

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

January 14, 2022

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

STATEWIDE

Denial of Petition for Contested Case Hearing filed by the Department of Hawaiian Home Lands on November 1, 2021, Regarding 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.

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on October 22, 2021 under agenda item D-8, the Board approved as amended staff's proposed guidance to appraisers to determine the upset rent for public auctions for water leases for consumptive use purposes pursuant to section 171-58, Hawaii Revised Statutes (HRS). The guidance contains multiple factors which are non-binding and grants deference to an appraiser to exercise their professional expertise and judgment as to which factors may be applicable in a particular situation and the weight accorded to each factor based on the circumstances. The factors contained in the guidance include the amount and proposed use of water; the amount of water diverted or extracted in proportion to the amount of water available from the surface or ground water source; the cost of water delivery; the avoided costs to the lessee of obtaining water from practicable alternative water sources; the net economic benefit to the lessee; the value contributed by the lessee for watershed management pursuant to HRS Section 171-58(e); and the current revocable permit rent.

The Board received both oral and written testimony from the Department of Hawaiian Home Lands (DHHL). During the meeting, DHHL verbally requested a contested case. Following an executive session, the Board voted to deny the request for contested case and proceeded to approve staff's recommendation as amended. On November 1, 2021, the Department received a written petition for contested case from DHHL filed via email by the Attorney General. A copy of the contested case petition is attached as **Exhibit A**.

DISCUSSION

An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015). When a contested-case hearing is required by statute or administrative rule, the analysis is simple. However, HRS Section 171-58 does not have a contested case requirement. Whether a contested-case hearing is required by constitutional due process is a much more complicated analysis. The petition identifies Article XII, Section 1, of the Hawaii State Constitution as the constitutional due process basis for DHHL being entitled to a contested case.

There is a two-step process in determining whether a person is entitled to a contested-case hearing under constitutional due process. First, a court must consider “whether the particular interest which claimant seeks to protect by a hearing is ‘property’ within the meaning of the due process clauses of the federal and state constitutions.” *Flores v. BLNR*, No. SCAP-17-59, 2018 WL 3751294, at \*11 (Haw. Aug. 8, 2018) (citation and internal brackets omitted). Second, if a court “concludes that the interest is ‘property,’ th[e] court analyzes what specific procedures are required to protect it.” *Id.*

Step one merely requires the court to determine whether an appellant seeks to protect a constitutionally cognizable property interest. *Flores*, 2018 WL 3751294, at \*12. To have such a property interest, a person “must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests “are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]” *Flores*, 2018 WL 3751294, at \*11 (citation and internal brackets omitted).

If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to step two, the Hawai‘i Supreme Court has been careful to emphasize that “[d]ue process is not a fixed concept requiring a specific procedural course in every situation.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Id.*

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected;
  - (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards;
- and

(3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at \*12.

#### Step One: DHHL Fails to Identify a Constitutionally Cognizable Property Interest

HAR § 13-1-29(b) provides that a formal petition for a contested-case hearing must include, among other things, a statement of “[t]he nature and extent of the requestor’s interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case[.]”

DHHL’s petition alleges that the guidance approved as amended by the Board will inhibit its ability to obtain entitled revenues to support the Native Hawaiian Rehabilitation Fund (NHRF) from the 30% of State receipts derived from water licenses pursuant to Article XII, Section I of the Hawaii State Constitution. In support of that position, DHHL alleges that dispositions by the Board for the use of water for private, commercial uses have been historically undervalued and failed to maximize revenues. Furthermore, DHHL alleges that the guidance fails to ensure an objective and appropriate valuation of water leases. DHHL also offers a proposed alternative methodology that values water at a certain percentage of the cost of the least expensive alternative source of similar quality and purpose.

While DHHL may have a property interest in the entitled 30% share of revenues from water leases, staff believes there is no constitutionally cognizable property interest affected by the subject Board action. The guidance approved by the Board does not impact DHHL entitlement to its 30% revenue share. Rather, DHHL argues that it has not received the “maximum revenues to which it is entitled from water leases.” However, by statute the share of revenues that DHHL is entitled to receive is subject to fair market value as determined by appraisal.<sup>1</sup> Pursuant to HRS Section 171-17, the upset price or rental of public lands (including water) for lease at public auction shall be determined by disinterested appraisal whenever prudent management so dictates. The guidance approved by the Board serves to effectuate that statutory requirement, as a disinterested appraiser would be free to exercise their professional expertise and judgment to determine the fair market value.

Furthermore, DHHL does not have any property interest as to the determination of fair market value. The provisions of Chapter 171, HRS do not afford DHHL the opportunity to participate in any rent valuation processes between the Department and its lessees. For example, HRS Section 171-17 affords the lessee the opportunity to pursue mediation and ultimately arbitration in the event the lessee disagrees with the valuation. These processes could surely impact the amount of revenue DHHL receives from qualifying dispositions, but the statute specifically limits the parties in the process to the Department and the lessee, excluding DHHL from participating in the mediation and arbitration processes.

#### Step Two: Even if DHHL Identified a Constitutionally Cognizable Property Interest, It Is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

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<sup>1</sup> Unless otherwise authorized by statute.



For the sake of argument, even if DHHL established that is seeking to vindicate a constitutionally cognizable property interest, DHHL is not entitled to a contested-case hearing. Even if DHHL asserts a constitutionally cognizable property interest, that is not the end of the inquiry as to whether a contested-case hearing is required. The touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. To determine what process is due, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected;
- (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and
- (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at \*12.

Regarding DHHL’s potential interest that may be affected by the Board’s action (30% of State receipts derived from water licenses), the specific injury to that interest from the Board action is not clearly articulated in the petition. DHHL provides no specific claim of injury as to how the guidance will result in an “under valuing” of water. Instead DHHL relies on conclusory statements alleging since that the Board’s past practices with dispositions of water resulted in an under valuing of water, it follows that the same result will occur here.<sup>2</sup> Such overly speculative claims are not sufficient to justify a contested case in this matter.

Moreover, staff believes that a contested case is not the proper forum to address DHHL’s concerns. Staff questions whether the Board has the authority to grant the relief requested by DHHL in its petition. DHHL contends that the guidance provides an appraiser too much discretion to determine fair market value, and that the goal of DHHL’s methodology intends to “even out the market”. DHHL ultimately requests that the Board adopt a methodology that would “revisit” DHHL’s proposed methodology. DHHL’s rationale and requested relief appear to be antithetical to the various provisions of Chapter 171, HRS that address the determination of fair market value. HRS Section 171-17 and other provisions of the chapter provide much deference to a qualified, disinterested appraiser to determine fair market value.<sup>3</sup> While staff is understanding of DHHL’s obligation to the NHRF, if DHHL wants to impose set criteria to value water to ensure a certain level of revenue, the more appropriate solution would be to pursue a statutory amendment instead of a contested case seeking relief that may be inconsistent with statute.

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<sup>2</sup> Although the intent of the guidance is to develop a methodology for valuing water that is consistent with the current understanding of the Board’s public obligations, staff does not agree with DHHL’s allegation that prior valuations done by appraisers were somehow under valued or otherwise not consistent with public trust obligations as understood at that time.

<sup>3</sup> Staff notes that while DHHL has advocated for its methodology for over a year, it has not provided any analysis by an appraiser supporting that either its proposed methodology is indicative of fair market value; or that the Board’s approved guidance is somehow not.



Second, staff recommends that the Board find that the risk of an erroneous deprivation of such an interest through Sunshine Law procedures is minimal and that a contested-case hearing would not add significant value. DHHL was provided notice of the meeting, including the staff submittal, and submitted testimony in opposition to the agenda item. Additionally, the DHHL Chairperson testified in person at the meeting and was not prevented from making any point. DHHL was afforded a substantial opportunity to be heard by providing written and oral testimony. It is unlikely that DHHL would gain significant value in being allowed to participate in a full contested-case hearing.

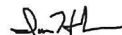
Third, staff recommends that the Board find that the governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in favor of rejecting the contested-case petition. Contested-case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources and the Board. The Thirty Meter Telescope contested-case hearing obviously sets the standard for time and expense, as it took many weeks and cost over \$600,000 in direct costs, including fees, travel costs, transcripts, meals, venue, and lodging, not counting the time spent by staff of Land Division, OCCL, DOCARE, and the Department of the Attorney General. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested-case hearings and may go into the many tens-of-thousands of dollars, once again not counting staff and attorney time. Even in this one instance, DHHL has failed to justify why the Department of Land and Natural Resources should bear such costs and spend many hours of staff time on a contested-case hearing of relatively limited import.

Therefore, staff recommends the Board find that even if DHHL asserted a constitutionally protected property interest, after examining and balancing the three Sandy Beach factors, DHHL is not entitled to a contested-case hearing.

RECOMMENDATION:

That the Board deny the Petition for a Contested Case Hearing filed by Department of Hawaiian Home Lands on November 1, 2021.

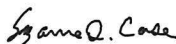
Respectfully Submitted,



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Ian Hirokawa  
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



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Suzanne D. Case, Chairperson

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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing  
on the 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

Case No. CCH\_\_\_\_\_

PETITION FOR CONTESTED CASE  
HEARING; CERTIFICATE OF SERVICE

PETITION FOR CONTESTED CASE HEARING

The Department of Hawaiian Home Lands, State of Hawai'i ("DHHL"), made an oral request for a contested case hearing during the Board of Land and Natural Resources' ("BLNR") October 22, 2021 meeting, with respect to the proposed action to adopt 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 ("HRS").<sup>1</sup> DHHL's oral request for a contested case hearing was denied by BLNR without stating a basis for denial of

<sup>1</sup> Board of Land and Natural Resources DLNR, *10.22.2021 Board of Land and Natural Resources Zoom Meeting*, YOUTUBE (Oct. 22, 2021) <https://www.youtube.com/watch?v=0mV0LurU2VE> (2:17:27).'

EXHIBIT A

DHHL's request for a contested case hearing. Pursuant to Hawaii Administrative Rules ("HAR") § 13-1-29.1, the BLNR may deny a request when it is "clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law, that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding." However, BLNR did not provide a rationale for a reason for its denial. DHHL submits this written petition to fulfill the requirements of HAR § 13-1-28. The bases for DHHL's contested case hearing request are as follows:

**I. THE PROPOSED GUIDANCE WILL INHIBIT DHHL'S ABILITY TO OBTAIN REVENUES TO WHICH IT IS ENTITLED UNDER ARTICLE XII, § 1 OF THE HAWAI'I STATE CONSTITUTION**

**A. Thirty Percent of State Receipts Derived from Water Licenses Must Go to the Native Hawaiian Rehabilitation Fund.**

Pursuant to Article XII, § 1 of the Hawai'i State Constitution, thirty percent of the state receipts derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses shall be deposited into the Native Hawaiian Rehabilitation Fund ("NHRF"). DHHL is mandated to use this fund "for the rehabilitation of native Hawaiians which shall include but not be limited to the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians [including native Hawaiian families and homestead communities] are thereby improved and perpetuated." Stand. Comm. Rep. No. 56, 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 635.<sup>2</sup> When the Hawaiian Home Lands Trust was first established in 1921, sugar was the dominant industry in the islands and water license fees were one of the two sources of funding for DHHL.

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<sup>2</sup> "This fund will allow the Hawaiian [H]omes [C]ommission to more economically utilize Hawaiian homestead lands...This fund is not designed to relieve the State of its responsibilities to the people of Hawai[']i outside the Hawaiian [H]omes [C]ommission." Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, 1 Proceedings, at 422.



To reflect the adoption of Article XII, § 1 of the Hawai‘i State Constitution, section 213(i) of the Hawaiian Homes Commission Act, 1920, as amended (“HHCA”) recognizes that thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the NHRF.

**B. The Hawaiian Homes Commission and DHHL Have Fiduciary Obligations to Administer the Hawaiian Home Lands in the Sole Interest of Native Hawaiian Beneficiaries.**

In 1920, Congress enacted the HHCA, which set aside approximately 203,500 acres of public lands for a homesteading program for native Hawaiians; these lands were given the status of Hawaiian home lands to be held in trust. *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982). The Hawaiian home lands were to be under the control of the Hawaiian Homes Commission (“Commission”). *Id.* When Hawai‘i entered the Union, the State acquired title to the Hawaiian home lands. *Kepo‘o v. Watson*, 87 Hawai‘i 91, 97-98 952 P.2d 379, 385-86 (1998). Both legal title and management responsibilities over Hawaiian home lands rest with the State. *Id.* DHHL, led by the Commission, is the state agency charged with administering the Hawaiian home lands.

In administering the Hawaiian home lands, the Commission and DHHL’s fiduciary duties include (1) the obligation to administer the trust solely in the interest of the beneficiary and (2) the use of reasonable skill and care to make the trust property productive. *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169. Further, a trustee is expected to invest the trust corpus in a manner which would produce income from which to carry out trust objectives. In fulfilling that investment function, a trustee is required to deal with the trust assets in accordance with the prudent investor standard. Therefore, the Commission and DHHL have the obligation to maximize the trust

property after consideration of public trust needs, including the proceeds from the NHRF towards the betterment of native Hawaiians.

**C. BLNR Has Historically Authorized the Use of Undervalued Water Leases for Private, Commercial Uses, Thereby Failing to Maximize Its Revenues from Water Licenses After Considering Public Trust Purposes.**

BLNR can permit on an annual basis or lease for a longer-term water resources through HRS § 171-58. Since the era of plantation agriculture, BLNR has issued long-term leases for the diversions of stream flows from former kingdom and now state-managed watersheds in regions, such as East Maui, to irrigate sugar plantations in areas like Central Maui and Upcountry. For decades, the BLNR and its predecessors sanctioned the diversions by issuing periodic leases. In May 2000, BLNR authorized Alexander and Baldwin, Inc., (“A&B”) to use approximately 33,000 acres of state land and to divert up to 450,000,000 gallons of water per day from East Maui streams flowing through the watershed covered by revocable permits without an environmental assessment (“EA”) or environmental impact statements (“EIS”) prepared prior to BLNR’s granting of these revocable permits. BLNR continued to issue consecutive, temporary revocable permits for this watershed on an annual basis since 1985.

In 2001, A&B requested a thirty-year lease of lands covered by the revocable permits and the temporary continuation of the year-to-year revocable permit pending issuance of a lease. The BLNR granted a holdover permit on a month-to-month basis. In 2003, BLNR granted a thirty-year lease to A&B without the preparation of an EA or EIS on a holdover status. BLNR continued to issue annual revocable permits for the next thirteen years.

On January 8, 2016, the Circuit Court published an Order Granting Plaintiffs’ Motion for Partial Summary Judgment in *Healoha Carmichael, et. al. v. Board of Land and Natural Resources, et al.*, Civ. No. 15-1-0650-04, ruling that that “A&B’s continuous uninterrupted use

of these public lands on a holdover basis for the last [thirteen] years is not the “temporary” use that HRS Chapter 171 envisions.” Further, issuance of the permits on a holdover basis was determined to be “inconsistent with the public interest and legislative intent” of HRS § 171-58, and HRS Chapter 343. In 2016, the Legislature passed Act 126 extending the revocable permit process for three years. Until Act 126’s expiration in 2019, BLNR continued to issue revocable permits without environmental compliance. Today, DLNR and revocable permit holders seek to reissue longer-term water leases and older water leases that have not been reappraised for decades, thereby rewarding permittees who have capitalized on a system of renewing revocable permits annually for decades, ultimately benefitting for a long-term lease under the guise of reduced rent revocable permits.<sup>3</sup> Because the valuation of water is a more complicated endeavor than appraising the value of land and water is a public trust resource, DHHL believes that the revocable permit rent for water revocable permits will not be reflective of fair market values.

DHHL has not received the maximum revenues to which it is entitled from water licenses after providing for public trust needs. Instead of seeking to rapidly, consistently, and fairly apply pricing and the overall applicability of the licensing process for water resources consistent with the understanding that water is a public trust resources, DLNR has moved slowly and

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<sup>3</sup> Private commercial uses are not protected by the public trust. “[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain.” *In re Water Use Permit Applications (“Waiāhole I”)*, 94 Hawai‘i 97, 138, 9 P.3d 409, 450 (2000). The public trust recognizes enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time. Private commercial users of water bear the burden of affirmatively justifying their uses. “[A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource.” *Kauai Springs, Inc. v. Plan. Comm’n of Cty. of Kauai (“Kauai Springs”)*, 133 Haw. 141, 174, 324 P.3d 951, 984 (2014). This burden includes showing the use is reasonable and beneficial and consistent with trust purposes, has no practicable alternative water source, and implements mitigation of the cumulative impact of diversions. *Id.* at 173, 324 P.3d at 983. Government agencies, like BLNR, have “duties under the public trust independent of the permit requirements,” including a duty to hold private commercial users to their burden under the public trust. *Id.* at 177, 324 P.3d at 984. While private use of state water for “economic” development may produce important benefits, there is a distinct difference for water being used for public interest and water being used for a public trust. *In re Kukui (Moloka‘i), Inc. (“Kukui”)*, 116 Hawai‘i 481, 508, 174 P.3d 320, 347 (2007); *see also Robinson v. Ariyoshi*, 65 Haw. 641, 677, 658 P.2d 287, 312 (1982) (“[U]nderlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.”).



inconsistently to implement provisions relating to minerals and water rights. The slow and inconsistent application of water rights has caused significant and notable controversy across the State, and the amount of revenue generated from water leases and licenses has declined significantly over time, even as the economic value of water for agricultural, renewable energy, and commercial purposes has risen. By trying to equally consider other public interests, such as small farmers and renewable energy interests along with public trust purposes, such as DHHL's entitlement to thirty percent of water license fees, DLNR is failing to uphold its responsibility to protect public trust purposes before other public interests that are not public trust purposes.<sup>4</sup>

In 1999, DLNR acknowledged that annual revenues from sugarcane land revenues and water leases have “fallen dramatically” due to the transition of lands out of sugarcane cultivation and “these revenues [were] not expected to increase greatly in the near future since the protected lands represent the prime agricultural lands in the State.” The Auditor of the State of Hawaii, *Follow-Up Study of Revenue Entitlements to the Department of Hawaiian Home Lands Report No. 99-13* 37 (Mar. 1999). However, DLNR also stated that since all sugar plantations have ceased operations, DLNR has “some experience in trying to implement the DHHL entitlement with respect to protected lands and have provided estimates on the resources needed to accurately identify and track protected lands in the years to come.” *Id.* at 38. The failure to properly value water sources at the moment of disposition means that public trust resources are

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<sup>4</sup> Prior discussion on the need for water leases cites policy goals of increased local food production. Although agriculture is a public purpose, the Hawai'i Supreme Court ruled that agricultural uses do not rise to the level of public trust purposes such as maintaining water in its natural state; protecting domestic water use; protecting Native Hawaiian traditional and customary rights; and reservations of water by the State Water Code, including reservations of water for DHHL water reservations. *Waiāhole I*, 94 Hawai'i at 136-38, 9 P.3d at 448-50; *see also Kauai Springs*, 133 Haw. at 172, 324 P.3d at 982; *In re Waiola O Moloka'i, Inc.*, 103 Hawai'i 401, 431, 83 P.3d 664, 694 (2004).

currently undervalued and will be at risk for continued diversions without properly compensating funds due to the NHRF.

**D. BLNR's Proposed Appraisal Guidance in the Staff Submittal Fails to Ensure an Objective and Appropriate Valuation for Water Leases**

HRS § 171-58 requires that water for disposition be appraised at fair market value to determine the upset rent for the public auction. However, water purveyors generally charge for the delivery of water, not water itself, which is a public trust resource; the lack of typical market indicators for the proper value of freshwater held in trust has left DLNR with little guidance on how to set a price for this resource. Thus, appraisers have no methodology to value water. DHHL supports the staff's intent to bring DHHL's water lease program into compliance with the public trust doctrine and modern resource principles. However, DHHL seeks to stop the failure to properly value water resources at the moment of disposition by establishing a methodology that would ensure that private diverters would only take the water needed to meet their needs.

To ensure the revenue stream is protected, DHHL proposed an alternative methodology that set a minimum selling price for any water leases issued under HRS § 171-58, ensuring that DHHL has equitable revenue from any waters leased in the State to fund the NHRF. This methodology ensures that any disposition of water rights by the State must comply with HRS § 171-58 and no water rights may be disposed of for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose. Under HRS § 171-58, energy companies' available alternative sources to water include diesel and fossil fuels. For example, under the current water lease price of \$53,000 per year, the Kaua'i Island Utility Cooperative ("KIUC") saves \$1,750,000 per year in costs (about three percent from savings from the alternative source, which is diesel). Yet, DHHL only receives \$16,000 per year.

DHHL's proposed methodology seeks to "even out the market." This methodology would set the minimum cost per water based on a percentage of the cost of the lease expensive alternative source. In the above scenario, if the minimum price is at eighty percent of the cost of the least expensive alternative source, the new proposed water lease in the above example would now be \$1,400,000 per year, in effect valuing water at a more competitive price and the same way across various leases, thereby increasing the value going toward the NHRF.

## **II. THE LEGAL AUTHORITY UNDER WHICH THE PROCEEDING, HEARING OR ACTION IS TO BE HELD OR MADE**

DHHL is entitled to procedural due process rights to protect its thirty percent of revenues under Article XII, § 1 of the Hawai'i State Constitution. "[C]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). To determine whether there is a due process right to a contested case hearing, a court will consider: "(1) [Whether] the particular interest which [the] claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it." *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

In *In re Application of Maui Elec. Co. ("MECO")*, the Hawai'i Supreme Court held the Sierra Club's assertion of its members' constitutional right to a clean and healthful environment under Article XI, § 9 of the Hawai'i State Constitution was "not a freestanding interest in general and aesthetic and environmental values" or a "unilateral expectation," but a "right guaranteed by the Constitution of this state." 141 Hawai'i 249, 264-65, 408 P.3d 1, 16-17 (2017). As in *MECO*, DHHL is seeking to protect its property interest derived from its constitutional right to thirty



percent of the state receipts derived from the leasing from water licenses to be transferred to the NHRF. The plain language of Article XII, § 1 of the Hawai‘i State Constitution suggests that the right of enforcement described in the provisions is self-executing. While the right is “subject to reasonable limitations and regulation as provided by law,” this provision does not suggest that legislative action is needed before the right can be implemented. Therefore, DHHL has asserted a protected property interest to thirty percent of revenues from water licenses.

“Procedural due process requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues.” *Application of Haw. Elect. Light Co.*, 67 Haw. 425, 430, 690 P.3d 274, 278 (1984). Due process is not a fixed concept requiring a specific procedural course in every situation and “calls for such procedural protections as the particular situation demands.” *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 387, 773 P.2d 250, 261 (1989). In determining the procedures required to comply with constitutional due process, courts consider the following factors: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Protect & Pres. Kahoma Ahupua‘a Ass’n v. Maui Planning Comm’n*, 149 Hawai‘i 304, 313, 489 P.3d 408, 417 (2021) (citations omitted).

The interest in question is DHHL’s constitutional right to thirty percent of the revenues from water licenses to be deposited into the NHRF. The risk of erroneous deprivation of DHHL’s interest remains high because the proposed guidance provides too much discretion to appraisers in determining the scope of the appraisal and is an inappropriate exercise of discretion and delegation in determining “which factors may be applicable and how much weight should be

afforded to each factor.” The guidance’s reliance on factors to determine the upset rent values, which is already considered to not be reflective of fair market values, would continue to provide DHHL with less than its entitled share as prescribed by Article XII, § 1 of the Hawai‘i State Constitution. Further, there is no private market in water rights that exists in Hawai‘i. DHHL’s ability to be rightfully compensated for these water leases have been and will continue to be negatively impacted absent a contested case hearing.

An “agency must perform its functions in a manner that fulfills the State’s affirmative obligations under the Hawai‘i [State] [C]onstitution.” *Matter of Gas Co., LLC*, 147 Hawai‘i 186, 207, 465 P.3d 633, 654 (2020) (citations omitted). A contested case hearing would enable DHHL with an opportunity to submit evidence and would make itself available for cross-examination on its alternative methodology. DHHL could submit evidence on how lack of maximized revenue to the NHRF will result in less opportunities available for the rehabilitation of HHCA beneficiaries.

Finally, under HRS § 171-58(g), DLNR is required to notify DHHL of its intent to execute any new lease, or to renew any existing lease of water rights. Any lease of water rights or renewal shall be subject to the rights of DHHL as provided by section 221 of the HHCA. Considering that DLNR is already required to consider DHHL in executing any new water lease and to renew its existing leases of water rights, it would not be unduly burdensome to allow DHHL to participate in a contested case hearing on matters related to the determination of the upset rent for public auctions for water leases.

DHHL is entitled to a contested case hearing that would assist the BLNR in properly considering the State’s constitutional and fiduciary obligations to the public trust resources, which will ensure that the full amount of DHHL’s thirty percent share of water license revenues

is deposited to the NHRF. Procedural due process, therefore, requires the Board to withdraw the guidance and grant Petitioner's contested case hearing request.

### **III. THE DISAGREEMENT DHHL HAS WITH THE GUIDANCE BEFORE THE BLNR**

The proposed BLNR action does not provide for adequate management of the State's water resources or consider or protect DHHL's rights set forth above. The guidance grants deference to an appraiser to exercise their professional expertise as to which factors may be applicable and how much weight should be accorded with each of the factor enumerated in the guidance. By providing the appraiser with discretion to ignore certain factors in determining fair market value, the guidance does not provide sufficient safeguards to ensure BLNR's exercise of authority to issue water licenses is transparent, appropriate, and consistent with BLNR's trust duties to Native Hawaiians, the public lands trust, and the Hawaiian home lands trust.

More discussion is necessary to establish a fair baseline for water lease appraisals, considering, the avoided cost and differential rates for large and small users, especially regarding the prioritization of public trust purposes. Given the history of large-scale diversions in Hawai'i in the name of "public use" for private consumption, DHHL remains concerned that ditch system diverters will be provided with reduced rents to the NHRF. DHHL remains concerned that the guidelines will result in a reduction of revenues to which DHHL would be entitled by devaluing water leases based on circumstances and contributions that do not benefit DHHL without its consultation.

### **IV. THE RELIEF SOUGHT BY DHHL**

In lieu of the proposed guidance as set in this Submittal Item, DHHL urges BLNR to adopt an alternative methodology that would revisit DHHL's proposed methodology that would utilize the percentage of the voided cost to the issue of obtaining water from practicable



alternative water source. DHHL has previously proposed a methodology that would prohibit the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative water sources of similar quality and purpose, except for water leases and licenses issued for instream traditional and customary native Hawaiian practices. Such an approach need not apply an equal percentage of avoided cost to all proposed uses; this approach could accommodate water uses where economic benefits to the user are smaller (including small farmers producing food for local consumption) and larger (where the value of avoided fuel costs can be in millions of dollars annually). In the latter scenario as outline in Part I.D, it is not clear that higher leases costs would be entirely passed to the consumer, but could be passed to the utility shareholders, to which DLNR and DHHL do not have a particular duty. The policy decision of whether water license fees for renewable energy production is passed down to rate-payers or should be absorbed by the utility company and it shareholders is within the domain of the Public Utilities Commission, rather than DLNR.

#### **V. DHHL'S CONTESTED CASE HEARING REQUEST SERVES THE PUBLIC INTEREST**

The State has a trust obligation to administer the Hawaiian home lands in the sole interest of native Hawaiian beneficiaries. As the agency responsible for implementing this trust obligation, DHHL has a fiduciary duty to properly carry out the obligations of the HHCA as discussed above. This includes administering the NHRF, which is used towards the improvement of the educational, economic, political, social, and cultural processes for its beneficiaries. The State's compliance with its trust obligations, DLNR's proper management of the public trust corpus, and DHHL's performance of its fiduciary duties are all undeniably in the public interest.

#### **VI. CONCLUSION**

For these reasons, Petitioners respectfully request BLNR grant a contested case hearing on the above guidance.

DATED: Honolulu, Hawai'i, November 1, 2021.

/s/ Alyssa-Marie Y. Kau  
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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing  
on the 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

Certificate of Service

Re: PETITION FOR CONTESTED CASE  
HEARING

CERTIFICATE OF SERVICE

I certify that on November 1, 2021, a true and correct copy of the above captioned document was served upon the following individuals by hand-delivery and email at the address listed below:

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DATED: Honolulu, Hawai'i, November 1, 2021.

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