



Sylvia M. Hussey, Ed.D.  
Ka Pouhana, Chief Executive Officer

Board of Land and Natural Resources

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, Hawai'i Revised Statutes

October 22, 2021

9:00 a.m.

Virtual Hearing

The Office of Hawaiian Affairs (OHA) submits testimony in **OPPOSITION** to Agenda Item D-8 and asks the Board of Land and Natural Resources (BLNR) to **NOT APPROVE** staff submittal's proposed guidance because it is vague and does not adequately justify its assumptions or its rejection of alternatives considered. Instead, OHA suggests formal rulemaking to set the guidance that appraisers should use to determine the upset rent for public auctions for water leases for consumptive use purposes, because rulemaking would provide greater opportunities for meaningful public review and comment on this incredibly important issue.

**As an initial matter, OHA notes that since time immemorial, water in Hawai'i has been considered a public trust resource to be managed and administered for the benefit of present and future generations.** Traditional Hawaiian laws and land management practices revolved around the sharing and beneficial use of stream and spring waters, which were treated not as a commodity, but as a community good to be respected and administered to meet a number of social and ecological needs. Today, our constitution and water code reflect this traditional understanding of water, as a fundamental resource that cannot be reduced to ownership, and that must be used and managed to fulfill specific public trust purposes and further the public interest. It is with this kuleana in mind that OHA offers the following comments.

**The proposed guidance is vague and provides too much discretion in determining the scope of the appraisal.** Although OHA acknowledges that an appraiser must rightfully exercise their professional judgment and expertise, it is not appropriate to propose the unfettered discretion to determine "which factors may be applicable and how much weight should be accorded to each factor." Furthermore, although public benefit should be considered for any decision that contemplates the use of public trust resources, the staff submittal offers little guidance as to how an appraiser would distinguish between competing public interests. Importantly, OHA notes that vague guidance runs the risk of leading to arbitrary decision-making.

**The staff submittal does not provide adequate justification for using “revocable permit rent” as a starting value to determine the upset rent.** The use of revocable permit rent for this purpose is justified only with the vague statement that “it serves as an indication of the value of water for a particular disposition.” OHA notes that within the context of *land*, OHA staff have identified a number of revocable permits that appear to be substantially undervalued when compared to fair market values; because the valuation of water is a more complicated endeavor, there is no reason to believe that the revocable permit rent for water RPs are reflective of fair market values.

**The staff submittal also does not provide adequate justification for rejecting “avoided cost” and “market cost” as alternative approaches to valuation.** Similar to the proposed use of “revocable permit rents” as a starting value, “avoided cost” or “market cost” could be used as a starting value and then subsequently adjusted. Without an explanation as to why “avoided cost” or “market cost” could not be used as a starting value, their rejection as alternatives is inappropriate.

In light of the public trust duty to protect our water resources for future generations, as well as the number of complexities and nuances that require careful consideration, OHA urges the BLNR to **NOT APPROVE** the proposed guidelines. **Instead, OHA suggests that formal rulemaking is a more appropriate process to create guidance for appraisers for the valuation of water because rulemaking would provide greater opportunities for meaningful public review and comment.**

Mahalo nui for the opportunity to testify on this matter.

**From:** [Hugh Starr](#)  
**To:** [DLNR.BLNR.Testimony](#)  
**Subject:** [EXTERNAL] Testimony-Item D-8-Land Board Meeting October 22, 2021  
**Date:** Thursday, October 21, 2021 3:48:36 PM

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Dear Chair Case and Land Board Members:

I write today on Item D-8 of your agenda tomorrow. Please accept my apologies for this late testimony; thank you for the opportunity to provide these comments for your consideration.

I am a long-time Maui County resident and have spent nearly one-half century now as an agricultural community consultant and broker on Maui; Hawaii's surface and ground water resources have long been an interest of mine.

First, may I commend your Water Commission Staff for putting forward a proposed "Guidance to Appraisers..."; this is quite a laudable acknowledgement of the Public Trust in long-term water and Forest Reserve stewardship of East Maui.

Staff has offered your Board 7 factors to help value the water and Staff has concluded by recommending a starting reference of the current revocable permit.

May I respectfully disagree on utilizing the existing, antiquated revocable permit as a starting reference; undeniably, Maui has now moved beyond this bare-bones framework.

Our Public Trust responsibilities are not incongruous with, nor in isolation from, the multiple open market forces at play in East Maui, be they in-stream & near-shore subsistence gathering, recharge of high-elevation ground water, scenic waterfalls & ponds, restoration of native forest habitat, etc. Our Public responsibility is now inextricably intertwined with multiple sophisticated economic metrics.

The nuances of water resource management in California(say) are indeed distinct from East Maui; both require professional balancing of complex variables. And methods for balancing & valuing these complexities exist, enabling informed professional appraisers to identify, then value, multiple variables, such as those unique to our Koolau Forest Reserve.

An experienced & qualified water appraiser will bring to the table vast experiences of other distant watershed/agricultural land interfaces; I respectfully request your Board consider reaching out beyond Hawaii for those experts to help you balance the water valuation responsibility you are charged with. Please provide for a comprehensive professional water valuation framework...it will last 30 years or more.

Thank you very much for the tireless dedication that each of you regularly & selflessly bestow upon Hawaii and her Future...

Aloha, Hugh Starr, Olinda, Maui

