



October 21, 2021

Board of Land and Natural Resources
Kalanimoku Building
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Re: October 22, 2021, Agenda Item D-8: Adoption of Guidance for Appraisers for the Determination of the Upset Rent for Public Auction for Water Leases for Consumptive Use Purposes Pursuant to Section 171-58, Hawai'i Revised Statutes

Dear Chair Case and Members of the Board:

Earthjustice submits this testimony in opposition to staff submittal D-8 concerning valuation of water leases issued pursuant to Hawai'i Revised Statutes ("HRS") section 171-58. While Earthjustice supports staff's intent to bring the Department's water lease program into compliance with the public trust doctrine and modern resource management principles, the proposed valuation methodology falls short of this goal, as discussed further below. Moreover, rulemaking is required when establishing a policy of general and prospective applicability such as the proposed water valuation methodology. *See Aguiar v. Hawaii Hous. Auth.*, 55 Haw. 478, 487-88, 522 P.2d 1255, 1262 (1974) (citing HRS § 91-1). Therefore, rather than adopt the staff submittal, the Board should direct staff to initiate rulemaking on valuation methodologies for state water leases and permits.

The staff submittal proposes that the appraiser "use the current revocable permit rent as a starting value, as it serves as an indication of the value of water for a particular disposition. The revocable permit rent would then be subject to adjustment," using seven enumerated factors. *See* Submittal at 2. Staff's proposed factors, briefly stated, are as follows:

1. The amount of water taken for use, and the private benefit derived therefrom;
2. The proportion of "available" water used by the diverter;
3. The maintenance costs for system, which would be deducted from the rent value;
4. The avoided cost to lessees of obtaining water from another source;
5. The net economic benefit to lessee;
6. The value contributed by the diverter to watershed management, which would be deducted from the rent value; and
7. The public benefit of the proposed use.

Id. at 2-3.

Earthjustice is generally supportive of staff's intent to establish a graduated valuation system that requires private commercial diverters obtaining substantial profit from the consumptive use of public water to pay a higher rate of rent than other diverters. However,

because of the large number of individual factors that may be considered by an appraiser, and the prospect that these discretionary factors need not be applied consistently, the proposed methodology may decrease rather than increase fairness, clarity, and transparency in the leasing process. A more transparent system would set a graduated rent schedule by rule, with reference to these factors.

Further, the basis for using the current revocable permit rent as a starting value is unclear, particularly given staff's acknowledgment that historical lease valuation failed to incorporate modern public trust and resource management principles. The avoided cost would be another, equally or more logical starting value for applying the adjustment factors proposed by staff. While staff disagrees with a proposal that would set rent *exclusively* by reference to the avoided cost, *see* Submittal at 3-4, there is no explanation why this would not be an appropriate starting point for valuation.

Finally, it would be inappropriate to reduce rental values with reference to potential future maintenance measures that a diverter may or may not implement (factor 3). This factor is inappropriate to consider when setting rental values. It may be appropriate in certain instances to provide a rent "credit" for maintenance measures once completed, but these is fundamentally different than the prospective rent reduction proposed in the staff submittal, which would primarily benefit large diverters. Further, all diverters are obligated under the law to reduce system loss and prevent waste, regardless of the financial costs.

Formal rulemaking would allow Department staff to consider these issues through a more comprehensive, deliberate, and transparent process that provides the opportunity for public comment and input than can inform the valuation methodology adopted by this Board.¹ Absent the opportunity for public notice and comment, individual leases are vulnerable to legal challenge for failure to comply with HRS Chapter 91 with regard to the lease value. *See Aguiar*, 55 Haw. at 490-93, 522 P.2d at 1263-65.

Thank you for this opportunity to submit testimony.

Respectfully submitted,



Leinā'ala L. Ley
Isaac H. Moriwake
EARTHJUSTICE

¹ Consistent with Hawai'i Administrative Rules ("HAR") Chapter 91, the Department's administrative rules provide for a 30-day public notice period prior to public hearing on the proposed rules, *see* HAR § 13-1-22, much longer than the seven-day notice provided for the instant agenda item.



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Testimony to the
BOARD OF LAND AND NATURAL RESOURCES
October 22, 2021

**Agenda Item D-8: Adoption of Guidance to Appraisers for the
Determination of the Upset Rent for Public Auctions for Water Leases for Consumptive Use Purposes
Pursuant to Section 171-58, Hawaii Revised Statutes**

Aloha e Chair Case and members of the Board of Land and Natural Resources,

The Native Hawaiian Legal Corporation has represented Nā Moku Aupuni O Ko‘olau Hui and other individual farmers, fishermen and women, and gatherers of native plants and stream animals in the East Maui region for two decades. And even after that extended time period, putting a monetary value on unfettered access by a single commercial entity to divert up to approximately 90 million gallons of water a day at the expense of an entire community has proven to be an extremely difficult task.

Much of that difficulty can be attributed to the fact that, in traditional Hawai‘i, water was correlated with life (ola), land (‘āina), and wealth (waiwai):

...The life of taro was dependent upon water. In his role as life-giver, Kane the procreator was addressed as Kane-of-the-water-of-life (Kane-ka-wai-ola). Water (wai) was so associated with the idea of bounty that the word for wealth was waiwai. And water rights were the basic form of law, the Hawaiian word for which was kana-wai, meaning “relative to water...”

...Fresh water as a life-giver was not to the Hawaiians merely a physical element; it had a spiritual connotation. In prayers of thanks and invocations used in offering to the land, and in prayers chanted when planting, and in prayers for rain, the “Water of Life of Kane” is referred to over and over again....^[1]

This spiritual belief in the integration of water into the life, land and wealth of the Hawaiian people has, against some fierce odds, persevered. So much so that commoditizing that which, in the Hawaiian worldview, represents spiritual wealth and life, goes far beyond the western dollar.

The other factor in this difficult equation is the history of impacts on Hawai‘i’s people and resources that have resulted in situation we find ourselves in today. Western contact brought about significant changes in both the traditional Hawaiian land tenure system and Hawai‘i’s social structure. As plantation agriculture flourished, concentration of land ownership and control increased. Plantations purchased considerable quantities of Government land and secured long-term leases on other portions of Government and Crown lands. Long-term leases at low prices enabled sugar companies to mortgage the land and secure working capital with little risk. In East Maui, construction of the system of ditches and

¹ Wai O Ke Ola: He Wahi Mo‘olelo No Maui Hikina, Vol. 1 at 21 (emphasis in original) (internal citations omitted).

tunnels that once diverted on average 160 mgd from East Maui streams to irrigate sugarcane in Central Maui commenced in 1876. And there began a conflict between a community and commercial interests over that which has literally fed a people for centuries.

Now fast forward to today—after generations of authorizing the use of water by big business on the cheap, the Board of Land and Natural Resources is now being asked via one short staff submittal to essentially put a price tag on a clearly valuable resource which by law belongs to everyone. As the submittal implicitly recognizes, because water is a valued public trust resource, its valuation is multifaceted. This requires much more opportunity for discussion than what can occur at this meeting. Thus, while the proposal before the Board offers some creative ideas, the proposal is fundamentally flawed at the outset. As such, it should be **rejected**.

First, the development of appraisal guidelines to govern future water leases must be developed through the Hawai‘i Revised Statutes (“HRS”) chapter 91 rulemaking process.² This process will allow for a more through public discourse with full transparency as required by chapter 91, which is crucial to ensure that leases of our most precious resource are valued based on concrete requirements and not subject to political favor. This is absolutely critical given the State’s constitutional and fiduciary obligations to the public trust, to Native Hawaiian traditional and customary practices, as well as to the public lands and Hawaiian home lands trust.

Second, using the current revocable permit rent as a starting value is arbitrary and inappropriate.³ More discussion is necessary to establish a fair baseline for water lease appraisals, considering, among other things, avoided cost and differential rates for large and small users. Similarly, given the Board’s public trust obligations, further decision is needed regarding the prioritization of public trust purposes, specifically traditional and customary practices. The submittal’s hasty rejection of the Department of Hawaiian Home Land’s avoided cost proposal does little to inspire confidence in these guidelines and further supports the need for rule-making to address all considerations in the appraisal process.

Third, giving discounts for “public benefit” invites arbitrary and highly subjective adjustments in appraisal value that may in fact conflict with public’s actual interest as well as the Board’s trust duties to Native Hawaiians, public lands trust, and the Hawaiian home lands trust, especially when certain lessees carry political favor. Additionally, given the history of large-scale diversions in Hawai‘i, the cost of maintenance and any necessary upgrades to a ditch system is necessarily the kuleana of the diverter. A lessee should not be rewarded with reduced rent in order to maintain and/or upgrade a currently inefficient system that has degraded over time under the lessee’s watch. Price breaks like this only supports the status quo and, if met with apathy by the Board, simply incentivizes diverters’ complacency to the detriment of our water resources. The Board is already obligated to ensure that lessees properly maintain infrastructure and prevent wasting water. As such, ditch system upgrades should always be a condition of any future water lease to maximize efficiency and minimize waste along with any other necessary conditions to ensure watershed protection.

² See HRS § 91-1; *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 488-89, 522 P.2d 1255, 1262-63 (1974) (“It is only those regulations concerning the internal management of an agency and not affecting private rights of the public that may be adopted without an opportunity for public participation.”) (internal quotations required).

³ Not only does the current RP rent formula not properly capture the value, but in the case of East Maui, using it as a minimum baseline serves to reward a lessee who has capitalized on a system of renewing revocable permits annually for decades, ultimately benefitting from a “long term lease” under the guise of reduced-rent RPs.

Here, the Board has the opportunity to uphold its high trust duties by rejecting the instant proposal and requiring rule-making to guarantee appraisal guidelines that have been properly researched and vetted by the public in the best interest of our islands' most important public trust resource.⁴ As such, NHLC respectfully urges the Board to **DENY** the recommendations in submittal item D-8 and to require any future proposals guiding appraisals for public trust to go through the Chapter 91 rulemaking process.

“Wai o ke ola! Wai, waiwai nui! Wai, nā mea a pau, ka wai, waiwai no kēlā!”
*Water is life! Water is of great value! Water, the water is that which is of value for all things!*⁵

Sincerely,



Ashley K. Obrey
Staff Attorney

⁴ See *State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) (“Under public trust principles, the State as a trustee has the duty to protect and maintain the property and regulate its use.”); *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 226, 140 P.3d 985, 1006 (2006) (recognizing “an affirmative duty to preserve and protect the State’s water resources”); *Kauai Springs, Inc. v. Planning Comm’n of the Cnty. Of Kaua‘i*, 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014) (“The purpose of the state water resource public trust is to protect certain uses.”); *Ching v. Case*, 145 Hawai‘i 148, 152, 449 P.3d 1146, 1150 (2019) (recognizing “an obligation to protect and preserve the resources however they are utilized”).

⁵ Wai O Ke Ola: He Wahi Mo‘olelo No Maui Hikina, Vol. 1 at 5.