

STATE OF HAWAI'I
OFFICE OF HAWAIIAN AFFAIRS
560 N. NIMITZ HIGHWAY, SUITE 200
(VIRTUAL MEETING - VIA ZOOM WEBINAR)

COMMITTEE ON BENEFICIARY ADVOCACY AND EMPOWERMENT
MINUTES

August 4, 2021 1:30 p.m.

ATTENDANCE:

Chairperson Kaleihikina Akaka
Vice-Chairperson Keola Lindsey
Trustee Leina'ala Ahu Isa
Trustee Keli'i Akina
Trustee Luana Alapa
Trustee Brendon Kalei'aina Lee
Trustee C. Hulu Lindsey
Trustee John Waihe'e, IV

Brandon Mitsuda
Mark Watanabe

ADMINISTRATION STAFF:

Hussey, Sylvia, Ka Pouhana / CEO
Brown, Casey / COO
Hinck, Ramona / CFO
Wong, Sterling / Chief Advocate
Tanaka, Wayne / Public Policy Manager
Gushiken, Raina, Senior Legal Counsel
Ohta, Everett, Assistant Legal Counsel
Brad Ka'aleleo Wong, Program Specialist
Chak, Kevin, IT

EXCUSED: Trustee Dan Ahuna

BAE STAFF:

I. CALL TO ORDER

Chair **Akaka** calls the Committee on Beneficiary Advocacy and Empowerment meeting for Wednesday, August 4, 2021 to order at **1:30 p.m.**

Chair **Akaka** notes for the record that PRESENT are:

| MEMBERS | | | AT CALL TO ORDER (1:30 p.m.) | TIME ARRIVED |
|------------|--------------------|-------------|---------------------------------|--------------|
| CHAIR | KALEIHIKINA | AKAKA | PRESENT | |
| VICE-CHAIR | KEOLA | LINDSEY | PRESENT | |
| TRUSTEE | LEINA'ALA | AHU ISA | PRESENT | |
| TRUSTEE | DAN | AHUNA | EXCUSED | |
| TRUSTEE | KELI'I | AKINA | PRESENT | |
| TRUSTEE | LUANA | ALAPA | PRESENT | |
| TRUSTEE | BRENDON KALEI'AINA | LEE | PRESENT | |
| TRUSTEE | CARMEN HULU | LINDSEY | PRESENT | |
| TRUSTEE | JOHN | WAIHE'E, IV | PRESENT | |

At the Call to Order, **EIGHT(8)** Trustees are PRESENT, thereby constituting a quorum.

II. PUBLIC TESTIMONY on Items Listed on the Agenda*

None

III. APPROVAL OF MINUTES

1. March 10, 2021

Chair Akaka recognizes Trustee Lee.

Trustee Lee: I move that we put on the table the minutes from March 10, 2021 meeting.

Chair Akaka: Yes

Trustee Lee: So is it open for discussion now Madam Chair?

Chair Akaka: Yes, we can have it open for discussion, mahalo.

Trustee Lee: So the minutes for the March 10, 2021 meeting were moved for approval at our previous meeting and then tabled until today and now that we have it off the table I'm looking at the minutes Madam Chair, and no corrections have been made. The corrections that were pointed out in the previous meeting three months ago still shows that my vote for the roll call for the minutes of the February 3rd meeting still indicate that I voted yes when I voted kanalua. So the minutes that have been tabled all of these months came back to us exactly the same without any changes being made.

Chair Akaka: Yes, so we'd be happy to clarify so we went back and looked at the recording and it is accurate, the minutes as they are.

Trustee Lee: So the recording reflects that I didn't vote kanalua?

Chair Akaka: Yes, that you voted aye. We can provide you the recording if you'd like to view it.

Trustee Lee: Yeah, Madam Chair I would appreciate that.

Chair Akaka: Yes, and our Corporation Counsel has had an opportunity to view it as well. So we can make that happen for you.

Trustee Lee: Thank you, Madam Chair.

Chair Akaka: You're welcome Trustee Lee

Board Chair Hulu Lindsey: Madam Chair, I'd like to move that we approve the minutes of March 10, 17 and 24.

Chair Akaka recognizes Trustee Lee.

Trustee Lee: The March 10th minutes are already before us so we have to vote on that before we take up 17 and 24.

Board Chair Hulu Lindsey: Then I'll second it because there was no second to that.

Trustee Lee: There was no second needed Trustee Hulu Lindsey. The motion was made at a previous meeting and then you made the motion to table it, so all I did was move to put it back on the table, no second is necessary for that. The Chair so stipulated so we just need to vote now on the March 10th meeting minutes.

Chair Akaka: Mahalo for that, so can we please have the **roll call** Brandon for March 10.

| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
|-------------------------|-------------|---|---|--------------|---------------|----------------------|----------|
| LEINA'ALA | AHU ISA | | | | | X | |
| DAN | AHUNA | | | | | | EXCUSED |
| KELI'I | AKINA | | | X | | | |
| LUANA | ALAPA | | | X | | | |
| BRENDON KALEI'ĀINA | LEE | 1 | | | | X | |
| CARMEN HULU | LINDSEY | | | X | | | |
| VICE CHAIR KEOLA | LINDSEY | | | | X | | |
| JOHN | WAIHE'E, IV | | | X | | | |
| CHAIR KALEIHIKINA | AKAKA | | | X | | | |
| TOTAL VOTE COUNT | | | | 5 | 1 | 2 | 1 |

1:36 p.m.

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

Trustee Ahu Isa: I wanted to hear what happens after he hears the recording.

Vice Chair Lindsey: I don't know why we are voting on minutes when one of our Trustees is questioning what's in there so I'm going to vote no on that until that gets clarified. Thank you, Madam Chair.

2. March 17, 2021

3. March 24, 2021

Board Chair Hulu Lindsey: I'd like to move that we approve the minutes of March 17.

Chair Akaka: Yes, is there a second?

Trustee Akina: Second

Trustee Lee: Madam Chair, I'd like to amend the motion if it pleases Trustee Hulu Lindsey to include the minutes of March 24th. Unless she wants to just make a new motion so we have to vote on the amendment.

Board Chair Hulu Lindsey: No, I was just wondering if anybody had questions it would be appropriate for us to take it one at a time. But I'd be happy to make a new motion to approve March 17 and 24.

Trustee Akina: I consent as the second.

Chair Akaka: Alright then if we could please have the roll call for approval of minutes for the 17th and 24th of March.

| | | | | | | | 1:39 p.m. |
|---------------------|-------------|---|---|-----------|------------|-------------------|-----------|
| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | EXCUSED |
| LEINA'ALA | AHU ISA | | | X | | | |
| DAN | AHUNA | | | | | | EXCUSED |
| KELI'I | AKINA | | 2 | X | | | |
| LUANA | ALAPA | | | X | | | |
| BRENDON KALEI'ĀINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | 1 | | X | | | |
| VICE CHAIR KEOLA | LINDSEY | | | X | | | |
| JOHN | WAIHE`E, IV | | | X | | | |
| CHAIR KALEIHIKINA | AKAKA | | | X | | | |
| TOTAL VOTE COUNT | | | | 8 | 0 | 0 | 1 |

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

Chair Akaka recognizes Trustee Lee.

Trustee Lee: Before before we move off of this agenda item number three, can I inquire with the Committee Chair where the minutes for the April 7th, April 14th, April 28th and June 9th meetings are? How come we don't have those to approve today, it's August.

Chair Akaka: Sorry, can you please repeat those again.

Trustee Lee: I'm inquiring with the Committee Chair where the minutes for the April 7th, the April 14th, April 28th and June 9th minutes are how come they're not before us for approval, it's August now.

Chair Akaka: Mahalo, we are queuing them up for the next meeting.

Trustee Lee: How come they're not here Madam Chair, they're on our website. The draft minutes are posted on our website. So how come we don't have them for the committee to approve.

Chair Akaka: We will have them for the next meeting, mahalo.

Trustee Ahu Isa: A point of clarification or point of personal privilege. I think once when I was on the Board of Education, the minutes in the law by law says you have to have it done within a certain period of time for us to be I think a month for the Board of Education minutes to be.

Chair Akaka: I think it might be about 40 days or so. Everett can you please provide clarification on that.

Assistant Senior Legal Counsel Ohta: This is Everett Ohta, Assistant Senior Legal Counsel. Sunshine law requires that the minutes of a meeting be posted to a public website of the Board are made available within 40 days of the agenda. I'm sorry of the the meeting to which they apply. So them being available on the OHA website satisfies that requirement.

Trustee Lee: Madam Chair, can I get clarification from counsel. So if I understand it correctly right, it does not stipulate whether it's draft minutes or approved minutes correct?

Assistant Senior Legal Counsel Ohta: Chair, to answer Trustee Lee's question, the minutes need to be posted whether in draft or approved form.

Trustee Lee: Right so we are in compliance because those minutes, the draft minutes are posted which is why my inquiry. Why they're not here for approval because they're done, it's been five months. My concern Counsel is just that we don't know when our next meeting is going to be. So because we had a meeting scheduled today and it's been five months. I was wondering why we don't have them for us to approve because we don't know when our next meeting is going to be.

Assistant Senior Legal Counsel Ohta: That is just a matter of scheduling to get those minutes for approval before this committee.

Chair Akaka: Mahalo, Everett.

IV. UNFINISHED BUSINESS

NONE

V. NEW BUSINESS

A. Presentation by OHA attorney Pamela Bunn, Esq. Re: the background and status of OHA participation in the Nā Wai 'Ehā (Maui) litigation and related matters.

Assistant Senior Legal Counsel Ohta: I would like to introduce Pam Bunn, partner with the Dentons Law Firm. She is on the Zoom to provide a presentation which provides background and update on the status of the Nā Wai 'Ehā litigation and proceedings. Pam has been OHA's attorney on this matter pretty much since the beginning and works in close coordination with Corp Counsel, and our OHA Public Policy team, particularly the Public Policy Manager was unavailable due to a conflicting hearing for this committee meeting. Pam will be going over the history of Nā Wai 'Ehā. You know it is a long history that has really spanned decades now. But she will provide that and help everyone understand where we are in the proceedings and kind of what to expect going forward so with that, Pam.



Nā Wai ‘Ehā

Update on Status; Upcoming Proceedings

OHA Board of Trustees

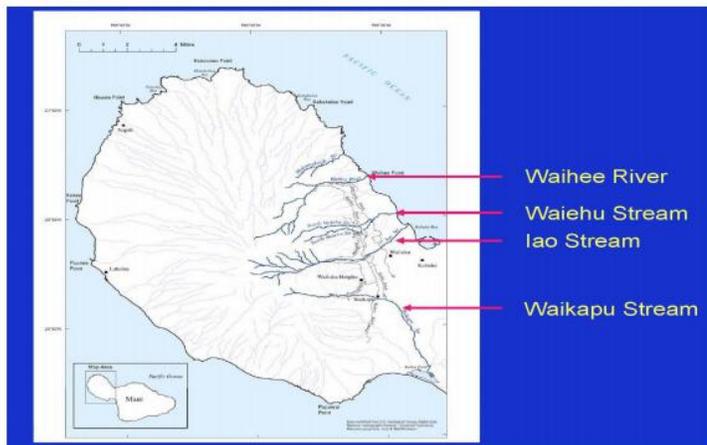
Committee on
Beneficiary Advocacy
and Empowerment

August 4, 2021

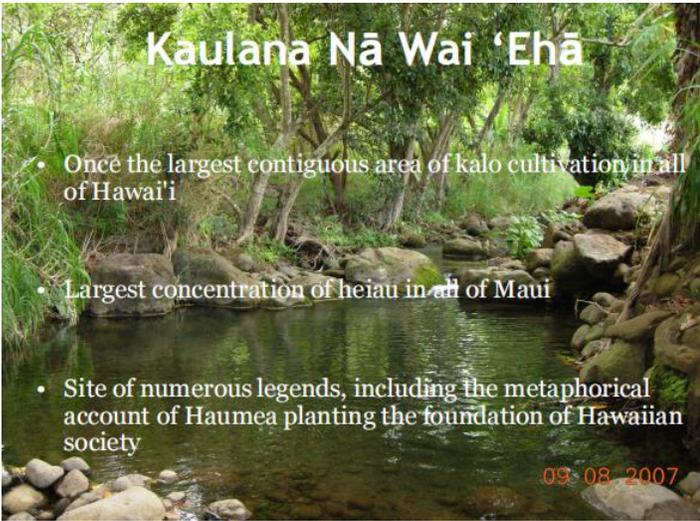
 Pamela W. Bunn

OHA Attorney Pamela Bunn: I'm Pam Bunn and as Everett has told you it's been my honor and privilege to represent OHA for more than 15 years now in this. So good afternoon Chair Akaka, Vice Chair, Trustee's staff. Thank you for having me here today. I know that some of you will have seen some of these slides. I have kind of an ever morphing slideshow as things go on. Although I know that some of you are newer than others. And so I try to start towards the beginning because it's one cohesive story. We'll see how it goes, feel free to stop me at any time if you have questions because if I get too far ahead then you might forget what they are.

Nā Wai ‘Ehā - The Four Waters



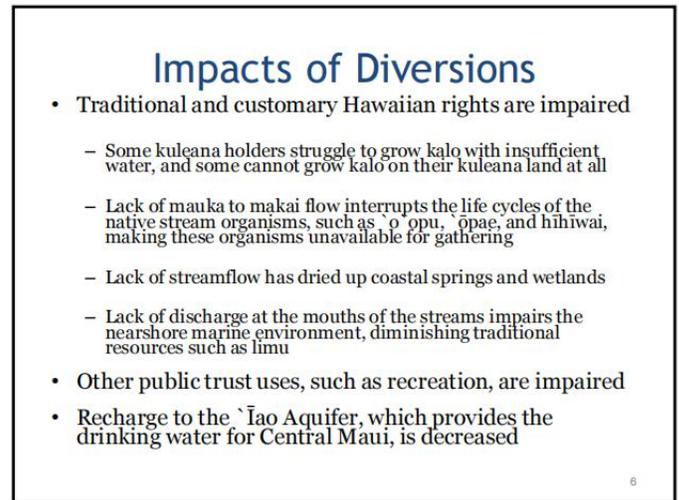
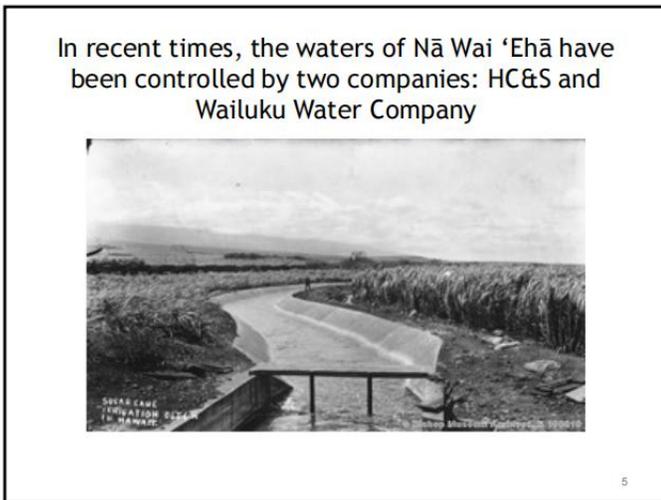
So the Nā Wai ‘Ehā case, there are two important water cases on Maui. One is in East Maui, that's not the Nā Wai ‘Ehā case, although it has many of the same players. The Nā Wai ‘Ehā case concerns the four great waters of West Central Maui. So from north to south, they are Waihe'e River, Waiehu Stream, what used to be called the 'Iao Stream, but has now been restored to its rightful name of Wailuku River and the southernmost is Waikapū Stream.



The Problem



This area is very prominent and important in the cultural history of Maui. It was once the largest contiguous area of kalo cultivation in all of the islands. It has the largest concentration of Heiau and it's the site of numerous legends. The problem is that the early sugar growers who recognize the value of Nā Wai 'Ehā waters and they devised ingenious ways to harvest those waters out of the streams and transport them to the dry central isthmus where they were primarily growing sugar. This is Wailuku River looking upstream and the river is coming towards you, there is a grate across the stream and a big vault under the grate. The water just drops through and gets carried out into in this case it's Waihe'e ditch and then there's also Spreckels ditch.



Now the predecessors of these companies used to control the water. But since the early 1920s. I would say the waters of Nā Wai 'Ehā have been primarily controlled by HC&S and Wailuku Water Company, which previously was Wailuku Agribusiness and before that Wailuku Sugar.

The impacts of the diversions have been devastating on traditional and customary rights. There are Kuleana users that don't have enough water to grow kalo. Some couldn't grow it at all, some with inadequate water. The diversions of the streams interrupt the life cycle of the native species because they are amphidromous. They need to get upstream to spawn and the spawn needs to float downstream. So a lot of 'o'opu, 'opae, hihiwai were no longer available for gathering. The diversions also caused the coastal springs and wetlands to dry up and except for extreme rain events and the lack of discharge at the mouth of the streams affected the estrogen ecosystems and disrupted things like limu and other things that have their life cycle in the estuary. It also

affected other public trust uses and it certainly affects the recharge to the 'Āo Aquifer which is where most of Central Maui 's drinking water comes from.

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. Secure permanent stewardship & funding for the watersheds so there will be streams for the future

September 20, 2007

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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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I highlighted the date on this slide so you can see how long ago we actually launched into litigation on this. This was in 2007 and these were OHA's goals for basically what turned out to be almost two decades worth of litigation. The first is to reestablish the year round flows in the Nā Wai 'Ehā streams from the mountain to the ocean on on a year round basis. The second goal was to return these public trust resources to public control and management and the third goal was to secure permanent stewardship and funding for the watersheds so that there will be streams for the future.

The first step in securing Mauka to Makai flow was a petition to amend the IIFS. IIFS are interim instream flow standards and they're basically the amount of water that is required to remain in a stream in order to support the public trust uses. When the water flow was adopted in like 1986 it just had status quo IIFS's. It just basically said the amount of water in the stream shall not be diminished below what it is today. So any more water in the stream after the water probe was enacted requires an amendment to the IIFS. So that's what this petition was. It was filed in July of 2004 by the community groups who are Hui o Nā Wai 'Ehā and Maui Tomorrow. And the Water Commission then set a contested case hearing and OHA intervened in that hearing.

First CCH Milestones

- December 3, 2007 Evidentiary hearing commenced on Maui
 - 23 hearing days
 - Testimony from 80 witnesses
 - 600 exhibits received in evidence
- October 14, 2008 Evidentiary hearing closed
- April 9, 2009 Proposed Decision issued
- May 11, 2009 Parties filed exceptions
- October 15, 2009 Hearing on exceptions
- June 10, 2010 CWRM Final Decision

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| | 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 |
| • 'Āo Stream | 13 mgd | 0 |
| • Waikapū Stream | 4 mgd | 0 |
| • TOTAL | 34.5 mgd | 12.5 mgd |

(The IIFS for Waikapū Stream would be conditional upon flow reaching Kealia Pond within 120 days)

So the first contested case was in December of 2007 and it went through late 2008. It was 23 days, we had dozens of witnesses, hundreds of exhibits. Doctor Miike was the hearings officer and many of you will recognize the name. He used to at one time be the Director of Health for the State of Hawai'i. He issued a proposed decision relatively quickly from he took from October to the following April. Then the parties filed exceptions to the decision. And after hearing on the exceptions, the full Commission votes on the final decision.

The proposed decision you can see is the comment of the column on the left, Doctor Miike proposed to restore 35,500,000 gallons per day to Nā Wai 'Ehā streams. The bigger streams getting more, the smaller getting less. The final decision cut that in less than half, far less than half, it would have restored no water at all to Wailuku River or to Waikapū stream. Despite the number of kuleana users trying to grow kalo on those streams. This was Laura Thielen and it was Governor Lingle at that time in 2010.

Supreme Court of Hawai'i.

In re 'ĪAO 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, 'Īao, and Waikapu Streams Contested Case Hearing.

No. SCAP-30603.

Aug. 15, 2012.

In reviewing Hui/MTF'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.

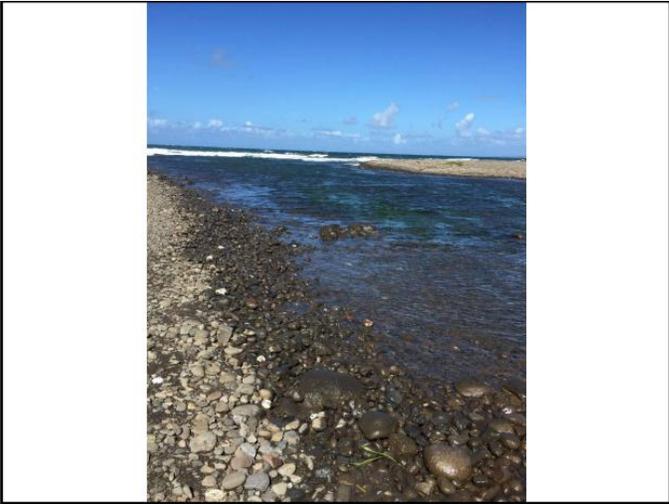
So OHA joined the community groups in appealing it and the Hawai'i Supreme Court absolutely agreed with us that the water Commission had erred primarily because it didn't give full consideration to traditional and customary Native Hawaiian rights and the feasibility of protecting them. So you can see down at the bottom, the court vacated the Commission's decision and remanded the case for further proceedings. Remanding basically means you're going back into another contested case hearing. So this was 2012 at this point when the Hawai'i Supreme Court made this decision.

| | Proposed Decision (4/9/09) | Final Decision (6/10/10) | Mediated IIFS (4/17/14) |
|------------------|----------------------------------|--------------------------------|-------------------------------|
| • Waihe'e River | 14 mgd | 10 mgd | 10 mgd |
| • Waiehu Stream | 3.5 mgd | 2.5 mgd | 2.0 mgd* |
| • Wailuku River | 13 mgd | 0 | 10 mgd* |
| • Waikapū Stream | 4 mgd | 0 | 2.9 mgd |
| • TOTAL | 34.5 mgd | 12.5 mgd | 24.9 mgd |

By 2014, we still haven't had another contested case hearing, and since the amended IIFS was really just the first step in what you'll see is a much bigger process. This was really holding things up. I mean by this point it was already seven years since we started the first contested case. So we got together and we suggested to it was Director Aila at the time, that you know nobody would be the first to say it, but the parties might be willing to negotiate and see if we could just resolve this ourselves. So he very wisely got Robbie Alm who is a very good mediator and we had a few meetings and we reached mediated IIFS and that's the green column at the right of slide. The the mediated IIFS were designed to make sure that there would be water at the mouths of the stream, so it would be Mauka to Makai flow on a year round basis and everybody agreed to these which meant there was no appeal, it meant we could move on. We had gotten past that hurdle.



So this is Waihe'e River towards the mouth and it's flowing into the ocean. This is after the restoration. It may have taken until early 2015 before it actually was restored.



This is why Waiehu Stream at the mouth flowing into the ocean. This is why Wailuku River flowing into the ocean.



And this is a little bit different. Waikapū Stream does not flow directly to the ocean. It flows into Keālia Pond, and then when there's enough water in Keālia Pond it breaks through and flows into the ocean. And even the springs and the wetlands got restored. This is by Duke Sevilla's House, which is near the mouth of the 'Īao Stream, or Wailuku River. It had been completely dried up as I said, except for very heavy rains prior to the restoration. Streams flowed Mauka to Makai, wetlands came back. The studies that have been done of the native species in the streams showed increases in population.

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. Secure permanent stewardship & funding for the watersheds so there will be streams for the future

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Petition to Designate Nā Wai 'Ehā as a Surface Water Management Area

- Designation effective April, 2008; first and only surface water designation in Hawai'i
- Required all users of Nā Wai 'Ehā water to apply for Water Use Permits by April, 2009
- Before permits can be issued for off-stream use, CWRM needs to know how much water is available

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And so we were ready to move on to the next step which was returning the public trust resources to public control and management. These things were kind of going on simultaneously. The first step in this process was to designate Nā Wai 'Ehā Streams as a surface water management area because under our water code the Commission only has authority to delegate in a designated management area. We have what's called a bifurcated code. Sometimes it seems like we took the worst of all possible worlds and combined them, but I don't think that was the intent. But unless an area is a designated water management area, the Commission can't regulate it. This is the first surface water designation ever in Hawai'i. It had never been done before and it became effective on April 8th, 2008, which means that everybody had to submit water use permits by April 8th, 2009, and there were hundreds as can be imagined. But before any of the permits can be issued for off stream use the Commission needs to know how much water is available. So we first have to look at what is not available.

Water Unavailable for Offstream Use:

- Water that is required to remain in the stream to satisfy IIFS
- Water required to satisfy appurtenant rights
- Water required to satisfy Traditional and Customary ("T&C") rights

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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 "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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So water for offstream use is not available if it's required to remain in the streams to satisfy the IIFS, or if it's required to satisfy appurtenant rights or if it's required to satisfy traditional and customary rights. So we started looking at those things and holders of appurtenant rights and traditional and customary rights were also being asked to get permits. So they applied for permits as well even though there is a very good argument that it's not required under the code, the Commission wanted it because it helped them with the management of this whole big unit at once to know how much water is going to be needed. So appurtenant rights, they're sort of a property right. It's like an easement, it's not a personal right it's a right that belongs to a piece of property and

it's the right to use the amount of water that was being used on the property at the time of the Māhele. It's expressly protected by the Hawai'i Constitution. It's protected by the state water code. I think of it as something like an easement. You know it's something that comes with the property. Sometimes when you buy property you have an easement across your neighbors driveway or something like that. In this case, it's an easement to use the amount of water that was being used at the time of the Māhele.

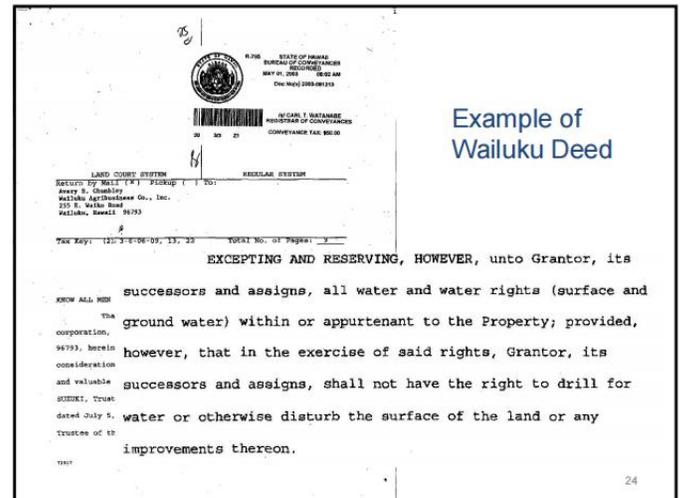
Extinguishment of Kuleana Rights:

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.*

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

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Example of Wailuku Deed

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Now our boys Supreme Court has said in its touchstone decision on appurtenant rights that appurtenant rights can also be severed. Because, well I'll correct that a little bit, but since it's a right that's attached to the property, when you try to detach the right from the property it results in the right being extinguished. The way that this often happened, particularly in Nā Wai 'Ehā was when Wailuku Sugar Company or Wailuku Agribusiness for then Wailuku water company sold land, they typically did it with a deed reservation and what they did was they reserved all water and water rights to themselves. So it's like okay, I'm selling you this property, but I'm keeping the water rights I'm keeping any appurtenant rights. And according to the Hawai'i Supreme Court decision in the *Reppun* versus the Board of Water Supply case, that means the rights are extinguished because the rights can't be used other than in association with the property. So trying to separate them from the property extinguishes them.

T & C Right to Cultivate Kalo

The Water Code provides that “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” and defined T&C rights to include “the cultivation or propagation of taro on one's own kuleana[.]”

HRS 174C-101(c).

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This was the First Time CWRM Determined Appurtenant Rights

The Water Code expressly protects appurtenant rights, but before this case, the Commission had never:

- promulgated rules to implement the mandated protection
- inventoried appurtenant rights; or
- actually made a determination of the existence or quantification of an appurtenant right

Consequently, it took a decade in this case, because the Commission devised the procedures as it went.

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The traditional and customary right to cultivate kalo is different because it's a personal right. It belongs to the person and not to the property, and it's the rights of ahupua'a tenants who are Native Hawaiian to conduct these various practices, including the cultivation of kalo and including, you know this is the version of it that's in the water code, but in the Constitution and the statutes it also includes the right to gather 'ōpae, and I think pick thatch, gather thatch, things like that and it covers a broad range of rights but the water code specifically provides for traditional customary right to cultivate kalo.

As with the first time that there was ever a surface water designation, this was also the first time that the Water Commission determined appurtenant rights. In the amount of time since the code was enacted in 1986, so we're talking more than 20 years by this point. They hadn't promulgated rules on how they were going to make this decision. There had never been an inventory of appurtenant rights. You know what appurtenant rights existed at the time of the Māhele there was nothing like that. And they had never actually made a determination of the existence for quantification of an appurtenant right. In this case it was kind of like building the plane while you were flying it. I mean, that's why it took ten years to actually have appurtenant rights determinations made.

First Phase of Appurtenant Rights Determinations- "Provisional Recognition":

- OHA assisted many kuleana users in Nā Wai 'Ehā to document their appurtenant rights
- Dr. Miike was appointed Hearings Officer for the appurtenant rights determinations
- Appurtenant rights were determined in two phases –
 1. the existence of the right (recognition);
 2. the amount of water the kuleana is entitled to (quantification)

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Phase 1 - CWRM's 12/31/14 Order:

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

| | |
|--|---|
| PROVISIONAL RECOGNITION OF APPURTENANT RIGHTS, NA WAI EHA |) Case No. CCH-MA13-02 |
| SURFACE WATER MANAGEMENT AREA, WAIHEE, WAIHEHU, IAO, WAIKAPU STREAMS, MAUI, HAWAII |) NA WAI EHA |
| |) PROVISIONAL ORDER ON CLAIMS THAT PARTICULAR PARCELS HAVE APPURTENANT RIGHTS |

NA WAI EHA
PROVISIONAL ORDER ON CLAIMS THAT PARTICULAR PARCELS HAVE APPURTENANT RIGHTS

On October 14, 2014 and November 21, 2014, the Hawaii Commission on Water Resource Management ("Commission") conducted due process hearings on Maui on the

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And it couldn't have been done without OHA's assistance. I mean, from things like the Kipuka Database, which all of the beneficiaries who were applying used and a lot of the big corporations that were trying to approve or get approval for their appurtenant rights, they used it. Again, Dr. Miike was the hearings officer and there were two phases to the determination. The first they called it provisional recognition. It's just we're going to recognize whether or not this piece of property has appurtenant rights and then they saved for a later day the quantification. But I just, I can't emphasize how instrumental OHA was in this. OHA staff helped people get their documentation together. They worked with the Water Commission staff who had lots of questions about things. They did a fabulous job and I just can't even think about how this would have gotten done without that kind of assistance.

So this was the only order on the provisional recognition. So it took from 2011 when we kind of started talking about the process until 2014. Most of the appurtenant rights claimants had to take time off work. They had what they called due process hearings, and those were on Maui and the claimants had to come in and answer any questions that the Commission had, so it was a lengthy process. But by 2014 they had made the provisional determinations, which again had nothing to do with the quantity of water, just we provisionally decide that you have your property has this right.

Phase 2 - Contested Case Hearing

- Quantification of appurtenant rights was by contested case hearing, which included *all* Nā Wai `Ehā water users
- Well over 100 parties, from individual kuleana users to corporate diverters and large landowners
- Each kuleana user was required to present written and oral testimony and exhibits regarding the amount of water used on the parcel at the time of the Māhele

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OHA was Instrumental in Helping Nā Wai `Ehā Kuleana Users Meet the Challenges

- Preparing testimony and exhibits
- Logistical issues
- Procedural fairness
- Communication
- Expert witnesses
- Water is a “zero sum” proposition
- Persuading the Hearings Officer and Creating a record

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Phase two of that was another contested case hearing. And this they called this kind of an integration contested case hearing because they were also trying to decide on the permit applications, decide on traditional and customary rights and they were also asked to go back and take another look at the IIFS because it was sort of in this time frame. Well, it was a little bit later in the process, but when HC&S announced it was going to stop growing sugar and so then a petition went in to say okay while we're doing all this other stuff, while we're doing the permitting, the appurtenant rights, the traditional and customary rights, let's amend the IIFS again too, because there's now going to be much more water. All of the the kuleana users were required to show up just in case anybody wanted to cross examine them about their appurtenant rights.

So again, it was a big undertaking and again OHA played a lead role because there were so many challenges. You know in the first contested case, a lot of OHA beneficiaries were witnesses. In this contested case, they were actually parties, they weren't witnesses, they were parties, and parties had a lot of challenges to meet. They had to prepare testimony and exhibits. There were lots of logistical issues about where the hearing was going to be, what day do I have to take off work. There were issues with procedural fairness. Things like service of process or how is somebody without an Internet connection living in Waikapū going to serve 120 other parties. So there were that kind of issues. Communication expert witnesses and of course the goal of the whole thing, which was to persuade the hearings officer and create a record. Again, OHA staff were instrumental and also partnered up with the law school clinic so these people got a lot of help and they absolutely needed it. I mean, there is no question about it. These are all pro save people and you know legal proceedings are confusing enough. They're confusing for lawyers. So a lot of people on the OHA staff helped, OHA partnered with the law school clinic and a lot of the clinic members helped. It was definitely a group effort.

Water is a “Zero-Sum” Proposition

- Priorities mandated by law needed to be strictly enforced:
 - Priority for kuleana use over commercial use
 - No priority for extinguished kuleana rights
 - Priority for T&C kalo cultivation
- Diverters needed to be held to their burdens of proof

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Importance for All Kuleana Users

- This proceeding will set precedent
- Procedurally, establishing an appurtenant right cannot be so burdensome that it impairs the ability to exercise the right
- Substantively, this proceeding will establish legal precedent regarding:
 - extinguishment of appurtenant rights
 - T&C right to cultivate kalo

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I just wanted to talk for a minute about water being a zero sum proposition which makes it very difficult because there are clear priorities that are or needed to be and had not been until this case strictly enforced. Kuleana use needs to be prioritized over commercial use, and you can't be giving priority to fully honor rights or appurtenant rights that have been extinguished. There also need to be more priority for traditional and customary kalo cultivation, and most of all holding the diverters to their burdens of proof.

And as I was saying that the difficulty for these people to do it themselves and fortunately they didn't have to, is that procedurally if this is the type of procedure that's going to be used to do these things, I mean at some point it gets so burdensome that it impairs the ability to exercise the right. You know, if exercising your appurtenant right requires you to know how to do title research and provide the documentation and show up at a hearing. I mean, at what point is the right being denied? So the two big things that OHA hoped to establish substantively in this proceeding were that Reppun is still the law of Hawai'i. If appurtenant rights are attempted to be severed, they are extinguished, and we wanted the Commission to focus much more on the traditional and customary right to cultivate kalo.

Second CCH Milestones

- July 11, 2016 Evidentiary hearing commenced on Maui
 - 11 hearing days, 103 witnesses
 - New IIFS Petition to Increase IIFS
 - HC&S announces cessation of sugar cultivation
- October 14, 2016 Evidentiary hearing closed
- November 1, 2017 Proposed Decision issued
- January 5, 2018 Parties filed exceptions
- November 19, 2019 Hearing on exceptions
- June 10, 2021 CWRM Final Decision

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So the second kind of integrated contested case hearing was held in the summer of 2016. Doctor Miike issued his proposed decision in November of 2017. The parties filed their exceptions in early 2018 and there was hearing on those exceptions in late 2019. And last month we got the final decision. Oh, and I had the date wrong. We had the final decision on June 30th, 2021, so almost two years after the hearing on the exceptions.

I just was showing you the caption how they. This is the hearings officer's proposed decision and you know they've loaded in the integration of the appurtenant rights with the IIFS and the permitting and it was just a big catch all.

High Points of Proposed Decision

- Awarded permits based on T&C rights
- Established priority for T&C rights and appurtenant rights exercised for kalo cultivation over other offstream uses
- Increased IIFS for Waihe'e River by 4 mgd

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Low Points of Proposed Decision

- Imposed an additional condition required to prove T&C rights, resulting in 2/3 of T&C applicants being denied
- Awarded permits for extinguished appurtenant rights, including golf courses and "gentlemen's estates"
- Limited permits for kalo cultivation to less water than expert testified was needed
- No restoration for other streams

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The high points of the proposed decision, and again this is Dr. Miike's decision that we got back in 2017. He actually awarded permits based on traditional and customary rights, which had never been done before, and he not only awarded the permits, but he established a priority category for those permits. So traditional or customary rights and appurtenant rights being used to grow kalo were given priority over all other off stream uses, commercial uses, even the county drinking water. He also increased the IIFS for Waihe'e River by 4,000,000 gallons a day.

The low points and there were a few. He imposed an additional requirement in order to exercise traditional and customary rights. These are rights that belong to ahupua'a tenants. Dr. Miike had it firmly in his mind and could not be shaken that in order to be an ahupua'a tenant your ancestors needed to be tenants of the same ahupua'a and engaging in the same practice that you proposed to engage in on the same land. It's not a requirement that's found anywhere in the law. It's not in the Constitution. It's not in any case. The result of it was that out of the 40 people that applied for traditional and customary rights and applied for permits based on traditional and customary rights, only 13 of them were awarded. He also awarded permits for extinguished appurtenant rights. These are two big golf courses by Wailuku Country Estates, which is, you know you can call it gentlemen's states or fake farms, but it's you know it's an agricultural subdivisions with mansions. And he limited the water for kalo cultivation to 100,000 gallons per day, per acre per day, which is far less than our expert determined was needed. And there was no restoration for any of the other streams, or no further restoration.

HC&S Sale to Mahi Pono

- Proposed Decision awarded 13.5 mgd of surface water to HC&S for “bioenergy crops,” and required it to use 3 mgd from Well 7.
- In May, 2019, Mahi Pono sought to substitute for HC&S, and threatened to reopen the contested case for more “protracted litigation” in an attempt to be awarded more water for diversified agriculture than HC&S was awarded.
- OHA vehemently opposed reopening.

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Settlement with Mahi Pono

- Following August 2019 hearing on Mahi Pono motion, CWRM granted the motion for substitution.
- Both at the hearing and in the written order, CWRM urged Mahi Pono to attempt to reach a resolution with OHA and the Community Groups of disputed issues.

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After the proposed decision, it's seen as sold its property to Mahi Pono, who I'm sure many of you have heard of and Mahi Pono brought a motion in 2019 to basically substituting for HC&S. There really should be nothing wrong with that. They now have the interest in eight seconds permit, and there's no reason you know not to just let them show up and substitute in. Then they started threatening though that you know they were going to. There was going to be protracted litigation because they were going to try to reopen the contested case. And proved that they needed more water than the 13.5 million gallons a day that the Commission had awarded to HC&S. OHA of course vehemently opposed that.

But we did ultimately reach a settlement with Mahi Pono. There was a hearing on Mahi Pono's motion in August of 2019, and the Commission granted the motion, which was expected, but went pretty far in urging Mahi Pono to attempt to reach a resolution with OHA and the community groups.

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

Surface Water Use Permit Applications,) Case No. CCH-MA-15-01
Integration of Appurtenant Rights and)
Amendments to the Interim Instream Flow) STIPULATION AND ORDER
Standards, Nā Wai 'Ehā Surface Water) REGARDING SWUPA 2206
Management Areas of Waihe'e, Waiehu, 'Iao,)
and Waikapū Streams, Maui)

STIPULATION REGARDING SWUPA 2206

HUI O NĀ WAI 'EHĀ and MAUI TOMORROW FOUNDATION, INC. (collectively, the "Community Groups"), OFFICE OF HAWAIIAN AFFAIRS ("OHA"), and MAHI PONO, LLC ("Mahi Pono"), collectively, the "Parties," by and through their respective attorneys or representatives, hereby stipulate as follows:

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FILED
Commission on Water Resource Management
12:21 pm, June 28, 2021
An errata to this decision was filed on June 30, 2021

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

Surface Water Use Applications,)
Integration of Appurtenant Rights) Case Number CCH-MA 15-01
and Amendments to the Interim Instream)
Flow Standards, Nā Wai 'Ehā Surface)
Water Management Areas of Waihe'e)
River, Waiehu Stream, Wailuku River)
(previously known as 'Iao Stream))
and Waikapū Stream, Maui)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION & ORDER

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So we negotiated for several months. We reached this agreement literally on the eve of the hearing on the exceptions to the proposed order. Mahi Pono actually made several important commitments. I mean there are pages of them, but the ones that stood out in my mind is that they committed to closing the low flow channel in Spreckels Ditch where it crosses Wailuku River which at times would impede water getting to the mouth of the river. So closing that up was important. They agreed to help the community members restore the po'owai at the North Waihe'e pāwai which had been damaged badly by floods, so they agreed to lend their help and

engineering expertise with that. They agreed to fully monitor all of their diversions and all of their uses. They agreed to survey any potential waste and devote an initial \$250,000 to remediating that waste. So they made substantial commitments. OHA and the community groups in exchange said that we would not oppose a water allocation of 9.35 million gallons per day, which was the acreage times 2500 gallons per acre per day, which is what has been used as the water duty for diversified agriculture. So that's what diversified ag got in the Waiāhole case. I mean, that's just kind of the standard number for diversified ag. We also agreed that the number could be increased to 11.2 million gallons per day provided that Mahi Pono met all its commitments and provided in addition that they had established an average pumping from their well of 4.5 million gallons per day. So if they use their whole 9.35 of surface water, plus they pumped 4.5 million gallons of water for a year and still needed more water than we would give them, then we would not oppose them receiving an additional 500 gallons per acre per day. So that would bring it up to 11.2. As I said we reached this stipulation the day before the hearing on the exceptions. When we went to the hearing it was announced and discussed and the Commission cheered and everybody was happy. That has been about all that has happened since late 2019 until now, when the final decision came out on June 28.

The Good News

- The Commission applied the appropriate standard for determining T&C rights
- Increased by 50% the amount of water awarded for kalo cultivation
- Agreed to follow *Reppun* decision that reservation of appurtenant rights extinguishes them

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The Bad News

- The Commission imposed an “after the fact” requirement for appurtenant rights claimants to prove their entire chain of title before receiving a permit
- The Final Decision contains some obvious mistakes
- The Final Decision did not restore any additional water to any stream beyond the 2014 mediated IIFS Agreement

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The good news about the final decision and a lot of it was great news. The Commission applied the appropriate standard for determining traditional and customary rights, which meant that everybody who was a legitimate ahupua'a tenant and wanted to grow kalo got water to do it. They increased the amount of water for kalo by 50% so from 100,000 gallons per acre per day to 150,000 gallons per acre per day and they agreed to follow the *Reppun* decision that reservations of appurtenant rights extinguished the rights.

The bad news is that they imposed an after the fact requirement for appurtenant rights claimants to prove their entire chain of title before receiving a permit. This was something that was extensively discussed back in 2010, 2011 when we were trying to set up what the process would be to make these mass decisions and OHA and the community groups were always very clear that no, a title search back, you know, for the entire chain of title, you can't require that it costs thousands of dollars and it takes several years, and the community members are not going to be able to do that. And the Commission agreed at that point. So to see this sneak into the decision, you know after the fact, when nobody had noticed it was coming was a little bit surprising. The two other problems were that the decision contained a few obvious mistakes and didn't restore any additional water beyond the 2014 mediated agreement. It in fact did not increase the IIFS of Waihe'e river as Dr. Miike would have done, it just put it back to what was agreed to in 2014.

Mistakes:

- New requirement for all documents in chain of title may be a mistake/misunderstanding based on CWRM politics in 2010-2012 period.
- After announcing that extinguished appurtenant rights would not be recognized, CWRM recognized 6 MGD in appurtenant rights for Wailuku Country Estates subdivision.
- Mahi Pono

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Mahi Pono Surface Water Allocation

| Proposed Decision | Stipulation | Final Decision | Errata (6/30/21) |
|-------------------|-------------|----------------|------------------|
| 13.5 MGD | 9.35 MGD | 13.5 MGD | 4.98 MGD |

The Errata also requires Mahi Pono to take 1 MGD of the surface water allocation from Spreckels Ditch at Wailuku River, which Mahi Pono has closed pursuant to the Stipulation

I want to talk just a little bit about the mistakes, you know, the new requirement for a full chain of title search. That could be a mistake or a misunderstanding. The way things were in the 2010 to 12 time period when this was being hammered out. I don't know if any of you knew Bill Tam, but he was the Deputy Director and he and AG did not see eye to eye, so they often didn't talk to each other and refused to talk to each other. So he has gone and she is still there and she might have put this in without fully understanding that no, this was not acceptable and we had all agreed this wasn't going to be required. So hopefully that's a mistake. The other one was that they were very clear that they were not going to be recognizing any appurtenant rights that had been extinguished by a deed reservation, but yet they recognized 6,000,000 gallons a day of appurtenant rights for Wailuku Country Estates you know, the gentleman estates which had its appurtenant rights extinguished.

The other mistake, and perhaps the most consequential, at least in terms of timing, was their mistake with Mahi Pono. The proposed decision would have given Mahi Pono 13.5 million gallons per day. The stipulation we reached with Mahi Pono would have given them 9.35 million gallons per day, and when the final decision came out it would have given them 13.5 million gallons per day, which is far more than they agreed that they could get by with. They noticed the decision within days and filed what's called an errata. It basically says, yeah, we we made a mistake in our decision, this is what it should say. The errata only gives Mahi Pono just under 5,000,000 gallons a day. Mahi Pono insists that that is existential, it cannot do business with that. The errata also requires Mahi Pono to take 1,000,000 gallons of water a day from the low flow diversion in Spreckels ditch at Wailuku River, which they've sealed up so they can't really do that.

Where are we Now?

Motions for Reconsideration are pending:

OHA & Community Groups jointly requested reconsideration/correction of requirement for full title search and chain of title requirement and recognition of Wailuku Country Estates' extinguished appurtenant rights;

Mahi Pono sought reconsideration of its surface water allocation

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What's Next?

- Consideration of appeal (deadline is 30 days after decision on motions for reconsideration)
- PUC Proceedings – in 2007 or 2008, PUC opened a docket to determine whether Wailuku Water Company was a public utility, and WWC petitioned for a CPCN. Proceedings stayed pending the outcome of the permitting decisions
- Implementation and enforcement

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So where we are now is that there are motions for reconsideration pending and the motion for reconsideration tolls the time within which you have to determine whether you want to file an appeal. So OHA and the community groups filed a joint request for reconsideration. Both of the requirement for a full title search and the recognition of Wailuku Country Estates appurtenant rights and Mahi Pono of course sought reconsideration basically of the errata that reduced its surface water allocation.

So what's next? The most immediate thing will be that once the Commission makes its decision on the motions for reconsideration, then OHA will have 30 days to determine whether it wants to file an appeal. I did not indicate any need for an executive session today because I'm really not prepared to give you any cogent advice on that at this point. I still think we need to know what the Commission is going to do on the motions. We're also in the process. One difference between the final decision and the proposed decision is that Dr. Miike is very anal about numbers and charts and graphs, and he goes through in great detail in very many charts how much water would be going where, how, what percentage of the time there wouldn't be enough water. I mean, that's all been stripped out of the final decision, so we're also undergoing the process of trying to figure that out. What is this going to look like? Because they the Commission made some judgment calls that were different than what Dr. Miike would do so yeah they didn't put water back in the streams, but they increased the amount of water for kalo cultivation. And so we kind of have to look at some of those tradeoffs, but that is something that will come. Something else that's going to come, but perhaps not quite as immediately is PUC proceedings. Back in 2007 or 2008, when we were having the original contested case hearing. The PUC opened a docket to determine whether Wailuku Water Company should be treated as a public utility because it sold water delivery services. Maybe not to the public, but to people that wanted them. And in response to that one, Wailuku Water Company filed a petition for a certificate of public convenience and necessity, which it would require in order to act as a public utility. This proceeding has been stayed for over a decade now. Basically, what the PUC said was, well you know, let's see what the Commission does about the permits. I mean, how can we determine whether there's a public convenience and necessity if we don't know where the water is going and who's permitted to have it so they put it off down the road. What's going to be the problem there or what's shaping up to be a problem there is that public utilities need to treat their customers the same. So you know they have tariffs, the tariff rate that the PUC has to approve. Right now there are a lot of kuleana uses. They get their water from Wailuku Water Company, from the ditch because through the course of history Wailuku Water Company has basically destroyed the traditional 'auwai that these users used to get their water from. So as a convenience to Wailuku Water Company they didn't want to use the 'auwai system and they put everything towards the ditch and they redesigned the whole system to meet their own convenience. And in exchange they provide water to some of the kuleana users. The fight in the PUC is going to be whether they are entitled to be paid for that and it's going to be a big fight and I think there is a very good historical and cultural argument that no, they should not have to pay for that. So the PUC is going to be put in

perhaps an awkward position trying to figure out what to do about that. How to align, you know tariffs and the way it's used to dealing with public utilities with appurtenant rights and which are basically easements. So that is something to look forward to. The biggest thing though I think is going to be implementation and enforcement of the decision. Well, the Water Commission staff as dedicated as they are, they don't really have the resources to chase Wailuku Water Company down and make sure that they're always complying with the IIFS. For a while we had some pretty good monitors that you know they were like live gauges and you could log in online and you can see where the stream flow was. They proved to be not able to withstand some of the flooding that we've had on Maui, and that Maui has had in the past few years, so that continues to be a big issue.

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. Secure permanent stewardship & funding for the watersheds so there will be streams for the future

September 20, 2007

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So I just wanted to come back to OHA's original goals. I would say that we have pretty much secured year round stream flows from mauka to makai. We have returned these public trust resources to public control and management. They're now firmly within the control of the Water Commission and not Wailuku Water Company. The last one is still a work in progress. We do not have permanent stewardship and funding. We're working it. And with that, any questions?

Trustee Akina: I don't have a question, I just wanted to thank you for all the hard work and you know, continuing to just push forth the case. Thank you so much for all you've done.

OHA Attorney Pamela Bunn: Thank you, Trustee. As I said at the beginning, it has been an honor and a privilege, and I truly mean that.

Board Chair Hulu Lindsey: Pam, I'm the Maui Trustee, I had heard that the County of Maui was planning to purchase the transition lines from Wailuku Sugar, do you know anything about that?

OHA Attorney Pamela Bunn: Trustee, that has been talked about for many years. It was a who's the mayor, two mayors ago. It was one of his pet projects because he believed that the County of Maui could have all the water it wanted if it took over the transmission system.

Board Chair Hulu Lindsey: Arikawa

OHA Attorney Pamela Bunn: That's right, and you know it has been discussed I think at some points I think there was Council approval of spending money for an appraisal of the system and it is still under discussion.

There has also been discussion about perhaps trust for public lands or somebody like that being able to help with it. I'm not sure that Wailuku Water Company has always been reasonable about what it's been asking and the system, I mean, face it, it's hundreds of years old. It needs work, it's very leaky. So it is quite an undertaking and it would take, I believe, a government entity and a pretty big investment. On the other hand, it's infrastructure week. You know, I think now is perhaps a good time to be looking to do things like that. So as far as anything firm, no, I don't know firmly it's going to happen but it continues to be discussed.

Board Chair Hulu Lindsey: Yeah, I think the water company has asked too much money of the County considering the condition of the transition lines.

OHA Attorney Pamela Bunn: I agree

Board Chair Hulu Lindsey: That's where the disagreement was. Thank you.

Chair Akaka: Any other questions trustees? I don't see any, mahalo nui Pam for your presentation and all your hard work on this it is truly appreciated.

OHA Attorney Pamela Bunn: Thank you, Chair. Thank you for having me.

Chair Akaka: CEO, anything else to be shared or Everett on this?

Ka Pouhana Hussey: Everett did you have any closing before we transition Chair Akaka to the next agenda item?

Assistant Senior Legal Counsel Ohta: No except to thank Pam. I know she's left the call, but she's certainly been our committed counsel through all of this various iterations of the case. It's taken a lot of work to get us to this point. But as you noted from Pam's presentation, a lot of the work and decision making, particularly by the Water Commission is really pressed incentivizing so it was very important for OHA to certainly be a partner in this case with the community groups to ensure that these processes are set and community focused as they'll be used and relied on going into the future for different communities across the islands, so thank you.

B. Update and Discussion re: Island Burial Councils, Burial Sites Working Group, Working Group/Task Force Appointments as per 2021 Legislative Session, and Overview of Statutorily Created Boards and Commissions with Seats Reserved for OHA Representation.

Chair Akaka yields the floor to Ka Pouhana Sylvia Hussey.

Ka Pouhana Hussey yields the floor to Chief Advocate Sterling Wong and Compliance and Enforcement Manager Kai Markell.

Today's Agenda Item

- Update and Discussion re:
 - 1) Island Burial Councils,
 - 2) Burial Sites Working Group,
 - 3) Working Group/Task Force Appointments as per 2021 Legislative Session, and
 - 4) Overview of Statutorily Created Boards and Commissions with Seats Reserved for OHA Representation

1) Island Burial Council Nominations

- BAE#21-02 will seek approval of OHA's 2021 nominations for IBCs:
 - O'ahu
 - Maui/Lāna'i
 - Moloka'i
- Action Item scheduled for next BAE Committee meeting (Aug. 18)

Chief Advocate Sterling Wong: Aloha, Sterling Wong, Chief Advocate for the Office of Hawaiian Affairs. I have Kai Markell on the line. I am going to share my screen for this presentation. So as been mentioned for this agenda item, we have four sort of topics for it. Update and discussions on Island Burial Councils, Burial Sites Working Group, Working Group and Task Force appointments from the 2021 legislative session and an overview of sort of boards and commissions with OHA seats created by law. To get us started I'm gonna kick it to Kai Markel our Compliance Enforcement Manager to go over the first topic, which is Island Burial Council nominations, with that I'll turn over to Kai.

Compliance and Enforcement Manager Markell: Thank you, Sterling and thanks for running the PowerPoint so I'll let you know when to switch the slides. So Aloha Chair, Vice Chair, Trustees and Administration. I'm going to just run through the Burial Council nomination process and OHA's role. Some of you are familiar with this from previous presentations and others may not. So we're coming forward with some names to appoint to the Island Burial Councils. Particularly the O'ahu Island Burial Council, Maui, Lāna'i and Moloka'i. We have an action item scheduled in August of 18th of this month.

HRS § 6E-43.5

Island Burial Councils

- Act 306 amended Chapter 6E, HRS based upon events at Honokahua, Kapalua, Maui
 - Established in DLNR 5 island burial councils:
 - Hawai'i,
 - Maui/Lāna'i,
 - Moloka'i,
 - O'ahu, and
 - Kaua'i/Ni'ihau,
 - Created geographic regions and landowner reps

So the Island Burial Councils were established in 1990, when Act 306 amended chapter 60 after the events at Honokahua in which 1100 men, women, children and infants were systematically excavated and exhumed to site the hotel, the Kapalua Ritz Carlton. And after protests, including on O'ahu at the Capitol, Governor John Waihe'e moved forward with Act 306 with the Legislature to amend the historic preservation laws and give protection to unmarked burials you know, so a burial in a cemetery at Punchbowl like my grandmother, you couldn't go try and dig her up without being arrested quickly. But my grandfather, who was in an unmarked

burial at Ko'olau Cemetery in Moloa'a, you could dig him up and you know give his po'o, his skull to Bishop Museum and put the rest of his iwi in a trash bag and things happen like that back then, it was horrendous. So part of the protections was creating the Island Burial Councils and there are five of them, Hawai'i, Maui/Lāna'i, Moloka'i, O'ahu and Kaua'i/Ni'ihau and part of the council's formation was to create geographic regions representing the various moku of each island. Because caring for iwi really is a family kuleana and they also of course had landowner reps because the legislation itself was controversial and land owners want to have quick disposition of burials found especially in construction projects. Previously, you could have one landowner rep to every three geographic regional representatives. So some councils had 15 members with literally 12 regional reps and 3 landowner reps and although the law creates the burial councils, their jurisdiction comes from common law. And common law allows next of kin to have a right to claim a deceased body, so it really is a family 'ohana jurisdiction that the Burial Councils exercise.

HRS § 6E-43.5

Island Burial Councils

- Determine the preservation or relocation of **previously identified** Native Hawaiian burial sites; not **inadvertent discoveries**;
- Assist DLNR in the inventory and identification of Native Hawaiian burial sites;
- Make recommendations regarding appropriate management, treatment, and protection of Native Hawaiian burial sites, and on any other matters relating to Native Hawaiian burial sites;

These Burial Councils, their biggest number one charge is to determine whether to preserve in place or relocate previously identified Native Hawaiian burial sites, so only Native Hawaiian burial sites and previously identified which means you know they're there. How do you know they're there? Because they may be recorded in history books, it may be a well known cemetery that people have talked about for generations. It may be barrels that were found by archaeologists during an archaeological survey of a piece of land. And they end up having to go to the Burial Council and the Burial Council is the only body that can determine whether you preserve in place or relocate those burials. Of course it's an administrative decision, then there's a right for reconsideration and there's an appellate process that you can appeal it through Circuit Court and up to the Supreme Court. The other word, inadvertent discoveries, was a concession that the land owners and development community made in 1989 and 1990 that burials that nobody knew were there that you just find in the middle of your construction project, have a right to a quick disposition within two to three days, depending on if it's one or more individuals, and that's become a point of contention in recent years, that classification of burials. So they also have an important function to help SHPD and the DLNR in inventorying and identifying Native Hawaiian burial sites. So the O'ahu Island Burial Council and Maui/Lāna'i are working on that for shoreline erosion. You know where there's beaches like Kua'o, Hamakuapoko on Maui, Ka'a'awa on O'ahu, where you've had dozens and sometimes hundreds of burials wash out over the decades. Inadvertent discovery is defined as unanticipated finding of remains and no one can say that after 108 kūpuna came out in a beach that is unanticipated, that more show up or not show up. So that's something that's again trying to fulfill their mission of helping identify burials even on places before a developer purchased the land, so they know that there's a lot of burials there before you invest in the land. They also make recommendations to the department on appropriate management, treatment and protection of Native Hawaiian burial sites on any other matters, so that's really broad.

HRS § 6E-43.5 Act 276 (2013)(An OHA Bill)

- o Amended council composition requirements
 - o 9 total members (Moloka'i: 5 total members)
 - o 1 rep per region; 6 regional reps (Moloka'i: 4 regional reps)
 - o Up to 3 landowner/developer representatives (Moloka'i: up to 1 landowner/developer representative)
- o Amended quorum requirements
 - o 5 members required to conduct business (Moloka'i: 3 members)

OHA's Role in IBC Nominations

o §6E-43.5 provides that:

- o Appointment IBC members shall be made by the Governor from lists for each council submitted by DLNR and OHA.
- o At all times, **at least two of the regional representatives** of each council shall have been appointed from a list of nominees submitted to the Governor by OHA

So back in 2013, OHA put forward a bill to amend Chapter 6E and it had to do with some of the quorum issues. Some councils were unable to meet because, like Moloka'i had a hard time finding large land owner reps over there, there was just a handful and thus Moloka'i was defunct for four or five years. They couldn't meet. So in 2013 it was amended to 9 total members instead of 15 max. Moloka'i has five and you have one rep per region and then up to three landowner development representatives. However, if there is no landowner rep, we can also fill it with the regional rep and double up like a large moku that may need two representatives. And it amended the quorum requirements, so only five members required to conduct business. And on Moloka'i, three. So we have three on Moloka'i now. OHA last year moved forward Keomailani Hanapi Hirata to add to the two Moloka'i Burial Council members, so they finally have three and they can conduct business now.

So OHA's role, appointments are made by the Governor from a list, and the list is submitted by DLNR and OHA. So this is how the law reads and this is how the rules read. The Governor will receive a list from OHA if we choose to send one, we're not mandated, but it submits a list, then he has to pick at least two, he or she has to pick two members from OHA's list on each council. That came in the amendments of 2013. It used to be at least 20% of the Council had to be from OHA's list. So at all times at least two of the regional representatives of each Council should have been appointed from a list of nominees submitted to the Governor by OHA. So DLNR puts their names in and OHA puts are names in.

OHA Nomination Process OHA Nomination Process (cont.)

- o Collaborative effort:
 - o **Community Engagement**
 - o Outreach
 - o **Compliance Enforcement**
 - o Applicant review/training
 - o **Public Policy**
 - o Senate confirmation testimonies
- o Candidate Selection
 - o Each candidate is scored based on their experience in and "understanding of the culture, history, burial beliefs, customs and practices of Native Hawaiians in the region" they seek to represent
 - o (as demonstrated candidate's resume and letter of intent)
 - o Community and regional representation
 - o Eagerness and willingness to voluntarily serve

So OHA has struggled over the last 30 years of fulfilling this function. There actually was a time when names would just go up to the administrator and sign a letter and give over 10 names to DLNR for them to review and compare with their list and also to send straight to the Governor. Now for the last decade, we've been bringing it before the Board and allowing the Board to kind of look at their names and support their names and the confirmation or nominations. So internally we have a collaborative effort between Community Engagement for

outreach to get people in review the initial applications, help beneficiaries. Compliance Enforcement does actually review of the applicants and their burial knowledge, and we also help train those who need training and then Public Policy handles the legislative, the Senate confirmation testimonies.

So you know the law requires that a candidate have an understanding of the culture burial beliefs. It's actually in the laws and rules. Not everybody has the same level of understanding of burial practices, so we're very concerned in getting people who want to serve and want to be willing to serve, that's the number one priority. They show a commitment that they want to take care of the kūpuna. Right, which Mary Kawena Pukui is our most cherished possession. Second is if anybody lacking in iwi we're willing to help bring them up to speed, and that's another function that we try and do. So we go through and we score everybody and we discuss it. Make sure they represent their region, their willingness to serve.

OHA Nomination Process (cont.)

- Collaborative Assessment and Scoring
- Candidates Submitted for BAE & BOT Approval

Appointment Process

- OHA nominees transmitted to Governor's Office of Boards and Commissions and DLNR
- Governor must appoint 2 regional representatives on each council from OHA nominee list
- Senate confirms
 - During current session for regular appointees
 - During following session for interim appointees

It's a collaborative assessment. Different parts of OHA weigh in and sometimes research and community engagement and then make sure the candidates who make the list are brought to the BAE and BOT for an approval to put in our letter which goes to the Governor, letting them choose.

So we work with the Governor's office, boards and commissions. When that relationship has waxed and waned over the over the decades as well depending on who's in that seat, as well as the Governor. The Governor supposed to appoint two representatives from OHA's list, and then it goes through the Senate confirmation. During the current session, so we will submit by December 1st a whole other list and then hopefully they'll get confirmed during the Senate session of 2022. However, there are interim appointees as well, so mentioning Moloka'i, we were able to get Keo Hanapi Hirata on, but at the same time La'akea Poepoe, he expired in June, so we're technically back down to two members again. However, he's being considered as an interim to hold that place until he can be nominated officially and confirmed by the Senate next year. Why he wasn't put in this session is one of the issues we have. I mean clearly as he's pretty new, he was expiring this past June and he could have easily made the Senate confirmation of this session and started his term. But now he's going to have like a staggered term which creates people leaving in the middle of a Senate session. Sometimes their term runs out, so that's one of the issues we're dealing with.

So I'm just going to sum up real quick that we have some names coming for O'ahu, one from Moloka'i, one from Maui/Lāna'i. They needed a Lāna'i Rep for several years now and they reached out to us and we have a Lāna'i name. There's still some dysfunction right now like the OIBC has four members who were appointed who never came through OHA. Two expressed interest and we never even were able to vet them and bring them to the Board and the Governor placed him on the Burial Council. So that in it of itself isn't problematic because these are some good people who applied. But what is problematic is that there's great confusion now between the Office of the Governor, SHPD and OHA's roles in the process, and apparently people are applying straight to the Governor's Office and he's picking and choosing and putting people on the Burial Council we have no knowledge about their basic understanding of burial beliefs and customs and practices that the law and rules require. There was also some issue about DLNR not submitting a separate list, but just supporting OHA's list and when you co mingle our list how can you show that two Council members are from

OHA's list and the rest are from DLNR's list when the list is commingled, and they're looking at our past list over the last five years, very few of our people got on councils, so I'm clearly questioning whether even two members of each council now currently is from OHA, which is again in violation of the law and statute. So we need to have a sit down with the Office of the Governor and straighten this out and determine what basis are they appointing people. And the other thing is we're bringing Hina forward again. Hina was a Chair of O'ahu IBC, decade long experience. The board approved her in 2016. We brought her name forward two years ago for reappointment. So technically the Board already supports her, but we're bringing her specifically back onto this agenda because it appears that she may have been targeted her seat and there's all this disruption now on the OIBC of who represents what region. And if you remember what Sterling is going to talk about next is the burial sites working group. The genesis of that was the protest earlier in the year by the Burial Council heads about all the stuff going on with the Burial Councils. The lack of support, the politics, the lack of AG legal advice and the working group is really a byproduct of this process here, the burial council. I'm going to end with that. If there's any questions.

Chief Advocate Sterling Wong: So just to be clear on the August 18th meeting we will be bringing a bunch of names forward per our you know 10 year process relating to this for these three councils, and we will have names so we'll go through them again at that time. If there's no questions Chair, I'll go through the next slide.

Chair Akaka: Yes mahalo Sterling and mahalo Kai for your presentation.

Board Chair Hulu Lindsey: I was thinking if a member of advocacy could make a meeting with the governor's lady that is in charge of boards and commissions and go through the statutes requiring DLNR and OHA to have separate lists and that they picked from separate lists. Sometimes they need to be reminded.

Chief Advocate Sterling Wong: Madam Chair, I think that Chair Hulu Lindsey brings up a fantastic point. We actually met with. I won't name names, but the Office of Boards and Commissions from the Governor's Office I think in like November. We try to keep an open discussion with them and clearly you know, Kai's been monitoring the Island Burial Council meetings and I think a lot of the intel he's providing about some of the confusion and issues we have with the quorum and IBC composition issues are coming from his monitoring of those meetings and we're hearing some disturbing things Madam Chair about how the Office of Boards and Commissions is sort of implementing this so I think we will you know, do exactly what you're requesting Madam Chair. We'll probably be setting up another meeting with that office. Having said that I think once the Board approves these names, I think we will include in that letter submitting these names I think we want to get on record and have some strong mana'o shared with that office about what our positions are and how this law reads and is interpreted and should be implemented, so I think those two actions both an in person meeting preceded by a letter would be helpful. You know, making sure that OHA is on record with our concerns. So Madam Chair your mana'o is clearly valid.

Board Chair Hulu Lindsey: And that's only one problem of Island Burial Councils. I'm sure you'll touch on the next one where SHPD is not cooperative.

Chair Akaka recognizes BAE Vice Chair Lindsey.

Vice Chair Lindsey: I got two questions, one I noticed that no Hawai'i Island Burial Council names are being put forth in the action item and I just wanted to confirm we've taken a look at that council and it's operating and we got folks in place for that council to be holding meetings?

Compliance and Enforcement Manager Markell: Yes, Trustee Lindsey that Hawai'i Island Burial Council is functioning right now and functioning at a high level. So again, there is a lot of confusion right now between DLNR's list of nominees whose terms are expiring, who they're putting forth and that communication is broken down such that at any point we can move forward and ask for interim appointees. But the whole process is really kind of in disarray at this point and the hard part is we work collaboratively. As Sterling mentioned we

had a great meeting with SHPD and the Office of the Governor, the end of 2020 and then all of a sudden everything kind of broke down. So we need to be collaborative in getting the names forward and the seats and everything for the Burial Councils, but at the same time, as Chair mentioned, we're dealing with a whole host of complaints about SHPD and it's very antagonistic on another level, which creates tensions between our staff and their staff. So it's a little problematic at this point, but if that answers your question.

Vice Chair Lindsey: It does Kai, thank you. Thank you, Madam Chair.

Chief Advocate Sterling Wong: Madam Chair if there's no additional questions, I'll go on to the next item if that's okay.

Chair Akaka: Yes, mahalo Sterling.

2) Burial Sites Working Group

- BAE #21-03 will seek approval of OHA's Burial Sites Working Nomination
 - Aug. 18 BAE Meeting
- "A representative of the **Hawaiian community** familiar with and experienced with the burial sites program to be appointed by the Office of Hawaiian Affairs" (SR171)

Burial Sites Working Group

- SR171 and HR113 both adopted, but different
 - Both essentially request OHA convene a Burial Sites Working Group
 - Final report due before 2022 Legislative Session
 - Combined SR171/HR113 scopes of work and compositions

Chief Advocate Sterling Wong: So let's go on to the next item in the agenda, Burial Sites working group. We will be presenting an action item on August 18th to the BAE Committee for the Board approval relating to a Hawaiian community representative for this working group. A little bit of background on the actual working group. As the BAE Committee will recall, there were two competing resolutions from this past legislative session looking to create a Burial Sites Working Group and this was as Kai mentioned earlier in response to I think the strong community concerns, the press conference and the like at the beginning of session relating to long standing concerns about SHPD and DLNR's implementation of the burial sites program, particularly with the Island Burial Councils and you know their management of burial sites. So two resos passed. They were sort of competing really with different sorts of asks and things so, but essentially both requested OHA to convene a Burial Sites Working Group. And these are resos by the way not laws. So both resos asked for some sort of final report to be due to the Legislature prior to the 2022 legislative session. So what staff did was and this was a really unique session where we have a situation where we have two competing resolutions. Usually there's a concurrent resolution. We combined both reso's scopes of work and compositions and I'll walk you through that really quick.

Scope of Work

- "Study and analyze the allegations of mismanagement by DLNR's SHPD" (SR171);
- "Determine a recommended course of action to address and resolve the allegations of mismanagement by DLNR's SHPD" (SR171);
- "Review and recommend improvements to the workings of the IBCs, which are administratively attached to SHPD, and how to implement them" (HR113);
- "Determine ways to strengthen protections and improve resources for Native Hawaiian burials" (HR113);
- "Examine ways to improve the implementation of the IBCs' duties and responsibilities and to better understand and determine their relationship to SHPD and its management" (HR113);
- "Review existing statutes and administrative rules pertaining to the IBCs and ways to develop their implementation" (HR113); "Provide recommendations on the development of a statewide survey and inventory that documents historic properties where burial sites exist or may exist, including properties owned by the State or the counties" (HR113).

Composition (14 members)

- OHA CEO or CEO's designee
- One individual from **each IBC**, *Total of five members;
- A representative of **Huliauapa'a**
- Dean or designee of UH **Richardson School of Law**
- **History and Culture Branch Chief** of DLNR's SHPD
- DLNR's **SHPD Burials Specialist**
- One member from **Attorney General's Office**
- One representatives of **large landowners and developers**, appointed by the Governor
- One **Native Hawaiian cultural practitioner**, to be selected by Huliauapa'a
- A representative of the **Hawaiian community** familiar with and experienced with the burial sites program to be appointed by OHA

So there's essentially six points combined between the two resos. You can see them here. I won't go through them individually, but basically, as I said earlier and I think what Kyle was alluding to, they are asking this working group to sort of evaluate mismanagement and concerns related to DLNR and SHPD's implementation of the burial sites program looking specifically at the IBC'S and the supports they're getting administratively. Also reviewing these existing statutes and administrative rules relating to IBCs and Hawaiian burials, and ultimately it's supposed to sort of get all this information, review it vet it and evaluate and produce some sort of report with recommendations to the Legislature.

The compositions called for in both resos sort of compete. So what we did was we took two, both resos, the compositions and we sort of meshed them together. We ended up with this 14 member composition. So I'll just go through them. So OHA's CEO who was actually identified as the Chair but and that person is going to be Kai Markell. I think our most qualified and experienced person on this issue. But we are going to hand over. The goal is to hand over the chairmanship to the rest of the Working Group to select the Chair among themselves so they can take sort of, you know, let the community lead on this issue. There will also be individuals nominated from each IBC. If there are questions about that, Kai can sort of answer that because he's been following that. Huliauapa'a is an organization that was really leading the charge on this effort at the beginning of session and throughout so they have a representative as well. UH Law School will have a representative. There will be a couple representatives from SHPD. They're listed there as well. You know the Attorney Generals. Support of you know the burial sites program in the IBCs has been a major concern, especially you know these IBCs and what not are state entities and they're supposed to be given legal support by the Attorney General's Office, and so that's why the Attorney General is included in here. Also, one representative from large land owners and developers to be appointed by the Governor. That sort of jibes with IBC composition. And then the two last ones, a Native Hawaiian cultural practitioner to be selected by Huliauapa'a and then I highlighted as it pertains to this presentation, a Hawaiian community member familiar with and experienced with burial sites program to be appointed by OHA, so that's what the action item we're going to be presenting at the next meeting is going to be about. It's specifically for this Hawaiian community representative.

Nomination Process

- Goal: fair and transparent
- June 18 announcement on OHA web and social media platforms
 - OHA requested interested individuals to submit a resume and a letter of intent, detailing:
 - Why [they] want to serve on the Burial Sites Working Group
 - What experience or expertise can they bring to the Burial Sites Working Group
- By July 2, 2021 deadline: 18 applicants

Nomination Process

- Four-person OHA panel consisting of Community Outreach; Compliance Enforcement; Land, Culture and History staff reviewed applications
- OHA staff evaluated the applicants against the following criteria:
 1. Complete Application (Letter of Interest and Resume);
 2. Demonstrated Experience in Iwi Kūpuna issues (practitioner, advocacy, number of years);
 3. Demonstrated knowledge in Native Hawaiian burial practices;
 4. Demonstrated knowledge and understanding of legal framework surrounding burial councils and historic preservation; and
 5. Experience on island burial councils.
- Staff will recommend the highest scoring applicant to the Board for approval

So our goal was to create sort of a fair and transparent process to make sure, much like our IBCs create a fair and transparent process. Make sure we get the best people in these positions. You know to represent our beneficiaries needs and to quell any sort of concerns about, you know to be honest, like sort of accusations about OHA friends and family and we're putting people on these things that aren't qualified. So we want to create a fair and transparent process. So what we did was we did a two week kāhea sort of a solicitation into the community. We posted on our social media platforms and our web asking people to apply. We had and you can see here we requested people to interested applicants to submit a resume and a letter of intent. We asked two specific questions for them to detail in their letter of intent. Why they want to serve on this working group and also what kind of experience and expertise they could bring to the working group. So by July 2nd we got 18 applicants which I would say is pretty robust. I didn't actually think we're going to get that much, so I think that illustrates that there's a lot of interest within the community about the work of this working group. So the nomination process in a large part, I think follows the IBC nomination process we just presented a four person panel internally from OHA consisting of a community outreach, compliance, enforcement and land culture and history from our research program staff, they reviewed the applications.

They vetted the applications through sort of a five point criteria process. You can see that here, so it's making sure they had a complete application, letter of interest and resume, demonstrated experience in iwi kūpuna issues, demonstrated knowledge in Native Hawaiian burial practices, demonstrated knowledge and understanding in legal framework surrounding IBCs and historic preservation issues and also experience on Island Burial Councils. Staff reviewed all 18 applicants and we are, we'll in the action item at the next BAE committee be providing our recommendation based off the highest score of this vetting process.

Notification to Applicants

- Once the Action Item is provided to BAE staff for meeting folders, a letter notifying the 17 applicants will be sent (Friday, Aug. 13)
- Burial Sites Working Group will offer opportunities for those 17 applicants as well as the rest of the public to provide/share their mana'o

Burial Sites Working Group

- BAE #21-03 will seek approval of OHA's Burial Sites Working Nomination
 - Aug. 18 BAE Meeting

And you know, because there were so many applicants. You know one of our concerns was to make sure we mālama sort of the applicants who have expressed interest in participating, and so what we will be doing is when the action item is submitted to the BAE and sort of public in that way we will be sending a sort of template letters to all 17 applicants notifying them that they weren't selected. Similar to, I think the grants process, making sure they know that they weren't selected and that the board will be considering another

name and so that will go out on the auspicious date of Friday the 13th next week and and then you know, I think to assuage concerns you know about, you know, sort of this robust interests and make sure they still have a place in this process. You know, the burial sites working group, and we're not the chair of the group we're not going to be the long term chair of the group, but I think we will impress upon the working group that they need to provide opportunities for these 17 applicants as well as the rest of the public to be able to provide their mana'o and share their mana'o on their experience and expertise relating to the scope of work of the working group specific to burial sites and IBCs and historic preservation. So we want to make sure that you know, even though these people unfortunately didn't make the recommendation that they're still going to be able to have, you know their voices heard and really participate in the process and sort of shape this moving forward. And as you know, the working groups just they're not going to make any decisions, they're just going to make recommendations and to the extent that they're making amendments on laws or administrative rules there of course is the public process to get those laws and rules adopted and implemented. So this is just really the first step. Once you know we send our report to the Legislature, should the Legislature pursue any of these recommendations they got to introduce a bill and you know, go through that entire legislative process to get the bill through. Community members and the public will definitely participate in that process and provide their mana'o on the shaping of those laws. Administrative rules similarly, have a public process through, I think. Chapter 92.

So having said that, this is the beginning of the you know, the journey. Well, I wouldn't say it's the beginning, it's part of the journey. There's a long road ahead, lots of opportunities for continued input. Again, Burial Sites Working Group. The nomination from OHA will be coming in an action item at August 18th, the August 18th meeting, and we'll provide the names at that time. Madam Chair, lot to cover right there. So I want to stop, see if there are any mana'o, any questions that we can sort of help answer.

Chair Akaka recognizes BAE Vice Chair Lindsey.

Vice Chair Lindsey: Hey Sterling, so the product of the working group and you touched on it just now but the product of the Working Group is going to be recommendations in a report to the Legislature. So if any of those, and like you said you know administrative rule changes have their own process and stuff like that. But if any of those are like changes to, or new statutes. I guess timing wise the OHA package would be already well in the works at the time the reports are prepared right. So for the upcoming session, we'd really be looking at a bill getting introduced to address any statutory recommendation like someone else or next year 's OHA's package if there is one.

Chief Advocate Sterling Wong: Madam Chair, I think Trustee Lindsey is bringing up a great point and you know, we've administered a number of groups similar to this, so I think Criminal Justice Task Force, Taro Security Task Force, the Elders at OHA, the Bioprospecting task force from the 2000s. You know we have administered similar groups and as Trustee Lindsey did mention the timing. You know what we're going to try and do is what we generally do. This is a non election year. So we'll probably bring our final legislative package to the Board mid October for approval and what we suspect you know when we administer these and we would participate in these working groups, we anticipate that the final report with recommendations would be completed, a draft report by Thanksgiving, so they're a little off. I would say, however, Trustee Lindsey that's not to say if bills and ideas are not identified early on and we can definitely share this with the working group that if they identify them early on, we can actually put them in our package in October. Moreover, non election year. So we don't have to worry about election and you know a reorganization of the Board, so we will have, you know, the full ability from you know November through the beginning of session to bring something to the Board in terms of amendments to the package that have already been approved, that can include some of these working group things, and we've done this in the past, so I want to say when I was the Public Policy Manager, almost every single year I was the manager. We amended the package that had been previously approved in the January prior to the session. I think there's you know, still a lot of opportunities for OHA to include in our package and put our full weight behind some of these legislative ideas if they come out from the

burial working group that the Board is interested in, so I think there's definitely a leeway, an opportunity for us to do that, Trustee Lindsey, and that's a great question.

Vice Chair Lindsey: Thank you, Sterling. Thank you, Madam Chair.

Chair Akaka: Any other questions? Sterling is there anymore that you would like to present.

3) Working Group/Task Force Appointments, 2021 Legislative Session

4) Overview of Statutorily Created Boards and Commissions with Seats Reserved for OHA Representation

| Board/Commission | Authority | OHA Chair (or designee) | OHA CEO (or designee) | OHA Seat (general) | Current Representative |
|--|--------------------|-------------------------|-------------------------------|--------------------|---|
| Behaviorable Health Working Group | Act 154 (SLH 2021) | | X "administrator of [OHA]" | | Sharde Freitas, Public Policy Advocate |
| Task Force on Missing and Murdered Native Hawaiian Women and Girls | HCR11/HR12 | | X | | Lisa Watkins-Victorino, Research Director |
| Maunakea Working Group | HR33 | | | X | Sterling Wong, Chief Advocate |
| Task Force on 21 st Century Data Governance | SCR5 | | X | | Lisa Watkins-Victorino, Research Director |
| Burial Sites Working Group | SR171/HR113 | | X | | Kal Markell, Compliance Enforcement Manager |

Chief Advocate Sterling Wong: Yeah, Madam Chair, just two more. Just real brief updates relating to this item. I'll just take them. I'll take the Board through them. So working group task force appointments pursuant to this past session there were five sort of working group task force thing that were created. They're listed here and in terms of appointments. We've got the staff listed here we've sort of appointed or assigned to represent OHA and the working groups. I would say you know most of the working groups just given the sort of the, have not been stood up yet, or if they've had meetings. It's just not real formal meetings yet. So no real updates at this point. But I definitely want to share with the Board an update on who from staff is going to be representing the agency on these. These task forces and working groups that were created just this past session. I'll leave this up if there are any questions. I don't really have substantive like updates. But if there are questions I can try and take them and then maybe come back to the Board at the next meeting or offline with updates if the Board is interested. If any Trustees are interested.

| Board/Commission | Authority | OHA Chair (or designee) | OHA CEO (or designee) | OHA Seat (general) | Current Representative |
|---|------------------------------------|-------------------------------------|-------------------------------|------------------------------------|--|
| Native Hawaiian Education Council | 20 USC § 7514(b) | X | | | Lisa Watkins-Victorino, Research Director |
| State Board on Geographic Names | HRS §4E-1 | X | | | Brad Kaaleleo Wong, Papahānaumokuākea Specialist |
| Community-Based Economic Development Advisory Council | HRS §210D-5 | X | | | Casey Brown, Ka Pou Nui/Chief Operating Officer |
| Hawai'i Interagency Council on Homelessness | HRS §346-382 | X | | | Colin Kippen, OHA Board Chief of Staff |
| Hawai'i Correctional System Oversight Commission | HRS §353L-1 | X "appointed by the chairperson" | | | Mark Patterson, Administrator of the Hawai'i Youth Correctional Facility |
| Hawai'i Climate Change Mitigation and Adaptation Commission | HRS §225P-3 | | X | | Sylvia Hussey, Ka Pouhana/Chief Executive Officer |
| Dark Night Skies Protection Advisory Committee | Act 185 (SLH 2017) | | X "administrator of [OHA]" | | Vacant and needs to be filled when contacted |
| Temporary Commission on the Thirteenth Festival of Pacific Arts | Act 104 (SLH 2017) | | X | | Hinaleimoana Wong-Kalu, Community Outreach Advocate |
| Kaho'olawe Island Reserve Commission | HRS §6K-5 | | | X "a trustee or representative" | Chair Hulu Lindsey |
| Kāne'ohe Bay Regional Council | HRS §200D-2 | | | X | Letani Peltier, Public Policy Advocate |

If not, we're just gonna mosey on into the next one and so this is the overview of boards and commissions that have like sort of long term statutorily been created so that OHA has been sitting on for you know a while now and there's I think 10 here and we have various staff, even Trustees, CEO sitting on these boards and commissions and task forces. One is even federally created with NHEC. Most of them are statutorily or by act created. Just providing the Board with an update on the membership and OHA's representative, representation.

Chair Akaka recognizes Trustee Lee.

Trustee Lee: This isn't really for Sterling, I think this is more for Ka Pou Nui Casey. Given the transparency that OHA is trying to work towards on our website, it would be great if there was a tab where our beneficiaries could click and find out all the boards and commissions that OHA statutorily has to sit on and who in OHA is seated there so that they could click on that person's name and then forward an email to them because we as Trustees I know we get asked by beneficiaries all the time well, who sits on this board and commission and a lot of times we don't know. We have to go look it up. So it would be great if we could just direct them to the website and then they could see the boards and commissions that OHA statutorily has to sit on or even when task force are created and then they can click on and see who from OHA sits there so that if they have an issue for that board or commission, they know who at OHA to go talk to versus trying to go navigate the whole system of OHA to try to find out who they have to go talk to. Thank you, Madam Chair.

Chair Akaka: Mahalo for that recommendation.

Chief Advocate Sterling Wong: And Chair with that I think that'll conclude my presentation.

Chair Akaka: Well before we go any further on that I would like to say hau'oli lā hānau to our very own Trustee John Waihe'e the 4th, happy birthday.

VI. ANNOUNCEMENTS

Chair Akaka: I believe we have our BOT meeting coming up tomorrow.

VII. ADJOURNMENT

Chair Akaka: Can I please get a motion to adjourn the meeting.

Trustee Waihe'e: So moved, Madam Chair.

Chair Akaka: Mahalo, birthday boy.

Trustee Alapa: Second

Chair Akaka: Mahalo for the second Trustee Luana. Alright, may I please have a **roll call vote** to adjourn.

| TRUSTEE | | 1 | 2 | 'AE (YES) | A'OLE (NO) | KANALUA (ABSTAIN) | 3:14 p.m. EXCUSED |
|-------------------------|---------|---|---|--------------|---------------|----------------------|----------------------|
| LEINA'ALA | AHU ISA | | | | | | EXCUSED |
| DAN | AHUNA | | | | | | EXCUSED |
| KELI'I | AKINA | | | X | | | |
| LUANA | ALAPA | | 2 | X | | | |
| BRENDON KALEI'ĀINA | LEE | | | X | | | |
| CARMEN HULU | LINDSEY | | | X | | | |
| VICE CHAIR KEOLA | LINDSEY | | | X | | | |
| JOHN | WAIHE`E | 1 | | X | | | |
| CHAIR KALEIHIKINA | AKAKA | | | X | | | |
| TOTAL VOTE COUNT | | | | 7 | 0 | 0 | 2 |

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

Chair Akaka: The meeting is now adjourned, mahalo members, all in attendance, and to all live streaming. A hui hou kākou, mālama pono.

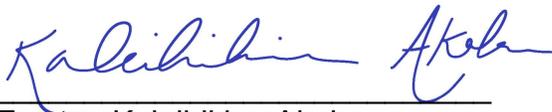
Chair Akaka adjourns the BAE meeting at **3:15 p.m.**

Respectfully submitted,

A handwritten signature in black ink that reads "Brandon R. Mitsuda". The signature is stylized with a large, looped 'B' and a long horizontal stroke extending to the right.

Brandon Mitsuda Trustee Aide
Committee on Beneficiary Advocacy and Empowerment

As approved by the Committee on Beneficiary Advocacy and Empowerment (BAE) on 09/15/21.

A handwritten signature in blue ink that reads "Kaleihikina Akaka". The signature is fluid and cursive, with a prominent 'K' and 'A'.

Trustee Kaleihikina Akaka
Chair
Committee on Beneficiary Advocacy and Empowerment