

**STATE OF HAWAI'I
OFFICE OF HAWAIIAN AFFAIRS
560 N. NIMITZ HIGHWAY, SUITE 200**

**COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT
MINUTES**

March 4, 2020 1:00 p.m.

ATTENDANCE:

Chairperson John Waihe'e, IV
Vice-Chairperson Kaleihikina Akaka
Trustee Leina'ala Ahu Isa
Trustee Dan Ahuna
Trustee Keli'i Akina
Trustee Brendon Kalei'aina Lee
Trustee C. Hulu Lindsey
Trustee Robert Lindsey
Trustee Colette Machado

ADMINISTRATION STAFF:

Sylvia Hussey, Ka Pouhana
Annie Kauhane, PP
Everett Ohta, CC
Gloria Palma, ADV
Jenifer Jenkins, PP
Jocelyn Doane, PP
Kai Markell, COMP
Keola Lindsey, ADV
Olan Fisher, PP
Raina Gushiken. CC
Wayne Tanaka, ADV

BOT STAFF:

Alyssa-Marie Kau
Brandon Mitsuda
Crayn Akina
Kama Hopkins
Kauikeaolani Wailehua
Lei Ann Durant
Maria Calderon
Mark Watanabe
Melissa Wennihan
Nathan Takeuchi

GUESTS:

Pamela Bunn, Esq.

I. CALL TO ORDER

Chair Waihe'e calls the Committee on Beneficiary Advocacy and Empowerment meeting for Wednesday, March 4, 2020 to order at **1:00 p.m.**

Chair Waihe'e notes for the record that **PRESENT** are:

| MEMBERS | | | AT CALL TO ORDER (1:00 p.m.) | TIME ARRIVED |
|------------|--------------------|-------------|---------------------------------|--------------|
| CHAIR | JOHN | WAIHE'E, IV | PRESENT | |
| VICE-CHAIR | KALEIHIKINA | AKAKA | PRESENT | |
| TRUSTEE | LEINA'ALA | AHU ISA | PRESENT | |
| TRUSTEE | DAN | AHUNA | PRESENT | |
| TRUSTEE | KELI'I | AKINA | PRESENT | |
| TRUSTEE | BRENDON KALEI'AINA | LEE | PRESENT | |
| TRUSTEE | CARMEN HULU | LINDSEY | PRESENT | |
| TRUSTEE | ROBERT | LINDSEY | PRESENT | |
| TRUSTEE | COLETTE | MACHADO | PRESENT | |

At the Call to Order, **NINE (9) Trustees are PRESENT**, thereby constituting a quorum.

Chair Waihe'e would like the record to show that some materials were received more recently than 72 hours ago, and that deadline per practice has been duly waived.

II. PUBLIC TESTIMONY*

None

III. APPROVAL OF MINUTES

- A. February 5, 2020
- B. February 12, 2020

BAE Vice-Chair Akaka moves to approve the minutes of February 5 and 12, 2020.

Trustee Machado seconds the motion.

Chair Waihe'e asks if there is any discussion. There is none.

Chair Waihe'e calls for a ROLL CALL VOTE.

| | | | | | | | 1:01 p.m. |
|-------------------------|---------|---|---|-----------|------------|-------------------|-----------|
| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA | AHU ISA | | | X | | | |
| DAN | AHUNA | | | X | | | |
| VICE-CHAIR KALEIHIKINA | AKAKA | 1 | | X | | | |
| KELI'I | AKINA | | | X | | | |
| BRENDON KALEI'AINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | | | X | | | |
| ROBERT | LINDSEY | | | X | | | |
| COLETTE | MACHADO | | 2 | X | | | |
| CHAIR JOHN | WAIHE'E | | | X | | | |
| TOTAL VOTE COUNT | | | | 9 | 0 | 0 | 0 |

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

Chair Waihe'e notes for the record that all members present vote 'AE (YES) and the MOTION CARRIES.

IV. UNFINISHED BUSINESS

A. 2020 OHA Legislative Package Updates - Matrix 1**†

Chair Waihe'e turns it over to Ka Pouhana Sylvia Hussey.

Ka Pouhana Hussey: Good afternoon Trustees, your fearless Public Policy Manager Jocelyn Doane is here to present.

Public Policy Manager Doane: Hi Trustees, so going through our package – it's doing surprisingly decently. OHA-1, the Senate version just moved over to the House – we originally requested four of the seven BLNR and four of the nine LUC members be appointed from a list from OHA; it was amended to be one which is still a victory. They were originally proposing to take it out, so we advocated and luckily the conversation is still alive. So that bill should pass. An important thing to note though is that the House Water and Land Chair didn't even hear the last bill, so we have some requests to make and meetings to have, to see if we can convince him to do that – maybe he'll like the one member better than the four.

OHA-2; our Employment Discrimination bills - both have crossed over from its respective chambers. They'll likely be heard between the 16th and 20th of this month in order to keep moving.

OHA-3, died a while ago, which we're not shocked about. The discussions happening at the legislature is less about increasing the regulations for Historic Preservation and more about changing the regulations.

OHA-4, our resolutions are doing fine. The resolution introduction deadline is on Friday, and our Senate resolution has already met its deadline; it just needs to crossover to the House. The House resolution will probably get its committee assignment when the rest are assigned.

OHA-5, also died unfortunately. As we've discussed in the past, the plaintiff's attorney lobbyists are very powerful. We knew this was going to be an uphill battle.

OHA-6, is doing surprisingly well. The Senate version is crossing over to the House.

That's the update for our package.

Chair Waihe'e asks if there are any questions on the OHA Legislative Package.

There are none.

V. NEW BUSINESS

A. 2020 OHA Legislative Positioning – Matrix 2**†

Chair Waihe'e turns it back over to Ka Pouhana Sylvia Hussey.

Ka Pouhana Hussey recalls on Public Policy Manager Jocelyn Doane and Senior Public Policy Advocate Wayne Tanaka to present.

Public Policy Manager Doane: So, we have one new resolution for your consideration, and a couple of measures that are not on the matrix because they were just introduced yesterday. SCR70 & SR37 are resolutions being introduced by the State Women's Commission related to a missing and murdered indigenous women task force. There's been a lot of discussion nationally about missing and murdered indigenous women across the country. Up to this point we have not necessarily looked at data as how it relates to Native Hawaiians specifically.

The State Women's Commission would be required to convene a Task Force and would also need the Administrator of the Task Force to determine the scope of the issue and report, investigate and compile data relating to missing and murdered Native Hawaiian women and girls in Hawai'i. We would be on the Commission along with: the Prosecuting Attorney and Police Chief of every County, the Attorney General and the Administrative Director of the Courts, the Director of Health, the Director of Human Health Services and some Community service providers, including Papa Ola Lokahi. The Commission would be required to report their findings at the end of 2021. We talked a little about data related to sex trafficking and Native Hawaiians specifically, so we think that there may be an issue here. We think it is a good idea to support, so we're recommending a position of SUPPORT on that. That's the only change I'm recommending. There are a few new measures that I'm going to go over really, quickly.

Page 2, There are eight resolutions related to potential sales by primarily HHFDC. You may recall that we have a policy to oppose almost any sale of ceded lands; we have some exceptions.

Items 6 & 10 – HCR20 & SCR23; are related to a portion of a street that would be sold to the City. I believe they're trying to condense projects, so this is related to kupuna rentals. This is a street, which makes it highly likely to be sold in the future and it's going to the City. So, we would recommend a position of MONITOR.

Items 7 & 11 – HCR21 & SCR24; on Inoaole Street in Waimanalo are ceded. 174 of 190 units have already been purchased and they started selling them before OHA filed their lawsuit. So, we would not recommend oppose for that reason – we are recommending MONITOR.

Items 8, 9, 12 & 13– HCR22, HCR23, SCR25 & SCR26; on Kuahelani Avenue and Mehe'ula Parkway in Mililani are not ceded lands, so we would recommend MONITOR on those as well.

There are a couple of **BILL POSITION CHANGE RECOMMENDATIONS** that we need to make, but I wanted to talk about all the HHFDC exemptions to 172 bills together to see how the Trustees want to proceed with them in a consistent way.

I spent the last two days re-reading all these bills to make sure I understand them, looking back at HHFDC's administrative rules and statutes. So, I want to go through all of them, and you'll note there are question marks because I want to have a discussion with the Trustees about what they do and then we can talk about what makes sense.

The first one is HB2297 – as a reminder DLNR has management and control over almost all of the State lands. There are exceptions to that rule - so basically what that means is that there is a framework of how Hawai'i can manage most of its Public Lands in a transparent way; an accountable way. In that Chapter you have lease length maximums, most of which are 65 years. There are provisions that only allow lease length extensions in certain circumstances and under certain circumstances. It requires for the most part, Fair Market Value, except for when you're leasing to another State agency or to a Non-Profit. We think that those processes and the transparent processes to make sure that they manage the Public Lands are really, important and we rely upon that for many things, including evaluation. That's how lands get leased. Different State agencies including HHFDC may exercise management and control over lands that they own. The rule is generally the exceptions to when DLNR has management, oversight and control; or for when a State agency truly owns the land.

HHFDC can currently do Affordable Housing with an unlimited number of years. That's not what they generally do now, but they could. So, that's really, important to understand because when you change who gets to decide and what rules apply, then you change things like: accountability, transparency, how evaluation is determined and then of course how long a property can be leased for.

HB2297 is one of the many bills we're going to discuss that would expand the applicability of HHFDC's disposition policies which is found in their statutes and rules to apply to substantially increase lands and in this instance it would be lands set aside to HHFDC primarily for Affordable Housing. So, this would not be lands leased from another State agency which is a policy being considered on a bunch of different bills. So, the set aside process is that the Governor decides that he/she is going to set aside lands to HHFDC and the BLNR would have to approve of it. So, there is some level of transparency there because the Board would have an opportunity to assess the situation. This specific bill does not include a provision that requires HHFDC to transfer units to OHA or DHHL.

There have been a lot of questions from the community about some of these bills like;

- *What lands are we talking about? and*
- *How do you know what lands we're going to use?*

The policy itself that is being proposed would be for any lands the Governor is willing to set aside to them, which are all public lands which are primarily and overwhelmingly ceded.

As the trustees know, we generally oppose any long-term leases and the form in which they've been taking over recent years is 99-years on Ceded or Public Land Trust Lands. With the multi-generations involved, you start creating a scenario where lessees feel like they own the land. Every year I see lessees at the legislature looking for policies to poke holes through some of these processes to let them have longer leases; overwhelmingly that's what the conversation is.

Trustee Lee: Just for clarification for the Board, our original position on this measure last year was Oppose and then we changed it to Comment.

Public Policy Manager Doane: So, generally we've opposed all 99-year lease bills. This bill would allow for leases even longer than 99 years. We would also oppose any exemptions to §171-2 that does not also make sure that they clearly comply with §171-64.7. We did change our position from Oppose to Comment because they made the amendment that we had asked for.

However, what has happened over the last year is that these bills have decreased after more research into §201H; a process which we never really had to do before. I don't know of any crazy, long leases on property we care about that they've done. Also, I do not think they've been doing a lot of super, long leases, but now it's a conversation and that's real. In learning more about the §201H processes, I've realized there is no lease term so that made me worried. Thus, I'm bringing this up today because I want the trustees to understand the context in which this is all happening so that we can decide as a Board what position we want to take.

Chair Waihe'e: Members, *does anybody have any insight?*

Trustee Lee: I think our opinion should be that these are our lands; and they're going to take it away from us again and lease it out into perpetuity. Our beneficiaries see the benefit to that and saying that Affordable Housing is a benefit is a flat out lie because there's no guarantee that it will go to our beneficiaries. If it's Affordable Housing - for sure no money is going to come to our beneficiaries. The purpose of Affordable Housing isn't to make money.

Trustee Ahuna: So, *what position do we want to take?*

Trustee Lee: I would agree with the position we took last year changing from Oppose to Comment, with the comments being that we want these provisions included. If we get questioned, which I'm sure we will; then we will fight against it because they're taking our land again.

Chair Waihe'e: If I understand correctly, we were opposing it until they made changes that made it so we commented, but now they moved those changes; *why wouldn't the recommendation go back to Oppose?*

Public Policy Manager Doane: So, it's a little bit more complicated than that – right now there are six bills that do the same §171-2 thing. We didn't totally realize what they could do, and the bills look really, different. Some of the bills do say '99 years' - some of the bills are silent and because they're silent – that means we have to learn about all the statutes and rules that would apply in those instances which we're less savvy about. I'm learning new information about how all these statutes work together. That's why I'm bringing them all to you now. I didn't realize at the time that we changed our position to comment - that they could do lease lengths forever.

Chair Waihe'e: I guess what I'm asking is, if they don't even have the bare minimum that changed it from Oppose to Comment – *why wouldn't you just recommend Oppose?*

Trustee Lee: I would have to agree with Trustee Waihe'e.

Public Policy Manager Doane: They made the change that we asked them to make last year.

Trustee Lee: *Then they took it out?*

Public Policy Manager Doane: No, they did not. What I'm trying to say and maybe I'm not doing the best of articulating it - is that now that I know what this truly means - an issue of which I was less aware of last year. Now that I know what this means I have more information than I'm bringing to the Board about what it means in practice. I know this is confusing because we've talked about it in detail with the other bills. This bill is not detailed like the other bills; it just has simple statutory changes. So, to understand the legal and policy implications of those changes, required more research.

Chair Waihe'e: The question I'm asking is *why aren't you recommending Oppose?* Everything that you're saying is making it even more so that we should Oppose it then we did before and your recommendation is currently Comment with a question mark.

Trustee Lee: Let me put it a different way, if you had known last year what you know now – *would you have to come to us with a recommendation to change to Comment or would we have left it as Oppose?*

Public Policy Manager Doane: I'm sorry, I understand your question. I wanted input from the trustees because the reason why we were opposing is nuance and sometimes difficult to explain to the lay person – where it would just look like we're opposing Affordable Housing projects. So, I wanted to make sure that we had a buy-in from all the trustees about the decisions that we're making. That's why I didn't come with a pre-recommendation.

Trustee Robert Lindsey: Whenever in your learning and trying to get a good sense about any bill, if in your mind these bills are detrimental to our basic mission, then clearly in my head, if I was sitting in your place, I'd say this is not good for our people and we should Oppose.

Public Policy Manager Doane: Ok, so what I'm hearing, is that the sentiment is that we would likely Oppose these kinds of bills and I just want to make sure that is where we're all at. Then, accordingly and consistent with that, I would recommend that we also Oppose Items 16, 18 and 19 – SB2036, SB2308 and SB3104.

Trustee Akina: *What would these bills have to reflect in order of us not to Oppose them?*

Public Policy Manager Doane: There would have to be some explicit consideration for Native Hawaiian interest, which are in two bills that we are not recommending Oppose on – Items 87 (SB2043) and 148 (SB2946). The gist is they want to provide more lands for HHFDC to build more housing; it makes sense. The only concerns that have been raised that I have heard; is fair housing and remuneration in these two bills that we are recommending COMMENT on.

Trustee Robert Lindsey: Housing is one of our Strategic Priorities and we know that Housing is critical for our State and our people. *Do we have data to show how this impacts our mission and how many of our Hawaiian people this would benefit?*

Public Policy Manager Doane: In all of our testimony we show how we're particularly impacted by the Housing crisis. We just go and show Housing data specifically for Native Hawaiians that was just published a month or so ago. Our needs are as needy as everyone else and the fact that we make less money than others. So absolutely the need and justification for Native Hawaiians to specifically be considered for housing is there. We wrote the language in a way that would give HHFDC flexibility for determining what kinds of projects would make sense to have DHHL units. So, if it's the will of the Board, I will recommend that we OPPOSE items 15, 16, 18 and 19.

Trustee Lee: With the understanding that we're going share our concerns with them, we won't just say that we stand on our position; we will highlight our concerns.

Public Policy Manager Doane: Yes, we will be clear that we are not just opposing the bills and share the ways that we've identified to address our concerns in our testimony.

Trustee Akina: *Is it too late to pursue amending these bills?*

Public Policy Manager Doane: No, they're all crossing over. Honestly as it relates to Item 19, it crossed over with a clean effective date, so there's a high probability that it will not be amended at all in the House and will be adopted early.

Trustee Machado: SB3104, there's a portion that says *exempts from the definition of Public Lands not set aside by the Governor or leased by any State Department or agency to the Hawai'i Housing Finance and Development Corporation*. That grabs me the wrong way, that's why we must Oppose.

Public Policy Manager Doane: Yes, that language is in all four of the bills.

Trustee Machado: That's critical.

Public Policy Manager Doane: Ok. So, if there are no other questions about the Affordable Housing bills then I'll move on. Page 3, Item 17 – SB2308; This is just a correction from last week, we didn't catch the companion. This is related to a sex trafficking committee and we would ask that OHA be put on there.

If you'll entertain us for a few more minutes there are some other **KEY BILLS** that I'd like to go over, we are not asking for any changes on these.

Page 16, Item 82 – SB1363; this is the Public Land Trust Bill with blanks. I think they absolutely moved this bill because they took us out of the other bill, but as you know this will be a huge uphill battle in the House. This bill is crossing over.

Page 22, Item 113 – SB2414; we went over this last week, the OHA Election Randomization Bill – they deleted the language that would randomization per precinct, so it might be that it's only randomized once. Whereas the last version would've had alphabetical randomization per precinct.

Senior Public Policy Advocate Tanaka: Page 10, Item 54 – HB2191; this measure would authorize the Board of Land and Natural Resources to extend all Commercial, Industrial, Resort, and Government Leases for up to 40 years. We’ve been continuing to OPPOSE because such authority would allow DLNR to essentially issue leases that would extend for over a century.

Public Policy Manager Doane: One last one. Page 31, Item 161 – SB3103; this is the School’s Facilities Bill that you may have seen in the news. It would establish a School Facilities agency that would kind of take over the responsibility of DAGS, but also potentially talk about other uses on school property. The horrible thing about this bill is that it exempts the agency from Chapter 6E completely, and it also has an exemption from 343 (EIS).

Those are all the updates I wanted to bring to your attention today.

Thank you.

Chair Waihe’e: Thank you Jocelyn. Members *are there any questions on the OHA Legislative Positioning?*

There are none.

Trustee Ahuna moves to approve Administration’s recommendations on:

NEW BILLS (Items 1 - 14) and where BILL POSITIONS FOR RECONSIDERATION Items are changed as follows:

- 15; HB2297 from ~~Comment~~ to OPPOSE
- 16; SB2036 from ~~Comment~~ to OPPOSE
- 17; SB2308 from ~~Monitor~~ to COMMENT
- 18; SB2648 from ~~Monitor~~ to OPPOSE
- 19; SB3104 from ~~Comment~~ to OPPOSE;

along with the following revision:

- ADD both SCR70 and SR37 as SUPPORT

on the OHA Legislative Positioning Matrix dated March 4, 2020, as amended.

| Bills that were discussed | | | | | |
|---------------------------|--------------|--|--|----------|-----------------------|
| ITEM | BILL # | REPORT | DESCRIPTION | POSITION | IN BAE MEETING CHANGE |
| New Bills | | | | | |
| ADD | SCR70 / SR37 | | REQUESTING THE HAWAII STATE COMMISSION ON THE STATUS OF WOMEN TO CONVENE A TASK FORCE TO CONDUCT A STUDY ON MISSING AND MURDERED NATIVE HAWAIIAN WOMEN AND GIRLS AND TO SUBMIT A REPORT ON THE STUDY TO THE LEGISLATURE. | | SUPPORT |
| 1 | HB1620 | RELATING TO THE ADMINISTRATION OF JUSTICE. | Amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case. Amends the requirements for appointing qualified examiners to perform examinations for penal responsibility. Requires an examination for penal responsibility to be conducted within fifteen days after a finding of fitness to proceed. Effective 7/1/2050. (HD2) | MONITOR | |

| | | | | |
|----|--------|--|---|---------|
| 2 | SB1256 | RELATING TO CERTAIN PENALTIES FOR VIOLATIONS OF SUBTITLE 4. | Amends fines for destroying or harvesting trees or tree products, including koa, on state forest reserves lands to an amount up to \$10,000 or three times the market value at the time and place of the violation for each tree, whichever is greater, in addition to any costs associated with restoration or replacement of the habitat and damages to public land or natural resources, or any combination thereof. Clarifies that any person violating any provision of part II (Forest Reserves) of chapter 183, Hawai'i Revised Statutes, or any rule adopted pursuant thereto, other than section 183-17, Hawai'i Revised Statutes, shall be guilty of a petty misdemeanor. Decriminalizes traffic infractions within forest reserves and sets fine amounts. Repeals the general penalty provision of section 183-4, Hawai'i Revised Statutes. Takes effect 12/31/2050. (SD1) | MONITOR |
| 3 | SB2033 | RELATING TO THE ADMINISTRATION OF JUSTICE. | Amends the effect of finding a defendant charged with a misdemeanor or petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Effective 7/1/2050. (SD1) | MONITOR |
| 4 | SB2408 | RELATING TO THE COMPOSITION OF THE STATE COUNCIL ON MENTAL HEALTH. | Requires the State Council on Mental Health to include an unspecified number of members with demonstrated knowledge of or work experience involving native Hawaiian concepts of well-being, culturally grounded mental health methodologies, or traditional healing or health practices. Effective 7/1/2050. (SD2) | SUPPORT |
| 5 | SB2627 | RELATING TO TAX CREDITS. | Increases the amount of the tax credit for individuals and households and the adjusted gross income eligibility cap for the income tax credit for low-income household renters using tax brackets for individuals and different categories of households and providing for annual increases based on the consumer price index. Effective 7/1/2050. (SD2) | MONITOR |
| 6 | HCR20 | | APPROVING THE TRANSFER OF THE LEASED FEE INTEREST IN A PORTION OF 610 COOKE STREET, HONOLULU, HAWAI'I, TO THE CITY AND COUNTY OF HONOLULU. | MONITOR |
| 7 | HCR21 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 41-613 INOAOLE STREET, WAIMĀNALO, HAWAI'I. | MONITOR |
| 8 | HCR22 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 95-033 KUAHELANI AVENUE, NO. 133, MILILANI, HAWAI'I. | MONITOR |
| 9 | HCR23 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 94-942 MEHE'ULA PARKWAY, NO. 244, MILILANI, HAWAI'I. | MONITOR |
| 10 | SCR23 | | APPROVING THE TRANSFER OF THE LEASED FEE INTEREST IN A PORTION OF 610 COOKE STREET, HONOLULU, HAWAI'I, TO THE CITY AND COUNTY OF HONOLULU. | MONITOR |
| 11 | SCR24 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 41-613 INOAOLE STREET, WAIMĀNALO, HAWAI'I. | MONITOR |
| 12 | SCR25 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 95-033 KUAHELANI AVENUE, NO. 133, MILILANI, HAWAI'I. | MONITOR |
| 13 | SCR26 | | APPROVING THE SALE OF THE LEASED FEE INTEREST IN 94-942 MEHE'ULA PARKWAY, NO. 244, MILILANI, HAWAI'I. | MONITOR |
| 14 | SCR39 | | URGING THE STATE TO IMPLEMENT A STATEWIDE RESPONSIBLE TOURISM INITIATIVE TO HELP EDUCATE TOURING VISITORS ABOUT SUSTAINABLE BEHAVIORS WITH RESPECT TO SUNSCREENS, POLYSTYRENE, AND SINGLE-USE PLASTICS. | MONITOR |

| Bills that were discussed | | | | | |
|---|--------|--|---|-----------------------|-----------------------|
| ITEM | BILL # | REPORT | DESCRIPTION | POSITION | IN BAE MEETING CHANGE |
| Bill Positions for Reconsideration | | | | | |
| 15 | HB2297 | RELATING TO PUBLIC LANDS. | Exempts lands set aside by the Governor to HHFDC for the primary purpose of developing affordable housing from classification as public land subject to DLNR management. Provides that lands set aside to HHFDC and no longer needed for housing, finance, and development purposes be returned to the public trust administered by DLNR. Takes effect on 7/1/2025. (HD1) | COMMENT >> ? | Comment >>> OPPOSE |
| 16 | SB2036 | RELATING TO PUBLIC LANDS. | Clarifies that lands set aside to the HHFDC by the governor or leased to the corporation by other state departments and agencies are excluded from the definition of "public lands" and require approval from the legislature upon disposition. Requires that lands set aside by the governor or leased to the HHFDC be returned to the public trust or to the leasing agency if the HHFDC is no longer needed by the HHFDC. Effective date 6/18/2050. (SD2) | COMMENT >> ? | Comment >>> OPPOSE |
| 17 | SB2308 | RELATING TO THE SEXUAL EXPLOITATION OF CHILDREN. | Establishes within the Department of Human Services a sexually exploited children statewide coordinator and program and a commercial sexual exploitation of children steering committee to address the needs of sexually exploited children. Requires the commercial sexual exploitation of children steering committee to provide reports to the Legislature. Establishes within each county a commercial sexual exploitation of children multidisciplinary team to facilitate the sharing of information and to immediately respond to cases of child sex trafficking. Appropriates funds. Effective 7/1/2050. (SD2) | MONITOR >> COMMENT | |
| 18 | SB2648 | RELATING TO PUBLIC LANDS. | Clarifies that lands set aside to the Hawai'i housing finance and development corporation by the governor or leased to the corporation by other state departments and agencies are exempt from the definition of "public lands". Requires the Hawai'i housing finance and development corporation to dispose of public lands pursuant to chapter 171, Hawai'i Revised Statutes. Clarifies that lands set aside by the governor or leased to the Hawai'i housing finance development corporation from other state agencies are subject to legislative approval prior to the sale or gift of those lands. Effective 7/1/2050. (SD2) | MONITOR >> ? | Monitor >>> OPPOSE |
| 19 | SB3104 | RELATING TO LAND DEVELOPMENT. | Establishes a residential leasehold program within the Hawai'i Housing Finance and Development Corporation. Exempts from the definition of public lands, lands set aside by the Governor or leased by any state department or agency to the Hawai'i Housing Finance and Development Corporation, for the primary purposes of developing affordable housing. Requires the Hawai'i Housing Finance and Development Corporation to submit a report to the Legislature that identifies all state lands that may be developed for multi-unit dwellings. Requires the Hawai'i Housing Finance and Development Corporation to submit a report to the Legislature that addresses various housing concerns, including the steps necessary to end the State's housing shortage. Authorizes the issuance of \$275,000,000 in general obligation bonds, with the proceeds used for the establishment of infrastructure to support the development of housing. (SD2) | COMMENT >> ? | Comment >>> OPPOSE |

Vice Chair Akaka seconds the motion.

Chair Waihe'e asks if there is any discussion. There is none.

Chair Waihe'e calls for a **ROLL CALL VOTE**.

| | | | | | | | Motion: 1:54 p.m. Vote: 1:55 p.m. |
|-------------------------|---------|---|---|--------------|---------------|-------------------------------------|--------------------------------------|
| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA | AHU ISA | | | X | | | |
| DAN | AHUNA | 1 | | X | | | |
| VICE-CHAIR KALEIHIKINA | AKAKA | | 2 | X | | | |
| KELI'I | AKINA | | | X | | | |
| BRENDON KALEI'AINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | | | | | 1-Kanalua 2-Kanalua = ABSTAIN | |
| ROBERT | LINDSEY | | | X | | | |
| COLETTE | MACHADO | | | X | | | |
| CHAIR JOHN | WAIHE'E | | | X | | | |
| TOTAL VOTE COUNT | | | | 8 | 0 | 1 | 0 |

MOTION: [] UNANIMOUS [**X**] PASSED [] DEFERRED [] FAILED

V. NEW BUSINESS

B. ACTION ITEM: BAE #20-02: Approval of Nominee(s) for the Moloka'i Island Burial Council

Chair Waihe'e turns it back over to Ka Pouhana Sylvia Hussey.

Ka Pouhana Hussey recalls on Chief Advocate Keola Lindsey.

Chief Advocate Keola Lindsey: Aloha Chair, Vice-Chair, and Trustees. I'm presenting to you folks today for your review and consideration, an action item recommending approval of an OHA nominee to the Moloka'i Island Burial Council. Included in the Action Item attachments is the background information about the applicant and staff's review has confirmed that this applicant is well-qualified and committed to serve and is aware of the responsibilities that come with the position. This nominee, though it is just one person, is critical for the Moloka'i Council because that council has five seats and quorum is a 'majority of the seats the council is entitled to'. They currently only have two seats filled so with this nominee they would be able to start conducting meetings again. Since we last met two weeks ago, we were given many names for consideration and this person was the only one who has made it through our process during the timeframe. We're still working on some of the other names to get through the process and hope to come back later to add more names for consideration.

Chair Waihe'e: Ok, thank you. Members: *can we get a motion on the table before we move into any discussion?*

Trustee Machado moves to approve the Office of Hawaiian Affairs' 2020 Nomination of Ms. Frances "Makanani" Cobb-Adams for immediate appointment to the Moloka'i Island Burial Council.

Trustee Robert Lindsey seconds the motion.

Chair Waihe'e asks if there is any discussion.

Trustee Lee: I just wanted to inform the Committee that I've known Fran since she was four. She's a 13-year Senior from Kamehameha Schools, so I've known her pretty much my whole life.

Trustee Hulu Lindsey: Her mother danced hula for me.

Trustee Ahuna: I know her very well, from when we were kids too.

Trustee Hulu Lindsey: Call for the vote.

Chair Waihe'e asks if there is any further discussion. There is none.

Chair Waihe'e calls for a **ROLL CALL VOTE**.

| | | | | | | Motion: 1:59 p.m. Vote: 2:01 p.m. |
|------------------------------|---|---|--------------|---------------|----------------------|--------------------------------------|
| TRUSTEE | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA AHU ISA | | | X | | | |
| DAN AHUNA | | | X | | | |
| VICE-CHAIR KALEIHIKINA AKAKA | | | X | | | |
| KELI'I AKINA | | | X | | | |
| BRENDON KALEI'AINA LEE | | | X | | | |
| CARMEN HULU LINDSEY | | | X | | | |
| ROBERT LINDSEY | | 2 | X | | | |
| COLETTE MACHADO | 1 | | X | | | |
| CHAIR JOHN WAIHE'E | | | X | | | |
| TOTAL VOTE COUNT | | | 9 | 0 | 0 | 0 |

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

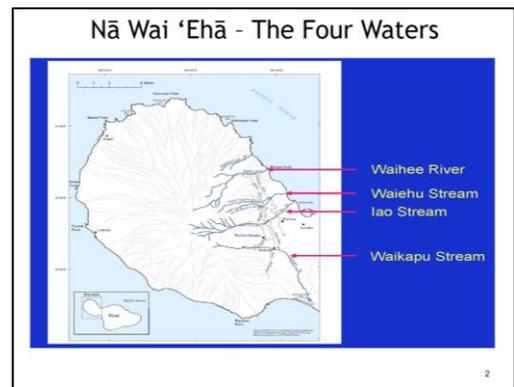
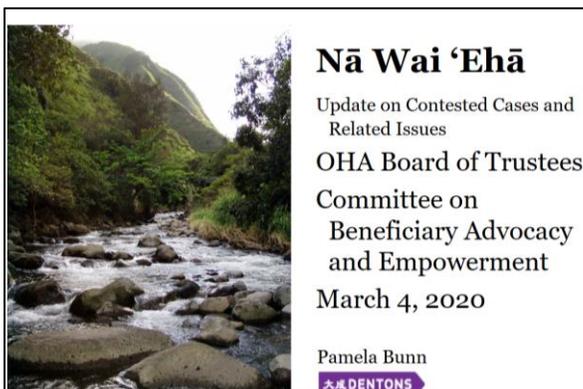
V. NEW BUSINESS

C. Briefing on the background and history of OHA participation in Nā Wai ‘Ehā (Maui) litigation and related matters.

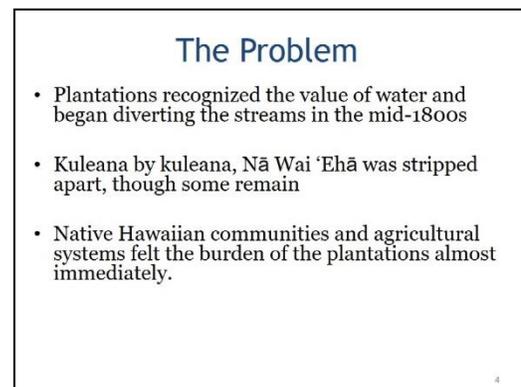
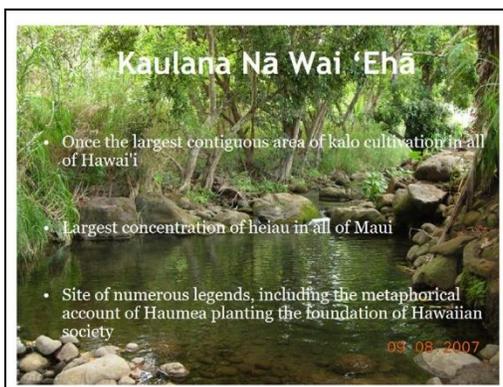
Chair Waihe‘e turns it back over to Ka Pouhana Sylvia Hussey.

Ka Pouhana Hussey recalls on Public Policy Manager Jocelyn Doane and Pamela Bunn, Esq. to provide some background and context.

Pamela Bunn: Good afternoon. For about sixteen years now it’s been my privilege and honor to represent OHA in the Nā Wai ‘Ehā Contested Cases and I do enjoy periodically coming in to update you. I’m hoping we’re going to have news soon because as you’ll see we’re getting to the point where we’re expecting a decision from the commission. Before that happens, I wanted to make sure you folks were updated. This case concerns Nā Wai ‘Ehā which are the four great waters of Maui; Waihe‘e River, Waiehu Stream, ‘Iao Stream which has now gone back to its original name Wailuku River and Waikapū Stream.



This is a legendary region of Maui; it was once the largest contiguous area of cultivation in all of Hawai‘i. It has the largest concentration of heiau and it’s the site of numerous legends. The problem has been that from the mid-1800s the plantations recognized the value of the abundant water in Nā Wai ‘Ehā and began diverting streams for sugar cultivation. The kuleana started disappearing as the Sugar planters bought up for very cheaply the water and put it in this diversion system and moved a lot of it to the Central plains for sugar. The Native Hawaiian Communities and the Agricultural Systems were impacted immediately.



Until late 2018 the waters of the four streams were controlled by HC&S and Wailuku Water Company which had previously been Wailuku Agribusiness and Wailuku Sugar.

“Hard crackers” - Kama’āina account from 1866

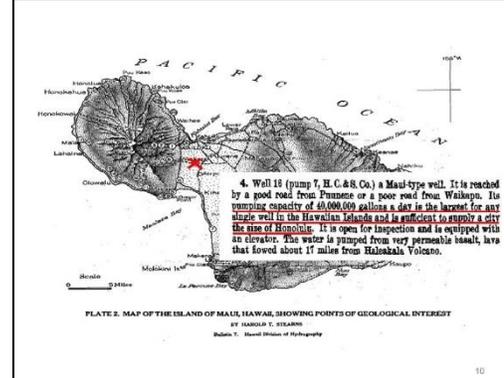
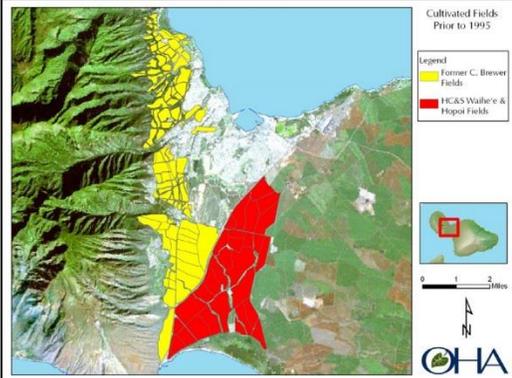
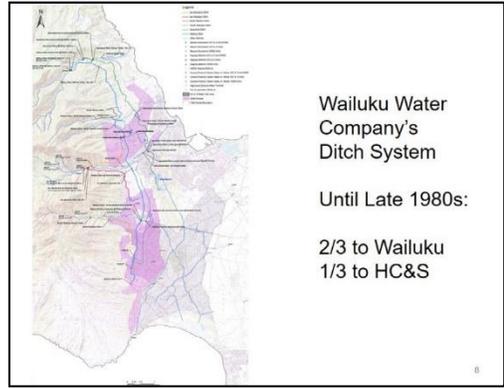
DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION--A letter by S.D. Hakuole, of Kula, Maui arrived at our office, he was declaring that the land of Wailuku is being lost due to the cultivation of sugarcane. Furthermore, he states the current condition of once cultivated laro patches being dried up by the foreigners, where they are now planting sugarcane. Also, he fears that Hawaiians of that place will no longer be able to eat poi, and that there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people. Although, let it be known that the Hawaiian people were accustomed to eating poi.

Nupepa Ruokoa
 A letter by S. D. Hakuole, of Kula, Maui, e hiki mai ana ko makou nei keena hana, he palapala na S. D. Hakuole, o Kula, Maui, e hiki mai ana i ka pou koo o ka maui o Wailuku i ka maui i ke ko. A ke hiki hou mai nei aq: ke hoomalua ia nei i ka laro lalo e na Holo, i wahi e kono ai i ke ko. A ke makou nei oi, e pau ana ka ai non o na laro oia wahi i ka ai ano i ka poi, a e ai wai e ai ana no pau i ka lalo oia haka naho, a i wahi aho mama e maua ole e na kama Hawaii. Oia na ma na kama i ka ai i ka poi, --.

Until late 2018, the waters of Nā Wai ‘Ehā were controlled by two companies: HC&S and Wailuku Water Company



Until the late 1980s there were agreements between the two companies by which they shared the water and shared operation of the system so about 2/3 of the water went to Wailuku Sugar and 1/3 to HC&S. HC&S is a subsidiary of A&B, and they had close to 40,000 acres in Central and East Maui and there were two large cases regarding the water rights for those. Nā Wai ‘Ehā was one and then there was the East Maui case because they had done the same thing in East Maui. The reason that HC&S could still grow sugar without having as much water as Wailuku is that it had a well, and it’s still there – it’s called Well No. 7. At the time it was built it was the largest well in all of Hawai‘i, it had a capacity of 40 million gallons per day – which is an astonishing amount of water; so Wailuku Sugar used most of the stream water and HC&S relied mostly on Well No. 7.



In the late 1980s there were a couple of changes that were pretty much independent of each other, but it resulted in the plantations needing quite a bit less water. So, Wailuku Agribusiness, which is now Wailuku Water Company stopped growing sugar all together and moved into Macadamia Nuts, Pineapple and other things that didn't require quite as much water. Then it started selling off its lands, so by the early 2000s it really had no more use for the water and became more of a water purveyor. HC&S completed a conversion from flood irrigation to drip irrigation, which in theory results in about a 90% reduction in water use. So, they needed a lot less water.

They didn't reduce the diversions however even though their water needs were substantially reduced. What

they did was HC&S started using Wailuku Water's share of the water so that it wouldn't have to use its Well. Then the electricity that it saved; it could sell to MECO because HC&S generated its own electricity. Diversions posed a problem for the communities of Nā Wai 'Ehā; most were without sufficient water to grow kalo on their kuleana lands.

Late 1980s - The Plantations Need Less Water, but Diversions Continue

- Wailuku Agribusiness Company (now Wailuku Water Company) ceased sugar cultivation, then ceased agriculture and starts selling off its lands. By early 2000s, it had no more use for water
- HC&S completed conversion from flood irrigation to drip irrigation
- Instead of reducing diversions, HC&S uses Wailuku's "share" of the diverted water and stops using Well No. 7

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The Problems with Diversions

- Traditional and customary Hawaiian rights are impaired
 - Some beneficiaries struggle to grow kalo with insufficient water, and some cannot grow kalo on their kuleana land at all
 - Lack of mauka to makai flow interrupts the life cycles of the native stream organisms, such as o'opu, opae, and hihiwai, making these organisms unavailable for gathering
 - Lack of streamflow has dried up coastal springs and wetlands
 - Lack of discharge at the mouths of the streams impairs the nearshore marine environment, diminishing traditional resources such as limu
- Other public trust uses, such as recreation, are impaired
- Recharge to the 'Āo Aquifer, which provides the drinking water for Central Maui, is decreased

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In 2007 these (slide below) were the goals OHA had for being involved in the Nā Wai 'Ehā case.

The first part of this - a petition to amend the Interim Instream Flow Standard. The IIFS defines the amount of water that's required to remain in the stream to support Public Trust uses. The four primary uses are: maintenance of the streams in their natural state, support for traditional and customary Native Hawaiian Rights, DHHL Reservations and drinking water for the general public. In the 1980s when the Water Code was first established, the legislature set the IIFS at the status quo. For every stream in Hawai'i whatever was flowing on the date it was set was the standard, and they stayed that way for a long time.

OHA's goals for Nā Wai 'Ehā

1. Re-establish year round flows in the streams of Nā Wai 'Ehā, from the summit of Pu'u Kukui and Mauna Kahalawai till they reach the Pacific Ocean
2. Return Public Trust resources to public control and management
3. Securing permanent stewardship & funding for the watersheds so there will be streams for the future

September 20, 2007 Admin Update - Nā Wai 'Ehā 13

Petition to amend the IIFS

- Interim Instream Flow Standards define the amount of water required to remain in a stream to support Public Trust uses
- In 1980s, State set them at status quo – amount flowing at time
- Petition to amend the IIFS was filed by Community Groups on June 26, 2004
- This petition resulted in contested case hearing, in which OHA intervened

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This case is only the second time that the IIFS has been increased. Waiahaole was the first case and it took 17 years – so we're trying to do it a little faster this time. The petition was filed by two community groups. Hui o Nā Wai 'Ehā and Maui Tomorrow in 2004 and OHA intervened in support of the community groups. The hearings were in late 2007 and early 2008. OHA's consistent position in the Contested Case was that there is enough water, if HC&S only used what it only needed.

Nā Wai 'Ehā Contested Case Hearing

Parties:

Hui o Nā Wai 'Ehā and Maui Tomorrow
 County of Maui
 Office of Hawaiian Affairs
 Hawaiian Commercial & Sugar Company
 Wailuku Water Company

Hearing Officer:

Dr. Lawrence Miike

Hearing:

24 Days of Hearings, from December 2007 to March 2008 (one day in October 2008)

Evidence:

77 Witnesses, more than 600 Exhibits

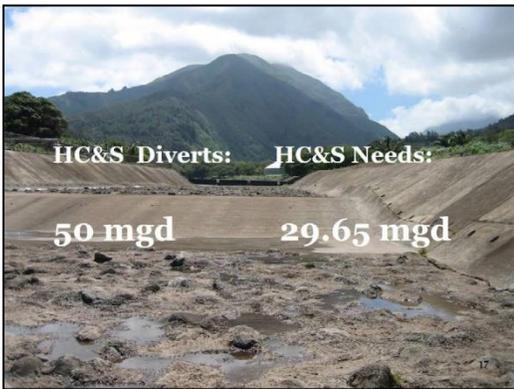
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OHA's Position in Contested Case

There is enough water to irrigate HC&S's fields and support public trust uses, including the exercise of traditional and customary Native Hawaiian rights, if water HC&S does not actually need is left in Nā Wai 'Ehā

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We were able to establish in the Contested Case Hearing that HC&S was diverting approximately 20 million gallons per day (mgd) more than that it had an actual need for. Waiale reservoir leaked 6-8 million gallons a day and their internal ditches leaked another 3 million gallons a day and they were using more water on their crops than they needed. That 20 million gallons alone would've put a lot of water back in the streams. We go to the proposed decision in 2009, that was a decision from Dr. Miike that makes a recommendation to the full Water Commission. All the parties have an opportunity to make objections to his decision and to argue them before the Water Commission, and then the Commission as-a-whole votes.

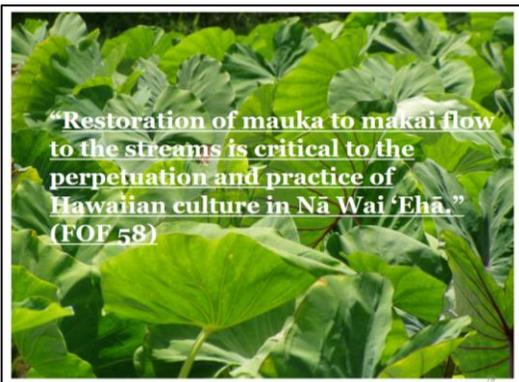


April 9, 2009 Proposed Decision Recognized:

- The negative impact stream diversions have had on traditional and customary Hawaiian practices in Nā Wai 'Ehā
- The Commission's public trust duty to protect the exercise of these practices to the greatest extent practicable
- That restoration of sufficient flow is critical to perpetuating Hawaiian culture in Nā Wai 'Ehā

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He recognized that these stream diversions have a negative impact on Traditional and Customary Hawaiian Practices in Nā Wai 'Ehā, and he also recognized that the Commission has a Public Trust Duty to protect the exercise of Traditional and Customary Practices to the greatest extent practical. I think his most compelling finding was that restoration of sufficient flow is critical to perpetuating Hawaiian Culture in Nā Wai 'Ehā. His recommendation would've put a total of 34.5 mgd back in the four streams; more in the two rivers and less in the two streams which are considerably smaller.



4/9/09 Proposed Decision Recommended IIFS

| | |
|------------------|-----------------|
| • Waihe'e River | 14 mgd |
| • Waiehu Stream | 3.5 mgd |
| • Wailuku River | 13 mgd |
| • Waikapū Stream | 4 mgd |
| • TOTAL | 34.5 mgd |

Then it went to the full Commission for its decision, and it took almost a year. The full Commission left most of the findings intact, including the FOF 58 – that mauka to makai flow was critical for the perpetuation of Hawaiian Culture. Even so, they didn't restore any water at all to Wailuku River or to Waikapū Stream and they cut back on the amounts to Waihe'e River and Waiehu Stream.

| | Proposed Decision (4/9/09) | Final Decision (6/10/10) |
|------------------|-------------------------------|-----------------------------|
| • Waihe'e River | 14 mgd | 10 mgd |
| • Waiehu Stream | 3.5 mgd | 2.5 mgd |
| • Wailuku River | 13 mgd | 0 |
| • Waikapū Stream | 4 mgd | 0 |
| • TOTAL | 34.5 mgd | 12.5 mgd |



OHA appealed; and that took two years. We appealed in 2010 and got the decision in 2012, and it was a resounding win – the Hawai'i Supreme Court said no this doesn't satisfy your Public Trust responsibilities and you haven't even considered the feasibility of protecting Traditional and Customary Rights. They vacated the entire decision and remanded it back to the Commission. These were the issues that they wanted them to work out. *(Primary Issues on Remand slide)*

Supreme Court of Hawai'i.
 In re 'ĀAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT APPLICATIONS and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Āao, and Waikapū Streams Contested Case Hearing.
 No. SCAP-30603.
 Aug. 15, 2012.

In reviewing Hui/MTE's and OHA's points of error, the court concludes that the Commission on Water Resource Management erred in several respects.

First, in considering the effect of the IIFS on native Hawaiian practices in Na Wai 'Eha, the Commission failed to enter findings of fact and conclusions of law regarding the effect of the amended IIFS on traditional and customary native Hawaiian practices in Na Wai 'Eha, and regarding the feasibility of protecting any affected practices.

Second, the Commission's analysis of instream uses was incomplete, as it focused on amphidromous species and did not fully consider other instream uses to which witnesses testified during the hearings.

Third, the Commission erred in its consideration of alternative water sources and in its calculation of diverting parties' acreage and reasonable system losses.

The court must vacate the Commission's June 10, 2010 Findings of Fact, Conclusions of Law, Decision and Order, and remand the case for further proceedings.

128 Hawai'i 228, 231-32, 287 P.3d 129, 132-33.

- ### Primary Issues on Remand
- Feasibility of protecting traditional and customary Native Hawaiian Rights
 - Restoration of Flow to 'Āao and Waikapū
 - HC&S's use of Well No. 7 as alternative to diverting from Nā Wai 'Ehā streams
 - Use of recycled water from Kahului Treatment Plant as alternative
 - Reduction of waste as alternative

As of 2012 we were back before the Commission. At the same time there were a few other things going on; the first was the designation of Nā Wai ‘Ehā as a Surface Water Management Area.

Designation of Nā Wai ‘Ehā as a Surface Water Management Area

- Designation effective April, 2008
- Requires all users of Nā Wai ‘Ehā water to file Surface Water Use Permit Applications (SWUPAs) by April, 2009
- 125 SWUPAs for existing uses, 115 accepted as complete, 69 claimed appurtenant rights
- 72 SWUPAs for new uses, 51 claimed appurtenant rights

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Water Available for Offstream Use:

- Before permits can be issued for off-stream use, CWRM needs to know how much water is available
- Water that is required to remain in the stream to satisfy IIFS is unavailable
- Water required to satisfy appurtenant rights is unavailable

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Appurtenant rights are interesting historically. They’re the right to use the amount of water that was used on a parcel at the time it was converted to fee simple during the Māhele and they’re treated as property right. They can also be extinguished. So, appurtenant rights don’t last forever because their property rights can determine whether the easement follows the property. In the case before the court in *Reppun*, what had happened was the seller of the property put in the deed a reservation of the water rights. In *Reppun*, the court held that that severed the appurtenant right. You can’t sever an appurtenant right from the land because it goes with the land, so if you attempt to sever it, you extinguish it.

Appurtenant (or Kuleana) Rights:

- The “rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land.” *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 551, 656 P.2d 57, 71 (1982).
- Kuleana rights are property rights – they are “incidents of land ownership”, and constitute “an easement in favor of the [property with an appurtenant right] as the dominant estate.” *Id.* (quoting *Peck v. Bailey*, 8 Haw. 658 (1867) (brackets in original)).
- Kuleana rights are expressly protected and preserved by the Hawai‘i Constitution (Art. XI, § 7) and the State Water Code (HRS § 174C-101(d)), and their exercise is a public trust purpose.

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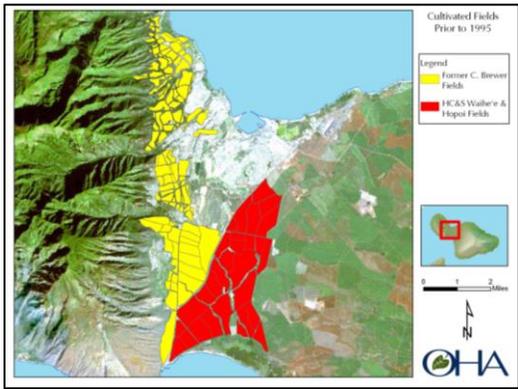
Extinguishment of Kuleana Rights:

In *Reppun*, Chief Justice Richardson held that an attempt to sever appurtenant rights from a parcel by reserving the rights in a deed had the effect of extinguishing the rights:

“We find, however, that while no appurtenant rights were effectively transferred in this case, *the deed that attempted to reserve such rights had the effect of extinguishing them.* For while easements appurtenant may not be utilized for other than the dominant estate, “[t]here is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant [estate].” *Id.*

Reppun, 65 Haw. at 552, 656 P.2d at 71 (emphasis added).

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Traditional and Customary Native Hawaiian Rights

HRS § 174C-101(c):

Traditional and customary rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, **the cultivation or propagation of taro on one’s own kuleana** and the gathering of hihiwai, opae, o’opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes.

See also Haw. Const., art. XII, § 7.

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During this process that lasted mostly into 2013 and 2014, OHA assisted many kuleana users in Nā Wai ‘Ehā to try and document their appurtenant rights where they had them. Dr. Miike was appointed as the Hearings Officer and they set out a structure and framework for how this would be done. The first phase was to determine whether the right did in fact exist. OHA’s Kīpuka database made it a lot easier for people to find their kuleana records.

Status of Kuleana Rights Determinations:

- OHA assisted many kuleana users in Nā Wai ‘Ehā to document their appurtenant rights
- Dr. Miike has been appointed Hearings Officer for the appurtenant rights determinations
- Appurtenant rights will be determined in two phases – first the existence of the right, and second, the amount of water the kuleana user is entitled to (this phase will be conducted in conjunction with the water permitting)
- The Hearings Officer has issued recommendations regarding the first phase, and a hearing was set for August 30, 2013 for CWRM to act on the recommendation, but it was postponed indefinitely

Where are we now?

- Dr. Miike has been appointed Hearings Officer for the remand proceedings
- Issues on remand have been briefed, final briefs due 2/18/14
- Remand contested case hearing scheduled to start March 10, 2014 on Maui
- Chair has asked to parties to mediate

In 2014 it took about 4 days of serious hard work, Robbie Alm was our mediator to reach a decision on new IIFS that almost doubled what we had in the 2010 final decision. With the mediated decision in hand that opened the way for everything else to be resolved.

| | Proposed Decision (4/9/09) | Final Decision (6/10/10) | Mediated Decision (4/17/14) |
|----------------|----------------------------------|--------------------------------|-----------------------------------|
| • Waihe‘e | 14 mgd | 10 mgd | 10 mgd |
| • Waiehu | 3.5 mgd | 2.5 mgd | 1.9 mgd |
| • Wailuku | 13 mgd | 0 | 10 mgd |
| • Waikapū | 4 mgd | 0 | 2.9 mgd |
| • TOTAL | 34.5 mgd | 12.5 mgd | 24.8 mgd |

Combined Contested Case Hearing

- **Appurtenant Rights Determinations** (following the establishment of the Mediated IIFS, CWRM held “due process” hearings and issued a provisional order on December 31, 2014)
- **Surface Water Use Permits**
- **Petition for Upward Amendment of IIFS** based on HC&S termination of sugar cultivation

What was decided was that we would have a combined Contested Case. During the Contested Case HC&S announced it was no longer going to grow sugar and that it was going to give up its lease on part of the land. So, we filed a petition then to amend the IIFS upwards. The really, good news was that we had argued that appurtenant rights that are reserved are extinguished and relied much more heavily on the traditional and customary right to grow kalo. The hearing officer recognized that right as a basis for a permit; that had never happened before. Not only that, he prioritized those rights, so in deciding who was getting permits he categorized them.

Combined Contested Case Hearing

- Prehearing conferences in 2015 and 2016
- Prehearing briefing and IIFS Petition in early 2016
- 11 hearing days from July to October, 2016.
- 96 witnesses (76 SWUPA applicants) testified

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Proposed FOF, COL, and D&O (11/1/2017)

- Recognized T&C right to cultivate kalo as basis for SWUPA, independent of appurtenant rights
- Prioritized T&C rights and appurtenant rights for T&C purposes as Category 1, existing uses and appurtenant rights for other purposes as Category 2, and new uses as Category 3.
- Increased the IIFS

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The proposed decision also increased the IIFS, not as much as we would've hoped, but it basically added 4 million gallons a day to Waihe'e River which is the largest of the four. Although the Hearing Officer recognized permitted and prioritized Traditional & Customary rights he imposed this restriction that has never been part of the law; which is that in order to establish that you have a Traditional & Customary right you have to prove that you have an ancestral connection both to the practice and to the location. That resulted in 2/3 of the beneficiaries who asserted Traditional & Customary rights being denied their permits for that. The other thing was that he found a way to revive the extinguished rights; as practical matter in this case it means several million gallons of water per day going to golf courses and gentlemen farms.

| | Proposed Decision (4/9/09) | Final Decision (6/10/10) | Stip. Decision (4/17/14) | Prop. Decision (11/1/17) |
|----------------|----------------------------------|--------------------------------|--------------------------------|--------------------------------|
| • Waihe'e | 14 mgd | 10 mgd | 10 mgd | 14 mgd |
| • Waiehu | 3.5 mgd | 2.5 mgd | 1.9 mgd | 1.9 mgd |
| • Wailuku | 13 mgd | 0 | 10 mgd | 10 mgd |
| • Waikapū | 4 mgd | 0 | 2.9 mgd | 2.9 mgd |
| • TOTAL | 34.5 mgd | 12.5 mgd | 24.8 mgd | 28 mgd |

BUT:

- While recognizing and prioritizing T&C rights, proposed decision imposed the extra-legal requirement that the practitioner's ancestors must have engaged in same practice on same land back to 1892. Resulted in 27 of the 41 beneficiaries who sought to exercise T&C rights to cultivate kalo being denied recognition of their T&C rights.
- Revived extinguished appurtenant rights, resulting in millions of gallons per day going to developers, gentlemen farms in Wailuku Country Estates, others who purchased their land knowing it had no water rights.

40

A couple things have changed since the 2017 proposed decision. One is that Mahi Pono purchased HC&S's property in December of 2018. In 2019 it substituted in for HC&S as a party. More recently in November 2019 we argued our exceptions to the commission. Now the commission has everything. It is in their hands, and what we're waiting for is a final decision.

Current Status

- Mahi Pono purchased HC&S's property in December 2018, and its May, 2019 motion to substitute for HC&S as a party was granted.
- The parties argued their exceptions to the Commission in November 2019. All that remains is for the Commission to issue a Final Decision.

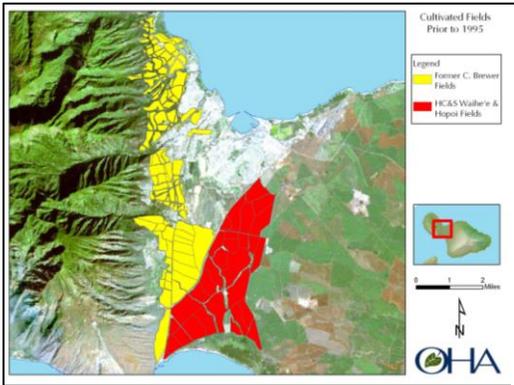
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New Alliances

- HC&S gave up the lease for its Iao-Waikapu Fields in 2016 and, during the contested case hearing, OHA and the Community Groups reached an agreement with the Lessor, Waikapu Properties, which withdrew its claims for appurtenant rights.
- Before the November 2019 Commission hearing, OHA and the Community Groups reached an agreement with Mahi Pono on its water use and other valuable concessions.

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We negotiated with Mahi Pono for several months, and the highlights are listed on the slides below.



Stipulation with Mahi Pono

- **MP Commitments include:**
 - MP supports and endorses Hui-MT/OHA's proposed IIFSs; will implement and comply.
 - Comprehensive and continual monitoring and reporting of stream and ditch flows, water uses, well use and salinity.
 - Recognize legal mandate of IIFS, prohibition against waste.
 - Immediate ditch improvements: bypass Wai'ale Reservoir, close low-flow intake at Spreckels.
 - Investigate and remediate system losses.
 - Potential assistance for North Waihe'e 'auwai reopening.
 - Non-transferable and ag-only conditions on permit.
 - Seek opportunities for native dryland ecosystem restoration.
 - Communication, transparency, information, site visits.

Stipulation with Mahi Pono (pt. 2)

- **MP's SWUPA 2206:** Total 11.22 mgd (vs. 15.65 mgd for HC&S in proposed D&O)
 - Initial 2,500 gad over 3,740 acres (9.35 mgd)
 - Additional 500 gad (1.87 mgd), if MP:
 - ✓ meets all its Commitments
 - ✓ reaches and maintains 4.5 mgd Well 7 use
 - ✓ has actual need for additional water
 - ✓ implements plan to remediate system losses
 - ✓ provides info to verify conditions have been met.

Current Water Needs on Former HC&S Fields

| | |
|-------------------------------|------------------------------|
| Waihe'e-Hopoi Fields | |
| HC&S 2009 SWUPA 2206 | Waikapū Properties |
| Existing use = 36.29 mgd | = 1.81 mgd (D&O Table 2) |
| Waihe'e-Hopoi Fields | |
| HC&S 2009 SWUPA 2206 | Mahi Pono |
| Existing use = 36.29 mgd | = 9.35 - 11.22 mgd (Stip.) |
| TOTAL 2009 = 46.87 mgd | TOTAL Now = 11-13 mgd |

As far as OHA's first goal; re-establishing year-round flows has been satisfied with the IIFS.

Returning the Public Trust resources was done through the designation, so now there is public control over those resources and anyone who wants to use stream water needs a permit.

As far as securing permanent stewardship and funding; that's our next task. I want to point out a couple of challenges; management of the ditch system – it is very old. Wailuku Water Company has been managing it for years, they're not making money at it anymore and they can't afford maintenance; there are gates that are frozen in place. So rather than trying to manage the flow into these ditches, they just set it and forget it. At some point they're going to abandon that system and that's going to put a lot of people struggling for how they're going to get water.

The other thing is the need to show cause to Wailuku Water Company as to why it shouldn't be regulated as a Public Utility and why it shouldn't have to apply for a CPCN.

OHA's goals for Nā Wai 'Ehā

1. Re-establish year round flows in the streams of Nā Wai 'Ehā, from the summit of Pu'u Kukui and Mauna Kahalawai till they reach the Pacific Ocean (IIFS Petition)
2. Return Public Trust resources to Public Control and Management (Designation)
3. Securing permanent stewardship & funding for the watersheds so there will be streams for the future (???)

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Challenges Ahead

1. Management of the Ditch system--What happens if/when it simply abandons the system?
2. PUC proceedings - will resume once Commission issues Final Decision on SWUPAs

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Whatever the final decision is, it is going to be historic. This case represents the first time that a watershed has ever been comprehensively managed. It's also the first surface water management area designation. The first time the commission has ever made determinations of appurtenant rights - it's been in the statute since the 1980s, but they've never done it before. It's the first recognition of the Traditional and Customary Rights to grow kalo as the basis for a water use permit.

The final slide contains photos of the streams today and if anyone has questions, I'd be happy to take them.

History Made

Whatever the Commission decides, it will be historic:

- First comprehensive management of watershed
- First surface water management area designation
- First appurtenant rights determinations
- First recognition of T&C right to cultivate kalo

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Chair Waihe'e: Thank you Pam. *Trustees are there any questions regarding the presentation?*

Trustee Akina: No question, but I did want to say that this is fascinating. Thank you and congratulations for all your work so far.

Pamela Bunn: I thank all of you.

Public Policy Manager Doane: I just wanted to give the big picture - I think that we have a lot about Nā Wai 'Ehā and the energy that our agency has put into it. Nā Wai 'Ehā is significant for many reasons, but the reason we decided to journey down this long path is because we see the implications being beyond Nā Wai 'Ehā – we see that the decisions made have impacted voluntarily updated interim instream flows on the West side of Maui and then it absolutely will and has affected what's happening in East Maui. So, I just wanted to point out how important this is for the Pae 'Āina.

Trustee Robert Lindsey: Pam, it's been a long journey and I want to thank you for staying with us all along the way.

VI. EXECUTIVE SESSION‡

Chair Waihe'e asks for a motion to resolve into Executive Session pursuant to *HRS § 92-5(a)(4)*.

Trustee Hulu Lindsey moves to resolve into Executive Session.

BAE Vice-Chair Akaka seconds the motion.

Chair Waihe'e asks if there is any discussion. There is none.

Chair Waihe'e calls for a Roll Call Vote.

| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | 2:47 p.m. EXCUSED |
|-------------------------|---------|---|---|--------------|---------------|----------------------|-----------------------------|
| LEINA'ALA | AHU ISA | | | | | | Departed at 2:36 p.m. |
| DAN | AHUNA | | | X | | | |
| VICE-CHAIR KALEIHIKINA | AKAKA | | 2 | X | | | |
| KELI'I | AKINA | | | X | | | |
| BRENDON KALEI'ĀINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | 1 | | X | | | |
| ROBERT | LINDSEY | | | X | | | |
| COLETTE | MACHADO | | | | | | Departed at 2:36 p.m. |
| CHAIR JOHN | WAIHE'E | | | X | | | |
| TOTAL VOTE COUNT | | | | 7 | 0 | 0 | 2 |

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

BAE Chair Waihe'e notes for the record that all members present vote 'AE (YES) and the **MOTION CARRIES**.

The committee resolved into Executive Session at 2:47 p.m. to discuss:

VI. EXECUTIVE SESSION‡

- A. Approval of Executive Session Minutes for January 22, 2020
- B. Consultation with OHA attorney Pamela Bunn, Esq. re: questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities regarding OHA's ongoing participation in Nā Wai 'Ehā (Maui) litigation, including the surface water use permit applications contested case hearing.

The committee returned to Open Session at 2:57 p.m.

VII. COMMUNITY CONCERNS*

None

VIII. ANNOUNCEMENTS

Ka Pouhana Hussey: Just a couple quick announcements. We just sent out the hearing notice for the FCC update right before this meeting. So, you should have that in your inbox; it's tomorrow 1:15 p.m. - 3:15 p.m. The second announcement is that oral arguments on the Carmichael case related to DLNR's authority to holdover water revocable permits originally scheduled tomorrow has been moved to the 31st.

Chair Waihe'e: Thank you Pouhana.

IX. ADJOURNMENT

BAE Vice-Chair Akaka moves to adjourn the BAE meeting.

Trustee Hulu Lindsey seconds the motion.

Chair Waihe'e asks if there is any discussion. There is none.

Chair Waihe'e asks if any members vote NO or ABSTAIN. There are no dissenting votes.

| | | | | | | 2:59 p.m. | |
|-------------------------|---------|---|---|--------------|---------------|----------------------|-----------------------|
| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA | AHU ISA | | | | | | Departed at 2:36 p.m. |
| DAN | AHUNA | | | X | | | |
| VICE-CHAIR KALEIHIKINA | AKAKA | 1 | | X | | | |
| KELI'I | AKINA | | | X | | | |
| BRENDON KALEI'AINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | | 2 | X | | | |
| ROBERT | LINDSEY | | | X | | | |
| COLETTE | MACHADO | | | | | | Departed at 2:36 p.m. |
| CHAIR JOHN | WAIHE'E | | | X | | | |
| TOTAL VOTE COUNT | | | | 7 | 0 | 0 | 2 |

MOTION: [X] UNANIMOUS [] PASSED [] DEFERRED [] FAILED

Chair Waihe'e adjourns the BAE meeting at 2:59 p.m.

Respectfully submitted,



Melissa Wennihan
Trustee Aide
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment on September 23, 2020.



Trustee John Waihe'e, IV
Chair
Committee on Beneficiary Advocacy and Empowerment