATION**

1. (a) **APPLICANT**
   - Firm/Name: Kehalani Mauka, LLC
   - Contact Person: Jay Nakamura
   - Address: 1100 Alakea St., 27th Flr.
   - Phone: 808-537-5220, Fax: 808-537-1801
   - E-mail: 

2. (b) **LANDOWNER OF SOURCE**
   - Firm/Name: Kehalani Mauka, LLC
   - Contact Person: Jay Nakamura
   - Address: 1100 Alakea St., 27th Flr.
   - Phone: 808-537-5220, Fax: 808-537-1801
   - E-mail: 

**SOURCE INFORMATION**

2. WATER MANAGEMENT AREA: Iao Aquifer
   - ISLAND: Maui
3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33, State Well No. 5330-05
   - (If source doesn't presently exist, please attach well construction/stream diversion permit or application.)

4. (b) PROPOSED NEW WELL/STREAM DIVERSION NAME:

5. (c) LOCATION: See attached. Attachment #1. Tax Map Key: 
   - (Attach and show source location on a USGS map, scale 1"=1', and a property tax map)

**USE INFORMATION**

6. LOCATION OF PROPOSED WATER USE: See attached.
   - (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: 5,771 gallons per day (averaged over 1 year)
8. METHOD OF MEASUREMENT: 
   - Flowmeter
   - Open-pipe
   - Mass
   - 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
   - Other

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours
   - (daytime hours of operation; example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER: See attached.
   - (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: *Includes Kehalani Project TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63 and 66.

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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 submission; 3) If necessary, further information may 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 available 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): Kehalani Mauka, LLC
Landowner (print): Kehalani Mauka, LLC

By Milwaukee Holding, LLC, its member
By Milwaukee Holding, LLC, its member

Signature: Stanford S. Carr, its manager
Signature: Stanford S. Carr, its manager

Date

WUPAFORM (4/29/03)
### TABLE 1. TMKs TO USE REQUESTED WATER

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**Note:**

- Project Name & Phases (include address if applicable)
- Identify project no. on TMK map
- Existing or New Use (if existing; fill in date of first use)
- Potable or Nonpotable
- TMK
- State LID
- Current County Zoning Code
- Units of Net Acres
- GPD (GPD/acre)
- 4-Year Cumulative Projected Demand
  - Year 1: 04 (year)
  - Year 2: 05 (year)
  - Year 3: 06 (year)
  - Year 4: 07 (year)
- Ultimate Demand GPD (TP Build Out)

---

**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. Attn: Arthur D. Chaiaccombe

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**Table 1:**

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**Total GPD**

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**Only for verification that:**

1. TMKs listed are consistent with zoning; and 2. projects listed are allowed with respect to zoning.
Supplemental Information

Re: Kehalani Mauka, LLC;
Application for ground water use permit for Iao Aquifer;
dated July 20, 2004

USE INFORMATION

6(a). LOCATION OF PROPOSED WATER USE:

Kehalani Mauka, LLC is currently a Hawaii limited liability company, and is in the process of negotiating an agreement with the County Department of Water Supply ("County DWS") that would, if an agreement is reached, allow the County to continue to use Shaft 33, State Well No. 5330-05 ("Shaft 33") for municipal purposes. If agreement with the County is not reached, the Applicant, or its designee, will continue the municipal use of Shaft 33 as a public utility, regulated by the Hawaii Public Utilities Commission.

10. PROPOSED USE:

Kehalani Mauka, LLC intends to use the water for municipal purposes including its Kehalani project located in Wailuku, Maui. (See Attachments 2 & 3) The water will be used for residential, park, school, commercial and irrigation of the common areas of the project. In addition, pending agreement with the County DWS, water will be used for municipal purposes as part of the County's Central Maui Water System ("CMWS"). Shaft 33, as of the date of designation, pumps approximately 5.8 mgd. that is used as part of the County system.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

(a) Can be accommodated with the available water source.

This water use application is for an existing use for Shaft 33, for an allocation of 5.771 mgd, the average existing use for the last year prior to designation of Iao Aquifer. Kehalani Mauka, LLC has allowed the County DWS, on an interim basis, to use Shaft 33 to serve as a part of the County's municipal system. The parties are currently negotiating a long-term agreement that would allow the County to continue the use of the Shaft 33 facilities. Kehalani Mauka believes that given the location of Shaft 33 in the Iao Aquifer, and its historical use, the application for 5.771 mgd. can be accommodated within the Iao Aquifer's sustainable yield. The water used from Shaft 33 by the County of Maui has already been calculated in the approximately 18 mgd. used by the County in Iao aquifer and this application is being made in conjunction with that existing use and not in addition to it.
Shaft 33 is a part of the CMWS that serves central and south Maui. See attached map of the service areas for Shaft 33. Shaft 33 has historically averaged approximately 5.8 mgd. This serves approximately 9667 households at the County standard rate of 600 gpd.

(b) Reasonable and beneficial use.

Kehalani is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single-family residences, located at the base of the West Maui Mountains with an expected build-out period of ten years. When completed, it will be one of the largest planned developments on the island. The current strategic focus is to develop the infrastructure for this master planned community, thus enabling the sale of both improved and unimproved lots to interested builders and developers.

Kehalani has land use and zoning entitlements and approvals that took over two decades to achieve. The Project District Zoning Ordinance allows maximum flexibility in fine-tuning development plans as the market dictates within an overall maximum of 2,400 residential units and up to 22 acres of neighborhood commercial development. The property is located adjacent to the County seat, Wailuku. Frontage on Honoapiilani Highway provides the project with great visibility required by commercial tenants and close proximity to Maui's primary job centers and resorts.

Pending agreement with the County DWS, this water use for the Kehalani project as well as the water use for the existing county water system customers who use the CMWS would continue.

As part of the County water system, the County of Maui has instituted programs to protect the aquifer and use water in an economic and efficient utilization including: utilization of alternative surface water sources, development of new sources in Waihee, conservation programs including leak detections, automatic radio-read meters to replace old under-performing meters, use of reclaimed water where appropriate and available, conservation pricing and rate structure, low flow fixture distribution, and public education on the importance of conservation. In addition, the County has put resources into natural resource management and protection including USGS study on the availability of water in central Maui, watershed, wellhead and surface water protection programs.

Residential housing projects, including planned communities, have been recognized by the Commission as a reasonable and beneficial use of water. Municipal use of water has been recognized by the Commission as a reasonable and beneficial use of water.
Supplemental Information
Kehalani Mauka, LLC, Application for ground water use permit for lao Aquifer, dated July 20, 2004
Page 3

(c) Will not interfere with any existing legal use.

Shaft 33 is the only source of the current county system that is located south of the lao stream and has historically been pumped at much higher levels than the present 5.771 mgd. Kehalani Mauka, LLC does not anticipate that pumpage at this level will interfere with any other existing legal uses, including other existing wells in lao aquifer.

(d) Is consistent with the public interest.

The Kehalani project is one of the few planned residential communities of this scale that offers affordable housing for local residents and seniors. The project provides housing within a few miles of Wailuku, the county center that is available and affordable for local residents. In fact, some housing sold has an owner/occupant requirement for a certain period of time to allow residents to purchase housing in close proximity to work and schools.

A component of the request is for domestic use. The Hawaii Supreme Court in In the Matter of Water Use Permit Applications, ("Waiahole I"), 94 Hawai'i 97 (2000) recognized domestic use as a public trust purpose. As a public trust purpose, domestic use should be recognized as in the public interest and should be given priority by the Commission. In addition, the Commission has found municipal use in the public interest.

Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest. (See Attachment 4) Serving municipal uses in the Kehalani project would similarly be in the public interest.

Kehalani Mauka, LLC has no practicable alternatives to the use of Shaft 33 for its municipal water needs. Surface water would require expensive treatment prior to using it for drinking water and may have other environmental effects that would make it not practicable. Reuse water is not an option for domestic use for health reasons and may not be available nor affordable for landscape irrigation use. The project is located within the lao aquifer, and other ground water sources may not be available given the sustainable yield of the aquifer. Therefore, there are no practicable alternatives for Kehalani Mauka, LLC besides the use of Shaft 33.
(e) Is consistent with State and County general plans and land use designations.

The project has the appropriate State and County general plans and land use designations. The project lands are designated “urban” in the State land use classification system. The project is designated “Project District No. 3” in the Wailuku-Kahului community plan.

(f) Is consistent with County land use plans and general policies.

The property is consistent with County land use plans and general policies. The property is current classified under Ordinance No. 2053, the “Wailuku-Kahului Project District 3,” which was specifically created to provide for the Kehalani project.

(g) Will not interfere with the rights of the Department of Hawaiian Home Lands (“DHHL”).

Kehalani Mauka, LLC is unaware of any DHHL lands near the project nor are there any DHHL wells in the Iao aquifer. Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL. Pending agreement with the County DWS, DHHL currently receives water from the County water system which includes this source, and the continuation of that use will benefit the DHHL. Kehalani Mauka, LLC is aware that any permit issued would be subject to the rights of the DHHL under Section 221 of the Hawaiian Homes Commission Act.
Wailuku Shaft 33
Wailuku Shaft 33 Service Area "A"
Wailu Shaft 33 Service Area "B"

Maalaea

Kihei

Wailea

Wailuku Shaft 33 service area
Tax Map Key parcel

0 2 4 Miles
September 22, 2004

Ms. Yvonne Y. Izu
Deputy Director
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu, HI 96809

Re: County of Maui Application for Water Use Permit
Wailuku Shaft 33 (Well No. 5330-05)

Dear Ms. Izu:

On September 21, 2004, County of Maui Department of Water Supply ("DWS") received your letter dated September 16, 2004 regarding DWS's application for a water use permit for the Wailuku Shaft.

In that letter, you advised that "[i]f we were to accept [DWS's application for the Wailuku Shaft] now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." Due to your use of the subjunctive tense, we cannot determine whether you have in fact accepted our application as complete. Please advise, in clear, unambiguous language, whether the Commission has accepted DWS's application for Wailuku Shaft 33 (Well 5330-05), and if so, the date of acceptance. If, on the other hand, the Commission has rejected DWS's application, please advise us of that fact in clear, unambiguous language, and provide us with a detailed description of the legal basis for that decision. In addition, please tell us who made the decision, and when that determination became effective, so that DWS can file the appropriate legal challenge to it.

"By Water All Things Find Life"
Ms. Yvonne Y. Izu
September 22, 2004
Page Two

Furthermore, your apparent legal conclusion that DWS's application "must" be considered as a "new" use conflicts with advice previously given to us by members of your staff, including Charlie Ice; the State Water Code; the Commission's administrative rules; and with Mr. Young's letter to us dated July 19, 2004, which stated that "[y]our failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use . . . " (emphasis supplied) The State Water Code, HRS § 174C-50(c) and § 13-171-15 of the Commission's administrative rules clearly provide for filing by existing users up to five years from the date of designation if the Commission determines that there is "just cause" for the failure to file on time. See, in addition, In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 166 (2000) [where date of designation was May 27, 1988, Commission could not accept any late applications after May 27, 1993]. We deny that our application was late. Mr. Young acknowledged receiving it on July 2, 2004. However, even if it had been filed after July 21, 2004, the Commission could and should accept it. At a minimum, DWS is legally entitled to a hearing on the subject of "just cause" before the Commission enters any conclusion of law on this subject. If you stand by your apparent legal conclusion that the Commission "must" treat DWS's application as one for a "new use," please consider this letter our formal request for a hearing on this issue.

Finally, the wording of your letter is unclear with respect to Kehalani Mauka LLC's competing application for the same source. Your letter states that "[e]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." This language suggests that the Commission has made findings that Kehalani Mauka's application is complete, and that its proposed use of the Wailuku Shaft for a development that has not yet been built, and which was not in existence as of the date of designation, is an existing use. As you know, DWS and others have filed timely, written objections to Kehalani Mauka's application. Among our objections were that Kehalani is not an "existing user" and that its application is incomplete. There can be no question that DWS is currently, and for 13 years has been, the sole existing user of this source. At
the very least, DWS is entitled to due process before being stripped of existing user status in favor of another party. Please be advised that DWS requests, and due process considerations require, a hearing on this matter. See *In the Matter of the Water Use Permit Applications*, 94 Hawaii 97, 119 n. 15 (2000) and authorities cited therein.

We respectfully remind you that "the state may compromise public rights in water resources pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *In the Matter of the Water Use Permit Applications*, 94 Hawaii 97, 143 (2000). Moreover, "the state water resources trust ... stops short of embracing private commercial use as a protected 'trust purpose.'" *Id.* at 138. These principles should guide the Commission in resolving the competing water use permit applications for the Wailuku Shaft.

We look forward to receiving your prompt attention and response to these matters.

Sincerely,

George Y. Tengan, Director
County of Maui
Department of Water Supply

cc: Honorable Alan M. Arakawa, Mayor
Honorable Keith A. Regan, Managing Director
Honorable Dain P. Kane, Council Chair
Honorable Danny A. Mateo, WRC Chair
Brian T. Moto, Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel
Edward S. Kushi, Jr., Deputy Corporation Counsel
Jeffrey T. Pearson, DWS Deputy Director
Ellen Kraftsow, DWS Planning Program Manager
Stanford S. Carr, Manager, Kehalani Mauka, LLC
September 23, 2004

Honorable Alan Arakawa, Mayor
Office of the Mayor
200 South High Street
Wailuku, HI 96793

Dear Mayor Arakawa:

Further Clarification of September 16, 2004 Letter
Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05)

Your phone call on September 22, 2004, expressed concern over our September 16, 2004 letter in which we indicated that the captioned application, having been completed on September 14, 2004, would not be treated as an "existing use application." This seems to be a very sensitive issue, and we hope that this letter will alleviate some of your concerns.

First, please be aware that de facto existing uses will be allowed to continue. (Existing uses are those uses in effect as of the date of designation, in this case July 21, 2003, as measured by the twelve-month average (12-MAV) as of that date.) This understanding was expressed by the Commissioners at the September 22, 2004 Commission meeting. The Commissioners all very clear that the existing use of the Wailuku Shaft as of July 21, 2003 are the municipal uses of Maui County.

Second, please note that at its September 22, 2004 meeting, the Commission amended staff's recommendation to go to public hearing on the existing use applications, by including all applications transmitted by the deadline that are either incomplete applications for existing uses or complete applications for new uses (those arising or proposed after July 21, 2003). In other words, the County's application for Wailuku Shaft 33 qualifies under this amendment and will have a public hearing on the same day that a public hearing is held on the existing use applications.

Finally, a brief explanation of the reasons underlying our September 16 letter is in order.

Water Code §174C-50(c) (Existing uses) states:

"An application for a permit to continue an existing use must be made within a period of one year from the effective date of designation. Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use...."
Honorable Alan Arakawa  
Page 2  
September 23, 2004

Under Application for a permit (§174C-51), is the statement "All permit applications filed under this part shall contain the following: (1) The name and address of the applicant and land owner..." The import of this is that without a signature of the landowner, the Commission cannot be certain that the application has the landowner's express permission, and quite clearly in this case, this was at issue. Thus, without the landowner's signature, we cannot deem the application to be complete.

Notice of these requirements was initially sent to the Maui Department of Water Supply (MDWS) July 28, 2003, followed by a registered copy of the same letter. At the same time, staff made representations to all existing users that, because water management areas were a new experience on Maui, staff was prepared to assist in completing the applications in a timely way. Other than friendly oral reminders during the normal course of work between MDWS and us (where there were verbal promises of getting the applications in by February 2004), we had no specific written communications on this application until around June 2004. At that time, the concern was expressed that some difficulty was encountered getting the landowner signature. At that point our advice was to transmit the application anticipating getting a signature page by the deadline. Your application for Wailuku Shaft was initially received July 2, 2004. The landowner signature was finally transmitted September 14, 2004. Meanwhile, Kehalani Mauka, LLC, the owner of the Wailuku Shaft, had filed its own application on July 20, 2004, deemed complete by the standards of §174C-51 and before the July 21, 2004 deadline.

One may argue that the Commission is being too strict in applying the one-year filing deadline in this case. We are guided, however, by the Supreme Court's ruling in the Waiahole contested case. The Court opined that the Commission had no choice but to not accept applications whose equally innocent apparent discrepancies or incompleteness were not reconciled prior to the deadline date. You may argue that there is a distinction with a difference that makes the court's ruling inapplicable to this case, and we invite you to do so by filing an appropriate action with the Commission (e.g., petition for declaratory action).

In any case, please bear in mind that all complete applications for existing use, which includes all those transmitted by the MDWS and the incomplete ones transmitted by the Department of Parks and Recreation, must go through a process of review and consideration on their merits, which may take months. As indicated in the beginning of this letter, this does not preclude the continuation of existing use while that process is underway as is provided under the Code §174C-48(a).

Finally, we are cognizant that the existing uses identified in Kehalani Mauka, LLC's complete application are those serving the Department of Water Supply's Central Maui Service Area.

If you have any questions, please do not hesitate to call me at 587-0214 or toll-free at 984-2400, extension 70214.

Sincerely,

[Signature]

VONNE Y. IZU  
Deputy Director

Cl:ss

c: County of Maui, Department of Water Supply
From: ROY  
Date: SEP 23 2004  
Suspense Date:  

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They fear a private developer pre-empting them with an end-run for new projects?

I think the reply we drafted before we got this answer this letter to. Notice the example of how they 'work within' by threatening legal action, and demand a prompt return. Sad. Then mirror 174(c) 50(c) too.
September 22, 2004

Ms. Yvonne Y. Izu
Deputy Director
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu, HI 96809

Via Fax and Mail

Re: County of Maui Application for Water Use Permit
Wailuku Shaft 33 (Well No. 5330-05)

Dear Ms. Izu:

On September 21, 2004, County of Maui Department of Water Supply ("DWS") received your letter dated September 16, 2004 regarding DWS's application for a water use permit for the Wailuku Shaft.

In that letter, you advised that "[i]f we were to accept [DWS’s application for the Wailuku Shaft] now, we must do so with the proviso that the shaft's use is a new use, to be considered after existing uses are acted upon." Due to your use of the subjunctive tense, we cannot determine whether you have in fact accepted our application as complete. Please advise, in clear, unambiguous language, whether the Commission has accepted DWS's application for Wailuku Shaft 33 (Well 5330-05), and if so, the date of acceptance. If, on the other hand, the Commission has rejected DWS's application, please advise us of that fact in clear, unambiguous language, and provide us with a detailed description of the legal basis for that decision. In addition, please tell us who made the decision, and when that determination became effective, so that DWS can file the appropriate legal challenge to it.
Ms. Yvonne Y. Izu  
September 22, 2004  
Page Two

Furthermore, your apparent legal conclusion that DWS's application "must" be considered as a "new" use conflicts with advice previously given to us by members of your staff, including Charlie Ice; the State Water Code; the Commission's administrative rules; and with Mr. Young's letter to us dated July 19, 2004, which stated that "[y]our failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use ...." (emphasis supplied). The State Water Code, HRS § 174C-50(c) and § 13-171-15 of the Commission's administrative rules clearly provide for filing by existing users up to five years from the date of designation if the Commission determines that there is "just cause" for the failure to file on time. See, in addition, In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 166 (2000) [where date of designation was May 27, 1988, Commission could not accept any late applications after May 27, 1993]. We deny that our application was late. Mr. Young acknowledged receiving it on July 2, 2004. However, even if it had been filed after July 21, 2004, the Commission could and should accept it. At a minimum, DWS is legally entitled to a hearing on the subject of "just cause" before the Commission enters any conclusion of law on this subject. If you stand by your apparent legal conclusion that the Commission "must" treat DWS's application as one for a "new use," please consider this letter our formal request for a hearing on this issue.

Finally, the wording of your letter is unclear with respect to Kehalani Mauka LLC's competing application for the same source. Your letter states that "[e]xisting use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such." This language suggests that the Commission has made findings that Kehalani Mauka's application is complete, and that its proposed use of the Wailuku Shaft for a development that has not yet been built, and which was not in existence as of the date of designation, is an existing use. As you know, DWS and others have filed timely, written objections to Kehalani Mauka's application. Among our objections were that Kehalani is not an "existing user" and that its application is incomplete. There can be no question that DWS is currently, and for 13 years has been, the sole existing user of this source. At
Ms. Yvonne Y. Izu  
September 22, 2004  
Page Three

the very least, DWS is entitled to due process before being stripped of existing user status in favor of another party. Please be advised that DWS requests, and due process considerations require, a hearing on this matter. See In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 119 n. 15 (2000) and authorities cited therein.

We respectfully remind you that "the state may compromise public rights in water resources pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." In the Matter of the Water Use Permit Applications, 94 Hawaii 97, 143 (2000). Moreover, "the state water resources trust . . . stops short of embracing private commercial use as a protected 'trust purpose.'" Id. at 138. These principles should guide the Commission in resolving the competing water use permit applications for the Wailuku Shaft.

We look forward to receiving your prompt attention and response to these matters.

Sincerely,

George Y. Tengan, Director  
County of Maui  
Department of Water Supply

cc: Honorable Alan M. Arakawa, Mayor  
Honorable Keith A. Regan, Managing Director  
Honorable Dain P. Kane, Council Chair  
Honorable Danny A. Mateo, WRC Chair  
Brian T. Moto, Corporation Counsel  
Jane E. Lovell, Deputy Corporation Counsel  
Edward S. Kushi, Jr., Deputy Corporation Counsel  
Jeffrey T. Pearson, DWS Deputy Director  
Ellen Kraftsow, DWS Planning Program Manager  
Stanford S. Carr, Manager, Kehalani Mauka, LLC
STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAI'I 96809

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

September 22, 2004
Honolulu, Hawaii

Maui Departments of Water Supply and Parks & Recreation
Hawaiian Commercial & Sugar Company
Kehalani Mauka, LLC
APPLICATIONS FOR WATER USE PERMITS
Iao Tunnel, Waihee Wells 1-3, Waiehu Heights Wells 1 & 2, Kepaniwai Well,
Mokuau Wells 1 & 3, Wailuku Shaft 33
Existing Uses Only
Iao Ground Water Management Area, Maui

APPLICANT 1:
Maui Department of Water Supply
200 South High Street
Wailuku, HI 96793

APPLICANT 2:
Hawaiian Commercial & Sugar Company
P.O. Box 791628
Paia, HI 96779

APPLICANT 3:
Maui Department of Parks & Recreation
700 Hali‘a Nakoa Street, Unit 2
Wailuku, HI 96793

APPLICANT 4:
Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813

SUMMARY OF REQUEST:

Authorize a subcommittee of Commissioners to convene and take testimony at a public hearing on
Maui concerning water use permits for existing use only for reasonable-beneficial use of ground water
from the Iao Aquifer.

LOCATION MAP: See Exhibit 1

BACKGROUND:

July 16, 2003 The Commission designated the Iao Aquifer as a ground-water management area,
effective July 21, 2003, coincident with a public notice announcing it.

July 21, 2003 Public notice was issued, requiring all existing uses to be continued only upon
application for a water use permit. A one-year deadline was given, until July 21,
2004, to file applications.
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should resend 8/25 letter to them summarizing then of 5/L. directions on alternative & dates info.

For [Name]'s signature if edits O.K. ✓
September 16, 2004

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

Dear Mr. Tengan:

County of Maui Application for Water Use Permit
Wailuku Shaft 33 (Well No. 5330-05)

Thank you for your letter dated September 9, 2004, transmitting a copy of your application for the captioned Wailuku Shaft with landowner signature. This would resolve the incompleteness of your prior application, but comes after the deadline (July 21, 2004) for existing use applications. Existing use of Wailuku Shaft 33 is the subject of a complete application by Kehalani Mauka, LLC, and will be considered as such.

If we were to accept the application now, we must do so with the proviso that the shaft’s use is a new use, to be considered after existing uses are acted upon.

In any case, we are recommending that, prior to decision-making, all applications consider the Supreme Court’s directions in their Waiahole opinion, exploring alternative sources for the identified uses and explaining the “duties” applied per unit of development. This was the subject of our August 25, 2004 letter (attached).

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
Attachment
September 9, 2004

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

Subject: County of Maui's Application for a Water Use Permit
for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

Dear Chairperson Young:

You previously acknowledged receipt, on July 2, 2004, of our water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You indicated to us, by letter dated August 18, 2004, that our application was "in limbo" because it was incomplete due to the absence of the landowner's signature.

We have now obtained the landowner's signature, and enclose a copy of our application, with the original signature of Stanford Carr. Mr. Carr signed as manager of Milwaukee Holdings, LLC, a member of Kehalani Mauka, LLC, on September 8, 2004.

We trust that our application will now be deemed complete, and that it will be processed without further delay.

If you have any questions, please do not hesitate to call.

Sincerely,

George Y. Tengan, Director
Enclosure
Peter T. Young, CWRM Chairperson
Page Two
September 9, 2004
Re: County of Maui’s Application for Water Use Permit
for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

copy w/enc:  Stanford S. Carr
              Edward S. Kushi, Jr., Deputy Corporation Counsel
              Jane E. Lovell, Deputy Corporation Counsel
              Jeffrey T. Pearson, DWS Deputy Director
              Ellen Kraftsow, DWS Plng Pgm Mgr

copy w/o enc: Alan M. Arakawa, Mayor
              Keith A. Regan, Managing Director
              Dain P. Kane, Council Chair
              Danny A. Mateo, WRC Chair
State of Hawaii

COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources

APPLICATION FOR WATER USE PERMIT

Instructions: Please print in ink or type and send 15 copies of completed application with attachments to the Commission on Water Resource Management, P.O. Box 821, Honolulu, Hawaii 96808. Application must be accompanied by a non-refundable filing fee of $25.00 payable to the Dept. of Land and Natural Resources. The Commission's application fee is $75.00 and the Branch fee is $100.00. For further information and complete instructions, visit http://www.hawaii.gov/dlnr/wrm.

PERMITTEE INFORMATION

1. (a) APPLICANT
   Name: George Tengan
   Title: Director
   Address: 200 S. High St, Walluku HI
   Phone: (808)270-7816
   Email: george.tengan@co.maui.hi.us

(b) LANDOWNER OF SOURCE
   Name: Kehalani Mauka LLC
   Address: 43 Fort Street, Suite 2110, Honolulu, HI
   Phone: (808)537-5220

2. SOURCE INFORMATION
   Type: Iao aquifer
   Island: Maui
   Management Area:
   Name: Walluku Shaft 33
   Number: 5330-05

3. EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER:
   (If source doesn't presently exist, please attach well construction/stream diversion permit or application)

4. PROPOSED WELL/STREAM DIVERSION NAME:
   Map:
   Tax Map Key:
   (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

5. METHOD OF TAKING WATER
   (check one):
   □ Artesian
   □ Well & Pump
   □ Diverted Surface
   □ Other

USE INFORMATION

6. PROPOSED WATER USE (If possible, show on same map as location source). Attach similar maps:
   (a) PUC Regulated Private System
   (b) Non-PUC Regulated Private System
   (c) Tax Map Key:

7. QUANTITY OF WATER REQUESTED: 5,771 million gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   □ Flowmeter
   □ Open-pipe
   □ weir
   □ Office
   □ Other

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

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

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:
    24 hours (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:

NOTE: Signing below indicates that the signatories understand and agree to the following:
1) the information provided on this application is accurate and true to the best of their knowledge;
2) Section 14 is the responsibility of the applicant prior to Commission approval;
3) if necessary, further information may 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.

Aplicant (print) George Tengan
Signature /---------4/---------
Date 9/12/04

Landowner (print) Kehalani Mauka LLC
Signature /---------8/---------
Date 9/8/2004
### TABLE 1. TMKs TO USE REQUESTED WATER

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**TOTAL GPD**

**DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE**

**DATE**

*Only for verification that: 1) TMKs listed are consistent with zoning; and 2) projects listed are allowed with respect to zoning.*

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 660 South King Street, 7th Floor, Honolulu, HI 96813. Attn: Arthur D. Chalacombe.*
APPLICATION FOR WATER USE PERMIT –  
Use Information

12(a) The proposed use of water can be accommodated with the available water source:
Proposed water use of 5.771 million gallons per day (MGD) is the moving average withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75 MGD, according to the CWRM database. Average annual draft is according to the same database 6.4 MGD.

Wailuku Shaft 33 along with Iao and Waihee aquifer sources and surface water treated by the Iao Treatment Plant serve the Central Maui System. MAV from these sources combined were from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:

- Iao aquifer 18.083 MGD
- Waihee aquifer 4.536 MGD
- Iao Tunnel 1.359 MGD
- Iao Treatment Plant 0.489 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved meters total 25.109 MGD. Average yearly consumption for Central Maui during the period July 1, 2002 to June 30, 2003 was 20.955 MGD. System losses and unaccounted-for water makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use
MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from Iao aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer designation. MAV from Iao aquifer have remained lower throughout the year than at the time of designation.

Consumption for single-family use, which represents 16 % of total use in Central Maui, average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial manner:

a. Distribute the withdrawals within Iao aquifer; development of new sources:
   - Iao well. Currently in design. Development anticipated by end 2005
   - Waikapu Mauka – developed and pump installed. On hold until foreclosure of additional land required resolved

b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee aquifer:
   - Well planned by private developer to be dedicated to the County.
   - Kupaa 1: On-line by end 2004

c. Provide additional surface water sources:
   - Iao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004

d. Alternative sources: East Maui source development, temporary use of existing well

e. Conservation:
   - Leak detection, in-house repairs
   - Automated radio-read meters replace old, under-registering meters
   - Reclaimed water use at commercial properties within 100 ft of R-1 distribution systems.
   - Reclaimed water use encouraged for dust control
   - Conservation pricing and rate structures

Outdoor conservation

Public education: targeted conservation checklists, media, activities and events, demonstration gardens, participatory learning.

f. Conservation rules: forestall water shortage, negligent or wasteful use

g. Resource protection: watershed, surface water and wellhead protection programs

h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use

The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985. The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is located on land owned by Kehalani Mauka LLC and is currently zoned Wailuku Kahului Project District 1. This portion of the parcel has long been used for public-quasi public municipal water supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following wells and tunnels are listed in the CWRM database as developed within the lāo aquifer:

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<th>WELL_NO</th>
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12(d) The proposed use of water is consistent with the public interest. The Wailuku Shaft source is mixed with lao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Waiehu, through Wailuku, Kahului, Puunene, Sprecklesville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

12(e) The proposed use of water is consistent with state and county general plans and land use designations. Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in consistence with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.

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12(f) The proposed use of water is consistent with county general plans and general policies. During the WUDP update process, the Department's ongoing source development and capital improvement programs support the General Plan objectives "to provide an adequate supply of potable and irrigation water to meet the needs of Maui County's residents" and "to make more efficient use of our ground, surface and recycled water sources".

12(g) The proposed use of water will not interfere with the rights of the Department of Hawaiian Home Lands. There are no DHHL wells withdrawing from the Iao aquifer. The Central Maui System services Hawaiian Home Land areas.
Wailuku Shaft 33 Service Area "A"

Wailuku Shaft 33
service area
Tax Map Key
parcel
Wailuku Shaft 33 Service Area "B"

Maalaea

Kihei

Wailea

Wailuku Shaft 33
service area
Tax Map Key
parcel
Wailuku Shaft 33
COUNTY OF MAUI
DEPARTMENT OF PLANNING
ZONING AND FLOOD CONFIRMATION REQUEST FORM

APPLICANT: DEPARTMENT OF WATER SUPPLY  TELEPHONE: _______________
ADDRESS: ___________________________________________________________
PROJECT NAME: WAILUKU SHAPT 33 (5330-05)
ADDRESS AND/OR LOCATION: __________________________________________
TMK: NUMBER(S): (2) 95 20 1001

ZONING INFORMATION
STATE LAND USE  URBAN COMMUNITY PLAN PD 3
COUNTY ZONING  PROJECT DISTRICT

OTHER SPECIAL DISTRICTS
  — Special Management Area
  — Shoreline Setback Area
  — Country Town Design District
  — Lahaina National Historic Landmark District
  — Maui Redevelopment Area
  — Other _____________________________________________________________

FLOOD INFORMATION
FLOOD HAZARD AREA* ZONE  C

BASE FLOOD ELEVATION  N/A MEAN SEA LEVEL, 1929 NATIONAL GEODETIC
VERTICAL DATUM OR FOR FLOOD ZONE A0, FLOOD DEPTH  N/A

FLOODWAY  [ ] Yes  [X] No

FLOOD DEVELOPMENT PERMIT IS REQUIRED [ ] Yes  [ ] No
* For FLOOD HAZARD AREA ZONES B OR C; A FLOOD DEVELOPMENT PERMIT would be required
if any work is done in any drainage facility or stream area that would reduce the capacity
of the drainage facility, river, or stream, or adversely affect downstream property.

FOR COUNTY USE ONLY
REMARKS/COMMENTS: ____________________________________________________
  ❑ Additional information required.
  ❑ Information submitted is correct.
  ❑ Correction has been made and initialed.

Reviewed and Confirmed by:

AARON SHINMOTO
Zoning Program Administrator

7/14/04

Page 8 of 8
September 9, 2004

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

Subject: County of Maui's Application for a Water Use Permit for Wailuku Shaft 33, State Well No. 5330-05 Iao Ground Water Management Area, Maui

Dear Chairperson Young:

You previously acknowledged receipt, on July 2, 2004, of our water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You indicated to us, by letter dated August 18, 2004, that our application was "in limbo" because it was incomplete due to the absence of the landowner's signature.

We have now obtained the landowner's signature, and enclose a copy of our application, with the original signature of Stanford Carr. Mr. Carr signed as manager of Milwaukee Holdings, LLC, a member of Kehalani Mauka, LLC, on September 8, 2004.

We trust that our application will now be deemed complete, and that it will be processed without further delay.

If you have any questions, please do not hesitate to call.

Sincerely,

George Y. Tengan, Director
Enclosure

"By Water All Things Find Life"
Peter T. Young, CWRM Chairperson
Page Two
September 9, 2004
Re: County of Maui's Application for Water Use Permit
for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

copy w/enc: Stanford S. Carr
Edward S. Kushi, Jr., Deputy Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel
Jeffrey T. Pearson, DWS Deputy Director
Ellen Kraftsow, DWS Plng Pgm Mgr

copy w/o enc: Alan M. Arakawa, Mayor
Keith A. Regan, Managing Director
Dain P. Kane, Council Chair
Danny A. Mateo, WRC Chair
State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
APPLICATION FOR WATER USE PERMIT

PERMITTEE INFORMATION
1. (a) APPLICANT
   Maui County Dept of Water
   George Tengan, Director
   Contact Person: George Tengan
   Address: 200 S. High St, Wailuku HI
   Phone: (808)270-7819
   E-mail: g.tengan@co.mau.hi.us

   (b) LANDOWNER OF SOURCE
       Kehalani Mauka LLC
       Jay Nakamura
       Contact Person: Jay Nakamura
       Address: 243 Fort St. Suite 2110 Topa Financial Ce
       Phone: (808)537-5228

SOURCE INFORMATION
2. WATER MANAGEMENT AREA: Iao aquifer
   ISLAND: Maui
3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33 5330-05
   (If source doesn't presently exist, please attach well construction/stream diversion permit or application.)
3. (b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME
       3-5-01-001
   (c) LOCATION: Address: Mauka
       Tax Map Key: __________
       (Attach and show source location on a USGS map, scale 1:10000, and a property tax map)

USE INFORMATION
4. SOURCE TYPE (check one)
   [ ] Stream
   [ ] Underground
   [ ] Water Well
   [ ] Pump
   [ ] Diverted Surface
   [ ] Other [explain]
5. METHOD OF TAKING WATER (check one): 
   [ ] Existing
   [ ] New Pump
   [ ] Existing Pump
   [ ] Diverted Surface
   [ ] Other [explain]

6. LOCATION OF PROPOSED WATER USE: (if possible, show on same maps as source location. Otherwise, attach similar maps)
   (a) C/PUC-Registered Private System
   (b) Non-PUC-Registered Private System
6. Tax Map Key: Please complete Table 1 on back of application and show applicable portion of property tax map

7. QUANTITY OF WATER REQUESTED: 5,771 million gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT: 
   [ ] Flowmeter
   [ ] Quantity
   [ ] Water
   [ ] Office
   [ ] Other [explain]

9. QUALITY OF WATER REQUESTED: 
   [ ] Fresh
   [ ] Brackish
   [ ] Saline
   [ ] Potable
   [ ] Non-Potable

10. PROPOSED USE: 
    [ ] Municipal (including hotels, stores, etc.)
    [ ] Individual Domestic
    [ ] Industrial
    [ ] Military
    [ ] Other [explain]

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours (daytime hours of operation; example, 7 a.m. to 12 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 and beneficial use.
    (c) Will not interfere with any existing legal use.
    (d) Is consistent with 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.

   "Reasonable and 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:


NOTE: Signing below indicates that the signer(s) attest(s) and swear(s) 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; 3) if necessary, further information may be required before this application is considered complete; 4) if a water use permit is granted by the Commission, the permit is subject to prior existing permitted uses, changes to sustainable yields and stream flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) upon permit approval, a water extraction plan must be submitted by the applicant about the Commission requires one.

Applicant [print] George Tengan

Signature ____________________________
Date 4/21/04

Landowner [print] Kehalani Mauka, LLC
By Milwaukee Holdings, LLC, its member

Signature ____________________________
Date September 8, 2004

Stanford S. Cark, its manager

WUPFORM (4/29/03)
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**TABLE 1.**

**REQUESTED WATER**

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</table>

**TOTAL GPO**

**DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE**

__Signature__

__Date__

*Only for projects that: 1) TMKs listed are consistent with zoning and land use regulations on Table 1, and 2) projects listed are associated with zoning and land use regulations as of 2004. This form is intended for individual projects and is not applicable for multiple projects. Please ensure all applicable regulations are met.*
APPLICATION FOR WATER USE PERMIT –
Use Information

12(a) The proposed use of water can be accommodated with the available water source:
Proposed water use of 5.771 million gallons per day (MGD) is the moving average withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75 MGD, according to the CWRM database. Average annual draft is according to the same database 6.4 MGD.

Wailuku Shaft 33 along with Iao and Waihee aquifer sources and surface water treated by the Iao Treatment Plant serve the Central Maui System. MAV from these sources combined were from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:
Iao aquifer 18.063 MGD
Waihee aquifer 4.536 MGD
Iao Tunnel 1.359 MGD
Iao Treatment Plant 0.489 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved meters total 25.109 MGD. Average yearly consumption for Central Maui during the period July 1, 2002 to June 30, 2003 was 26.955 MGD. System losses and unaccounted-for water makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use
MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from Iao aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer designation. MAV from Iao aquifer have remained lower throughout the year than at the time of designation.

Consumption for single-family use, which represents 16 % of total use in Central Maui, average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial manner:

a. Distribute the withdrawals within Iao aquifer; development of new sources:
   Iao well. Currently in design. Development anticipated by end 2005
   Waikapu Mauka – developed and pump installed. On hold until foreclosure of additional land required resolved.

b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee aquifer:
   Well planned by private developer to be dedicated to the County.
   Kupaa 1: On-line by end 2004

c. Provide additional surface water sources:
   Iao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004

d. Alternative sources: East Maui source development, temporary use of existing well

e. Conservation:
   Leak detection, in-house repairs
   Automated radio-read meters replace old, under-registering meters
   Reclaimed water use at commercial properties within 100 ft of R-1 distribution systems.
   Reclaimed water use encouraged for dust control
   Conservation pricing and rate structures

Outdoor conservation:
Public education: targeted conservation checklists, media, activities and events, demonstration gardens, participatory learning.

f. Conservation rules: forestall water shortage, negligent or wasteful use

g. Resource protection: watershed, surface water and wellhead protection programs

h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use

The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985. The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is located on land owned by Kehalani Mauka LLC and is currently zoned Wailuku Kahului Project District 1. This portion of the parcel has long been used for public-quasi public municipal water supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following wells and tunnels are listed in the CWRM database as developed within the lāo aquifer:

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12(d) The proposed use of water is consistent with the public interest
The Wailuku Shaft source is mixed with lao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Waiehu, through Wailuku, Kahului, Puunene, Spreckelsville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

12(e) The proposed use of water is consistent with state and county general plans and land use designations
Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in accordance with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.
12(f) The proposed use of water is consistent with county general plans and general policies. During the WUDP update process, the Department's ongoing source development and capital improvement programs support the General Plan objectives "to provide an adequate supply of potable and irrigation water to meet the needs of Maui County's residents" and "to make more efficient use of our ground, surface and recycled water sources".

12(g) The proposed use of water will not interfere with the rights of the Department of Hawaiian Home Lands. There are no DHHL wells withdrawing from the lao aquifer. The Central Maui System services Hawaiian Home Land areas.
Wailuku Shaft 33 Service Area "A"
Wailuku Shaft 33

[Map of the area showing Wailuku Shaft 33 with grid markings for distance in feet.]

0 2000 4000 Feet
COUNTY OF MAUI  
DEPARTMENT OF PLANNING  
ZONING AND FLOOD CONFIRMATION REQUEST FORM

APPLICANT: DEPARTMENT OF WATER SUPPLY  TELEPHONE: ____________________________

ADDRESS: ____________________________________________________________

PROJECT NAME: WAI'ILUKU SHORE STREET (FE30-08)  

ADDRESS AND/OR LOCATION: ____________________________________________

TMK: NUMBER(S): (2) 78 00 1001

ZONING INFORMATION

STATE LAND USE  URBAN  COMMUNITY PLAN  PD 3

COUNTY ZONING  PROJECT DISTRICT

OTHER SPECIAL DISTRICTS

_ _ Special Management Area
_ _ Shoreline Setback Area
_ _ Country Town Design District
_ _ Lahaina National Historic Landmark District
_ _ Maui Redevelopment Area
_ _ Other

FLOOD INFORMATION

FLOOD HAZARD AREA* ZONE  C

BASE FLOOD ELEVATION  _______________ MEAN SEA LEVEL 1929 NATIONAL GEODETIC
VERTICAL DATUM OR FOR FLOOD ZONE A0, FLOOD DEPTH  _______________

FLOODWAY [ ]Yes [ ]No

FLOOD DEVELOPMENT PERMIT IS REQUIRED [ ]Yes [ ]No

* For FLOOD HAZARD AREA ZONES B OR C; A FLOOD DEVELOPMENT PERMIT would be required if any work is done in any drainage facility or stream area that would reduce the capacity of the drainage facility, river, or stream, or adversely affect downstream property.

FOR COUNTY USE ONLY

REMARKS/COMMENTS:

_ _ Additional information required.
_ _ Information submitted is correct.
_ _ Correction has been made and initialed.

REVIEWED AND CONFIRMED BY:  
AARON SHINMOTO  
Program Administrator  
Zoning Administration and Enforcement Division  
______________________________________________________________  
7/14/04  DATE

(S:\ALL\FORMS\APPLFORMS\SMAAssessment2003.wpd) Revised 12/18/03
August 25, 2004

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

Dear Mr. Tengan:

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 Iao 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,

[Signature]

[VONNE Y. IZU]
Deputy Director

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

Dear Mr. Tengan:

We acknowledge receipt, on July 2, 2004, of your water use permit applications for the Wailuku Shaft 33 (Well No. 5330-05) and Waihee Well 3 (Well No. 5431-04). However, please be aware that we cannot accept the application as complete for processing without the landowner’s signature.

Your failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either your or the landowner’s part.

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

Sincerely,

YVONNE Y. IZU
Deputy Director

Cl:ss
FROM: Yvonne Izu, Deputy Director  DATE: 8/18/04  SUSPENSE DATE: __________
TO:              FOR: IMMEDIATE ATTENTION

   Peter T. Young, Chairperson
   Dan Davidson, Land Deputy
   Deputy Attorney General
   Aquatic Resources
   Conveyances
   Enforcement
   Forestry & Wildlife
   Historic Preservation
   Land Division
   Engineering Division
   State Parks
   Fiscal
   Personnel

REMARKS: Ltr. to George Tengan
          Status of WUPA for Wailuku Shaft ##
          (Well No. 5330-05)

Signature: YVONNE Y. IZU
Date: 8/18/04
Our advice has been to submit by the deadline, even w/o LO signature, to show attentiveness and good faith. We can try another, should he be back today - we should discuss today to contact LO, but DWS should be informed that it’s their responsibility.

I understood they were continuing to try.

How can we accept without landlord’s signature?

I see MCL-51 (1)(B), joint application/permit.

Please have you/me see & sign.

7/19 addendum letter should be attached in reply - don’t they read letters in them?
Dear Mr. Tengan:

Status of Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05)

Thank you for your letter dated August 10, 2004, inquiring about the status of this application. As specified in our July 19, 2004 acknowledgement letter (enclosed) the application cannot be accepted as complete due to the absence of the landowner's signature.

Our staff is in no position to advise that a water use permit application can be processed without the landowner's knowledge or acceptance as evidenced by signature.

The Code is clear on this point under water use permits:

"All permit applications filed under this part shall contain the following:
(1) The name and the address of the applicant and landowner, provided that
   (A) (you use the principal address of a legal entity)
   (B) In the event a lessee, licensee, developer, or any other person with a
       terminable interest or estate in the land, which is the water source of the
       permitted water, applies for a permit, the landowner shall also be stated as a
       joint applicant for the water use permit."  (HRS 174C-51, emphasis added)

Attached is our July 19, 2004 letter also, reflected this position.

Staff has, in fact, urged the DWS to file the application before the July 21, 2004 deadline, with the expectation that incomplete aspects might be handled before the deadline. As the deadline has passed with your application still incomplete, your application might be considered "in limbo" with respect to continuing existing uses.

As you know, a separate water use permit application for this source has been filed by the well owner and landowner, Kehalani Mauka LLC, and has been accepted as complete. We understand that their interest is to negotiate a lease with the County to
continue existing municipal use, or to use it for existing and new uses if such a lease is not concluded. Objections (or comments) to the Kehalani Mauka LLC application are due by September 2, 2004, and we urge you to take advantage of this opportunity to identify the County's interest in this source in more detail.

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,

Peter T. Young
Chairperson
August 10, 2004

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Status of application for Water Use Permit for the Wailuku Shaft 33 Well (Well No. 5330-05)

Dear Ms. Izu:

The Department of Water Supply respectfully requests that the Commission on Water Resource Management (CWRM) clarify its position and verify the status of the Department of Water Supply (DWS) application for Wailuku Shaft 33 Well, Well No. 5330-05. The following is the chronology of relevant events for the subject application.

As you know, while DWS is not the landowner, DWS is the user of the water produced by Wailuku Shaft 33. As the user, DWS completed the subject application and provided it on February 4, 2004 to the landowner, Kehalani Mauka LLC, for signature. DWS contacted the landowner's representative, Jay Nakamura, by telephone and fax on March 24, 2004 to follow up on its request for a signature. However, the landowner did not respond.

Therefore, DWS staff contacted CWRM in May, inquiring how to proceed in the event that DWS could not obtain the landowner's signature. CWRM staff Charlie Ice and Lenore Nakama verbally informed DWS staff Ellen Kraftsow and Eva Blumenstein on different occasions that if the landowner refused to sign, DWS should submit the application without the landowner's signature, and the CWRM would contact the landowner to attempt to resolve the situation. CWRM staff Lenore Nakama also indicated that since DWS's application is for a continued use of an existing source, the CWRM would likely process the application without the landowner's signature.

Maui County Corporation Counsel contacted the landowner on July 8, 2004 to remind it of DWS's request to sign the application. However, no signature was provided.

Following CWRM's advice, DWS submitted its application to CWRM for a Water Use Permit for Wailuku Shaft 33 without the landowner's signature on July 9, 2004.

CWRM wrote to DWS on July 19, 2004, advising that CWRM could not accept the application as complete for processing without the landowner's signature, and that DWS's failure to obtain the

By Water All Things Find Life
Landowner's signature might raise the issue of whether application could be treated as a continuing existing use.

Maui County Corporation Counsel sent yet another letter to the landowner on July 22, 2004, questioning a separate permit application filed by Kehalani Mauka LLC for the same source.

DWS's Water Use Permit for the subject source is not listed in the August 2004 Water Resource Bulletin. DWS staff Eva Blumenstein contacted CWRM staff Lenore Nakama and was informed verbally that DWS's application was not accepted because the landowner's signature was absent.

This state of affairs leaves DWS in the unenviable position of not knowing whether a major source of the Maui public water supply will be available to the public. Therefore, DWS asks that CWRM explicitly state whether DWS's application for Wailuku Shaft has been accepted, rejected, or is in limbo. If the latter, DWS asks that CWRM clarify what steps DWS needs to take to rectify the situation. DWS also requests that CWRM clarify whether the competing application for the same source has been accepted, and if so, what the impact of acceptance of the competing application will be (if any) on DWS's continued ability to provide water to the public from this source.

As objections to the Kehalani Mauka LLC permit application are due no later than September 2, 2004, we would appreciate a formal, written response no later than August 24, 2004.

Sincerely,

[Signature]

George Tengan
Director

cc.
Mayor Alan M. Arakawa, County of Maui
Jane Lovell, Esq., County of Maui
Edward Kushi, Esq., County of Maui
Danny Mateo, WRC Chair, County of Maui

*By Water All Things Find Life*
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</table>

Please enter into WUPA db and assign #5.

5330-05 Waialua Shaft (8) #702 wu

5431-04 Waialua #703

Susan, please have yuome look over and sign this problem WUPA.

Izumi, no customers signature yet!
APPLICATION FOR WATER USE PERMIT

State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
APPLICATION FOR WATER USE PERMIT

1. (a) APPLICANT
Mau County Dept of Water Supply
George Tengan, Director
200 S. High St, Wailuku HI
(808) 270-7816 (808) 270-7833
E-mail george.tengan@co.maui.hi.us

(b) LANDOWNER OF SOURCE
Kehalani Mauka LLC
Jay Nakamura
660 Fort St, Suite 2110, Tupa Finan
Fort Street Tower, Honolulu, HI
(808) 537-5226 (808) 537-1801
E-mail

SOURCES INFORMATION

- Iao aquifer, Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33 5330-05
(b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME: 
(c) LOCATION: Address ____________________________

LOCATION OF PROPOSED WATER (check one):

- Stream
- Saral
- 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
(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: 5,771 million 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: 24 hours

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

- Can be accommodated with the available water source.
- Is a reasonable-beneficial use.
- Will not interfere with any existing legal use.
- Is consistent with the public interest.
- Is consistent with state and county general plans and land use designations.
- Is consistent with county land use plans and general policies.
- 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:

NOTE: Signing below indicates that the signatories understand and accept 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; 3) If necessary, further information may 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) George Tengan
Signature ____________________________
Date ____________________________

Landowner (print) Jay Nakamura
Signature ____________________________
Date ____________________________

For Official Use Only:
RECEIVED
JUL 2 8:59

WUPA NO. 702
TABLE 1. TMKs TO USE REQUESTED WATER

<table>
<thead>
<tr>
<th>1.</th>
<th>2.</th>
<th>3.</th>
<th>4.</th>
<th>5.</th>
<th>6.</th>
<th>7.</th>
<th>8.</th>
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<th>10.</th>
<th>11.</th>
<th>12.</th>
<th>13.</th>
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<tr>
<td><strong>PROJECT NAME &amp; PHASES</strong> (include address if applicable)</td>
<td><strong>EXISTING or NEW USE</strong></td>
<td><strong>POTABLE or NONPOTABLE</strong></td>
<td><strong>STATE LUD</strong></td>
<td><strong>CURRENT COUNTY ZONING CODE</strong></td>
<td><strong>UNITS of NET ACRES</strong></td>
<td><strong>0 = YEAR CUMULATIVE PROJECTED DEMAND</strong></td>
<td><strong>000 = ULTIMATE DEMAND GDP (TO BUILD OUT)</strong></td>
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<td>2.</td>
<td>SHAFT 33</td>
<td>1991</td>
<td>*BASED ON</td>
<td><strong>FRACTION OF</strong></td>
<td><strong>MAV FOR THIS</strong></td>
<td><strong>SOURCE VERSUS</strong></td>
<td><strong>CENTRAL SYSTEM</strong></td>
<td><strong>MAV</strong></td>
<td><strong>Waihee, surface or other sources</strong></td>
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<td>3.</td>
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<td>MGD</td>
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</table>

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 850 South King Street, 7th Floor, Honolulu, HI 96813 Attn: Arthur D. Challacombe.
APPLICATION FOR WATER USE PERMIT – Use Information

12(a) The proposed use of water can be accommodated with the available water source:
Proposed water use of 5.771 million gallons per day (MGD) is the moving average withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75 MGD, according to the CWRM database. Average annual draft is according to the same database 6.4 MGD.

Wailuku Shaft 33 along with Iao and Waihee aquifer sources and surface water treated by the Iao Treatment Plant serve the Central Maui System. MAV from these sources combined were from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:
- Iao aquifer: 18.063 MGD
- Waihee aquifer: 4.536 MGD
- Iao Tunnel: 1.359 MGD
- Iao Treatment Plant: 0.489 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved meters total 25.109 MGD. Average yearly consumption for Central Maui during the period July 1, 2002 to June 30, 2003 was 20.955 MGD. System losses and unaccounted-for water makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use
MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from Iao aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer designation. MAV from Iao aquifer have remained lower throughout the year than at the time of designation.

Consumption for single-family use, which represents 16 % of total use in Central Maui, average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial manner:
- a. Distribute the withdrawals within Iao aquifer; development of new sources:
  - Iao well. Currently in design. Development anticipated by end 2005
  - Waikapu Mauka – developed and pump installed. On hold until foreclosure of additional land required resolved
- b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee aquifer:
  - Well planned by private developer to be dedicated to the County.
  - Kupaa 1: On-line by end 2004
- c. Provide additional surface water sources:
  - Iao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004
- d. Alternative sources: East Maui source development, temporary use of existing well
- e. Conservation:
  - Leak detection, in-house repairs
  - Automated radio-read meters replace old, under-registering meters
  - Reclaimed water use at commercial properties within 100 ft of R-1 distribution systems.
  - Reclaimed water use encouraged for dust control
  - Conservation pricing and rate structures
Low flow fixtures required in new developments. Code sets flow limits. Free fixture
distribution
Outdoor conservation
Public education: targeted conservation checklists, media, activities and events,
demonstration gardens, participatory learning.
f. Conservation rules: forestall water shortage, negligent or wasteful use
g. Resource protection: watershed, surface water and wellhead protection programs
h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater
availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use
The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985.
The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is
located on land owned by Kehalani Mauka LLC and is currently zoned Wailuku Kahului Project
District 1. This portion of the parcel has long been used for public-quasi public municipal water
supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following
wells and tunnels are listed in the CWRM database as developed within the lao aquifer:

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<td>Maui DWS</td>
<td>MUN</td>
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</table>
12(d) The proposed use of water is consistent with the public interest
The Wailuku Shaft source is mixed with Iao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Waiehu, through Wailuku, Kahului, Puunene, Sprecklesville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

12(e) The proposed use of water is consistent with state and county general plans and land use designations
Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in consistency with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.
Wailuku Shaft 33 Service Area "B"

Maalaea

Kihei

Wailea

Wailuku Shaft 33 service area
Tax Map Key parcel
June 17, 2011

Honorable William J. Aila, Jr., Chairperson
Commission on Water Resource Management
State of Hawaii Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Dear Chairperson Aila:

Subject: Water Shortage Plan for Transfer of Water Use Permit (WUP No. 864 to WUP No. 926) for Well No. 5330-05, Iao Ground-Water Management Area

Pursuant to Section 13-171-42(c) of your administrative rules, please find attached the water shortage plan for the above referenced water use permit transfer in the Iao Ground-Water Management Area.

Should you have any questions, please contact our Water Resources Planning Division at (808) 244-8550.

Sincerely,

David Taylor
Director

emb

c: Engineering Division
   Ed Kushi, Jr. First Deputy Corporation Counsel
   Jane Lovell, Deputy Corporation Counsel

 enclosure
16-9-1 Purpose. The purpose of the rule is to prevent overdraft of Iao aquifer.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-2 Definitions. The definitions as set forth herein, and in Board of Water Supply Rules and Regulations Rule Sections 1-2, 16-8-2, and 16-7-3 shall apply in these rules unless another meaning is plainly evident from the context. If there is any conflict between definitions it is intended that the broader or more inclusive definition apply. If a word or phrase is not defined the commonly accepted definition of that word or phrase shall apply.

"Base period water use" or "base period" means the monthly average water use based on water usage for the immediately preceding full twenty-four (24) month billing cycle at the time of the caution low groundwater declaration. Partial billing cycles are not to be included in the determination of the monthly average.

"Sustainable yield" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the Commission on Water Resources Management.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-3 Caution low groundwater condition. A caution low groundwater condition exists:

(a) At any time the 12 month moving average pumpage of gallons of water withdrawn from the Iao Aquifer exceeds 95% of the sustainable yield of the Iao Aquifer; or

(b) Whenever chloride content reaches the absolute limit in ppm chloride shown in Column A in Schedule 1 in more than one area based on a 3 month moving average.

(b) The board shall at any time during the period in which a caution low groundwater condition exists inform the public that a caution low groundwater condition exists. Thereafter the director shall:

(1) Conduct an intensive public appeal for water conservation through the mass media;

(2) Institute voluntary irrigation and other water use schedules to reduce water consumption;

(3) Send letters to large consumers and other private well operators asking them to cut back their usage; and

(4) Notify the Mayor, Maui County Council, and the State Commission on Water Resources Management

(c) The goal for draft reduction is 5% of Iao Aquifer sustainable yield as determined by the Commission on Water Resources Management.

(d) Consumers shall be given a target of a 10% reduction of their base period water use as the goal for reduction of water use in the caution low ground water condition.
(e) No new applications for water meters or payment of the water system development fee shall be accepted by the Department at any time when the combination of actual pumpage from the Iao Aquifer plus the amount of water estimated to be used, based on paid for meter reservations for meters which have not been physically installed, equals or exceeds 98%.

(f) The following procedure shall be followed to issue meters after the caution low ground water condition is lifted:

(1) The director shall establish a system to put all such requests on a master list in the order in which they are received;

(2) When applications for meters may be accepted the director shall contact the persons on the master list in the order which the request was received and inform them that they may file an application. The application and payment of the fee must be submitted within 90 days of notification;

(3) If the person does not apply for a meter and pay the fee within this period the person is removed from the list and must reapply in the normal course of business; and

(4) No new applications for meters shall be accepted until all of the persons on the list have first been offered a meter and have either applied for a meter and paid the fee or have not applied within the period specified in subsection (3), above.

(g) The director shall, at each board meeting while a caution low groundwater condition exists, report to the board:

(1) The status of the chloride levels of the department's facilities listed in Schedule 1;

(2) The weekly average of daily pumpage; the effectiveness of the voluntary conservation measures being advocated; increase or decrease in public appeals to conserve water; and

(3) Such other information which the board may require from time to time to evaluate the status of the low condition and make modification to the voluntary conservation measures being advocated.

(Eff. 03/15/99) (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-4 Alert Low Groundwater Condition.

(a) An alert low groundwater condition exists:

(1) At any time the 12 month moving average pumpage of gallons of water withdrawn from the Iao Aquifer reaches 98% of the sustainable yield of the Iao Aquifer; or

(2) Whenever chloride content reaches the absolute limit in ppm chloride shown in Column B in Schedule 1 in more than one area based on a 3 month moving average.

(b) The board shall at any time during the period in which an alert low groundwater condition exists declare that an alert low groundwater condition exists. Thereafter the director shall:

(1) Implement mandatory restrictions pursuant to Section 16-9-6 of these rules;

(2) Take appropriate action against those person(s) failing to comply with these provisions as permitted within these and the other Board Rules and Regulations;

(3) Take any action authorized to be taken pursuant to Section 16-9-3 of these rules; and

(4) Notify the Mayor, Maui County Council, and the state Commission on Water Resources Management.

(c) Private wells.

(1) During an alert low groundwater condition period the Board shall ask owners of private wells that adversely affect the Iao Aquifer sustainable yield to comply with maximum monthly water allotments established for each private well or battery of private wells. Such allotments shall be stated as a percentage of the highest average daily draft for each month of the year over the last five years prior to the effective date of the alert low groundwater condition as declared by the board.

Example:

| John Doe Well - Average Daily Pumpage Each Month |
|---------|---------|---------|---------|---------|
| Jan     | 2.3 mgd | 1.7 mgd | *2.4 mgd| 2.0 mgd | 1.9 mgd |
| Feb     | 1.8 mgd | 1.9 mgd | 1.8 mgd | *2.0 mgd| 1.8 mgd |
| Mar     | *1.9 mgd| 1.8 mgd | 1.8 mgd | 1.7 mgd | 1.8 mgd |
| Apr     | 2.2 mgd | 2.0 mgd | *2.6 mgd| 2.3 mgd | 2.3 mgd |
| etc.    | etc.    | etc.    | etc.    | etc.    | etc.    |

* Highest Average Daily Pumpage for Each Month of the Year Over the Last 5 years for John Doe Well.
16-9-5 Critical Low Groundwater Condition.

(a) A critical low groundwater condition exists:
   (1) At any time the 12 month moving average pumpage of gallons of water withdrawn from the Iao Aquifer reaches 100% of the sustainable yield of the Iao Aquifer;
   (2) Whenever chloride content reaches the absolute limit in ppm chloride shown in column C in Schedule 1 in more than one area based on a 3 month moving average.

(b) The board shall at any time during the period in which a critical low groundwater condition exists declare that a critical low groundwater condition exists. Thereafter, the director shall:
   (1) Implement mandatory restrictions within the scope of these rules and regulations;
   (2) Take appropriate action against those person(s) failing to comply with these provisions as permitted within these and the other Board Rules and Regulations;
   (3) Take any action authorized to be taken pursuant to Section 16-9-3 and 16-9-4 of these rules; and
   (4) Notify the Mayor, Maui County Council, and the state Commission on Water Resources Management.

(c) Private wells.
   (1) During a critical low groundwater condition period, the board shall ask owners of private wells that adversely affect the Iao Aquifer sustainable yield to comply with maximum monthly water allotments established for each private well or battery of private wells. Such allotments shall be stated as a percentage of the highest average daily draft for each month of the year over the last five years prior to the effective date of the critical low groundwater condition as declared by the board. The board may, from time to time, increase or decrease the initial percentage limit set for the well or battery of wells provided that in no case shall the percentage be less than 70% of the highest average daily draft for each month of the year over the last five years.
   (2) Any Owner of two or more separate wells may regulate the draft on their wells so that the aggregate monthly draft will not exceed the combined monthly allotment for all of their wells.

(d) The goal for draft reduction is 15% of Iao Aquifer sustainable yield as determined by the Commission on Water Resources Management.

(e) Consumers shall be given a target of a 20% reduction of their base period water use as the goal for reduction of water use during a critical low ground water condition.

(f) The director shall, at each board meeting while a declared critical low groundwater condition as provided herein is in effect, report to the board:
   (1) The status of the chloride levels of the department's facilities listed in Schedule 1;
   (2) The weekly average of daily pumpage; the restrictions and allotments in force; plans to increase or reduce restrictions and allotments; and
Such other information which the Board may require from time to time to evaluate the status of the low groundwater condition and make modifications to the restrictions and allotments imposed.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-6 Mandatory restrictions related to alert low groundwater condition.
(a) Board of water supply consumers. During an alert low ground-water condition period, the director may set lawn and ground cover water irrigation restrictions on any of the department's consumers. Such restrictions shall relate to the time when such irrigation may take place and the quantity of water used and may be different for the various classes of the department's consumers as the director shall determine. In addition, the director shall establish water allotments for consumers which shall not be less than 90% of the base period water use, but not less than 400 gallons/day for single family and duplex residences.
(b) During an alert low groundwater condition no meter applications shall be accepted and no meters shall be installed.
(c) Department personnel may issue warnings and citations for violations of mandatory restrictions.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-7 Mandatory restrictions related to critical low groundwater condition.
(a) Board of water supply consumers. The director shall declare that one or more of the following restrictions apply to any or all classes of the department's consumers. Such restrictions may relate to the time when the uses listed in this paragraph may occur and the quantity of water used and may be different for the various classes of the department's consumers as the director may determine.
(b) The restrictions include the following:
(1) Limits on lawn and ground cover water irrigation;
(2) Limits on plant and garden irrigation;
(3) Limits on the washing of cars, boats, trailers, and other vehicles;
(4) Limits on the filling of swimming pools and other types of pools and ponds;
(5) Limits on the washing of sidewalks, walkways, driveways, patios, parking lots, tennis courts, and other hard-surfaced areas; and
(6) Limits on the operations of fountains.
(c) Department personnel may issue warnings and citations for violations of mandatory restrictions set by the director. [Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-8 Surcharge penalties for Alert and Critical Groundwater Conditions.
(a) During alert and critical low groundwater condition periods a surcharge schedule for excess water use shall be established according to the following procedure. The director shall set water allotments per billing period for each class of the department's consumers. Such allotments shall be stated as a percentage (which may be greater than 100% but not less than 70%) of the base period water use. In addition, the allotment shall not be less than 400 gallons per day for single family and duplex residences.
(b) The base period water use as defined in section 16-9-2, above, shall be used to determine surcharge penalties. This amount is not a moving average but is intended to be used for the duration of any Alert or Critical Groundwater condition.
(c) Surcharge penalties shall be charged as follows during Alert and Critical Groundwater conditions:
(1) Usage between the allotment as set forth in Section 16-9-8(a), above, and the base period water usage shall be subject to a surcharge of three (3) times the current highest block rate;
(2) Usage above the base period water usage shall be charged at twenty (20) times the current highest block rate; and
(3) Consumers who use more than the base period water usage are also subject to the installation of a flow restriction device and/or the discontinuation of water service, including removal of the meter.
(d) Surcharges shall be assessed each consumer after receipt of the first water bill following the establishment of allotments by the board. Upon termination of allotments by the board, surcharges shall cease.
[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-9 Penalties.
Any violation by any person of the restrictions declared by the board under Sections 16-9-6 and 16-9-7 of this chapter or who consumes water in excess of the amount designated for their class shall be subject to the installation of a flow restriction device by the department and punishable according to these rules and regulations and section 3-
26 of the rules and regulations of the department of water supply. An offender shall pay the actual cost for the installation and removal of a flow restriction device by the department, which cost shall be billed at the prevailing wage rate(s) plus costs for equipment and materials. Water service may be discontinued for an offense committed after the installation of a flow restrictor in accordance with section3-12 of the rules and regulations of the department of water supply. [Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-10 Procedures for control of water use during Alert or Critical low groundwater conditions.

(a) Declaration of low groundwater level condition. The Director shall inform the public and the department's consumers of the declaration of an alert or critical low groundwater condition by publishing such declaration in a newspaper of general circulation on the island of Maui at least once a day for three consecutive days. The alert or critical low groundwater condition shall begin at midnight on the third day of the publication declaring such condition. The following notices shall be issued during an alert or critical low groundwater condition:

(1) Notice of restrictions. The Director shall inform the public and the department's consumers of the restrictions being imposed because of an alert or critical low groundwater condition by publishing such restrictions in a newspaper of general circulation on the island of Maui at least once a day for three consecutive days. The restrictions shall begin at midnight on the third day of a publication declaring such condition and shall terminate at midnight on the first day of a publication terminating such condition;

(2) Notice of water allotment to consumers. Each consumer shall be notified of their water allotment per billing period by printing such amount on their water bill or by direct mail to the consumer. In cases where a water bill is not sent directly to the person using the water, the consumer shall be responsible for informing the user of the water allotment per billing period applicable to them; and

(3) Notice of maximum monthly water allotment to private well operators. Private well operators shall be notified by mail of their monthly water allotment.
I. Exceptions. Consideration of written applications for exceptions regarding the allotment system or regulations and restrictions on water use shall be set forth in this chapter. Written applications for exceptions shall be accepted, and may be granted, by the director. The director shall report to the Board at each Board meeting a list of all exemptions requested and exceptions granted by consumer class since the previous meeting. Grounds for granting such exceptions are:

A. Failure to do so would cause an unnecessary and undue hardship to the applicant, including but not limited to adverse economic impacts such as loss of production or jobs;

B. Failure to do so would cause an emergency condition affecting the health, sanitation, fire protection, or safety of the applicant or the public;

C. For single family residences with more than four persons permanently residing in the home, if a written application for exception is granted as provided herein, the applicable allotment shall be increased by 40 gallons per person per day for each person permanently residing in the home in excess of four persons;

D. For multiple residential units with more than two dwelling units where the allotment is less than 280 gallons per day per dwelling unit, if a written application for an exception is granted as provided herein, the applicable allotment shall be 280 gallons for each unit; and

E. Denial of an application for exception may be appealed in writing to the board, which shall consider the appeal as a contested case pursuant to Board of Water Supply Rules of Practice and Procedure, Title 16, chapter 2.

II. The director shall inform the public and the department's consumers of the termination by the Board of an alert or critical low groundwater condition by publishing such termination in a newspaper of general circulation on the island of Maui at least once a day for three consecutive days. The alert or critical low groundwater condition and all restrictions and allotments associated therewith shall terminate at midnight on the first day of a publication terminating such condition. [Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-11 Termination of Caution, Alert, or Critical low groundwater conditions
The board may terminate a declared Caution, Alert, or Critical Low Groundwater condition whenever chloride content and moving annual average pumpage over three consecutive months at sources that caused the declared low groundwater level conditions to exist are appropriately reduced below their respective amounts. [Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-12 Exemption of private wells within designated groundwater control areas
New and existing private wells within designated groundwater control areas only shall be exempt from the provision of these rules and regulations. However, owners of private wells shall be asked to comply with any allotments set by the board for private wells. Control and regulation of such wells shall be subject to state statutes, rules, regulations, directives, and standards as currently exist and as may, from time to time hereafter, be amended. Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

Upon designation of the Iao Aquifer by the appropriate state agency the Board shall meet and consider the reasons for designation and independently determine whether the criteria for declaring either a caution, alert, or critical low groundwater condition exists and, if so, to declare the appropriate low groundwater condition as existing. Nothing in this rule shall require the Board to declare that any such low groundwater condition exists, even though the Iao aquifer may be so designated by a state agency. [Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

16-9-14 Effective date.
This rule shall become effective ten (10) days after it is filed with the county clerk of the county of Maui. Eff. 03/15/99] (Auth: HRS 91-4) (Imp: HRS 54-33)

Adopted on the 14th day of January, 1999, by the Board of Water Supply of the County of Maui.
<table>
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</table>
**COMMISSION ON WATER RESOURCE MANAGEMENT**  

**FROM:** Charley  
**DATE:** 09 March 06

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<td>CHING, F.</td>
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| IMATA, R.    |       |              |       |              | Please See Me |
| NAKAMA, L.   |       |              |       |              |              |
| HIGA, D.     |       |              |       |              |              |
| UYENO, D     |       |              |       |              |              |

There are the sites being proposed for Kahelani well development, to replace Wailuku shaft withdrawals. The numbers seem encouraging (more so than I expected). Other thoughts? We shall see...
Proposed Siting of Kehalani Wells

This is in response to an email (attached) from your Engineering Branch, which attached a copy of a letter from Warren Unemori Engineering transmitting a letter from their consultants, Mink & Yuen, to your office. We were asked for something in writing to verify the statement that we concurred with their analysis. The Mink & Yuen analysis concludes that “the impact of the replacement wells on the Iao Tank Site Well will be minimal from the water-level standpoint”.

We had been informally given a draft of their letter and later contacted by telephone by Mink & Yuen. The substance of this exchange was to identify that Mink & Yuen had done an analysis with formulas derived by John Mink for analyzing the probable effects of pumpage from the proposed replacement well sites on water levels, and that the method the Commission staff uses to do a similar analysis had shown essentially the same results. Our staff concurred with this conclusion. However, we do not agree with the statement that chlorides in Wailuku Shaft ("Shaft 33", Well No. 5330-05) are stable and less than 60 mg/L. In fact, the data show a consistent rising trend since 1996, from 40 mg/L to slightly greater than 60 mg/L (see attached graph).

We believe that a more complete analysis would examine chlorides in the wells, something that can only be done by pump testing the proposed wells. We note that the chlorides in the Wailuku Shaft have been slowly but steadily rising under the current pumping regime of about 5 mgd. We have not yet seen pump test results for the Tank Site Well (5230-03), which would be a starting point.

Preliminarily, we note that the Iao Tank Site well is proposed to withdraw an average 2 mgd, and that Kehalani’s proposed Wailuku Shaft replacements wells would withdraw a total of about 5 mgd, totaling 7.0 mgd from a 1,000-ft. cross-section of the aquifer gradient. This is more than is now being withdrawn from this area, and intuitively, we feel it is optimistic to believe that this will not affect water levels and chlorides in this area. We believe that this would be too much pumpage from this limited an area.

Pump tests from the proposed well sites will show more clearly what sorts of impacts there are.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director
March 14, 2006

Ms. Wendy Taomoto, P.E.
Department of Water Supply
Engineering Division
County of Maui
200 South High Street
Wailuku, Hawaii 96793

Dear Wendy,

Re: Proposed Wells at Iao Tank Site

This is in reference to your concern of the impact the proposed well may have on the DWS-drilled well at the Iao tank site.

We asked our hydrogeological consultant, Mink & Yuen, to evaluate your concern. Their response is attached in a 3 page report. Their conclusion and calculations indicate that the impact of the replacement wells on the Iao tank well will be minimal from the water level and water quality standpoint for the reasons stated. They also checked with Charley Ice of CWRM who concurred with their analysis.

Based on the consultant’s findings, we hope DWS will approve the well locations so that our client can proceed with the drilling of the new wells.

Your prompt response and approval will be appreciated.

Sincerely,

[Signature]
Warren S. Unemori
President

Enclosure

cc: Jay Nakamura (w/encl.)
    Ron Shimizu (w/encl.)
    Alva Nakamura (w/encl.)
March 8, 2006

Mr. Warren S. Unemori
Warren S. Unemori Engineer, Inc.
Wells Street Professional Center
2145 Wells Street, Suite 403
Wailuku, Maui, Hawaii 96793

Subject: Possible Impact of Shaft 33 Replacement Wells on New Maui DWS Well the Iao Tank Site

Dear Warren,

This letter is in response to your memorandum of February 24, 2006 regarding concern by the Maui Department of Water Supply (DWS) the impact the Shaft 33 replacement wells will have on their new source at the Iao Tank Site. Our analysis is outlined below.

Shaft 33 may have up to three replacement wells drilled to provide 4.85 to 5 mgd that is presently supplied by the shaft. The closest well to the recently drilled Maui DWS Iao Tank Site Well (5230-03) is Proposed Well Site 1 at 510± ft. southwest and down gradient from the 5230-03. Proposed Well Site 2 is 930± ft. away, and possible Well Site 3 is 675± ft. from the Iao Tank site well. The Shaft 33 pump (5330-05) as shown on the plans is 815± ft. from the new well.

Shaft 33 has been pumping up to 5 mgd for Maui DWS with chlorides stable and less than 60 mg/L. The existing pumping well in the shaft has a bottom elevation of -280 ft., msl.

At the present configuration, pumping up to 5 mgd from one location will create a drawdown cone that will affect water levels some distance from the pumping well. At the present time there are no water level observation wells south of Iao Stream and in the vicinity of Shaft 33. The Waikapu Mauka well (5131-01) owned by Maui DWS is over 1.5 miles south of Shaft 33 and exhibits an 18± ft., msl water level. At the present time, the Commission on Water Resource Management (CWRM) is drilling a deep monitor well (Iao Deep Well) located between Shaft 33 and Waikapu Mauka. This well will be outfitted with a water level transducer.
To calculate the theoretical steady-state change in water levels for an areally infinite unconfined aquifer the following relationship is used:

\[ s = \frac{Q}{2\pi T} \ln \left\{ \frac{1.5}{r} \left( \frac{Tt}{S} \right)^{0.5} \right\} \]

Where:
- \( s \) = drawdown in feet
- \( Q \) = maximum draft in ft\(^3\)/d
- \( T \) = transmissivity in ft\(^2\)/d
- \( t \) = time in days
- \( r \) = distance from Proposed Well Sites 1, 2, 3 in feet from Iao Tank Well
- \( S \) = specific yield, taken at 0.15

To analyze the steady-state change in water level, \( Q \) is taken for 1,750 gpm (2.5 mgd) or 336,898 ft\(^3\)/d and 3470 gpm (5 mgd) or 668,021 ft\(^3\)/d, transmissivity, \( T \), is taken at 1,000,000 ft\(^2\)/d, which is not unreasonable in a basal aquifer, \( t \) is taken at 200,000 days or steady-state conditions. Using the distances \( r \) as shown above, the following table gives the theoretical drawdown seen at the new Iao Tank Site well:

<table>
<thead>
<tr>
<th>Proposed Well</th>
<th>Distance (r, ft.)</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>510</td>
<td>0.44</td>
</tr>
<tr>
<td>2</td>
<td>930</td>
<td>0.40</td>
</tr>
<tr>
<td>3</td>
<td>675</td>
<td>0.42</td>
</tr>
<tr>
<td>Shaft 33 (5 mgd)</td>
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<td>0.82</td>
</tr>
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The above theoretical water level changes do not reflect changes in recharge or pumping patterns. Actual effects of pumping should be similar to what is occurring now with the 4.85 to 5 mgd being pumped from the existing shaft. Spreading out the pumpage from one source optimizes the development of the Iao Aquifer south of Iao Stream.

In summary, based upon the above analysis and taking into account actual field conditions, we conclude that the impact of the replacement wells on the Iao Tank well will be minimal from a water level standpoint. From a water quality perspective, we note that the effort by CWRM to optimize new well construction by limiting their bottom hole elevations to the upper fresh water
core of the lens. Doing this should limit any effects due to upconing at the replacement wells.

Sincerely,

[Signature]
George A. L. Yuen/President
Mr. Warren S. Unemori  
Warren S. Unemori Engineer, Inc.  
Wells Street Professional Center  
2145 Wells Street, Suite 403  
Wailuku, Maui, Hawaii 96793

Subject: Possible Impact of Shaft 33 Replacement Wells on New Maui DWS Well the Iao Tank Site

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core of the lens. Doing this should limit any effects due to upconing at the replacement wells.

Sincerely,

__________________________
George A. L. Yuen, President
Glenn sent an unsigned copy, talked on the phone about it, and Kevin agreed that the numbers look favorable. I can email back "we concur with their analysis", but am not inclined to do anything more. If they want more, they should forward the letter to us with a request, and we can make it official.

----- Forwarded by Charley F Ice/DLNR/StateHiUS on 03/16/2006 04:28 PM -----

"Wendy Taomoto"
<Wendy.Taomoto@co.mau.hi.us>
03/16/2006 01:05 PM

To <Charley.F.Ice@hawaii.gov>
cc "Alva Nakamura" <Alva.Nakamura@co.mau.hi.us>, "Larry Winter" <Larry.Winter@co.mau.hi.us>, "Myles Fujinaka" <Myles.Fujinaka@co.mau.hi.us>
Subject Keahalani Wells (Shaft 33)

Charley,

Attached is letter from Keahalani's engineer & hydrogeologist regarding the location of the 3 proposed replacement wells for Shaft 33.

The cover letter states that they checked with "Charley Ice of CWRM who concurred with their analysis."

Is it possible for you to send me something in writing verifying this statement?

WENDY TAOMOTO
Dept. of Water Supply - Engineering Div.
County of Maui
200 South High Street, 5th Floor
Wailuku, Hawaii 96793
Phone: (808) 270-7835
Fax: (808) 270-7833

[attachment "Kehalani Wells WSUE ltr 14march2006.pdf" deleted by Kevin L Gooding/DLNR/StateHiUS]
I agreed with their analysis of the water level impact of the three proposed wells on the lao Tank site well. (we have not received the pump test data from the lao Tank Site well, this would be helpful in refining the analysis)

I do not agree that there will be minimal impacts on water quality (chlorides). The only information that we have is that chlorides at Shaft 33 are gradually rising. We should send a clarification to the Unemori letter.

Also, I do not think that three wells are adequate to replace the 5 mgd Shaft 33.

Roy and I discussed this. If Maui DWS wants the lao Tank well in addition to the shaft 33 replacement wells then we are talking about 5 mgd (Shaft 33 replacement) + 2.3 mgd (lao tank proposd pump) = 7.3 mgd for the four new wells. This would be too much pumpage for that well field.

Kevin

Dean A Nakano/DLNR/StateHiUS

Roy/Charley: I'm not clear on all the issues here, however, I do not want to get into another situation of "CWRM staff said this and CWRM staff said that." Do we have everything in writing as far as what we have "concurred" with?

I'm not sure what the basis was for the attached letter to Maui DWS from Warren Unemori stating that Charley concurred with their analysis. From Charley's email below, it does not appear that we issued this concurrence in writing.

Please follow-up and get back to me on this. Thanks, Dean

Charley F Ice/DLNR/StateHiUS

To Kevin L Gooding/DLNR/StateHiUS, Roy Hardy/DLNR/StateHiUS, Dean A Nakano/DLNR/StateHiUS
cc Edwin T Sakoda/DLNR/StateHiUS, Lenore Y Nakama/DLNR/StateHiUS, Kevin L Gooding/DLNR/StateHiUS
Subject Fw: Keahalani Wells (Shaft 33)
1. What/How did they base Charley's concurrence on? His verbal response to a phone call from somebody?
2. What do we have in writing, if anything? What did we send, if anything?
3. Shouldn't we clear up any misrepresentations as to what CWRM is concurring with or is concerned with?
4. Do we have a written request from whoever asking specific questions about the shaft, replacement of the shaft source, the sustainability re 3 or 4 wells, etc.?

Please take appropriate action to clear this matter up as soon as possible. Thanks, Dean

Charley F Ice/DLNR/StateHiUS

To Roy Hardy/DLNR/StateHiUS@StateHiUS
cc Dean A Nakano/DLNR/StateHiUS@StateHiUS, Edwin T Sakoda/DLNR/StateHiUS@StateHiUS, Kevin L Gooding/DLNR/StateHiUS@StateHiUS, Lenore Y Nakama/DLNR/StateHiUS@StateHiUS
Subject Re: Fw: Keahalani Wells (Shaft 33)

The only thing I "concurred with" was that the calculations appear to make the proposed wells not interfere with the lao Tank Site. As Kevin points out, if they think that Wailuku Shaft can be replaced by 3-4 wells pumping 5.77 mgd from this small area, we need to see the pump test proof, and it's not intuitively true. Maybe a letter to that effect is a good solution. At this point, we have only been copied with a draft, not requested anything in writing, by Unemori or MDWS, so I'm not sure what basis we want to respond. The only "request" I've seen is an inference by email.

Roy Hardy/DLNR/StateHiUS

To Kevin L Gooding/DLNR/StateHiUS@StateHiUS
cc Charley F Ice/DLNR/StateHiUS@StateHiUS, Dean A Nakano/DLNR/StateHiUS@StateHiUS, Edwin T Sakoda/DLNR/StateHiUS@StateHiUS, Lenore Y Nakama/DLNR/StateHiUS@StateHiUS
Subject Re: Fw: Keahalani Wells (Shaft 33)

I think one thing we also don't agree with is that the chlorides are 'stable' in Shaft 33 as stated in the letter. I agree with Kevin's points, points not raised in the M&Y's analysis letter. Strictly speaking, are they asking us the larger question about increasing pumpage between 4 new wells? I think our position should be we need to see the pump test data from 5230-03 lao tank well first. Since BWS is going to be operating all of these 4 eventually, maybe they can coordinate a good pump test using all these wells as observation wells when they are pump testing each one for a really good test.

Kevin L Gooding/DLNR/StateHiUS

To Dean A Nakano/DLNR/StateHiUS@StateHiUS
cc Charley F Ice/DLNR/StateHiUS@StateHiUS, Edwin T
Charley, plz draft a letter to DWS clarifying our position as stated in this email string for Kevin's and my review. Thanks.

Charley F Ice/DLNRIStateHiUS

To Dean A Nakano/DLNRIStateHiUS
cc Edwin T Sakoda/DLNRIStateHiUS@StateHiUS, Kevin L Gooding/DLNRIStateHiUS@StateHiUS, Lenore Y Nakama/DLNRIStateHiUS@StateHiUS, Roy Hardy/DLNRIStateHiUS@StateHiUS
Subject Re: Fw: Keahalani Wells (Shaft 33)

The Unemori info was prepared by Mink & Yuen, specifically by Glenn Bauer. In the first week of March, Glenn called to run this by me, I presume because I had asked Ellen to let us know when MDWS received a proposal from Keahalani for well sites they would dedicate to the County, and we'd look at them -- Ellen was concerned they'd be too close together, and I was inclined to agree, from the rumor of where they were. Before that point, I hadn't known that Unemori was Keahalani's consultant, nor that M&Y was Unemori's consultant.

Glenn was taking off and couldn't wait to get a signed copy to us, so walked in a draft. He had used the formula used by John Mink, plugging in current numbers, and found that the result of those calculations fit almost exactly with the equations he used here, which he assumed Kevin would use. He felt the numbers showed no interference between the proposed new sites and the lao Tank Site. He was clear that he was not signing it personally.

As I say, that's the extent of the "collaboration" to date, and the extent of any official communications. Now, Wendy Taomoto of MDWS Engineering has forwarded a copy of M&Y's letter to Unemori with the letter from Unemori to MDWS. Is this an official request?

Dean A Nakano/DLNRIStateHiUS

To Charley F Ice/DLNRIStateHiUS@StateHiUS
cc Edwin T Sakoda/DLNRIStateHiUS@StateHiUS, Kevin L Gooding/DLNRIStateHiUS@StateHiUS, Lenore Y Nakama/DLNRIStateHiUS@StateHiUS, Roy Hardy/DLNRIStateHiUS@StateHiUS
Subject Re: Fw: Keahalani Wells (Shaft 33)

I think we need to discuss this. **Bottom line,** the cover letter states that they checked with "Charley Ice of CWRM who concurred with their analysis."
June 13, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David Taylor, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Dear Mr. Taylor:

Transfer of Water Use Permit
(WUP No. 864 to WUP No. 926) for Well No. 5330-05
 Iao Ground-Water Management Area, Maui

This is in response to a letter from Kehalani Mauka, LLC on May 24, 2011, requesting to transfer a portion of Water Use Permit No. 865 for the subject well. Please note that as part of the transfer process, we have assigned a new Water Use Permit Number for this well. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.137 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No. 865 from 0.613 mgd to 0.476 mgd in WUP No. 925, and the addition of this amount to Maui Department of Water Supply from the 4.878 mgd issued in WUP No. 864 to 5.015 mgd in WUP No. 926.

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. The Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.

4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Please continue to use your standard water use reporting form.

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

WILLIAM J. AILA, JR.
Chairperson

Attachments

c: Kehalani Mauka, LLC
GROUND-WATER USE PERMIT
WUP NO. 926

PERMITTEE

Permittee/Water User | Landowner of Source
---|---
Address | Address
Maui Department of Water Supply | Kehalani Mauka, LLC
200 South High Street | 1100 Alakea St., 27th Floor
Wailuku, HI 96793 | Honolulu, HI 96813

PERMITTED SOURCE INFORMATION

Island | Maui
Water Management Area
Aquifer Sector | Wailuku
Aquifer System | Iao
System Sustainable Yield | 20
Well Name | Wailuku Shaft (Shaft 33)
State Well No. | 5330-05

PERMITTED USE INFORMATION

Reasonable beneficial use
Municipal
Withdrawal (12 month moving ave.) | 5.015 mgd
Location of water use
TMK # | various
State land use classification | multiple
County zoning classification | multiple

Pursuant to Hawaii’s State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission in its January 31, 2007 decision are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

Attachment

Kehalani Mauka, LLC
**COMMISSION ON WATER RESOURCE MANAGEMENT**

**ROUTE SLIP FOR NEW APPLICATIONS**

**FROM:** CHARLEY FUJII, N.

**DATE:** 3-Jun-11

**SUSPENSE DATE:** 10-Jun-11

**TO:**

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<td>Fujii, I.</td>
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<td>KUNIMURA, I.</td>
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<td>HARDY, R.</td>
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<td>NAKAMA, L.</td>
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<td>YOSHINAGA, M.</td>
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<td>IMATA, R.</td>
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**WELL NUMBER** 5330-05

**WELL NAME** Shaft 33

**WUP Number** Old= 864/ New= 926

**MDWS**

**ATTACHMENTS FOR APPLICATION PROCESSING** - Both applicant & staff generated

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<td>8 CONTRACTOR VERIF.</td>
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**INCOMPLETE ACTION DATES:**

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May 24, 2011

Mr. William M. Tam, Deputy Director
Commission on Water Resource Management
State of Hawaii – Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 865)
Wailuku Shaft (Well No. 5330-05)

We respectfully request the transfer of 137,000 gpd from our above referenced permit to the Maui Department of Water Supply’s water use permit WUP No. 864. This request is made in accordance with the additional units developed at the module 17 neighborhood (aka Hoolea Terrace) and for the development of our Commercial Center (aka C-111) area as indicated on the attached Estimated Water Demand Projection for Kehalani.

The resulting potable ground water amounts for this request will be 0.476 mgd for WUP No. 865 and 5.015 mgd for WUP No. 864 as indicated below.

<table>
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<tr>
<th>WUP No.</th>
<th>Amount</th>
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<tr>
<td>865 (Kehalani Mauka, LLC)</td>
<td>0.613 mgd - 0.137 mgd = 0.476 mgd</td>
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<tr>
<td>864 (County of Maui Department of Water Supply)</td>
<td>4.878 mgd + 0.137 mgd = 5.015 mgd</td>
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</table>

Your timely review and approval of this request greatly appreciated. Should there be any questions, please do not hesitate to contact Development Manager, Jay Nakamura at 542-2226.

Sincerely,

Stanford S. Carr
Managing Member

Attachment
Cc: R. Riegels, J. Nakamura
    Charlie Ice @ Hawaii Commission of Water Resource Management
    P. Meyer, County of Maui Department of Water Supply
### ESTIMATED WATER DEMAND PROJECTION FOR KEHALANI

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<th>PHASE</th>
<th>NEIGHBORHOOD (MODULE NUMBER)</th>
<th>TYPE</th>
<th>ACREAGE</th>
<th>DENSITY</th>
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<td>2015</td>
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<td>2016</td>
<td>2017</td>
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<td>2013</td>
<td>2014</td>
<td>2015</td>
<td>2016</td>
<td>2017</td>
</tr>
</tbody>
</table>

*Based on Maui DWS Daily Domestic Consumption Guidelines of 6,000 gallons/acre

**Based on Maui DWS Daily Domestic Consumption Guidelines of 1,700 gallons/acre
October 27, 2008

864.wup

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Jeffrey Eng, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Attn: Eric Yamashige, Deputy Director

Dear Mr. Eng:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 822 to WUP No. 864) for Well No. 5330-05
Lao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 822 for the subject well. Please note that as part of the transfer process, we have assigned a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.078 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No.822 from 0.691 mgd to 0.613 mgd in WUP No. 865, and the addition of this amount to Maui Department of Water Supply from the 4.800 mgd issued in WUP No. 822 to 4.878 mgd in WUP No. 864.

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. The Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.

4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

[Signature]
LAURA H. THELENI
Chairperson

c: Kehalani Mauka, LLC
GROUND-WATER USE PERMIT
WUP NO. 864

PERMITTEE

<table>
<thead>
<tr>
<th>Permittee/Water User</th>
<th>Landowner of Source</th>
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<tr>
<td>County of Maui</td>
<td>Kehalani Mauka, LLC</td>
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<tr>
<td>Address</td>
<td>Address</td>
</tr>
<tr>
<td>Department of Water Supply</td>
<td>1100 Alakea Street</td>
</tr>
<tr>
<td>Wailuku, HI 96793</td>
<td>Honolulu, HI 96813</td>
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PERMITTED SOURCE INFORMATION

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<td>Aquifer System</td>
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<td>State Well No.</td>
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PERMITTED USE INFORMATION

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<td>Withdrawal (12 month moving ave.)</td>
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<tr>
<td>Location of water use</td>
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<td>State land use classification</td>
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<tr>
<td>County zoning classification</td>
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</table>

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

Attachment

c: Kehalani Mauka, LLC
October 27, 2008

Mr. Richard Riegels, Manager
Kehalani Mauka, LLC
1100 Alakea Street 27th Floor
Honolulu, HI 96813

Attn: Jay Nakamura, Senior Development Manager

Dear Mr. Riegels:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 707 to WUP No. 865) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 707 for the subject well. Please note that as part of the transfer process, we have assigned you a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of a portion of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.078 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No.707 from 0.691 mgd to 0.613 mgd in WUP No. 865, and the addition of this amount to Maui Department of Water Supply from the 4.800 mgd issued in WUP No. 822 to 4.878 mgd in WUP No. 864.

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.
4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

Laura H. ThieLEN
Chairperson

c: Maui Department of Water Supply
GROUND-WATER USE PERMIT
WUP NO. 865

PERMITTEE

Permittee/Water User  Landowner of Source
Address  Kehalani Mauka, LLC  Address  Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor  1100 Alakea Street, 27th Floor
Honolulu, HI 96813

PERMITTED SOURCE INFORMATION

Island  Maui
Water Management Area
Aquifer Sector  Wailuku
Aquifer System  Iao
System Sustainable Yield  20
Well Name  Wailuku Shaft (Shaft 33)
State Well No.  5330-05

PERMITTED USE INFORMATION

Reasonable beneficial use  Municipal
Withdrawal (12 month moving ave.)  0.613 mgd
Location of water use
TMK #  3-5-001:001
State land use classification  Urban
County zoning classification  Residential single- and multi-family

Pursuant to Hawaii’s State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

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6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

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9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
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   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
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Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

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11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
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Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

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16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

Attachment

c: County of Maui, Department of Water Supply
October 27, 2008

864.wup

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Jeffrey Eng, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Attn: Eric Yamashige, Deputy Director

Dear Mr. Eng:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 822 to WUP No. 864) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 822 for the subject well. Please note that as part of the transfer process, we have assigned a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of the permit does not create any new rights and liabilities in favor of or against the transferee.

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Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. The Maui Department of Water Supply shall be exempt from modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, the right to modify or revoke this permit, after a hearing.

4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission’s declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:

   a. The net change in permitted use within an aquifer is zero.

   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.

   c. No adverse impacts to water resources or other existing legal uses are anticipated.

   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the lao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

[Signature]

LAURA H. THELEN
Chairperson

c: Kehalani Mauka, LLC
GROUND-WATER USE PERMIT
WUP NO. 864

PERMITTEE

<table>
<thead>
<tr>
<th>Permittee/Water User</th>
<th>Landowner of Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>County of Maui</td>
<td>Kehalani Mauka, LLC</td>
</tr>
<tr>
<td>Address</td>
<td>Address</td>
</tr>
<tr>
<td>200 South High Street</td>
<td>1100 Alakea Street</td>
</tr>
<tr>
<td>Wailuku, HI 96793</td>
<td>Honolulu, HI 96813</td>
</tr>
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PERMITTED SOURCE INFORMATION

<table>
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<tr>
<th>Island</th>
<th>Maui</th>
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<tbody>
<tr>
<td>Water Management Area</td>
<td>Maui</td>
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<tr>
<td>Aquifer Sector</td>
<td>Wailuku</td>
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<tr>
<td>Aquifer System</td>
<td>Iao</td>
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<tr>
<td>System Sustainable Yield</td>
<td>20</td>
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<tr>
<td>Well Name</td>
<td>Wailuku Shaft (Shaft 33)</td>
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<tr>
<td>State Well No.</td>
<td>5330-05</td>
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PERMITTED USE INFORMATION

<table>
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<th>Reasonable beneficial use</th>
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<td>Withdrawal (12 month moving ave.)</td>
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<td>Location of water use</td>
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<td>TMK #</td>
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<tr>
<td>State land use classification</td>
<td>multiple</td>
</tr>
<tr>
<td>County zoning classification</td>
<td>multiple</td>
</tr>
</tbody>
</table>

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

Attachment

Kehalani Mauka, LLC
COMMISSION ON WATER RESOURCE MANAGEMENT

FROM: ROY

DATE: OCT 14 2008

TO: CHENG, C.
    CHING, F.
    CHONG, R.
    DANBARA, S.
    ENGLAND, D.
    FUJII, N.
    HARDY, R.
    HOAGBIN, S.
    ICE, C.
    IMATA, R.
    KAWAHARA, K.
    KIMURA, J.

INIT: KUNIMURA, I.
      LEROUX, E.
      MILLS, D.
      OHYE, L.
      OHYE, M.
      OSHIRO, K.
      SAKODA, E.
      SWANSON, S.
      TORRES, R.
      UYENO, D.
      YODA, K.
      YOSHINAGA, M.

INIT: Approval
      Signature
      Information

FOR: ______________________

PLEASE:

See Me
Review & Comment
Take Action
Type Draft
Type Final
File
Xerox ___ copies

--- Need to recheck special condition of 822, which exempts MOWS from 1746-57 on modifications. (As are not sure can do now given recent advice)

--- Have them fill out transfer form
October 10, 2008

Mr. Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management
State of Hawaii Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Kawahara:

Subject: WATER USE PERMIT (WUP No. 822)
Wailuku Shaft (Well No. 5330-05)

We respectfully request an increase of 78,400 gallons per day to our WUP No. 822 (Wailuku Shaft (Well No. 5330-05), MDWS) to reflect a transfer of that amount from WUP No. 707 (Wailuku Shaft (Well No. 5330-05), Kehalani) as referenced in Kehalani Mauka, LLC's letter of October 10, 2008.

This change will result in a reduction of 0.0784 MGD from 0.691 MGD to 0.6126 MGD for WUP No. 707 (Wailuku Shaft (Well No. 5330-05), Kehalani), and a resulting increase from 4.800 MGD to 4.8784 MGD for WUP No. 822 (Wailuku Shaft (Well No. 5330-05), MDWS).

The timely review and approval of this request is greatly appreciated. Please feel free to contact Deputy Director Eric Yamashige at 270-7834 if you have any questions.

Sincerely,

JEFFREY K. ENG
Director

C: Engineering Division
Planning Division
Jane Lovell, Deputy Corporation Counsel
Ed Kushi, Deputy Corporation Counsel

"By Water All Things Find Life"

The Department of Water Supply is an Equal Opportunity provider and employer. To file a complaint of discrimination, write: USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington DC 20250-9410. Or call (202) 720-5964 (voice and TDD)
January 30, 2008

Mr. Jeffrey Eng, Director
Department of Water Supply
County of Maui
200 South High Street
Wailuku, HI 96793

Dear Mr. Eng:

Water Shortage Plan for the lao Ground Water Management Area

Thank you for your transmittal of the lao Water Management Rule as your water shortage plan for lao wells, dated January 14, 2008. It is accepted and meets condition #16 of your water use permits.

Please be aware that as the Commission on Water Resource Management moves closer to creating its own water shortage plan for the lao Ground Water Management Area, as required in the Code, it will be considering actual pumpage volume reductions for each ground water source and appropriate enforceability provisions, which may be in conjunction with similar surface water diversion reductions pending the Na Wai Eha contested case hearing and surface water management area designation proceedings. Be assured that we would be consulting with you prior to adopting a plan to meet the needs of that shortage.

If you have any questions, please contact Charley Ice of our staff at 587-0251 or toll-free at 984-2400 (Maui), extension 70251.

Sincerely,

KEN C. KAWAHARA, P.E.
Deputy Director
January 14, 2008

Mr. Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management
State of Hawaii Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Kawahara:

Subject: Water Shortage Plan for Existing Water Use Permits in the Iao Ground-Water Management Area

Pursuant to Section 13-171-42(c) of your administrative rules, please find attached the water shortage plan for our permitted wells in the Iao Ground-Water Management Area.

Should you have any questions, please contact our Water Resources and Planning Division at (808) 244-8550.

Sincerely,

Jeffrey K. Eng
Director

emb

c: Engineering Division
   Ed Kushi, Jr. Deputy Corporation Counsel
   Jane Lovell, Deputy Corporation Counsel

enclosure

By Water All Things Find Life
Maui County Administrative Rule
Title 16, Chapter
IAO WATER MANAGEMENT RULE

16-9-1 **Purpose.**

16-9-2 **Definitions.**

16-9-3 **Caution low groundwater condition.**

16-9-4 **Alert low groundwater condition.**

16-9-5 **Critical low groundwater condition.**

16-9-6 **Mandatory restrictions related to Alert low groundwater condition.**

16-9-7 **Mandatory restrictions related to Critical low groundwater condition.**

16-9-8 **Surcharge Penalties for Alert and Critical low groundwater condition.**

16-9-9 **Penalties.**

16-9-10 **Procedures for control of water use during Alert or Critical low groundwater level conditions.**

16-9-11 **Termination of Caution, Alert or Critical low groundwater level conditions.**

16-9-12 **Exemption of private wells within designated groundwater control areas.**

16-9-13 **Effective date.**

**16-9-1 Purpose.** The purpose of the rule is to prevent overdraft of Iao aquifer.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

**16-9-2 Definitions.**

The definitions as set forth herein, and in Board of Water Supply Rules and Regulations Rule Sections 1-2, 16-8-2, and 16-7-3 shall apply in these rules unless another meaning is plainly evident from the context. If there is any conflict between definitions it is intended that the broader or more inclusive definition apply. If a word or phrase is not defined the commonly accepted definition of that word or phrase shall apply.

"**Base period water use**" or "**base period**" means the monthly average water use based on water usage for the immediately preceding full twenty-four (24) month billing cycle at the time of the caution low groundwater declaration. Partial billing cycles are not to be included in the determination of the monthly average.

"**Sustainable yield**" means the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the Commission on Water Resources Management.

[Eff. 03/15/99] (Auth: HRS 54-33) (Imp: HRS 54-33)

**16-9-3 Caution low groundwater condition.**

(a) A caution low groundwater condition exists:

(1) At any time the 12 month moving average pumpage of gallons of water from the Iao Aquifer exceeds 95% of the sustainable yield of the Iao Aquifer; or

(2) Whenever chloride content reaches the absolute limit in ppm.

(b) The board shall at any time during the period in which a caution low groundwater condition exists. Thereafter the director shall:

(1) Conduct an intensive public appeal for water conservation through the mass media;

(2) Institute voluntary irrigation and other water use schedules to reduce water consumption;

(3) Send letters to large consumers and other private well operators asking them to cut back their usage; and

(4) Notify the Mayor, Maui County Council, and the State Commission on Water Resources Management.

(c) The goal for draft reduction is 5% of Iao Aquifer sustainable yield as determined by the Commission on Water Resources Management.

(d) Consumers shall be given a target of a 10% reduction of their base period water use as the goal for
September 7, 2007

Mr. Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management
State Department of Land & Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Kawahara:

Subject: Water Use Permit Application for
Iao Tank Site Well (State Well No. 5230-02) and
Waikapu Tank Site Well (State Well No. 5131-01)

Pursuant to CWRM letter dated June 1, 2006, we are submitting for your approval proposed new distribution of pumpage totaling 16.998 mgd (shown in table below) to be allocated to the 8 existing permitted wells, Iao Tank Site Well, and Waikapu Tank Site Well. This pumpage differs from the 11.227 mgd referred to in CWRM letter to reflect the current allocation of 16.998 mgd, which includes 5.771 mgd from Shaft 33 (State Well No. 5330–05).

<table>
<thead>
<tr>
<th>Well Name (State Well No.)</th>
<th>Current Allocation (MGD)</th>
<th>Requested Revised Allocation (MGD)</th>
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<tr>
<td>E15</td>
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<tr>
<td>E16</td>
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<td>E24</td>
<td>0.400</td>
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<td>TOTAL (MGD)</td>
<td>16.998</td>
<td>16.998</td>
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</table>

"By Water All Things Find Life"

The Department of Water Supply is an Equal Opportunity provider and employer. To file a complaint of discrimination, write: USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington DC 20250-9410. Or call (202) 720-5964 (voice and TDD)
The proposed request also complies with the four conditions set forth in Declaratory Ruling DEC-ADM97-A1 as follows:

1. The net change in permitted use within an aquifer is zero.
   
   DWS Response: Based on allocations requested shown in table above, the proposed wells will result in a net zero increase in withdrawal from the Iao Aquifer.

2. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   
   DWS Response: The addition of the proposed wells will increase the number of sources available providing better distribution of withdrawals from the Iao Aquifer, which will allow for more efficient and optimal operation of the system (i.e., chloride levels, emergency repairs, pump replacements, etc.).

3. No adverse impacts to water resources or other existing legal uses are anticipated.
   
   DWS Response: There are no adverse impacts to water resources or other existing legal uses anticipated.

4. End use location and type remain unchanged.
   
   DWS Response: The end use location and type will remain unchanged being there will be no changes in customer service area or type being served.

If you have any questions, please feel free to call me at (808) 270-7816.

Sincerely,

Jeffrey K. Eng
Director

WKT
Copy: 1) Engineering Division
       2) Water Resources Division
       3) Jane Lovell, Deputy Corporation Counsel
       4) Edward Kushi, Jr., Deputy Corporation Counsel
Approval of Water Use Permit (WUP No. 822) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your September 7, 2007 letter, requesting modification of water use permits for various municipal sources in the Iao Ground-Water Management Area. This letter transmits your water use permit for Wailuku Shaft (Well No. 5330-05) for use of 4,800 million gallons per day (mgd) of water on a 12-month moving average basis that was administratively modified per Declaratory Ruling DEC-ADM97-A1. As part of the Commission's approval, the following special conditions were added and are part of your permit under Standard Permit Condition 19:

**Special Condition**

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

4. Should alternative permanent sources of water be found for these uses, then the Commission reserves the right to revoke this permit, after a hearing.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form
Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

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

Sincerely,

[Signature]

LAURA H. THIELEN
Chairperson

Attachments

c: Jane Lovell
GROUND-WATER USE PERMIT
WUP NO. 822

PERMITTEE

Permittee/Water User | Landowner of Source
---|---
Address: Maui Department of Water Supply | Address: Kehalani Mauka LLC
200 South High Street | 745 Fort Street 2110
Wailuku, HI 96793 | Honolulu HI 96813

PERMITTED SOURCE INFORMATION

| Island | Maui |
| Water Management Area | Maui |
| Aquifer Sector | Wailuku |
| Aquifer System | Iao |
| System Sustainable Yield | 20 |
| Well Name | Wailuku Shaft |
| State Well No. | 5330-05 |

PERMITTED USE INFORMATION

Reasonable beneficial use | Municipal
Withdrawal (12 month moving ave.) | 4.800 mgd
Location of water use | various within Central Maui Service Area
TMK # | various
State land use classification | various
County zoning classification | various

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31, 2007 and March 21, 2007 meetings are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   
a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

W. Roy Handy

Attachment

c: Jane Lovell
As the Owner of the Shaft 33, we hereby acknowledge the Department of Water Supply's request to reallocate a portion of the 5.77 MGD permitted use to other existing permitted wells and modifying the 5.77 MGD allocation to 4.80 MGD.

Jay Nakamura  
Vice President, Senior Development Manager  
Stanford Carr Development, LLC  
1100 Alakea, 27th Floor  
Honolulu, Hawaii 96813  
Phone: (808) 537-5220  
Fax: (808) 537-1801  
E-Mail: jyn@stanfordcarr.com

--------Original Message--------

From: Wendy Taomoto [mailto:Wendy.Taomoto@co.maiu.hi.us]  
Sent: Tuesday, October 23, 2007 11:42 AM  
To: Jay Nakamura  
Cc: Gary Phillips  
Subject: Re: DWS Request for CWRM

Jay,  

Attached is letter DWS wrote to CWRM.

Wendy

Can you send me a copy of the 5.77 to 4.9 MGD request so I can reference in an e-mail to CWRM with our concurrence.

Jay Nakamura  
Vice President, Senior Development Manager  
Stanford Carr Development, LLC  
1100 Alakea, 27th Floor  
Honolulu, Hawaii 96813
County of Maui.

IT Security measures will reject attachments larger than 12 MB, and will block or quarantine high-risk file types in attachments.
September 7, 2007

Mr. Ken C. Kawahara, P.E., Deputy Director
Commission on Water Resource Management
State Department of Land & Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Kawahara:

Subject: Water Use Permit Application for
Iao Tank Site Well (State Well No. 5230-02) and
Waikapu Tank Site Well (State Well No. 5131-01)

Pursuant to CWRM letter dated June 1, 2006, we are submitting for your approval proposed new distribution of pumpage totaling 16.998 mgd (shown in table below) to be allocated to the 8 existing permitted wells, Iao Tank Site Well, and Waikapu Tank Site Well. This pumpage differs from the 11.227 mgd referred to in CWRM letter to reflect the current allocation of 16.998 mgd, which includes 5.771 mgd from Shaft 33 (State Well No. 5330-05).

<table>
<thead>
<tr>
<th>Well Name (State Well No.)</th>
<th>Current Allocation (MGD)</th>
<th>Requested Revised Allocation (MGD)</th>
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<tbody>
<tr>
<td>Mokuahu 1 (5330-09)</td>
<td>1.994</td>
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<td>Mokuahu 3 (5330-11)</td>
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<tr>
<td>Waiehu Hts 1 (5430-01)</td>
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<tr>
<td>Waiehu Hts 2 (5430-02)</td>
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<td>Waiehe 1 (5431-02)</td>
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<td>Waiehe 2 (5431-03)</td>
<td>2.439</td>
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<tr>
<td>Waiehe 3 (5431-04)</td>
<td>1.513</td>
<td>3.400</td>
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<tr>
<td>Shaft 33 (5330-05)</td>
<td>5.771</td>
<td>4.800</td>
</tr>
<tr>
<td>Iao Tank Site (5230-03)</td>
<td>—</td>
<td>0.498</td>
</tr>
<tr>
<td>Waikapu Tank Site (5131-01)</td>
<td>—</td>
<td>0.400</td>
</tr>
<tr>
<td><strong>TOTAL (MGD)</strong></td>
<td><strong>16.998</strong></td>
<td><strong>16.998</strong></td>
</tr>
</tbody>
</table>

"By Water All Things Find Life"

The Department of Water Supply is an Equal Opportunity provider and employer. To file a complaint of discrimination, write: USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington DC 20250-9410. Or call (202) 720-5964 (voice and TDD)
The proposed request also complies with the four conditions set forth in Declaratory Ruling DEC-ADM97-A1 as follows:

1. The net change in permitted use within an aquifer is zero.
   
   **DWS Response:** Based on allocations requested shown in table above, the proposed wells will result in a net zero increase in withdrawal from the Iao Aquifer.

2. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   
   **DWS Response:** The addition of the proposed wells will increase the number of sources available providing better distribution of withdrawals from the Iao Aquifer, which will allow for more efficient and optimal operation of the system (i.e., chloride levels, emergency repairs, pump replacements, etc.).

3. No adverse impacts to water resources or other existing legal uses are anticipated.
   
   **DWS Response:** There are no adverse impacts to water resources or other existing legal uses anticipated.

4. End use location and type remain unchanged.
   
   **DWS Response:** The end use location and type will remain unchanged being there will be no changes in customer service area or type being served.

If you have any questions, please feel free to call me at (808) 270-7816.

Sincerely,

Jeffrey K. Eng
Director

WKT
Copy: 1) Engineering Division
2) Water Resources Division
3) Jane Lovell, Deputy Corporation Counsel
4) Edward Kushi, Jr., Deputy Corporation Counsel
As the Owner of the Shaft 33, we hereby acknowledge the Department of Water Supply's request to reallocate a portion of the 5.77 MGD permitted use to other existing permitted wells and modifying the 5.77 MGD allocation to 4.90 MGD.

Jay Nakamura  
Vice President, Senior Development Manager  
Stanford Carr Development, LLC  
1100 Alakea, 27th Floor  
Honolulu, Hawaii 96813  
Phone: (808) 537-5220  
Fax: (808) 537-1801  
E-Mail: jyn@stanfordcarr.com

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Sent: Tuesday, October 23, 2007 11:42 AM  
To: Jay Nakamura  
Cc: Gary Phillips  
Subject: Re: DWS Request for CWRM

Jay,  

Attached is letter DWS wrote to CWRM.

Wendy  

>>> "Jay Nakamura" <jyn@stanfordcarr.com> 10/23/2007 10:33 AM >>>  
Can you send me a copy of the 5.77 to 4.9 MGD request so I can reference in an e-mail to CWRM with our concurrence.

Jay Nakamura  
Vice President, Senior Development Manager  
Stanford Carr Development, LLC  
1100 Alakea, 27th Floor  
Honolulu, Hawaii 96813  
Phone: (808) 537-5220
Fax: (808) 537-1801
E-Mail: jyn@stanfordcarr.com <mailto:jyn@stanfordcarr.com>

-----------------------------------------------

County of Maui.
IT Security measures will reject attachments
larger than 12 MB, and will block or quarantine
high-risk file types in attachments.

20071023120134032.pdf
September 6, 2007

Mr. Jeffrey Eng
Maui Department of Water Supply
200 South High Street
Wailuku, HI 96793

Dear Mr. Eng:

Approval of Water Use Permit (WUP No.702)
Wailuku Shaft (Well No. 5330-05)
Lao Ground-Water Management Area, Maui

This letter transmits your water use permit for Wailuku Shaft, "Shaft 33" (Well No.5330-05) for use of 5.771 million gallons per day (mgd) of water on a 12-month moving average basis that was approved by the Commission on Water Resource Management (Commission) on January 31, 2007 and March 21, 2007. As part of the Commission's approval, the following special conditions were added and are part of your permit under Standard Permit Condition 19:

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

4. Standard Condition 7 has been amended to reflect the Commission's final decision and order on this permit.

Enclosed with this letter of approval is your water use permit. Please be sure to read the conditions of your approved permit.
We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

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

Sincerely,

LAURA H. THIELEN
Interim Chairperson

Attachments: Water Use Report Form

c: Kehalani Mauka, LLC
GROUND-WATER USE PERMIT
WUP NO. 702

PERMITTEE

Permittee/Water User
Address		Maui Department of Water Supply
200 South High Street
Wailuku, HI 96793

Landowner of Source
Address		Kehalani Mauka, LLC
1100 Alakea Street
Honolulu, HI 96813

PERMITTED SOURCE INFORMATION

Island		Maui
Water Management Area		Wailuku
Aquifer Sector		Iao
Aquifer System		20
System Sustainable Yield		Wailuku Shaft, "Shaft 33"
Well Name		5330-05
State Well No.

PERMITTED USE INFORMATION

Reasonable beneficial use		Municipal
Withdrawal (12 month moving ave.)	5.771 mgd
Location of water use		Central Maui Service Area
TMK #		various
State land use classification
County zoning classification

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and final Decision and Order, as amended, approved by the Commission in its January 31, 2007 and March 21, 2007 decisions, are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality); 
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

LAURA H. THIELEN, Interim Chairperson
Commission on Water Resource Management

Attachment

c: Kehalani Mauka, LLC
Dear Parties:

Attached is the Commission’s Decision and Order on County of Maui, Department of Water Supply’s Motion for Reconsideration, Clarification, and/or Correction of Findings of Fact, Conclusions of Law, and Decision and Order “In the Matter of Water Use Permit Applications for the Iao Ground Water Management Area Basal Source Contested Case Hearing (CCH-MA05-1).”
COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of Water Use Permit Applications For the Iao Ground Water Management Area Basal Source Contested Case Hearing ) Case No. CCH-MA05-1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was served by U.S. mail, postage pre-paid to the following parties addressed as follows:

BRIAN T. MOTO, ESQ.
Corporation Counsel
JANE E. LOVELL, ESQ.
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, HI 96793
Attorneys for MAUI DEPARTMENT OF WATER SUPPLY

GARY R. PHILLIPS, ESQ.
Stanford Carr Development, LLC
Alakea Corporate Tower
1100 Alakea Street, 27th Floor
Honolulu, HI 96813
Attorney for KEHALANI MAUKA

MARK J. BENNETT
Attorney General
SONIA FAUST
Deputy Attorney General
JULIE CHINA
Deputy Attorney General
State of Hawaii
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Dated: Honolulu, HI ____________

MAR 21 2007

SUSAN HOAGBIN, Commission on Water Resource Management
COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of Water Use Permit Applications For the `Iao Ground Water Management Area Basal Source Contested Case Hearing Case No. CCH-MA05-1

DECISION AND ORDER ON COUNTY OF MAUl, DEPARTMENT OF WATER SUPPLY'S MOTION FOR RECONSIDERATION, CLARIFICATION, AND/OR CORRECTION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
I. MDWS's Motion and Commission's Response

On February 8, 2007, County of Maui, Department of Water Supply (hereinafter “MDWS”) filed a motion for reconsideration, clarification, and or correction of the Commission’s January 31, 2007, Findings of Fact, Conclusions of Law, and Decision and Order (CCH-MA05-1).

CCH-MA05-1 involved new water-use permits for MDWS and Kehalani Mauka (hereinafter “KM”). By July 21, 2004, some existing users did not meet the one-year deadline for filing water use permit applications (hereinafter, “WUPA”). Among the applications deemed incomplete and therefore not meeting the one-year deadline were MDWS’s and KM’s for basal sources, so both applications were deemed new-use applications.

MDWS’s motion requests that:
1. the 12-month moving average (12-MAV) at the time of designation be changed from 4.904 mgd to 5.771 mgd;
2. the amount awarded to Kehalani Mauka (0.691 mgd) be reduced each time MDWS provides a new water meter to newly-built residences or commercial buildings in Kehalani Mauka’s project; and
3. all references to “Tao” be changed to “Iao.”

MDWS originally reported withdrawal from Shaft 33, the source at issue between MDWS and KM, as 5.771 mgd at the time of groundwater designation. This was the best figure at the time, but there had been some recalibration of the equipment by MDWS itself, which resulted in the amount being revised to 4.904 mgd. (Lovell, Transcript, April 19, 2006, pp. 22-23) MDWS, referring to an exchange at the hearing between the Hearings Officer and Commission staff, who cited the 4.9 mgd figure, states that “(t)here was no evidence presented from any witness under oath in the evidentiary portion of the contested case hearing, or from any document admitted into evidence, that established the accuracy of this informal exchange between the hearings officer and CWRM staff members Hardy and Ice.” (MDWS’s Motion, p. 3) However, as a matter of course in contested case hearings, the Hearings Officer had submitted into evidence “all of the related materials that took place in past Commission meetings and staff papers, et cetera, so that you’re free to refer to those also. There will be some contradictions in those but that’s an issue we all deal with in our argument. So all of the past documents are part of the record and part of the evidence here.” (Miike, Transcript, April 19, 2006, p. 67)

Therefore, the revision from 5.771 mgd to 4.904 mgd at the time of designation is in the evidence for the contested case hearing.

MDWS was issued a new-use permit for 5.771 mgd, the amount being asked for. Its permit application was being treated as a new use and not an existing use. Thus, instead of being limited to the amount in use at time of designation (4.904 mgd), as would be required for an existing-use permit, MDWS was awarded what it asked for, or 5.771 mgd. MDWS has suffered no detriment. Moreover, after correcting its error on the amount
being withdrawn at the time of designation, MDWS now asks the Commission not to recognize that error.

MDWS also claims that replacing 4.904 mgd with 5.771 mgd is necessary "in order to prevent a substantial injustice," because "(i)n determining that the automatic trigger for designation had been met, CWRM used the figure 5.771 mgd" and that "it could be argued that the CWRM erred in designating the Iao Aquifer as a groundwater management area in the first place." (MDWS's Motion, p. 4) Exceeding 90 percent of the sustainable yield is only one of the criteria for designating a groundwater management area. There are eight reasons listed in the Water Code, including the presence of "serious disputes." (HRS §174C-44) The fact that the use of 5.771 mgd plus other withdrawals triggered automatic designation by exceeding 90% of the sustainable yield does not invalidate the designation.

On MDWS’s request to reduce KM’s water-use permit by an equivalent amount each time MDWS provides water, the Commission’s decision already pointed out that, under HRS §174C-57(c), MDWS can place this requirement on KM and neither would have to apply to the Commission for a modification in their water-use permits (although they would have to report the changes in their respective permits). (Decision and Order, p. 19) Moreover, the Commission will not set a precedent of micro-managing water-use permits and will continue to rely on the non-use provisions of the Code to reduce the permitted amounts only after periodic review of overall water use. Permitted water that is not used is not wasted, because it would remain in the aquifer.

Finally, MDWS recommends that “I’ao” be replaced by “Iao.” The latter is correct according to Hawaiian dictionaries. (Pukui, M.K. & Elbert, S.H., Hawaiian Dictionary, University of Hawaii Press: Honolulu, p. 93, 1986) However, MDWS does not follow its own advice, because it refers to the aquifer’s name as “Iao” (without the okina) in its Motion.

II. Decision and Order

MDWS’s Motion to change the 12-month moving average of the basal portion of the ‘Iao Aquifer System at the time of designation from 4.904 mgd to 5.771 mgd is denied.

MDWS’s Motion for the Commission to reduce KM’s water-use permit each time MDWS provides a new water meter to newly-built residences or commercial buildings in Kehalani Mauka’s project is denied.

MDWS’s Motion to change all references in the Decision and Order from “I’ao” to “Iao” is granted.

The foregoing Decision and Order on County of Maui, Department of Water Supply’s Motion for Reconsideration, Clarification, and/or Correction of Findings of Fact, Conclusions of Law, and Decision and Order is hereby Adopted.
IT IS SO ORDERED.

Dated: Honolulu, Hawaii March 21, 2007

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

PETER T. YOUNG, Chairperson

LAWRENCE H. MIIKE, M.D., J.D.
Commissioner and Hearings Officer

MEREDITH J. CHING, Commissioner

JAMES A. FRAZIER, Commissioner

NEAL S. FUJIWARA, Commissioner

CHIYOMEL. FORIBO, M.D., Commissioner
January 31, 2007

Dear Parties:

Attached is the Commission's Findings of Fact, Conclusions of Law, and Decision and Order "In the Matter of Water Use Permit Applications for the I'ao Ground Water Management Area Basal Source Contested Case Hearing (CCH-MA05-1)."

PETER T. YOUNG, Chairperson

LAWRENCE H. MIIKE
Commissioner and Hearings Officer

MEREDITH J. CHING, Commissioner

JAMES A. FRAZIER, Commissioner

NEAL S. FUJIWARA, Commissioner

CHIYOME L. FUKINO, Commissioner
COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of Water Use Permit Applications For the Iao Ground Water Management Area Basal Source Contested Case Hearing Case No. CCH-MA05-1

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was served by U.S. mail, postage pre-paid to the following parties addressed as follows:

BRIAN T. MOTO, ESQ.
Corporation Counsel
JANE E. LOVELL, ESQ.
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, HI 96793
Attorneys for MAUI DEPARTMENT OF WATER SUPPLY

GARY R. PHILLIPS, ESQ.
Stanford Carr Development, LLC
Alakea Corporate Tower
1100 Alakea Street, 27th Floor
Honolulu, HI 96813
Attorney for KEHALANI MAUKA

MARK J. BENNETT
Attorney General
SONIA FAUST
Deputy Attorney General
JULIE CHINA
Deputy Attorney General
State of Hawaii
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Dated: Honolulu, HI JAN 31 2007

SUSAN HOAGBIN, Commission on Water Resource Management
COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of Water )
Use Permit Applications )
For the I'ao Ground Water )
Management Area Basal Source )
Contested Case Hearing )

Case No. CCH-MA05-1

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION AND ORDER

I hereby certify that the foregoing
is a true and correct photocopy of the
original document on file in the office of the
Commission on Water Resource Management.

Dated 01-31-07 By Deputy for Water Resource
Management
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<td>h. Has no practical alternatives</td>
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<td>ii. Kehalani Mauka</td>
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<td>a. Can be accommodated with the available water source</td>
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b. Is a reasonable-beneficial use as defined in section 174C-3

c. Will not interfere with any existing legal use of water

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 policies

g. Will not interfere with the rights of DHHL

h. Has no practical alternatives

III. Conclusions of Law

A. There is water available for both MDWS and KM

B. Both MDWS’s and KM’s WUPAs must be processed as new uses

C. MDWS’s WUPA meets the conditions for a permit

D. KM’s WUPA meets the permit conditions but for a reduced amount

E. MDWS’s “reservation” of the I’ao basal aquifer

IV. Decision and Order

Appendix A: Standard Water Use Conditions

Appendix B: Rulings on the Proposed Findings of Fact Submitted by the Parties
I. Background

On July 9, 2001, a petition was filed to designate the I'ao and Waihe'e Aquifer System Areas as ground-water management areas. Following numerous reviews, hearings, and meetings of the Commission on Water Resource Management (hereinafter, “Commission”) and its Findings of Fact, the Commission denied immediate designation but imposed triggers to automatically cause designation. One of these triggers was pumping greater than ninety percent (90%) of the aquifer’s sustainable yield, based on a 12-month moving average (hereinafter, “12-MAV”).

In June 2003, the 12-MAV for the I’ao Aquifer System Area exceeded the Commission’s designated trigger, and on July 21, 2003, I’ao was officially designated a Ground Water Management Area upon publication of the public notice declaring designation and describing the water management area regulations. Ground water in the I’ao Aquifer System includes basal, caprock, and high-level dike sources.

By July 21, 2004, some existing users did not meet the one-year deadline for filing water use permit applications (hereinafter, “WUPA”). Among the applications deemed incomplete and therefore not meeting the one–year deadline were Maui Department of Water Supply (hereinafter, “MDWS”) and Kehalani Mauka (hereinafter, “KM”) for basal sources. MDWS submitted its WUPA on July 2, 2004, but its application was deemed not complete because it lacked the landowner’s signature. On July 23, 2004, the landowner, KM, submitted a completed application for the same battery of wells as MDWS, Well No. 5330-05, commonly referred to as “Wailuku Shaft 33.” Because both MDWS’s (WUPA No. 702) and KM’s (WUPA No. 707) applications were completed after the one-year deadline for filing existing-use WUPAs, both applications were deemed new-use applications. A new-use application from the basal aquifer was also filed by Living Waters for a new well it had under construction at the time of designation.

All WUPAs were the subject of objections, and on September 22, 2004, the Commission authorized a subcommittee to convene a public hearing on Maui to hear objections to and clarifications of the WUPAs. Existing and new-use WUPAs were to be addressed in separate sessions but on the same day, and the public hearing was to remain open to allow the public time to request a contested case hearing. Commissioners James Frazier and Lawrence Miike were appointed to the subcommittee.

On October 28, 2004, the subcommittee conducted the first session of the public hearing. On the same date, MDWS filed a Petition for Declaratory Ruling that its WUPA for Wailuku Shaft 33 was timely filed and therefore should be an existing use and not a new use.

At its April 20, 2005, meeting, the Commission denied MDWS’s Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the
authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 cannot
be used to amend two applications to change the status of timely or untimely filings as
the one-year deadline for applying for existing uses had expired.

On April 22, 2005, a second session of the public hearing was held on Maui. The
hearing remained open for subsequent information gathering. On July 11, 2005, an
information-sharing meeting was held on Maui by Commission staff, where the parties
attending reported on meetings between them to resolve some issues to avoid a possible
contested case hearing.

On September 7, 2005, the next session of the public hearing was held on Maui.
This session was limited to basal and caprock wells, and it was announced that the public
hearing would be closed at the end of the meeting for these wells. Prior to the close of the
hearing, several requests were made for a contested case hearing (hereinafter, “CCH”)
concerning various basal well sources, and timely written requests were submitted by two
applicants, MDWS and KM, and three organizations: Hui o Na Wai Eha and Maui
Meadows Association, both represented by Earthjustice, and the Office of Hawaiian
Affairs (hereinafter, “OHA”). MDWS requested a CCH for all eight of its WUPAs and
for KM’s competing application for the Shaft 33 battery of wells; KM requested a CCH
for its and MDWS’s competing application for the Shaft 33 battery of wells; and Hui o
Na Wai Eha/Maui Meadows Association and OHA requested a CCH for all eight of
MDWS’s WUPAs.

On October 5, 2005, Commissioner Lawrence Miike was appointed the hearings
officer.

On October 17, 2005, standing was granted to all five requesting parties. On
December 16, 2005, Hui o Na Wai Eha/Maui Meadows Association and OHA withdrew
their objections and request for a CCH regarding MDWS’s WUPAs, stating that they had
reached a resolution with MDWS. MDWS’s request for a contested case on all eight of
its WUPAs had been conditioned on another party requesting a CCH, leaving only the
competing applications for Shaft 33 between MDWS and KM as the subject of this CCH.

On April 7, 2006, KM filed a motion for declaratory ruling that its application for
Shaft 33 was for an existing use.

On April 19, 2006, the CCH was held on Maui, at which time the hearing officer
also heard and denied KM’s motion for declaratory ruling.

Closing oral arguments were held on May 24, 2006, in Honolulu, and Proposed
Findings of Fact, Conclusions of Law, and Decision and Order were submitted to the
Hearings Officer on July 28, 2006.

The WUPAs from caprock sources were approved on October 25, 2005. The
WUPAs from the basal aquifer that were not the subject of this CCH (the other seven
MDWS WUPAs and a new-use application from the Living Waters Land Foundation) were approved on February 15, 2006.

Diked, high-level well and tunnel sources were not part of the September 7, 2005, hearing, and the public hearing remained open for those WUPAs. On February 2, 2006, the final session of the public hearing for WUPAs from these sources was held on Maui. Prior to the close of the hearing, verbal requests were made by various parties for a CCH on all WUPAs from high-level dike sources. Written requests were submitted by: 1) MDWS; 2) Wailuku Water Company (hereinafter, “WWC,” and previously known as Wailuku Agribusiness Co., Inc.); 3) Hawaiian Commercial & Sugar Company (hereinafter, “HC&S”); 4) OHA; 5) Hui o Na Wai Eha/Maui Tomorrow Foundation; and 6) Ka Aha O Na Wai Eha Ku Moku O Mauiola.

On June 25, 2004, a Petition had been filed by Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., to amend the interim instream flow standards (hereinafter, “IIFS”) for Waihe’e, North & South Waiehu, I’a and Waikapu Streams and their tributaries. On October 19, 2004, these two parties also filed a Waste Complaint and a Petition for Declaratory Order against WWC (then known as Wailuku Agribusiness Co., Inc.) and HC&S.

On February 15, 2006, the Commission initiated a CCH for the I’a high-level WUPAs and specified that the petition to amend the IIFS of the four streams would be included in the CCH. The Commission further directed that mediation for the waste complaint be initiated prior to the CCH. On March 17, 2006, the Commission clarified its intent by ordering that two CCHs be held, one for the I’a high-level WUPAs (CCH-MA06-01) and a separate CCH for the waste complaint (CCH-MA06-02). Standing has been granted in these two CCHs to the same five parties: 1) MDWS; 2) WWC; 3) HC&S; 4) OHA; and 5) Hui o Na Wai Eha/Maui Tomorrow Foundation. Ka Aha O Na Wai Eha Ku Moku O Mauiola had not applied to be a party in the CCH on the waste complaint, and had withdrawn its request to be a party in the CCH on the high-level WUPAs.

Commissioner Lawrence Miike has also been appointed hearings officer for these two on-going CCHs.

II. Findings of Fact

The findings of fact numbers of the two parties are in brackets. Modifications were made for clarification and accuracy.

A. Sustainable Yield and Available Water

1. CWRM has set the sustainable yield for the I’a basal aquifer at 20 mgd. (See Staff Submittal for the CWRM meeting of February 15, 2006, at p. 4) [MDWS FOF25]
2. On February 15, 2006, CWRM approved MDWS’s applications for seven existing basal sources, totaling 11.227 mgd. (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF 26]

3. On February 15, 2006, CWRM also approved Living Waters Foundation’s new use application for 20,000 gallons per day (.02 mgd). (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF27]

4. Therefore, of the 20 mgd in sustainable yield of the I’ao basal aquifer, 11.247 mgd have been permitted, leaving 8.753 mgd available for new-use permits.

B. MDWS’s and KM’s WUPAs

5. Both MDWS and KM requested 5.771 mgd from Wailuku Shaft 33, State Well No. 5330-05, based on existing municipal use reported by MDWS. There are three wells at Shaft 33, with only one pump working. (MDWS Exhibit A-1) [MDWS FOF28] (KM Exhibit B-4) [KM FOF1, 28] (Tengan, Transcript, May 25, 2006, at 11)

6. The 5.771 mgd reported as developed from Shaft 33 at the time the I’ao Aquifer System was designated a Ground Water Management Area was based on information available at the time of the initial application for an existing use. The actual 12-month moving average (12-MAV) at the time was 4.904 mgd. (Transcript, at 8) On April 21, 2006, the 12-MAV was 4.812 mgd. (MDWS, email to the Hearings Officer, May 19, 2006, per Minute Order Number 8, dated April 21, 2006) 5.771 mgd was the best figure at the time the application was submitted, but recalibration of some of the equipment resulted in the different number. (Transcript, at 22-23)

7. MDWS is currently negotiating with KM to drill three new wells at Shaft 33 that would be able to withdraw 5.771 mgd. (Tengan, Transcript, May 25, 2006, at 14) [KM FOF18]

8. Shaft 33 is located on land owned by KM. (Nakamura, written testimony, at 3)

9. Shaft 33 is part of MDWS’s Central Maui Water System that serves all of central and south Maui. The Kehalani project is within the Central Maui service area, and the existing homes and attendant common areas of the project are currently being provided water from Shaft 33. (MDWS, written testimony, at 2) [KM FOF 21]

10. Previously, MDWS had an agreement with KM’s former landowner to purchase water from Shaft 33 for its municipal purposes, and since 1991, KM and MDWS have a month-to-month agreement that allows MDWS to operate and draw water from Shaft 33 free of charge. (Nakamura, written testimony, at 3-4) [KM FO F19, 20]

11. KM and MDWS have been in negotiations, since at least July 2004, for an agreement that would provide for MDWS’s continued, long-term use of Shaft 33 that
would include the continued supply of water to the Kehalani project. (Nakamura, written testimony, at 4) [KM FOF22]

12. CWRM had designated the I'ao Aquifer System as a ground-water management area on July 21, 2003. As a result, existing users had to apply for water use permits within one year of the designation date, or before July 21, 2004. (Staff Submittal for the meeting of the CWRM, February 15, 2006, at p. 1) [MDWS FOF12; KM FOF24-25]

13. MDWS completed a WUPA for Shaft 33 and forwarded it for signature on February 4, 2004, to the landowner, KM. With the statutory deadline of July 21, 2004 for existing uses, MDWS signed and submitted its WUPA to CWRM without KM's signature, where it was received on or about July 2, 2004. (MDWS, written testimony, at 3) [MDWS FOF15-18]

14. On September 18, 2004, KM finally signed MDWS's WUPA for Shaft 33, and MDWS transmitted the signed document to CWRM the next day. (MDWS, written testimony, at 3) [MDWS FOF19-20]

15. CWRM concluded that MDWS's existing-use WUPA was not complete until after the statutory deadline for existing-use applications and therefore would be processed as a new-use WUPA. (MDWS, written testimony, at3) [MDWS FOF21, 24]

16. MDWS challenged the CWRM conclusion and filed a Petition for Declaratory Ruling on October 28, 2004. (MDWS written testimony, at 3) [MDWS FOF22-23]

17. At its April 20, 2005, meeting, the Commission denied MDWS's Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner's signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. (Minutes of the April 20, 2005, CWRM meeting) [MDWS FOF 23-24]

18. KM's WUPA was filed on July 20, 2004, but completed on July 23, 2004, for continued use of 5.771 mgd from Shaft 33, based on existing municipal use reported by MDWS. [KM FOF27-28]

19. Pursuant to CWRM's Public Hearing Notice, dated March 28, 2005, regarding continuance of the original hearing of October 28, 2004, to be held on April 22, 2005, KM's WUPA, which was initially categorized as an existing use, was categorized as a new-use permit. (Public Hearing Notice, dated March 28, 2005)

20. Prior to the close of the final session of the public hearing on September 7, 2005, KM made an oral request for a contested case hearing, and on September 16, 2005,
timely filed a written petition for a contested case hearing. KM’s request included its contesting CWRM’s conclusion that KM’s WUPA was for a new use and that MDWS had to be the applicant for the 5.771 mgd request that was based on existing municipal use reported by MDWS. (KM’s Motion for Declaratory Ruling that Kehalani Mauka LLC’s Application for Shaft 33 is for an Existing Use, received by CWRM on April 7, 2006)

21. At the start of the contested case hearing, held on April 19, 2006, the Hearings Officer heard arguments on KM’s Motion for Declaratory Ruling. KM argued, among other things, that as a landowner, it should be allowed to “step into the shoes” of the existing user, MDWS, to obtain an existing-use permit for 5.771 mgd pumped from Shaft 33 for municipal uses, or in the alternative, for 0.221 mgd that was in use specifically by the Kehalani project at the date of designation. (Transcript, 04/19/06, at 4, 6-8) [KM FOF38]

22. The Hearings Officer denied the motion on three separate grounds: 1) while the Code does not specifically say that the existing user needs to be the one filing for existing use, there was no agreement between MDWS and KM that KM would file for the existing use; 2) because KM cannot be a purveyor of municipal water services under the definition which says it has to be through a public agency, it would be a change in use, and therefore, not an existing use; and 3) by KM’s own submittal, it claims current use of 0.221 mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd and any other amount under a new-use permit is better addressed in the contested case hearing. (Transcript, 04/19/06, at 11-17)

23. KM, in its closing argument, revised its requested allocation from 5.771 mgd to 1.696 mgd: 0.221 mgd for its claim of an existing use on the MDWS system at the date of designation and 1.475 mgd for a new use for the Kehalani project. (KM’s Closing Argument, at 3) [KM FOF42]

24. The KM request for 1.696 mgd was based on the following: 1,586 single-family units at an average use of 600 gallons per unit per day, or 951,600 gallons per day; 815 multi-family units at an average of 560 gallons per unit per day, or 456,400 gallons per day; 19.54 acres at 6,000 gallons per acre per day for commercial parks, or 117,240 gallons per day; and 56.50 acres for open spaces at 1,700 gallons per acre per day, or 96,050 gallons per day. (KM Exhibit B-6 as amended per Minute Order Number 8, dated April 21, 2006)

25. KM’s estimates were based on Maui county duties/meter requirements of 600 gallons per day for single-family units, 560 gallons per day for multi-family units, 6,000 gallons per acre per day for light industry, and 1,700 gallons per acre per day for schools and parks. Hawaii, Kauai, and Oahu had lower duties/meter requirements, 400-500 gallons per day for single-family units, 350-400 gallons per day for multi-family units, and 3,000 gallons per acre per day for light industry. Schools and parks for the other three counties were higher at 4,000 gallons per acre per day. (KM Exhibit B-5)
26. MDWS reported that average daily water use in the Kehalani subdivisions ranged between 298 to 384 gallons per unit per day from July 21, 2003, to April 19, 2006. A total of 483 single-family units were identified as of the end of the reporting period. MDWS had no records for services designated for multi-family units. (MDWS’s response to Minute Order Number 8, dated April 21, 2006)

27. MDWS is not sure that the averages they have reported provides a totally accurate picture, but average actual use is probably less than the Maui county duties/meter requirements of 560-600 gallons per unit per day. The first phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. (Lovell and Tengan, Transcript, May 25, 2006, at 49-50)

28. As of May 19, 2006, KM reported a total of 479 units completed, 255 single-family units and 224 multi-family units. 72 single-family units were under construction and first occupancy was in progress. 44 single-family units were under construction and first occupancy expected in 2006. Projected first occupancies for the remainder of the project were as follows: 1) 305 single-family and 80 multi-family units in 2007; 2) 59 single-family and the 19.54 commercial acres in 2008; 3) 105 single-family and 140 multi-family units in 209; 4) 201 single-family units in 2010; 5) 160 multi-family units in 2011; 6) 30 single-family and 85 multi-family units in 2012; 7) 225 single-family units in 2013; and 8) 560 multi-family units in 2014. (KM Closing Argument, Exhibit C)

29. Shaft 33 is not a stand-alone water source. Instead, it is an integral part of MDWS’s public water supply for Central and South Maui and is the major source of water for the Central Maui system, providing more than one-quarter of the water required to meet the needs of the people and businesses served by the Central Maui system. (MDWS written testimony, at 2) [MDWS FOF 2, 9, 11]

30. MDWS opposes KM’s WUPA for Shaft 33 because it plans to develop Waikapu Mauka and I’ao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. These plans are part of MDWS’s programs to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water resources, development of new sources in Waihe‘e, conservation programs, use of reclaimed water, and the like. MDWS contends that these programs are dependent on MDWS’s continued control of the Wailuku Shaft. (MDWS Exhibits A-5 and B-4, written testimony at 10-11) [MDWS FOF 82-84]

31. With a project of the magnitude of KM’s, MDWS would probably require the developer to develop his own source. But MDWS does not support a new water-use permit in the amount requested for Shaft 33 by KM and has been requiring developers of large projects to provide sources outside of the I’ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. (MDWS, written testimony, at 13-14; Tengan and Lovell, transcript, 04/19/06, at 54-57)

32. On the other hand, MDWS states that since the aquifer was designated, “as people have been ready to receive water service, they come in and they get their meter. But
always with an eye on how much is still available.” (Lovell, Transcript, April 19, 2006, at 55-56) MDWS further states that “there is no showing that it is in the public interest to have a competing private water company serving this small portion of Central Maui.” (Lovell, Transcript, May 25, 2006, at 10)

C. Conditions for a Permit

i. Maui Department of Water Supply

a. Can be accommodated with the available water source

33. The sustainable yield of the I'ao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd. (FOF4-5, 23, supra)

b. Is a reasonable-beneficial use as defined in section 174C-3

34. Shaft 33, like all of MDWS's sources for which permits have been sought and granted, serves municipal purposes in the Central Maui service area. (Staff Submittal for the CWRM meeting of February 15, 2006, at 5) [MDWS FOF30]

35. Approximately two-thirds of the I'ao ground water pumped by MDWS (including Shaft 33) is used to provide potable water to single-family and multi-family residences. A portion of the remaining one-third is used to satisfy the potable needs of commercial, industrial, and agricultural customers. (MDWS written testimony, at 5-6) [MDWS FOF42-43]

36. Maui County's potable water sources are protected and conserved through the use of reclaimed wastewater and non-potable sources for uses such as irrigation. (MDWS Exhibits A-1, A-3, A-4) [MDWS FOF33]

37. MDWS conservation efforts include a fixture program and public education programs, and demand has been reduced by about 0.5 mgd. (MDWS Exhibit A-3) [MDWS FOF37-38]

38. Many of MDWS's commercial, industrial, and agricultural customers use reclaimed or brackish water for irrigation and other non-potable uses. (MDWS written testimony, at 5-6) [MDWS FOF44]

39. MDWS also relies on surface water sources to serve its municipal needs to the extent such surface water is available. (MDWS written testimony, at 5-6) [MDWS FOF45]
c. Will not interfere with any existing legal use of water

40. MDWS has seven of the eight currently permitted uses in the 'I'ao basal aquifer, and the eighth, Living Waters Foundation, was recently granted a new use permit, leaving 8.753 mgd available for new permits. (FOF2-4, supra)

41. No streams or springs have been identified as being affected by MDWS's basal aquifer withdrawals, and initial objections to all eight of MDWS's WUPAs were withdrawn by OHA and Earthjustice's clients. (Staff submittal for the CWRM meeting of February 15, 2006, at 60 [MDWS FOF54-55, 63]

42. MDWS's Shaft 33 WUPA will be used for the same purposes as its seven other existing-use WUPAs that have been approved. (MDWS written testimony, at 7) [MDWS FOF57]

43. Domestic, agricultural, commercial, and industrial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c))

44. Municipal use is "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.'" (HRS 174C-3)

45. Maui county's planning director has certified that MDWS's WUPAs are consistent with state and county land use designations, including the County's General Plan and the Kahului-Wailuku Community Plan. (MDWS written testimony, at 7) [MDWS FOF58]

46. MDWS's seven approved WUPAs are for the same purpose as the WUPA for Shaft 33, and those seven WUPAs were found to be consistent with applicable plans, land use classifications, and land use policies. (Staff submittal for the CWRM meeting of February 15, 2006, at 7) [MDWS FOF59-60]

47. MDWS's Central Maui system serves homes built by the Department of Hawaiian Homelands (hereinafter, "DHHL"). DHHL has not requested party status in this
contested case and has not objected to MDWS’s WUPA. (MDWS written testimony, at 8) [MDWS FOF 61-62]

48. Under CWRM’s Standard Water Use Permit Conditions, all permits continue to be subject to the rights of DHHL. (CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. Has no practical alternatives

49. Ground water from the I’ao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6) [MDWS FOF 41]

50. MDWS already has conservation programs, uses surface-water sources when available, and many of its agricultural, commercial, and industrial customers use reclaimed or brackish water for irrigation or non-potable purposes. (FOF 37-39, supra)

ii. Kehalani Mauka

a. Can be accommodated with the available water source

51. The sustainable yield of the I’ao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd. (FOF 4-5, 23, supra)

b. Is a reasonable-beneficial use as defined in section 174C-3

52. KM’s WUPA is primarily for domestic use as defined in HRS 174C-3, and a limited amount of related landscaping and commercial uses. (FOF 24, supra)

53. KM’s request is based on Maui county duties/meter requirements, and the actual use of its early project phases are less than these guidelines. (FOF 25-26, supra)

54. KM has instituted water conservation measures throughout the Kehalani project to encourage and practice conservation of water. Water conservation measures include low-flow fixtures such as low-flow shower heads and low-flush toilets. Purchasers of units receive a brochure describing water conservation and efficient water uses. (Nakamura, written testimony, at 8; Blane, Transcript, April 19, 2006, at 36) [KM FOF 73-75]

55. In terms of landscape and irrigation, KM has tried to match irrigation with natural rainfall, which is about 30 inches a year. KM is installing timed, moisture sensors that irrigate only in non-peak daylight hours and when it is not raining. Irrigation systems are also fitted with high-tech sprinkler heads, which will regulate water flow at 30 pounds per square inch. Project landscape is designed to take into account water-utilization
measures. For example, KM has minimized use of turfgrass, which is a high user of water, and instead, has utilized groundcover called asysphsia, which is very drought tolerant. Xeriscape plants will continue to be planted in the common areas. (Blane, Transcript, April 19, 2006, at 36-37, 43-44; Nakamura, written testimony, at 8) [KM FOF76-79]

56. Typically, 60 to 65 percent of water usage in a community goes for purely domestic use, while the rest is for irrigation of landscaping and open areas, washing cars, and other such tasks. The Kehalani project is reporting usage of approximately 80 to 85 percent for purely domestic use. (Blane, Transcript, April 19, 2006, at 38-39) [KM FOF80-81]

c. Will not interfere with any existing legal use of water

57. KM’s original and final, reduced request for water were for the same source as MDWS’s WUPA, for which initial objections were withdrawn. (FOF41, supra)

d. Is consistent with the public interest

58. KM’s domestic and commercial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c)) [KM FOF93]

59. While some water will be for commercial use, as well as irrigation of parks, open spaces, and common areas of Kehalani, approximately 85% will be for domestic use. (Nakamura, written testimony, at 9; Transcript, April 19, 2006, at 28) [KM FOF70]

60. The Kehalani project will provide a full range of single- and multi-family housing, including affordable housing for local families and seniors in a convenient location near Kahului. The project will bring approximately 2,400 homes to West Maui, as well as schools, parks, open spaces, and a community recreational center. It is one of the few planned residential communities of this scale that will offer affordable housing. (Nakamura, written testimony, at 2-3) [KM FOF94-97]

e. Is consistent with state and county general plans and land use designations

61. The Kehalani project has all land use and zoning requirements in place. (Blane, written testimony, at 3) [KM FOF101]

62. In 1991, the project lands were zoned from agricultural to urban district by the State Land Use Commission (hereinafter, “LUC”). (KM Exhibit B-8; Blane, written testimony, at 3) [KM FOF102]

63. In 1991, the project was also approved under the establishment of the Wailuku-Kahului Project District 3 zoning. (KM Exhibit B-7; Blane, written testimony, at 3) [KM FOF103]
f. Is consistent with county land use plans and policies

64. In 1991, the Kehalani project received county land-use zoning approval. (KM Exhibits B-7 and B-8) [KM FOF107]

65. Maui County has divided the island into multiple community plans with county land-use policies set out for each area. The Wailuku-Kahului community Plan was adopted in 2002. In that plan, the County specifically recognizes that one of the goals of the plan is “a sufficient supply and choice of attractive, sanitary and affordable housing accommodations for the broad cross section of residents, including the elderly.” (KM Rebuttal Brief, Exhibit C) [KM FOF108-110]

66. Historically speaking, the Kehalani project has been in the community plan since 1982. In using a project district approach, the planning director is required to certify at each of three steps that the individual components of any development plan are in conformance with the standards and criteria of the project district. KM spent seven years in the entitlement process at the community plan and the land-use and zoning levels, and at each stage the project received certification that the project was consistent with the community plans. Various planning directors throughout the years, including the current director, have signed on several occasions in the past confirming that KM’s proposed water use is consistent with county land-use plans and policies. (Blane, Transcript, April 19, 2006, at 47-48, 50 [KM FOF112-113]

67. The current planning director for Maui County, at the request of MDWS, stated that adding 2,400 homes and 22 acres of commercial development, without developing any new water resources, is inconsistent with the county’s land-use plans and policies and concurred with MDWS that “(t)he current average pumpage of 5.771 mgd is in its entirety serving the County’s municipal system” and that “additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the I’ao aquifer in order to avoid overpumpage of the aquifer.” (MDWS written testimony, at 13-14; Exhibit A-10) [MDWS FOF105, 108]

68. KM spent seven years in the entitlement process, at both the community plan, the land use and the zoning level, and in each case one of the major criteria was the project’s consistency with the community plans, and KM would not have gotten its entitlements if it had been ruled that it was not. (Blane, Transcript, April 19, 2006, at 47-48)

69. The entire Kehalani project has all of the approvals. There are three steps, and the project has steps one and two for the entire project. As for step three, every time a module is to be developed, the housing and landscaping plans are taken to the Planning Director for approval as conforming to the general guidelines. To date, the Planning Director has approved all of the 13 plans presented to him. (Blane, Transcript, April 19, 2006, at 49-50)
g. Will not interfere with the rights of DHHL

70. DHHL submitted a WUPA and a request for water reservation to the Commission on July 22, 2004. On the WUPA, no source was identified, so the Commission requested more information to complete DHHL's WUPA request. The Commission also stated its understanding that DHHL's existing and foreseeable services were and would continue to be delivered by MDWS, which had applied for existing pumpage for all of its sources, and that it was unnecessary for existing end users served by MDWS to apply for a WUPA. On the reservation request, the Commission's response stated that some of the services were for lands that were not yet acquired. Because water reservations are established by rule in designated water management areas, the Commission stated that it was essential to associate the eventual use with a source in a particular aquifer system and requested more specific information to identify those lands to be acquired. In addition, several of the uses identified in the request were already receiving service and therefore would not be the appropriate subject of a water reservation. (Commission letter to DHHL, November 18, 2004)

71. Under the State Water Code and the standard conditions of use, any water use permit issued by the Commission may be modified at any time to meet Hawaiian Home Lands requirements. (§174C-101(a); CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. Has no practical alternatives

72. Ground water from the I'ao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6) [MDWS FOF 41]  

73. The vast majority of KM's use (approximately 85%) is for domestic use. KM does not have any rights to surface water, as that was expressly reserved in favor of the previous owner. Surface water would also require expensive treatment prior to using it for drinking water, and KM understands that the current surface water system is under another legal challenge at the Commission and may be subject to change. Re-use water is not an option for domestic use for health reasons and is not available near the project site and may not be affordable for landscape irrigation use. (Nakamura, written testimony, at 8-9)

74. To install a dual water system would cost roughly $200 a linear foot and a total cost of $5-6 million in the completed portion of the project. Installing in the un-built portion of the project would cost probably an additional $2 million. (Blane, Transcript, April 19, 2006, at 41-42)
III. Conclusions of Law

Reference to Findings of Fact from this Contested Case Hearing are in brackets.

A. There is water available for both MDWS and KM

1. The sustainable yield of the I'ao basal aquifer is 20 mgd. Permits have been issued for 11.247 mgd, leaving 8.753 mgd available for new use permits. [FOF1-3]

2. MDWS is requesting 5.771 mgd from Wailuku Shaft 33, while KM’s revised request is for 1.696 mgd, for a total request of 7.467 mgd. [FOF5, 23] Therefore, both WUPAs can be accommodated even if the full amounts requested are granted.

3. “Wailuku Shaft 33” is not a single well but a battery of wells, of which there are currently three, only one of which has a working pump. MDWS is negotiating with KM, the landowner, to drill three new wells. [FOF5, 7]

4. MDWS’s and KM’s WUPAs are not competing applications. Both requests can be accommodated within the sustainable yield of the I'ao basal aquifer. While the WUPAs are for the same site, they are not necessarily for the same well. WUPAs must only specify the location of the well (HRS §174C-51), and the provisions for well construction and pump installation regulate the actual amounts of water that may be withdrawn under the water-use permits. (HRS §§ 174C-81 to 174C-87) The Code defines competing uses as when two or more existing uses draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield. (HRS §174C-50(h)) The sustainable yield would not be exceeded, and both applications did not meet the existing-use requirements (see below).

B. Both MDWS’s and KM’s WUPAs must be processed as new uses

5. At its April 20, 2005, meeting, CWRM denied MDWS’s Petition for Declaratory Ruling on the following grounds: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. [FOF17]

6. In regard to KM’s Motion for Declaratory Ruling [FOF20]: 1) while the Code does not specifically state that the existing user must be the party filing for the existing use, there was no agreement between MDWS and KM that KM would file for the existing use and in fact MDWS is contesting KM’s WUPA; 2) because KM cannot be a purveyor of municipal water services under the definition which states it must be through a public agency (HRS §174C-3), it would be a change in use, and therefore, not an
existing use; and 3) by KM’s own submittal, it claims its own existing use of only 0.221 mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd and any other amount under a new-use permit is better addressed in the contested case hearing. [FOF22]

7. While both MDWS and KM were using water from the I’ao basal aquifer at the time of designation, both did not meet the requirements for an existing-use WUPA and both WUPAs must therefore be processed as new uses, not existing uses. As such, both applications are not limited to the amounts being used on July 21, 2003, the date of designation of the I’ao Aquifer System as a ground-water management area. (FOF12) At that date, MDWS was using 4.904 mgd, of which 0.221 mgd was being provided to KM. (FOF6, 21) Therefore, MDWS’s WUPA will be evaluated as a request for 5.771 mgd, and KM’s, for 1.696 mgd.

C. MDWS’s WUPA meets the conditions for a permit

8. “Domestic uses of the general public” has been specifically identified by the Hawai’i Supreme Court as a water resources trust purpose. (In re Use Permit Application [hereinafter, “Waiahole I”], 94 Haw. 97, at 136; 9 P.3d 409 [2000]) About two-thirds of MDWS I’ao ground water is used to provide potable water to residences, while the remaining one-third is for commercial, industrial, and agricultural customers [FOF35], which the Water Code also identifies as being in the public interest. (HRS §174C-2(c))

9. MDWS’s WUPA also meets all of the Code’s requirements. [FOF34-48]

10. MDWS has a working policy to use all available water resources, including surface water, and reclaimed and brackish water for irrigation or non-potable purposes. [FOF50]

11. Even if other alternative sources were available, “(c)onsidering whether alternative water resources are practicable innately requires prioritizing among public trust resources.” (In re Use Permit Application [hereinafter, “Waiahole II”] 105 Haw. 1, at 20; 93 P.3d 643 [2004]) The I’a basal aquifer is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. [FOF49] Municipal use is the highest and best use of I’ao basal aquifer water.

12. While MDWS’s use was 4.904 mgd at the time of designation, its request is for 5.771 mgd, the original amount based on information available at the time of the initial application for an existing use. [FOF6] However, Shaft 33 is not a stand-alone source for MDWS but an integral part of its public water supply for Central and South Maui and is the major source of water for the Central Maui system. [FOF29] MDWS and KM are also in negotiations to drill three new wells at Shaft 33 that would be able to withdraw 5.771 mgd. [FOF7] Therefore, increasing demand and coordinated management of all of MDWS’s water sources are sufficient reasons to award MDWS its request of 5.771 mgd.
under a new-use WUPA, instead of only the 4.904 mgd that it was withdrawing at the
time of designation.

13. It is also not required that the 5.771 mgd request be reduced by the 0.221 mgd that
was being provided to KM at the time of designation. The Commission does not award
water-use permits to municipal systems based on identification of individual customers
but on aggregate demand and need.

D. KM’s WUPA meets the permit conditions but for a reduced amount

14. While KM’s proposed use is not “domestic use of the general public (emphasis
added)” and therefore not a public trust purpose, 85 percent of the use is domestic use,
which is the highest and best use of potable water. [FOF56] The remaining 15 percent is
for related landscaping and commercial uses [FOF56], which are also identified in the
Water Code as being in the public interest. (HRS §174C-2(c))

15. KM’s WUPA also meets all of the Code’s requirements. [FOF53-71]

16. The Maui County Planning Director’s conclusion that KM’s WUPA is
inconsistent with the county’s land use plans and policies must be premised on the
assumption that the Kehalani project will add 2,400 new homes and 22 acres of
commercial development, and that it would require the 5.771 mgd that MDWS is
requesting in its WUPA. [FOF67] However, nearly 600 units will have been completed
and occupied in the Kehalani project by the end of 2006 [FOF28], and the project has met
all the land-use and zoning requirements, been approved under the establishment of the
Wailuku-Kahului Project District 3 zoning, and has received county land-use zoning
approval. [FOF61-66] The Planning Director has also approved all of the 13 plans for the
modules that have been or are being constructed. [FOF69] If the Planning Director’s
comments pertain to the ongoing Kehalani project, they are in direct contradiction to the
actions that his office has taken.

17. KM has no practical alternatives. [FOF73-74]

18. Even if other alternative sources were available, “(c)onsidering whether
alternative water resources are practicable innately requires prioritizing among public
trust resources.” (Waiahole II, 105 Haw. 1, at 20) The I’ao basal aquifer is particularly
well-suited for potable use, because it requires less treatment to achieve state and federal
drinking-water standards than other sources (such as surface water) do. [FOF49]
Domestic use is the highest and best use of potable water.

19. KM’s revised request is for 1.696 mgd, based on Maui county duties/meter
requirements applied to single- and multi-family units, commercial parks, and open
spaces. [FOF24-25]

a. MDWS reported that average daily water use in the completed and
occupied Kehalani subdivisions ranged between 298 to 384 gallons per unit per
day from July 21, 2003, to April 19, 2006. [FOF26] MDWS is not sure of the accuracy of these averages but has concluded that average actual use is probably less than the Maui county duties/meter requirements. [FOF27] KM has instituted water conservation measures [FOF54-56], which supports the conclusion that the actual average use is likely less than the Maui county duties/meter requirements. On the other hand, MDWS also testified that the first-phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. [FOF27] Therefore, a reasonable estimate of future average use would be 400 gallons per unit per day, which is slightly higher than the high range of past use, which has averaged between 298 to 384 gallons per unit per day. 400 gallons per unit per day is also close to the water duties/meter requirements for the other counties. [FOF25] Applied to the 2,401 single- and multi-family units after completed build-out, the total projected use would be 0.960 mgd. However, 1,060 of these units are projected to be completed between 2011-2014 [FOF28], or more than four years from the issuance of any water-use permit under this Decision and Order, and the Water Code provides for revocation of a permit for partial or total non-use for a period of four continuous years or more. [HRS §174C-58(4)] Therefore, the water-use permit for the housing units would be reduced by 0.424 mgd, or from 0.960 mgd to 0.536 mgd.

b. The Maui county standards for light industry are 6,000 gallons per acre per day and 1,700 gallons per acre per day for schools and parks. The other counties have standards of 3,000 gallons per acre per day for light industry and 4,000 gallons per acre per day for schools and parks. [FOF25] Given the water conservation measures reported by KM [FOF54-56], a reasonable level would be 3,000 gallons per acre per day for light industry and 1,700 gallons per acre per day for schools and parks. This would reduce the water budget for 19.54 commercial acres and 56.5 acres of open spaces to 0.155 mgd.

20. Under KM’s WUPA, the revised amount is therefore 0.691 mgd.

E. MDWS’s “reservation” of the I’ao basal aquifer

21. Except for KM’s WUPA and Living Waters Foundation’s new permit [FOF3], all of the existing wells in the I’ao basal aquifer are MDWS’s. [FOF2] MDWS has been requiring developers of large projects to provide sources outside of the I’ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. [FOF31] MDWS also maintains that its various water utilization, conservation, and development programs are dependent on its continuous control of Shaft 33. [FOF30] MDWS also opposes KM’s WUPA because “there is no showing that it is in the public interest to have a competing private water company serving this small portion of Central Maui.” [FOF32] However, MDWS develops water from sources both within and outside the I’ao basal aquifer, so any private water company would be a competitor, including any developer that develops water outside the aquifer. In KM’s case, it is a landowner over the I’ao basal aquifer, owns the land where Shaft 33 is located, and its
cooperation is needed for MDWS to continue to use that source. Yet MDWS is attempting to require KM to seek water sources outside the aquifer.

a. MDWS’s policy on developers of large projects can be implemented through negotiation and the county’s land-use planning [HRS §§ 174C-2(e) and 174C-49(a)(6)], but:

No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after July 1, 1987, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46. [HRS §174C-4(b)]

b. MDWS may petition the Commission to reserve the remaining sustainable yield of the I’ao basal aquifer for municipal uses. If and when such a reservation is established, then only MDWS would have the right to apply for a water-use permit from the reserved water. [HRS §174C-49(d); HAR §§ 13-171-13(d), 13-171-60]

c. DHHL’s reservation request is incomplete, pending further information to be provided at the Commission’s request. Part of the reservation request appeared to be for services already being provided water, and more specific information on the lands to be acquired by DHHL was also to be provided. [FOF70] Any water use permit issued by the Commission is also subject to modification at any time to meet DHHL requests. [FOF71]

d. Until such reservations are established, KM has the right to apply for a water-use permit from the remaining sustainable yield of the I’ao basal aquifer.

Caveat: Finally, if any statement denominated a conclusion of law is more properly considered a finding of fact, then it should be treated as a finding of fact; and conversely, if any statement denominated as a statement of fact is more properly considered a conclusion of law, then it should be treated as a conclusion of law.

IV. Decision and Order

MDWS is issued a water-use permit for 5.771 mgd under WUPA No. 702 from Wailuku Shaft 33, State Well No. 5330-05.

KM is issued a water-use permit for 0.691 mgd under WUPA No. 707 from Wailuku Shaft 33, State Well No. 5330-05.
KM may apply for a modification of its permit for: 1) a change in the quantity of water currently awarded if it deems the amount insufficient to meet its reasonable and beneficial needs under actual use conditions; and/or 2) for the 1,060 units projected to be completed between 2011-2014 in whole or in part within the four-year statutory window of use/nonuse. [HRS§174C-57]

The Commission recognizes that KM is currently obtaining all of its water from MDWS and that they are in negotiations for the continued use of Shaft 33 by MDWS. KM’s permit is for its own system and not as a customer of MDWS, and its permit must be exercised within the statutory window. If the parties agree that MDWS will continue to provide water to KM, the Water Code provides for transfer of the permit, in whole or in part [HRS §174C-59], and county agencies are exempt from the requirements of the section pertaining to the modification of permit terms if the modification does not involve a change in the quantity of water to be used or where the new use would not adversely affect the quality of the water or quantity of use of another permittee. [HRS §174C-57(c)]

Both permits are subject to the Standard Water Use Conditions, attached as Appendix A. If Shaft 33 is found to be insufficient to meet the amounts awarded under both permits, the Commission under condition number 8 may modify the permits and the amounts of water initially granted may be reduced.

Finally, the Commission’s “Rulings on the Proposed Findings of Fact Submitted by the Parties” is contained in Appendix B.

The foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER are hereby ADOPTED.

IT IS SO ORDERED.

DATED: HONOLULU, HAWAII January 31, 2007

COMMISSION ON WATER RESOURCE MANAGEMENT

PETER T. YOUNG, Chairperson

LAWRENCE H. MIKE, M.D., J.D.
Commissioner and Hearings Officer

MEREDITH J. CHING, Commissioner

JAMES A. FRAZIER, Commissioner

NEAL S. FUJIIWARA, Commissioner

CHIYOME LI FUKINO, M.D., Commissioner
Appendix A

Standard Water Use Conditions

1. The water described in this water-use permit may only be taken from the location described and used for the reasonable beneficial use at the location described. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:

   a. can be accommodated with the available water source;
   b. is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. will not interfere with any existing legal use of water;
   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 policies; and
   g. will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

3. The ground-water use here must not interfere with surface or other ground-water permitted uses or reservations.

4. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:

   a. A separate water-use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

5. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

6. The water-use permit application and submittal, as amended, are incorporated into this permit by reference.

7. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.
8. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:

a. protect the water sources (quantity or quality);
b. meet other legal obligations including other water-use permits;
c. insure adequate conservation measures;
d. require efficiency of water uses;
e. reserve water for future uses, provided that all legal existing uses of water shall be protected;
f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

9. An approved flowmeter must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on forms provided by the Commission on a monthly basis.

10. This permit shall be subject to the Commission's periodic review of the I'ao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the I'ao Aquifer System, or relevant modified aquifer(s), is reduced.

11. A permit may be transferred, in whole or in part, from the permittee to another, if:

a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
b. The Commission is informed of the transfer within ninety days.

Failure to inform the Commission of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes grounds for revocation.

12. The use(s) authorized by law and by this permit do not constitute ownership rights.

13. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.
14. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply toward the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply toward the four-year period of forfeiture.

15. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the I'ao Ground-Water Management Area.

16. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

17. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.
Appendix B

Rulings on the Proposed Findings of Fact Submitted by the Parties

The Commission makes the following rulings on the parties’ proposed findings of fact. The findings are placed in two categories.

Category A contains findings that are accepted in their entirety, or accepted with minor modifications or corrections that do not substantially alter the meaning of the original findings.

Category B contains findings that are rejected because they may be: 1) duplicative; 2) not relevant; 3) not material; 4) taken out of context; 5) contrary (in whole or in part) to the found facts; 6) an opinion (in whole or in part); 7) contradicted by other evidence; or 8) contrary to law.

Maui Department of Water Supply

A. Accepted

B. Rejected
1, 5, 10, 12-14, 36, 39-40, 46-47, 52, 73, 77-81, 85-89, 92-98, 102, 109-112, 114-115

Kehalani Mauka

A. Accepted

B. Rejected
1, 13, 24-26, 29-37, 39-41, 43-61, 66-68, 72, 82-84, 87-92, 98-100, 106, 114-122
PETITION REQUESTING A CONTESTED CASE HEARING BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

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

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

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

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

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

1. NAME: Kehalani Mauka, LLC
(If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.) (See Attached DCCA Records. Kehalani Mauka, LLC is governed by two members, one of which is Milwaukee Holdings, LLC. Stanford Carr is authorized to sign for Milwaukee Holdings, LLC)

2. ADDRESS: 1100 Alakea Street, 27th Floor
Honolulu, Hawaii 96813
PHONE: 808-537-5220 FAX: 808-537-1801


4. ADDRESS: 841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
PHONE: 808-528-4200 FAX: 808-531-8466

5. SUBJECT MATTER: Application for Water Use Permit for State Well No. 5330-05 (“Shaft 33”)

6. DATE OF PUBLIC HEARING/COMMISSION MEETING: September 7, 2005

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


8. ARE YOU HAWAIIAN? No.
PETITION REQUESTING A CONTESTED CASE HEARING BEFORE
THE COMMISSION ON WATER RESOURCE MANAGEMENT

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

Kehalani Mauka is the owner of TMK No.2-3-5-01, Parcel 67. Shaft 33 is located on Parcel 67.

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

See answer to #9 above.

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

The Kehalani Project is comprised of TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, 64, 66, and 67.

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

Shaft 33 is located on the Parcel 67 and was a part of the County of Maui municipal water at the date of designation of the lao Aquifer. Estimated pumping reported as of that date was approximately 5.771 mgd. This source continues to be used by the County of Maui Department of Water Supply.

Kehalani Mauka is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single family residences, located at the base of the West Maui Mountains.

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

Kehalani Mauka is the landowner of the parcel and owner of the Shaft 33. It is the Applicant for a water use permit for an existing use of 5.771 mgd. used by the County of Maui at the date of designation of lao Aquifer.

Kehalani Mauka believes that it has standing to request a contested case hearing and be a party under section 13-167-52, and 13-167-54(a)(1), (3), and (4), HAR.

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

Section 174C-50(a) & (b), HRS, provides that:
(a) All existing users of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).
(b) After publication is provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria of subsection (a) is met and the existing use is reasonable and beneficial.
At the date of designation, it is undisputed that there was an existing use of Shaft 33 in the amount of 5.771 mgd. Kehalani Mauka filed its application in a timely manner and is the landowner and applicant of for a water use permit for Shaft 33. The Commission accepted the application as complete. Kehalani Mauka respectfully disagrees with the preliminary analysis that it has applied for a new use and that the existing user, the County of Maui Department of Water Supply has to be the applicant. There is no requirement in the water code or regulations that requires that the existing user must be part of the application for an existing water use permit.

Finally, Kehalani Mauka’s use is reasonable and beneficial as detailed in its application and subsequent filings which are incorporated by this reference into this application for a contested case hearing.

15. WHAT ARE THE BASIC FACTS AND ISSUES?

1. Kehalani Mauka is the owner of Parcel 67 and Shaft 33.
2. As of the date of designation of lao Aquifer, approximately 5.771 mgd. was being used by the County of Maui Department of Water Supply for its municipal system.
3. That the existing use by the County of Maui Department of Water Supply continues to this day.

Issue: Is Kehalani Mauka’s timely application for a water use that existed on the day of designation of lao Aquifer entitled to have its water use application considered an existing use under section 174C-50, HRS, et.al.

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

Issuance of an existing use water use permit for 5.771 mgd. for Shaft 33 to Kehalani Mauka, LLC.

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

The County of Maui Department of Water Supply.

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

Kehalani Mauka, LLC
By Milwaukee Holdings, LLC,
its Member

Stanford S. Carr, its Manager
Name (Print)
Signature
Date

3 CCHR FORM (05/21/1996)
## General Information

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#### Agent Info

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obviously not looking at all and uses critically.
August 22, 2005

Mr. Peter T. Young, Chairperson
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
Post Office Box 621
Honolulu, Hawaii 96809

Dear Chairperson Young:

SUBJECT: County of Maui, Department of Water Supply's Application for a Water Use Permit for Wailuku Shaft 33, State Well No. 5330-05, Iao Ground Water Management Area, Maui

This is in response to your letter to Mayor Alan Arakawa requesting the County's advice on whether the above-referenced permit application, filed by and on behalf of the County's Department of Water Supply, is consistent with the County's land use plans and policies. It is consistent.

Sincerely,

MICHAEL W. FOLEY
Planning Director

MWF:atw
c: Mayor Alan M. Arakawa
George Y. Tengan, Department of Water Supply
File
P:\LETTER\Young-DLNR Water-082205.wpd
Revised Measuring-Point Elevations for Selected Wells in the Waihee and Iao Aquifer Areas on the Island of Maui

The USGS has been working with the National Geodetic Survey (NGS) to update benchmark and well measuring-point elevations in central Maui as part of a ground-water availability study with the Maui Department of Water Supply. The purpose of this effort is to ensure that water-level monitoring wells used in this study are tied to a common and accurate vertical datum.

Benchmark and reference-mark elevations were determined by the NGS using differential GPS (Global Positioning System) methods during September 2-4, and November 18-20, 2003.

Well measuring-point elevations were determined by the USGS using vertical leveling surveys from NGS benchmarks and USGS reference marks during September 22-26, and December 15-19, 2003.

Measuring-point elevations for selected wells in the Waihee and Iao aquifer areas are provided below. The difference between the previously reported and the revised measuring-point elevation for each well is also provided. Leveling notes and photographs of the measuring points are available in well folders maintained by the USGS Water Resources office in Honolulu.

It is important to recognize that the revised well measuring-point elevations will result in a modification of the absolute water levels (referenced to mean sea level), but not the relative change in water levels measured over time (trend).

Historical water levels measured in these wells may be revised pending further research into possible causes for the differences between the previously reported and the revised well measuring-point elevations. Future water-level measurements will be based on the revised well measuring-point elevations.

Related links:

Ground-Water Availability in Central Maui - Project description
Recent Hydrologic Conditions, Iao Aquifer area, Maui - Updated every three months

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<td>C. Takumi Engineering report (1/31/00) provides MP elevation of 639.37 ft for top of casing, based on leveling from a benchmark elevation of 631.87 ft located about 200 ft from well (Exhibit A-1, Mink &amp; Yuen, 6/21/99). Driller's well-completion report provides MP elevation of 638.10 ft for top of casing (5/20/99). No record of MP survey notes and initial benchmark. Waianani Drilling and Ed Valera (surveyor) combined trigonometric leveling (using a total station and vertical angles) from Tanaka's work and a carpenter's level to get the initial height of casing.</td>
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**Kanoa TH**

USGS reports MP elevation of 305.22 ft for top of casing, based on leveling from nearby RM - 1-inch pipe (1/22/03). RM elevation of 304.50 ft provided by C. Takumi Engineering. No record of RM survey notes and initial benchmark. K. Tanaka set the 1/2-in. pipe using trigonometric leveling (using a total station and vertical angles).

**Kanoa 1**

Driller's well-completion report has elevation of 309.15 ft for top of pump base plate (5/29/99). No record of MP survey or initial benchmark.

**Kanoa 2**

Driller's well-completion report has MP elevation 281.83 ft for top of sounding tube (6/7/00). C. Takumi Engineering report (Aug. 2000) has 281.38 ft for top of sounding tube (Exhibit A, Mink & Yuen, 7/12/00).

**North Waihee 1**

USGS reports MP elevation of 285.23 ft for top of measuring tube, based on leveling from nearby RM - 3/4 inch pipe (8/12/97). RM elevation of 266.63 ft given by W.S. Unemori Engineering. No record of RM survey notes and initial benchmark in well folder, however, Unemori confirms this elevation from their notes. From information provided by Reed Ariyoshi of W.S. Unemori, and Wendy Taomoto, MDWS, the best estimate of the difference between the top of the casing prior to pump installation and the measuring tube after installation is 1.01 ft (old casing higher in elevation). As a result, the old mp for data prior to August 1997, 284.78 ft, is very close to the new measuring tube elevation plus 1.01 ft (284.77 ft).

**North Waihee 2**

Height of measuring point modified after pump installation. Measuring tube modified twice since pump installation in 1997 and leveling on 8/12/97. USGS reports MP elevation of 284.39 ft for top of measuring tube on 8/12/97. USGS reports MP elevation of 284.33 ft for top of measuring tube on 3/30/99 after first modification, based on measuring up from base plate elevation of 284.11 ft. Previous leveling on 8/12/97 and 3/30/99 are based on RM (3/4-inch pipe) elevation of 266.63 ft provided by W.S. Unemori Engineering. No record of RM survey notes and initial benchmark in well folder, however, Unemori confirms this elevation.
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<td>USGS reports MP elevation of 380.66 ft for top of 1.75-inch PVC casing, based on leveling from nearby RM - &quot;X&quot; chiseled in concrete at entrance to TH D shelter (8/23/85). RM elevation of 380.01 ft provided by Dan Lum, DOWALD (8/29/83). No record of RM survey notes and initial benchmark.</td>
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USGS reports MP elevation of 32.17 ft for top of casing, based on leveling from Wailuku Courthouse NGS benchmark elevation of 331.066 ft (4/17/97).

USGS reports MP elevation of 551.33 ft for top of 6-inch coupling, based on leveling from RM - 0.5 inch pipe located on the east side of the concrete foundation (4/11/75). RM elevation of 550.61 ft provided by Norman Saito Engineering, based on leveling from Wailuku Courthouse NGS benchmark (12/74). Dan Lum (DOWALD) provides elevation of 552.08 ft for top of 8-inch casing, and 551.15 ft for top of conductor pipe (5/14/74).

USGS reports MP elevation of 519.33 ft for top of casing, based on leveling from Waikapu 1 well MP elevation of 551.33 ft (6/21/83). DOWALD as-built drawing provides elevation of 519.47 ft for top of 20-inch casing.

USGS surveying on 12/29/03 to top of 6-inch threaded coupling welded to plate that is welded to the top of the 18-inch casing (highest point after removing plug). CWRM well completion report and Water Resources International as-built drawing provides elevation of 764.7 ft for top plate welded to 18-inch casing.

---

1 Revised well measuring-point elevations were determined by the USGS using vertical leveling from National Geodetic Survey benchmarks and reference marks in December 2003. NGS benchmark and reference mark elevations provided by NGS on 1/20/04. Leveling notes and photographs of the measuring points are available in well folders maintained by the USGS Hawaii District Office.

2 Difference calculated by subtracting the previous from the revised well measuring-point elevation.

3 All information contained in USGS well folder.

4 Maui Department of Water Supply refers to this well as Mokuau Pump 2 (Well 502) whereas Commission on Water Resource Management well index refers to this well as Mokuau 1.
COMMISSION ON WATER RESOURCE MANAGEMENT

FROM: GLENN TO: INIT.
ANAKALEA, P. KUNIMURA, I.
BAUER, G. NAKAMA, L.
CHING, F. NAKANO, D.
DANBARA, S. OHYE, M.
FUJII, N. SAKODA, E.
GOODING, K. SUBIA, S.
HARDY, R. SWANSON, S.
HIGA, D. UYENO, D.
ICE, C. YODA, K.
IMATA, R. YOSHINAGA, M.

DATE: JUN - 7 2005 SUSPENSE DATE: 

TO: INIT. TO: INIT. FOR: PLEASE:

APPROVAL SIGNATURE INFORMATION
SEE ME REVIEW & COMMENT TAKE ACTION
TYPE DRAFT TYPE FINAL FILE
XEROX ___ COPIES

SENT IN BY
GLENN L. SHEPHERD
477 SOUTH ALU ROAD
WAILUKU HAWAII 96793
Key Central Maui water source closing

Shaft 33, which provides nearly a quarter of needs, is too unsafe to operate.

By HARRY EAGAR
Staff Writer

WAILUKU — Shaft 33, part of an old plantation irrigation system that supplies almost a quarter of the water used in Central and South Maui, needs to be closed, because of the threat of collapse.

No specific proposals are on the table, but the Board of Water Supply was told recently that it would cost millions of dollars to replace the old pas sageway dug deep into the side of the slopes above Wailuku.

County Water Director George Tengan says a guessimate of $2 million each to replace three wells and pumps is not unreasonable. The request may

See SHAFT 33 on Page A5

From 406 feet up the slopes above Wailuku town, Shaft 33 descends deep into the side of the West Maui Mountains to a chamber where pumps draw from three wells in the liao aquifer.
The Islands

World Cities

National Cities


Tomorrow's surf forecast: Waves 3 - 5 ft.

All forecasts and maps provided by AccuWeather, Inc. ©2005


Precipitation Elsewhere

Sun and Moon

UV Index

The ultraviolet index is a guide to exposure to the sun. The higher the UV Index number, the greater the need for eye and skin protection.
Aquifer
Continued from Page A1

The stored water.
When that adit was being sunk in the late 1920s, a Honolulu bank was being torn down and the door was recycled. However, it cannot be opened, because of the pressure of the water behind it.
Lima and his crew service Shaft 33 quarterly, and they take precautions. These include testing for dangerous gases and carrying breathing equipment.
They also alert the Maui Fire Department before they go in.
Lima says he's never had any trouble in the 13 years he's been performing maintenance on the salinity. It was possible to pump so hard in the beginning because the Iao aquifer was not being exploited much.
Wailuku Sugar Co. used the shaft water only when ditch water failed. Shaft 33's output was sufficient to irrigate 2,000 acres.
According to Avery Chumbley, president of Wailuku Agribusiness Inc. (successor to Wailuku Sugar), the well was no longer pumped in the '80s after Wailuku Sugar initiated its unsuccessful switch to macadamia nuts and shut down the Wailuku Sugar Mill.

Two of these, Iao and Kualapuu, have been "designated" or taken under commission control for permits to withdraw water.
Sustainable yield is defined as the maximum rate at which water may be withdrawn from a source without impairing the utility or quality of the source.
"As stewards of the state's water resources, we must continually revisit and refine our estimates of groundwater availability as new technology and data become available," said Peter Young, chairman of the Board of Land and Natural Resources (which oversees the commission).
"It will affect management decisions on land use, population and industry growth for years to come."

Groundwater basal aquifers provide more than 90 percent of Hawaii's drinking water.

In Maui County, aquifers are the primary sources of drinking water for Molokai, Lanai, Hana and Central-South Maui. West Maui is sustained with a combination of groundwater and surface water, while Upcountry Maui depends primarily on surface water drawn from streams.

For Central and South Maui, Mayor Alan Arakawa is seeking to increase use of surface water formerly serving Wailuku Sugar Co. fields, but the move is being challenged by a group demanding restoration of stream flows for traditional uses such as taro growing, and to allow native stream fauna to recover.

Over the years, DLNR has drilled 10 deep monitor wells on Oahu, Maui and Hawaii, to observe properties of basal aquifers. The Honolulu Board of Water Supply and the U.S. Geological Survey also have deep monitor wells.

Work on a new deep well in Iao is scheduled to begin soon.
The wells monitor water levels in the aquifer and the concentration of salt in the water column.
Hawaiian islands are saturated with water, and because fresh water is lighter than salt water, the rain that seeps through the rocks forms a lens floating on the salt water that infiltrates from the ocean.
In a productive area like Iao Valley, the fresh lens is more than 600 feet deep.
The fresh water, being lighter, also is pushed above sea level. At the water department's recently dug shallow well at Wailuku, for example, the water table was 17 feet above sea level.

A standard hydrologic formula says that for every foot of water above sea level, there are 40 feet of fresh water below sea level.

Therefore, the fresh lens at Wailuku was about 680 feet deep before pumping began.
The midpoint is defined as the depth where salinity rises to 250 parts per million.
The depth of the transition or mixing zone, which can be scores of feet thick, is a key factor in understanding the health of the aquifer.

The commission's 1990 Water Resource Protection Plan uses a...
Shaft 33
Continued from Page A1
show up in the 2007 county budget.

Other costs, which could be considerable, are being discussed with the owner, Kehalani Mauka.

Shaft 33, also called Wailuku Shaft, was one of the assets acquired by Stanford Carr when he bought the stock of Brewer Homes. The county has been using it for years. Neither C. Brewer nor Carr has been paid for the county's access to the water source.

"It's just the good will of the company," says Tengan.

Carr needs water meters for the continuation of his housing projects at Kehalani, which at build-out will consume about 1.5 million gallons per day.

Both Kehalani and the Department of Water Supply have applied for withdrawal permits since the State Commission on Water Resource Management took control of (or "designated") the lao aquifer in 2003.

Although there has been some attempt by public witnesses testifying at commission hearings to present it as a conflict, neither of the parties thinks so. And they have gotten support from Dr. Lawrence Mike, the water commissioner who is taking the lead in the permit hearings.

A hearing in Wailuku in April, he indicated that the department will continue to get water, whatever the eventual arrangements between it and Kehalani.

The Wailuku Shaft was dug in 1945-47 by a Los Angeles oil drilling firm. As a well it was and is a resounding success. But the shaft - technically an adit, not a tunnel, because it has only one entrance - which is about 5 feet in diameter, was never sealed with Gunnite (a form of concrete that is blasted onto tunnel walls to strengthen and waterproof them).

Use of the shaft was abandoned around 1984 but restarted in 1992. Although some water department employees have been down it, they no longer enter it routinely, because of the hazard.

But Melvin Lima does.

"I don't see any risk except tripping and falling down," says Lima, who owns Mel's Waterworks in Honolulu and services underground systems throughout the state.

Shaft 33 is not nearly as scary as some others, Lima says. The spookiest is an old sugar plantation in Kau on the Big Island.

A huge adit penetrates deep into Lanaihale, the ridge to the north and east of Lanai City, to tap the high level aquifer that provide Lanai's fresh water. Well-lighted and roomy, it even supports a few ferns at its bottom, which also presents the startling spectacle of a system at the bottom of the shaft.

If there were a cave-in, according to Tengan, it might be possible to escape by a narrow, unlighted air shaft.

The Wailuku Shaft was sunk from the 406-foot elevation just above Wailuku and ends in a huge chamber (30 feet long, 22 feet wide and 58 feet high) whose floor is 26 ½ feet above sea level, which was the "head" of water in 1947.

The pressure of the lens of fresh water floating on the heavier sea water was then 26 ½ feet above sea level. To keep the pump room free of water, its floor had to be higher than the water.

Since then, heavy pumping has lowered the head of water in the lao aquifer to 10 feet or less, raising alarm about saltwater infiltration, because the head signals the depth of the fresh water beneath it. For every foot of fresh water above sea level, there are 40 feet below.

Wells that reach 200 to 300 feet below sea level could be spoiled if the midpoint (where the salinity begins to be a problem) rises to their level.

From the floor of the Shaft 33 chamber, three wells were sunk 150 feet into the aquifer. (Accounts in The Maui News from 1947 say those vertical shafts were extended another 70 feet, but today only 150 feet is used.)

The three wells were gushers. Powered by more than 2,000 horsepower, three pump engines collected 15 million gallons per

Back in those days, he noted, the Shaft 33 pumps consumed so much of the island's electricity that Wailuku Sugar would need to call Maui Electric Co. to alert its generator operators before the plantation would start its pumps.

In 1992, Shaft 33 was reopened because the county needed to back off pumping at Mokuhau, the wells developed by the county in the 1950s as Kahului began its growth spurt.

Demand on the north half of the lao aquifer increased even more after 1975, with the development of two large wells at Waiehu, as part of the Central Maui Source Joint Venture, the project that made possible the development of South Maui.

Originally planned to tap a water source believed to be capable of providing 36 million gallons a day, the Waiehu wells and a 36-inch transmission system running from Waiehu to Kihei was designed to supply the Wailea Beach Resort and the Makana Resort, with other smaller developments along the way allowed to tap the system, paying fees that compensated the joint venture partners.

But the new Waiehu wells drawing down the aquifer, along with increasing demand in the still-growing Kahului area, had a negative effect on the Mokuhau wells.

Water department engineers acknowledge that the Mokuhau wells were driven too close to each other — like three straws draining from the draw is high, the underlying salt water will begin to "upwell" or rise up to the point from which the water is being pumped.

The Shaft 33 wells were close together, too (just 10 feet apart), but they reached a very rich source of water and have been pumped more heavily with no signs of upwelling.

By the early '90s, however, demand on the overall lao aquifer had tripled over 30 years to nearly 20 million gallons a day, and wells throughout the system were exhibiting signs of stress.

At two monitoring sites in Waiehu, the level of the aquifer was down sharply. Test Hole E showed the height of the fresh water lens fell from 18 to 20 feet above sea level in 1984 to a low of 9 feet in 2003, although reduced pumping has boosted the level to 13 feet in 2005.

Test Hole B was at 18 feet in 1989, and is fluctuating between 9 and 12 feet in 2004-05.

Shaft 33 was pumped at an average of 5 million gallons per day beginning in 1992. The aquifer level went from a high of 17 feet in 1997 to less than 8 feet between 2003 and 2004, rising back to 12 feet this year.

After the 1975 estimates that the lao aquifer would be capable of producing 36 mgd proved overly optimistic, the legal sustainable yield of lao aquifer was reset at 20 mgd. Some critics think the actual sustainable yield is much less.
Key Central Maui water source closing
By HARRY EAGAR, Staff Writer
Sunday, June 05, 2005 8:46 AM

WAILUKU – Shaft 33, part of an old plantation irrigation system that supplies almost a quarter of the water used in Central and South Maui, needs to be closed, because of the threat of collapse.

No specific proposals are on the table, but the Board of Water Supply was told recently that it would cost millions of dollars to replace the old passageway dug deep into the side of the slopes above Wailuku.

County Water Director George Tengan says a guesstimate of $2 million each to replace three wells and pumps is not unreasonable. The request may show up in the 2007 county budget.

Other costs, which could be considerable, are being discussed with the owner, Kehalani Mauka.

Shaft 33, also called Wailuku Shaft, was one of the assets acquired by Stanford Carr when he bought the stock of Brewer Homes. The county has been using it for years. Neither C. Brewer nor Carr has been paid for the county’s access to the water source.

“It’s just the good will of the company,” says Tengan.

Carr needs water meters for the continuation of his housing projects at Kehalani, which at build-out will consume about 1.5 million gallons per day.

Both Kehalani and the Department of Water Supply have applied for withdrawal permits since the State Commission on Water Resource Management took control of (or “designated”) the Iao aquifer in 2003.

Although there has been some attempt by public witnesses testifying at commission hearings to present this as a conflict, neither of the parties thinks so. And they have gotten support from Dr. Lawrence Miike, the water commissioner who is taking the lead in the permit hearings.
At a hearing in Wailuku in April, he indicated that the department will continue to get water, whatever the eventual arrangements between it and Kehalani.

The Wailuku Shaft was dug in 1945-47 by a Los Angeles oil drilling firm. As a well it was and is a resounding success. But the shaft – technically an adit, not a tunnel, because it has only one entrance – which is about 5 feet in diameter, was never sealed with Gunnite (a form of concrete that is blasted onto tunnel walls to strengthen and waterproof them).

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A huge adit penetrates deep into Lanaihale, the ridge to the north and east of Lanai City, to tap the high level aquifer that provide Lanai’s fresh water. Well-lighted and roomy, it even supports a few ferns at its bottom, which also presents the startling spectacle of a blue bank vault door holding back the stored water.

When that adit was being sunk in the late 1920s, a Honolulu bank was being torn down and the door was recycled. However, it cannot be opened, because of the pressure of the water behind it.

Lima and his crew service Shaft 33 quarterly, and they take precautions. These include testing for dangerous gases and carrying breathing equipment.

They also alert the Maui Fire Department before they go in.

Lima says he’s never had any trouble in the 13 years he’s been performing maintenance on the systems at the bottom of the shaft.

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The Wailuku Shaft was sunk from the 406-foot elevation just above Wailuku and ends in a huge chamber (30 feet long, 22 feet wide and 58 feet high) whose floor is 26 1/2 feet above sea level, which was the "head" of water in 1947.

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The three wells were gushers. Powered by more than 2,000 horsepower, three pump engines collected 15 million gallons per day of pure water, with very low salinity.

It was possible to pump so hard in the beginning because the Iao aquifer was not being exploited much.

Wailuku Sugar Co. used the shaft water only when ditch water failed. Shaft 33’s output was sufficient to irrigate 2,000 acres.

According to Avery Chumbley, president of Wailuku Agribusiness Inc. (successor to Wailuku Sugar), the well was no longer pumped in the ’80s after Wailuku Sugar initiated its unsuccessful switch to macadamia nuts and shut down the Wailuku Sugar Mill.

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But the new Waiehu wells drawing down the aquifer, along with increasing demand in the still-growing Kahului area, had a negative effect on the Mokuhau wells.
Water department engineers acknowledge that the Mokuhau wells were driven too close to each other – like three straws drawing from the same point in an ice cream float – and heavy pumping aggravates upwelling in the aquifer.

The basal lens that is the Iao aquifer is a deep layer of fresh water floating on heavier salt water that lies under all of the islands. The fresh water comes from rain that percolates into the ground in the watersheds on the upper slopes of the island.

When a well draws from the fresh water lens, it reduces the weight of the fresh water at the point where the well draws water. If the pumping is not excessive, fresh water in the lens flows to replace what the well is taking. But when the draw is high, the underlying salt water will begin to “upwell” or rise up to the point from which the water is being pumped.

The Shaft 33 wells were close together, too (just 10 feet apart), but they reached a very rich source of water and have been pumped more heavily with no signs of upwelling.

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After the 1975 estimates that the Iao aquifer would be capable of producing 36 mgd proved overly optimistic, the legal sustainable yield of Iao aquifer was reset at 20 mgd. Some critics think the actual sustainable yield is much less.

Shaft 33’s 5 mgd is the single biggest source of water for Central and South Maui.

Ironically, since the mayor’s office regained control of water policy (with the change of the County Charter approved in 2002), the water department is now looking to utilize additional water from the ditches, although Shaft 33 was sunk in the first place to replace unreliable surface flows.

The difference is that the closing of Wailuku Sugar/Agribusiness has sharply reduced the demand for irrigation water.

Driven at a 30-degree angle, the shaft is 764 feet long, and penetrates 647 feet into the side of
the mountain, measured horizontally.

Tengan says discussions are close to a resolution over how to handle the abandonment and replacement of Shaft 33.

According to David Blane, a former county planning director who worked for Brewer Homes and now for Carr's SDC Development, drilling vertical wells in the same location would be a likely choice, because it would almost guarantee hitting the big, rich source again.

The department is also working to spread out pumping in the Iao aquifer, not to increase the total draw but to better manage the resource and prevent upwelling at any single source.

The amount needed from the replacement wells could be less than 5 mgd, according to how successful new wells at Waikapu and Iao Tank prove.

In any case, the state commission cannot permit withdrawal of more than 20 mgd, so new sources must be found somewhere else.

Kehalani will have to pay for source development of the 1.5 mgd it wants and also for closing Shaft 33.

Tengan says it may not be necessary to completely refill the shaft. Whether environmental regulators will agree to allowing Kehalani Mauka/Carr to abandon the machinery underground remains to be determined.

The machinery could be brought out, says Lima, but it would be "a big job."

It probably would be bigger than installing the equipment in a deep hole in the ground in the first place.

When Wailuku Sugar announced it would seek to tap Iao groundwater – the first significant use of that resource – the cost was estimated at $200,000.

But by the time the water flowed, the cost had risen to $500,000.

"That's not unusual, even today," says Tengan.

Harry Eagar can be reached at heagar@mauinews.com.

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COMMISSION ON WATER RESOURCE MANAGEMENT

FROM: Charley
DATE: 23 Sep 02

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Purpose? MOWS not reporting? Yes, they are. We learned that HLF is the owner, and wanted to officially acknowledge their responsibility.

O.K.
Mr. Rick Prahler  
Hawaii Land and Farms  
745 Fort Street, #2110  
Honolulu, HI 96813  

Dear Mr. Prahler:

Water Use Reporting Notice  
Wailuku Shaft “33” (Well No. 5330-05)

We understand that Hawaii Land and Farms is the current owner of Wailuku Shaft or “Shaft 33”. The well owner bears the responsibility for reporting use of their wells, pursuant to § 13-168-7, HAR.

However, it is our understanding that there is some agreement in place for the Maui Department of Water Supply to use this well, and we are, in fact, receiving water use reports for this well from them. Should this situation change, please continue to report any use from this well on the enclosed form.

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

Sincerely,

LINNEL T. NISHIOKA  
Deputy Director

CI: ss  
Enclosure
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FROM: LINNEL  DATE: 9/00  SUSPENSE DATE  

Please file

Well 5330-05

Thanks

Maybe I am not so bad right now?  Good job Todd.

What was measuring WT before?  Wasn't it GS, and what did they use then?
March 24, 2000

Mr. David R. Craddick, Manager
Department of Water Supply
County of Maui
P.O. Box 1109
Wailuku, Hawaii 96793-7109

Dear Mr. Craddick:

The USGS is currently monitoring water levels in Shaft 33 (Well 5330-05) manually and using a data recorder and pressure transmitter (supplied by your department). However, there appears to be a problem with the transmitter. Since about January 1999, the water level recorded from your transmitter has steadily drifted lower than the manual measurements. Currently, it is recording water levels about 1 foot lower than the true measurements. Simple line stretch or slippage would show recorded water levels higher than the manual measurements, which is the opposite of what we are detecting. Todd Presley of our office called the transmitter manufacturer (Keller) and they offered little immediate help other than to suggest opening up the transmitter and seeing if there is an obvious problem. They did say that they would recalibrate old transmitters. We will continue with periodic manual measurements but discontinue recording the transmitter readings because we can no longer be confident of the quality of the data.

On another matter related to water-level monitoring, we have been unable to locate a suitable well in the Haiku area to be used for making periodic water-level measurements. Therefore, we would like to substitute by monitoring the Kanoa Observation well in the Waihee area and wait until a monitoring well is drilled in the Haiku area before we collect more data there.

If you have any additional questions, please feel free to call Steve Gingerich or me at our office at 522-8290.

Respectfully,

Gordon Tribble
District Chief

cc: Commission on Water Resources Management
Dear Mr. Nishioka,

This letter is in regards to the Wailuku Shaft 33. Wailuku Agribusiness has been reporting its use over the past months. We no longer own Wailuku Shaft 33. Please refer all matters concerning Shaft 33 to Hawaii Land and Farming.

Should you have any questions concerning this please call me at 244-2208.

Sincerely,

Clayton Suzuki
Land Manager
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FYI -

Thanks, Neal!

Could you call Todd Presley at 8865
37 let him know owner is Wailuku Ag

[Signature]
11-1-99

contact person

James Turner
October 28, 1999

MEMO TO THE FILE

FROM: Neal Fujii

SUBJECT: Wailuku Shaft 33 Pumping Status

On October 28, 1999, I spoke with Mr. Clayton Suzuki of Wailuku Ag. He concurred that Wailuku Shaft has been returned to Wailuku Ag. from Maui DWS. He stated that Wailuku Ag. is NOT using Wailuku Shaft and has no plans to do so in the future.

I also told him to expect a letter from our office requesting water use data from both surface and ground water. He was very cooperative and agreed to share what data they had. I thanked him and hung up.
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what is going on? Ed, can we meet w/Pac on this. Yes. I recall Aivers understood our minimum requirement to deal acceptably. Sounds like Pac taking a stronger position now. How do they justify/allow any other shaft on the State, Hekawa, Shaft 3 (Lahaina), etc. Dalt S&D branch usually recommends on the conservative side. I don't know if they would insist on it.
Mr. David R. Craddick, Director  
Department of Water Supply  
County of Maui  
P. O. Box 1109  
Wailuku, Hawaii  96793-7109  

Dear Mr. Craddick:  

SUBJECT: PERMANENT UTILIZATION OF SHAFT 33 AS A WATER SOURCE  

We have reviewed your letter dated November 14, 1997 regarding the proposed usage of new well(s) which would be drilled vertically into the existing Shaft 33 well(s). Your letter also states that "The State Water Commission staff is considering authorizing sealing only the area of the tunnel that is 50 feet vertically below the surface, the unused wells, and the annular space of the new well or wells." We have contacted the State Water Commission and verified that the 50 feet vertical restriction is a minimum requirement to authorize the sealing of the tunnel. However, the Safe Drinking Water Branch recommends that the whole tunnel be sealed properly.

The proposed new sources of potable water must be approved by the Director of Health prior to its use. Such an approval is based primarily upon the submission of a satisfactory engineering report which addresses the requirements set in Section 11-20-29.

If you should have any questions, please contact the Safe Drinking Water Branch, Engineering Section, in Honolulu at 586-4258 or call toll free direct from Maui at 984-2400, ext. 64258.

Sincerely,

WILLIAM WONG, P.E., CHIEF  
Safe Drinking Water Branch  
Environmental Management Division

Warren Unezumi has the job, and requested a copy of the Standards (sent). He's trying to get in touch with Bill Wong and is wondering about practical alternatives (different materials)... Unezumi's geotechnical advice is that hydrostatic pressure could build up on the lower seals (?)

Let's wait for WEP modification application. This
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Candidate told Queenie that the 50-foot tunnel seal was the maximum to be allowed rather than the minimum. She also did not realize that they would be drilling into the existing works.
November 14, 1997

William Wong, P.E., Chief
State of Hawaii
Department of Health
Safe Drinking Water Branch
Environmental Management Division
P. O. Box 3378
Honolulu, Hawaii 96801

Dear Mr. Wong:

We need to know your concerns with the permanent utilization of Shaft 33 as a water source.

Wailuku Shaft has been in use as a temporary facility since 1991. We are looking at using one or two of the wells on a permanent basis. Wells would be drilled vertically into the existing wells and the tunnel shaft and pump room abandoned. Homes, roads, potable waste, and storm water lines could intersect the vertical plane of the tunnel.

The State Water Commission staff is considering authorizing sealing only the area of the tunnel that is 50 feet vertically below the surface, the unused wells, and the annular space of the new well or wells. This would leave a direct conduit for water traveling the 50 feet vertically to go directly to the pump room floor which is at 10 feet above the water table.

The enclosed drawing shows a plan and cross sectional view.

Sincerely,

David Craddick, Director
DC/jaw
Enclosure

copy: George Y. Tengan
Engineering
Seth Bakes
Avery Chumbley
Rae M. Loui

"By Water All Things Find Life"
# Facsimile Transmittal

**DATE:** 12/4/97  
**NO. OF PAGES (w/cover sheet):** 3

**TO:**  
**OFFICE:** DLNR

**FAX:** 587-0219  
**PHONE:**

**FROM:** Queenie Kemori  
**OFFICE:** DOH/SDWB

**PHONE:** (808) 586-4258  
**FAX:** (808) 586-4370

**MESSAGE:**

```
Biff.
master
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**NOTE:** If this transmittal was illegible or incomplete, please call the sender.
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This seems to say that independently of the use of shift 33—
any land use above the acd features does the required water
the shaft will only not serve as a source but should be
sealed

- See in file.
November 14, 1997

William Wong, P.E., Chief
State of Hawaii
Department of Health
Safe Drinking Water Branch
Environmental Management Division
P. O. Box 3378
Honolulu, Hawaii 96801

Dear Mr. Wong:

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The enclosed drawing shows a plan and cross sectional view.

Sincerely,

David Craddick, Director
DC/jaw
Enclosure

“By Water All Things Find Life”
Report of Committee in Charge of the Experiment Station

HAWAIIAN SUGAR PLANTERS' ASSOCIATION
For the Year Ending September 30, 1948

HONOLULU, HAWAII
1948
Weiluku Shaft Produces Irrigation Water

A shaft with three drilled wells has been completed by the Weiluku Sugar Company at Weiluku, Maui, and has been successfully tested at maximum pump capacity of 15 mgp.

The well was originally designed as a shaft and skimming tunnel or "Mau-type" well, with the tunnel a little below sea level or about 30 feet below static water level. The wells which were drilled from a chamber at the bottom of the shaft, are about 300 feet deep and are 25 inches in diameter at the top and 20 1/2 or 22 inches in diameter at the bottom.

They are equipped with deep-well pumps set at 80-foot depth with 20-foot suction pipes.

Wells Nos. 1 and 2 were first tested on December 8, 1947, and well No. 3 was pumped January 21, 1948. So far, the longest pumping period has been 72 hours. At the end of this period the maximum drawdowns from the original 20-foot head were 11.9, 13.1 and 13.2 feet, respectively. In the three wells, the specific capacities of the wells, figured from these drawdowns, are the very large amounts of 380,000 to 420,000 gallons per day per foot of drawdown.

Kuhuva Well Proves Unsuccessful

A wildcat well has been sunk into the 2100-foot head perched artesian water at Naliku, Maui by Camay Drilling Company for East Maui Irrigation Company. Air-lift pumping has demonstrated a specific capacity of only 1250 gallons per day per foot drawdown, too low to be economical.

The well was drilled from an altitude of 1200 feet to a total depth of 1430 feet. It was cased for 918 feet, and the casing was sealed into the upper confining bed. When the well was 349 feet deep it was tested with an air-lift pump. The water stood at a depth of about 230 feet or an altitude of about 1140 feet. With a drawdown of 200 feet the well yielded a quarter of a million gallons per day.

The additional depth of the main hole was drilled deliberately to penetrate the peehing bed in order to increase, if possible, the drawdown so as to wash any possible mud from the walls of the well.
This Is--(Gulp)--Interesting

If you are a farmer or a conservation man, the well of the Wailukua Sugar Co. on Maui is something you might want to see.

But a warning: a trip to the well is not for the casual sightseer. It is uncomfortable, tiring and frustrating if you don't like being in confined spaces. The stone structure has an accommodating bent at the entrance, not enthusiastic about human beings.

If you're an average person, who just wants to see a well which is based on that sort of thing for you, you're in for a surprise. You'll have a hard time understanding what they're doing. And you'll have a hard time understanding what they're doing if you don't have a knowledge of the place.

They will show you, where a good-size bore hole was sunk for a sugar plant, there was a new hole drilled, and a new well was put in. The old well was taken down, and it was taken down for a new one. The old well was taken down for a new one, and the new one was put in. The old well was taken down for a new one, and the new one was put in.

This well is very interesting, and it is very interesting if you know what you're doing. It is very interesting if you know what you're doing, and it is very interesting if you know what you're doing if you have a knowledge of the place.

February 12, 1946.
Mr. Dan A. Davis
U. S. Geological Survey
333 Federal Building
Honolulu 14, Hawaii

Dear Sir:

This letter is in reply to your request for consent on the applicability of rotary drilling to Hawaiian conditions. My experiences with rotary drilling consist in more or less close connections with six drilling contracts, at as many sugar plantations for a total of 20 wells, in the last 10 years.

The first of these contracts, let by Hawaiian Agricultural Co. to Camay Drilling Co., called for the drilling of two wells from a chamber at the bottom of a shaft, at altitude of about 230 feet to slightly below sea level. These wells developed a ground-water body with a water level known to be approximately at shaft chamber level but of unknown depth. They were drilled with mud. I was not present at the testing, but the wells deliver several hundred gpm enough to individual deep-well pumps. The drawdown cannot be measured in the wells themselves, but, when measured in a drill hole between them it is to be measured in inches. The wells are about 17½ inches diameter and about 10 feet apart. I believe there were no special difficulties encountered in their drilling, and no difficulties with installing the casing and pumps, which, at one time, were run down the wells.

The second contract, let by Pepeekeo Sugar Co. to Camay Drilling Co., called for two wells to be drilled from surface at between 250 and 300 feet, to 30 feet below sea level. One was to pass through a chamber at the base of a shaft, the construction of which was halted by high level water, believed by me to be perched water, but hoped by the plantation to be deep confined water of the sort described at Pahala (Hamun, Agr. Co.). The drilling was done in a similar manner to that at Pahala, and was performed very expeditiously, except for difficulties introduced by drilling through the chamber. Testing was done with an airlift pump, and the very small yield with a very great drawdown, 75 or 100 feet confirmed, I thought, the perched nature of the water. The drilling mud was so tight on the sides of the hole that the water level remained high through several pumping cycles. Eventually it washed off the sides of the hole below the perching member, and allowing the perched water to drain, permitted the water level to drop. It should be noted that this trouble with the drilling and stemmed from the fact that the head outside the hole below the perching member was never greater than the head inside, that is, there was no drawdown below the perching member.

The third contract was let by Wailuku Sugar Co. with Camay Drilling Co. for drilling three holes from a chamber at the base of a shaft about 30 feet above sea level to about 300 feet depth. The holes were 2½ inches diameter at the top and 17½ at the bottom, and were spaced 8 feet apart in a line. No special difficulties were encountered in the drilling. These wells were drilled with mud, which was washed out to the extent that the drawdowns decreased for about ½ hour of pumping. Color remained noticeable for a few hours of pumping, as I remember. These wells deliver 5 mgd splitwise, and when operated simultaneously they are drawn down about...
Mr. Dan A. Davis, Honolulu

-2-  

August 6, 1956

10 feet. This is the highest yield for comparable wells of which I am aware.

The fourth contract was let by East Maui Drilling Co. with Casey Drilling Co. for drilling a single 12 1/8 to 17 1/2 inch wildcat hole from about 1400 feet elevation. The well was eventually drilled to sea level, the third deepest well ever drilled in the islands, I believe. The drillers had considerable difficulty in the hard, fresh, lava of the East Maui ditch country where the hole was located. Bit consumption was very high, and there were several twist-offs. The ground-water body being investigated was a high-level, perched, artesian body, of unusual hydrography, previously studied by small diameter diamond-drill holes. The head in the aquifer was less than 300 feet below the surface, but the aquifer was several hundred feet below that. The well was drilled with mud. The capacity of the well was very disappointing, about 100 gpm with a drawdown of over 100 feet, as tested by airlift pumping. It is conceivable that mud plugging might have accounted for the low yield, but visible mud discharge terminated during the test. It is believed more likely that the aquifer itself was tight.

The fifth contract was let by Wailana Agricultural Co. to Pacific Drilling Co. for 11 wells of 12-inch diameter, each 40 to 50 feet deep. Although very hard rock was expected and encountered, there was no difficulty experienced with the drilling. One hole penetrated very massive impervious rock and two more were drilled on the wrong side of a geologic contact and penetrated swamp sediments. One well is used only as a water-level observation well. The other seven wells deliver an estimated 6 gpm with a drawdown of 1 foot. The yield is estimated because it is only a part of the yield of a larger battery of wells, all emptying into a trench. The Wailana wells were drilled partly using mud and partly with airlift pumping of the cuttings. With this system, there is no mud used, and there is always a drawdown in the hole to prevent even lodging of the cuttings. These wells are evidently successful.

The last contract was let by Lahaina Plantation Co. with Pacific Drilling Co. for a 9 inch test well to be enlarged to 12 inches if capacity warranted. The well was drilled from an altitude of about 250 feet, and eventually extended to about 450 feet below sea level. The rotary drilling contractor was selected because he offered to drill the smaller diameter pilot well first at an extra cost. The well was never enlarged because the capacity did not warrant it. The well was drilled with mud, and cleaned out by airlift pumping. The limitation on capacity was shown by interference shown in a nearby test hole to result definitely from low permeability in the aquifer rather than any well plugging. No difficulty was experienced in the drilling.

I would summarize our experience by saying that for some holes, particularly those that would require drilling with mud and in which the measurement of water levels or the testing of complicated hydrology is necessary, rotary drilling would not be satisfactory. For other holes, particularly those that can be drilled with air and in which pilot-hole drilling is of advantage, rotary drilling has been preferred. For many holes, rotary drilling must compete with churn drilling on the basis of price alone. Our early experience seemed to indicate that rotary drilling costs would be high, but more recent experience has reversed this impression.

If you should need more extensive or exact data than that furnished above, please let me know.
Mr. Dan A. Davis, Honolulu

August 6, 1956

Yours very truly,

EXPERIMENT STATION, HSPA

By

Dorak C. Cox
Geologist

DCU:bs
cc: Project File - 2
REAR (SOUTH) ELEVATION

Scale: 1"=40'

SIDE (WEST) ELEVATION

Scale: 1"=40'

WALUKE SHAFT

#230-09
SIDE (WEST) ELEVATION
Scale: 1"=40'
Mr. David Craddick, Director  
Department of Water Supply  
County of Maui  
200 S. High Street  
Wailuku, Hawaii 96793

Dear Mr. Craddick:

Abandoning Wailuku Shaft 5350-05

We received your August 5, 1997 request for clarification on rules for abandonment of Wailuku Shaft. We understand you nonetheless expect to continue use of the wells accessed by the shaft.

The Well Standards for abandoning are intended to prevent contamination of ground water from surface sources, and the method addresses the usual situation of a cased well shaft. The Standards specify backfilling the shaft with cement for a complete seal.

It is not clear to us exactly how the Wailuku Shaft situation may differ. Please submit a recommendation explaining how to seal the Shaft while still maintaining function of the wells.

If you have any questions, please call Charley Ice at 587-0251 or toll-free at 984-2400 (Maui), extension 70251.

Sincerely,

RAE M. LOUI  
Deputy Director

CI:ss
August 5, 1997

Honorable Rae M. Loui, Deputy Director
State of Hawaii
Department of Land & Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu, Hawaii 96809

Dear Ms. Loui:

We would like to know Commission rules for abandonment of Wailuku Shaft as an entrance to the Wailuku Shaft wells. The wells would be used in the continued supply of potable water after the shaft is abandoned.

Your early response in this matter is appreciated.

Sincerely,

David Craddick, Director
DC/jaw

c:  George Y. Tengan
    Eric Okazaki
    Engineering

"By Water All Things Find Life"
DECLARANT/SOURCE FILE/CROSS REFERENCES

DECLARANT: Wailuku Agri (not Maui DWS)

SOURCE FILE #: STR TITLE/FILE NAME: #5330-05

SEE OTHER DECLARATIONS FOR SAME SOURCE/SAME PARCEL:

Roy 12-7-95 field inspection report filed in declaration file with photos & blueprint - Re inspected 4/30/96 by G.B.

(new folder started 5/96) 55

(Handwritten notes on the page.)
May 1, 1996

MEMORANDUM FOR THE RECORD

FROM: Glenn Bauer

SUBJECT: Resistivity Logging at Waiehu Monitor Well and Shaft 33

On April 30, 1996 Mitch Ohye and I ran the fluid resistivity logging tool down Waiehu Monitor well located within the Iao Aquifer System. Normally the thief sampler collects water samples at prescribed depths on a quarterly basis, but because the sampler is under repair, the opportunity arose to use the fluid resistivity tool to create a detailed profile of the lens. Although the instrument provides a continuous measure of salinity (fluid resistivity as ohmeters) with depth, we recorded resistivity every five feet from elevation 0 to elevation -1000 feet msl.

The attached graph shows the results of the resistivity log as well as the chloride samples collected by the USGS in January 1996. As can be seen from the graph, fluid resistivity is sensitive in the fresh water portion of the lens and is much less sensitive in salt water. The major break shown in the chloride concentrations at -400 feet msl and at -625± feet msl are clearly shown. The location of lens’ mid-point is not clear from the fluid resistivity, but is found (for January 1996) by interpolating for 9,500 mg/l between the sampling depths (-675 and -750 feet msl) using the chloride data.

I believe that the use of the resistivity tool, in conjunction with sampling, will provide a better way to monitor the Iao Aquifer System at the Waiehu Monitor well. Fluid resistivity should be done twice a year—perhaps during the winter and during the summer when the demand for water is much greater.

Mitch and I also arranged with Eric Okazaki of Maui DWS to visit Shaft 33. We also checked the USGS water level measuring transducer install in the pump room. Of the three 800 HP motors in the pump room, only one is on at 3,700 gpm. Apparently the pump runs 24 hours, but is shut down every two months for maintenance. The transducer should record the recovery.

Within the incline portion of the shaft, the contact between a boulder conglomerate and the underlying Wailuku Basalt was observed. The contact is about 375 feet from the shaft’s portal on a 30° incline. Horizontal distance from the portal is to the projection of the contact on the land surface is 325± feet. Depth to the contact in the incline shaft is about 187 feet.
Waiehu Monitor Well, Iao Aquifer
Elevation vs Fluid Resistivity 4/30/96

Chloride concentrations are from samples collected by the USGS in January 1996.

Interpolated lens mid-point in January 1996 is 728 ft. msl.
Assumed reference point altitude 30.04 ft; Assumed resistor value of 130.8 ohms
### Test boring Maui T102—Continued.

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### Test boring Maui T102 (Puu Hele). Wailuku Sugar Co. 2 miles north of Maui. Measurements for January through October adjusted to correct for stretch in measuring line. Records available: 1940-46.

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<td>305.4</td>
<td>26</td>
<td>July 16</td>
<td>6.0</td>
</tr>
<tr>
<td>Feb. 18</td>
<td>7.3</td>
<td>305.8</td>
<td>25</td>
<td>Aug. 15</td>
<td>5.9</td>
</tr>
<tr>
<td>Mar. 16</td>
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<td>306.5</td>
<td>25</td>
<td>Sept. 15</td>
<td>5.8</td>
</tr>
<tr>
<td>Apr. 16</td>
<td>7.0</td>
<td>306.5</td>
<td>29</td>
<td>Oct. 16</td>
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</tr>
<tr>
<td>May 14</td>
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<td>306.6</td>
<td>19</td>
<td>Nov. 16</td>
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</tr>
<tr>
<td>June 15</td>
<td>6.3</td>
<td>306.4</td>
<td>23</td>
<td>Dec. 15</td>
<td>6.1</td>
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### Test boring Maui T112. Wailuku Sugar Co. 0.5 mile southwest of Wailuku. Measurements for January through September adjusted to correct for stretch in measuring line. Measurements for October, November, and December from automatic water-stage recorder. Records available: 1944-46.

<table>
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<tr>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
</tr>
</thead>
<tbody>
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<td>27.4</td>
<td>429.7</td>
<td>14</td>
<td>July 16</td>
<td>25.2</td>
</tr>
<tr>
<td>Feb. 16</td>
<td>27.0</td>
<td>430.1</td>
<td>16</td>
<td>Aug. 15</td>
<td>22.0</td>
</tr>
<tr>
<td>Mar. 18</td>
<td>26.7</td>
<td>430.4</td>
<td>16</td>
<td>Sept. 15</td>
<td>22.8</td>
</tr>
<tr>
<td>Apr. 16</td>
<td>26.3</td>
<td>430.8</td>
<td>16</td>
<td>Oct. 15</td>
<td>19.6</td>
</tr>
<tr>
<td>May 14</td>
<td>25.7</td>
<td>431.4</td>
<td>13</td>
<td>Nov. 16</td>
<td>21.9</td>
</tr>
<tr>
<td>June 15</td>
<td>24.0</td>
<td>435.1</td>
<td>12</td>
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<td>22.5</td>
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<table>
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<th>Chloride</th>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
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<td>163.12</td>
<td>101</td>
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<td>99</td>
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<td>17.14</td>
</tr>
<tr>
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<td>17.70</td>
<td>163.39</td>
<td>102</td>
<td>Sept. 15</td>
<td>16.83</td>
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<td>Apr. 16</td>
<td>17.71</td>
<td>163.58</td>
<td>100</td>
<td>Oct. 15</td>
<td>16.64</td>
</tr>
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<td>May 14</td>
<td>17.60</td>
<td>163.49</td>
<td>102</td>
<td>Nov. 16</td>
<td>16.14</td>
</tr>
<tr>
<td>June 15</td>
<td>17.37</td>
<td>163.72</td>
<td>106</td>
<td>Dec. 15</td>
<td>16.28</td>
</tr>
</tbody>
</table>

### Shaft 33. Wailuku Sugar Co. 0.5 mile southwest of Wailuku. Measurements discontinued. Records available: 1944-47.

#### ISLAND OF MOLOKAI

Total ground-water pumpage on Molokai for 1948 was 46 million gallons, or 29 million gallons greater than in 1947.

### Water levels, in feet, in observation wells in Molokai


<table>
<thead>
<tr>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
</tr>
</thead>
</table>
| Feb. 7 | 33.75 | 39.38 | ... | May 14 | 33.70 | 39.55 | ...
| Feb. 8 | 34.75 | 39.48 | ... | May 15 | 34.45 | 39.78 | ...
| Feb. 11 | 34.80 | 39.45 | ... | July 19 | 34.35 | 39.87 | ...
| Mar. 16 | 35.68 | 38.68 | ... | Aug. 26 | 4.15 | 39.07 | ...

- **Pumping.**

- **Hulapue well.** 2.7 miles east of Kamalo well. Records available: 1938-48.

<table>
<thead>
<tr>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
<th>Date</th>
<th>Water level</th>
<th>Chloride</th>
</tr>
</thead>
</table>
| Feb. 7 | 5.31 | 36.40 | ... | May 30 | 4.99 | 36.72 | ...
| Mar. 11 | 5.27 | 36.44 | ... | July 19 | 5.01 | 36.70 | ...
| Mar. 16 | 5.03 | 36.70 | ... | Aug. 26 | 4.73 | 36.88 | ...
| May 14 | 4.80 | ... | ... | ... | ... | ... | ...
Mr. R. M. Allen, Manager
Walluku Sugar Co.
Walluku, Maui

Dear Mr. Allen:

I would further suggest that good horizontal surveys be made as soon as the cane is harvested in the area, with the following suggestions for measurement at the Walluku Shaft.

1. Closer measurement of drawdown in wells.
   In the base of each pump, drill a hole through which to lower a steel tape.
   W.T. Wong says 3/8" holes would be sufficient, but 1/2" holes might be better.
   The holes must be placed so that the tape can be lowered 15 feet, without meeting an obstruction. These holes could be tapped for pipe plugs so that they can be closed when not in use.

2. Surveys:
   While the above measurement is satisfactory at present, measurements in the future will be of greater importance.
   There are no surveyed horizontal ties at present between the three drilled wells in the shaft and the Field 63 test hole, nor between the test hole, and the same test hole. Such ties should be a matter of course. Determinations of permeability of the Walluku aquifer depend on distances between the various holes which are presently only roughly obtained. W.T. Wong estimates that it would take a 3-man crew perhaps a week to make the necessary survey at present. It would have required a great deal of time when the cane was small in Field 63, and it will require less when the Field 63 is harvested, but that may be too late to provide answers to the problem of further water development if it is needed immediately.

I would suggest that the following values be established now:

1. The exact distances between each of the three walls.
2. The deviation from vertical in each of the wells, and its direction, as well as known.
3. The approximate azimuth of the line through the three wells.
4. The approximate distance and azimuth from the northeastern most of the wells to the Field 63 test hole. There is no tie between the walls and the shaft survey, and the tie between the shaft and Field 63 is by stadia, but I should think the distance could be established fairly easily within a 5-foot error.

January 22, 1948

Mani Shaft 33
MANAGER'S OFFICE
WAILUKU SUGAR COMPANY

Dear Sir:

Herewith, are the salt content of the Wailuku Shaft and the depth of the Iao Well and Field 63 Hole, and also the gage reading of the shaft water which we gathered since you left here.

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Depth (ft)</th>
<th>Salt Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 11</td>
<td>3:15 am</td>
<td>425.94</td>
<td>1.25 grains/lt</td>
</tr>
<tr>
<td></td>
<td>9:55</td>
<td>1.15</td>
<td></td>
</tr>
<tr>
<td></td>
<td>10:55</td>
<td>1.20</td>
<td></td>
</tr>
<tr>
<td></td>
<td>12:50 pm</td>
<td>1.15</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3:45</td>
<td>1.10</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Depth (ft)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 12</td>
<td>4:25 am</td>
<td>425.82</td>
</tr>
<tr>
<td>Dec. 13</td>
<td>4:25 am</td>
<td>425.90</td>
</tr>
</tbody>
</table>

Yours truly,

Mr. D. A. Davis

Field 63 Manager

January 27, 1949

P.S. Check the first measurement for 6:15 am. We missed it.
**Field 55 Measurement**

(Deep, ft.)

<table>
<thead>
<tr>
<th>Dec. 11</th>
<th>Dec. 12</th>
<th>Dec. 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:45 am</td>
<td>429.42 ft.</td>
<td>8:30 am</td>
</tr>
<tr>
<td>9:45 am</td>
<td>429.60</td>
<td>9:30 am</td>
</tr>
<tr>
<td>10:45 am</td>
<td>429.85</td>
<td>10:30 am</td>
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<tr>
<td>11:45 am</td>
<td>429.97</td>
<td>11:30 am</td>
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<tr>
<td>12:45 pm</td>
<td>439.30</td>
<td>12:30 pm</td>
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<tr>
<td>1:45 pm</td>
<td>439.80</td>
<td>1:30 pm</td>
</tr>
<tr>
<td>2:00 pm</td>
<td>430.06</td>
<td>2:00 pm</td>
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</table>

**Cage Reading and M.D.D.**

<table>
<thead>
<tr>
<th>Dec. 11</th>
<th>Dec. 12</th>
<th>Dec. 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:50 am</td>
<td>0.96</td>
<td>8:40 am</td>
</tr>
<tr>
<td>9:00 am</td>
<td>0.77</td>
<td>8:43 am</td>
</tr>
<tr>
<td>9:15 am</td>
<td>0.97</td>
<td>9:08 am</td>
</tr>
<tr>
<td>9:30 am</td>
<td>0.97</td>
<td>9:10 am</td>
</tr>
<tr>
<td>9:45 am</td>
<td>1.50</td>
<td>9.69</td>
</tr>
<tr>
<td>10:00 am</td>
<td>1.48</td>
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<tr>
<td>10:15 am</td>
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<td>10:30 am</td>
<td>1.49</td>
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<tr>
<td>11:00 am</td>
<td>1.48</td>
<td>9.91</td>
</tr>
<tr>
<td>12:00 am</td>
<td>1.48</td>
<td>9.91</td>
</tr>
<tr>
<td>12:05 pm</td>
<td>stop</td>
<td>2:15 pm</td>
</tr>
<tr>
<td>2:00 pm</td>
<td>0.96</td>
<td>1.12</td>
</tr>
<tr>
<td>Pumped into upper ditch at 11:40</td>
<td>1.25</td>
<td>2:15 pm</td>
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<tr>
<td></td>
<td></td>
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<td>3:13 pm</td>
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<td>8.91</td>
</tr>
<tr>
<td>3:10 pm</td>
<td>stop</td>
<td>2:15 pm</td>
</tr>
</tbody>
</table>

**Diagram**

[Diagram not shown]

**Mr. D. A. Davis**

**January 21, 1948**

**Yours truly,**

[Signature]

[Dr. N. G. Wong]

**W H O : so**

**Cc: Mr. D. A. Davis**
Wailuku Sugar Co. Shaft
Discharge Measurements

Discharge measured by Parshall flume at Shaft entrance.

<table>
<thead>
<tr>
<th>Time</th>
<th>Gage Height</th>
<th>Discharge MGD</th>
<th>Pumps Running</th>
<th>Remarks</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>12-9-47</td>
<td></td>
<td></td>
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<td></td>
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</tr>
<tr>
<td>2:50 P</td>
<td>0.72</td>
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</tr>
<tr>
<td>2:54</td>
<td>0.80</td>
<td>3.66</td>
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<td></td>
</tr>
<tr>
<td>2:55</td>
<td>0.78</td>
<td>3.62</td>
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<td>3:01</td>
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</tr>
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<td>3:05</td>
<td>0.78</td>
<td>3.52</td>
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<td>3:08</td>
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<tr>
<td>Time</td>
<td>Gage Height</td>
<td>Discharge MGD</td>
<td>Pumps Running</td>
<td>Remarks</td>
<td></td>
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<tr>
<td>-------</td>
<td>-------------</td>
<td>---------------</td>
<td>---------------</td>
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<tr>
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<td>4.39</td>
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<td>1:35</td>
<td>0.88</td>
<td>9.24</td>
<td>Me 1&amp;2</td>
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<tr>
<td>1:40</td>
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<td>4.32</td>
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<td>8.91</td>
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<td>1:47</td>
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<tr>
<td>2:00</td>
<td>0.88</td>
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</tr>
<tr>
<td>12-11-47</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9:15 A</td>
<td>0.97</td>
<td>4.93</td>
<td>No. 1</td>
<td>Temp of Water at 9:00 = 73° F.</td>
<td></td>
</tr>
<tr>
<td>9:45</td>
<td>1.50</td>
<td>9.69</td>
<td>No. 1&amp;2</td>
<td>Temp of Water = 72°</td>
<td></td>
</tr>
</tbody>
</table>

Note: Temperature of water measured at discharge of water from pipe into concrete lined flume with Tycoos 0-220° F. thermometer with 2° graduations.
Records furnished by Wailuku Sugar Co.

(Altitude of temporary M.P., at the level of the proposed pump-chamber floor, is 29.45 ft., 370.55 ft. below land-surface datum.)

Shaft 33. Wailuku Sugar Co. 0.5 mile southwest of Wailuku, in field 63 at Wailuku Sugar Co. Latitude 20°53'07", longitude 156°30'47". Still under construction. Reached water in May 1946. Shaft inclined at approximately 30°. Altitude of land surface at shaft collar 400 feet. This shaft is at the same locality of Test boring Maui T-112, and it is planned that water level measurements in the shaft will replace those in the test boring.

Highest water level 27.97 Oct. 16, 1947; lowest 25.91 Nov. 19, 1946

Records available 1946-47

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Wailuku Sugar Co. Shaft
Well No. 1

Water levels measured with airline and Bourdon gage.
Drawdown calculated using 29.9 psi or 69.1 as length of column of water in
airline at static level.

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<th>Feet of water in airline</th>
<th>Drawdown</th>
<th>Remarks</th>
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-5-

Remarks:

- Maui shaft 33
- Tried pump No. 2 with valve closed.
- Started pump No. 2. Valve open 4 turn.
- Valve on pump No. 2 open 5 turns.
- Discharge, 4.4 mgd.
- Valve on pump No. 2 open wide. 4.54 mgd.
- W.L. in sump = 27.42 f
- Pump No. 2 stopped.
- Started pump No. 1. Valve wide open.
- Temperature of water at discharge at tunnel entrance = 73° F.
- Pump No. 1 turned off.
- Start pump No. 2.
- Opening valve.
- Start pump No. 1.
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Wailuku Sugar Co. Shaft
Well No. 2

Water levels measured with airline and Bourdon gage.
Drawdown calculated using 30.2 psi or 69.8 ft. as length of water column
in air line at static water level.

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<th>Remarks</th>
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<td>Tried to start Pump No. 1, low rotation, low voltage, low amperage. Wrong taps. Shut off pump.</td>
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</tbody>
</table>

Remarks:
- Opened valve 2 turns.
- Valve opened full.
- Approx. Pump stopped. Water level returned to 30.2 in about 10 sec.
- Start pump No. 1. Valve wide open.
- Temp. of water at discharge at shaft entrance = 73° F.
- Pump No. 1 turned off.
- Started pump No. 2 and opened valve.
- Started pump No. 1.
- Pumps land 2 running.
<table>
<thead>
<tr>
<th>Time</th>
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<th>Drawdown</th>
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**Remarks**

- Pump No. 2 stopped.
- Shut down pump No. 1.
- Pumps No. 1 and No. 2 running
<table>
<thead>
<tr>
<th>Time</th>
<th>Gage Reading</th>
<th>Feet of Water in Airline</th>
<th>Drawdown</th>
<th>Pumps running</th>
<th>Remarks</th>
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</table>

**Remarks:**
- Maui Shaft 33
- Pump No. 1 shutdown.
- Start pump No. 2.
- Start pump No. 1.
- Pump No. 2 stopped.
- Pump No. 1 shut down.
Wailuku Sugar Co.
Well No. 3

Water levels measured with airline and Bourdon gage graduated in feet of water.

Feet of water in airline calculated by subtracting gage reading from 200', which is scale reading on gage equivalent to zero pressure.

Drawdown calculated by subtracting feet of water in airline from 70 feet, the length of column of water in airline at static water level.

<table>
<thead>
<tr>
<th>Time</th>
<th>Gage Reading psi</th>
<th>Feet of Water in Airline</th>
<th>Drawdown</th>
<th>Pumps Running</th>
<th>Remarks</th>
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## Wailuku Sugar Co. Shaft

### Altitude of Water Level in Sump

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<tr>
<th>Time</th>
<th>Water Level Alt., Feet</th>
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<td>10:18 A</td>
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WATER LEVELS AND ARTESIAN PRESSURE, 1946, SOUTHWESTERN STATES

Shaft 33, Waialuku Sugar Co., 0.5 mile southwest of Waialuku, in field 65 at Waialuku Sugar Co., Latitude 20°25'17" N., Longitude 156°40'47" W.
Still under construction. Reached water in May 1946. Shaft inclined at approximately 50°. Altitude of land surface at shaft collar 490.00 feet. This shaft is at the same locality of test boring Maui TI12, and it is planned that water level measurements in the shaft will replace those in the test boring. (Altitude of temporary measuring point, at the level of the proposed pump-chamber floor, is 29.45 feet, 570.65 feet below land-surface datum.)

<table>
<thead>
<tr>
<th>Date</th>
<th>Water level</th>
<th>Date</th>
<th>Water level</th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>Aug. 30</td>
<td>26.45</td>
<td>Dec. 18</td>
<td>26.45</td>
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</table>

ISLAND OF MOLOKAI

The Ualapue and Kamala wells showed net losses of 0.33 and 0.17 foot.
Records after May 15 are not available for test boring TI1.

Total pumpage for the year on Molokai decreased 0.64 million gallons, because of decreased pumpage from the Kamakana well at Kawela.

A drilled well at an altitude of 886 feet at Kualapuu, on the western slope of East Molokai, encountered water standing 10 feet above sea level, with a chloride content of 574 parts per million. The high salinity probably results from a very low rate of recharge in this arid part of the island.

Water levels, in feet, in observation wells in Molokai, 1946
(Measurements made by Herbert Wilson)

Kamala well (*845, p. 83; 886, p. 97; 941, p. 144; 944, p. 248; 991, p. 125; 1021, p. 176; 1026, p. 104). Half a mile northeast of Kamala wharf,

<table>
<thead>
<tr>
<th>Date</th>
<th>Water level</th>
<th>Date</th>
<th>Water level</th>
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<tr>
<td>Mar. 15</td>
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<td>1.50</td>
</tr>
<tr>
<td>Apr. 15</td>
<td>1.50</td>
<td>Aug. 15</td>
<td>1.50</td>
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<tr>
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<td>Sept. 15</td>
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<td>Aug. 15</td>
<td>1.67</td>
<td>Dec. 15</td>
<td>1.67</td>
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</table>

Ualapue well (*845, p. 63; 886, p. 87; 941, p. 177; 944, p. 248; 991, p. 102; 1021, p. 176; 1026, p. 104). 2.75 miles east of Kamala well,

<table>
<thead>
<tr>
<th>Date</th>
<th>Water level</th>
<th>Date</th>
<th>Water level</th>
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Wailuku Shaft 6-5330-05

Sketch not to scale

Planned configuration

Non pumping water level is about 20' above MSL.

Pumping water level is about 6' below MSL.

Bubbler gage intake is about 10' below MSL.

pump intake about 30' below MSL.
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<td>159</td>
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<tr>
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**Scale:**
- Horizontal: Nat. Core S
- Vertical: 1" = 4’-0”
PUBLIC RECORD DATA

Taxkey  | Subdiv/Condo | Tnr | Property Address | Owner/Lessee          | Beds | Baths | Land area | Living area |
---|---|---|---|---|---|---|---|---|
2-3-5-1-1 | Walluku | F | IAO VALLEY ROAD | KEHALANI MAUKA LLC | COUNTY OF MAUI | | | |

This information has been supplied by third parties and has not been independently verified by Hawaii Information Service and is, therefore, not guaranteed.
June 13, 2011

Transfer of Water Use Permit (WUP No. 865 to WUP No. 925) for Well No. 5330-05 Iao Ground-Water Management Area, Maui

This is in response to your May 24, 2011 letter, requesting to transfer a portion of Water Use Permit No. 865 for the subject well. Please note that as part of the transfer process, we have assigned you a new Water Use Permit Number for this well. This is for record keeping purposes only and voids and supersedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of a portion of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this modification is 0.137 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No. 865 from 0.613 mgd to 0.476 mgd in WUP No. 926, and the addition of this amount to Maui Department of Water Supply from the 4.878 mgd issued in WUP No. 864 to 5.015 mgd in WUP No. 926.

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.
4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit.
2. Please continue to use your standard water use reporting form.

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

WILLIAM J. AILA, JR.
Chairperson

Attachment

c: Maui Department of Water Supply
GROUND-WATER USE PERMIT
WUP NO. 925

PERMITTEE

Permittee/Water User
Kehalani Mauka, LLC
1100 Alakea Street 27th Floor
Honolulu, HI 96813

Landowner of Source
Same

PERMITTED SOURCE INFORMATION

Island Maui
Water Management Area
Aquifer Sector Wailuku
Aquifer System Iao
System Sustainable Yield 20
Well Name Wailuku Shaft (Shaft 33)
State Well No. 5330-05

PERMITTED USE INFORMATION

Reasonable beneficial use Municipal
Withdrawal (12 month moving ave.) 0.476 mgd
Location of water use
TMK # 3-5-001:001
State land use classification Urban
County zoning classification Residential single- and multi-family

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission in its January 31, 2007 decision are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

[Signature]
WILLIAM J. AILA, JR., Chairperson
Commission on Water Resource Management

Attachment

c: Maui Department of Water Supply
COMMISSION ON WATER RESOURCE MANAGEMENT
ROUTE SLIP FOR NEW APPLICATIONS

FROM: CHARLEY       DATE: 3-Jun-11       SUSPENSE DATE: 10-Jun-11

TO: INIT. TO: INIT. FOR: PLEASE:
______ FUJII, N. ____ KUNIMURA, I. 1 Approval See Me
______ HARDY, R. ____ TAM, W. 3 Signature 1 Review & Comment
______ 3 NAKAMA, L. ____ UYENO, D. 3 Information 1 Take Action
______ YODA, K. ____ YOSHINAGA, M. 1 Approval Type Draft acknow letter
______ HOAGBIN, S. ____ ICE, C. 2 Signature Type Final, label file folder, update People.db
______ IMATA, R. ____ 4 File & Input Issue Date

WELL NUMBER 5330-05      WELL NAME Shaft 33      WUP Number Old=865/New=925

☐ WELL CONSTRUCTION ☐ PUMP INSTALLATION ☐ WUPA ☐ WUP Transfer

ATTACHMENTS FOR APPLICATION PROCESSING - Both applicant & staff generated

1. TRANS. LETTER ☑ WUP 925
2. PERMIT PROCESS TABLE
3. CWRM MAPS making 1-mile radius and penciling in on hanging maps
4. APPL. FORM (11 COPIES)
5. USGS MAPS (11 COPIES)
6. TAX MAPS (11 COPIES)
7. PARCEL OWNER VERIF. MLS PRINTOUT
8. CONTRACTOR VERIF. DCCA LICENSE SCREEN PRINTOUT
9. ALL INFO FILLED IN
10. BACKGROUND CHECK
11. $25 FEE DEPOSIT SLIP
12. DHP/CDUP/SMA pre-screen (SMA map printout http://gis.hicentral.com/website/parcelzoning/viewer.htm, or INGRID'S SMA/CD MAP)
   (LUC map printout http://luc.state.hi.us/luc_maps.htm, or INGRID'S SMA/CD MAP)
13. EA 343 5(a) triggers? ☑ NO
   (YES - trigger identified is:
   (if triggered, exemption analysis memo must be attached before accepting)

FOLDER: ☐ MADE NEW FILE FOLDER, ATTACHED
☒ FILE FOLDER ALREADY MADE, IN FILE CABINET

INCOMPLETE ACTION DATES:

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Kahalani portion.
May 24, 2011

Mr. William M. Tam, Deputy Director
Commission on Water Resource Management
State of Hawaii – Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 865)
Wailuku Shaft (Well No. 5330-05)

We respectfully request the transfer of 137,000 gpd from our above referenced permit to the Maui Department of Water Supply’s water use permit WUP No. 864. This request is made in accordance with the additional units developed at the module 17 neighborhood (aka Hoolea Terrace) and for the development of our Commercial Center (aka C-1/11) area as indicated on the attached Estimated Water Demand Projection for Kehalani.

The resulting potable ground water amounts for this request will be 0.476 mgd for WUP No. 865 and 5.015 mgd for WUP No. 864 as indicated below:

WUP No. 865 (Kehalani Mauka, LLC)
0.613 mgd - 0.137 mgd = 0.476 mgd

WUP No. 864 (County of Maui Department of Water Supply)
4.878 mgd + 0.137 mgd = 5.015 mgd

Your timely review and approval of this request greatly appreciated. Should there be any questions, please do not hesitate to contact Development Manager, Jay Nakamura at 542-2226.

Sincerely,

Stanford S. Carr
Managing Member

Attachment
Cc: R. Riegel, J. Nakamura
    Charlie Ice @ Hawaii Commission of Water Resource Management
    P. Meyer, County of Maui Department of Water Supply
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</table>

Total: 842,130

*Based on Maui DWS Daily Domestic Consumption Guidelines of 6,000 gallons/acre
**Based on Maui DWS Daily Domestic Consumption Guidelines of 1,700 gallons/acre
October 27, 2008

864.wup

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Jeffrey Eng, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Attn: Eric Yamashige, Deputy Director

Dear Mr. Eng:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 822 to WUP No. 864) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 822 for the subject well. Please note that as part of the transfer process, we have assigned a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.078 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No.822 from 0.691 mgd to 0.613 mgd in WUP No. 865, and the addition of this amount to Maui Department of Water Supply from the 4.800 mgd issued in WUP No. 822 to 4.878 mgd in WUP No. 864.

**Special Conditions**

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. The Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.

4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.
5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission’s declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:

   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

LAURA H. THIELEN
Chairperson

c: Kehalani Mauka, LLC
PERMITTEE

<table>
<thead>
<tr>
<th>Permittee/Water User</th>
<th>Landowner of Source</th>
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<tr>
<td>County of Maui</td>
<td>Kehalani Mauka, LLC</td>
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<tr>
<td>Department of Water Supply</td>
<td>Address</td>
</tr>
<tr>
<td>200 South High Street</td>
<td>1100 Alakea Street</td>
</tr>
<tr>
<td>Wailuku, HI 96793</td>
<td>Honolulu, HI 96813</td>
</tr>
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PERMITTED SOURCE INFORMATION

| Island           | Maui               |
| Water Management Area | Wailuku          |
| Aquifer Sector   | Iao                |
| Aquifer System   |                  |
| System Sustainable Yield | 20               |
| Well Name        | Wailuku Shaft (Shaft 33) |
| State Well No.   | 5330-05           |

PERMITTED USE INFORMATION

| Reasonable beneficial use | Municipal |
| Withdrawal (12 month moving ave.) | 4.878 mgd |
| Location of water use | various |
| TMK #                  |          |
| State land use classification | multiple |
| County zoning classification | multiple |

Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.
Dear Mr. Riegels:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 707 to WUP No. 865) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 707 for the subject well. Please note that as part of the transfer process, we have assigned you a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of a portion of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.078 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No. 707 from 0.691 mgd to 0.613 mgd in WUP No. 865, and the addition of this amount to Maui Department of Water Supply from the 4.800 mgd issued in WUP No. 822 to 4.878 mgd in WUP No. 864.

Special Conditions

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.
4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

LAURA H. THEILEN
Chairperson

c: Maui Department of Water Supply
GROUND-WATER USE PERMIT
WUP NO. 865

PERMITTEE

Permittee/Water User
Address: Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813

Landowner of Source
Address: Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813

PERMITTED SOURCE INFORMATION

Island: Maui
Water Management Area
Aquifer Sector: Wailuku
Aquifer System: Iao
System Sustainable Yield: 20
Well Name: Wailuku Shaft (Shaft 33)
State Well No.: 5330-05

PERMITTED USE INFORMATION

Reasonable beneficial use: Municipal
Withdrawal (12 month moving ave.): 0.613 mgd
Location of water use
TMK #: 3-5-001:001
State land use classification: Urban
County zoning classification: Residential single- and multi-family

Pursuant to Hawaii’s State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
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3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
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   d. Is consistent with the public interest;
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5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
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6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

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9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

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b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

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14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

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17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

LAURA H. THEILEN, Chairperson
Commission on Water Resource Management

Attachment

c: County of Maui, Department of Water Supply
Thanks Charley! I plan to send in the request as outlined below. I would sincerely appreciate any input and/or comments you may have before I submit this formally.
Sincerely, Jay

Jay Nakamura
Vice-President - Senior Development Manager
Stanford Carr Development, LLC
1100 Alakea Street, 27th Floor
Honolulu, Hawaii 96813
T: (808) 547-2226
F: (808) 537-1801
C: (808) 497-7888
E: jyn@stanfordcarr.com

May 2, 2011

Mr. William M. Tam, P.E. Deputy Director
Commission on Water Resource Management
State of Hawaii – Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 865)
Wailuku Shaft (Well No. 5330-05)

We respectfully request the transfer of 137,000 gpd from our above referenced permit to the Maui Department of Water Supply’s water use permit WUP No. 864. This request is made in accordance with the additional units developed at the module 17 neighborhood (aka Hoolea Terrace) and for the development of our Commercial Center (aka C-1/11) area as indicated on the attached Estimated Water Demand Projection for Kehalani.

The resulting potable ground water amounts for this request will be 0.476 mgd for WUP No. 865 and 5.015 mgd for WUP No. 864 as indicated below.

WUP No. 865 (Kehalani Mauka, LLC)
0.613 mgd – 0.137 mgd = 0.476 mgd
WUP No. 864 (County of Maui Department of Water Supply)
4.878 mgd + 0.137 mgd = 5.015 mgd

Your timely review and approval of this request greatly appreciated. Should there be any questions, please do not hesitate to contact Development Manager, Jay Nakamura at 542-2226.

Sincerely,

Stanford S. Carr
Managing Member

Attachment
Cc: R. Riegels, J. Nakamura
Charley Ice @ Hawaii Commission of Water Resource Management
P. Meyer, County of Maui Department of Water Supply

From: Charley.F.ice@hawaii.gov [mailto:Charley.F.ice@hawaii.gov]
Sent: Tuesday, May 24, 2011 11:09 AM
To: Jay Nakamura
Subject: RE: CWRM Permit Transfer Request (Kehalani to DWS)

Howzit! Ken left in June. Lenore Ohye was Acting Deputy until Bill Tam was officially on board in January. William Tam can be reached at 587-0214.

Jay Nakamura <jyn@stanfordcarr.com>
05/24/2011 10:45 AM

Charlie, is Ken Kawahara still the Deputy for CWRM?

---------------------------------------------------------------------------------------------
Jay Nakamura
Vice-President - Senior Development Manager
Stanford Carr Development, LLC
1100 Alakea Street, 27th Floor
Honolulu, Hawaii 96813
T: (808) 547-2226
F: (808) 537-1801
C: (808) 497-7888
E: jyn@stanfordcarr.com
Hi Charley! Hope all is well. Anyhow, we would like to once again transfer a portion of our CWRM permit to DWS on Maui to accommodate some new projects at Kehalani. Just wondering if we should follow the same process as before? If so, we'll proceed accordingly. I attached the previous transfer info for your reference. Appreciate your input.

Aloha, Jay
# Estimated Water Demand Projection for Keahalani

## Table: Estimated Water Demand Projection for Keahalani

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*Based on Maui DWS Daily Domestic Consumption Guidelines of 1,700 gallons/acre

*Based on Maui DWS Daily Domestic Consumption Guidelines of 6,000 gallons/acre
October 27, 2008

865.wup

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard Riegels, Manager
Kehalani Mauka, LLC
1100 Alakea Street 27th Floor
Honolulu, HI 96813

Attn: Jay Nakamura, Senior Development Manager

Dear Mr. Riegels:

Transfer/DEC-ADM97-A1 Modification of Water Use Permit
(WUP No. 707 to WUP No. 865) for Well No. 5330-05
Iao Ground-Water Management Area, Maui

This is in response to your October 10, 2008 letter, requesting to transfer a portion of Water Use Permit No. 707 for the subject well. Please note that as part of the transfer process, we have assigned you a new Water Use Permit Number for this well, administratively modified per Declaratory Ruling DEC-ADM97-A1. This is for record keeping purposes only and voids and supercedes the previous Water Use Permit Number listed above. As provided by law, your notice of transfer simply notifies us of the transfer of a portion of the permit does not create any new rights and liabilities in favor of or against the transferee.

The amount of this transfer/modification is 0.078 mgd of potable ground water. The effective result is the reduction of the amount issued to Kehalani Mauka, LLC in WUP No. 707 from 0.691 mgd to 0.613 mgd in WUP No. 865, and the addition of this amount to Maui Department of Water Supply from the 4.800 mgd issued in WUP No. 822 to 4.878 mgd in WUP No. 864.

**Special Conditions**

1. The Commission delegates to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. Should alternate permanent sources of water be found for this use, then the Commission reserves the right to modify or revoke this permit, after a hearing.
4. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

5. This water use permit has been administratively approved by the Chairperson under the provisions of the Commission's declaratory ruling DEC-ADM97-A1. Should any of the modified uses change in such a way that the uses do not meet the following criteria, this permit shall be rendered invalid:
   a. The net change in permitted use within an aquifer is zero.
   b. The modification would result in more efficient and optimal operation of multiple sources under a single operator.
   c. No adverse impacts to water resources or other existing legal uses are anticipated.
   d. End use location and type remain unchanged.

6. Standard Condition 7 is amended as follows: Previous special conditions made by official Commission action on former water use permit approvals from the source(s) identified in this permit are incorporated unless specifically waived.

Enclosed with this letter of approval are the following:

1. Your water use permit
2. Your official monthly water use report form

Please be sure to read the conditions of your approved permit.

We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

If you have any questions, please call Charley Ice of the Commission staff at 587-0218.

Sincerely,

[Signature]

LAURA H. THIELEN
Chairperson

c: Maui Department of Water Supply
GROUND-WATER USE PERMIT
WUP NO. 865

PERMITTEE

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PERMITTED SOURCE INFORMATION

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<td>County zoning classification</td>
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Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and submittal, as amended, approved by the Commission at its January 31 and March 21, 2007 meetings are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:
   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

LAURA H. THIELEN, Chairperson
Commission on Water Resource Management

Attachment

c: County of Maui, Department of Water Supply
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PLEASE:  
- See Me  
- Review & Comment  
- Take Action  
- Type Draft  
- Type Final  
- File  
- Xerox ___ copies  

Good enough - no need for.

Who control assignment of
October 10, 2008

Mr. Ken C. Kawahara, P.E. Deputy Director
Commission on Water Resources Management
State of Hawaii – Department of Land and Natural Resources
PO Box 621
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 707)
   Wailuku Shaft (Well No. 5330-05)

We respectfully request the transfer of 78,400 gpd from our above referenced permit to the Maui Department of Water Supply’s water use permit WUP No. 822. This request is made in accordance with the development of neighborhood module 17 as indicated on the attached Estimated Water Demand Projection for Kehalani. This change will result in a reduction from 0.691 mgd to 0.6126 mgd for WUP No. 707. The timely review and approval of this request greatly appreciated. Should there be any questions, please do not hesitate to contact Senior Development Manager, Jay Nakamura at 542-2226.

Sincerely,

Richard Riegels
Manager

Attachment
Cc: J. Nakamura, S. Carr, R. Shimizu
    Eric Yamashige, Department of Water Supply Maui
## ESTIMATED WATER DEMAND PROJECTION FOR KEHALANI

### Table: Estimated Water Demand Projection for Kehalani

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| Parks** | 21.00 | 1,700 | 35,700 |
| Community Center** | 5.00 | 1,700 | 8,500 |
| Landscape/Common Area** | 11.00 | 1,700 | 18,700 |
| Roadways** | 9.00 | 1,700 | 16,150 |
| Open Space** | 8.00 | 1,700 | 17,600 |

Subtotal: 1,668,840

*Based on Maui DWS Daily Domestic Consumption Guidelines of 1,700 gallons/acre

*Based on Maui DWS Daily Domestic Consumption Guidelines of 6,000 gallons/acre

Kehalani - Projected Water Demands (revised 5-15-06b)
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<td>CHING, F.</td>
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<td>YOSHINAGA, M.</td>
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Duplicate or original? Get a signed copy on 7/15/08. Hardcopy of email as promised.
July 21, 2008

Charley Ice  
State of Hawaii – Department of Land and Natural Resources  
Commission on Water Resources Management  
PO Box 621  
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 707)

In accordance with the condition 16 of our permit, we hereby submit the attached water shortage plan. Your review and acknowledgement of our submittal is greatly appreciated. Should there be any questions, please do not hesitate to contact me at 547-2226.

Sincerely,

Jay Nakamura  
Senior Development Manager

Attachment  
Cc: SC, DR, RS
PROPOSED WATER SHORTAGE PLAN
WUP No. 707
Wailuku Shaft (Well No. 5330-05)

In the event the State Commission on Water Resource Commission (CWRM) declares a water shortage for the Iao Ground-Water Management Area, the Permittee shall take the following steps.

1) The Permittee shall contact the appropriate staff person at CWRM for details on such declaration.

2) Since the Permittee and the County of Maui share the same facility for water use (Wailuku Shaft), the Permittee shall contact the Department of Water Supply on Maui to coordinate efforts on water use including but not limited to the reduction in pumping from the subject well.

3) The Permittee shall contact the Managing Agent for the Kehalani Master Plan Community (primary area serviced by the WUP No. 707) to coordinate efforts on water use reduction. These efforts shall include but are not limited to:
   a) Notification of Kehalani residents on water use reduction
   b) Reduction in irrigation of landscape easements, ROW’s and parks throughout neighborhood
   c) Temporary restrictions on use of potable water for private yard irrigation
   d) Temporary restrictions on use of potable water for car and house washing
   e) Ongoing monitoring to ensure compliance with any restrictions
   f) Routine inspections for water leaks in various common area systems

4) The Permittee will contact all Developers and Builders actively working or constructing within the Kehalani Master Plan Community to coordinate efforts on water use reduction.

5) The Permittee shall report back to the appropriate staff person at CWRM on progress made on the above items.
Here's my water shortage plan. I'll be mailing it in today. Thanks for your help!

From: Charley.F.Ice@hawaii.gov [mailto:Charley.F.Ice@hawaii.gov]
Sent: Tuesday, July 15, 2008 6:52 PM
To: Jay Nakamura
Subject: Iao Water Management Rule
July 21, 2008

Charley Ice
State of Hawaii – Department of Land and Natural Resources
Commission on Water Resources Management
PO Box 621
Honolulu, HI 96809

Re: Water Use Permit (WUP No. 707)

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Sincerely,

Jay Nakamura
Senior Development Manager

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Cc: SC, DR, RS
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WUP No. 707
Wailuku Shaft (Well No. 5330-05)

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3) The Permittee shall contact the Managing Agent for the Kehalani Master Plan Community (primary area serviced by the WUP No. 707) to coordinate efforts on water use reduction. These efforts shall include but are not limited to:
   a) Notification of Kehalani residents on water use reduction
   b) Reduction in irrigation of landscape easements, ROWs and parks throughout neighborhood
   c) Temporary restrictions on use of potable water for private yard irrigation
   d) Temporary restrictions on use of potable water for car and house washing
   e) Ongoing monitoring to ensure compliance with any restrictions
   f) Routine inspections for water leaks in various common area systems

4) The Permittee will contact all Developers and Builders actively working or constructing within the Kehalani Master Plan Community to coordinate efforts on water use reduction.

5) The Permittee shall report back to the appropriate staff person at CWRM on progress made on the above items.
Dear Mr. Nakamura:

Approval of Water Use Permit (WUP No.707)
Wailuku Shaft (Well No. 5330-05)
Iao Ground-Water Management Area, Maui

This letter transmits your water use permit for Wailuku Shaft, "Shaft 33" (Well No.5330-05) for use of 0.691 million gallons per day (mgd) of water on a 12-month moving average basis that was approved by the Commission on Water Resource Management (Commission) on January 31, 2007 and March 21, 2007. As part of the Commission's approval, the following special conditions were added and are part of your permit under Standard Permit Condition 19:

**Special Conditions**

1. The Commission shall delegate to the Maui Department of Water Supply the authority to allocate the use of water for municipal purposes, in accordance with §174C-48(b) HRS.

2. Maui Department of Water Supply shall be exempt from the requirements of permit modifications as provided in §174C-57.

3. In the event that the tax map key at the location of the water use is changed, the permittee shall notify the Commission in writing of the tax map key change within thirty (30) days after the permittee receives notice of the tax map key change.

4. Standard Condition 7 has been amended to reflect the Commission's final decision and order on this permit.

Enclosed with this letter of approval is your water use permit. Please be sure to read the conditions of your approved permit.
We draw your attention to two key conditions of your permit that require your response. First, you are required to keep a record of your monthly total pumpage, water level, salinity, and water temperature. This information must be submitted to the Commission on a regular monthly basis using the enclosed water use report form. You should make copies of the enclosed report form as needed.

Second, you are required to submit a water shortage plan to the Commission within thirty (30) days of the issuance date of this permit. Your water shortage plan simply identifies what you are willing to do should the Commission declare a water shortage situation in the Iao Ground-Water Management Area and can be as short as a one page letter. In a water shortage situation, the Commission may require temporary reductions in pumpage from all sources. The Commission is required, by law, to formulate a plan to implement such area-wide reductions, which should accommodate, include, and be consistent with your plans. Therefore, your help, by submitting your water shortage plan, is greatly needed in formulating the Commission's overall Water Shortage Plan.

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

Sincerely,

LAURA H. THIELEN
Interim Chairperson

Attachments: Water Use Report Form

c: Maui Department of Water Supply
STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

GROUND-WATER USE PERMIT
WUP NO. 707

PERMITTEE

<table>
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<tr>
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<tr>
<td>Kealani Mauka LLC</td>
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<td>Honolulu, HI 96813</td>
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PERMITTED SOURCE INFORMATION

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PERMITTED USE INFORMATION

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<td>County zoning classification</td>
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Pursuant to Hawaii's State Constitution, Article XI, Section 7, Hawaii Revised Statutes, Chapter 174C; Hawaii Administrative Rules, Chapters 13-167 through 13-171; and Hawaii decisional law and custom, the permittee is hereby authorized to use ground water from the sources and in the amount and from and upon the locations described above; subject however, to the requirements of law including but not limited to the following conditions:
1. The water described in this water use permit may only be taken from the location described and used for the reasonable beneficial use described at the location described above. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The right to use ground water is a shared use right.

3. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:
   a. Can be accommodated with the available water source;
   b. Is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. Will not interfere with any existing legal use of water;
   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 policies; and
   g. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

4. The ground-water use here must not interfere with surface or other ground-water rights or reservations.

5. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:
   a. A separate water use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

6. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

7. The water use permit application and final Decision and Order, as amended, approved by the Commission in its January 31, 2007 and March 21, 2007 decisions, are incorporated into this permit by reference.

8. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.

9. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:
   a. protect the water sources (quantity or quality);
   b. meet other legal obligations including other correlative rights;
   c. insure adequate conservation measures;
   d. require efficiency of water uses;
   e. reserve water for future uses, provided that all legal existing uses of water as of June, 1987 shall be protected;
   f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
   g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

10. An approved flowmeter(s) must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on Water Resource Management on forms provided by the Commission on a monthly basis (attached).
11. This permit shall be subject to the Commission's periodic review of the Iao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the Iao Aquifer System, or relevant modified aquifer(s), is reduced.

12. A permit may be transferred, in whole or in part, from the permittee to another, if:

   a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and

   b. The Commission is informed of the transfer within ninety days.

Failure to inform the department of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer, which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes a ground for revocation.

13. The use(s) authorized by law and by this permit do not constitute ownership rights.

14. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.

15. The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply towards the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply towards the four-year period of forfeiture.

16. The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the Iao Ground-Water Management Area.

17. The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

18. The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.

19. Special conditions in the attached cover transmittal letter are incorporated herein by reference.

   [Signature]

   LAURA H. THIELEN, Interim Chairperson
   Commission on Water Resource Management

Attachment

c: Maui Department of Water Supply
MORIHARA LAU & FONG

LINNEL T. NISHIOKA 4279-0
400 Davies Pacific Center
841 Bishop Street
Honolulu, Hawai‘i  96813
Telephone:  528-4200

Attorney for
KEHALANI MAUKA, LLC

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAI‘I

In the Matter of Water Use Permit Applications For the Iao Ground Water Management Area Basal Source Contested Case Hearing  )  Case No.: CCH-MA05-1 KEHALANI MAUKA LLC'S MOTION FOR DECLARATORY RULING THAT KEHALANI MAUKA LLC'S APPLICATION FOR SHAFT 33 IS FOR AN EXISTING USE; DECLARATION OF LINNEL T. NISHIOKA; EXHIBIT “A”; CERTIFICATE OF SERVICE

...
KEHALANI MAUKA LLC'S MOTION FOR DECLARATORY RULING THAT KEHALANI MAUKA LLC'S APPLICATION FOR SHAFT 33 IS FOR AN EXISTING USE

Comes now, Kehalani Mauka, LLC ("Kehalani"), by and through its attorneys, Morihara Lau & Fong, and hereby files this motion for declaratory ruling with the Commission on Water Resource Management ("Commission") that Kehalani's application for a water use permit for water from Wailuku Shaft 33 ("Shaft 33") is for an existing use. Kehalani owns Shaft 33 and the lands surrounding it. Kehalani filed an application for an existing water use permit for Shaft 33 water on July 20, 2004. See Exhibit B-4\(^1\). The Commission accepted the application as complete on July 23, 2004. See Statement of Jay Nakamura\(^2\) at page 5. There is no dispute that on the date of designation, July 21, 2003, there was an existing use of 5.771 million gallons per day ("mgd") of Shaft 33 water reported by the Maui County Department of Water Supply ("MDWS"). See Statement of Jay Nakamura at page 5.

Kehalani will demonstrate that: (1) The Hawai'i State Water Code's ("Water Code" or "Code") definition of "existing use" refers to the use that existed on the date of designation and not the existing user. (2) Commission precedent holds that landowners may step into the shoes of prior users for existing use permit purposes, without having to apply for a new use permit, as long as the category of existing use remains the same, and (3) applying this precedent to the present situation, Kehalani, as landowner, must be allowed to step into the shoes of the MDWS to obtain an existing use permit for 5.771 mgd for municipal use of the water from Shaft 33, because it seeks

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\(^1\) Filed on March 10, 2006.

\(^2\) Filed on March 10, 2006.
to continue municipal use of the Shaft 33 waters, the category of use that existed on the
date 'Iao Aquifer was designated.

I. STATEMENT OF FACTS

Kehalani Mauka is a master planned residential community that will bring
approximately 2,400 homes to West Maui, along with commercial properties, schools,
parks, open spaces, and a community recreational center. Kehalani is located in
Wailuku Heights and encompasses 550 acres at TMK Nos. 2-3-04-07, Parcel 2; and
2-3-5-01, Parcels 1, 17, 60, 61, 63, 64, and 67. See Statement of Jay Nakamura at
page 2. Kehalani has land use and zoning entitlements and approvals that took over
two decades to achieve. See Statement of David Blane at pages 1-3. When completed
it will be one of the largest planned communities on the island.

The project lands have been owned by Milwaukee Holdings, LLC since
November 1999, and are currently being developed by Stanford Carr Development
International, LLC. Stanford S. Carr and Howard Hamamoto, both long-time residents
of Hawai‘i, own Milwaukee Holdings. See Statement of Jay Nakamura at page 3.
Wailuku Shaft 33, which taps the underlying 'Iao Aquifer, is situated on Kehalani project
lands and is thus owned by Kehalani Mauka LLC. (For the purposes of this Motion,
both Milwaukee Holdings and Kehalani will be referred to as the landowner.) For
approximately eight years prior to Milwaukee Holdings' acquisition of the Kehalani
lands, the MDWS had an agreement with the former landowner C. Brewer Homes to
purchase water from Shaft 33 for municipal purposes. An average of 5.771 million
gallons of water per day ("mgd") was pumped from Shaft 33 into the MDWS's Central

3 Filed on March 10, 2006.
Maui system, which services Wailuku as well as other Central and West Maui areas.

When Milwaukee Holdings took possession of the land, it allowed the MDWS to continue to draw that amount of water free of charge and continues to do so to this day. See Statement of Jay Nakamura at page 5.

On July 21, 2003, the Commission designated 'Īao Aquifer as a ground water management area triggering the requirement under the Water Code that water use permits be sought within one year of the date of designation for the continuation of existing uses. HRS § 174C-50(a) states “[a]ll existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).” Kehalani sought to obtain a permit to continue the existing use of the waters originating on its lands at Shaft 33, and thus submitted an application for an existing use permit to the Commission on July 20, 2004. That application was accepted as timely and complete by the Commission. By virtue of its position as the existing user, the MDWS also sought an existing use permit for Shaft 33 waters. The Commission has already made a determination that the MDWS permit is for a new use under HRS section 174C-49. Kehalani seeks to use the existing 5.771 mgd pumped from Shaft 33 for municipal purposes, consistent with the prior existing use, to serve the domestic, commercial and irrigation needs of the Kehalani Mauka project and, if feasible, to continue its agreement with the County of Maui for use of that water in its municipal water system.4

4 Parties continue to negotiate a water facilities agreement to allow Maui Department of Water Supply to use Shaft 33 on a longer term basis than the current month to month agreement.
II. LEGAL ANALYSIS

A. General Principles of Statutory Interpretation

A basic canon of statutory interpretation requires that a statute be construed to give effect to the intention of the legislature by examining the plain language of the statute itself. *In re Water Use Permit Applications*, 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000) ("Waiahole I"). Specific statutory language must be read consistently with the entire statute, in context with the statute as a whole. *Id.* If the language of the statute is a clear and unambiguous statement of the legislature's intent, then the plain and obvious meaning must be given effect. *Kaiser Found. Health Plan, Inc. v. Department of Labor & Indus. Relations*, 70 Haw. 72, 82, 762 P.2d 796, 801 (1988). In determining whether the language of the statute is clear and unambiguous, the words are generally "taken in their usual sense unless there is sufficient evidence to indicate that they were intended to be taken in some other sense." *Ottmann v. Young*, 12 Haw. 303, 306 (1900). An ambiguity exists "[w]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute . . . ."

*Waiahole I*, 94 Hawai'i at 144, 9 P.3d at 456. Where the words of a law are ambiguous, the intentions of the legislature may be ascertained by examining the context, reason, and spirit of the law. *Hawaii Revised Statutes* ("HRS") § 1-14. Further, "where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Waiahole I*, 94 Hawai'i at 144, 9 P.3d at 456 (internal quotation marks and citations omitted). An agency's interpretation is palpably erroneous "when
the agency's reading of the statute contravenes the legislature's manifest purposes."

Waialohi I, 94 Hawai'i at 145, 9 P.3d at 457.

B. The Existing Use Provision of the Water Code Unambiguously Refers to Existing Use, not Existing User

The plain language of the Water Code refers to existing uses of water in a designated water management area require a water use permit to continue. Neither the Water Code nor the regulations require that the party who applies for the existing use at the time of designation be the existing user at the time of designation. The language of HRS § 174C-50, entitled "existing uses," merely refers to the existing use, and does not specify the existing user in the context of an existing use permit at all. See, e.g., HRS § 174C-50(a) ("All existing uses of water . . . may be continued . . . only with a permit . . . .") and HRS § 174C-50(b) (The Commission "shall issue a permit for the continuation of a use in existence . . . .") (emphases added). The only reference to the existing user in the existing use section of the Code is found in subsection 174C-50(c), which discusses the right of the existing user to apply for a new use permit should that user fail to timely perfect an existing use permit application. HRS § 174C-50(c). Even that subsection does not specify that the existing user must be the applicant for the existing use permit, and instead merely states that "[a]n application for a permit to continue an existing use must be made within a period of one year from the effective date of designation." HRS § 174C-50(c). Thus, on its face, the existing use provision of the Water Code unambiguously protects the use that existed on the date of designation and not the user.
C. Assuming Arguendo that the Existing Use Provision is Ambiguous, the Commission has Not Limited Existing Use Permits to Existing Users

Even assuming that there is an ambiguity that exists under the Water Code as to whether an applicant for a water use permit must be the water user at the time of designation to qualify for an existing use permit, the Commission in past precedents has not construed the existing use provision in that way. As explained above, the plain language of the Water Code refers only to existing use, and there is no provision that expressly equates existing use with existing user. The Commission is the administrative agency responsible for implementing the Water Code; it has the authority to reasonably interpret the existing use section of the Code. See Waiahole I, 94 Hawai‘i at 144, 9 P.3d at 456. See also HRS § 174C-5 ("The general administration of the state water code shall rest with the [Commission].").

As will be established below, in the Waiahole case, the Commission appropriately construed the Water Code to mean that existing uses are not extinguished merely because there is a change in user, rather, the focus is on maintaining a category of continuing use. Thus, a discontinuity between uses and users will not interfere with the water permitting process so long as the subsequent user maintains the same category of use. This interpretation is based on the plain language of the Water Code as a whole, is reasonable, and is in accord with legislative intent. As such, the Hawai‘i Supreme Court did not find this interpretation to be "palpably erroneous," and rather, it implicitly accepted this interpretation by considering and ruling upon the existing uses of landowners and subsequent users in Waiahole I and Waiahole II, despite the fact that they were not the existing users at the time of designation. See Waiahole I, 94 Hawai‘i
at 162-5, 9 P.3d at 474-7. See also In re Water Use Permits, 105 Hawai'i 1, 21-6, 93 P.3d 643, 663-8 (2004) ("Waiahole II").

In the ongoing Waiahole dispute, Waiahole Irrigation Company ("WIC"), owner and operator of the Waiahole Ditch, and Oahu Sugar Company ("OSCO"), lessee of the land on which the water was used, jointly filed a combined application for an existing use permit, "acting as the agent for the... end users." Order No. 8, In re Water Use Permit Applications, Interim Order Identifying "Existing Uses" Allowed to Continue Under HRS § 174C-48(a) at 11 (1995) ("Order No. 8"). See Exhibit "4". (WIC was wholly owned and operated by OSCO at that time.) Although WIC did not utilize the water for its own agricultural purposes, its application was accepted for apportionment of water to WIC's end users, including OSCO. Order No. 8 at 10. When OSCO ended its sugarcane operations shortly after the one-year deadline passed to apply for existing use permits, Waiahole I, 94 Hawai'i at 111, 9 P.3d at 423, the Commission allowed, and in fact required, the landowners from which OSCO had previously leased its agricultural lands to step into the shoes of OSCO as joint applicants, Order No. 8 at 11. These landowners, including, inter alia, Campbell Estate and Robinson Estate, had entered into new agricultural leases with different farmers, and then requested existing use permits for the water previously used by OSCO on those lands by virtue of their position as landowners and subsequent users. Order No. 8 at 11. See also Waiahole I, 94 Hawai'i at 163-4, 9 P.3d at 475-6.

Under the Water Code, a change in use precludes an application for an existing use, and the applicant is required to seek a new use permit. HRS § 174C-57(a). In interpreting this section, the Commission looked to the plain language of the
HRS § 174C-3 definition of “change in use,” and determined that a continuing use may change without obtaining a new permit, as long as that use remains within the same category of water use. Order No. 8 at 6. See also, HRS § 174C-3 (“Change in Use’ means any modification or change in water use from or to domestic, municipal, military, agriculture, or industrial uses.”). The statutory categories of use under the Water Code include domestic, municipal, military, agriculture, and industrial. HRS § 174C-3.

Although Order 8 applied to section 48(a) of the Water Code, which allows the temporary continuation of existing uses prior to the issuance of water use permits, see Order No. 8 at 5, the Commission continued to apply this interpretation when it issued existing use permits under HRS § 174C-50 to the landowners and subsequent users in its final Decision & Order I (“D&O I”), D&O I at 4-8. Thus, under both subsections 48(a) and 50, it is only if one of the preceding categories of use changes that a new use permit must be sought.

In Waiāhole, OSCO’s existing use was for sugarcane crops, but the new lessees sought to use that water for diversified agriculture. Waiāhole I, 94 Hawai‘i at 162-4, 9 P.3d at 474-6. Following its interpretation of the change in use provision, the Commission found in Order No. 8 that “a change in crop type is still a form of farming and does not constitute a ‘change in use’ under the Water Code so long as the ‘use’ remains in agriculture.” Order No. 8 at 6-7. Thus, although there was a change both in user and crop type, the new users could nevertheless acquire existing use permits by virtue of the prior existing users’ application for the same category of water use. In its D&O I, the Commission accordingly granted existing use permits to the landowners to provide water for subsequent lessees. D&O I at 8. In reviewing the D&O I, the Hawai‘i
Supreme Court did not establish any requirement that existing uses may only be held by existing users, thus implicitly adopting the Commission's interpretation that the existing use analysis turns on the existing category of use and not the exiting user. See, e.g., Waiahole I, 94 Hawai'i at 162, 9 P.3d at 474 ("[T]he Commission primarily considered and granted permit applications for agricultural uses already in existence . . .").

Kehalani’s current situation is similar to that discussed above in that the existing use at the time 'Iao Aquifer was designated was for a municipal use. Under the Water Code, "‘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 from fire, and for the purposes listed under the term ‘domestic use.’" HRS § 174C-3. Municipal use is not limited to County agencies and the Commission has issued water use permits for municipal uses to private water utility companies on Oahu and Molokai. Thus, in accordance with the statutory definition, Kehalani’s use constitutes municipal use, and would therefore continue the current existing category of use of Shaft 33 waters. Following its own precedent as accepted by the Hawai‘i Supreme Court, the Commission can and must find that Kehalani’s continued use of Shaft 33 is an existing municipal use by virtue of the fact that it is the landowner and will not effect a change in the existing category of municipal use. Therefore, Kehalani Mauka hereby respectfully requests that the Commission on Water Resource Management issue a declaratory
ruling that Kehalani Mauka’s application for a water use permit at Wailuku Shaft 33 is for an existing use.

Dated: Honolulu, Hawaii, April 7, 2006.

LINNEL T. NISHIOKA

Attorney for KEHALANI MAUKA, LLC
1. I got a call from Ron Serie, owner of Summit Trade Wells, who says theirs are not even hooked up yet, and doesn't know what it could be, but try call Rick Holt (I did), and if no luck, he'll go physically check his wells.

2. Eva Bloomenstein from MDWS/Planning called to report back that Kehalani had 320 meters issued as of July 2003, individually not a single developer, and a July average use of 150,000 gpd. Sounds like bona fide use!
TO: Ellen Kraftson  
FROM: Charles Ice  

Date: 12 Sep 05

Here's the map for Kehalani.
Please verify that the small lots shown (not large blocks) were actually receiving water in the amount of 0.221 mgd (verification of amt not critical) as of 21 July 03.
July 15, 2005

Mr. Dean Nakano, Acting Deputy Director
Department of Land and Natural Resources
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Water Use Application Information, Wailuku Shaft (Shaft 33), Well No. 5330-05

Dear Mr. Nakano:

This letter is a follow-up to your staff's request for additional information concerning Water Use Permit Application No. 707 for Kehalani Mauka, LLC ("Kehalani Mauka" or "the project"), use of the Wailuku Shaft on the portion of the Kehalani Mauka project that had actual water service from Shaft 33 (State Well No. 5330-05).

To clarify, Kehalani Mauka is seeking an existing use permit for a municipal use. The project is within the service area for the Central Maui Water System and Shaft 33. Therefore, given our request is seeking an existing use, we do not believe that it should be limited to the units in service on July 21, 2003. We do not think the Commission would limit such municipal use of the County of Maui or other municipal users. However, to respond to your inquiry, as of July 21, 2003, 320 units were in service with an additional amount for irrigation of the common areas for that portion of the project. Enclosed is Table 1 detailing the portion of the project under DWS service and a Map indicating the location of that portion of the project.

Thank you for your patience as we try to come to some agreement with the Maui County under the Department of Water Supply ("MDWS") on the use of Shaft 33 and a joint application with MDWS.

Sincerely,

[Signature]

Linnel T. Nishioka

Enclosures

LTN: ai

cc w/encls: Mr. Jay Nakamura
Mr. David Blane
Jane Lovell, Esq., Maui Corporation Counsel
Portion of Kehalani Project on the DWS Water System as of 7/21/03*

TABLE 1. TMKs TO USE REQUESTED WATER

<table>
<thead>
<tr>
<th>PROJECT NAME &amp; PHASES (include existing &amp; proposed)</th>
<th>POTABLE</th>
<th>NON-PO TABLE</th>
<th>TMK</th>
<th>STATE</th>
<th>CURRENT</th>
<th>ZONING</th>
<th>USE</th>
<th>WATER USE (GPD)</th>
<th>4-YEAR CUMULATIVE PROJECTED DEMAND</th>
<th>SUBTOTAL (GPD)</th>
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<tbody>
<tr>
<td>1. A portion of Kehalani</td>
<td>existing</td>
<td>potable</td>
<td>pending</td>
<td>urban</td>
<td>urban</td>
<td>320 x 600</td>
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<td>2. Project: (See Attached Map)</td>
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<td>3. Kaimana (179 Units)</td>
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<td>4. Halemalu (30 Units)</td>
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<td>5. Nanea (80 Units)</td>
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<td>6. Olena I (31 Units)</td>
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<td>8. Irrigation of common areas in Kaimana,</td>
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<td>9. Halemalu, Nanea and Olena I</td>
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<td>10. (15% of potable use)</td>
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<td>TOTAL GPD 221,000</td>
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(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.

*Kehalani Mauka continues to assert that its entire application for shaft 33 (State Well No. 5330-05) is for an existing use.
Kehalani
A Master-Planned Community
COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI' I

In the Matter of Water Use Permit Applications For the I'ao Ground Water Management Area Basal Source Contested Case Hearing ) ) Case No. CCH-MA05-1

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Approved
31 Jan 07
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<td>i.</td>
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<td>a.</td>
<td>Can be accommodated with the available water source</td>
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<td>b.</td>
<td>Is a reasonable-beneficial use as defined in section 174C-3</td>
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<td>c.</td>
<td>Will not interfere with any existing legal use of water</td>
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<td>Is consistent with the public interest</td>
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<td>e.</td>
<td>Is consistent with state and county general plans and land use designations</td>
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<td>f.</td>
<td>Is consistent with county land use plans and policies</td>
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<td>g.</td>
<td>Will not interfere with the rights of the department of Hawaiian home lands as provided in Section 221 of the Hawaiian Homes Commission Act</td>
<td>9</td>
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<td>h.</td>
<td>Has no practical alternatives</td>
<td>10</td>
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<tr>
<td>ii.</td>
<td>Kehalani Mauka</td>
<td>10</td>
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<tr>
<td>a.</td>
<td>Can be accommodated with the available water source</td>
<td>10</td>
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</tbody>
</table>
b. Is a reasonable-beneficial use as defined in section 174C-3

c. Will not interfere with any existing legal use of water

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 policies

g. Will not interfere with the rights of DHHL

h. Has no practical alternatives

III. Conclusions of Law

A. There is water available for both MDWS and KM

B. Both MDWS’s and KM’s WUPAs must be processed as new uses

C. MDWS’s WUPA meets the conditions for a permit

D. KM’s WUPA meets the permit conditions but for a reduced amount

E. MDWS’s “reservation” of the N`ao basal aquifer

IV. Decision and Order

Appendix A: Standard Water Use Conditions

Appendix B: Rulings on the Proposed Findings of Fact Submitted by the Parties
I. Background

On July 9, 2001, a petition was filed to designate the I'ao and Waihe'e Aquifer System Areas as ground-water management areas. Following numerous reviews, hearings, and meetings of the Commission on Water Resource Management (hereinafter, “Commission”) and its Findings of Fact, the Commission denied immediate designation but imposed triggers to automatically cause designation. One of these triggers was pumping greater than ninety percent (90%) of the aquifer’s sustainable yield, based on a 12-month moving average (hereinafter, “12-MAV”).

In June 2003, the 12-MAV for the I'ao Aquifer System Area exceeded the Commission’s designated trigger, and on July 21, 2003, I'ao was officially designated a Ground Water Management Area upon publication of the public notice declaring designation and describing the water management area regulations. Ground water in the I'ao Aquifer System includes basal, caprock, and high-level dike sources.

By July 21, 2004, some existing users did not meet the one-year deadline for filing water use permit applications (hereinafter, “WUPA”). Among the applications deemed incomplete and therefore not meeting the one-year deadline were Maui Department of Water Supply (hereinafter, “MDWS”) and Kehalani Mauka (hereinafter, “KM”) for basal sources. MDWS submitted its WUPA on July 2, 2004, but its application was deemed not complete because it lacked the landowner’s signature. On July 23, 2004, the landowner, KM, submitted a completed application for the same battery of wells as MDWS, Well No. 5330-05, commonly referred to as “Wailuku Shaft 33.” Because both MDWS’s (WUPA No. 702) and KM’s (WUPA No. 707) applications were completed after the one-year deadline for filing existing-use WUPAs, both applications were deemed new-use applications. A new-use application from the basal aquifer was also filed by Living Waters for a new well it had under construction at the time of designation.

All WUPAs were the subject of objections, and on September 22, 2004, the Commission authorized a subcommittee to convene a public hearing on Maui to hear objections to and clarifications of the WUPAs. Existing and new-use WUPAs were to be addressed in separate sessions but on the same day, and the public hearing was to remain open to allow the public time to request a contested case hearing. Commissioners James Frazier and Lawrence Miike were appointed to the subcommittee.

On October 28, 2004, the subcommittee conducted the first session of the public hearing. On the same date, MDWS filed a Petition for Declaratory Ruling that its WUPA for Wailuku Shaft 33 was timely filed and therefore should be an existing use and not a new use.

At its April 20, 2005, meeting, the Commission denied MDWS’s Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the
authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired.

On April 22, 2005, a second session of the public hearing was held on Maui. The hearing remained open for subsequent information gathering. On July 11, 2005, an information-sharing meeting was held on Maui by Commission staff, where the parties attending reported on meetings between them to resolve some issues to avoid a possible contested case hearing.

On September 7, 2005, the next session of the public hearing was held on Maui. This session was limited to basal and caprock wells, and it was announced that the public hearing would be closed at the end of the meeting for these wells. Prior to the close of the hearing, several requests were made for a contested case hearing (hereinafter, “CCH”) concerning various basal well sources, and timely written requests were submitted by two applicants, MDWS and KM, and three organizations: Hu o Na Wai Eha and Maui Meadows Association, both represented by Earthjustice, and the Office of Hawaiian Affairs (hereinafter, “OHA”). MDWS requested a CCH for all eight of its WUPAs and for KM’s competing application for the Shaft 33 battery of wells; KM requested a CCH for its and MDWS’s competing application for the Shaft 33 battery of wells; and Hu o Na Wai Eha/Maui Meadows Association and OHA requested a CCH for all eight of MDWS’s WUPAs.

On October 5, 2005, Commissioner Lawrence Miike was appointed the hearings officer.

On October 17, 2005, standing was granted to all five requesting parties. On December 16, 2005, Hu o Na Wai Eha/Maui Meadows Association and OHA withdrew their objections and request for a CCH regarding MDWS’s WUPAs, stating that they had reached a resolution with MDWS. MDWS’s request for a contested case on all eight of its WUPAs had been conditioned on another party requesting a CCH, leaving only the competing applications for Shaft 33 between MDWS and KM as the subject of this CCH.

On April 7, 2006, KM filed a motion for declaratory ruling that its application for Shaft 33 was for an existing use.

On April 19, 2006, the CCH was held on Maui, at which time the hearing officer also heard and denied KM’s motion for declaratory ruling.

Closing oral arguments were held on May 24, 2006, in Honolulu, and Proposed Findings of Fact, Conclusions of Law, and Decision and Order were submitted to the Hearings Officer on July 28, 2006.

The WUPAs from caprock sources were approved on October 25, 2005. The WUPAs from the basal aquifer that were not the subject of this CCH (the other seven...
MDWS WUPAs and a new-use application from the Living Waters Land Foundation) were approved on February 15, 2006.

Diked, high-level well and tunnel sources were not part of the September 7, 2005, hearing, and the public hearing remained open for those WUPAs. On February 2, 2006, the final session of the public hearing for WUPAs from these sources was held on Maui. Prior to the close of the hearing, verbal requests were made by various parties for a CCH on all WUPAs from high-level dike sources. Written requests were submitted by: 1) MDWS; 2) Wailuku Water Company (hereinafter, “WWC,” and previously known as Wailuku Agribusiness Co., Inc.); 3) Hawaiian Commercial & Sugar Company (hereinafter, “HC&S”); 4) OHA; 5) Hui o Na Wai Eha/Maui Tomorrow Foundation; and 6) Ka Aha O Na Wai Eha Ku Moku O Mauiola.

On June 25, 2004, a Petition had been filed by Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc., to amend the interim instream flow standards (hereinafter, “IIFS”) for Waihe'e, North & South Waiehu, I'ao and Waikapu Streams and their tributaries. On October 19, 2004, these two parties also filed a Waste Complaint and a Petition for Declaratory Order against WWC (then known as Wailuku Agribusiness Co., Inc.) and HC&S.

On February 15, 2006, the Commission initiated a CCH for the I’ao high-level WUPAs and specified that the petition to amend the IIFS of the four streams would be included in the CCH. The Commission further directed that mediation for the waste complaint be initiated prior to the CCH. On March 17, 2006, the Commission clarified its intent by ordering that two CCHs be held, one for the I’ao high-level WUPAs (CCH-MA06-01) and a separate CCH for the waste complaint (CCH-MA06-02). Standing has been granted in these two CCHs to the same five parties: 1) MDWS; 2) WWC; 3) HC&S; 4) OHA; and 5) Hui o Na Wai Eha/Maui Tomorrow Foundation. Ka Aha O Na Wai Eha Ku Moku O Mauiola had not applied to be a party in the CCH on the waste complaint, and had withdrawn its request to be a party in the CCH on the high-level WUPAs.

Commissioner Lawrence Miike has also been appointed hearings officer for these two on-going CCHs.

II. Findings of Fact

The findings of fact numbers of the two parties are in brackets. Modifications were made for clarification and accuracy.

A. Sustainable Yield and Available Water

1. CWRM has set the sustainable yield for the I’ao basal aquifer at 20 mgd. (See Staff Submittal for the CWRM meeting of February 15, 2006, at p. 4) [MDWS FOF25]
2. On February 15, 2006, CWRM approved MDWS’s applications for seven existing basal sources, totaling 11.227 mgd. (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF 26]

3. On February 15, 2006, CWRM also approved Living Waters Foundation’s new use application for 20,000 gallons per day (.02 mgd). (Minutes of the February 15, 2006, CWRM meeting) [MDWS FOF27]

4. Therefore, of the 20 mgd in sustainable yield of the I’ao basal aquifer, 11.247 mgd have been permitted, leaving 8.753 mgd available for new-use permits.

B. MDWS’s and KM’s WUPAs

5. Both MDWS and KM requested 5.771 mgd from Wailuku Shaft 33, State Well No. 5330-05, based on existing municipal use reported by MDWS. There are three wells at Shaft 33, with only one pump working. (MDWS Exhibit A-1) [MDWS FOF28] (KM Exhibit B-4) [KM FOF1, 28] (Tengan, Transcript, May 25, 2006, at 11)

6. The 5.771 mgd reported as developed from Shaft 33 at the time the I’ao Aquifer System was designated a Ground Water Management Area was based on information available at the time of the initial application for an existing use. The actual 12-month moving average (12-MAV) at the time was 4.904 mgd. (Transcript, at 8) On April 21, 2006, the 12-MAV was 4.812 mgd. (MDWS, email to the Hearings Officer, May 19, 2006, per Minute Order Number 8, dated April 21, 2006) 5.771 mgd was the best figure at the time the application was submitted, but recalibration of some of the equipment resulted in the different number. (Transcript, at 22-23)

7. MDWS is currently negotiating with KM to drill three new wells at Shaft 33 that would be able to withdraw 5.771 mgd. (Tengan, Transcript, May 25, 2006, at 14) [KM FOF18]

8. Shaft 33 is located on land owned by KM. (Nakamura, written testimony, at 3) [KM FOF19]

9. Shaft 33 is part of MDWS’s Central Maui Water System that serves all of central and south Maui. The Kehalani project is within the Central Maui service area, and the existing homes and attendant common areas of the project are currently being provided water from Shaft 33. (MDWS, written testimony, at 2) [KM FOF21]

10. Previously, MDWS had an agreement with KM’s former landowner to purchase water from Shaft 33 for its municipal purposes, and since 1991, KM and MDWS have a month-to-month agreement that allows MDWS to operate and draw water from Shaft 33 free of charge. (Nakamura, written testimony, at 3-4) [KM FOF19, 20]

11. KM and MDWS have been in negotiations, since at least July 2004, for an agreement that would provide for MDWS’s continued, long-term use of Shaft 33 that
would include the continued supply of water to the Kehalani project. (Nakamura, written testimony, at 4) [KM FOF22]

12. CWRM had designated the I'ao Aquifer System as a ground-water management area on July 21, 2003. As a result, existing users had to apply for water use permits within one year of the designation date, or before July 21, 2004. (Staff Submittal for the meeting of the CWRM, February 15, 2006, at p. 1) [MDWS FOF12; KM FOF24-25]

13. MDWS completed a WUPA for Shaft 33 and forwarded it for signature on February 4, 2004, to the landowner, KM. With the statutory deadline of July 21, 2004 for existing uses, MDWS signed and submitted its WUPA to CWRM without KM’s signature, where it was received on or about July 2, 2004. (MDWS, written testimony, at 3) [MDWS FOF15-18]

14. On September 18, 2004, KM finally signed MDWS’s WUPA for Shaft 33, and MDWS transmitted the signed document to CWRM the next day. (MDWS, written testimony, at 3) [MDWS FOF19-20]

15. CWRM concluded that MDWS’s existing-use WUPA was not complete until after the statutory deadline for existing-use applications and therefore would be processed as a new-use WUPA. (MDWS, written testimony, at 3) [MDWS FOF21, 24]

16. MDWS challenged the CWRM conclusion and filed a Petition for Declaratory Ruling on October 28, 2004. (MDWS written testimony, at 3) [MDWS FOF22-23]

17. At its April 20, 2005, meeting, the Commission denied MDWS’s Petition for Declaratory Ruling because: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. (Minutes of the April 20, 2005, CWRM meeting) [MDWS FOF 23-24]

18. KM’s WUPA was filed on July 20, 2004, but completed on July 23, 2004, for continued use of 5.771 mgd from Shaft 33, based on existing municipal use reported by MDWS. [KM FOF27-28]

19. Pursuant to CWRM’s Public Hearing Notice, dated March 28, 2005, regarding continuance of the original hearing of October 28, 2004, to be held on April 22, 2005, KM’s WUPA, which was initially categorized as an existing use, was categorized as a new-use permit. (Public Hearing Notice, dated March 28, 2005)

20. Prior to the close of the final session of the public hearing on September 7, 2005, KM made an oral request for a contested case hearing, and on September 16, 2005,
timely filed a written petition for a contested case hearing. KM’s request included its
contesting CWRM’s conclusion that KM’s WUPA was for a new use and that MDWS
had to be the applicant for the 5.771 mgd request that was based on existing municipal
use reported by MDWS. (KM’s Motion for Declaratory Ruling that Kehalani Mauka
LLC’s Application for Shaft 33 is for an Existing Use, received by CWRM on April 7,
2006)

21. At the start of the contested case hearing, held on April 19, 2006, the Hearings
Officer heard arguments on KM’s Motion for Declaratory Ruling. KM argued, among
other things, that as a landowner, it should be allowed to “step into the shoes” of the
existing user, MDWS, to obtain an existing-use permit for 5.771 mgd pumped from Shaft
33 for municipal uses, or in the alternative, for 0.221 mgd that was in use specifically by
the Kehalani project at the date of designation. (Transcript, 04/19/06, at 4, 6-8) [KM
FOF38]

22. The Hearings Officer denied the motion on three separate grounds: 1) while the
Code does not specifically say that the existing user needs to be the one filing for existing
use, there was no agreement between MDWS and KM that KM would file for the
existing use; 2) because KM cannot be a purveyor of municipal water services under the
definition which says it has to be through a public agency, it would be a change in use,
and therefore, not an existing use; and 3) by KM’s own submittal, it claims current use of
0.221 mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd
and any other amount under a new-use permit is better addressed in the contested case
hearing. (Transcript, 04/19/06, at 11-17)

23. KM, in its closing argument, revised its requested allocation from 5.771 mgd to
1.696 mgd: 0.221 mgd for its claim of an existing use on the MDWS system at the date of
designation and 1.475 mgd for a new use for the Kehalani project. (KM’s Closing
Argument, at 3) [KM FOF42]

24. The KM request for 1.696 mgd was based on the following: 1,586 single-family
units at an average use of 600 gallons per unit per day, or 951,600 gallons per day; 815
multi-family units at an average of 560 gallons per unit per day, or 456,400 gallons per
day; 19.54 acres at 6,000 gallons per acre per day for commercial parks, or 117,240
gallons per day; and 56.50 acres for open spaces at 1,700 gallons per acre per day, or
96,050 gallons per day. (KM Exhibit B-6 as amended per Minute Order Number 8, dated
April 21, 2006)

25. KM’s estimates were based on Maui county duties/meter requirements of 600
gallons per day for single-family units, 560 gallons per day for multi-family units, 6,000
gallons per acre per day for light industry, and 1,700 gallons per acre per day for schools
and parks. Hawaii, Kauai, and Oahu had lower duties/meter requirements, 400-500
gallons per day for single-family units, 350-400 gallons per day for multi-family units,
and 3,000 gallons per acre per day for light industry. Schools and parks for the other three
counties were higher at 4,000 gallons per acre per day. (KM Exhibit B-5)
26. MDWS reported that average daily water use in the Kehalani subdivisions ranged between 298 to 384 gallons per unit per day from July 21, 2003, to April 19, 2006. A total of 483 single-family units were identified as of the end of the reporting period. MDWS had no records for services designated for multi-family units. (MDWS's response to Minute Order Number 8, dated April 21, 2006)

27. MDWS is not sure that the averages they have reported provides a totally accurate picture, but average actual use is probably less than the Maui county duties/meter requirements of 560-600 gallons per unit per day. The first phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. (Lovell and Tengan, Transcript, May 25, 2006, at 49-50)

28. As of May 19, 2006, KM reported a total of 479 units completed, 255 single-family units and 224 multi-family units. 72 single-family units were under construction and first occupancy was in progress. 44 single-family units were under construction and first occupancy expected in 2006. Projected first occupancies for the remainder of the project were as follows: 1) 305 single-family and 80 multi-family units in 2007; 2) 59 single-family and the 19.54 commercial acres in 2008; 3) 105 single-family and 140 multi-family units in 209; 4) 201 single-family units in 2010; 5) 160 multi-family units in 2011; 6) 30 single-family and 85 multi-family units in 2012; 7) 225 single-family units in 2013; and 8) 560 multi-family units in 2014. (KM Closing Argument, Exhibit C)

29. Shaft 33 is not a stand-alone water source. Instead, it is an integral part of MDWS's public water supply for Central and South Maui and is the major source of water for the Central Maui system, providing more than one-quarter of the water required to meet the needs of the people and businesses served by the Central Maui system. (MDWS written testimony, at 2) [MDWS FOF2, 9, 11]

30. MDWS opposes KM’s WUPA for Shaft 33 because it plans to develop Waikapu Mauka and I‘ao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. These plans are part of MDWS’s programs to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water resources, development of new sources in Waihe‘e, conservation programs, use of reclaimed water, and the like. MDWS contends that these programs are dependent on MDWS’s continued control of the Wailuku Shaft. (MDWS Exhibits A-5 and B-4, written testimony at 10-11) [MDWS FOF82-84]

31. With a project of the magnitude of KM’s, MDWS would probably require the developer to develop his own source. But MDWS does not support a new water-use permit in the amount requested for Shaft 33 by KM and has been requiring developers of large projects to provide sources outside of the I‘ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. (MDWS, written testimony, at 13-14; Tengan and Lovell, transcript, 04/19/06, at 54-57)

32. On the other hand, MDWS states that since the aquifer was designated, “as people have been ready to receive water service, they come in and they get their meter. But
always with an eye on how much is still available.” (Lovell, Transcript, April 19, 2006, at 55-56) MDWS further states that “there is no showing that it is in the public interest to have a competing private water company serving this small portion of Central Maui.” (Lovell, Transcript, May 25, 2006, at 10)

C. Conditions for a Permit

i. Maui Department of Water Supply

a. Can be accommodated with the available water source

33. The sustainable yield of the I'ao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd. (FOF4-5, 23, supra)

b. Is a reasonable-beneficial use as defined in section 174C-3

34. Shaft 33, like all of MDWS’s sources for which permits have been sought and granted, serves municipal purposes in the Central Maui service area. (Staff Submittal for the CWRM meeting of February 15, 2006, at 5) [MDWS FOF30]

35. Approximately two-thirds of the I’ao ground water pumped by MDWS (including Shaft 33) is used to provide potable water to single-family and multi-family residences. A portion of the remaining one-third is used to satisfy the potable needs of commercial, industrial, and agricultural customers. (MDWS written testimony, at5-6) [MDWS FOF42-43]

36. Maui County’s potable water sources are protected and conserved through the use of reclaimed wastewater and non-potable sources for uses such as irrigation. (MDWS Exhibits A-1, A-3, A-4) [MDWS FOF33]

37. MDWS conservation efforts include a fixture program and public education programs, and demand has been reduced by about 0.5 mgd. (MDWS Exhibit A-3) [MDWS FOF37-38]

38. Many of MDWS’s commercial, industrial, and agricultural customers use reclaimed or brackish water for irrigation and other non-potable uses. (MDWS written testimony, at 5-6) [MDWS FOF44]

39. MDWS also relies on surface water sources to serve its municipal needs to the extent such surface water is available. (MDWS written testimony, at 5-6) [MDWS FOF45]
c. Will not interfere with any existing legal use of water

40. MDWS has seven of the eight currently permitted uses in the I’ao basal aquifer, and the eighth, Living Waters Foundation, was recently granted a new use permit, leaving 8.753 mgd available for new permits. (FOF2-4, supra)

41. No streams or springs have been identified as being affected by MDWS’s basal aquifer withdrawals, and initial objections to all eight of MDWS’s WUPAs were withdrawn by OHA and Earthjustice’s clients. (Staff submittal for the CWRM meeting of February 15, 2006, at 60 [MDWS FOF54-55, 63]

d. Is consistent with the public interest

42. MDWS’s Shaft 33 WUPA will be used for the same purposes as its seven other existing-use WUPAs that have been approved. (MDWS written testimony, at 7) [MDWS FOF57]

43. Domestic, agricultural, commercial, and industrial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c))

44. Municipal use is “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.’” (HRS 174C-3)

e. Is consistent with state and county general plans and land use designations

45. Maui county’s planning director has certified that MDWS’s WUPAs are consistent with state and county land use designations, including the County’s General Plan and the Kahului-Wailuku Community Plan. (MDWS written testimony, at 7) [MDWS FOF58]

f. Is consistent with county land use plans and policies

46. MDWS’s seven approved WUPAs are for the same purpose as the WUPA for Shaft 33, and those seven WUPAs were found to be consistent with applicable plans, land use classifications, and land use policies. (Staff submittal for the CWRM meeting of February 15, 2006, at 7) [MDWS FOF59-60]

g. Will not interfere with the rights of the department of Hawaiian home lands as provided in Section 221 of the Hawaiian Homes Commission Act

47. MDWS’s Central Maui system serves homes built by the Department of Hawaiian Homelands (hereinafter, “DHHL”). DHHL has not requested party status in this
contested case and has not objected to MDWS’s WUPA. (MDWS written testimony, at 8) [MDWS FOF61-62]

48. Under CWRM’s Standard Water Use Permit Conditions, all permits continue to be subject to the rights of DHHL. (CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. Has no practical alternatives

49. Ground water from the I’ao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6) [MDWS FOF 41]

50. MDWS already has conservation programs, uses surface-water sources when available, and many of its agricultural, commercial, and industrial customers use reclaimed or brackish water for irrigation or non-potable purposes. (FOF37-39, supra)

ii. Kehalani Mauka

a. Can be accommodated with the available water source

51. The sustainable yield of the I’ao basal aquifer is 20 mgd. 11.247 mgd have been permitted, leaving 8.753 mgd available for new use permits. The combined requests for MDWS and KM equal 7.467 mgd. (FOF4-5, 23, supra)

b. Is a reasonable-beneficial use as defined in section 174C-3

52. KM’s WUPA is primarily for domestic use as defined in HRS 174C-3, and a limited amount of related landscaping and commercial uses. (FOF24, supra)

53. KM’s request is based on Maui county duties/meter requirements, and the actual use of its early project phases are less than these guidelines. (FOF25-26, supra)

54. KM has instituted water conservation measures throughout the Kehalani project to encourage and practice conservation of water. Water conservation measures include low-flow fixtures such as low-flow shower heads and low-flush toilets. Purchasers of units receive a brochure describing water conservation and efficient water uses. (Nakamura, written testimony, at 8; Blane, Transcript, April 19, 2006, at 36) [KM FOF73-75]

55. In terms of landscape and irrigation, KM has tried to match irrigation with natural rainfall, which is about 30 inches a year. KM is installing timed, moisture sensors that irrigate only in non-peak daylight hours and when it is not raining. Irrigation systems are also fitted with high-tech sprinkler heads, which will regulate water flow at 30 pounds per square inch. Project landscape is designed to take into account water-utilization
measures. For example, KM has minimized use of turfgrass, which is a high user of water, and instead, has utilized groundcover called asysphsia, which is very drought tolerant. Xeriscape plants will continue to be planted in the common areas. (Blane, Transcript, April 19, 2006, at 36-37, 43-44; Nakamura, written testimony, at 8) [KM FOF76-79]

56. Typically, 60 to 65 percent of water usage in a community goes for purely domestic use, while the rest is for irrigation of landscaping and open areas, washing cars, and other such tasks. The Kehalani project is reporting usage of approximately 80 to 85 percent for purely domestic use. (Blane, Transcript, April 19, 2006, at 38-39) [KM FOF80-81]

c. **Will not interfere with any existing legal use of water**

57. KM’s original and final, reduced request for water were for the same source as MDWS’s WUPA, for which initial objections were withdrawn. (FOF41, supra)

d. **Is consistent with the public interest**

58. KM’s domestic and commercial uses are objectives declared to be in the public interest by the State Water Code. (HRS 174C-2(c)) [KM FOF93]

59. While some water will be for commercial use, as well as irrigation of parks, open spaces, and common areas of Kehalani, approximately 85% will be for domestic use. (Nakamura, written testimony, at 9; Transcript, April 19, 2006, at 28) [KM FOF70]

60. The Kehalani project will provide a full range of single- and multi-family housing, including affordable housing for local families and seniors in a convenient location near Kahului. The project will bring approximately 2,400 homes to West Maui, as well as schools, parks, open spaces, and a community recreational center. It is one of the few planned residential communities of this scale that will offer affordable housing. (Nakamura, written testimony, at 2-3) [KM FOF94-97]

e. **Is consistent with state and county general plans and land use designations**

61. The Kehalani project has all land use and zoning requirements in place. (Blane, written testimony, at 3) [KM FOF101]

62. In 1991, the project lands were zoned from agricultural to urban district by the State Land Use Commission (hereinafter, “LUC”). (KM Exhibit B-8; Blane, written testimony, at 3) [KM FOF102]

63. In 1991, the project was also approved under the establishment of the Wailuku-Kahului Project District 3 zoning. (KM Exhibit B-7; Blane, written testimony, at 3) [KM FOF103]
f. **Is consistent with county land use plans and policies**

64. In 1991, the Kehalani project received county land-use zoning approval. (KM Exhibits B-7 and B-8) [KM FOF107]

65. Maui County has divided the island into multiple community plans with county land-use policies set out for each area. The Wailuku-Kahului community Plan was adopted in 2002. In that plan, the County specifically recognizes that one of the goals of the plan is “a sufficient supply and choice of attractive, sanitary and affordable housing accommodations for the broad cross section of residents, including the elderly.” (KM Rebuttal Brief, Exhibit C) [KM FOF108-110]

66. Historically speaking, the Kehalani project has been in the community plan since 1982. In using a project district approach, the planning director is required to certify at each of three steps that the individual components of any development plan are in conformance with the standards and criteria of the project district. KM spent seven years in the entitlement process at the community plan and the land-use and zoning levels, and at each stage the project received certification that the project was consistent with the community plans. Various planning directors throughout the years, including the current director, have signed on several occasions in the past confirming that KM’s proposed water use is consistent with county land-use plans and policies. (Blane, Transcript, April 19, 2006, at 47-48, 50 [KM FOF112-113]

67. The current planning director for Maui County, at the request of MDWS, stated that adding 2,400 homes and 22 acres of commercial development, without developing any new water resources, is inconsistent with the county’s land-use plans and policies and concurred with MDWS that “(t)he current average pumpage of 5.771 mgd is in its entirety serving the County’s municipal system” and that “additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the I’ao aquifer in order to avoid overpumpage of the aquifer.” (MDWS written testimony, at 13-14; Exhibit A-10) [MDWS FOF105, 108]

68. KM spent seven years in the entitlement process, at both the community plan, the land use and the zoning level, and in each case one of the major criteria was the project’s consistency with the community plans, and KM would not have gotten its entitlements if it had been ruled that it was not. (Blane, Transcript, April 19, 2006, at 47-48)

69. The entire Kehalani project has all of the approvals. There are three steps, and the project has steps one and two for the entire project. As for step three, every time a module is to be developed, the housing and landscaping plans are taken to the Planning Director for approval as conforming to the general guidelines. To date, the Planning Director has approved all of the 13 plans presented to him. (Blane, Transcript, April 19, 2006, at 49-50)
g. **Will not interfere with the rights of DHHL**

70. DHHL submitted a WUPA and a request for water reservation to the Commission on July 22, 2004. On the WUPA, no source was identified, so the Commission requested more information to complete DHHL’s WUPA request. The Commission also stated its understanding that DHHL’s existing and foreseeable services were and would continue to be delivered by MDWS, which had applied for existing pumpage for all of its sources, and that it was unnecessary for existing end users served by MDWS to apply for a WUPA. On the reservation request, the Commission’s response stated that some of the services were for lands that were not yet acquired. Because water reservations are established by rule in designated water management areas, the Commission stated that it was essential to associate the eventual use with a source in a particular aquifer system and requested more specific information to identify those lands to be acquired. In addition, several of the uses identified in the request were already receiving service and therefore would not be the appropriate subject of a water reservation. (Commission letter to DHHL, November 18, 2004)

71. Under the State Water Code and the standard conditions of use, any water use permit issued by the Commission may be modified at any time to meet Hawaiian Home Lands requirements. (§174C-101(a); CWRM Standard Water Use Permit Conditions, citing HRS 174C-49(a))

h. **Has no practical alternatives**

72. Ground water from the I'ao basal aquifer, including from Shaft 33, is particularly well-suited for potable use, because it requires less treatment to achieve state and federal drinking-water standards than other sources (such as surface water) do. (MDWS written testimony, at 5-6)

73. The vast majority of KM’s use (approximately 85%) is for domestic use. KM does not have any rights to surface water, as that was expressly reserved in favor of the previous owner. Surface water would also require expensive treatment prior to using it for drinking water, and KM understands that the current surface water system is under another legal challenge at the Commission and may be subject to change. Re-use water is not an option for domestic use for health reasons and is not available near the project site and may not be affordable for landscape irrigation use. (Nakamura, written testimony, at 8-9)

74. To install a dual water system would cost roughly $200 a linear foot and a total cost of $5-6 million in the completed portion of the project. Installing in the un-built portion of the project would cost probably an additional $2 million. (Blane, Transcript, April 19, 2006, at 41-42)
III. Conclusions of Law

Reference to Findings of Fact from this Contested Case Hearing are in brackets.

A. There is water available for both MDWS and KM

1. The sustainable yield of the I’ao basal aquifer is 20 mgd. Permits have been issued for 11.247 mgd, leaving 8.753 mgd available for new use permits. [FOF1-3]

2. MDWS is requesting 5.771 mgd from Wailuku Shaft 33, while KM’s revised request is for 1.696 mgd, for a total request of 7.467 mgd. [FOF5, 23] Therefore, both WUPAs can be accommodated even if the full amounts requested are granted.

3. “Wailuku Shaft 33” is not a single well but a battery of wells, of which there are currently three, only one of which has a working pump. MDWS is negotiating with KM, the landowner, to drill three new wells. [FOF5, 7]

4. MDWS’s and KM’s WUPAs are not competing applications. Both requests can be accommodated within the sustainable yield of the I’ao basal aquifer. While the WUPAs are for the same site, they are not necessarily for the same well. WUPAs must only specify the location of the well (HRS §174C-51), and the provisions for well construction and pump installation regulate the actual amounts of water that may be withdrawn under the water-use permits. (HRS §§ 174C-81 to 174C-87) The Code defines competing uses as when two or more existing uses draw water from the same hydrologically controllable area and the aggregate quantity of water consumed by the users exceeds the appropriate sustainable yield. (HRS §174C-50(h)) The sustainable yield would not be exceeded, and both applications did not meet the existing-use requirements (see below).

B. Both MDWS’s and KM’s WUPAs must be processed as new uses

5. At its April 20, 2005, meeting, CWRM denied MDWS’s Petition for Declaratory Ruling on the following grounds: 1) the original application lacked the co-applicant landowner’s signature and was therefore incomplete, and by the time a completed application was filed, the one-year deadline had passed; 2) the Commission lacked the authority to accept late filings of an existing-use WUPA; and 3) HAR §13-167-27 (pertaining to insufficient documents filed with CWRM) cannot be used to amend two applications to change the status of timely or untimely filings as the one-year deadline for applying for existing uses had expired. [FOF17]

6. In regard to KM’s Motion for Declaratory Ruling [FOF20]: 1) while the Code does not specifically state that the existing user must be the party filing for the existing use, there was no agreement between MDWS and KM that KM would file for the existing use and in fact MDWS is contesting KM’s WUPA; 2) because KM cannot be a purveyor of municipal water services under the definition which states it must be through a public agency (HRS §174C-3), it would be a change in use, and therefore, not an
existing use; and 3) by KM's own submittal, it claims its own existing use of only 0.221
mgd, so the issue of whether KM should be awarded an existing use of 0.221 mgd and
any other amount under a new-use permit is better addressed in the contested case
hearing. [FOF22]

7. While both MDWS and KM were using water from the I'ao basal aquifer at the
time of designation, both did not meet the requirements for an existing-use WUPA and
both WUPAs must therefore be processed as new uses, not existing uses. As such, both
applications are not limited to the amounts being used on July 21, 2003, the date of
designation of the I'ao Aquifer System as a ground-water management area. (FOF12) At
that date, MDWS was using 4.904 mgd, of which 0.221 mgd was being provided to KM.
(FOF6, 21) Therefore, MDWS's WUPA will be evaluated as a request for 5.771 mgd,
and KM's, for 1.696 mgd.

C. MDWS's WUPA meets the conditions for a permit

8. "Domestic uses of the general public" has been specifically identified by the
Hawai'i Supreme Court as a water resources trust purpose. (In re Use Permit
Application [hereinafter, "Waiahole I"], 94 Haw. 97, at 136; 9 P.3d 409 [2000]) About
two-thirds of MDWS I'ao ground water is used to provide potable water to residences,
while the remaining one-third is for commercial, industrial, and agricultural customers
[FOF35], which the Water Code also identifies as being in the public interest. (HRS
§174C-2(c))

9. MDWS's WUPA also meets all of the Code's requirements. [FOF34-48]

10. MDWS has a working policy to use all available water resources, including
surface water, and reclaimed and brackish water for irrigation or non-potable purposes.
[FOF50]

11. Even if other alternative sources were available, "(c)onsidering whether
alternative water resources are practicable innately requires prioritizing among public
trust resources." (In re Use Permit Application [hereinafter, "Waiahole II"] 105 Haw.
1, at 20; 93 P.3d 643 [2004]) The I'ao basal aquifer is particularly well-suited for potable
use, because it requires less treatment to achieve state and federal drinking-water
standards than other sources (such as surface water) do. [FOF49] Municipal use is the
highest and best use of I'ao basal aquifer water.

12. While MDWS's use was 4.904 mgd at the time of designation, its request is for
5.771 mgd, the original amount based on information available at the time of the initial
application for an existing use. [FOF6] However, Shaft 33 is not a stand-alone source for
MDWS but an integral part of its public water supply for Central and South Maui and is
the major source of water for the Central Maui system. [FOF29] MDWS and KM are also
in negotiations to drill three new wells at Shaft 33 that would be able to withdraw 5.771
mgd. [FOF7] Therefore, increasing demand and coordinated management of all of
MDWS's water sources are sufficient reasons to award MDWS its request of 5.771 mgd
under a new-use WUPA, instead of only the 4.904 mgd that it was withdrawing at the
time of designation.

13. It is also not required that the 5.771 mgd request be reduced by the 0.221 mgd that
was being provided to KM at the time of designation. The Commission does not award
water-use permits to municipal systems based on identification of individual customers
but on aggregate demand and need.

D. KM’s WUPA meets the permit conditions but for a reduced amount

14. While KM’s proposed use is not “domestic use of the general public (emphasis
added)” and therefore not a public trust purpose, 85 percent of the use is domestic use,
which is the highest and best use of potable water. [FOF56] The remaining 15 percent is
for related landscaping and commercial uses [FOF56], which are also identified in the
Water Code as being in the public interest. (HRS §174C-2(c))

15. KM’s WUPA also meets all of the Code’s requirements. [FOF53-71]

16. The Maui County Planning Director’s conclusion that KM’s WUPA is
inconsistent with the county’s land use plans and policies must be premised on the
assumption that the Kehalani project will add 2,400 new homes and 22 acres of
commercial development, and that it would require the 5.771 mgd that MDWS is
requesting in its WUPA. [FOF67] However, nearly 600 units will have been completed
and occupied in the Kehalani project by the end of 2006 [FOF28], and the project has met
all the land-use and zoning requirements, been approved under the establishment of the
Wailuku-Kahului Project District 3 zoning, and has received county land-use zoning
approval. [FOF61-66] The Planning Director has also approved all of the 13 plans for the
modules that have been or are being constructed. [FOF69] If the Planning Director’s
comments pertain to the ongoing Kehalani project, they are in direct contradiction to the
actions that his office has taken.

17. KM has no practical alternatives. [FOF73-74]

18. Even if other alternative sources were available, “(c)onsidering whether
alternative water resources are practicable innately requires prioritizing among public
trust resources.” (Waiahole II, 105 Haw. 1, at 20) The I‘ao basal aquifer is particularly
well-suited for potable use, because it requires less treatment to achieve state and federal
drinking-water standards than other sources (such as surface water) do. [FOF49]
Domestic use is the highest and best use of potable water.

19. KM’s revised request is for 1.696 mgd, based on Maui county duties/meter
requirements applied to single- and multi-family units, commercial parks, and open
spaces. [FOF24-25]

a. MDWS reported that average daily water use in the completed and
occupied Kehalani subdivisions ranged between 298 to 384 gallons per unit per
day from July 21, 2003, to April 19, 2006. [FOF26] MDWS is not sure of the accuracy of these averages but has concluded that average actual use is probably less than the Maui county duties/meter requirements. [FOF27] KM has instituted water conservation measures [FOF54-56], which supports the conclusion that the actual average use is likely less than the Maui county duties/meter requirements. On the other hand, MDWS also testified that the first-phase lots were smaller, about 3,600 square feet, and the project is now going to larger lots up to 6,000 square feet. [FOF27] Therefore, a reasonable estimate of future average use would be 400 gallons per unit per day, which is slightly higher than the high range of past use, which has averaged between 298 to 384 gallons per unit per day. 400 gallons per unit per day is also close to the water duties/meter requirements for the other counties. [FOF25] Applied to the 2,401 single- and multi-family units after completed build-out, the total projected use would be 0.960 mgd. However, 1,060 of these units are projected to be completed between 2011-2014 [FOF28], or more than four years from the issuance of any water-use permit under this Decision and Order, and the Water Code provides for revocation of a permit for partial or total non-use for a period of four continuous years or more. [HRS §174C-58(4)] Therefore, the water-use permit for the housing units would be reduced by 0.424 mgd, or from 0.960 mgd to 0.536 mgd. 

b. The Maui county standards for light industry are 6,000 gallons per acre per day and 1,700 gallons per acre per day for schools and parks. The other counties have standards of 3,000 gallons per acre per day for light industry and 4,000 gallons per acre per day for schools and parks. [FOF25] Given the water conservation measures reported by KM [FOF54-56], a reasonable level would be 3,000 gallons per acre per day for light industry and 1,700 gallons per acre per day for schools and parks. This would reduce the water budget for 19.54 commercial acres and 56.5 acres of open spaces to 0.155 mgd.

Under KM’s WUPA, the revised amount is therefore 0.691 mgd.

E. MDWS’s “reservation” of the I’ao basal aquifer

21. Except for KM’s WUPA and Living Waters Foundation’s new permit [FOF3], all of the existing wells in the I’ao basal aquifer are MDWS’s. [FOF2] MDWS has been requiring developers of large projects to provide sources outside of the I’ao aquifer, because of its designation as a water management area and in order to avoid over-pumping of the aquifer. [FOF31] MDWS also maintains that its various water utilization, conservation, and development programs are dependent on its continuous control of Shaft 33. [FOF30] MDWS also opposes KM’s WUPA because “there is no showing that it is in the public interest to have a competing private water company serving this small portion of Central Maui.” [FOF32] However, MDWS develops water from sources both within and outside the I’ao basal aquifer, so any private water company would be a competitor, including any developer that develops water outside the aquifer. In KM’s case, it is a landowner over the I’ao basal aquifer, owns the land where Shaft 33 is located, and its
cooperation is needed for MDWS to continue to use that source. Yet MDWS is attempting to require KM to seek water sources outside the aquifer.

a. MDWS’s policy on developers of large projects can be implemented through negotiation and the county’s land-use planning [HRS §§ 174C-2(e) and 174C-49(a)(6)], but:

No state or county government agency may enforce any statute, rule, or order affecting the waters of the State controlled under the provisions of this chapter, whether enacted or promulgated before or after July 1, 1987, inconsistent with the provisions of this chapter. Nothing in this chapter to the contrary shall restrict the power of any county to plan or zone as provided in chapter 46. [HRS §174C-4(b)]

b. MDWS may petition the Commission to reserve the remaining sustainable yield of the I’ao basal aquifer for municipal uses. If and when such a reservation is established, then only MDWS would have the right to apply for a water-use permit from the reserved water. [HRS §174C-49(d); HAR §§ 13-171-13(d), 13-171-60]

c. DHHL’s reservation request is incomplete, pending further information to be provided at the Commission’s request. Part of the reservation request appeared to be for services already being provided water, and more specific information on the lands to be acquired by DHHL was also to be provided. [FOF70] Any water use permit issued by the Commission is also subject to modification at any time to meet DHHL requests. [FOF71]

d. Until such reservations are established, KM has the right to apply for a water-use permit from the remaining sustainable yield of the I’ao basal aquifer.

Caveat: Finally, if any statement denominated a conclusion of law is more properly considered a finding of fact, then it should be treated as a finding of fact; and conversely, if any statement denominated as a statement of fact is more properly considered a conclusion of law, then it should be treated as a conclusion of law.

IV. Decision and Order

MDWS is issued a water-use permit for 5.771 mgd under WUPA No. 702 from Wailuku Shaft 33, State Well No. 5330-05.

KM is issued a water-use permit for 0.691 mgd under WUPA No. 707 from Wailuku Shaft 33, State Well No. 5330-05.
KM may apply for a modification of its permit for: 1) a change in the quantity of water currently awarded if it deems the amount insufficient to meet its reasonable and beneficial needs under actual use conditions; and/or 2) for the 1,060 units projected to be completed between 2011-2014 in whole or in part within the four-year statutory window of use/nonuse. [HRS§174C-57]

The Commission recognizes that KM is currently obtaining all of its water from MDWS and that they are in negotiations for the continued use of Shaft 33 by MDWS. KM’s permit is for its own system and not as a customer of MDWS, and its permit must be exercised within the statutory window. If the parties agree that MDWS will continue to provide water to KM, the Water Code provides for transfer of the permit, in whole or in part [HRS §174C-59], and county agencies are exempt from the requirements of the section pertaining to the modification of permit terms if the modification does not involve a change in the quantity of water to be used or where the new use would not adversely affect the quality of the water or quantity of use of another permittee. [HRS §174C-57(c)]

Both permits are subject to the Standard Water Use Conditions, attached as Appendix A. If Shaft 33 is found to be insufficient to meet the amounts awarded under both permits, the Commission under condition number 8 may modify the permits and the amounts of water initially granted may be reduced.

Finally, the Commission’s “Rulings on the Proposed Findings of Fact Submitted by the Parties” is contained in Appendix B.

The foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER are hereby ADOPTED.

IT IS SO ORDERED.

DATED: HONOLULU, HAWAII

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

PETER T. YOUNG, Chairperson

LAWRENCE H. MIIKE, M.D., J.D.
Commissioner and Hearings Officer

MEREDITH J. CHING, Commissioner

JAMES A. FRAZIER, Commissioner

NEAL S. FUJIWARA, Commissioner

CHIYOME L. FUKINO, M.D., Commissioner
Appendix A

Standard Water Use Conditions

1. The water described in this water-use permit may only be taken from the location described and used for the reasonable beneficial use at the location described. Reasonable beneficial uses means "the use of water in such a quantity as is necessary for economic and efficient utilization which is both reasonable and consistent with State and County land use plans and the public interest." (HRS § 174C-3)

2. The water use must at all times meet the requirements set forth in HRS § 174C-49(a), which means that it:

   a. can be accommodated with the available water source;
   b. is a reasonable-beneficial use as defined in HRS § 174C-3;
   c. will not interfere with any existing legal use of water;
   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 policies; and
   g. will not interfere with the rights of the Department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act and HRS § 174C-101(a).

3. The ground-water use here must not interfere with surface or other ground-water permitted uses or reservations.

4. The ground-water use here must not interfere with interim or permanent instream flow standards. If it does, then:

   a. A separate water-use permit for surface water must be obtained in the case an area is also designated as a surface water management area;
   b. The interim or permanent instream flow standard, as applicable, must be amended.

5. The water use authorized here is subject to the requirements of the Hawaiian Homes Commission Act, as amended, if applicable.

6. The water-use permit application and submittal, as amended, are incorporated into this permit by reference.

7. Any modification of the permit terms, conditions, or uses may only be made with the express written consent of the Commission.
8. This permit may be modified by the Commission and the amount of water initially granted to the permittee may be reduced if the Commission determines it is necessary to:

a. protect the water sources (quantity or quality);
b. meet other legal obligations including other water-use permits;
c. insure adequate conservation measures;
d. require efficiency of water uses;
e. reserve water for future uses, provided that all legal existing uses of water shall be protected;
f. meet legal obligations to the Department of Hawaiian Home Lands, if applicable; or
g. carry out such other necessary and proper exercise of the State's and the Commission's police powers under law as may be required.

Prior to any reduction, the Commission shall give notice of its proposed action to the permittee and provide the permittee an opportunity to be heard.

9. An approved flowmeter must be installed to measure monthly withdrawals and a monthly record of withdrawals, salinity, temperature, and pumping times must be kept and reported to the Commission on forms provided by the Commission on a monthly basis.

10. This permit shall be subject to the Commission's periodic review of the I'ao Aquifer System's sustainable yield. The amount of water authorized by this permit may be reduced by the Commission if the sustainable yield of the I'ao Aquifer System, or relevant modified aquifer(s), is reduced.

11. A permit may be transferred, in whole or in part, from the permittee to another, if:

a. The conditions of use of the permit, including, but not limited to, place, quantity, and purpose of the use, remain the same; and
b. The Commission is informed of the transfer within ninety days.

Failure to inform the Commission of the transfer invalidates the transfer and constitutes a ground for revocation of the permit. A transfer which involves a change in any condition of the permit, including a change in use covered in HRS § 174C-57, is also invalid and constitutes grounds for revocation.

12. The use(s) authorized by law and by this permit do not constitute ownership rights.

13. The permittee shall request modification of the permit as necessary to comply with all applicable laws, rules, and ordinances that will affect the permittee's water use.
The permittee understands that under HRS § 174C-58(4), that partial or total nonuse, for reasons other than conservation, of the water allowed by this permit for a period of four (4) continuous years or more may result in a permanent revocation as to the amount of water not in use. The Commission and the permittee may enter into a written agreement that, for reasons satisfactory to the Commission, any period of nonuse may not apply toward the four-year period. Any period of nonuse which is caused by a declaration of water shortage pursuant to section HRS § 174C-62 shall not apply toward the four-year period of forfeiture.

The permittee shall prepare and submit a water shortage plan within 30 days of the issuance of this permit as required by HAR § 13-171-42(c). The permittee's water shortage plan shall identify what the permittee is willing to do should the Commission declare a water shortage in the I'ao Ground-Water Management Area.

The water use permit shall be subject to the Commission's establishment of instream standards and policies relating to the Stream Protection and Management (SPAM) program, as well as legislative mandates to protect stream resources.

The permittee understands that any willful violation of any of the above conditions or any provisions of HRS § 174C or HAR § 13-171 may result in the suspension or revocation of this permit.
Appendix B

Rulings on the Proposed Findings of Fact Submitted by the Parties

The Commission makes the following rulings on the parties’ proposed findings of fact. The findings are placed in two categories.

Category A contains findings that are accepted in their entirety, or accepted with minor modifications or corrections that do not substantially alter the meaning of the original findings.

Category B contains findings that are rejected because they may be: 1) duplicative; 2) not relevant; 3) not material; 4) taken out of context; 5) contrary (in whole or in part) to the found facts; 6) an opinion (in whole or in part); 7) contradicted by other evidence; or 8) contrary to law.

Maui Department of Water Supply

A. Accepted

B. Rejected
1, 5, 10, 12-14, 36, 39-40, 46-47, 52, 73, 77-81, 85-89, 92-98, 102, 109-112, 114-115

Kehalani Mauka

A. Accepted

B. Rejected
1, 13, 24-26, 29-37, 39-41, 43-61, 66-68, 72, 82-84, 87-92, 98-100, 106, 114-122
PETITION REQUESTING A CONTESTED CASE HEARING BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

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

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

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

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

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

1. NAME: Kehalani Mauka, LLC
   (If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.) (See Attached DCCA Records. Kehalani Mauka, LLC is governed by two members, one of which is Milwaukee Holdings, LLC. Stanford Carr is authorized to sign for Milwaukee Holdings, LLC)

2. ADDRESS: 1100 Alakea Street, 27th Floor
   Honolulu, Hawaii 96813
   PHONE: 808-537-5220  FAX: 808-537-1801


4. ADDRESS: 841 Bishop Street, Suite 400
   Honolulu, Hawaii 96813
   PHONE: 808-528-4200  FAX: 808-531-8466

5. SUBJECT MATTER: Application for Water Use Permit for State Well No. 5330-05 ("Shaft 33")

6. DATE OF PUBLIC HEARING/COMMISSION MEETING: September 7, 2005

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

8. ARE YOU HAWAIIAN? No.
PETITION REQUESTING A CONTESTED CASE HEARING BEFORE
THE COMMISSION ON WATER RESOURCE MANAGEMENT

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

Kehalani Mauka is the owner of TMK No.2-3-5-01, Parcel 67. Shaft 33 is located on Parcel 67.

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

See answer to #9 above.

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

The Kehalani Project is comprised of TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, 64, 66, and 67.

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

Shaft 33 is located on the Parcel 67 and was a part of the County of Maui municipal water at the date of designation of the loa Aquifer. Estimated pumping reported as of that date was approximately 5.771 mgd. This source continues to be used by the County of Maui Department of Water Supply.

Kehalani Mauka is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single family residences, located at the base of the West Maui Mountains.

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

Kehalani Mauka is the landowner of the parcel and owner of the Shaft 33. It is the Applicant for a water use permit for an existing use of 5.771 mgd. used by the County of Maui at the date of designation of loa Aquifer.

Kehalani Mauka believes that it has standing to request a contested case hearing and be a party under section 13-167-52, and 13-167-54(a)(1), (3), and (4), HAR.

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

Section 174C-50(a) & (b), HRS, provides that:
(a) All existing users of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).
(b) After publication is provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria of subsection (a) is met and the existing use is reasonable and beneficial.
PETITION REQUESTING A CONTESTED CASE HEARING BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

At the date of designation, it is undisputed that there was an existing use of Shaft 33 in the amount of 5.771 mgd. Kehalani Mauka filed its application in a timely manner and is the landowner and applicant of for a water use permit for Shaft 33. The Commission accepted the application as complete. Kehalani Mauka respectfully disagrees with the preliminary analysis that it has applied for a new use and that the existing user, the County of Maui Department of Water Supply has to be the applicant. There is no requirement in the water code or regulations that requires that the existing user must be part of the application for an existing water use permit.

Finally, Kehalani Mauka’s use is reasonable and beneficial as detailed in its application and subsequent filings which are incorporated by this reference into this application for a contested case hearing.

15. WHAT ARE THE BASIC FACTS AND ISSUES?

1. Kehalani Mauka is the owner of Parcel 67 and Shaft 33.
2. As of the date of designation of lao Aquifer, approximately 5.771 mgd. was being used by the County of Maui Department of Water Supply for its municipal system.
3. That the existing use by the County of Maui Department of Water Supply continues to this day.

Issue: Is Kehalani Mauka’s timely application for a water use that existed on the day of designation of lao Aquifer entitled to have its water use application considered an existing use under section 174C-50, HRS, et.al.

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

Issuance of an existing use water use permit for 5.771 mgd. for Shaft 33 to Kehalani Mauka, LLC.

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

The County of Maui Department of Water Supply.

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

Kehalani Mauka, LLC
By Milwaukee Holdings, LLC,
its Member

Stanford S. Carr, its Manager
Name (Print)

Signature

Date

CCHR FORM (05/21/1996)
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http://www.hawaii.gov/dcca/hizsearch/exe/hizsearch.cgi?&file no=2688&file suffix=C5... 9/13/2005
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<td>MGR</td>
<td>01/01/2005</td>
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<td>CARR, KATHY SIU PUNG</td>
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## Transaction Information

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the WATER USE PERMIT APPLICATIONS for the Iao Aquifer

Docket No. ____________________________

PETITION FOR A CONTESTED CASE;
CERTIFICATE OF SERVICE

COMES NOW, COUNTY OF MAUl, DEPARTMENT OF WATER SUPPLY ("DWS"), by and through its attorneys BRIAN T. MOTO, Corporation Counsel, and JANE E. LOVELL, Deputy Corporation Counsel, and formally requests a contested case, pursuant to Rule § 13-167-52(a) of the Hawaii Administrative Rules ("HAR"), and Hawaii Revised Statutes ("HRS") § 174C et seq., as follows:

I. WATER USE PERMITS AT ISSUE
A. Wailuku Shaft 33

DWS requests a contested case as to Wailuku Shaft 33 (Well No. 5330-05, WUP No. 702 filed by County of Maui, Department of Water Supply) and on the competing application, WUP No. 707, filed by Kehalani Mauka, LLC.
B. **DWS's Remaining Water Use Permit Applications**

If any other person or entity requests a contested case as to any or all of the following sources and water use permit applications, then DWS also requests a contested case as to each and every application set forth below that forms the basis of another entity's request for a contested case:

- **Waihee Wells 1, 2, and 3 (Well Nos. 5431-02, 5431-03, and 5431-04), WUP Nos. 695, 696, and 703 filed by County of Maui, Department of Water Supply);**

- **Waiehu Heights Wells 1 and 2 (Well Nos. 5430-01 and 5430-02, WUP Nos. 697 and 698 filed by County of Maui, Department of Water Supply);**

- **Mokuhau Wells 1 and 3 (Well Nos. 5330-09 and 5330-11, WUP Nos. 700 and 701 filed by County of Maui, Department of Water Supply);**

- **Kepaniwai Well (Well No. 5332-05, WUP No. 699 filed by the County of Maui, Department of Water Supply); and**

- **Iao Tunnel (Well No. 5332-02, WUP No. 680 filed by the County of Maui, Department of Water Supply.**

**II. LEGAL AUTHORITY**

DWS brings this petition pursuant to Rule § 13-167-52(a) of the HAR, and HRS §§ 91 et seq. and 174C et seq.

**III. PETITIONER'S INTEREST**

DWS manages and operates all water systems owned by the County of Maui for the benefit of the people of Maui. DWS is the applicant for all but one of the water use permit applications referenced in Section I., above. Kehalani Mauka's application for Wailuku Shaft 33 directly competes with DWS's application for the
same source. DWS cannot adequately serve the individual homeowners, businesses, churches, government offices, and other customers in Central Maui if DWS's Water Use Permit applications are denied, or if the amounts requested by DWS from each of the above-referenced sources are reduced.

IV. DISAGREEMENTS CONTESTED BY PETITIONER/BASIC FACTS AND ISSUES RAISED

DWS is requesting a contested case because Kehalani Mauka has filed a water use application for DWS's major source for Central Maui, namely, Wailuku Shaft 33. As to DWS's remaining water use permit applications, objections have been lodged by Earthjustice on behalf of Maui Meadows Homeowners Association and Hui o Nā Wai `Ehā, and by the Office Hawaiian Affairs to all of the water use permit applications referenced in Section I, above.

A. Kehalani Mauka's Application For Wailuku Shaft 33


HRS § 174C-49(a)(1) requires applicants for water use permits to establish that the proposed use of water "[c]an be accommodated with the available water source." Kehalani Mauka LLC did not meet this burden. Kehalani Mauka LLC wants to use Wailuku Shaft 33 for its Kehalani Mauka project, a 550-acre master planned community of approximately 2,400 homes, as well as a mixture of commercial properties. According to the application, when completed, the project "will be one of the largest planned developments on the island." Kehalani Mauka LLC stated that it was "in the process of negotiating a lease with the County Department of Water Supply," but acknowledged that if no such lease were
concluded, Kehalani Mauka LLC would use Wailuku Shaft 33 for its own purposes. To date, no lease with DWS has been concluded.

The entire amount of water pumped from Wailuku Shaft 33 is currently being used by DWS to serve existing users within the County's municipal system. If Kehalani Mauka LLC's water use permit application for the Wailuku Shaft were approved, the consequence, of necessity, would be a reduction of the amount of water available to DWS for existing municipal uses.

Kehalani Mauka LLC did not provide any calculation of the demand for the Kehalani Mauka project at full build out. On this basis alone, Kehalani Mauka LLC failed to demonstrate that its proposed use of water for its project can be accommodated with the existing output of Wailuku Shaft 33.


HRS § 174C-49(a)(2) requires applicants for water use permits to establish that the proposed use of water "[i]s a reasonable-beneficial use as defined in section 174C-3." Kehalani Mauka LLC did not meet this burden. Its application mentioned certain programs instituted by the County of Maui to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water sources, development of new sources in Waihee, conservation programs, use of reclaimed water, and the like. The application did not mention that DWS also plans to develop Waikapu Mauka and Iao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. All of these programs, which have been instituted by DWS to protect the aquifer and to use Wailuku
Shaft 33 in an economic and efficient manner, are dependent on DWS's continued control of the source. However, no agreement between DWS and the Kehalani Mauka LLC has been reached to date. If Wailuku Shaft 33 is used to accommodate Kehalani Mauka LLC's additional 2,400 homes and up to 22 acres of commercial development, additional strain will be placed on the aquifer or water service to existing DWS customers may be seriously impacted. Kehalani Mauka LLC's proposed use is neither reasonable nor beneficial.

3. **Kehalani Mauka LLC Failed To Establish That Its Proposed Use Of Wailuku Shaft 33 Will Not Interfere With Any Existing Legal Use.**

HRS § 174C-49(a)(3) provides that applicants for water use permits must establish that the proposed use "[w]ill not interfere with any existing legal use of water."

Although Kehalani Mauka LLC tried to gloss over a key jurisdictional fact, Kehalani Mauka LLC is not the existing user of water from Wailuku Shaft 33.

DWS continues to maintain that it is the existing user of this source, notwithstanding this Commission's ruling on DWS's petition for a declaratory ruling. Since August 1991, DWS has been the only user of the shaft. DWS has installed distribution appurtenances and has kept up maintenance of the shaft since that time. Kehalani Mauka LLC stated that it did "not anticipate that pumpage at this level [5.771 MGD] will interfere with any other existing legal uses. . . ." However, Kehalani Mauka LLC did not provide any factual or scientific foundation for that assertion. Kehalani Mauka LLC did not explain how the DWS is supposed to supply an additional 2,400 new homes from this source, and up to 22
acres of new commercial development, while at the same time, maintaining service to DWS's existing customers in Central and South Maui. Kehalani Mauka LLC did not meet its burden under HRS § 174C-49(a)(3).


HRS § 174C-49(a)4) requires applicants to establish that the proposed use is "consistent with the public interest." Kehalani Mauka LLC did not do so.

In support of its application, Kehalani Mauka LLC stated that "Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest." DWS agrees. However, Kehalani Mauka LLC further claimed that: "Serving municipal uses in the Kehalani project would similarly be in the public interest." Kehalani Mauka LLC has not explained how these additional new uses could be accommodated without either overpumping the aquifer or taking water away from existing users. Neither of those outcomes would be in the public interest.


HRS § 174C-49(a)(7) requires that the applicant must demonstrate that its proposed use "[w]ill not interfere with the rights of the department of Hawaiian home lands. . . ." Kehalani Mauka LLC did not do so. Kehalani Mauka LLC stated that "Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL." However, Kehalani Mauka LLC acknowledged that
"DHHL currently receives water from the County water system that includes this source . . . ." If the output of Wailuku Shaft 33 must accommodate 2,400 additional homes, and up to 22 acres of new commercial development, then existing DHHL users who depend on this source could be harmed if the end result is rationing of water to existing users or overpumping of the Iao aquifer.

6. **Kehalana Mauka LLC's Application Is Not Consistent With State And County General Plans And Land Use Designations.**

As the Planning Director of the County of Maui advised this Commission in a letter dated October 8, 2004, Kehalani Mauka's proposed use is not consistent with state and county general plans and land use designations, as required by HRS § 174C-49(a)(6), nor is the proposed use consistent with County land use plans and policies as required by HRS § 174C-49(a)(7).

The Wailuku-Kahului Community Plan, adopted in 2002, provides at page 30 for several objectives and policies with respect to water and utilities. Among these are coordinating "water system improvement plans with growth areas to ensure adequate supply . . . ." That Community Plan also provides that "[f]uture growth should be phased to be in concert with the service capacity of the water system." However, the Kehalani Mauka application seeks to use a source currently serving the Central Maui system for 2,400 additional homes and 22 acres of additional commercial development. As the County's Planning Director advised the Commission on October 8, 2004, adding 2,400 homes and 22 acres of commercial development to the already taxed Central Maui system, which is served by the Iao Aquifer, is not consistent with the Community Plan's objectives and policies.
Maui's General Plan, adopted in 1990, provides for monitoring "growth activities throughout Maui County in order that development of new water sources is concurrent with approval of new developments." (General Plan, p. 11) Director Foley advised that allowing for 2,400 new houses and 22 acres of commercial development without developing any new water sources would not be consistent with this aspect of the General Plan.

The General Plan also provides for supporting the Department of Water Supply (previously, the Board of Water Supply) in its determination of "future water needs consistent with the General Plan, Community Plans, and the growth management strategy." Id. County of Maui's Department of Water Supply noted in its objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft that "[t]he current average pumpage of 5.771 MGD is in its entirety serving the County's municipal system" and that "additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the Iao aquifer in order to avoid overpumpage of the aquifer." The Planning Director agreed and concurred with that assessment.

B. Earthjustice And OHA Objections

DWS responded to the objections of Earthjustice and OHA, which were similar. In that process, many of the objections were addressed. However, OHA and Earthjustice continue to assert that DWS has not provided sufficient information to meet its statutory burden. Other outstanding issues between the parties include Native Hawaiian water rights, traditional and customary rights, the nature
and extent of DWS's conservation efforts, the relationship between the public trust doctrine and DWS's mission, the effect (if any) of DWS's wells on surface water flows, practicable alternatives, and DHHL reservations.

V. RELIEF REQUESTED

DWS requests that all of its water use permit applications be granted; that Kehalani Mauka LLC's application for Wailuku Shaft 33 be denied; and that all objections to DWS's applications be overruled.

VI. OTHER AFFECTED PARTIES

DWS believes that the other parties whose interests may be affected by the relief requested in Section V, above, are Kehalani Mauka LLC, Earthjustice on behalf of Maui Meadows Homeowners Association and Hui o Na Wai `Ehā, and the Office Hawaiian Affairs.


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By

JANE E. LOVELL
Deputy Corporation Counsel
STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

COMMISSION ON WATER RESOURCE MANAGEMENT

In the Matter of the
WATER USE PERMIT APPLICATIONS
for the Iao Aquifer

Docket No. ______________________

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was duly
served TODAY upon the following counsel in the manner indicated,
addressed as follows:

METHOD OF SERVICE:
MAIL  HAND DELIVERY

Peter T. Young, Chairperson  X
State of Hawaii
Dept. of Land & Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Dean Nakano, Deputy Director  X
Commission on Water Resource Management
P. O. Box 621
Honolulu Hawaii 96809

Mark J. Bennett, Attorney General  X
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu HI 96813

Gary Phillips, Esq.  X
Hawaii Land and Farming, Inc.
745 Fort Street
Honolulu HI 96813

Linnell T. Nishioka, Esq.  X
Oshima Chun Fong & Chung LLP
841 Bishop Street, Suite 400
Honolulu HI 96813
Kapua Sproat, Esq.
EarthJustice
223 S. King Street, Suite 400
Honolulu, HI 96813

Clyde W. Namu'o
Jonathan L. Scheuer, Ph.D.
State of Hawaii
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, HI 96813


BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By JANE E. LOVELL
Deputy Corporation Counsel
Mr. Dean Nakano, Acting Deputy Director  
Department of Land and Natural Resources  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, Hawaii 96813  

Re: Water Use Application Information, Wailuku Shaft (Shaft 33), Well No. 5330-05

Dear Mr. Nakano:

This letter is a follow-up to your staff's request for additional information concerning Water Use Permit Application No. 707 for Kehalani Mauka, LLC ("Kehalani Mauka" or "the project"), use of the Wailuku Shaft on the portion of the Kehalani Mauka project that had actual water service from Shaft 33 (State Well No. 5330-05).

To clarify, Kehalani Mauka is seeking an existing use permit for a municipal use. The project is within the service area for the Central Maui Water System and Shaft 33. Therefore, given our request is seeking an existing use, we do not believe that it should be limited to the units in service on July 21, 2003. We do not think the Commission would limit such municipal use of the County of Maui or other municipal users. However, to respond to your inquiry, as of July 21, 2003, 320 units were in service with an additional amount for irrigation of the common areas for that portion of the project. Enclosed is Table 1 detailing the portion of the project under DWS service and a Map indicating the location of that portion of the project.

Thank you for your patience as we try to come to some agreement with the Maui County under the Department of Water Supply ("MDWS") on the use of Shaft 33 and a joint application with MDWS.

Sincerely,

[Linnel T. Nishioka]

Enclosures

LTN:ai

cc w/encls: Mr. Jay Nakamura  
Mr. David Blane  
Jane Lovell, Esq., Maui Corporation Counsel

400 Davies Pacific Center • 841 Bishop Street • Honolulu, Hawaii 96813 • Telephone (808) 526-4201 • Facsimile (808) 531-8466 • URL www.imlgroup.com
Portion of Kehalani Project on the DWS Water System as of 7/21/03*

**TABLE 1. TMKs TO USE REQUESTED WATER**

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<th>2.</th>
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<th>5.</th>
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<th>8.</th>
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<td>PROJECT NAME &amp; PHASE (include address if applicable)</td>
<td>EXISTING</td>
<td>POTABLE</td>
<td>STATE</td>
<td>CURRENT</td>
<td>6-YEAR</td>
<td>ULTIMATE</td>
<td>DEPARTMENT</td>
<td>DATE</td>
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<td></td>
<td>or NON-POTABLE</td>
<td>USE</td>
<td>COUNTY</td>
<td>GROUND</td>
<td>Cumulative</td>
<td>GROUND</td>
<td>OF PLANNING AND PERMITTING SIGNATURE</td>
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<td>ZONING</td>
<td>PROJECTED DEMAND</td>
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<tr>
<td>1.</td>
<td>A portion of Kehalani</td>
<td>existing</td>
<td>potable</td>
<td>pending</td>
<td>urban</td>
<td>urban</td>
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<td>2.</td>
<td>Project: (See Attached Map)</td>
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<td>Kaimana (179 Units)</td>
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<td>4.</td>
<td>Halemalu (30 Units)</td>
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<td>5.</td>
<td>Nanea (80 Units)</td>
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<td>6.</td>
<td>Olena I (31 Units)</td>
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<td>Subtotal (gpd)</td>
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<td>192,000</td>
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<td>Irrigation of common areas in Kaimana</td>
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<td>urban</td>
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<td>Halemalu, Nanea and Olena I</td>
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<td>(15% of potable use)</td>
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<td>Subtotal (gpd)</td>
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<td>TOTAL GPD</td>
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(For Oahu only) DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE __________________________  DATE ________________

Only for verification that: 1) TMKs listed are consistent with zoning and development plans; and 2) projects listed are allowed with respect to zoning and development plans.

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

*Kehalani Mauka continues to assert that its entire application for shaft 33 (State Well No. 5330-05) is for an existing use.
Kehalani
A Master-Planned Community
Key Central Maui water source closing
By HARRY EAGAR, Staff Writer

Sunday, June 05, 2005 8:46 AM

WAILUKU – Shaft 33, part of an old plantation irrigation system that supplies almost a quarter of the water used in Central and South Maui, needs to be closed, because of the threat of collapse.

No specific proposals are on the table, but the Board of Water Supply was told recently that it would cost millions of dollars to replace the old passageway dug deep into the side of the slopes above Wailuku.

County Water Director George Tengan says a guesstimate of $2 million each to replace three wells and pumps is not unreasonable. The request may show up in the 2007 county budget.

Other costs, which could be considerable, are being discussed with the owner, Kehalani Mauka.

Shaft 33, also called Wailuku Shaft, was one of the assets acquired by Stanford Carr when he bought the stock of Brewer Homes. The county has been using it for years. Neither C. Brewer nor Carr has been paid for the county’s access to the water source.

“It’s just the good will of the company,” says Tengan.

Carr needs water meters for the continuation of his housing projects at Kehalani, which at build-out will consume about 1.5 million gallons per day.

Both Kehalani and the Department of Water Supply have applied for withdrawal permits since the State Commission on Water Resource Management took control of (or “designated”) the Iao aquifer in 2003.

Although there has been some attempt by public witnesses testifying at commission hearings to present this as a conflict, neither of the parties thinks so. And they have gotten support from Dr. Lawrence Miike, the water commissioner who is taking the lead in the permit hearings.
At a hearing in Wailuku in April, he indicated that the department will continue to get water, whatever the eventual arrangements between it and Kehalani.

The Wailuku Shaft was dug in 1945-47 by a Los Angeles oil drilling firm. As a well it was and is a resounding success. But the shaft – technically an adit, not a tunnel, because it has only one entrance – which is about 5 feet in diameter, was never sealed with Gunnite (a form of concrete that is blasted onto tunnel walls to strengthen and waterproof them).

Use of the shaft was abandoned around 1984 but restarted in 1992. Although some water department employees have been down it, they no longer enter it routinely, because of the hazard.

But Melvin Lima does.

"I don't see any risk except tripping and falling down," says Lima, who owns Mel's Waterworks in Honolulu and services underground systems throughout the state.

Shaft 33 is not nearly as scary as some others, Lima says. The spookiest is an old sugar plantation shaft in Kau on the Big Island.

A huge adit penetrates deep into Lanaihale, the ridge to the north and east of Lanai City, to tap the high level aquifer that provide Lanai's fresh water. Well-lighted and roomy, it even supports a few ferns at its bottom, which also presents the startling spectacle of a blue bank vault door holding back the stored water.

When that adit was being sunk in the late 1920s, a Honolulu bank was being torn down and the door was recycled. However, it cannot be opened, because of the pressure of the water behind it.

Lima and his crew service Shaft 33 quarterly, and they take precautions. These include testing for dangerous gases and carrying breathing equipment.

They also alert the Maui Fire Department before they go in.

Lima says he's never had any trouble in the 13 years he's been performing maintenance on the systems at the bottom of the shaft.

If there were a cave-in, according to Tengan, it might be possible to escape by a narrow, unlighted air shaft.

The Wailuku Shaft was sunk from the 406-foot elevation just above Wailuku and ends in a huge chamber (30 feet long, 22 feet wide and 58 feet high) whose floor is 26 1/2 feet above sea level, which was the "head" of water in 1947.

The pressure of the lens of fresh water floating on the heavier sea water was then 26 1/2 feet
above sea level. To keep the pump room free of water, its floor had to be higher than the water.

Since then, heavy pumping has lowered the head of water in the Iao aquifer to 10 feet or less, raising alarm about saltwater infiltration, because the head signals the depth of the freshwater beneath it. For every foot of fresh water above sea level, there are 40 feet below.

Wells that reach 200 to 300 feet below sea level could be spoiled if the midpoint (where the salinity begins to be a problem) rises to their level.

From the floor of the Shaft 33 chamber, three wells were sunk 150 feet into the aquifer. (Accounts in The Maui News from 1947 say those vertical shafts were extended another 70 feet, but today only 150 feet is used.)

The three wells were gushers. Powered by more than 2,000 horsepower, three pump engines collected 15 million gallons per day of pure water, with very low salinity.

It was possible to pump so hard in the beginning because the Iao aquifer was not being exploited much.

Wailuku Sugar Co. used the shaft water only when ditch water failed. Shaft 33’s output was sufficient to irrigate 2,000 acres.

According to Avery Chumbley, president of Wailuku Agribusiness Inc. (successor to Wailuku Sugar), the well was no longer pumped in the ’80s after Wailuku Sugar initiated its unsuccessful switch to macadamia nuts and shut down the Wailuku Sugar Mill.

Back in those days, he noted, the Shaft 33 pumps consumed so much of the island’s electricity that Wailuku Sugar would need to call Maui Electric Co. to alert its generator operators before the plantation would start its pumps.

In 1992, Shaft 33 was reopened because the county needed to back off pumping at Mokuhau, the wells developed by the county in the 1950s as Kahului began its growth spurt.

Demand on the north half of the Iao aquifer increased even more after 1975, with the development of two large wells at Waiehu, as part of the Central Maui Source Joint Venture, the project that made possible the development of South Maui.

Originally planned to tap a water source believed to be capable of providing 36 million gallons a day, the Waiehu wells and a 36-inch transmission system running from Waiehu to Kihei was designed to supply the Wailea Beach Resort and the Makena Resort, with other smaller developments along the way allowed to tap the system, paying fees that compensated the joint venture partners.

But the new Waiehu wells drawing down the aquifer, along with increasing demand in the still-growing Kahului area, had a negative effect on the Mokuhau wells.
Water department engineers acknowledge that the Mokuha wells were driven too close to each other – like three straws drawing from the same point in an ice cream float – and heavy pumping aggravates upwelling in the aquifer.

The basal lens that is the Iao aquifer is a deep layer of fresh water floating on heavier salt water that lies under all of the islands. The fresh water comes from rain that percolates into the ground in the watersheds on the upper slopes of the island.

When a well draws from the fresh water lens, it reduces the weight of the fresh water at the point where the well draws water. If the pumping is not excessive, fresh water in the lens flows to replace what the well is taking. But when the draw is high, the underlying salt water will begin to "upwell" or rise up to the point from which the water is being pumped.

The Shaft 33 wells were close together, too (just 10 feet apart), but they reached a very rich source of water and have been pumped more heavily with no signs of upwelling.

By the early '90s, however, demand on the overall Iao aquifer had tripled over 30 years to nearly 20 million gallons a day, and wells throughout the system were exhibiting signs of stress.

At two monitoring sites in Waiehu, the level of the aquifer was down sharply. Test Hole E showed the height of the fresh water lens fell from 18 to 20 feet above sea level in 1984 to a low of 9 feet in 2003, although reduced pumping has boosted the level to 13 feet in 2005.

Test Hole B was at 18 feet in 1989, and is fluctuating between 9 and 12 feet in 2004-05.

Shaft 33 was pumped at an average of 5 million gallons per day beginning in 1992. The aquifer level went from a high of 17 feet in 1997 to less than 8 feet between 2003 and 2004, rising back to 12 feet this year.

After the 1975 estimates that the Iao aquifer would be capable of producing 36 mgd proved overly optimistic, the legal sustainable yield of Iao aquifer was reset at 20 mgd. Some critics think the actual sustainable yield is much less.

Shaft 33's 5 mgd is the single biggest source of water for Central and South Maui.

Ironically, since the mayor's office regained control of water policy (with the change of the County Charter approved in 2002), the water department is now looking to utilize additional water from the ditches, although Shaft 33 was sunk in the first place to replace unreliable surface flows.

The difference is that the closing of Wailuku Sugar/Agribusiness has sharply reduced the demand for irrigation water.

Driven at a 30-degree angle, the shaft is 764 feet long, and penetrates 647 feet into the side of
the mountain, measured horizontally.

Tengan says discussions are close to a resolution over how to handle the abandonment and replacement of Shaft 33.

According to David Blane, a former county planning director who worked for Brewer Homes and now for Carr's SDC Development, drilling vertical wells in the same location would be a likely choice, because it would almost guarantee hitting the big, rich source again.

The department is also working to spread out pumping in the Iao aquifer, not to increase the total draw but to better manage the resource and prevent upwelling at any single source.

The amount needed from the replacement wells could be less than 5 mgd, according to how successful new wells at Waikapu and Iao Tank prove.

In any case, the state commission cannot permit withdrawal of more than 20 mgd, so new sources must be found somewhere else.

Kehalani will have to pay for source development of the 1.5 mgd it wants and also for closing Shaft 33.

Tengan says it may not be necessary to completely refill the shaft. Whether environmental regulators will agree to allowing Kehalani Mauka/Carr to abandon the machinery underground remains to be determined.

The machinery could be brought out, says Lima, but it would be "a big job."

It probably would be bigger than installing the equipment in a deep hole in the ground in the first place.

When Wailuku Sugar announced it would seek to tap Iao groundwater – the first significant use of that resource – the cost was estimated at $200,000.

But by the time the water flowed, the cost had risen to $500,000.

"That's not unusual, even today," says Tengan.

Harry Eagar can be reached at heagar@mauinews.com.

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June 1, 2005

Ms. Linnel T. Nishioka
Ishikawa Morihara Lau & Fong LLP
400 Davies Pacific Center
841 Bishop Street
Honolulu, HI 96813

Dear Ms. Nishioka:

Meeting Confirmation
Information on Reasonable and Beneficial Use

Our public meeting to discuss information requested regarding water use permits in the Iao Ground Water Management Area is confirmed for the J. Walter Cameron Center, Room 1, in Kahului on June 8, 2005, from 2:30 to 6:30 p.m.

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

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

CI:ss
May 25, 2005

Ms. Linnel T. Nishioka
Ishikawa Morihara Lau & Fong LLP
400 Davies Pacific Center
841 Bishop Street
Honolulu, HI 96813

Dear Ms. Nishioka:

Information on Reasonable and Beneficial Use

The hearing officers sent questions to all applicants and additional questions to individual objecting parties, dated August 25, November 15, and November 18, 2004. Without evaluating the adequacy of the responses, we have tabulated the response results (enclosed). Some of the questions have not been addressed at all by various applicants.

The interested public at the public hearing has expressed confidence that we are making progress in receiving better information to address their objections, and we are tentatively scheduling an informal meeting on June 8, 2005 at the Cameron Center in Kahului to offer the public the opportunity to review the latest responses before moving to a final session of the public hearing (public notice to be sent when confirmed).

The accompanying table for the applicants show three columns on the right-hand side that indicate (Yes or No) whether issues have been directly addressed, without evaluating the quality or adequacy of the response. These three issues were raised by the Supreme Court June 21, 2004 remand of the Waiahole case: whether alternatives have been explored, whether amounts per unit of use (“duties”) are prescribed, and whether there are valued cultural, historical, or natural resources that are related to the water source for which you have a water use permit application.

If there are such resources, there are public trust presumptions in favor of maintenance of the water source in its natural state and for the practice of traditional and customary native Hawaiian rights related to those resources. Applicants must identify the extent to which those resources will be affected or impaired by their water uses, and the feasible actions, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist. The hearing officers have opined that it is the responsibility of individuals who claim such rights to provide evidence of their claims.

There is a higher level of scrutiny for private commercial uses in the balancing between public and private purposes. As for municipal uses, at least part of those uses—domestic use—is also a public trust purpose.

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,

DEAN A. NAKANO
Acting Deputy Director

Cl: ss
Enclosure

c: Garret Hew, Hawaiian Commercial & Sugar Co.
Clayton Suzuki, Wailuku Agribusiness Company, Inc.
George Tengan, County of Maui, Department of Water Supply
Randy Gentry, County of Maui, Department of Parks and Recreation
Megan Wells, Living Waters Land Foundation, LLC
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><strong>Existing Uses</strong> as of July 21, 2003 and accepted as completed applications submitted by the July 21, 2004 deadline</td>
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High-level Dike Sources (impacting stream flows, to be later combined with the IIFS petition proceedings)

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<td>680</td>
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Existing Uses as of July 21, 2003 and accepted as complete applications submitted by the July 21, 2004 deadline

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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) 974-4000 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

Dated: March 28, 2005

Publish in: Maui News issue of April 1, 2005
Ishikawa Morihara Lau & Fong LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813

Dear Ms. Nishioka:

Kehalani Mauka LLC Water Use Permit Application
Wailuku Shaft (Well No. 5530-05)

Thank you for your recent inquiry with Commission staff regarding your client’s Water Use Permit Application for existing use of the captioned ground-water source.

Although the Commission staff recognizes that your client, Kehalani Mauka LLC, filed its Water Use Permit Application as an existing use, based on testimony received in the course of the public hearing held on October 28, 2004, the Commission staff is uncertain that your client’s application will meet the criteria for an existing use permit. In particular, the Commission staff had the following concerns:

- Section 174C-50, Hawaii Revised Statutes provides in pertinent part that “(a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).” Section (b) further provides that “After publication as provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.” (Emphasis added.)

- The subject application notes continuation of Maui Department of Water Supply Municipal existing use without identification of locations other than the entire Central Maui Water Service Area and not specifically Kehalani’s existing use locations and amounts. The application also identifies what are clearly new parcels of residential and commercial use of unspecified amounts.
Based on staff's review and further evaluation of the application, testimony presented at the initial public hearing, and all further information provided by you, staff's current proposal is to recommend to the Commission that Kehalani's application be considered a new use and not an existing municipal use application. Accordingly, the Commission staff indicated in the March 28, 2005 Public Notice regarding the continuance of the Iao Water Use Permit Application Public Hearing that Kehalani's application would be heard as a new use.

Staff's categorization of your client's Water Use Application for purposes of the public hearing should not imply any final recommendation by the staff to the Commission or a determination on the part of the Commission. The recommendation to be made by Commission staff to the Commission is still subject to any additional testimony or information that is received during the public hearing scheduled for April 22, 2005, and/or any further hearings. A final decision by the Commission on your client's application will be made at a later time by the Commission.

If your client does not agree with the above proposed recommendation, additional testimony may be provided at the April 22, 2005 public hearing in support of your client's position. However, should your client feel that it is entitled to a contested case hearing and wish to request a hearing under Section 174C-60, HRS and Sections 13-167-51 through 65, Hawaii Administrative Rules, such a request should be made prior to the close of the public hearing.

Should you have any questions, please contact me at 587-0240.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

RH:ss
Charley/Roy,

Was there a mistake on the public notice for Kehalani’s application. We filed it as an existing use application and it was noticed as an existing use on the last public notice for the hearing. Since no intervening action has happened at the CWRM that I am aware of, shouldn't it still be on the existing use list?

Please advise. Kehalani did complete its application in a timely manner and was given written notice by the CWRM that its application was received as an existing use application.

I realize that in the course of considering everything, it may change, we are trying to get something done with MDWS but I don't think the status of our application should change absent commission action.

Thanks, Linnel

Ishikawa Morihara Lau & Fong LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
Telephone No.: (808) 528-4200
Fax No.: (808) 531-8466

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COMMISSION ON WATER RESOURCE MANAGEMENT

FROM: ROY
DATE: APR - 1 2005
SUSPENSE DATE: ____________

TO: NAKAMA, L.
INIT: ____________
TO: NAKANO, D.
INIT: ____________
TO: OHYE, M.
INIT: ____________
TO: SAKODA, E.
INIT: ____________
TO: SUBIA, S.
INIT: ____________
TO: SWANSON, S.
INIT: ____________
TO: UYENO, D.
INIT: ____________
TO: YODA, K.
INIT: ____________
TO: YOSHINAGA, M.
INIT: ____________

PLEASE:
See Me
Review & Comment
Take Action
Type Draft
Type Final
File
Xerox ______ copies

- no out for moves...yet (for late filing)
- same thing - private agreement between them is holding things up. gone ps 4/5
- Send to Mayor's library for the file ASAP w/post-it (green)
March 31, 2005

Dean Nakano, Acting Deputy Director
Department of Land & Natural Resources,
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Water Use Application Information, Wailuku Shaft (Shaft 33), Well No. 5330-05

Dear Mr. Nakano:

This letter responds to the Commission’s request for additional information dated November 15, 2004, concerning Water Use Permit Application No. 707 for Kehalani Mauka, LLC (“Kehalani Mauka” or “the project”), use of the Wailuku Shaft. For ease of reference, we have restated the questions and then provided our answers below.

Question No. 1. Is Kehalani Mauka, LLC, coming in jointly with or separately from Maui Department of Water Supply (“MWDS”) for use of ground water from Shaft 33?

Response. Kehalani Mauka, LLC’s application is separate from the MWDS application for use of ground water from Shaft 33. The parties are negotiating an agreement for the use of Shaft 33. Kehalani’s intent is that once an agreement is in place that it will submit a joint application with MWDS.

Question No. 2. On Table 1 of the application, you list “4363” in Column 7 (Units or Net Acres) for your proposed use. Is it 4363 dwelling units, commercial units, total units, service connections, net acres, or some other unit, and what are the per-unit amounts required for each type of unit?

Response. Shaft 33 is currently being used by the County of Maui as part of its Central Maui Water System. As such, we used the figures provided by the County of Maui on its July 2, 2004 application for Shaft 33. We will inquire further from the County of Maui and provide further information. You raised a good question on the number, we noted in our application that based on the County’s standard rate for single-family homes is currently 600 gallons per day,
Shaft 33 could provide for approximately 9667 households. See Kehalani Application at page 2, section 12(a).

**Question No. 3.** On October 8, 2004 -- the County of Maui commented that your proposed project, adding 2400 new homes and 22 acres of additional commercial development, is inconsistent with the Wailuku-Kahului Community Plan adopted in 2002. How does Kehalani Mauka, LLC respond to this comment?

**Response.** Kehalani Mauka has contacted the County Planning Department that has confirmed that Kehalani Mauka has received all necessary zoning and community plan approvals. The project received all necessary Community Plan and zoning approvals from Maui County in 1990, and is established as a distinct project district in the Wailuku-Kahului Community Plan as “Wailuku-Kahului Project District 3.” See Chapter 19.80, Maui County Code and Ordinance 2053 approving the project. Kehalani Mauka therefore believes the project is consistent with the 2002 version of the Wailuku-Kahului Community Plan.

**Question No. 4.** The TMK numbers identified on Table 1 and public landownership records show the following:

<table>
<thead>
<tr>
<th>TMK</th>
<th>Land Owner of Public Records</th>
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<tr>
<td>2-3-4-07-2</td>
<td>C. Brewer Homes</td>
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<td>2-3-5-01-1</td>
<td>Niehaus, Davies, et al.</td>
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<tr>
<td>2-3-5-01-17</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<td>2-3-5-01-60</td>
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<tr>
<td>2-3-5-01-61</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<td>2-3-5-01-62</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<tr>
<td>2-3-5-01-66</td>
<td>Kehalani - Maui LLC</td>
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Please explain how Kehalani Mauka, LLC represents land ownership of all these parties.

**Response.** Kehalani Mauka is the owner of the TMK Parcel where Shaft 33 is located. For the other parcels, Kehalani Mauka has sold some of the lands in the project to third parties. An example of this can be seen in TMK 2-3-5-01-60, which is the Olena Project. This land has been sold to and developed by another entity. Therefore, some of the proposed communities and/or neighborhoods in the project have been sold to other developers, who have done or who will do the actual construction. Kehalani Mauka thus no longer owns all the land within the project site. However, for project master plan purposes, Stanford Carr, the
Question No. 5. Please clearly identify Kehalani Mauka, LLC, projects that have actual service from this source, existing as of July 21, 2003. Where is it delivered and what is the total amount of use to be continued?

Response. To clarify, Kehalani Mauka is seeking an existing use permit for a municipal use. The project is within the service area for the Central Maui Water System and Shaft 33. Therefore, given our request is seeking an existing use, we do not believe that it should be limited to the units in service on July 21, 2003. We do not think the Commission would limit such municipal use of the County of Maui or other municipal users. However, to respond to your inquiry, as of July 21, 2003, the project's aggregate density was 320 units. Since that time, Olena II, which has a density of 32 units, has been completed. The project's density as of the date of this letter is therefore 352 units.

Question No. 6. Does Kehalani Mauka, LLC, propose to allow existing use by Maui County under the Department of Water Supply ("MWDS") from Shaft 33, and if so, what is the total amount of use to be continued?

Response. The existing use at the time of designation was 5.771 mgd. It is currently part of the County of Maui's Central Maui Water System and is being used by the County of Maui. Kehalani Mauka and the County of Maui are currently in negotiations for the use of Shaft 33. Once that agreement is final, we will be better able to answer this question.

Question No. 7. Please clearly identify Kehalani Mauka, LLC, projects that propose new uses, namely some or all of its 550-acre master-planned community for which land use and zoning entitlements have been approved. What is the amount of water use being reserved from the Wailuku Shaft (Shaft 33) for this purpose?

Response. Kehalani Mauka is seeking an existing use permit for 5.771 mgd. for municipal uses, it is not seeking a permit for new uses. Kehalani Mauka and the County of Maui are currently in negotiations for the use of Shaft 33. Once that agreement is final, we will be better able to answer this question.

Question No. 8. The question of "municipal use" has arisen in the context of whether Kehalani Mauka, LLC, is a municipal service or private utility. Please provide your definition of
"municipal use" for the uses proposed under your application, and how it relates to "public trust" and "public interest."

**Response.** We can better answer this question when Kehalani has reached an agreement with the MDWS and it is Kehalani’s intention to file a joint application. At this point in time, Kehalani is not a PUC regulated entity. Municipal use is water use for domestic and other purposes on a public or private water system. Domestic water use is a public trust purpose and in the public interest.

**Question No. 9.** You did not specify units nor acreage to be served under any of these scenarios. Please provide detail in Table 1 for any existing or proposed Kehalani Mauka water use.

**Response.** We can better answer this question when Kehalani has reached an agreement with MDWS and it is Kehalani’s intention to file a joint application. Water use for Shaft 33 will include the Kehalani Mauka project.

Thank you for your patience as we try to come to some agreement with the MDWS on the use of Shaft 33 and a joint application with MDWS. To the extent possible at this time, I hope that the above satisfactorily answers all of the questions you posed and addresses any concerns you may have. We understand that there will be another public hearing in April and we are happy to elaborate further at that time. If you have any questions, please call Jay Nakamura at 537-5220, Extension 226.

Sincerely,

[Signature]

Stanford Carr
President

cc: George Tengan, Maui County, Department of Water Supply
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<th>FROM:</th>
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<td>IZU, Y.</td>
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**PLEASE:**
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- Take Action
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- Type Final
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O.K. I guess we need to get moving on our letter asking for more info on when 3rd resumes.

P.S. set up April public hearing.
February 17, 2005

Ms. Linnel T. Nishioka
Oshima Chun Fong & Chung LLP
841 Bishop Street, Suite 400
Honolulu, HI 96813

Dear Ms. Nishioka:

Water Use Application Information
Wailuku Shaft (Well No. 5330-05)

Thank you for your letter requesting extension for your response concerning our December 7, 2004 request for additional information concerning the captioned application. Our apologies for not providing a more prompt reply.

During the interim, we received a petition for a Declaratory Ruling concerning the two competing water use applications for this source. We had anticipated earlier resolution, and now believe the Commission will take action on this matter at its March 17, 2005 meeting.

As a result, we approve your request for an extension to reply to our December request. Please provide your response by March 31, 2005.

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

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

Cl: ss
February 10, 2005

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Water Use Application Information Wailuku Shaft
(Shaft 33), Well No. 5330-05

Dear Ms. Izu:

On behalf of our client, Kehalani Mauka, LLC (“Kehalani”), we request an additional one (1) month extension from our original request dated December 7, 2004 and thereonafter on January 5, 2005, to file Kehalani’s response regarding additional information requested in your letter dated November 15, 2004. Accordingly, Kehalani will have up to and including March 10, 2005, within which to file its response. Thank you for your consideration in this matter. Should you have any questions, please do not hesitate to contact the undersigned at 528-4200.

Very truly yours,

Linnei T. Nishioka

LN:jhy
FROM: ROY

DATE: JAN - 5 2005

INIT. TO: INIT: FOR: PLEASE:
NAKAMA, L. NAKANO, D. OHYE, M. SAKODA, E. STAHL, K. SUBIA, S. SWANSON, S. UYENO, D. YODA, K. YOSHINAGA, M.

Approval Signature Information
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need to add extension request column in your summary table on the info.
January 5, 2005

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Water Use Application Information Wailuku Shaft (Shaft 33), Well No. 5330-05

Dear Ms. Izu:

On behalf of our client, Kehalani Mauka, LLC ("Kehalani"), we request an additional one (1) month extension from our original request dated December 7, 2004, to file Kehalani’s response regarding additional information requested in your letter dated November 15, 2004. Accordingly, Kehalani will have up to and including February 10, 2005, within which to file its response. Thank you for your consideration in this matter. Should you have any questions, please do not hesitate to contact the undersigned at 528-4200.

Very truly yours,

[Signature]
Linnel T. Nishioka
December 17, 2004

BY U.S. MAIL & FACSIMILE TRANSMITTAL

Fax: (808) 587-0219

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
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 ‘Iao 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 ‘Aina 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. 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 ʻIao 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 ʻIao. 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 ʻIao 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 ʻIao. 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
Letter to Yvonne Izu Re. Burdens Of Proof And Legal Standards Regarding: (1) Traditional & Customary Native Hawaiian Rights & Practices; & (2) Municipal Uses

December 17, 2004

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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 `Iao, at the October 28, 2004 public hearing on Maui, and in the petition to restore stream flow in Waihe'e, North and South Waiehu, `Iao 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 `Iao, 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 `Iao. 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 (Akakū) 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
Letter to Yvonne Izu

Rt.: Jurisdiction of Roof and Legal Stands

Regarding:

(1) Traditional & Customary Native Hawaiian Rights & Practices; & (2) Municipal Uses

December 17, 2004

Page 6 of 13

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 I as a public
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 Mokuhau 1. MDWS has also admitted that it transports potable water from Taro 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

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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, Taro and Waihe’e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) at 66.
Letter to Yvonne Izu Re: Burdens Of Proof And Legal Standards Regarding: (1) Traditional & Customary Native Hawaiian Rights & Practices; & (2) Municipal Uses
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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) 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 § 8:59 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).

Similarly, the seminal treatise on eminent domain explains that “[t]he doctrine that a riparian town

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 statutes 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 Waialhole decision as potential support for the idea of municipal uses being a public trust purpose. The letter emphasizes Waialhole 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 Waialoha 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). 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 Waiāhole I must not lose sight of the forest for the trees. A larger view of the public trust purposes recognized in Hawai'i 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 'lao, 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, Waiahole 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, Waiahole I and other public trust precedent do not support including municipal uses as a "public trust purpose." The reasoning of the Hawaii Supreme Court in Waiahole 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.

B. Waiahole I States The Standard For Municipal Use Applicants Under The Public Trust And Code.

The November 15 letter also points out that municipal uses are not "private commercial uses" discussed in Waiahole I. Of course, the only uses at issue in Waiahole I were private commercial uses," so claiming that Waiahole 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 Waiahole 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 Waiahole 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. Waialoa, 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[.]” Wai‘ola, 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.” Wai‘ahole 1, 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 Wai‘ahole 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,

[Signature]

D. Kapua Sproat

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)
December 16, 2004

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.¹

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:
  Waihee 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);
  Waiheu 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);
  Waiheu 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, alodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, abo 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

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 WUPA, 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 ‘lao, 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 'Iao 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 ʻĪao. 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,

[Signature]

Clyde W. Nāmu’o
Administrator

Cc: Kapua Sproat Esq.
Earthjustice
223 South King Street, Suite 400
Honolulu, Hawai‘i 96813
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
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**PLEASE:**
- Approval
- Signature
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- See Me
- Review & Comment
- Take Action
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- File
- Xerox copies

*What do you think we're gonna do in extension? Just?*
December 7, 2004

Via Hand Delivery

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii  96813
Attn: Charley Ice

Re: Water Use Application Information Wailuku Shaft
(Shaft 33), Well No. 5330-05

Dear Ms. Izu:

On behalf of our client, Kehalani Mauka, LLC ("Kehalani"), we request an additional one (1) month extension to file Kehalani’s response regarding additional information requested in your letter dated November 15, 2004. Accordingly, Kehalani will have up to and including January 10, 2005, within which to file its response. Thank you for your consideration in this matter. Should you have any questions, please do not hesitate to contact the undersigned at 528-4200.

Very truly yours,

Linnel T. Nishioka

LNjhy
400 Davies Pacific Center • 841 Bishop Street • Honolulu, Hawaii 96813 • Telephone (808) 528-4200 • Facsimile (808) 531-8466
www.ocfc.com
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<td>Yoshinaga, M.</td>
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**PLEASE:**

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- Type Draft
- Type Final
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- Xerox copies

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Please get Yonnie's letters for her. Thanks. Also, let her know we are short on getting all the WRPA information to Kahului Library soon. Thx.

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

Dear Ms. Lovell:

Petition for Declaratory Ruling in Water Use Permit Application
Wailuku Shaft (Shaft 33), Well No. 5330-05

We received your letter dated November 12, 2004, requesting a copy of letters
sent by the Commission to parties on your circuit of service for the captioned petition, as
well as any comments or responses thereto, unless the latter is clearly marked to have
copied you in the process.

Enclosed are the copies of letters we have sent inviting comments and
responses. We have received one response from the Office of Hawaiian Affairs to date,
which indicates they have copied you.

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,

[Signature]

YVONNE Y. IZU
Deputy Director

Cl:ss
Enclosure
November 18, 2004

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

Cl:ss
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<td>YODA, K.</td>
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<td>CHING, F.</td>
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</tbody>
</table>
Deputy Director Yvonne Y. Izu
Commission on Water Resource Management
Department of Land and Natural Resources
State of Hawaii
Post Office Box 621
Honolulu, HI 96809

Re: County of Maui Department of Water Supply's Petition for a Declaratory Ruling - Wailuku Shaft 33

Dear Deputy Director Izu:

I understand that on November 4, you sent a letter to one or more parties inviting comments and responses to our petition for a declaratory ruling. Would you please send, to my direct attention, copies of any and all such letters?

We also request copies of any and all comments or responses (unless the document itself shows that the commenting party served us directly.)

Finally, please advise us of the schedule for responses, for our reply thereto, and for any further action with respect to our petition.

Thank you for your courtesy and cooperation.

Very truly yours,

JANE E. LOVELL

S:\ALL\Jel\WaterIssues\Nov10ltr.wpd
November 15, 2004

Mr. Jay Nakamura
Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813

Dear Mr. Nakamura:

Water Use Application Information
Wailuku Shaft (Shaft 33), Well No. 5330-05

Following adjournment of the still-open public hearing convened October 28, 2004, the Commissioners appointed to conduct the hearing have requested additional information from all applicants.

Concerning Water Use Permit Application (WUPA) No. 707 for Kehalani Mauka, LLC use of the Wailuku Shaft, there are questions regarding the distinction between existing and proposed new uses by Kehalani Mauka, LLC. WUPA No. 707 lists on Table 1 all the existing County municipal uses as of July 21, 2003, identifying various TMK parcels of use not owned by Kehalani Mauka, LLC. The text of the application specifies the intention to serve future Kehalani projects that have not yet been built. These would be proposed new uses. However, the relation between actual existing uses and future Kehalani Mauka LLC uses is unclear. Therefore these requests follow:

1) Is Kehalani Mauka, LLC coming in jointly with or separately from Maui Department of Water Supply (MDWS) for use of ground water from Shaft 33?

2) On Table 1 of the application, you list “4363” in Column 7 (Units or Net Acres) for your proposed use. Is it 4363 dwelling units, commercial units, total units, service connections, net acres, or some other unit, and what are the per-unit amounts required for each type of unit?

3) On October 8, 2004 – the County of Maui commented that your proposed project, adding 2400 new homes and 22 acres of additional commercial development, is inconsistent with the Wailuku-Kahului Community Plan adopted in 2002. How does Kehalani Mauka, LLC respond to this comment?
4) The TMK numbers identified on Table 1 and public landownership records show the following:

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<th>TMK</th>
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<td>2-3-4-07-2</td>
<td>C. Brewer Homes</td>
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<td>2-3-5-01-1</td>
<td>Niehaus, Davis, et al</td>
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<td>2-3-5-01-17</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<td>2-3-5-01-60</td>
<td>Wailuku C-3, LLC</td>
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<td>2-3-5-01-61</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<td>2-3-5-01-62</td>
<td>Hawaii Land and Farming Company, Inc.</td>
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<td>2-3-5-01-66</td>
<td>Kehalani - Maui LLC</td>
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Please explain how Kehalani Mauka, LLC represents land ownership of all these parties.

5) Please clearly identify Kehalani Mauka, LLC projects that have actual service from this source, existing as of July 21, 2003. Where is it delivered and what is the total amount of use to be continued?

6) Does Kehalani Mauka, LLC propose to allow existing use by Maui County under the Department of Water Supply (MDWS) from Shaft 33, and if so, what is the total amount of use to be continued?

7) Please clearly identify Kehalani Mauka, LLC projects that propose new uses, namely some or all of its 550-acre master-planned community for which land use and zoning entitlements have been approved. What is the amount of water use being reserved from the Wailuku Shaft (Shaft 33) for this purpose?

8) The question of "municipal use" has arisen in the context of whether Kehalani Mauka, LLC is a municipal service or private utility. Please provide your definition of "municipal use" for the uses proposed under your application, and how it relates to "public trust" and "public interest".

9) You did not specify units nor acreage to be served under any of these scenarios. Please provide detail in Table 1 for any existing or proposed Kehalani Mauka water use.

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 or toll-free at 984-2400, extension 70251.

Sincerely,

YVONNE Y. IZU
Deputy Director
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 Waiāhole decision, he noted that the Court refers to “the vital domestic uses of the general public” (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 Waiāhole “prescribes a ‘higher level of scrutiny’ for private commercial uses” (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

Cl: 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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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

Cl:ss

c: Kapua Sproat, Earthjustice
November 4, 2004

Mr. Gary Phillip
Hawaii Land and Farming, Inc.
745 Fort Street
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Mr. Phillip,

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.


Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director - Water
Ms. Kapua Sproat, Esq.
EarthJustice
223 South King Street, Suite 400
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Kapua,

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Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director-Water

November 4, 2004
November 4, 2004

Mr. Clyde W. Namu'o
State of Hawaii
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Clyde,

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.


Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director-Water
Oshima Chun Foung & Chung LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813

Subject: Petition for a Declaratory Ruling – Wailuku Shaft 33

Dear Linnell,

The County of Maui, through its Department of the Corporation Counsel, filed a Petition for a Declaratory Ruling, dated October 26, 2004, relating to its application for a water use permit for Wailuku Shaft 33. According to the Certificate of Service attached to the Petition, each of you received a copy of the Petition and supporting documents.


Please feel free to call me if you have any questions at (808) 587-0214.

Sincerely,

Yvonne Y. Izu
Deputy Director-Water
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 Waiahole I decision, it refers to "the vital domestic uses of the general public (my emphasis)" 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.'"

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." 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:

[O]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 RECORD DATA

Assessed Values reflect tax year 2004

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11/1/2004
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<td>F WAILUKU C-3 LLC</td>
<td>WAILUKU C-3 LLC</td>
<td>5.97 ac</td>
<td>0</td>
<td>2/1/2001 DEED</td>
<td>$1,000,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2-3-5-1-61</td>
<td>F OFF</td>
<td>HONOAIPILANI HWY</td>
<td>25.08 ac</td>
<td>0</td>
<td>12/5/2003 DEED</td>
<td>$900,000</td>
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<tr>
<td></td>
<td>HONOAIPILANI</td>
<td>HWY</td>
<td>HI LAND &amp; FARMING CO</td>
<td>19.04 ac</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2-3-5-1-62</td>
<td>F 1885 KOAE PL</td>
<td>SPENCER HOMES INC</td>
<td>1.92 ac</td>
<td>0</td>
<td>10/23/1998 DEED</td>
<td>$1,001</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>2-3-5-1-63</td>
<td>F OFF</td>
<td>HONOAIPILANI HWY</td>
<td>1.92 ac</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>2-3-5-1-64</td>
<td>F HONOAIPILANI HWY</td>
<td>HI LAND &amp; FARMING CO</td>
<td>15.30 ac</td>
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<td></td>
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<tr>
<td>2-3-5-1-65</td>
<td>F ROADWAY</td>
<td>HI LAND &amp; FARMING CO</td>
<td>4,397 sqft</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>2-3-5-1-66</td>
<td>F WAIALE RD</td>
<td>KEHALANI-MAUI LLC</td>
<td>11.09 ac</td>
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<td>1/9/2004 DEED</td>
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<tr>
<td>2-3-5-1-67</td>
<td>F KEHALANI MAUKA LLC</td>
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<td>40.07 ac</td>
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<td>1/9/2004 DEED</td>
<td>$5,040,000</td>
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</table>

This information has been supplied by third parties and has not been independently verified by Hawaii Information Service and is, therefore, not guaranteed.

http://webre1.hawaiiinformation.com/re4/Base/Lib/ActionMenuPrintModal.htm
Public Hearing

Applications for Water Use Permits
Kaoa 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.

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Requested amount (mgd)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wailuku Shaft 33</td>
<td>5330-05</td>
<td>Kehalani**</td>
<td>707</td>
<td>3-5-1:1</td>
<td>5.771</td>
</tr>
<tr>
<td>Mokuhau Well 1</td>
<td>5330-09</td>
<td>MDWS</td>
<td>700</td>
<td>3-3-2:24</td>
<td>1.994</td>
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<tr>
<td>Mokuhau Well 3</td>
<td>5330-11</td>
<td>MDWS</td>
<td>701</td>
<td>3-3-2:24</td>
<td>2.221</td>
</tr>
<tr>
<td>Waiehu Heights Well 1</td>
<td>5430-01</td>
<td>MDWS</td>
<td>697</td>
<td>3-3-2:28</td>
<td>0.165</td>
</tr>
<tr>
<td>Waiehu Heights Well 2</td>
<td>5430-02</td>
<td>MDWS</td>
<td>698</td>
<td>3-3-2:28</td>
<td>1.415</td>
</tr>
<tr>
<td>Waihee Well 1</td>
<td>5431-02</td>
<td>MDWS</td>
<td>695</td>
<td>3-3-17:31</td>
<td>1.480</td>
</tr>
<tr>
<td>Waihee Well 2</td>
<td>5431-03</td>
<td>MDWS</td>
<td>696</td>
<td>3-3-17:31</td>
<td>2.439</td>
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<tr>
<td>Waihee Well 3</td>
<td>5431-04</td>
<td>MDWS</td>
<td>703</td>
<td>3-3-17:31</td>
<td>1.513</td>
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<tr>
<td>Iao Tunnel</td>
<td>5320-02</td>
<td>DWS</td>
<td>680</td>
<td>3-3-3:3</td>
<td>1.389</td>
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<tr>
<td>Keanaewai Well</td>
<td>5320-05</td>
<td>MDWS</td>
<td>699</td>
<td>3-3-3:5</td>
<td>1.042</td>
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<tr>
<td>Iao Tunnel</td>
<td>5330-02</td>
<td>HC&amp;S</td>
<td>691</td>
<td>3-4-34:34</td>
<td>0.100</td>
</tr>
</tbody>
</table>

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:

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Requested amount (mgd)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wailuku Shaft 33</td>
<td>5330-05</td>
<td>MDWS**</td>
<td>702</td>
<td>3-5-1:1</td>
<td>5.771</td>
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<tr>
<td>War Memorial Stadium</td>
<td>5329-04</td>
<td>MP&amp;R</td>
<td>709</td>
<td>3-8-7:55</td>
<td>0.038</td>
</tr>
<tr>
<td>Baldwin High School</td>
<td>5329-05</td>
<td>MP&amp;R</td>
<td>710</td>
<td>3-8-7:55</td>
<td>0.010</td>
</tr>
<tr>
<td>Maui Stadium</td>
<td>5329-14</td>
<td>MP&amp;R</td>
<td>713</td>
<td>3-8-7:55</td>
<td>0.039</td>
</tr>
<tr>
<td>Papahaku Park</td>
<td>5429-02</td>
<td>MP&amp;R</td>
<td>712</td>
<td>3-2-13:29</td>
<td>0.324</td>
</tr>
<tr>
<td>Waiehu Golf</td>
<td>5529-02</td>
<td>MP&amp;R</td>
<td>711</td>
<td>3-2-13:6</td>
<td>0.039</td>
</tr>
<tr>
<td>Waiehu Golf 1</td>
<td>5530-03</td>
<td>MP&amp;R</td>
<td>708</td>
<td>3-2-13:29</td>
<td>0.324</td>
</tr>
<tr>
<td>Waiehu Golf 2</td>
<td>5530-04</td>
<td>MP&amp;R</td>
<td>714</td>
<td>3-2-13:29</td>
<td>0.324</td>
</tr>
<tr>
<td>Black George Tunnel</td>
<td>5332-01</td>
<td>HC&amp;S</td>
<td>685</td>
<td>3-3-3:3</td>
<td>not identified</td>
</tr>
<tr>
<td>Iao Needle Tunnel 1</td>
<td>5333-01</td>
<td>HC&amp;S</td>
<td>684</td>
<td>3-3-3:1</td>
<td>not identified</td>
</tr>
<tr>
<td>Iao Needle Tunnel 2</td>
<td>5333-02</td>
<td>HC&amp;S</td>
<td>686</td>
<td>3-3-3:3</td>
<td>not identified</td>
</tr>
</tbody>
</table>

*Living Waters #1

<table>
<thead>
<tr>
<th>Well Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Requested amount (mgd)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Living Waters #1</strong></td>
<td>5634-01</td>
<td>LWLF</td>
<td>704</td>
<td>3-2-13:15</td>
<td>0.020</td>
</tr>
</tbody>
</table>

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

Yonne Y. Izu, Deputy Director for
Peter T. Young, Chairperson

Dated: October 7, 2004

Publish in: Maui News issue of October 12, 2004
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.
October 27, 2004

Via Hand Delivery

Ms. Yvonne Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813

Re: Kehalani Mauka, LLC’s Application for Wailuku Shaft 33,
Well No. 5330-05, WUPA No. 707, TMK No. 3-5-1:1

Dear Deputy Director Izu:

On behalf of our client, Kehalani Mauka, LLC, this letter is in response to your letter dated August 25, 2004. In that letter, the Commission asked applicants seeking ground water use permits in Iao aquifer to review the Supreme Court directions in its latest Waiahole case, In re Water Use Permits, 105 Hawai‘i 1, 93 P.3d 643 (2004), and to provide information on practicable alternatives and per unit amounts of water use. We understand that this letter was sent to all applicants for the use of ground water in Iao aquifer.

Kehalani Mauka LLC provided information that addresses your August 25, 2004 letter in its original application.

Kehalani Mauka, LLC submitted its water use permit application on July 20, 2004. In that application, we submitted information to supplement the original application. In that letter, we addressed the issues discussed in your August 25, 2004 letter. A copy of that July 20, 2004 application is enclosed for your convenient reference.

Additionally, although not required by the Commission, Kehalani Mauka, LLC would like to provide additional information to address some of the objections filed against its application concerning: (1) its existing use application, (2) providing water to the Department of Hawaiian Homelands (“DHHL”), and (3) potential effect on traditional and customary practices of native Hawaiians.
Kehalani Mauka, LLC’s application for Shaft 33 is an existing use for 5.771 mgd.

Kehalani Mauka, LLC is applying for an existing use for Shaft 33. Several commentators to this application have alleged that only the existing user may file for a water use permit for an existing use. The statute, however, is clear that the water use permit is for an existing use regardless of the actual user at the effective date of designation.

Section 174C-50, Hawaii Revised Statutes, states, in relevant part:

(a) All existing uses of water in a designated water management area, except those exempted from regulation by this chapter, may be continued after the effective date of designation only with a permit issued in accordance with sections 174C-51, 174C-52, and 174C-53(b).

(b) After publication as provided in section 174C-52, the commission shall issue a permit for the continuation of a use in existence on the effective date of designation, if the criteria in subsection (a) are met and the existing use is reasonable and beneficial.

(Emphasis added).

There is no dispute that on July 21, 2003, the date of designation for Iao Aquifer, Well No. 5330-05 (“Shaft 33”) was an existing use for 5.771 mgd. based on a 12-month moving average. Shaft 33 was used and continues to be used as part of the Central Maui municipal system that supplies water to Central and South Maui. Kehalani Mauka, LLC is the owner of Shaft 33 that is currently being used by the County of Maui for its Central Maui municipal system. Kehalani Mauka, LLC has continues to seek an agreement with the County of Maui and has did meet with the County on October 22, 2004 and is hopeful that some agreement will be reached.

Kehalani Mauka, LLC will continue to provide water to DHHL projects that directly use water from Shaft 33.

In its comments dated August 27, 2004, the County of Maui Department of Water Supply (“MDWS”) has indicated that two DHHL projects have water meter reservations for Shaft 33, Waiehu Kou Phases III and IV for a total projected water use of 154,600 gpd. Kehalani Mauka, LLC has no objection to DHHL receiving water from Shaft 33 for its Waiehu Kou Phases III and IV from the MDWS system.
Kehalani Mauka, LLC does not believe that traditional and customary practices of native Hawaiians will be impacted.

The traditional and customary practices alleged in the objections raised center on taro cultivation and other surface water uses of water. It is important to note that this application concerns ground water and does not involve the use of surface water from either Iao or Waikapu streams. Based on investigative work done by Kehalani Mauka, LLC, no natural streams or other natural surface water features are contained on the Kehalani Mauka property and the water table is at least 25 feet below the surface. Kehalani Mauka, LLC is unaware of any traditional and customary practices related to its application.

Please contact the undersigned at 528-4200 should you require further information or have any questions on this matter.

Very truly yours,

Linne T. Nishioka

LTN:jhy
Enclosure
STATE OF HAWAII
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources

APPLICATION FOR WATER USE PERMIT
Continue or Surface Water

Instructions: Please print in ink or type and send 15 copies of completed application with attachments to the
Commission on Water Resource Management, P.O. Box 821, Honolulu, Hawaii 96809. Application must be
accompanied by a non-refundable filing fee of $25.00 payable to the Dept. of Land and Natural Resources. The
Commission may not accept incomplete applications. For assistance, call the Regulation Branch at 808-537-0225.
For further information and updates to this application form, visit http://www.hawaii.gov/dlnr/cwnm.

PERMITTEE INFORMATION
1. (a) APPLICANT
Firm/Name: Kehalani Mauka, LLC
Contact Person: Jay Nakamura
Address: 1100 Alakea St., 27th Flr.
Phone: 808-537-5220, Fax: 808-537-1801
E-mail:

(b) LANDOWNER OF SOURCE
Firm/Name: Kehalani Mauka, LLC
Contact Person: Jay Nakamura
Address: 1100 Alakea St., 27th Flr.
Phone: 808-537-5220, Fax: 808-537-1801

SOURCE INFORMATION
2. WATER MANAGEMENT AREA: Iao Aquifer
ISLAND: Maui
3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33, State
(b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME:
(c) LOCATION: Address: See attached, Attachment #1. Tax Map Key:
(Attach and show source location on a
USGS map, scale 1"=2000", and a property tax map)

4. SOURCE TYPE (check one): Stream
5. METHOD OF TAKING WATER (check one): Open-pipe

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
(b) Non-PUC-Regulated Private System
(c) Tax Map Key: Please complete Table 1 on back of application and shade applicable portion of property tax map.
7. QUANTITY OF WATER REQUESTED: 5,771* gallons per day (averaged over 1 year)
8. METHOD OF MEASUREMENT:
9. QUALITY OF WATER REQUESTED: 
10. PROPOSED USE: 
11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours
daytime hours of operation; example, 7 a.m. to 2 p.m.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER: See attached.
(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: * Includes Kehalani Project TMK Nos. 2-3-04-07,
Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, and 66.

NOTE: Signing below indicates that the signatures understand and swear to: 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; 3) If necessary, further information may 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
permits, 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) Kehalani Mauka, LLC
By Milwaukee Holdco, LLC, its member
Signature: Stanford S. Carr, its manager
Date

Landowner (print) Kehalani Mauka, LLC
By Milwaukee Holdco, LLC, its member
Signature: Stanford S. Carr, its manager
Date
## Table 1. TMKs to Use Requested Water

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<tr>
<th></th>
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<th>4-Year Cumulative Projected Demand</th>
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<td>Year 2</td>
</tr>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(year)</td>
<td>(year)</td>
</tr>
</tbody>
</table>

*Based on County DWS estimate. Includes Kehalani Project TMK Nos. 2-3-4-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63 and 66.

---

**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 Attn: Arthur D. Challacombe.
Supplemental Information

Re: Kehalani Mauka, LLC;
Application for ground water use permit for Iao Aquifer;
dated July 20, 2004

USE INFORMATION

6(a). LOCATION OF PROPOSED WATER USE:

Kehalani Mauka, LLC is currently a Hawaii limited liability company, and is in the process of negotiating an agreement with the County Department of Water Supply ("County DWS") that would, if an agreement is reached, allow the County to continue to use Shaft 33, State Well No. 5330-05 ("Shaft 33") for municipal purposes. If agreement with the County is not reached, the Applicant, or its designee, will continue the municipal use of Shaft 33 as a public utility, regulated by the Hawaii Public Utilities Commission.

10. PROPOSED USE:

Kehalani Mauka, LLC intends to use the water for municipal purposes including its Kehalani project located in Wailuku, Maui. (See Attachments 2 & 3) The water will be used for residential, park, school, commercial and irrigation of the common areas of the project. In addition, pending agreement with the County DWS, water will be used for municipal purposes as part of the County’s Central Maui Water System ("CMWS"). Shaft 33, as of the date of designation, pumps approximately 5.8 mgd. that is used as part of the County system.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

(a) Can be accommodated with the available water source.

This water use application is for an existing use for Shaft 33, for an allocation of 5.771 mgd, the average existing use for the last year prior to designation of Iao Aquifer. Kehalani Mauka, LLC has allowed the County DWS, on an interim basis, to use Shaft 33 to serve as a part of the County’s municipal system. The parties are currently negotiating a long-term agreement that would allow the County to continue the use of the Shaft 33 facilities. Kehalani Mauka believes that given the location of Shaft 33 in the Iao Aquifer, and its historical use, the application for 5.771 mgd. can be accommodated within the Iao Aquifer’s sustainable yield. The water used from Shaft 33 by the County of Maui has already been calculated in the approximately 18 mgd. used by the County in Iao aquifer and this application is being made in conjunction with that existing use and not in addition to it.
Shaft 33 is a part of the CMWS that serves central and south Maui. See attached map of the service areas for Shaft 33. Shaft 33 has historically averaged approximately 5.8 mgd. This serves approximately 9667 households at the County standard rate of 600 gpd.

(b) Reasonable and beneficial use.

Kehalani is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single-family residences, located at the base of the West Maui Mountains with an expected build-out period of ten years. When completed, it will be one of the largest planned developments on the island. The current strategic focus is to develop the infrastructure for this master planned community, thus enabling the sale of both improved and unimproved lots to interested builders and developers.

Kehalani has land use and zoning entitlements and approvals that took over two decades to achieve. The Project District Zoning Ordinance allows maximum flexibility in fine-tuning development plans as the market dictates within an overall maximum of 2,400 residential units and up to 22 acres of neighborhood commercial development. The property is located adjacent to the County seat, Wailuku. Frontage on Honoapiilani Highway provides the project with great visibility required by commercial tenants and close proximity to Maui's primary job centers and resorts.

Pending agreement with the County DWS, this water use for the Kehalani project as well as the water use for the existing county water system customers who use the CMWS would continue.

As part of the County water system, the County of Maui has instituted programs to protect the aquifer and use water in an economic and efficient utilization including: utilization of alternative surface water sources, development of new sources in Waihee, conservation programs including leak detections, automatic radio-read meters to replace old under-performing meters, use of reclaimed water where appropriate and available, conservation pricing and rate structure, low flow fixture distribution, and public education on the importance of conservation. In addition, the County has put resources into natural resource management and protection including USGS study on the availability of water in central Maui, watershed, wellhead and surface water protection programs.

Residential housing projects, including planned communities, have been recognized by the Commission as a reasonable and beneficial use of water. Municipal use of water has been recognized by the Commission as a reasonable and beneficial use of water.
(c) Will not interfere with any existing legal use.

Shaft 33 is the only source of the current county system that is located south of the Iao stream and has historically been pumped at much higher levels than the present 5.771 mgd. Kehalani Mauka, LLC does not anticipate that pumpage at this level will interfere with any other existing legal uses, including other existing wells in Iao aquifer.

(d) Is consistent with the public interest.

The Kehalani project is one of the few planned residential communities of this scale that offers affordable housing for local residents and seniors. The project provides housing within a few miles of Wailuku, the county center that is available and affordable for local residents. In fact, some housing sold has an owner/occupant requirement for a certain period of time to allow residents to purchase housing in close proximity to work and schools.

A component of the request is for domestic use. The Hawaii Supreme Court in In the Matter of Water Use Permit Applications, ("Waiahole I"), 94 Hawai‘i 97 (2000) recognized domestic use as a public trust purpose. As a public trust purpose, domestic use should be recognized as in the public interest and should be given priority by the Commission. In addition, the Commission has found municipal use in the public interest.

Shaft 33 currently is a part of the Department of Water Supply’s Central Maui System that serves all of Central Maui’s domestic and municipal water needs. Serving that need is in the public interest. (See Attachment 4) Serving municipal uses in the Kehalani project would similarly be in the public interest.

Kehalani Mauka, LLC has no practicable alternatives to the use of Shaft 33 for its municipal water needs. Surface water would require expensive treatment prior to using it for drinking water and may have other environmental effects that would make it not practicable. Reuse water is not an option for domestic use for health reasons and may not be available nor affordable for landscape irrigation use. The project is located within the Iao aquifer, and other ground water sources may not be available given the sustainable yield of the aquifer. Therefore, there are no practicable alternatives for Kehalani Mauka, LLC besides the use of Shaft 33.
(e) Is consistent with State and County general plans and land use designations.

The project has the appropriate State and County general plans and land use designations. The project lands are designated "urban" in the State land use classification system. The project is designated "Project District No. 3" in the Wailuku-Kahului community plan.

(f) Is consistent with County land use plans and general policies.

The property is consistent with County land use plans and general policies. The property is currently classified under Ordinance No. 2053, the "Wailuku-Kahului Project District 3," which was specifically created to provide for the Kehalani project.

(g) Will not interfere with the rights of the Department of Hawaiian Home Lands ("DHHL").

Kehalani Mauka, LLC is unaware of any DHHL lands near the project nor are there any DHHL wells in the lao aquifer. Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL. Pending agreement with the County DWS, DHHL currently receives water from the County water system which includes this source, and the continuation of that use will benefit the DHHL. Kehalani Mauka, LLC is aware that any permit issued would be subject to the rights of the DHHL under Section 221 of the Hawaiian Homes Commission Act.
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need to update summary table and copies of this for Mike of Frasier
Mr. Peter T. Young  
Chairperson  
State of Hawaii Department of Land and Natural Resources  
Commission on Water Resource Management  
P. O. Box 621  
Honolulu, Hawaii 96809  

Dear Chairperson Young:

RE: Kehalani Mauka, LLC's Application for a Water Use Permit for Wailuku Shaft 33, State Well No. 5330-05, Iao Ground Water Management Area, Maui

This is in response to your letter to Mayor Alan Arakawa, dated August 9, 2004, requesting the County's advice on whether the above-referenced permit application is inconsistent with the county's land use plans and policies. It is.

The Wailuku-Kahului Community Plan, adopted in 2002, provides at page 30 for several objectives and policies with respect to water and utilities. Among these are coordinating "water system improvement plans with growth areas to ensure adequate supply . . ." That Community Plan also provides that "[f]uture growth should be phased to be in concert with the service capacity of the water system." However, the Kehalani Mauka application seeks to use a source currently serving the Central Maui system for 2,400 additional homes and 22 acres of additional commercial development. Adding 2,400 homes and 22 acres of commercial development to the already taxed Central Maui system, which is served by the Iao Aquifer, is not consistent with the Community Plan's objectives and policies.

Maui's General Plan, adopted in 1990, provides for monitoring "growth activities throughout Maui County in order that development of new water sources is concurrent with approval of new developments." (General Plan, p. 11) Allowing for 2,400 new houses and 22 acres of commercial development without developing any new water sources would not be consistent with this aspect of the General Plan.

The General Plan also provides for supporting the Department of Water Supply (previously, the Board of Water Supply) in its determination of "future water needs consistent with the General Plan, Community Plans, and the growth management strategy." Id. County of Maui's Department of Water Supply noted in its objection to Kehalani Mauka LLC's application for a water use permit for the Wailuku Shaft that "[t]he current average pumpage of 5.771 MGD is in its entirety serving the County's municipal system" and that "additional demand for the Kehalani Mauka project needs to be accommodated by sources outside of the Iao aquifer in order to avoid overpumpage of the aquifer." The Planning Department agrees and concurs with that assessment.
Thank you for allowing us to comment on Kehalani Mauka LLC's water use permit application.

Sincerely,

MICHAEL W. FOLEY
Planning Director

MWF:lar

c: Honorable Alan Arakawa, Mayor
   George Y. Tengan, Director, Department of Water Supply
   Wayne A. Boteilho, Deputy Director
   Clayton I. Yoshida, AICP, Planning Program Administrator
   Ann Cua, Staff Planner
   Project File
   General File
   K:\WP_DOCS\PLANNING\PH3\2004\8\KehalaniSites1and4\WaterShaft33.wpd
STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT,
September 22, 2004
Honolulu, Hawaii

Maui Departments of Water Supply and Parks & Recreation
Hawaiian Commercial & Sugar Company
Kehalani Mauka, LLC
APPLICATIONS FOR WATER USE PERMITS
Iao Tunnel, Waihee Wells 1-3, Waiehu Heights Wells 1 & 2, Kepaniwai Well,
Mokuhau Wells 1 & 3, Wailuku Shaft 33
Existing Uses Only
Iao Ground Water Management Area, Maui

APPLICANT 1:
Maui Department of Water Supply
200 South High Street
Wailuku, HI 96793

APPLICANT 2:
Hawaiian Commercial & Sugar Company
P.O. Box 791628
Paia, HI 96779

APPLICANT 3:
Maui Department of Parks & Recreation
700 Hali'a Nakoa Street, Unit 2
Wailuku, HI 96793

APPLICANT 4:
Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813

SUMMARY OF REQUEST:

Authorize a subcommittee of Commissioners to convene and take testimony at a public hearing on
Maui concerning water use permits for existing use only for reasonable-beneficial use of ground water
from the Iao Aquifer.

LOCATION MAP: See Exhibit 1

BACKGROUND:

July 16, 2003    The Commission designated the Iao Aquifer as a ground-water management area,
effective July 21, 2003, coincident with a public notice announcing it.

July 21, 2003    Public notice was issued, requiring all existing uses to be continued only upon
application for a water use permit. A one-year deadline was given, until July 21,
2004, to file applications.
### Complete WUPAs, Iao WMA

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DHHL Reservation Request

**Monday, 13 Sep 04**

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- They don't show tunnel doesn't work here? She works for them. Conflict of interest should have triggered a check no?
- Not sure what last pg # is for.
STANFORD CARR DEVELOPMENT, LLC
Alakea Corporate Tower
1100 Alakea Street, 27th Floor
Honolulu, Hawaii  96813
Telephone: (808) 537-5220
Facsimile: (808) 537-1801

FAX TRANSMITTAL

DATE: September 17, 2004

TO: Linnel T. Nishioka

OF: Deputy Director

FROM: elena for Stanford S. Carr

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__ For Approval
__ For your use/information
__ For payment/reimbursement
__ For further processing

___ For review and comments
___ As requested/required
___ For execution
___ For signature and return

HARD COPY WILL BE MAILED [ ] HARD COPY WILL NOT BE MAILED [x]

Remarks:

CONFIDENTIALITY NOTE: The information in this facsimile message is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this facsimile message is strictly prohibited. If you have received this facsimile message in error, please immediately notify us by telephone and return the original message to us at the address above via the United States Postal Service.
September 9, 2004

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

Subject: County of Maui's Application for a Water Use Permit  
for Wailuku Shaft 33, State Well No. 5330-05  
Iao Ground Water Management Area, Maui

Dear Chairperson Young:

You previously acknowledged receipt, on July 2, 2004, of our water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You indicated to us, by letter dated August 18, 2004, that our application was "in limbo" because it was incomplete due to the absence of the landowner's signature.

We have now obtained the landowner's signature, and enclose a copy of our application, with the original signature of Stanford Carr. Mr. Carr signed as manager of Milwaukee Holdings, LLC, a member of Kehalani Mauka, LLC, on September 8, 2004.

We trust that our application will now be deemed complete, and that it will be processed without further delay.

If you have any questions, please do not hesitate to call.

Sincerely,

George Y. Tengan, Director  
Enclosure

"By Water All Things Find Life"
Peter T. Young, CWRM Chairperson
Page Two
September 9, 2004
Re: County of Maui’s Application for Water Use Permit
for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

copy w/enc: Stanford S. Carr
Edward S. Kushi, Jr., Deputy Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel
Jeffrey T. Pearson, DWS Deputy Director
Ellen Kraftsow, DWS Plng Pgm Mgr

copy w/o enc: Alan M. Arakawa, Mayor
Keith A. Regan, Managing Director
Dain P. Kane, Council Chair
Danny A. Mateo, WRC Chair
**State of Hawaii**  
**Commission on Water Resource Management**  
**Department of Land and Natural Resources**  
**APPLICATION FOR WATER USE PERMIT**

**For Official Use Only:**

**PERMIT INFORMATION**

1. **(a) APPLICANT:**  
   - Maui County Dept of Water Supply  
   - George Tengan, Director  
   - 200 S. High St, Wailuku HI  
   - Phone: (808)270-7814  
   - Email: george.tengan@co.maui.hi.us

2. **LANDOWNER OF SOURCE:**  
   - Kehalani Hauka LLC  
   - Jay Nakamura  
   - 618 Fort St, Suite 210, Taps Financial Ce  
   - Phone: (808)537-5229  
   - Phone: (808)537-1801

**SOURCE INFORMATION**

2. **WATER MANAGEMENT AREA:**  
   - Wailuku  
   - Maui

3. **(a) EXISTING WELLS/STREAM DIVERSION NAME AND STATE NUMBER:**  
   - Wailuku Shaft 33 5330-05

4. **PROPOSED (NEW) WELLS/STREAM DIVERSION NAME:**  
   - Wailuku Shaft 33

5. **LOCATION:**  
   - Tax Map Key: 3-5-01-061  
   - (Attach and show source location on a IRSG map, scale 1:2000, and a property tax map)

6. **SOURCE TYPE (check only):**  
   - Stream

7. **METHOD OF TAKING WATER (check one):**  
   - Artesian

8. **METHOD OF MEASUREMENT:**  
   - Flowmeter

9. **QUALITY OF WATER REQUESTED:**  
   - Safe

10. **PROPOSED USE:**  
    - Municipal or industrial (farming, mining, etc.)

11. **PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:**  
    - 24 hours

12. **APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:**
    - (a) Can be accomplished 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.

13. **REMARKS, EXPLANATIONS:**

---

**USE INFORMATION**

- **LOCATION OF PROPOSED WATER USE:**
  - (a) PUD-Regulated Private System  
  - (b) Irrigation

- **QUANTITY OF WATER REQUESTED:**
  - 5.771 million gallons per day (averaged over 1 year)

- **METHOD OF MEASUREMENT:**
  - Flowmeter

- **QUALITY OF WATER REQUESTED:**
  - Safe

- **PROPOSED USE:**
  - Municipal or industrial (farming, mining, etc.)

- **PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:**
  - 24 hours

---

**NOTE:** Signing below indicates that the information submitted is true and correct to the best of their knowledge. 1. If item 14 is the information provided on the application is accurate and true to the best of their knowledge. 2. Item 1 is the ability of the applicant to pay the application fee. 2. Item 14 is the information provided on the application is considered complete. 3. If a water use permit is granted by the Commission, this permit is subject to prior existing permitted uses, changes in state and federal laws, and increased water standards. 4. Upon permit approval, a water standard plan must be submitted by the applicant. 5. The Commission requires the signature and date.

Applicant (print):
George Tengan
Signature:____________________
Date:____________________
Applicant (print):
Kehalani Hauka, LLC
Signature:____________________
Date:____________________

**Applicant (print):**
By Milwaukee Water, Inc., its member
Signature:____________________
Date:____________________

**Applicant (print):**
By Milwaukee Water, Inc., its member
Signature:____________________
Date:____________________

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**WUPAFORM (4/28/03)***
### TABLE 1. TMKs TO USE REQUESTED WATER

<table>
<thead>
<tr>
<th>PROJECT NAME</th>
<th>PHASE</th>
<th>SCHEDULED USES</th>
<th>PERIOD</th>
<th>TOTAL GPD</th>
<th>COST</th>
<th>SERVICES</th>
<th>METER TYPE</th>
<th>HUB TOLERANCE</th>
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**TOTAL GPD**

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<th>21,193</th>
<th>21,565</th>
<th>21,970</th>
<th>22,376</th>
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</table>

**DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE**

Only for verification that: 1) TMKs listed are consistent with zoning; and 2) project's listed are adhered with respect to zoning.
APPLICATION FOR WATER USE PERMIT

Use Information

12(a) The proposed use of water can be accommodated with the available water source:

Proposed water use of 5.771 million gallons per day (MGD) is the moving average withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75 MGD, according to the CWRM database. Average annual draft is according to the same database 6.4 MGD.

Wailuku Shaft 33 along with Iao and Waihee aquifer sources and surface water treated by the Iao Treatment Plant serve the Central Maui System. MAV from these sources combined were from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:

- Iao aquifer: 18.028 MGD
- Waihee aquifer: 4.536 MGD
- Iao Tunnel: 1.359 MGD
- Iao Treatment Plant: 0.469 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved meters total 25.109 MGD. Average yearly consumption for Central Maui during the period July 1, 2002 to June 30, 2003 was 20.955 MGD. System losses and unaccounted-for water makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use

MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from Iao aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer designation. MAV from Iao aquifer have remained lower throughout the year than at the time of designation.

Consumption for single-family use, which represents 16% of total use in Central Maui, average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial manner:

a. Distribute the withdrawals within Iao aquifer; development of new sources:
   - Iao well. Currently in design. Development anticipated by end 2005
   - Waikapu Mauka – developed and pump installed. On hold until foreclosure of additional land required resolved

b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee aquifer:
   - Well planned by private developer to be dedicated to the County.
   - Kupua 1: On-line by end 2004

c. Provide additional surface water sources:
   - Iao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004

d. Alternative sources: East Maui source development, temporary use of existing well

e. Conservation:
   - Leak detection, in-house repairs
   - Automated radio-read meters replace old, under-registering meters
   - Reclaimed water use at commercial properties within 100 ft. of R-1 distribution systems.
   - Reclaimed water use encouraged for dust control
   - Conservation pricing and rate structures
Low flow fixtures required in new developments. Code sets flow limits. Free fixture distribution

Outdoor conservation
Public education: targeted conservation checklists, media, activities and events, demonstration gardens, participatory learning.

f. Conservation rules: forestall water shortage, negligent or wasteful use
g. Resource protection: watershed, surface water and wellhead protection programs
h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use
The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985. The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is located on land owned by Kehalanl Mauka LLC and is currently zoned Wailuku Kahului Project District 1. This portion of the parcel has long been used for public-quasi public municipal water supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following wells and tunnels are listed in the CWRM database as developed within the lao aquifer:

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<th>WELL_NO</th>
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The proposed use of water is consistent with the public interest. The Wailuku Shaft source is mixed with Iao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Wailehu, through Wailuku, Kahului, Puunene, Spreckelsville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

The proposed use of water is consistent with state and county general plans and land use designations. Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in consistence with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.
12(f) The proposed use of water is consistent with county general plans and general policies. During the WUDP update process, the Department's ongoing source development and capital improvement programs support the General Plan objectives "to provide an adequate supply of potable and irrigation water to meet the needs of Maui County's residents" and "to make more efficient use of our ground, surface and recycled water sources".

12(g) The proposed use of water will not interfere with the rights of the Department of Hawaiian Home Lands. There are no DHHL wells withdrawing from the lao aquifer. The Central Maui System services Hawaiian Home Land areas.
Wailuku Shaft 33 Service Area "A"
Wailuku Shaft 33 Service Area "B"
COUNTY OF MAUI
DEPARTMENT OF PLANNING
ZONING AND FLOOD CONFIRMATION REQUEST FORM

APPLICANT: ________________________________   TELEPHONE: ________________________________

PROJECT NAME: ________________________________
ADDRESS AND/OR LOCATION: ________________________________
TMK NUMBERS: ________________________________

ZONING INFORMATION
STATE LAND USE ________________________________ COMMUNITY PLAN ________________________________
COUNTY ZONING ________________________________ PROJECT DISTRICT ________________________________

OTHER SPECIAL DISTRICTS
1. Special Management Area
2. Shoreline Setback Area
3. Country Town Design District
4. Lahaina National Historic Landmark District
5. Maui Redevelopment Area
6. Other

FLOOD INFORMATION
FLOOD HAZARD AREA ZONE
BASE FLOOD ELEVATION ________________________________ MEAN SEA LEVEL, 1929 NATIONAL GEODETIC
VERTICAL DATUM OR FOR FLOOD ZONE A0, FLOOD DEPTH ________________________________

FLOODWAY [ ] Yes [ ] No
FLOOD DEVELOPMENT PERMIT IS REQUIRED [ ] Yes [ ] No
* For FLOOD HAZARD AREA ZONES B OR C; A FLOOD DEVELOPMENT PERMIT would be required if any work is done in any drainage facility or stream area that would reduce the capacity of the drainage facility, river, or stream, or adversely affect downstream property.

REMARKS/COMMENTS:
□ Additional information required.
□ Information submitted is correct.
□ Correction has been made and initialed.

FOR COUNTY USE ONLY

REVIEWED AND CONFIRMED BY:

AARON SHINMOTO
Zoning Administration and Enforcement Division

SIGNATURE ________________________________ DATE 7/14/04

Page 8 of 8

(S:\ALL\FORMS\APPL\FORMS\SMMAAssessment2003.wpd) Revised 12/18/03
HAWAII HISTORIC PRESERVATION DIVISION REVIEW

Applicant/Agency: Yvonne Izu, Deputy Director State of Hawaii
Address: Department of Land and Natural Resources
Commission of Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

SUBJECT: Chapter 6E-8 Historic Preservation Review – Request for Comments
[Determination] for the Water Use Permit Application for the Iao Ground Water Management Area (Wailuku Shaft 33, State Well No. 5330-05) [State/COWRM]

1. We believe there are no historic properties present, because:

   ___ a) intensive cultivation has altered the land
   ___ b) residential development/urbanization has altered the land
   ___ c) previous grubbing/grading has altered the land
   ___ d) an acceptable archaeological assessment or inventory survey found no historic properties
   ___ e) other: The subject permit application involves an existing well and no ground altering activities are involved.

2. This project has already gone through the historic preservation review process, and mitigation has been completed ___.

   ✓ Thus, we believe that “no historic properties will be affected” by this undertaking

In the event that historic sites (human skeletal remains, etc.) are identified during the construction activities, all work needs to cease in the immediate vicinity of the find, the find needs to be
protected from additional disturbance, and the State Historic Preservation Office needs to be contacted immediately at 243-5169, on Maui, or at (808) 692-8023, on O’ahu.

Staff: Cathleen A. Dagher  Date: 7 September 2004
Cathleen A. Dagher, Assistant Maui/Lana’i Island Archaeologist, (808) 692-8023
September 9, 2004

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

Subject: County of Maui's Application for a Water Use Permit  
for Wailuku Shaft 33, State Well No. 5330-05  
Iao Ground Water Management Area, Maui

Dear Chairperson Young:

You previously acknowledged receipt, on July 2, 2004, of our water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You indicated to us, by letter dated August 18, 2004, that our application was "in limbo" because it was incomplete due to the absence of the landowner's signature.

We have now obtained the landowner's signature, and enclose a copy of our application, with the original signature of Stanford Carr. Mr. Carr signed as manager of Milwaukee Holdings, LLC, a member of Kehalani Mauka, LLC, on September 8, 2004.

We trust that our application will now be deemed complete, and that it will be processed without further delay.

If you have any questions, please do not hesitate to call.

Sincerely,

George Y. Tengan, Director
Enclosure

"By Water All Things Find Life"
September 9, 2004

Re: County of Maui’s Application for Water Use Permit for Wailuku Shaft 33, State Well No. 5330-05
Iao Ground Water Management Area, Maui

copy w/enc: Stanford S. Carr
Edward S. Kushi, Jr., Deputy Corporation Counsel
Jane E. Lovell, Deputy Corporation Counsel
Jeffrey T. Pearson, DWS Deputy Director
Ellen Kraftsow, DWS Png Pgm Mgr

copy w/o enc: Alan M. Arakawa, Mayor
Keith A. Regan, Managing Director
Dain P. Kane, Council Chair
Danny A. Mateo, WRC Chair
WATER USE PERMIT

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

APPLICATION FOR WATER USE PERMIT

1. (a) APPLICANT: Maui County Dept of Water Supply
    Name: George Tengan
    Address: 200 S. High St, Wailuku HI
    Phone: (808)270-7816, (808)270-7833
    E-mail: george.tengan@co.maui.hi.us

2. SOURCE INFORMATION:
   (a) EXISTING WELLSTREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33 5330-05
   (b) PROPOSED (NEW) WELLSTREAM DIVERSION NAME: See map
   (c) LOCATION: Address: 751 Fort St, Suite 2110, Toba Financial Center, Honolulu, HI
      Tax Map Key: 35 01-001
      (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

3. USE INFORMATION:
   (a) PUC-Regulated Private System
   (b) Intended Dedication to Dept. /Board of Water Supply
   (c) Non-PUC-Regulated Private System
   (d) Tax Map Key: Please complete Table 1 on back of application and shade applicable portion of property tax map.

4. METHOD OF TAKING WATER (check one):
   (a) Artesian
   (b) Well & Pump
   (c) Diverted Surface
   (d) Other (explain)

5. METHOD OF MEASUREMENT:
   (a) Flowmeter
   (b) Open-pipe
   (c) weir
   (d) other (explain)

6. QUALITY OF WATER REQUESTED:
   (a) Municipal (including hotels, stores, etc.)
   (b) Individual Domestic
   (c) Industrial
   (d) Military
   (e) Other Explain

7. QUANTITY OF WATER REQUESTED: 5,771 million gallons per day (averaged over 1 year)

8. PROPOSED USE:
   (a) Municipal (including hotels, stores, etc.)
   (b) Individual Domestic
   (c) Industrial
   (d) Military
   (e) Other Explain

9. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours (daytime hours of operation; example, 7 a.m. to 2 p.m.)

10. 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.

11. REMARKS, EXPLANATIONS:

NOTE: Signing below indicates that the signatories understand and agree 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; 3) If necessary, further information may 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 in-stream 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) George Tengan

Landowner (print) Kehalani Mauka, LLC

By Milwaukee Holdings LLC, its member

Signature: ____________________________

Date: ____________________________

WUPAFORM (4/28/03)

By: ____________________________

Date: ____________________________
### Table 1. TMKs to Use Requested Water

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<td><strong>NEW USE</strong></td>
<td><strong>POTABLE or NONPOTABLE</strong></td>
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**TOTAL GPD**

**DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE**

DATE

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*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 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 acceptable/complete. Please consult with DPP at 660 South King Street, 7th Floor, Honolulu, HI 96813. Attn: Arthur D. Challascombe*
APPLICATION FOR WATER USE PERMIT –
Use Information

12(a) The proposed use of water can be accommodated with the available water source:
Proposed water use of 5.771 million gallons per day (MGD) is the moving average
withdrawals (MAV) from the Wailuku Shaft 33 over 2003. Installed pump capacity is 21.75
MGD, according to the CWRM database. Average annual draft is according to the same
database 6.4 MGD.

Wailuku Shaft 33 along with lao and Waihee aquifer sources and surface water treated by the
lao Treatment Plant serve the Central Maui System. MAV from these sources combined were
from July 1, 2002 to June 30, 2003 24.447 MGD, broken down as follows:
lao aquifer 18.063 MGD
Waihee aquifer 4.536 MGD
lao Tunnel 1.359 MGD
lao Treatment Plant 0.489 MGD

Water meter reservations as of July 2003 was 565,150 gallons per day (GPD), with an
additional 97,000 GPD for Department of Hawaiian Homelands. Withdrawals and reserved
meters total 25.109 MGD. Average yearly consumption for Central Maui during the period
July 1, 2002 to June 30, 2003 was 20.955 MGD. System losses and unaccounted-for water
makes up the difference.

12(b) The proposed use of water is a reasonable-beneficial use
MAV for Wailuku Shaft as of June 30, 2003 was 5.792 MGD. Overall withdrawals from lao
aquifer as of December 2003 were 18.028 MGD, or .035 MGD lower than at aquifer
designation. MAV from lao aquifer have remained lower throughout the year than at the time
of designation.

Consumption for single-family use, which represents 16 % of total use in Central Maui,
average 543 GPD, compared to the system standard of 600 GPD. Acreage breakdown for
the entire Central system is not available to compare use calculations for other classes.

Planning steps to protect the aquifer and utilize the source in a reasonable and beneficial
manner:
a. Distribute the withdrawals within lao aquifer; development of new sources:
lao well. Currently in design. Development anticipated by end 2005
Waikapu Mauka – developed and pump installed. On hold until foreclosure of
additional land required resolved
b. Relocate withdrawals outside of the aquifer; development of new sources within Waihee
aquifer:
   Well planned by private developer to be dedicated to the County.
   Kupaa 1: On-line by end 2004
c. Provide additional surface water sources:
lao Treatment Plant – increase capacity to 2.4 MGD. Anticipated on-line by end 2004
d. Alternative sources: East Maui source development, temporary use of existing well
e. Conservation:
   Leak detection, in-house repairs
   Automated radio-read meters replace old, under-registering meters
   Reclaimed water use at commercial properties within 100 ft of R-1 distribution systems.
   Reclaimed water use encouraged for dust control
   Conservation pricing and rate structures
Low flow fixtures required in new developments. Code sets flow limits. Free fixture distribution
Outdoor conservation
Public education: targeted conservation checklists, media, activities and events, demonstration gardens, participatory learning.

f. Conservation rules: forestall water shortage, negligent or wasteful use
g. Resource protection: watershed, surface water and wellhead protection programs
h. Monitoring and modeling of aquifer status. Agreement with USGS to study groundwater availability in Central Maui

12(c) The proposed use of water will not interfere with any existing legal use

The shaft and pumps were last used by Wailuku Sugar Co aka Wailuku Agribusiness in 1985. The Maui County Department of Water Supply is currently the only user of the shaft. The shaft is located on land owned by Kehalani Mauka LLC and is currently zoned Wailuku Kahului Project District 1. This portion of the parcel has long been used for public-quasi public municipal water supply activities.

Groundwater development in the area includes an observation well within 1,000 ft. The following wells and tunnels are listed in the CWRM database as developed within the Iao aquifer:

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<tr>
<th>WELL_NO</th>
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12(d) The proposed use of water is consistent with the public interest
The Wailuku Shaft source is mixed with lao and Waihee aquifer sources to serve the Central Maui System. This public system serves 17,070 customers in the communities extending from Waiehu, through Wailuku, Kahului, Puunene, Sprecklesville, Paia and Kuau on the North, and from Maalaea through Kihei to Makena on the South.

12(e) The proposed use of water is consistent with state and county general plans and land use designations
Proposed water use and withdrawals from the Central Maui sources will meet current demand as built-out in accordance with the Wailuku, Paia-Haiku and Kihei-Makena Community Plan designations and consistent with land use designations. The Water Use and Development Plan (WUDP) is being updated in consistence with the 1990 Maui County General Plan, the County Community Plans, the State Water Resources Protection Plan, the State Water Quality Plan, the State Water Projects Plan, and the State Agricultural WUDP.
12(f) The proposed use of water is consistent with county general plans and general policies
During the WUDP update process, the Department's ongoing source development and capital improvement programs support the General Plan objectives "to provide an adequate supply of potable and irrigation water to meet the needs of Maui County's residents" and "to make more efficient use of our ground, surface and recycled water sources".

12(g) The proposed use of water will not interfere with the rights of the Department of Hawaiian Home Lands
There are no DHHL wells withdrawing from the lao aquifer. The Central Maui System services Hawaiian Home Land areas.
COUNTY OF MAUI  
DEPARTMENT OF PLANNING  
ZONING AND FLOOD CONFIRMATION REQUEST FORM  

APPLICANT:  DEPARTMENT OF WATER SUPPLY  
TELEPHONE:  
ADDRESS:  
PROJECT NAME:  WAILUKU SHEET 33 (8330-02)  
ADDRESS AND/OR LOCATION:  
TMK: NUMBER(S):  (2) 66-02-00  

ZONING INFORMATION

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OTHER SPECIAL DISTRICTS

- Special Management Area
- Shoreline Setback Area
- Country Town Design District
- Lahaina National Historic Landmark District
- Maui Redevelopment Area
- Other

FLOOD INFORMATION

FLOOD HAZARD AREA* ZONE

BASE FLOOD ELEVATION =-mean Sea Level, 1929 National Geodetic Vertical Datum or for Flood Zone A, Flood Depth

FLOODWAY [ ] Yes [ ] No

FLOOD DEVELOPMENT PERMIT IS REQUIRED [ ] Yes [ ] No

* For Flood Hazard Area Zones B or C; a Flood Development Permit would be required if any work is done in any drainage facility or stream area that would reduce the capacity of the drainage facility, river, or stream, or adversely affect downstream property.

FOR COUNTY USE ONLY

REMARKS/COMMENTS:
- Additional information required
- Information submitted is correct
- Correction has been made and initialed

REVIEWED AND CONFIRMED BY:

AARON SHINMOTO (Signature)  
Expenditure Program Administrator  
Zoning Administration and Enforcement Division  

DATE: 7/14/04

Revised 12/18/03
August 9, 2004

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

FROM: Yvonne Y. Izu, Deputy Director  
Commission on Water Resource Management  

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

Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: Skippy Hau  
Phone: 243-5834  
Date: 9/8/04

Signed: Skippy Hau
TO: Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management

FROM: Skippy Hau, Aquatic Biologist

SUBJECT: Kehalani Mauka, LLC for Well No. 5530-05
Water Use Permit Application

September 8, 2004

I reviewed the application and found their request continues the use of an existing well (State Well No. 5330-05). It is also known as “Shaft 33.” The application is for 5.771 MGD.

I am concerned that this proposal might justify build-out of the subdivision (2,400 homes) without increasing any new water sources. The amount of water used by the subdivision is not clear. There is no distinction between new and existing water use amounts.

The attached graph shows the monitoring of chloride concentration by USGS. While the results are below EPA standards, the trend continues to increase. Although there appears to have been suspension of water withdrawals in 1997 and 1999, the chloride trend continues to increase when withdrawals are restored. The declining trend at the beginning of 2004 appears to be the result of heavy rains in November, January and February.

Is this increasing chloride trend similar to other monitoring wells in the lao aquifer? It is an indicator that should be watched over time.
Shaft 33

Chloride concentration, in milligrams per liter vs Pumpage, in million gallons per day

Shaft 33, 5330-05
Shaft 33 monthly pumpage
FAX TRANSMITTAL

CONFIDENTIALITY

The information contained in this FAX transmittal is intended only for the personal and confidential use of the designated recipient(s) named below. This message may be an attorney-client communication and, as such, is privileged and confidential. If the reader of this message is not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error, and that any review, dissemination, distribution or copying of this message is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us by mail. Thank you.

TO:   Yvonne Y. Izu, Deputy Director

Commission on Water Resource Management

FAX NO.:   587-0219
FROM:   Kapua Sproat
DATE:   September 2, 2004
RE:   Objections to Water Use Permit Applications

Number of pages (including this cover memo): 18
If there are any problems with transmission, please call (808) 599-2436.

ATTACHMENT:

Objections to Maui County Department of Water Supply and Kehalani Mauka, LLC's water use permit applications.
August 9, 2004

TO: Other Interested Parties
FROM: Yvonne Y. Izu, Deputy Director
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, we transmit for your review and comment a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

We would appreciate your review of the attached application for any conflicts or interferences 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 of our Administrative Rules and must be filed by the September 2, 2004 deadline. If we do not receive your comments by this date, we will assume you have no comments.

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.

Classification:
Attachment(s)

Response:

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

Contact person: D. Kapua Sproat
Phone: 599-2436, ext. 16
Date: September 2, 2004

Signed: [Signature]
September 2, 2004

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

Peter T. Young, Chair
Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to Kehalani Mauka, LLC’s Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05); ʻIao Ground Water Management Area, Maui, Hawai‘i

Dear Chair Young and Deputy Director Izu:

On behalf of Hui o Nā Wai ʻEhā and Maui Meadows Homeowners Association, Earthjustice submits the following comments regarding Kehalani Mauka, LLC’s Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05). This application seeks a permit for new municipal use in the ʻIao Ground Water Management Area. For all of the reasons detailed herein, the application fails to establish that its proposed use complies with all of the requirements of the law. We urge this Commission to require Kehalani Mauka to supplement its application before holding a public hearing on this issue. We also request that you hold that public hearing on Maui so that our clients and other affected stakeholders can provide more detailed testimony on this important issue.

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 ʻIao 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 ʻIao 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 ʻIao and Waihe‘e aquifers.

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 ʻIao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from ʻIao, Waihe‘e, Waiculī, and Waikapō streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs,
Earthjustice's Objection Kehalani Mauka, LLC's Water Use Permit Application  
September 2, 2004  
Page 2 of 7

... aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

This Commission bears an affirmative burden to analyze and account for the impacts of its decisions on public trust resources. See In re Wai'ola o Moku'a'i, Inc. ("Wai'ola"), 103 Haw. 401, 430 (2004); In re Water Use Permit Applications ("Wai'ahole I"), 94 Haw. 97, 141 (2000). When allocating water, the 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. Wai'ola, 103 Haw. at 429 (citing Wai'ahole I, 94 Haw. at 136-138, 142). The law mandates that this Commission "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.

The Hawai'i Supreme Court recently 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'ahole Ditch Combined Contested Case Hearing ("Wai'ahole II"), No. 24873, slip. op. at 26 (Haw. June 21, 2004). The Court delineated a water use permit applicant's burden:

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. 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 public interest... In addition, applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public [resources] to satisfy those needs.

Id. (citations and quotations omitted). If the Commission issues a water use permit without findings that "reasonably explain and justify its conclusions and rulings," that permit is especially vulnerable to being vacated. Id. at 26, 37-38, 45, 52-53 (remand with instructions for the Commission to make findings that demonstrate whether permit applicant met its burden; to articulate factors relied on in deciding whether a permit applicant has practicable alternative water sources; to establish factual basis for applicant's actual need for water). See also Wai'ola, 103 Haw. at 432, 439. The Supreme Court has made clear that it will not rubber stamp water use permitting decisions where the Commission has not conducted adequate fact-finding and analysis. See id.

Kehalani Mauka's permit application fails to provide the factual 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 application is insufficient for the following reasons:

221 S. KIng STREET. SUITE 400, HONOLULU, HI 96813-4501  
T: 808.591.2436 F:808.521.8841 E: earthjustice@earthjustice.org  
W EBSITE: www.earthjustice.org  
SEP-02-2004 05:59PM FAX: 8085216841 ID: DLNR WATER COMMISHIN PAGE:004 R=95%
Earthjustice’s Objection Kehalani Mauka, LLC’s Water Use Permit Application
September 2, 2004
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1. The application failed to establish that its new use is consistent with the public interest and will not interfere with existing legal uses of water, pursuant to HRS §§174C-49(a)(3) and 174C-49(a)(4).

Kehalani Mauka claims that a component of its request is for domestic use, but fails to provide any supporting information. On its face, Kehalani Mauka’s request is for municipal use, not individual personal needs. See Haw. Rev. Stat. § 174C-3 (defining domestic use as “any use of water for individual personal needs and for household purposes”) (emphasis added). As such, Kehalani Mauka’s proposed new use is not for a protected public trust purpose and enjoys no priority. In fact, since it is a new use, all existing uses shall be considered first.

Kehalani Mauka attempts to justify its new use as consistent with the public interest because Maui County Department of Water Supply (“MDWS”) has been using Shaft 33 to supply the Central Maui System for the last decade. Haw. Rev. Stat. § 174C-49(a)(4). MDWS’ past and current use of Shaft 33 has no bearing on Kehalani Mauka’s proposed new use. Instead, Kehalani Mauka must justify the relative importance of its new use in light of other public trust purposes, while also establishing that it will not interfere with existing legal uses of water, including public trust uses and MDWS’ own use of Shaft 33 to provide municipal water for Maui County. Id. at § 174C-49(a)(3). After all, the consistent with the public interest and reasonable-beneficial use requirements for water use permit applications “demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question.” Waiāhole I, 94 Haw. at 161.

a. Kehalani Mauka failed to address any impacts of its proposed new use on resource protection.

“[T]he maintenance of waters in their natural state constitutes a distinct ‘use’ under the water resources trust.” Waiāhole I, 94 Haw. at 136. Kehalani Mauka must therefore address the potential impact of its proposed municipal use on the maintenance of water in its natural state, especially resource protection. This is especially important in ʻĪao, where the condition of the aquifer has long been in question and the true sustainable yield hotly debated.

b. Kehalani Mauka failed to address traditional and customary Native Hawaiian rights & practices.

Kehalani Mauka must affirmatively demonstrate that its proposed new use will not harm existing and potential traditional and customary Native Hawaiian rights and practices. See Waiāopa, 103 Haw. at 442 (“the absence of evidence that its 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.”). In determining whether Kehalani Mauka has met its burden, the Commission must consider the constitutional minimum delineated by the Hawai‘i Supreme Court. Specifically, the Commission has an affirmative duty to determine and must make specific findings regarding: (1) the identity and scope of cultural resources, including the extent to which traditional and customary practices are exercised, in the affected area, (2) the extent to which cultural resources, including traditional and customary practices, will be
Earthjustice’s Objection Kehalani Mauka, LLC’s Water Use Permit Application
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affected, and (3) where traditional and customary practices are found to exist, feasible action that the Commission can take to protect affected practices. See Ka Pa’ukai o Ka ‘Aina v. Land Use Comm’n, 94 Haw. 31, 47 (2000). Kehalani Mauka has neglected to provide any information regarding these issues.

At a minimum, the law requires and we request that Kehalani Mauka provide the information necessary for the public to consider and this Commission to make the above-described determinations. As just one example, oral history from what is now the ‘Iao groundwater management area identifies springs which were renowned for healing and purifying powers, including one named Waiola (on what is now the Sevilla family property). Native Hawaiians from this area traditionally used these springs to purify themselves before entering heiau. Waiola and other springs in the area are now dry as a result of ground and surface water conditions in the ‘Iao aquifer. Kehalani Mauka’s application lacks any information regarding Waiola or other cultural resources in the aquifer (such as springs or spring-fed lo‘i) that may be affected by this proposed new use of ground water.

In addition, the 1990 Hawai‘i Stream Assessment (“HSA”) determined that streams in the vicinity of Kehalani Mauka’s proposed municipal use host a substantial population of native species, including varieties of ‘o‘o‘pin. In particular, ‘Iao Stream, which is in close proximity to the subject water source, was one of only nine streams on Maui worthy of designation as a candidate stream for protection. ‘Iao was designated a Blue Ribbon Resource, meaning that it was selected as one of Hawai‘i’s very best recreational resources due to its outstanding hiking, fishing, swimming, parks, nature study, and scenic views. ‘Iao also has tremendous cultural importance and its once supported 10 to 50 acres of kalo cultivation. Without due consideration of the impacts of Kehalani Mauka’s proposed new use on these resources, the application cannot be approved.

Kehalani Mauka’s failure to provide information demonstrating that its proposed new use is consistent with these important public interests and existing legal uses of water is a serious flaw in its application and Maui Meadows and Hui o Nā Wai ‘Ehā respectfully urge this Commission to deny the permit application in its present form. In the alternative, we ask that this Commission order Kehalani Mauka to provide necessary information within four weeks of the date of this objection, so that the community and the Commission can review and analyze this information before any public hearing and the Commission may, if necessary, request supplemental information.

2. Kehalani Mauka’s application failed to establish that its proposed use of water is “reasonable-beneficial,” pursuant to HRS §174C-49(a)(2).

Kehalani Mauka’s application also fails to demonstrate that its proposed use is reasonable and beneficial by detailing actual water needs. The law requires that permit applicants demonstrate, at a minimum, that the requested amount of water reflects actual need. See Wai‘eholo I, 94 Haw. at 162 (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs”). Kehalani Mauka wholly failed to detail the needs of its 2,400 homes and 22 acres of commercial development. Maui Meadows and Hui o Nā Wai ‘Ehā also note that total build out for this project is expected to take ten years,
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but water use permits are generally issued for expected build out over a maximum of four years. In
detailing its water needs, Kehalani Mauka must make explicit what its needs will be over the
next four years and at total build out.

Assuming, arguendo, that Kehalani Mauka’s application can satisfy the actual needs
requirement, the application fails to adequately analyze alternative sources and more information
is needed. Alternatives analysis is necessary to evaluate whether the applicant has adequately
established that its requested allocation would support a reasonable-beneficial use. The Supreme
Court carefully defined the burden of proof for all water use applicants:

[B]esides 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 intrinsic to the
public interest, the statutory instream use protection scheme, and the definition of
‘reasonable-beneficial’ use and is an essential part of any balancing between competing
interests.

Waiāhole 1, 94 Haw. at 161. Even though Kehalani Mauka failed to seriously examine
alternative sources of water, it conceded that questions exist regarding the availability of water
and sustainable yield of the aquifer. This Commission cannot issue permits to Kehalani Mauka
absent additional information demonstrating that the requested amounts constitute a reasonable
beneficial use of potable water.

3. Kehalani Mauka failed to establish that the water source will accommodate its proposed
new use, pursuant to HRS §174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate a
proposed use. HRS §174C-49(a)(1). More information is needed, especially given the “serious
dispute between the interested public...related to the integrity of the aquifer and land use
decisions that affect demand on the aquifer.” COWRM “Iao-Waihe’e Final FOF & COL at ix.
In fact, this Commission recommended designating both the ‘Iao and Waie’e aquifers as ground
water management areas because authorized planned use back in 2002 was 29.2 mgd, which
“exceed[ed] the sustainable yields (Iao 20 mgd and Waie’e 8 mgd = 28) available to the [Central
Maui Service Area].” Id. This issue is even more critical now since this Commission has
limited pumping in the Waie’e aquifer to 4.0 mgd, yet it continues to receive requests for new
ground water wells (such as the Ko‘olau Cattle Company application) as well as permits for new
uses from existing wells in the ‘Iao aquifer (such as this one). 1 We also underscore the fact that
better information on the sustainable yields of the ‘Iao and Waie’e aquifers will not be available
for several more years, when USGS completes its Central Maui model.

1 Maui Meadows and Hui o Nā Wai ‘Ehā also note that the Commission has, thus far,
failed to enter into a Memorandum of Agreement (“MOA”) with MDWS to limit pumping to 4.0
mgd. Since this was a condition of rescinding the triggers for automatic designation of the
Waie’e aquifer, the aquifer should be designated if MDWS refuses to sign the MOA.
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As this Commission is well aware, authorized planned use has increased since 2002. Even if 29.2 mgd is used as a conservative figure, authorized planned use far exceeds the 24 mgd (‘Iao 20 mgd and Waie‘e 4 mgd = 24) now available to supply the Central Maui Service Area. MDWS’ current pumpage already exceeds 26 mgd (calculated on a monthly average). Moreover, MDWS recently announced that applications for roughly 880,000 gpd had already been signed, even though MDWS believed that it had about only 800,000 gpd in unused capacity with which to issue new water meters. See Harry Eager, Council may block new C. Maui water meters, Maui News, Aug. 20, 2004. Regardless, Kehalani Mauka has wholly failed to establish that the ‘Iao aquifer can accommodate 2,400 new houses and 22 acres of commercial development for, in Kehalani’s own words, “one of the largest planned developments” on Maui.

4. Although Kehalani Mauka’s application indicates that its proposed new use is in accordance with State and Maui County general plans, land use designations, and policies, this is insufficient for the Commission to determine whether the proposed use is reasonable-beneficial, pursuant to HRS §§ 174C-49(a)(5) & 174C-49(a)(6).

Kehalani Mauka claims that its proposed use will meet the demands outlined in state and county general plans, land use designations, and general policies. Where, as here, authorized land use outstrips the available water supply, this Commission ruled and the Hawai‘i Supreme Court affirmed that consistency with county plans and land use designations does not end the inquiry into whether a proposed water use may be permitted. In a situation similar to this one, the Commission concluded:

As competition for water resources increases, the analysis of both the public interest and of reasonableness must become both more rigorous and affirmative. The counties will be required to articulate their land use priorities with greater specificity. For example, even at the present time, there is more land zoned for various uses than available water to supply those proposed uses. Thus, it is not sufficient to merely conclude that a particular parcel of land is properly zoned and that the use is “beneficial.” That minimal conclusion may be inadequate to resolve situations in which competitive demand exceeds supply.


The situation on Maui is analogous, if not worse, than the situation in Honolulu addressed by this Commission in Waiohole I & II. Again, authorized planned use in the Central Maui Service Area exceeds both the 28 mgd sustainable yield of the aquifers supplying the Central Maui Service Area, as well as the 24 mgd that this Commission established as the maximum available now. COWRM ‘Iao-Waie‘e Final FOP & COL at ix. Current pumpage also exceeds the maximum amount safely available from sources of supply for the Central Maui Service Area. Be that as it may, the fact that Kehalani Mauka’s proposed use is consistent with county land use designations “only provides a minimal standard by which to judge applications.” Waiohole I, 94 Haw. at 188. Additional information is needed.
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5. Kehalani Mauka failed to establish that its proposed use will not interfere with the rights and needs of the Department of Hawaiian Home Lands, pursuant to HRS § 174C-49(a)(7).

Kehalani Mauka’s claim that it is unaware of any wells or projects of the Department of Hawaiian Home Lands ("DHHL") is wholly insufficient. In its objection dated August 27, 2004, MDWS notes that DHHL has outstanding water reservations in addition to its current uses. Kehalani Mauka must provide additional information regarding both existing and future DHHL projects within the Central Maui Service Area and how Kehalani Mauka’s proposed new use will impact those rights and needs. See Waialua, 103 Haw. 401.

Conclusion

Kehalani Mauka must affirmatively demonstrate compliance with the state constitution, Water Code, and public trust principles. Absent all of the required components, Kehalani Mauka’s application cannot be approved. Maui Meadows and Hui o Na Wai ‘Eha respectfully urge this Commission to deny the application or defer action on them until Kehalani Mauka provides all of the information detailed in this objection. Such information is no more and no less than is required by law to adequately review and analyze all proposed water uses and to protect the public interest in our public trust resources.

Mahalo for this opportunity to comment. If you have any questions or require additional information, please don’t hesitate to contact me.

Me ke aloha,

D. Kapua’Ikapu

cc: Jay Nakamura, Kehalani Mauka, LLC
    Via First-Class U.S. Mail

    Jane Lovell, Esq., Maui County Deputy Corporation Counsel
    Via First-Class U.S. Mail
RE: Objection to the application for Water Use Permit for Well 5330-05 (Shaft 33) by Kehalani Mauka LLC TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, 64, 66, and 67, all in the ‘Īao Ground Water Management Area, Maui.

Mr. Young and Commissioners,

The Office of Hawaiian Affairs (OHA) appreciates the opportunity to comment on this Water Use Permit Application (WUPA). OHA objects to this application because it was accepted by the Commission despite being incomplete and for other reasons specified herein.

Our primary concern is that the application is internally inconsistent and therefore incomplete: the applicants claim to be both requesting a permit for an existing use and a new use. The applicant in its attached item 10 states that it “…intends to use the water for municipal purposes including its Kehalani project…,” an uncompleted development. However, in its item 12 states that “This water use application is for an existing use…” These statements contradict each other. It is impossible under the Water Code for a water use to both be an existing and a new use.

There are at least two implications that arise from this inconsistency. First, the application is clearly inaccurate and therefore incomplete: it is not possible for OHA or the Commission to fulfill their statutory obligations and examine the application, if it is not clear what the applicant is seeking. Because of this, the application should not have been accepted by the Commission as complete in all material respects. Secondly, if the application is indeed (as it appears) to be for a new use of water, than it should be considered only after all existing uses are considered in the context of the available water in the aquifer.

OHA is also concerned because of other omissions in the application:

First, the applicant has a cursory examination of the affect of these withdrawals on Hawaiian Home Lands, which we find inadequate but leave to that agency to comment on. We note and object to the fact, however, that the other classes of Native Hawaiian water rights receive no treatment in this WUPA.
Secondly, the applicant has provided a cursory and therefore inadequate consideration of alternative sources of water.

Because of these errors and omissions, OHA objects and requests:

a) The application be found by the Commission to be incomplete and returned to the applicant so they may add further information and resubmit; or
b) If the Commission is unwilling to deem the application incomplete, orders a public hearing on the application on Maui; and
c) Defers holding that public hearing until further information legally required is submitted to the Commission and interested parties with sufficient time for review; and
d) Defers that hearing until after actual existing use applications are heard.

Thank you for the opportunity to comment. If you have further questions, please contact Dr. Jonathan Likeke Scheuer at 594-1946 or email him at jonathans@oha.org.

Sincerely,

Clyde W. Nāmu'o
Administrator

CC: Kehalani Mauka, LLC
1100 Alakea Street, 27th Floor
Honolulu, HI 96813
August 9, 2004

TO: Honorable Micah Kane, Director
Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
Department of Health
Mr. Clyde W. Namu'o, 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 is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: Jonathan Likeke Scheuer
Signed: (Signature)

Phone: 808-574-1946
Date: 9/2/04
This may be a second time you get this, kala mai no ku‘u hemahema, Ano Ai:

**PLEASE TAKE NOTICE OF THIS OBJECTION:**

**IN RE: WELL APPLICATIONS FOR WELL # 25531-01 AND # 5431-04 AND 5330-05.**

WE, THE "AHA KU MOKU OF NA WAI EHA ("THE ASSEMBLAGE IN WHOM THE MOKU BELONGS" UNDER ADJUDICATED TITLE)

WE HEREBY, **OBJECT** TO THE TAKING OF WATER FOR DEVELOPMENT PURPOSES; ON THE FOLLOWING GROUNDS:

1) **NO LAWFUL TRANSFER OF TITLE TO PROPERTIES (THAT INCLUDE THE WATER) BEING PROPOSED FOR DEVELOPMENT.**

2) **WE, AS A COMMUNITY VEHEMENTLY DENY ANY MORE ILLEGAL DEVELOPMENT OF OUR MOKU BASED ON THE ABOVE. This includes the taking of water and displacement of our DUE PROCESS.**

3) **LIVING WATERS LLC IS TAKING WATER AT PRESENT IN 2-3 FOOT PIPES SET IN OLD AUWAI'S ON THE PROPERTY THEY ARE ILLEGALLY OCCUPYING; FILING IN SUIT AGAINST THE STATE FOR INSTREAM FLOW; FILING TRO'S AGAINST THE KANUHA FAMILY FOR AN EASEMENT ON THE KANUHA PROPERTY; APPLYING FOR A WELL FROM YOU AND THE PROPERTY ITSELF IS IN LITIGATION.**

4) **DAVID SINGER'S Q/D DID NOT INCLUDE OUR INTERESTS**

5) **VALERIE DEVA & DON HARRIS Q/D FROM AVERY CHUMBLEY DID NOT INCLUDE OUR INTERESTS.**

6) **WE DO NOT WANT OUR ROADS CLOSED AND CHANGED INTO PRIVATE ROADS THAT SHUT US OFF FROM OUR MAUKA MAKAI RIGHTS AS IS GOING ON – ON OUR ISLAND RIGHT NOW.**

7) **WE REPRESENT ALL OF OUR COLLECTIVE OHANA AT PRESENT, LINEAL AND CULTURAL DESCENDANTS OF MOKU O NA WAI EHA.**

WE ARE THE PO'E AHA KU MOKU composed of PO'O REPRESENTING APPROXIMATELY 200-300 PEOPLE. WE ARE APPOINTED UNDER THE KANAWAI HO'ILINA TO OBJECT ON ALL OF OUR FAMILIES BEHALF AND TO PROTECT THEIR ROYAL PATENTS AND LAND COMMISSION AWARDS THAT INCLUDE A BUNDLE OF RIGHTS, PROTECTED BY THE 1839 CONSTITUTION. OUR KUPUNA HAVE SET THIS FORTH AND WE HAVE COME TOGETHER TO OBJECT ON THIS DATE: SEPTEMBER 1, 2004 AS A COMMUNITY OF KANAKA MAOLI HAWAII.

DO NOT INFRINGE UPON THE POPULACE TO SATISFY A FEW WHO WANT TO CONTROL THE WATER FOR THEIR PERSONAL BENEFITS THAT DO NOT HELP THE COMMUNITY AT ALL, ESPECIALLY THAT WHICH IS BASED ON QUITCLAIM DEEDS AND FRAUDULENT TRANSFERS FROM A PLANTATION.

BY YOUR COMMISSION APPROVING THESE APPLICATIONS, WE ARE THEREBY DISPLACED FROM OUR CONSTITUTIONAL RIGHTS, SUBJECT TO DEPRIVATION OF OUR PROPERTIES AND ADVERSELY AFFECTED BY YOUR DECISION.

"KOE NA KULEANA O NA KANAKA" IS A RESERVATION OF OUR PROPERTY RIGHTS INCLUDING EVERY RIGHT THERETO, WITHIN EVERY ALI'I LAND COMMISSION AWARD AND ROYAL PATENT THAT REPRENTS NO LESS THAT A 33 1/3 PERCENT OF THAT TITLE.

**E OLA I KA WAI KA HAWAI MAOLI.**

Mahealani Ventura-Oliver

Po'e ho'oilina a 'Aha ku moku o Na Wai Eha

Aloha Title Co.

584 Haiki Pl.

Waiehu, Hi 96793

808-249-0113 or 808-870-0422

Fax: 808-244-0469

THE PO'HO'ILINA ARE:

MAHEALANI VENTURA-OLIVER FOR: KAULI, KALEOHANO, NAHUINA, KUANE, KAMALU, NAMAHANA, MOREHA AND KAMEBAMOKU, BIRCH, KAMALU, PEPEIAO AND KEALOHAPAULELE, KANAWAIKUAIKI, LUNAILIO, A KOE NA KULEANA O NA KANAKA, ET AL.

KEEALUIKUAIKI KAPU FOR: KEEALUIKUAIKI NUI, NAMAHANA, KAMALU, KUANE, KALEO, KAIILILI, KAILEOPUPUPU, KEAIHI, KEALOHAPAULELE, LUNAILIO, A KOE NA KULEANA O NA KANAKA, ET AL.

FOSTER AMPONG: KALEOHANO, TIMOTEO, KEKUKUAIKI, KANUHA, LUNAILIO, KAMALU, A KOE NA KULEANA O NA KANAKA, ET AL.

OLIVER DUKESLOW FOR PEPEHU, MAULE, AWANA, LUNAILIO, KAMALU, A KOE NA KULEANA O NA KANAKA, ET AL.

MAGARET HOOPII FOR NA HOOPII, KAMALU, LUNAILIO, KAMALU, A KOE NA KULEANA O NA KANAKA, ET AL.


INCLUDE TO THIS LIST OF FAMILIES THE OHANA OF OTHERS FROM OUTER ISLANDS WHO COME TO OUR PU'UKOHUA, HEAIU, KU'AHU, AHU, TRAILS, KUULA, PAILINA, KANU'ANA, ETC. TO PRACTICE CULTURAL BELIEFS, TO FISH, DIVE, COLLECT AND GATHER UMU DEPENDENT UPON THE MOKU, FRESH WATER, SPECIES THAT ARE GATHERED IN THE IKU, AND WE EACH HAVE THAT EXACT INalienable FREEDOM THAT THIS IS TO BE PROTECTED BY LAW.

ADD TO THIS OBJECTION: LEGAL SPECIES THAT ARE THREATENED BY THE LOSS OF STREAM FLOW, DEGRADATION OF THE WATER SCORPE AREA TO REPLENISH THE NATURAL FLOW AND RETURN OF OUR FRESH WATER, RUN OFF ACCIDENTS, STORM DRAIN POLLUTION, LOSS OF ENVIRONMENT AND GENOCIDE OF OUR PEOPLE. LET US LIVE.
FROM: ROY  
DATE: SEP - 1 2004  
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Charley, 9/3/04  
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August 27, 2004

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

Re: Objection to application for Water Use Permit for Kehalani Mauka, LLC for the Wailuku Shaft 33 (Well No. 5330-05, source TMK 3-5-01:067)

Dear Chairperson Young and Commissioners:

As the existing user, the Maui County Department of Water Supply ("DWS") applied for a Water Use Permit for the subject source, Wailuku Shaft 33 (Well No. 5330-05) on July 2, 2004. DWS objects to the competing application filed by Kehalani Mauka LLC on or about July 20, 2004 for the same source on the following grounds:

DWS Objection 1. The Applicant has not established that the proposed use of water can be accommodated with the available water source.

H.R.S. § 174C-49(a)(1) requires applicants for water use permits to establish that the proposed use of water "[c]an be accommodated with the available water source." Applicant has not met this burden, and cannot do so.

Applicant proposes that Wailuku Shaft 33 be used for Applicant's Kehalani Mauka project, a 550-acre master planned community of approximately 2,400 homes, as well as a mixture of commercial properties. According to the application, when completed, the project "will be one of the largest planned developments on the island." The Applicant states that it is "in the process of negotiating a lease with the County Department of Water Supply," but acknowledges that if no such lease is concluded, Applicant intends to use all of the water produced by Wailuku Shaft 33 for its own purposes. To date, no lease with DWS has been concluded.

The average pumpage of 5.771 MGD from Wailuku Shaft 33 is currently being used by DWS to serve existing users within the County's municipal system. The County has advised the Applicant that it needs to develop additional source for its Kehalani Mauka project. If the Kehalani Mauka project were served from Wailuku Shaft 33, the result, of necessity, would be either a reduction of the amount of water available to DWS, the existing user, for municipal uses, or harmful overpumping of the aquifer to provide for the additional 2,400 homes and up to 22 acres of commercial development to be constructed by Applicant.

To make matters worse, Applicant has not provided any calculation of the demand for the Kehalani Mauka project at full build out. On this basis alone, Applicant has failed to demonstrate that its

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The proposed use of water for its project can be accommodated with the existing output of Wailuku Shaft 33.

**DWS Objection 2. The Applicant has not established that the proposed use of water is a reasonable-beneficial use as defined in section 174C-3.**

H.R.S. § 174C-49(a)(2) requires applicants for water use permits to establish that the proposed use of water "[i]s a reasonable-beneficial use as defined in section 174C-3." Applicant has not met this burden, and cannot do so. The application mentions certain programs instituted by the County of Maui to protect the aquifer and to utilize the source efficiently, including utilization of alternative surface water sources, development of new sources in Waiehe, conservation programs, use of reclaimed water, and the like. The application does not mention that DWS also plans to develop Waikapu Mauka and Iao Tank site wells while reducing pumpage from Wailuku Shaft 33 in order to redistribute pumpage throughout the aquifer. All of these programs, which have been instituted by DWS to protect the aquifer and to use Wailuku Shaft 33 in an economic and efficient manner, are dependent on DWS's continued control of the source. However, no agreement between DWS and the Applicant has been reached to date. If Wailuku Shaft 33 is used to accommodate Applicant's additional 2,400 homes and up to 22 acres of commercial development, additional strain will be placed on the aquifer or water service to existing DWS customers must be curtailed. In short, Applicant's proposed use is neither reasonable nor beneficial.

**DWS Objection 3. The Applicant has failed to establish that the proposed use of the water will not interfere with any existing legal use.**

H.R.S. § 174C-49(a)(3) provides that applicants for water use permits must establish that the proposed use "will not interfere with any existing legal use of water."

Although Applicant tries to gloss over a key jurisdictional fact, Applicant is not the existing user of water from Wailuku Shaft 33. Applicant's predecessor in interest, Wailuku Sugar Co aka Wailuku Agribusiness, last used the shaft and pumps in 1985, although it continued to maintain the pumps at three-month intervals until June of 1990. Power to the pumping stations was cut off in February 1991.

The existing user, as it mentioned in its own competing application for this source, is DWS. Since August 1991, DWS has been the only user of the shaft. DWS has installed distribution appurtenances and has kept up maintenance of the shaft since that time. The Applicant states that it "does not anticipate that pumpage at this level [5.771 MGD] will interfere with any other existing legal uses. . . ." However, the Applicant does not provide any factual or scientific foundation for this assertion. The Applicant does not explain how the DWS is supposed to supply an additional 2,400 new homes from this source, and up to 22 acres of new commercial development, while at the same time, maintaining service to DWS's existing customers. In fact, to serve Applicant's new developments, on top of its already existing customers, DWS would have to either increase pumpage from Wailuku Shaft 33 or some other groundwater source in the aquifer, or decrease service to existing customers. Applicant cannot meet its burden under H.R.S. § 174C-49(a)(3).

**DWS Objection 4. The Applicant has not established that the proposed use of the water is consistent with the public interest.**

H.R.S. § 174C-49(a)(4) requires applicants to establish that the proposed use is "consistent with the public interest." Applicant has not done so.

In support of its application, Applicant notes that its development will provide affordable housing and that "[a] component of the request is for domestic use." Applicant states that "Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest." DWS agrees. However, Applicant goes further: "Serving municipal uses in the Kehalani project would similarly be in the public interest." Applicant has not explained how these additional new uses can be

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accommodated without either overpumping the aquifer or taking water away from existing users. Neither of these outcomes would be in the public interest. DWS is developing new sources outside the lao aquifer, including treatment of surface water in order to alleviate pressure on the lao aquifer and to provide for additional demand from new projects in Central Maui. The Applicant could better serve the public interest by participating in new source development, and by timing the proposed project so that it can be served from the Central Maui System once new sources outside the lao aquifer come on-line.

DWS Objection 5. Applicant has not established that its proposed use will not interfere with the rights of the Department of Hawaiian Home Lands.

H.R.S. § 174C-49(a)(7) provides that the applicant must demonstrate that its proposed use "will not interfere with the rights of the department of Hawaiian home lands. . . ." Applicant has not done so. Applicant states that "Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL." However, Applicant acknowledges that "DHHL currently receives water from the County water system that includes this source . . . ." DHHL has outstanding meter reservations for the Waiehu Kou Phase III development totaling 97,000 gallons per day in estimated demand from the Central Maui system. Additional demand of 57,600 gallons per day is estimated by DHHL for the proposed Waiehu Kou Phase IV project. If the output of Wailuku Shaft 33 must accommodate 2,400 additional homes, and up to 22 acres of new commercial development, then existing DHHL users who depend on this source will be harmed by either receiving less water, or through overpumping of the lao aquifer.

Additional County Comments:

The County of Maui will comment separately on whether the proposed use is consistent with state and county general plans and land use designations (H.R.S. § 174C-49(a)(6)) and whether the proposed use is consistent with County land use plans and policies (H.R.S. § 174C-49(a)(7)). By letter dated August 9, 2004 addressed to Mayor Alan M. Arakawa, the Commission on Water Resource Management asked for the County's response within 60 days. County calculates that its response is due on or before October 8, 2004.

Relief Requested:

DWS urges the Commission to deny the application of Kehalani Mauka LLC for the reasons stated above. DWS requests the Commission to grant DWS's competing application for the same source. In the alternative, DWS asks that Kehalani Mauka's Water Use Permit application be denied, and that DWS be allowed to revise DWS's applications for other sources within the lao aquifer in order to make up for the 5.771 mgd that DWS is presently using from Wailuku Shaft 33 to serve existing municipal users in Central Maui.

Should you have any questions, please contact me at (808) 270-7816 or Ellen Kraftsow of my staff at (808) 270-7199.

Sincerely,

George Y. Tohegan
Director

cc: Hon. Alan M. Arakawa, Mayor, County of Maui
Hon. Dain P. Kane, Chair, Maui County Council
Hon. Danny Mateo, WRC Chair, Maui County Council
Jane Lovell, Esq., Deputy Corporation Counsel, County of Maui
Edward Kushi, Esq., Deputy Corporation Counsel, County of Maui
Linnel T. Nishioka, Esq. Oshima Chun Fong & Chung LLP

By Water All Things Find Life
August 9, 2004

TO: Other Interested Parties
FROM: Yvonne Y. Izu, Deputy Director
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, we transmit for your review and comment a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

We would appreciate your review of the attached application for any conflicts or interferences 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 of our Administrative Rules and must be filed by the September 2, 2004 deadline. If we do not receive your comments by this date, we will assume you have no comments.

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: D. Kapua Sproat
Signed

Phone: 599-2436, ext. 16
Date: September 2, 2004
September 2, 2004

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

Peter T. Young, Chair
Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to Kehalani Mauka, LLC’s Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05); ʻĪao Ground Water Management Area, Maui, Hawai‘i

Dear Chair Young and Deputy Director Izu:

On behalf of Hui ʻo Nā Wai ʻEhā and Maui Meadows Homeowners Association, Earthjustice submits the following comments regarding Kehalani Mauka, LLC’s Water Use Permit Application for Wailuku Shaft 33 (Well No. 5330-05). This application seeks a permit for new municipal use in the ʻĪao Ground Water Management Area. For all of the reasons detailed herein, the application fails to establish that its proposed use complies with all of the requirements of the law. We urge this Commission to require Kehalani Mauka to supplement its application before holding a public hearing on this issue. We also request that you hold that public hearing on Maui so that our clients and other affected stakeholders can provide more detailed testimony on this important issue.

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 Waihe‘e aquifers.

Hui ʻo 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,
Earthjustice’s Objection Kehalani Mauka, LLC’s Water Use Permit Application  
September 2, 2004  
Page 2 of 7

aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other 
recreational, scientific, cultural, educational and religious activities.

This Commission bears an affirmative burden to analyze and account for the 
impacts of its decisions on public trust resources. See In re Wai‘ola o Moloka‘i, Inc. 
(“Wai‘ola”), 103 Haw. 401, 430 (2004); In re Water Use Permit Applications (“Wai‘ahole 
I”), 94 Haw. 97, 141 (2000). When allocating water, the 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. Wai‘ola, 103 Haw. at 429 (citing 
Wai‘ahole I, 94 Haw. at 136-138, 142). The law mandates that this Commission “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.

The Hawai‘i Supreme Court recently 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‘ahole Ditch Combined Contested Case Hearing (“Wai‘ahole II”), No. 
24873, slip. op. at 26 (Haw. June 21, 2004). The Court delineated a water use permit 
applicant’s burden:

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. 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 public interest. ... In addition, 
applicants must still demonstrate their actual needs and, within the constraints of 
available knowledge, the propriety of draining water from public [resources] to satisfy 
those needs.

Id. (citations and quotations omitted). If the Commission issues a water use permit without 
findings that “reasonably explain and justify its conclusions and rulings,” that permit is 
especially vulnerable to being vacated. Id. at 26, 37-38, 45, 52-53 (remand with instructions for 
the Commission to make findings that demonstrate whether permit applicant met its burden; to 
articulate factors relied on in deciding whether a permit applicant has practicable alternative 
water sources; to establish factual basis for applicant’s actual need for water). See also Wai‘ola, 
103 Haw. at 432, 439. The Supreme Court has made clear that it will not rubber stamp water use 
permitting decisions where the Commission has not conducted adequate fact-finding and 
analysis. See id.

Kehalani Mauka’s permit application fails to provide the factual 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 application is insufficient for 
the following reasons:
1. The application failed to establish that its new use is consistent with the public interest and will not interfere with existing legal uses of water, pursuant to HRS §§174C-49(a)(3) and 174C-49(a)(4).

Kehalani Mauka claims that a component of its request is for domestic use, but fails to provide any supporting information. On its face, Kehalani Mauka’s request is for municipal use, not individual personal needs. See Haw. Rev. Stat. § 174C-3 (defining domestic use as “any use of water for individual personal needs and for household purposes”) (emphasis added). As such, Kehalani Mauka’s proposed new use is not for a protected public trust purpose and enjoys no priority. In fact, since it is a new use, all existing uses shall be considered first.

Kehalani Mauka attempts to justify its new use as consistent with the public interest because Maui County Department of Water Supply (“MDWS”) has been using Shaft 33 to supply the Central Maui System for the last decade. Haw. Rev. Stat. § 174C-49(a)(4). MDWS’ past and current use of Shaft 33 has no bearing on Kehalani Mauka’s proposed new use. Instead, Kehalani Mauka must justify the relative importance of its new use in light of other public trust purposes, while also establishing that it will not interfere with existing legal uses of water, including public trust uses and MDWS’ own use of Shaft 33 to provide municipal water for Maui County. Id. at § 174C-49(a)(3). After all, the consistent with the public interest and reasonable-beneficial use requirements for water use permit applications “demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question.” Waiāhole I, 94 Haw. at 161.

a. Kehalani Mauka failed to address any impacts of its proposed new use on resource protection.

“[T]he maintenance of waters in their natural state constitutes a distinct ‘use’ under the water resources trust.” Waiāhole I, 94 Haw. at 136. Kehalani Mauka must therefore address the potential impact of its proposed municipal use on the maintenance of water in its natural state, especially resource protection. This is especially important in ‘Iao, where the condition of the aquifer has long been in question and the true sustainable yield hotly debated.

b. Kehalani Mauka failed to address traditional and customary Native Hawaiian rights & practices.

Kehalani Mauka must affirmatively demonstrate that its proposed new use will not harm existing and potential traditional and customary Native Hawaiian rights and practices. See Wai‘ola, 103 Haw. at 442 (“the absence of evidence that its 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.”). In determining whether Kehalani Mauka has met its burden, the Commission must consider the constitutional minimum delineated by the Hawai‘i Supreme Court. Specifically, the Commission has an affirmative duty to determine and must make specific findings regarding: (1) the identity and scope of cultural resources, including the extent to which traditional and customary practices are exercised, in the affected area, (2) the extent to which cultural resources, including traditional and customary practices, will be
affected, and (3) where traditional and customary practices are found to exist, feasible action that the Commission can take to protect affected practices. See Ka Paʻakai o Ka ʻĀina v. Land Use Comm’n, 94 Haw. 31, 47 (2000). Kehalani Mauka has neglected to provide any information regarding these issues.

At a minimum, the law requires and we request that Kehalani Mauka provide the information necessary for the public to consider and this Commission to make the above-described determinations. As just one example, oral history from what is now the ʻIao ground water management area identifies springs which were renowned for healing and purifying powers, including one named Waiola (on what is now the Sevilla family property). Native Hawaiians from this area traditionally used these springs to purify themselves before entering heiau. Waiola and other springs in the area are now dry as a result of ground and surface water conditions in the ʻIao aquifer. Kehalani Mauka’s application lacks any information regarding Waiola or other cultural resources in the aquifer (such as springs or spring-fed loʻi) that may be affected by this proposed new use of ground water.

In addition, the 1990 Hawaiʻi Stream Assessment ("HSA") determined that streams in the vicinity of Kehalani Mauka’s proposed municipal use host a substantial population of native species, including varieties of ʻōpū. In particular, ʻIao Stream, which is in close proximity to the subject water source, was one of only nine streams on Maui worthy of designation as a candidate stream for protection. ʻIao was designated a Blue Ribbon Resource, meaning that it was selected as one of Hawaiʻi’s very best recreational resources due to its outstanding hiking, fishing, swimming, parks, nature study, and scenic views. ʻIao also has tremendous cultural importance and it once supported 10 to 50 acres of kalo cultivation. Without due consideration of the impacts of Kehalani Mauka’s proposed new use on these resources, the application cannot be approved.

Kehalani Mauka’s failure to provide information demonstrating that its proposed new use is consistent with these important public interests and existing legal uses of water is a serious flaw in its application and Maui Meadows and Hui o Nā Wai ʻEhā respectfully urge this Commission to deny the permit application in its present form. In the alternative, we ask that this Commission order Kehalani Mauka to provide necessary information within four weeks of the date of this objection, so that the community and the Commission can review and analyze this information before any public hearing and the Commission may, if necessary, request supplemental information.

2. Kehalani Mauka’s application failed to establish that its proposed use of water is “reasonable-beneficial,” pursuant to HRS §174C-49(a)(2).

Kehalani Mauka’s application also fails to demonstrate that its proposed use is reasonable and beneficial by detailing actual water needs. The law requires that permit applicants demonstrate, at a minimum, that the requested amount of water reflects actual need. See Waiāhole I, 94 Haw. at 162 (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs”). Kehalani Mauka wholly failed to detail the needs of its 2,400 homes and 22 acres of commercial development. Maui Meadows and Hui o Nā Wai ʻEhā also note that total build out for this project is expected to take ten years,
but water use permits are generally issued for expected build out over a maximum of four years. In detailing its water needs, Kehalani Mauka must make explicit what its needs will be over the next four years and at total build out.

Assuming, arguendo, that Kehalani Mauka's application can satisfy the actual needs requirement, the application fails to adequately analyze alternative sources and more information is needed. Alternatives analysis is necessary to evaluate whether the applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Supreme Court carefully defined the burden of proof for all water use applicants:

[B]esides 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 intrinsic to the public interest, the statutory instream use protection scheme, and the definition of 'reasonable-beneficial' use and is an essential part of any balancing between competing interests.

Waiāhole I, 94 Haw. at 161. Even though Kehalani Mauka failed to seriously examine alternative sources of water, it conceded that questions exist regarding the availability of water and sustainable yield of the aquifer. This Commission cannot issue permits to Kehalani Mauka absent additional information demonstrating that the requested amounts constitute a reasonable beneficial use of potable water.

3. Kehalani Mauka failed to establish that the water source will accommodate its proposed new use, pursuant to HRS §174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate a proposed use. HRS §174C-49(a)(1). More information is needed, especially given the "[s]erious dispute between the interested public...related to the integrity of the aquifer and land use decisions that affect demand on the aquifer." COWRM ʻIao-Waihe'e Final FOF & COL at ix. In fact, this Commission recommended designating both the ʻIao and Waihe'e aquifers as ground water management areas because authorized planned use back in 2002 was 29.2 mgd, which "exceed[ed] the sustainable yields (Iao 20 mgd and Waihee 8 mgd = 28) available to the [Central Maui Service Area]." Id. This issue is even more critical now since this Commission has limited pumpage in the Waihe'e aquifer to 4.0 mgd, yet it continues to receive requests for new ground water wells (such as the Koʻolau Cattle Company application) as well as permits for new uses from existing wells in the ʻIao aquifer (such as this one). We also underscore the fact that better information on the sustainable yields of the ʻIao and Waihe'e aquifers will not be available for several more years, when USGS completes its Central Maui model.

1 Maui Meadows and Hui o Nā Wai ʻEhā also note that the Commission has, thus far, failed to enter into a Memorandum of Agreement ("MOA") with MDWS to limit pumping to 4.0 mgd. Since this was a condition of rescinding the triggers for automatic designation of the Waihe'e aquifer, the aquifer should be designated if MDWS refuses to sign the MOA.
As this Commission is well aware, authorized planned use has increased since 2002. Even if 29.2 mgd is used as a conservative figure, authorized planned use far exceeds the 24 mgd (‘Iao 20 mgd and Waihe’e 4 mgd = 24) now available to supply the Central Maui Service Area. MDWS’ current pumpage already exceeds 26 mgd (calculated on a monthly average). Moreover, MDWS recently announced that applications for roughly 880,000 gpd had already been signed, even though MDWS believed that it had about only 800,000 gpd in unused capacity with which to issue new water meters. See Harry Eager, Council may block new C. Maui water meters, Maui News, Aug. 20, 2004. Regardless, Kehalani Mauka has wholly failed to establish that the ‘Iao aquifer can accommodate 2,400 new houses and 22 acres of commercial development for, in Kehalani’s own words, “one of the largest planned developments” on Maui.

4. Although Kehalani Mauka’s application indicates that its proposed new use is in accordance with State and Maui County general plans, land use designations, and policies, this is insufficient for the Commission to determine whether the proposed use is reasonable-beneficial, pursuant to HRS §§ 174C-49(a)(5) & 174C-49(a)(6).

Kehalani Mauka claims that its proposed use will meet the demands outlined in state and county general plans, land use designations, and general policies. Where, as here, authorized land use outstrips the available water supply, this Commission ruled and the Hawai‘i Supreme Court affirmed that consistency with county plans and land use designations does not end the inquiry into whether a proposed water use may be permitted. In a situation similar to this one, this Commission concluded:

As competition for water resources increases, the analysis of both the public interest and of reasonableness must become both more rigorous and affirmative. The counties will be required to articulate their land use priorities with greater specificity. For example, even at the present time, there is more land zoned for various uses than available water to supply those proposed uses. Thus, it is not sufficient to merely conclude that a particular parcel of land is properly zoned and that the use is “beneficial.” That minimal conclusion may be inadequate to resolve situations in which competitive demand exceeds supply.


The situation on Maui is analogous, if not worse, than the situation in Honolulu addressed by this Commission in Wai‘ahole I & II. Again, authorized planned use in the Central Maui Service Area exceeds both the 28 mgd sustainable yield of the aquifers supplying the Central Maui Service Area, as well as the 24 mgd that this Commission has established as the maximum available now. COWRM ‘Iao-Waihe’e Final FOF & COL at ix. Current pumpage also exceeds the maximum amount safely available from sources of supply for the Central Maui Service Area. Be that as it may, the fact that Kehalani Mauka’s proposed use is consistent with county land use designations “only provides a minimal standard by which to judge applications.” Wai‘ahole I, 94 Haw. at 188. Additional information is needed.
5. Kehalani Mauka failed to establish that its proposed use will not interfere with the rights and needs of the Department of Hawaiian Home Lands, pursuant to HRS § 174C-49(a)(7).

Kehalani Mauka’s claim that it is unaware of any wells or projects of the Department of Hawaiian Home Lands (“DHHL”) is wholly insufficient. In its objection dated August 27, 2004, MDWS notes that DHHL has outstanding meter reservations in addition to its current uses. Kehalani Mauka must provide additional information regarding both existing and future DHHL projects within the Central Maui Service Area and how Kehalani Mauka’s proposed new use will impact those rights and needs. See Wai‘ola, 103 Haw. 401.

Conclusion

Kehalani Mauka must affirmatively demonstrate compliance with the state constitution, Water Code, and public trust principles. Absent all of the required components, Kehalani Mauka’s application cannot be approved. Maui Meadows and Hui o Nā Wai `Ehā respectfully urge this Commission to deny the application or defer action on them until Kehalani Mauka provides all of the information detailed in this objection. Such information is no more and no less than is required by law to adequately review and analyze all proposed water uses and to protect the public interest in our public trust resources.

Mahalo for this opportunity to comment. If you have any questions or require additional information, please don’t hesitate to contact me.

Me ke aloha,

cc: Jay Nakamura, Kehalani Mauka, LLC
Via First-Class U.S. Mail

Jane Lovell, Esq., Maui County Deputy Corporation Counsel
Via First-Class U.S. Mail
TO: Honorable Micah Kane, Director
   Department of Hawaiian Home Lands
   
   Honorable Chiyome L. Fukino, M.D., Director
   Department of Health
   
   Mr. Clyde W. Namu'o, Administrator
   Office of Hawaiian Affairs
   Attn: Mr. Jonathon Scheuerer
   
   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
   Lao Ground Water Management Area, Maui

Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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.

Class
Attachment(s)

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

Contact person: Bill Wong
Signed: Bill Wong
Phone: 586-4258
Date: AUG 30 2004
TO: Peter T. Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources

FROM: Anthony J. H. Ching, Executive Officer

SUBJECT: Water Use Permit Applications
Iao Groundwater Management Area, Maui

We have reviewed the subject applications forwarded by your transmittals dated August 9, 2004, and find that Waihee 3 Well (No. 5431-04) and Waihee Mauka Living Waters #1 (No. 5531-01), as generally represented on the USGS maps, are designated within the boundary of the State Land Use Agricultural District. Wailuku Shaft 33 (No. 5330-05), as generally represented on the USGS map, is designated within the boundary of the State Land Use Urban District.

With respect to your request as to whether the current designation is appropriate for the proposed project, please be advised that although sections 205-2(d) and 205-4.5(a), Hawaii Revised Statutes (HRS), do not explicitly list wells as permissible activities or uses within the Agricultural 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 Agricultural District. To the extent that the water requested from the Waihee 3 Well 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 Waihee Mauka Living Waters #1 Well, to the extent that the water will be used for the irrigation of macadamia nut orchards and various other crops, as well as for individual domestic use, these activities would appear to be appropriate uses within the Agricultural District.
With respect to Wailuku Shaft 33, please be advised that pursuant to section 205-2(b), 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.

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

Enclosures
August 9, 2004

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 is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: BERT SARUWATARI  
Phone: 587-3822  

Signed:  
Date: 8/16/04
August 25, 2004

Mr. Jay Nakamura  
Kehalani Mauka, LLC  
1100 Alakea St., 27th Floor  
Honolulu, HI 96813

Dear Mr. Nakamura:

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 Lao 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
August 9, 2004

TO:
   Honorable Micah Kane, Director
   Department of Hawaiian Home Lands

   Honorable Chiyome L. Fukino, M.D., Director
   Department of Health

   Mr. Clyde W. Namu'o, Administrator
   Office of Hawaiian Affairs
   Attn: Mr. Jonathon Scheurer

   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 is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: Rebecca Alakai
Signed: R. Alakai
Phone: 808-667-623
To: Peter T. Young, Chairman  
Commission on Water Resource Management

From: Micah A. Kane, Chairman  
Department of Hawaiian Home Lands

Subject: Water Use Permit Application, Kehalani Mauka, LLC, Well No. 5330-05, Iao Groundwater Management Area, Maui

Thank you for the opportunity to provide comments on the subject water use permit application. The application states that it is for a new 550-acre master planned community of 2,400 single family homes, commercial properties, multi-family dwellings, located at the base of the West Maui Mountains with an expected build-out period of ten years.

The Department of Hawaiian Home Lands (DHHL) has significant landholdings in the area as stated in our memo dated July 13, 2004. New uses in this aquifer may limit our ability to provide water for our future projects. According to Ch. 174C-49, HRS, new use applicants must meet a number of criteria in order to get water use approval. As such, DHHL has concerns regarding the subject application as follows.

1. Kehalani Mauka LLC (Kehalani) submitted the Water Use Permit Application (WUPA) after the one-year deadline had passed for existing use permit consideration. Therefore, the Commission on Water Resource Management (CWRM) must consider the request a new, rather than an existing, use application.

2. TMK's 3-5-7:01 and 67 are both indicated on the application as the location of the well, yet Kehalani is not the owner of record of parcel 01 and parcel 67 does not exist.

3-5-1:67 indicated, also not known; site appears to be 3-5-1.0 (see MLS printout)
3. According to our records, the listed owner of the subject well is Hawaii Land and Farm, not Kehalani. Further, Kehalani states in their application that they are in the process of leasing their well to the County BWS and that the water developed by the subject well was included in the 18 mgd used by the Maui County Board of Water Supply (BWS). A review of the WUPA's submitted by the BWS does not include the subject well in their application.

4. Kehalani states that the application is 5.77 mgd for some 2,400 residences and other uses at the base of the West Maui Mountains. The application also states that the source serves 9,667 households in Wailuku and Kihei.

The DHHL respectfully requests that the CWRM carefully review new applications and provide clarity with respect to ownership, consumption figures that are consistent with the request, and provide other information required under the Water Code as part of the review process.

Thank you for your thoughtful consideration. If you have any questions, please call Rebecca Alakai at 587-6423.
August 9, 2004

TO: Dede Mamiya, Administrator
   Land Division

FROM: Yvonne Y. Izu, Deputy Director
   Commission on Water Resource Management

SUBJECT: Request for Comments
   Water Use Permit Application
   Kehalani Mauka, LLC for Well No. 5330-05

Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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:

( ) 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 (X) does not require a CDUP. If a CDUP is required it ( ) has (XX) has not been approved and ( ) is (XX) is not currently active.
( ) Other relevant Land Division rules/regulations, information, or recommendations are attached.
( ) No objections
(XX) Other comments: Original source of private title is LC Award 387 issued between 1845 and 1855.

Contact person: Gary Martin
Phone: 587-0421

Signed: Gary Martin
Date: SEP - 1 2004
Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: Ann T. Cue
Signed: [Signature]
Phone: 278-7735
Date: 8/26/04
Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: [Signature]

Signed: [Signature] Phone: 587-0290

Date: 8/31/04
August 9, 2004

Mr. Jay Nakamura
Kehalani Mauka, LLC
1100 Alakea St., 27th Floor
Honolulu, HI 96813

Dear Mr. Nakamura:

We acknowledge receipt, on July 23, 2004, of your completed water use permit application for the Wailuku Shaft 33 (Well No. 5330-05). You can expect your application to be processed within ninety (90) days from the date of receipt unless there are objections to your application.

Enclosed is a copy of the public notice for your water use permit application which will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

Please be aware that there may be objections to your application. If objections are made, the objector is required to file such objections with the Commission and is also required to send you a copy of the objections.

You, or any other party, may respond to objections by filing a brief in support of your application with the Commission within ten (10) days of the filing of an objection. You, or the other party, must also send a copy of the response to the objector.

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

Sincerely,

YVONNE Y. IZU
Deputy Director

CI:ss
Enclosure
c: Alan Oshima, Esq., Linnel Nishioka, Esq., Oshima Chun Fong & Chung
August 9, 2004

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

FROM: Yvonne Y. Izu, Deputy Director
      Commission on Water Resource Management

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

Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004. If we do not receive your comments by this date, we will assume you have no comments.

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: ________________________ Phone: ________________________
Signed: ________________________ Date: ________________________
Transmitted for your review and comment is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004.** If we do not receive your comments by this date, we will assume you have no comments.

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.

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: __________________
August 9, 2004

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 is a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

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 September 2, 2004.** If we do not receive your comments by this date, we will assume you have no comments.

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: ___________________________ 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. Namu'o, Administrator  
Office of Hawaiian Affairs  
Attn: Mr. Jonathon Scheurer  
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 is a copy of a water use permit application for  
Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the  

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 September 2, 2004. If we do not receive your comments by this date, we will  
assume you have no comments.  

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.  

Class  
Attachment(s)  

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

Contact person: __________________________________ Phone: __________________  
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
Kehalani Mauka, LLC for Well No. 5330-05

In accordance with the Department of Land and Natural Resources Administrative Rules, Section 13-171-17(a), we are sending you a copy of the public notice for the water use permit application for the Kehalani Mauka, LLC for Well No. 5330-05, which will be published in the Maui News.

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 a copy of the application 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.

Sincerely,

Peter T. Young
Chairperson

Cl: ss
Enclosures
August 9, 2004

TO: Other Interested Parties
FROM: Yvonne Y. Izu, Deputy Director
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, we transmit for your review and comment a copy of a water use permit application for Kehalani Mauka, LLC for Well No. 5330-05. Public notice of this application will be published in the Maui News issues of August 11, 2004 and August 18, 2004.

We would appreciate your review of the attached application for any conflicts or interferences 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 of our Administrative Rules and must be filed by the September 2, 2004 deadline. If we do not receive your comments by this date, we will assume you have no comments.

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: ___________________
INTERESTED OTHERS LIST

ADDITIONAL STANDARD CORRESPONDENCE

Kapua Sproat  
EarthJustice  
223 South King Street 4 F1  
Honolulu, HI 96813

James Williamson, Vice-President  
Maui Meadows Homeowners Association  
PO Box 1935  
Kihei, HI 96753
PUBLIC NOTICE

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

The following application for water use permit has been received and is hereby made public in accordance with Department of Land and Natural Resources Administrative Rules 13-171, "Designation and Regulation of Water Management Areas."

Waihee Mauka Living Waters #1 (Well No. 5531-01)
Applicant: Living Waters Land Foundation LLC
P.O. Box 2667
Wailuku, HI 96973
Date Completed Application Received: July 15, 2004
Aquifer: Iao System, Wailuku Sector, Maui
Water Source: Waihee Mauka Living Waters #1 (Well No. 5531-01) at Kope Gulch, makai of Spreckels Ditch, Maui, Tax Map Key 3-2-13:15
Quantity Requested: 0.020 million gallons per day.
New Water Use: Irrigation of 553.62 acres currently supplied by Wailuku Agribusiness, Inc. and applicant is asking for a new groundwater source to backup this existing surface water use.
Place of Water Use: Same description as source at Tax Map Key: 3-2-13:15

Waihee 3 (Well No. 5431-04)
Applicant: County of Maui
Department of Water Supply
200 S. High Street
Wailuku, HI 96793
Date Completed Application Received: July 21, 2004
Aquifer: Iao System, Wailuku Sector, Maui
Water Source: Waihee 3 (Well No. 5431-04) at Waihee, Maui, Tax Map Key 3-2-17:018
Quantity Requested: 1.513 million gallons per day.
Existing Water Use: Municipal
Place of Water Use: Central Maui Service System at Various Tax Map Keys

Wailuku Shaft 33 (Well No. 5330-05)
Applicant: Kehalani Mauka, LLC
1100 Alakea St., 27th Floor
Honolulu, HI 96813
Date Completed Application Received: July 23, 2004
Aquifer: Iao System, Wailuku Sector, Maui
Water Source: Wailuku Shaft 33 (Well No. 5330-05), Maui, Tax Map Key 3-5-1:67
Quantity Requested: 5.771 million gallons per day.
Existing & New Water Use: Municipal
Place of Water Use: Kehalani Project at Tax Map Key: 3-4-07:2; 3-5-01:1,17,60,61,63,64,66,67

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 September 2, 2004. 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.

COMMISSION ON WATER RESOURCE MANAGEMENT

Date: AUG - 3 2004

Chairperson

Publish in: Maui News issues of August 11 and 18, 2004
ALOHA,
This may be a second time you get this, kala mai no ku'u hemahema, Ano Ai:

PLEASE TAKE NOTICE OF THIS OBJECTION:
IN RE: WELL APPLICATIONS FOR WELL # 25531-01 AND # 5431-04 AND 5330-05.

WE, THE "AHA KU MOKU OF NA WAI EHA ("THE ASSEMBLAGE IN WHOM THE MOKU BELONGS" UNDER ADJUDICATED TITLE)

WE HEREBY OBJECT TO THE TAKING OF WATER FOR DEVELOPMENT PURPOSES; ON THE FOLLOWING GROUNDS:
1) NO LAWFUL TRANSFER OF TITLE TO PROPERTIES (THAT INCLUDE THE WATER) BEING PROPOSED FOR DEVELOPMENT.
2) WE, AS A COMMUNITY VEHEMENTLY DENY ANY MORE ILLEGAL DEVELOPMENT OF OUR MOKU BASED ON THE ABOVE. This includes the taking of water and displacement of our DUE PROCESS.
3) LIVING WATERS LLC IS TAKING WATER, AT PRESENT IN 2-3 FOOT PIPES SET IN OLD AUWAI'S ON THE PROPERTY THEY ARE ILLEGALLY OCCUPYING; FILING IN SUIT AGAINST THE STATE FOR INSTREAM FLOW; FILING TRO'S AGAINST THE KANUHA FAMILY FOR AN EASEMENT ON THE KANUHA PROPERTY; APPLYING FOR A WELL FROM YOU AND THE PROPERTY ITSELF IS IN LITIGATION.
4) DAVID SINGER'S Q/D DID NOT INCLUDE OUR INTERESTS
5) VALERIE DEVA & DON HARRIS Q/D FROM AVERY CHUMBLEY DID NOT INCLUDE OUR INTERESTS.
6) WE DO NOT WANT OUR ROADS CLOSED AND CHANGED INTO PRIVATE ROADS THAT SHUT US OFF FROM OUR MAUKA MAKAI RIGHTS AS IS GOING ON – ON OUR ISLAND RIGHT NOW.
7) WE REPRESENT ALL OF OUR COLLECTIVE OHANA AT PRESENT, LINEAL AND CULTURAL DESCENDANTS OF MOKU O NA WAI EHA.

WE ARE THE PO'E AHA KU MOKU composed OF PO'O REPRESENTING APPROXIMATELY 200-300 PEOPLE. WE ARE APPOINTED UNDER THE KANAWAI HO'ILINA TO OBJECT ON ALL OF OUR FAMILIES BEHALF AND TO PROTECT THEIR ROYAL PATENTS AND LAND COMMISSION AWARDS THAT INCLUDE A BUNDLE OF RIGHTS, PROTECTED BY THE 1839 CONSTITUTION. OUR KUPUNA HAVE SET THIS FORTH AND WE HAVE COME TOGETHER TO OBJECT ON THIS DATE: SEPTEMBER 1, 2004 AS A COMMUNITY OF KANAKA MAOLI HAWAII.
THE PO'O Hō'ILINA ARE:

MAHEALANI VENTURA-OLIVER FOR: KALILI, KALEOHANO, NAHUINA, KUANE'A, KAMAMALU, NAMAHANA, MOIKEHA AND KAME'IAMOKU, BIRCH, KAMAKEA, PEPE'IAO AND KEALOHAPA'ULE, KAWA'AKAUAKAHI, LUNALILO, A KOE NA KULEANA O NA KANAKA, ET AL.

KEEAUMOKU KAPU FOR: KEEAUMOKU NUI, NAMAHANA, KAMAMALU, KEKAI, KALEO, KAIALI'I'I, KALEOPU'UPU'U, KEAIHI, HEWAHEWANUI, LUNALILO, A KOE NA KULEANA O NA KANAKA, ET AL.

FOSTER AMPONG: KALEOHANO, TIMOTEO, KEKAHUNA, KANUHA, LUNALILO, KAMAMALU A KOE NA KULEANA O NA KANAKA, ET AL.

SUSAN KA'AWA, FOR KA'AWA, HEWAHEWA NUI, KAMAMALU, KAUHI LUNALILO A KOE NA KULEANA O NA KANAKA, ET AL.

OLIVER DUKELOW FOR PEPEHU, MAULE, AWANA, LUNALILO, KAMAMALU, A KOE NA KULEANA O NA KANAKA, ET AL.

MAGARET HOOPII FOR NA HOOPII, KAMAKA, LUNALILO, KAMAMALU A KOE NA KULEANA O NA KANAKA, ET AL.

NELSON ARMITAGE FOR LUNALILO, KAMAMALU A KOE NA KULEANA O NA KANAKA, ET AL AND THE CONSTITUENTS OF THE ORGANIZATION OF THE REINSTATED GOVERNMENT RESPECTIVELY; NUMBERING ANOTHER 200 PERSONS.

INCLUDE TO THIS LIST OF FAMILIES; THE OIHANA OF OTHERS FROM OUTER ISLANDS WHO COME TO OUR PU'UHONUA, HEIAU, KU'AHU, AHU, TRAILS, KU'ULA, PA'ILINA, KĀNU ANA, ETC. TO PRACTICE CULTURAL BELIEFS, TO FISH, DIVE, COLLECT AND GATHER LIMU DEPENDENT UPON THE MULIWAI - FRESH WATER, SPECIES THAT ARE GATHERED IN THE IUKA, AND WE EACH HAVE THAT EXACT INALIENABLE FREEDOM THAT THIS IS TO BE PROTECTED BY LAW.

ADD TO THIS OBJECTION: LEGAL SPECIES THAT ARE THREATENED BY THE LOSS OF STREAM FLOW, DEGRADATION OF THE WATER SCOPE AREA TO REPLENISH THE NATURAL FLOW AND RETURN OF OUR FRESH WATER, RUN OFF ACCIDENTS, STORM DRAIN POLLUTION, LOSS OF ENVIRONMENT AND GENOCIDE OF OUR PEOPLE. LET US LIVE.

DO NOT INFRINGE UPON THE POPULACE TO SATISFY A FEW WHO WANT TO CONTROL THE WATER FOR THEIR PERSONAL BENEFITS THAT DO NOT HELP THE COMMUNITY AT ALL, ESPECIALLY THAT WHICH IS BASED ON QUITCLAIM DEEDS AND FRAUDULENT TRANSFERS FROM A PLANTATION.

BY YOUR COMMISSION APROVING THESE APPLICATIONS, WE ARE THEREBY DISPLACED FROM OUR CONSTITUTIONAL RIGHTS, SUBJECT TO DEPRIVATION OF OUR PROPERTIES AND ADVERSELY AFFECTED BY YOUR DECISION.

"KOE NA KULEANA O NA KANAKA" IS A RESERVATION OF OUR PROPERTY RIGHTS INCLUDING EVERY RIGHT THERETO, WITHIN EVERY ALI'I LAND COMMISSION AWARD AND ROYAL PATENT THAT REPRESENTS NO LESS THAT A 33 1/3 PERCENT OF THAT TITLE.

E OLA I KA WAI HA HAWAI'I MAOLI.

Mahealani Ventura-Oliver
Po'e ho'o'ilina a 'Aha ku moku o Na Wai Eha
Aloha Title Co.
584 Haiki Pl.
Waiehu, HI 96793
808-249-0113 or 808-870-0422
Fax: 808-244-0469
Parcel 67. Is the application okay for processing?

Oshima Chun Fong & Chung LLP
841 Bishop Street, Suite 400
Honolulu, HI 96813
TELEPHONE: (808) 528-4200
FACSIMILE: (808) 531-8466

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CONFIDENTIAL ATTORNEY CLIENT INFORMATION AND/OR ATTORNEY WORK PRODUCT
exclusively for intended recipients. Please DO NOT FORWARD OR
DISTRIBUTE to anyone else. If you have received this e-mail in error,
please call 808/528-4200 to report the error and then delete this
message from your system. Thank you.

>>> <Lenore.Y.Nakama@hawaii.gov> 07/23/04 08:20AM >>>
Linnel,
Sorry, I just listened to your voice mail message! I checked out both
parcels 1 and 67 and both are owned by Kehalani. Which parcel should I
assign to the source TMK? Thanks, Lenore

Lenore Y Nakama/DLNR/StateHiUS
07/23/2004 06:55 AM

To
"LINNEL NISHIOKA" <LN@ocfc.com>
cc

Subject
Re: TMK Nos. Kehalani

Hi Linnel,
OK, no problem to add those 2 parcels to the proposed end uses. Please
also don't forget to check on the TMK at the source location. Looks
like
it's in 3-5-01 but not sure what the parcel number is.
Thanks, Lenore

"LINNEL NISHIOKA" <LN@ocfc.com>
07/22/2004 02:08 PM

To
<lenore.y.nakama@hawaii.gov>
cc

Subject
TMK Nos. Kehalani

Lenore,

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3-5-01 Parcels 64 and 67. I just found out that these were recently assigned numbers by the Maui real property tax department who is behind in assigning numbers to different subdivisions. There may be further TMK Nos. added as this thing goes along but I will try to keep updating it.

Sorry, thanks, Linnel

Oshima Chun Fong & Chung LLP
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"LINNEL NISHIOKA" <LN@ocfc.com> 

To <Lenore.Y.Nakama@hawaii.gov> 
cc

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### WEST INDIAN ISLANDS

**DATE:** July 20, 2004

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**TOTAL:** $ 25.00

**REMARKS:**

LINE (1) | Well No. 5330-05

LINE (2)
LINE (3)
LINE (4)
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This information has been supplied by third parties and has not been independently verified by Hawaii Information Service and is, therefore, not guaranteed.
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: JUL 22
SUSPENSE DATE: [Redacted]

PLEASE:
See Me
Review & Comment
Take Action

FOR:
Approval
Signature
Information

TO:
MATHIAS, T.
NAKAMA, L.
NAKANO, D.
OHYE, M.
SAKODA, E.
STAHLMAN, S.
UENO, D.
YODA, K.
YOSHINAGA, M.

INIT:

FROM:
ROY

INIT:

TO:
BAUER, G.
CHING, F.
DANBARA, S.
FUJII, N.
GOODING, K.
HARDY, R.
HIGA, D.
IMATA, R.
IZU, Y.
KUNIMURA, I.

(05/04)

[Redacted]
July 22, 2004

Via Hand Delivery

Yvonne Izu, Deputy Director
Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, Hawaii  96813

Re: Kehalani Mauka, LLC’s water use permit application for Shaft 33,
   State Well No. 5330-5 for Iao Aquifer, Maui, Hawaii

Dear Deputy Director Izu:

This letter is to inform you that we have just been informed that the Kehalani
Project has two additional tax map key numbers (“TMK Nos.”) that were the result of
subdividing existing TMK Nos. that were already provided to your office.

Please supplement our application with adding TMK No. 2-3-5-01, Parcels 64
and 67. Parcel 67 is the current TMK No. parcel that Shaft 33, State Well No. 5330-5 is
located.

If there are any questions or you need further information, please do not hesitate
to contact us. Thank you for your time and consideration of our client’s application.

Very truly yours,

Linnel T. Nishioka

LTN:jhy
cc: Howard H. Hamamoto
F:\DOCUMENT\Kehalani\Revision to add TMK Nos.doc
Yvonne Izu, Deputy Director  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, Hawaii 96813

Re:  Kehalani Mauka, LLC's water use permit application for Shaft 33,  
State Well No. 5330-05 for Iao Aquifer, Maui, Hawaii

Dear Deputy Director Izu:

Our firm has been retained to represent Kehalani Mauka, LLC in the water use permit application for Shaft 33, State Well No. 5330-05 for Iao Aquifer, Maui, Hawaii. Please direct all inquiries and correspondence to:

Alan Oshima, Esq.  
Linnel Nishioka, Esq.  
Oshima Chun Fong & Chung  
841 Bishop Street, Suite 400  
Honolulu, Hawaii 96813  
(808)-528-4200  
Email: amo@ocfc.com; and  
ln@ocfc.com

If there are any questions or you need further information, please do not hesitate to contact us. Thank you for your time and consideration of our client's application.

Very truly yours,

[Signature]

Linnel T. Nishioka

LTN:jhy
cc: Howard H. Hamamoto

400 Davies Pacific Center • 841 Bishop Street • Honolulu, Hawaii 96813 • Telephone (808) 528-4200 • Facsimile (808) 531-8466

www.ocfc.com
APPLICATION FOR WATER USE PERMIT

COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources

APPLICATION FOR WATER USE PERMIT

XXGroundwater or ☐ Surface Water

PERMITTEE INFORMATION

1. (a) APPLICANT: Kehalani Mauka, LLC
   Firm Name: Kehalani Mauka, LLC
   Contact Person: Jay Nakamura
   Address: 1100 Alakea St., 27th Flr.
   Phone: 808-537-5220 Fax: 808-537-1801
   E-mail: 

2. SOURCE INFORMATION

   2. WATER MANAGEMENT AREA: Iao Aquifer
      ISLAND: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Walluku Shaft 33, State Well No. 5330-05
   (b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME: 
      (c) LOCATION: Address 
      Tax Map Key: 3.5.01.67

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)

6. LOCATION OF PROPOSED WATER USE: (if possible, show on same maps as source location. Otherwise, attach similar maps) 
   See attached.
   (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 map.

7. QUANTITY OF WATER REQUESTED: 3,571 MGD* 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 See attached.
     ☐ Industrial ☐ Military ☐ Other Explain

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours
     (daytime hours of operation; example: 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER: See attached.
     (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.

REMARKS, EXPLANATIONS: *Includes Kehalani Project TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63 and 66, 64, 67.

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; 3) If necessary, further information may 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) Kehalani Mauka, LLC
By Milwaukee Holdings LLC, its member
Signature: Stanford S. Ciri, its manager
Date: July 20, 2004

Landowner (print) Kehalani Mauka, LLC
By Milwaukee Holdings LLC, its member
Signature: Stanford S. Ciri, its manager
Date: July 20, 2004

WUPAFCRM (4/29/03)

For Official Use Only:

RECEIVED
04 JUL 20 P3:11
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<th>PROJECT NUMBER AND PROJECT DESCRIPTION</th>
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<th>UNITS OF MEASURE</th>
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TOTAL GPD: n/a

DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE: n/a

Only for verification that: 1) TMKs listed are consistent with zoning; and 2) projects listed are allowed with respect to zoning.

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. Attn: Arthur D. Challacombe
Supplemental Information

Re: Kehalani Mauka, LLC;
Application for ground water use permit for Iao Aquifer;
dated July 20, 2004

USE INFORMATION

6(a). LOCATION OF PROPOSED WATER USE:

Kehalani Mauka, LLC is currently a Hawaii Limited Liability Company, and is in the process of negotiating a lease with the County Department of Water Supply ("County DWS") that would, if a lease is reached, allow the County to continue to use Shaft 33, State Well No. 5330-05 ("Shaft 33") for municipal purposes. If agreement on a lease with the County is not reached, the Kehalani Mauka, LLC or its designee, will continue the municipal use of Shaft 33 as a public utility, regulated by the Hawaii Public Utilities Commission.

10. PROPOSED USE:

Kehalani Mauka, LLC intends to use the water for municipal purposes including its Kehalani project located in Wailuku, Maui. (See Attachments 2 & 3) The water will be used for residential, park, school, commercial and irrigation of the common areas of the project. In addition, pending agreement on a lease with the County DWS, water will be used for municipal purposes as part of the County's Central Maui Water System ("CMWS"). Shaft 33, as of the date of designation, pumps approximately 5.8 mgd. that is used as part of the County system.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

(a) Can be accommodated with the available water source.

This water use application is for an existing use for Shaft 33, for an allocation of 5.771 mgd, the average existing use for the last year prior to designation of Iao Aquifer. Kehalani Mauka, LLC has allowed the County DWS, on an interim basis, to use Shaft 33 to serve as a part of the County's municipal system. The parties are currently negotiating a long-term lease that would allow the County to continue the use of the Shaft 33 facilities. Kehalani Mauka believes that given the location of Shaft 33 in the Iao Aquifer, and its historical use, the application for 5.771 mgd. can be accommodated within the Iao Aquifer's sustainable yield. The water used from Shaft 33 by the County of Maui has already been calculated in the approximately 18 mgd. used by the County in Iao aquifer and this application is being made in conjunction with that existing use and not in addition to it.
Shaft 33 is a part of the CMWS that serves central and south Maui. See Attachment 4, map of the historic service areas for Shaft 33. Shaft 33 has historically averaged approximately 5.8 mgd. this serves approximately 9667 households at the County standard rate of 600 gpd.

(b) Reasonable and beneficial use.

Kehalani is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single-family residences, located at the base of the West Maui Mountains with an expected build-out period of ten years. When completed, it will be one of the largest planned developments on the island. The current strategic focus is to develop the infrastructure for this master planned community, thus enabling the sale of both improved and unimproved lots to interested builders and developers.

Kehalani has land use and zoning entitlements and approvals that took over two decades to achieve. The Project District Zoning Ordinance allows maximum flexibility in fine-tuning development plans as the market dictates within an overall maximum of 2,400 residential units and up to 22 acres of neighborhood commercial development. The property is located adjacent to the County seat, Wailuku. Frontage on Honoapiilani Highway provides the project with great visibility required by commercial tenants and close proximity to Maui’s primary job centers and resorts.

Pending agreement with the County DWS, this water use for the Kehalani project as well as the water use for the existing county water system customers who use the CMWS would continue.

As part of the County water system, the County of Maui has instituted programs to protect the aquifer and use water in an economic and efficient utilization including: utilization of alternative surface water sources, development of new sources in Waihee, conservation programs including leak detections, automatic radio-read meters to replace old under-performing meters, use of reclaimed water where appropriate and available, conservation pricing and rate structure, low flow fixture distribution, and public education on the importance of conservation. In addition, the County has put resources into natural resource management and protection including USGS study on the availability of water in central Maui, watershed, wellhead and surface water protection programs.

Residential housing projects, including planned communities, have been recognized by the Commission as a reasonable and beneficial use of water. Municipal use of water has been recognized by the Commission as a reasonable and beneficial use of water.
(c) Will not interfere with any existing legal use.

Shaft 33 is the only source of the current county system that is located south of the lao stream and has historically been pumped at much higher levels than the present 5.771 mgd. Kehalani Mauka, LLC does not anticipate that pumpage at this level will interfere with any other existing legal uses, including other existing wells in lao aquifer.

(d) Is consistent with the public interest.

The Kehalani project is one of the few planned residential communities of this scale that offers affordable housing for local residents and seniors. The project provides housing within a few miles of Wailuku, the county center that is available and affordable for local residents. In fact, some housing sold has an owner/occupant requirement for a certain period of time to allow residents to purchase housing in close proximity to work and schools.

A component of the request is for domestic use. The Hawaii Supreme Court in In the Matter of Water Use Permit Applications, ("Waiahole I"), 94 Hawai'i 97 (2000) recognized domestic use as a public trust purpose. As a public trust purpose, domestic use should be recognized as in the public interest and should be given priority by the Commission. In addition, the Commission has found municipal use in the public interest.

Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest. (See Attachment 4) Serving municipal uses in the Kehalani project would similarly be in the public interest.

Kehalani Mauka, LLC has no practicable alternatives to the use of Shaft 33 for its municipal water needs. Surface water would require expensive treatment prior to using it for drinking water and may have other environmental effects that would make it not practicable. Reuse water is not an option for domestic use for health reasons and may not be available nor affordable for landscape irrigation use. The project is located within the lao aquifer, and other ground water sources may not be available given the sustainable yield of the aquifer. Therefore, there are no practicable alternatives for Kehalani Mauka, LLC besides the use of Shaft 33.
(e) Is consistent with State and County general plans and land use designations.

The project has the appropriate State and County general plans and land use designations. The project lands are designated “urban” in the State land use classification system. The project is designated “Project District No. 3” in the Wailuku-Kahului community plan.

(f) Is consistent with County land use plans and general policies.

The property is consistent with County land use plans and general policies. The property is current classified under Ordinance No. 2053, the “Wailuku-Kahului Project District 3,” which was specifically created to provide for the Kehalani project.

(g) Will not interfere with the rights of the Department of Hawaiian Home Lands (“DHHL”).

Kehalani Mauka, LLC is unaware of any DHHL lands near the project nor are there any DHHL wells in the Iao aquifer. Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL. Pending a lease with the County DWS, DHHL currently receives water from the County water system that includes this source, and the continuation of that use will benefit the DHHL. Kehalani Mauka, LLC is aware that any permit issued would be subject to the rights of the DHHL under Section 221 of the Hawaiian Homes Commission Act.
Wailuku Shaft 33 Service Area "A"

ATTACHMENT "4"
July 19, 2004

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

Dear Mr. Tengan:

We acknowledge receipt, on July 2, 2004, of your water use permit applications for the Wailuku Shaft 33 (Well No. 5330-05) and Waihee Well 3 (Well No. 5431-04). However, please be aware that we cannot accept the application as complete for processing without the landowner's signature.

Your failure to submit a completed application by July 21, 2004 may raise the issue of whether your application can be treated as a continuing existing use. Nonetheless, we highly encourage that you acquire the landowner signature as soon as possible to avoid any appearance of a willful violation on either your or the landowner's part.

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

Sincerely,

YVONNE Y. IZU  
Deputy Director

Cl: ss
State of Hawaii
Commission on Water Resource Management
Department of Land and Natural Resources
Application for Water Use Permit
X Groundwater or Surface Water

Instructions: Please print in ink or type and send 15 copies of completed application with attachments to the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809. Application must be accompanied by a non-refundable filing fee of $25.00 payable to the Dept. of Land and Natural Resources. The Commission may not accept incomplete applications. For assistance, call the Regulation Branch at 587-0225. For further information and updates to this application form, visit http://www.hawaii.gov/dlnr/cwrm.

Permittee Information
1. (a) Applicant
   Firm/Name: Kehalani Mauka, LLC
   Contact Person: Jay Nakamura
   Address: 1100 Alakea St., 27th Flr.
   Phone: 808-537-5220 Fax: 808-537-1801
   E-mail:  

   (b) Landowner of Source
   Firm/Name: Kehalani Mauka, LLC
   Contact Person: Jay Nakamura
   Address: 1100 Alakea St., 27th Flr.
   Phone: 808-537-5220 Fax: 808-537-1801
   E-mail:  

Source Information
2. Water Management Area: Iao Aquifer
   Island: Maui

3. (a) Existing Well/Stream Diversion Name and State Number: Wailuku Shaft 33, State Well No. 5330-05
   (b) Proposed (New) Well/Stream Diversion Name:
   (c) Location: Address See attached. Attachment #: 3-5-1-67
      (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

4. Source Type (check one):
   X X Borehole
   X X Dike-confined
   X X Perched
   X X Caprock

5. Method of taking Water (check one):
   X X Artesian
   X X Well & Pump
   X X Diverted Surface
   X X Other (explain)

Use Information
6. Location of Proposed Water Use: (If possible, show on same maps as source location. Otherwise, attach similar maps) See attached.
   (a) 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: 5,771 MGD* (gallons per day, averaged over 1 year)

8. Method of Measurement:
   X Flowmeter
   X Open-pipe
   X weir
   X Orifice
   X Other (explain)

9. Quality of Water Requested:
   X Fresh
   X Brackish
   X Salt
   X Potable
   X Non-Potable

10. Proposed Use:
    X Municipal (including hotels, stores, etc.)
    X Individual Domestic
    X Irrigation
    X Industrial
    X Military

11. Proposed Time of Water Withdrawal or Diversion: 24 hours
    (Day/times of operation; example: 7 a.m. to 2 p.m.)

12. Applicant Must Establish That the Proposed Use of Water: See attached.
   (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 —
   A "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:
   *Includes Kehalani Project TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63 and 66.

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Note: Signing below indicates that the signatories understand and agree 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; 3) if necessary, further information may 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) Kehalani Mauka, LLC
Landowner (print) Kehalani Mauka, LLC
By Milwaukee Holdings, LLC, its member
Signature: Stanford S. Car, its manager
Date: July 20, 2004

For Official Use Only:

WUPAFORM (4/29/03)
**TABLE 1. TMKs TO USE REQUESTED WATER**

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**TOTAL GPD**

**DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE** n/a **DATE**

Only for verification that: 1) TMKs listed are consistent with zoning; and 2) projects listed are allowed with respect to zoning.

**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. Alt: Arthur D. Challacombe
Supplemental Information

Re: Kehalani Mauka, LLC; Application for ground water use permit for Iao Aquifer; dated July 20, 2004

USE INFORMATION

6(a). LOCATION OF PROPOSED WATER USE:

Kehalani Mauka, LLC is currently a Hawaii Limited Liability Company, and is in the process of negotiating a lease with the County Department of Water Supply (“County DWS”) that would, if a lease is reached, allow the County to continue to use Shaft 33, State Well No. 5330-05 (“Shaft 33”) for municipal purposes. If agreement on a lease with the County is not reached, the Kehalani Mauka, LLC or its designee, will continue the municipal use of Shaft 33 as a public utility, regulated by the Hawaii Public Utilities Commission.

10. PROPOSED USE:

Kehalani Mauka, LLC intends to use the water for municipal purposes including its Kehalani project located in Wailuku, Maui. (See Attachments 2 & 3) The water will be used for residential, park, school, commercial and irrigation of the common areas of the project. In addition, pending agreement on a lease with the County DWS, water will be used for municipal purposes as part of the County's Central Maui Water System (“CMWS”). Shaft 33, as of the date of designation, pumps approximately 5.8 mgd. that is used as part of the County system.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

(a) Can be accommodated with the available water source.

This water use application is for an existing use for Shaft 33, for an allocation of 5.771 mgd, the average existing use for the last year prior to designation of Iao Aquifer. Kehalani Mauka, LLC has allowed the County DWS, on an interim basis, to use Shaft 33 to serve as a part of the County’s municipal system. The parties are currently negotiating a long-term lease that would allow the County to continue the use of the Shaft 33 facilities. Kehalani Mauka believes that given the location of Shaft 33 in the Iao Aquifer, and its historical use, the application for 5.771 mgd. can be accommodated within the Iao Aquifer’s sustainable yield. The water used from Shaft 33 by the County of Maui has already been calculated in the approximately 18 mgd. used by the County in Iao aquifer and this application is being made in conjunction with that existing use and not in addition to it.
Shaft 33 is a part of the CMWS that serves central and south Maui. See Attachment 4, map of the historic service areas for Shaft 33. Shaft 33 has historically averaged approximately 5.8 mgd. this serves approximately 9667 households at the County standard rate of 600 gpd.

(b) Reasonable and beneficial use.

Kehalani is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single-family residences, located at the base of the West Maui Mountains with an expected build-out period of ten years. When completed, it will be one of the largest planned developments on the island. The current strategic focus is to develop the infrastructure for this master planned community, thus enabling the sale of both improved and unimproved lots to interested builders and developers.

Kehalani has land use and zoning entitlements and approvals that took over two decades to achieve. The Project District Zoning Ordinance allows maximum flexibility in fine-tuning development plans as the market dictates within an overall maximum of 2,400 residential units and up to 22 acres of neighborhood commercial development. The property is located adjacent to the County seat, Wailuku. Frontage on Honoapiilani Highway provides the project with great visibility required by commercial tenants and close proximity to Maui’s primary job centers and resorts.

Pending agreement with the County DWS, this water use for the Kehalani project as well as the water use for the existing county water system customers who use the CMWS would continue.

As part of the County water system, the County of Maui has instituted programs to protect the aquifer and use water in an economic and efficient utilization including: utilization of alternative surface water sources, development of new sources in Waihee, conservation programs including leak detections, automatic radio-read meters to replace old under-performing meters, use of reclaimed water where appropriate and available, conservation pricing and rate structure, low flow fixture distribution, and public education on the importance of conservation. In addition, the County has put resources into natural resource management and protection including USGS study on the availability of water in central Maui, watershed, wellhead and surface water protection programs.

Residential housing projects, including planned communities, have been recognized by the Commission as a reasonable and beneficial use of water. Municipal use of water has been recognized by the Commission as a reasonable and beneficial use of water.
(c) Will not interfere with any existing legal use.

Shaft 33 is the only source of the current county system that is located south of the Iao Stream and has historically been pumped at much higher levels than the present 5.771 mgd. Kehalani Mauka, LLC does not anticipate that pumpage at this level will interfere with any other existing legal uses, including other existing wells in Iao aquifer.

(d) Is consistent with the public interest.

The Kehalani project is one of the few planned residential communities of this scale that offers affordable housing for local residents and seniors. The project provides housing within a few miles of Wailuku, the county center that is available and affordable for local residents. In fact, some housing sold has an owner/occupant requirement for a certain period of time to allow residents to purchase housing in close proximity to work and schools.

A component of the request is for domestic use. The Hawaii Supreme Court in In the Matter of Water Use Permit Applications, ("Waiahole I"), 94 Hawai'i 97 (2000) recognized domestic use as a public trust purpose. As a public trust purpose, domestic use should be recognized as in the public interest and should be given priority by the Commission. In addition, the Commission has found municipal use in the public interest.

Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest. (See Attachment 4) Serving municipal uses in the Kehalani project would similarly be in the public interest.

Kehalani Mauka, LLC has no practicable alternatives to the use of Shaft 33 for its municipal water needs. Surface water would require expensive treatment prior to using it for drinking water and may have other environmental effects that would make it not practicable. Reuse water is not an option for domestic use for health reasons and may not be available nor affordable for landscape irrigation use. The project is located within the Iao aquifer, and other ground water sources may not be available given the sustainable yield of the aquifer. Therefore, there are no practicable alternatives for Kehalani Mauka, LLC besides the use of Shaft 33.
(e) Is consistent with State and County general plans and land use designations.

The project has the appropriate State and County general plans and land use designations. The project lands are designated "urban" in the State land use classification system. The project is designated "Project District No. 3" in the Wailuku-Kahului community plan.

(f) Is consistent with County land use plans and general policies.

The property is consistent with County land use plans and general policies. The property is current classified under Ordinance No. 2053, the "Wailuku-Kahului Project District 3," which was specifically created to provide for the Kehalani project.

(g) Will not interfere with the rights of the Department of Hawaiian Home Lands ("DHHL").

Kehalani Mauka, LLC is unaware of any DHHL lands near the project nor are there any DHHL wells in the lao aquifer. Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL. Pending a lease with the County DWS, DHHL currently receives water from the County water system that includes this source, and the continuation of that use will benefit the DHHL. Kehalani Mauka, LLC is aware that any permit issued would be subject to the rights of the DHHL under Section 221 of the Hawaiian Homes Commission Act.
Wailuku Shaft 33
Wailuku Shaft 33 Service Area "A"
State of Hawaii
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
APPLICATION FOR WATER USE PERMIT
XXGroundwater or ☐ Surface Water

Instructions: Please print in ink or type and send 15 copies of completed application with attachments to the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809. Application must be accompanied by a non-refundable filing fee of $25.00 payable to the Dept. of Land and Natural Resources. The Commission may not accept incomplete applications. For assistance, call the Regulation Branch at 587-0235. For further information and updates to this application form, visit http://www.hawai.gov/dlnr/cwrm/

PERMITTEE INFORMATION
1. (a) APPLICANT: Kehalani Mauka, LLC
   Firm/Name: Kehalani Mauka, LLC
   Contact Person: Jay Nakamura
   Address: 1100 Alakea St., 27th Flr.
   Phone: 808-537-5220 Fax 808-537-1801
   E-mail: ____________________________

SOURCE INFORMATION
2. WATER MANAGEMENT AREA: Iao Aquifer
   ISLAND: Maui
3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Wailuku Shaft 33, State Well No. 5330-05
   (If source doesn’t presently exist, please attach well construction/stream diversion permit or application)
(b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME: ____________________________
   (Attach and show source location on a USGS map, scale 1:2000, and a property tax map)

USE INFORMATION
4. SOURCE TYPE (check one): ☐ stream ☐ ground
   ✔ Artesian __________________________________________
   ☐ Dike-confined ☐ Perched ☐ Caprock
5. METHOD OF TAKING WATER (check one): ________________________________________
   Drawdown
   ✔ Intended Dedication to Dept. /Board of Water Supply ☐ Non-PUC-Regulated Private System
   ✔ Open-pipe ☐ Well ☐ Dike-confined ☐ Perched ☐ Caprock
   ✔ Non-PUC-Regulated Private System
   (Attach and show source location on a USGS map, scale 1:2000, and a property tax map)
6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps) See attached.
   (a) 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: 5.771 MGD* gallons per day (averaged over 1 year)
8. METHOD OF MEASUREMENT: __________________________________________
   ✔ Flowmeter ☐ Open-pipe ☐ Well ☐ Dike-confined ☐ Perched
   ✔ Non-PUC-Regulated Private System
   ✔ Diverted Surface ☐ Other (explain)
9. QUALITY OF WATER REQUESTED: ____________________________________________
   ✔ Artesian ☐ Brackish ☐ Other (explain)
   ✔ Perched ☐ Salty ☐ Non-Potable
10. PROPOSED USE: __________________________________________
    ☐ Municipal (including hotels, stores, etc.) ☐ Individual Domestic ☐ Military
    ☐ Industrial ☐ Irrigation ☐ Other Explain ____________________________
11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: 24 hours
    (daytime hours of operation; example, 7 a.m. to 2 p.m.)
12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER: See attached.
    (a) Can be accommodated with the available water source.
    (b) Is a reasonable-beneficial use.*
    (c) Will not interfere with any existing legal use.
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    (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: *Includes Kehalani Project TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63 and 66, 67, 70, 71, 72.

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; 3) if necessary, further information may 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) Kehalani Mauka, LLC Landowner (print) Kehalani Mauka, LLC
By Milwaukee Holdings, LLC, its member By Milwaukee Holdings, LLC, its member
Signature: ________ Date: July 20, 2004 Signature: ________ Date: July 20, 2004

Official Use Only:

WUPA FORM (4/29/03)
TABLE 1. TMKs TO USE REQUESTED WATER

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dated July 20, 2004

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6(a). LOCATION OF PROPOSED WATER USE:

Kehalani Mauka, LLC is currently a Hawaii Limited Liability Company, and is in the process of negotiating a lease with the County Department of Water Supply ("County DWS") that would, if a lease is reached, allow the County to continue to use Shaft 33, State Well No. 5330-05 ("Shaft 33") for municipal purposes. If agreement on a lease with the County is not reached, the Kehalani Mauka, LLC or its designee, will continue the municipal use of Shaft 33 as a public utility, regulated by the Hawaii Public Utilities Commission.

10. PROPOSED USE:

Kehalani Mauka, LLC intends to use the water for municipal purposes including its Kehalani project located in Wailuku, Maui. (See Attachments 2 & 3) The water will be used for residential, park, school, commercial and irrigation of the common areas of the project. In addition, pending agreement on a lease with the County DWS, water will be used for municipal purposes as part of the County's Central Maui Water System ("CMWS"). Shaft 33, as of the date of designation, pumps approximately 5.8 mgd. that is used as part of the County system.

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:

(a) Can be accommodated with the available water source.

This water use application is for an existing use for Shaft 33, for an allocation of 5.771 mgd, the average existing use for the last year prior to designation of Iao Aquifer. Kehalani Mauka, LLC has allowed the County DWS, on an interim basis, to use Shaft 33 to serve as a part of the County's municipal system. The parties are currently negotiating a long-term lease that would allow the County to continue the use of the Shaft 33 facilities. Kehalani Mauka believes that given the location of Shaft 33 in the Iao Aquifer, and its historical use, the application for 5.771 mgd. can be accommodated within the Iao Aquifer's sustainable yield. The water used from Shaft 33 by the County of Maui has already been calculated in the approximately 18 mgd. used by the County in Iao aquifer and this application is being made in conjunction with that existing use and not in addition to it.
Shaft 33 is a part of the CMWS that serves central and south Maui. See Attachment 4, map of the historic service areas for Shaft 33. Shaft 33 has historically averaged approximately 5.8 mgd. This serves approximately 9667 households at the County standard rate of 600 gpd.

(b) Reasonable and beneficial use.

Kehalani is a 550-acre master planned community of approximately 2,400 homes including a mixture of commercial properties, multi-family dwellings and single-family residences, located at the base of the West Maui Mountains with an expected build-out period of ten years. When completed, it will be one of the largest planned developments on the island. The current strategic focus is to develop the infrastructure for this master planned community, thus enabling the sale of both improved and unimproved lots to interested builders and developers.

Kehalani has land use and zoning entitlements and approvals that took over two decades to achieve. The Project District Zoning Ordinance allows maximum flexibility in fine-tuning development plans as the market dictates within an overall maximum of 2,400 residential units and up to 22 acres of neighborhood commercial development. The property is located adjacent to the County seat, Wailuku. Frontage on Honoapiilani Highway provides the project with great visibility required by commercial tenants and close proximity to Maui's primary job centers and resorts.

Pending agreement with the County DWS, this water use for the Kehalani project as well as the water use for the existing county water system customers who use the CMWS would continue.

As part of the County water system, the County of Maui has instituted programs to protect the aquifer and use water in an economic and efficient utilization including: utilization of alternative surface water sources, development of new sources in Waihee, conservation programs including leak detections, automatic radio-read meters to replace old under-performing meters, use of reclaimed water where appropriate and available, conservation pricing and rate structure, low flow fixture distribution, and public education on the importance of conservation. In addition, the County has put resources into natural resource management and protection including USGS study on the availability of water in central Maui, watershed, wellhead and surface water protection programs.

Residential housing projects, including planned communities, have been recognized by the Commission as a reasonable and beneficial use of water. Municipal use of water has been recognized by the Commission as a reasonable and beneficial use of water.
(c) Will not interfere with any existing legal use.

Shaft 33 is the only source of the current county system that is located south of the lao stream and has historically been pumped at much higher levels than the present 5.771 mgd. Kehalani Mauka, LLC does not anticipate that pumpage at this level will interfere with any other existing legal uses, including other existing wells in lao aquifer.

(d) Is consistent with the public interest.

The Kehalani project is one of the few planned residential communities of this scale that offers affordable housing for local residents and seniors. The project provides housing within a few miles of Wailuku, the county center that is available and affordable for local residents. In fact, some housing sold has an owner/occupant requirement for a certain period of time to allow residents to purchase housing in close proximity to work and schools.

A component of the request is for domestic use. The Hawaii Supreme Court in In the Matter of Water Use Permit Applications, ("Waiahole I"), 94 Hawai'i 97 (2000) recognized domestic use as a public trust purpose. As a public trust purpose, domestic use should be recognized as in the public interest and should be given priority by the Commission. In addition, the Commission has found municipal use in the public interest.

Shaft 33 currently is a part of the Department of Water Supply's Central Maui System that serves all of Central Maui's domestic and municipal water needs. Serving that need is in the public interest. (See Attachment 4) Serving municipal uses in the Kehalani project would similarly be in the public interest. Kehalani Mauka, LLC has no practicable alternatives to the use of Shaft 33 for its municipal water needs. Surface water would require expensive treatment prior to using it for drinking water and may have other environmental effects that would make it not practicable. Reuse water is not an option for domestic use for health reasons and may not be available nor affordable for landscape irrigation use. The project is located within the lao aquifer, and other ground water sources may not be available given the sustainable yield of the aquifer. Therefore, there are no practicable alternatives for Kehalani Mauka, LLC besides the use of Shaft 33.
(e) Is consistent with State and County general plans and land use designations.

The project has the appropriate State and County general plans and land use designations. The project lands are designated "urban" in the State land use classification system. The project is designated "Project District No. 3" in the Wailuku-Kahului community plan.

(f) Is consistent with County land use plans and general policies.

The property is consistent with County land use plans and general policies. The property is current classified under Ordinance No. 2053, the "Wailuku-Kahului Project District 3," which was specifically created to provide for the Kehalani project.

(g) Will not interfere with the rights of the Department of Hawaiian Home Lands ("DHHL").

Kehalani Mauka, LLC is unaware of any DHHL lands near the project nor are there any DHHL wells in the lao aquifer. Kehalani Mauka does not believe that this request will interfere with the rights of the DHHL. Pending a lease with the County DWS, DHHL currently receives water from the County water system that includes this source, and the continuation of that use will benefit the DHHL. Kehalani Mauka, LLC is aware that any permit issued would be subject to the rights of the DHHL under Section 221 of the Hawaiian Homes Commission Act.
Wailuku Shaft 33 Service Area "B"