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COMMISSION ON WATER
RESOURCE MANAGEMENT

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing	)	Case No. CCH-MA06-02
Concerning Complaint C04-31 from)	
Earthjustice, on Behalf of Hui o Nā Wai 'Ehā	)	INTERVENOR OFFICE OF HAWAIIAN
and Maui Tomorrow Foundation, Inc.	)	AFFAIRS' MOTION FOR
Regarding Waste of Surface Water from	)	RECONSIDERATION OF MINUTE
Ditches of Wailuku Water Company, LLC,	)	ORDER NUMBER 5 OR, IN THE
Wailuku, Maui	)	ALTERNATIVE, FOR AN ORDER
	)	PROVIDING FOR PRODUCTION OF
	)	REQUESTED DOCUMENTARY
	)	EVIDENCE AND THE EXAMINATION
	)	OF WITNESSES PRIOR TO THE FILING
	)	OF OPENING BRIEFS; MEMORANDUM
	)	IN SUPPORT OF MOTION;
	)	CERTIFICATE OF SERVICE
)	
)	

INTERVENOR OFFICE OF HAWAIIAN AFFAIRS' MOTION FOR
RECONSIDERATION OF MINUTE ORDER NUMBER 5 OR, IN THE ALTERNATIVE,
FOR AN ORDER PROVIDING FOR PRODUCTION OF REQUESTED
DOCUMENTARY EVIDENCE AND THE EXAMINATION OF WITNESSES
PRIOR TO THE FILING OF OPENING BRIEFS

Intervenor Office of Hawaiian Affairs ("OHA"), by and through its counsel, PAUL JOHNSON PARK & NILES, Attorneys at Law, A Law Corporation, hereby moves for reconsideration pursuant to Hawai'i Administrative Rules ("HAR") § 13-167-64(a) of that portion of Minute Order Number 5 regarding the lack of a procedure for discovery in a contested case hearing. The Commission, pursuant to its administrative rules, has the authority to require production of documentary and other evidence, and to establish appropriate deadlines for such production.

In the alternative, OHA requests an order providing for production of requested documentary evidence and the examination of witnesses prior to the submission of opening briefs in the contested case hearing pursuant to Hawai'i Revised Statutes ("HRS") § 91-9 and HAR §§ 13-167-22(b)(1) and (3), 13-167-22(c), 13-167-22(d), 13-167-51, and 13-167-56(b).

Discovery is not prohibited by either Chapter 91 of the Hawai'i Revised Statutes or by the Rules of Practice and Procedure for the Commission on Water Resource Management contained in Chapter 167 of the Hawai'i Administrative Rules ("CWRM Rules"). To the contrary, the ability to obtain information prior to the submission of opening briefs in this matter is necessary for the orderly and just conduct of the contested case hearing.

DATED: Honolulu, Hawai'i, November 27, 2006.

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In the Matter of the Contested Case Hearing)	Case No. CCH-MA06-02
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Regarding Waste of Surface Water from)	
Ditches of Wailuku Water Company, LLC,)	
Wailuku, Maui)	
)	
)	
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Pursuant to HAR § 13-167-64, the Commission on Water Resource Management (the "Commission") has the discretion to reconsider a decision if the moving party can show that (1) new information not previously available would affect the result, or (2) that a substantial injustice would otherwise occur. Haw. Admin. R. § 13-167-64(a) (WESTLAW through November 2006). Reconsideration of Minute Order Number 5 is appropriate because a substantial injustice would occur if OHA were forced to file its opening brief and prepare for witness testimony in the contested case hearing without the prior opportunity to obtain information on the water use of Wailuku Water Company LLC ("WWC") and Hawaiian Commercial & Sugar Company ("HC&S") (collectively, the "Companies"). Neither WWC nor HC&S has been forthcoming with information regarding their respective water usage, and it would severely prejudice OHA's ability to present its case if the Companies' data is not available unless and until the Companies choose to present it.

Minute Order Number 5, dated November 17, 2006, states that "there is no procedure for conducting discovery in a contested case hearing" and that "[m]odification of procedures to allow for discovery would require a stipulation of the parties per HRS [§] 91-9(d) and HAR [§] 13-1-32." Such broad statements misinterpret the scope of the discretion granted to the Commission under HRS § 91-9 and Chapter 167 of the Hawai'i Administrative Rules, and unnecessarily and improperly restrict the power of the Commission to compel information from parties to a contested case hearing. While Chapter 167 may not set forth explicit procedures for conducting "discovery", it clearly grants the Commission authority to implement any procedures necessary for the orderly and just conduct of the contested case hearing. Such procedures undoubtedly include those allowing for the acquisition of documents and procurement of testimony at any time during the contested case hearing process, especially from parties in sole possession of the information necessary for the Commission to make an informed decision regarding the ongoing waste of the surface waters of Nā Wai 'Ehā, and HRS § 91-9 and Chapter 167 should be interpreted and applied accordingly.

II. ARGUMENT

A. A "Full Hearing" Is Required By Hawai'i Revised Statutes § 91-9

"[I]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Haw. Rev. Stat. § 91-9(a) (2005 Cum. Supp.). In addition, "[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved." Id. at § 91-9(c) (1993 Repl.). These provisions of HRS § 91-9 mandate that contested case hearings be "full hearings", and necessarily contemplate not only the opportunity for parties to present evidence and testimony and to argue the merits before the Commission during the hearing, but the opportunity to obtain evidence in a timely manner as well. See In re

Kauai Elec. Div. of Citizens Utils. Co., 60 Haw. 166, 182, 590 P.2d 524, 536 (1978) (finding that the appellant was afforded a full and fair hearing prior to the issuance of the order at issue because said order was not issued "until after all parties had been given ample opportunity to obtain and present all their evidence, to present testimony, both written and oral, to cross examine witnesses, and to argue the issues on the merits before the [Public Utilities] Commission").

Especially with respect to the uses of the diverted waters of Nā Wai `Ehā, it is apparent that current information from those parties accused of waste has not been forthcoming, even in the context of a confidential mediation, and that even the Commission's staff has been unable to obtain that information. It is equally apparent that information regarding the uses of the diverted water is essential to a full and fair hearing as contemplated by HRS § 91-9 and that, in order for the parties to be able to adequately present their positions to the Commission, this information must be obtained prior to the submission of opening briefs. Without access to the specific data showing what is currently being done with the surface waters of Nā Wai `Ehā, OHA is effectively precluded from presenting its case and the Commission will be placed in the untenable position of relying on the unsubstantiated assertions of WWC and HC&S that they are not committing waste. Such a situation flies in the face of the "full hearing" requirement of HRS § 91-9 by failing to give OHA the opportunity to timely obtain and review the Companies' evidence for purposes of making a showing fairly adequate to establish both the existence of waste and the propriety, from the standpoint of justice and law, of enjoining the waste of Nā Wai `Ehā's surface water by WWC and HC&S.

B. The Commissioner Has The Authority To Compel The Production Of Documents And The Examination of Witnesses Prior to The Filing of Opening Briefs

One of the primary purposes of proceedings before the Commission is to gather the information necessary for the Commission to carry out its public trust duties. See Haw. Admin. R. § 13-167-22(b) ("The commission may ... hold proceedings as necessary from time to time for the purpose of: (1) obtaining information necessary or helpful in the determination of its policies or actions; ...[and] (3) carrying out its duties and responsibilities including ... the enforcement of rules, orders and legal standards and obligations."). In furtherance of this objective, the Commission is given the power to "subpoena witnesses and require the production of any document, record, chart, photograph, recording, notes, compilation of information, or any other evidence or form of evidence recognized by law." Id. at § 13-167-22(c). This power to compel the attendance of witnesses and the production of documents is also delegated to the hearings officer. See id. at § 13-167-56(b) ("The presiding officer shall have the power to ... compel attendance of witnesses and the production of documentary evidence, examine witnesses, ... issue subpoenas, ... receive relevant evidence, hold conferences before and during hearings, ... fix times for submitting documents, ... and dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.").

The CWRM Rules do not set forth specific procedures for exercising this power to conduct what is essentially the equivalent of some aspects of civil discovery. Instead, the Commission is required to "follow procedures that, in its opinion, best serve the purposes of the proceedings, unless specifically prescribed in these rules, chapter 91, Hawaii Revised Statutes, or by law." Id. at § 13-167-22(d). See also id. at § 13-167-51 ("Unless specifically prescribed in this chapter or by chapter 91, Hawaii Revised Statutes, the commission may adopt procedures

that in its opinion will best serve the purposes of the hearing."). Because compelling the attendance of witnesses and the production of documents prior to the filing of opening briefs in the contested case hearing is not specifically prescribed by the CWRM Rules, by chapter 91 of the Hawai`i Revised Statutes, or by law, the Commission is obligated to utilize such procedures if they will best serve the purposes of the proceeding.

C. Early Discovery Will Best Serve The Purposes of the Hearing

Early discovery will best serve the purposes of the hearing by providing for the organized presentation of evidence, which will make the hearing itself more effective and efficient. If the Commission compels the parties to produce documentary evidence and to make witnesses available for examination prior to the commencement of the contested case hearing, the hearing process will be streamlined by giving the parties the time and opportunity to adequately prepare for the presentation of evidence during the contested case. Without the opportunity to evaluate the evidence prior to filing their opening briefs and preparing for witness testimony, the parties will be unable to effectively present their positions to the Commission and will be forced to analyze any data or other information offered as the hearing proceeds, which will lend itself to wasted time, confusion, and general inefficiency in the conduct of the contested case hearing.

For example, in order to accurately determine the extent of the ongoing waste, OHA must be able to examine WWC's Water Delivery Agreements (the "Agreements"). If OHA is forced to wait until after the submission of opening briefs to obtain the information contained in these Agreements, it will have missed its opportunity to present to the Commission an accurate picture of the current end uses of Nā Wai `Ehā's surface water. OHA would thus have no choice but to file supplemental or other briefs to address the newly-provided information

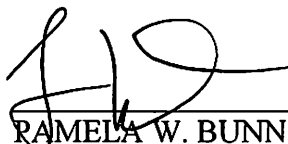
and/or to identify additional witnesses to testify with respect to the same. Such inefficiency and wastefulness can be avoided altogether if the Commission merely exercises its authority to compel the production of documentary and other evidence prior to the submission of opening briefs.

III. CONCLUSION

Section 91-9 of the Hawai'i Revised Statutes mandates that contested case hearings be "full hearings", which necessarily encompasses the ability to obtain evidence at a time that will afford each party ample opportunity to present its case. In addition, the Commission has the authority under the CWRM Rules to compel the parties to produce documentary evidence and to make witnesses available for examination at any time during the contested case hearing process, including prior to the filing of opening briefs and, indeed, is required to do so where such procedures will best serve the purposes of the hearing.

Based on the foregoing, Intervenor Office of Hawaiian Affairs respectfully requests that the Commissioner grant its Motion for Reconsideration or, in the alternative, issue an order providing for the production of requested documentary evidence and the examination of witnesses prior to the filing of opening briefs.

DATED: Honolulu, Hawai'i, November 27, 2006.



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_____)	

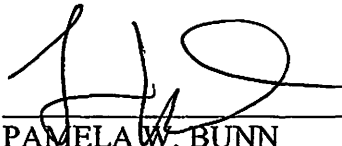
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing was served on the following parties by e-mail attachment, receipt confirmed by recipient, followed by U.S. mail, postage prepaid, addressed as set forth below:

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DATED: Honolulu, Hawaii, November 27, 2006.

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