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DEPARTMENT OF HAWAIIAN HOME LANDS
Ka ʻOihana ʻĀina Hoʻopulapula Hawaiʻi
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TESTIMONY OF WILLIAM J. AILĀ, JR, CHAIRMAN HAWAIIAN HOMES COMMISSION BEFORE THE BOARD OF LAND AND NATURAL RESOURCES DECEMBER 8-9, 2022 AT 9:00 AM VIA VIDEOCONFERENCE

Testimony in **Opposition** to Item D-7:
Denial of Petition for Contested Case Hearing filed by the Department of Hawaiian Home Lands on August 22, 2022, Regarding August 12, 2022, Agenda Item D-2, Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Piʻihonua, South Hilo, Island of Hawaiʻi, Tax Map Key: (3) 2-6-009; 2-6-029 and Acceptance of Wailuku Watershed Management Plan

Aloha Chair Case and Board Members:

The Department of Hawaiian Home Lands ("DHHL") respectfully opposes the Department of Land and Natural Resource ("DLNR") staff's recommendation to deny DHHL's request for a contested case hearing filed by DHHL on August 22, 2022 regarding the Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Piʻihonua, South Hilo, Island of Hawaiʻi, Tax Map Key: (3) 2-6-009; 2-6-029 and Acceptance of Wailuku Watershed Management Plan.

I. The Wailuku Watershed Management Plan's Cost Share Contributions Should be Included in DHHL's Thirty Percent Share of All State Receipts Derived from Water Licenses.

Thirty percent of receipts received by the State from water licenses must be deposited into the Native Hawaiian Rehabilitation Fund ("NHRF"). DHHL respectfully disagrees with DLNR's determination that DHHL is only entitled to thirty percent of annual rent derived from water licenses. Omission of the watershed management cost share contributions from DHHL's thirty percent share of receipts would conflict with Article XII, Section 1 of the Hawaiʻi State Constitution, which provides in relevant part:

> **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 native Hawaiian rehabilitation fund**, section 213 of the

> Hawaiian Homes Commission Act, 1920, for the purposes enumerated in that section.[1]
>
> (emphasis added)

The Wailuku Watershed Management Plan is a component of the water license that HECO is seeking as required by Section 171-58(e), Hawaii Revised Statutes ("HRS").[2] The Wailuku Watershed Management Plan is further memorialized as a component of a water license by Special Condition #39 in DLNR's "Draft Water License Agreement." *See* State of Hawaiʻi Dept. of Land & Nat. Res. Div. of Forestry and Wildlife, *Wailuku Watershed Mangement Plan*, SALE OF WATER LICENSE AT PUBLIC AUCTION FOR THE NON-CONSUMPTIVE USE OF WATER FROM THE WAILUKU RIVER FOR HYDROELECTRIC GENERATION PURPOSES, PIʻIHONUA, SOUTH HILO, ISLAND OF HAWAII, TAX MAP KEY: (3) 2-6-009; 2-6-029; AND ACCEPTANCE OF WATERSHED MANAGEMENT PLAN, Aug. 12, 2022, at 29, https://dlnr.hawaii.gov/wp-content/uploads/2022/08/D-2.pdf. A water licensee may agree to this cost share and pay related receipts to the State as a condition of its water license.

At its August 12, 2022 meeting, the Board of Land and Natural Resources ("BLNR") accepted the Wailuku Watershed Management Plan and the inclusion of watershed management cost share contributions. DLNR staff recommended that the future licensee to pay annual receipts to the State in the amount of $31,080 as part of its fulfillment of Special Condition #39 of the Draft Water License Agreement.

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[1] Section 213(i) of the Hawaiian Homes Commission Act ("HHCA") states in relevant part:

> Pursuant to Article XII, Section 1, of the [Hawai'i] State Constitution thirty per cent 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. The department shall use this money for the rehabilitation of native Hawaiians, native Hawaiian families, and Hawaiian homestead communities, which shall include the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians thereby improved and perpetuated.

[2] HRS § 171-58(e) provides:

> (e) Any new lease of water rights shall contain a covenant that requires the lessee and the department of land and natural resources to jointly develop and implement a watershed management plan. The board shall not approve any new lease of water rights without the foregoing covenant or a watershed management plan. The board shall prescribe the minimum content of a watershed management plan; provided that the watershed management plan shall require the prevention of the degradation of surface water and ground water quality to the extent that degradation can be avoided using reasonable management practices.

These watershed management cost share contributions are receipts derived from the prospective water license. Deprivation of these watershed management cost share contributions would result in material harm to DHHL and its beneficiaries. The material harm to DHHL can be calculated as the difference of thirty percent (30%) of receipts derived from State water licenses versus only thirty percent (30%) of rents collected from State water licenses. The proposed watershed management cost share contributions are nearly double the proposed upset rental rate. Omission of the water management cost share contributions from DHHL's share of receipts would substantially reduce deposits to the NHRF.

The Hawaiʻi State Constitution clearly provides that thirty percent of State receipts – not rent – derived from water licenses shall go to the NHRF. Considering the watershed management cost share contributions as State receipts is consistent with the reasoning provided by the delegates of the Constitutional Convention of 1978, who propose the creation of NHRF. Specifically, the delegates stated that the thirty percent of such funds "should be diverted to DHHL in perpetuity…[T]his source of moneys should be protected and preserved and therefore, provided that, regardless of the use to which these lands are put, the revenues derived therefrom would be subject to these provisions." Stand. Comm. Rep. No. 56, in 2 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 632-33 (1980).

We respectfully request that watershed management cost share contributions pursuant to the Wailuku Water License be considered as part of all receipts collected pursuant to Section 213(i) of the HHCA.

II. DHHL Has Outstanding Concerns Related to the Appraisal Methodology to Calculate Water License Annual Rent

DHHL has previously provided testimony on the appraisal mechanism provided by HECO and continues to have concerns with its FERC rate. In sum, DHHL proposed a methodology that would utilize the percentage of the avoided cost to the lessee of obtaining water from a predictable water source. This methodology would prohibit the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose, except for water licenses issued for instream tradition and customary native Hawaiian practices. DHHL remains concerned that this appraisal methodology will create a low water license fee.

As part of its fiduciary obligations, DLNR retains the burden of conducting its due diligence in examining viable appraisal methodologies. The burden is not on DHHL to hire an appraiser to vet DHHL's alternative appraisal methodology, rather that burden is on DLNR as part of its due diligence in its examination of viable appraisal methodologies.

The submittal only discusses the FERC methodology at length, the appraisal methodology offered by the water license applicant. There appears to be an inherent conflict of interest in determining the fair market value of water here as it would be in the water license applicant's self-interest to favor a methodology that results in a lower rent than other appraisal methodologies, which would result in higher rents.

DLNR's submittal also does not identify alternative appraisal methodologies that were considered by the State appraiser and the reasons why those methodologies are no longer being considered by DLNR to justify its due diligence in selecting its methodology. There are still outstanding questions on other appraisal methodologies directed by the State's appraiser to examine in addition to the FERC appraisal methodology and why alternative methodologies were not recommended by the State's appraiser.

Thank you for your time and consideration of DHHL's testimony.