

**THE PROTECTION AND IMPLEMENTATION OF NATIVE HAWAIIAN WATER RIGHTS**

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on behalf of

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Introduction. The Trustees of the Office of Hawaiian Affairs (OHA) have the power and responsibility under Article XII, Section 6 of Hawaii's State Constitution and Sections 10-5 and 10-6 of the Hawaii Revised Statutes (H.R.S.) to formulate policy regarding the rights to natural resource of persons of Hawaiian ancestry and to monitor the management of these resources. Because of this responsibility, OHA appreciates the opportunity to submit this paper on the Protection and Implementation of Hawaiian Water Rights to the Review Commission on the State Water Code.

The Water Code is a useful document which brings some order to the regulation of water in Hawai'i. It is based on the traditional Hawai'i and Kingdom law which viewed water as a resource held in trust to be managed for the benefit of all the people. The Code also explicitly recognizes in H.R.S. Section 174C-101 that persons of Hawaiian ancestry have preferential rights to water pursuant to the Hawaiian Homes Commission Act, 1920, as amended, and pursuant to traditional and customary rights. The traditional rights

include gathering rights to 'opae, hihwai, and 'o'opu, which require streams with sufficient water to allow them to thrive, and the appurtenant water rights guarantee water sufficient to produce taro and provide for other traditional kuleana uses.

The Code does not go far enough, however, in spelling out the nature of the rights of Hawaiians to water, and how these rights are to be implemented and protected. In addition, the Water Commission has not fulfilled its constitutional mandate under Article XII, Section 7, of Hawaii's Constitution which anticipates the establishment of a comprehensive program to manage and protect Hawaii's fresh water resources. The Water Commission's actions can best be characterized as crisis management, and it has tended to allocate water on a first-come, first-served basis. Instead, the Commission should step back from the day-to-day issues and take a broad holistic view of the situation. Part of that broad view should involve reaffirming and implementing the preferential rights to water that Native Hawaiians are entitled to.

This preferential status is already acknowledged in Hawaii's statutes and practices. As the Hawaiian people move toward the development of a sovereign Native Hawaiian Government, their claim to water and the revenues generated by it will come into greater focus. Even now, these rights exist and references to them can be found in a number of statutes. One current practice that shows clearly that the priority rights of Hawaiians to water has been recognized is the fact that OHA receives 20 % and DHHL receives

another 30 % of the revenues produced from all the water leases for water generated on government lands.

The language in Section 174C-101 and also in Section 221 of the Hawaiian Homes Commission Act is, however, quite general and leaves many questions unanswered. This paper addresses these uncertainties and offers specific suggestions for strengthening the protection and implementation of Hawaiian water rights.

OHA submits that Hawaiians have preferential rights to water, and that these rights exist as rights without regard to whether they can be quantified. It is important to accept this basic proposition. The measure of the right is the right itself. And the best way to ensure that the rights of present and future Hawaiians are protected is to include them as full participants in the decisionmaking process. As explained below, OHA recommends that the Chairs of OHA's Board of Trustees and the Hawaiian Homes Commission serve as ex officio voting members of the Water Commission, until the establishment of a sovereign Native Hawaiian Government, whose representatives would then assume these seats.

The statutes recognizing the water rights of Native Hawaiians focus on two separate sources--the Hawaiian Home Lands trust and traditional rights. These two types of rights will be discussed separately below because they present different problems.

Section 221 of the Hawaiian Homes Commission Act. This provision states that all "water licenses" issued by the Department of Land and Natural Resources granting the right to use "government-owned water" is subject a right of the Department of

Hawaiian Home Lands to claim the water for the purpose of agriculture, aquaculture, livestock-raising, or domestic needs of individuals on Hawaiian Home Lands. This provision is ambiguous in a number of respects. What exactly is "government-owned water," in light of the extensive litigation following the decision in McBryde Sugar Company v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), and in light of the language in Section 174C-2(a) of the Water Code, which says that "the waters of the State are held for the benefit of the citizens of the State." Does the concept of a "water license" in Section 221 include a permit issued by the Commission on Water Resource Management, given the close link between the Commission and the Department of Land and Natural Resources (the chairperson of the Board of Land and Natural Resources serves as chairperson of the Commission pursuant to H.R.S. Section 174C-7(b))? And more fundamentally, does Section 221 of the Hawaiian Homes Commission Act provide Hawaiian homesteaders with any rights to the infrastructure needed to deliver water to their homesteads, or does it only provide access to water in the abstract?

What if the Department of Hawaiian Home Lands or a group of homesteaders sought to develop their lands for an industrial or tourist-oriented use, such as a hotel or golf course? Would they then be entitled to water under Section 221?

Perhaps the most important question is how the rights of future generations of Hawaiians to water can be protected. OHA submits that representatives of the Department of Hawaiian Home Lands should be involved as decisionmakers in any situation where

water is allocated to private developers in any way that affects present or future claims for water by Hawaiian homesteaders.

The situation on Moloka'i presents a graphic example of the types of choices that must be made and illustrates how important it is for Hawaiians to be involved in the decisionmaking.

The DHHL needs water for the 10,000 acres it seeks to develop for agriculture on Moloka'i. The costs involved in this development are significant, and it is unclear where the funds are to come from. In addition to this uncertainty, it is also unclear where the water should come from. Should water be taken from Pelekunu Valley to supply the homestead land, even if that diversion of water affects ground water levels in the valley, which in turn affects the traditional gathering practices of local Hawaiians? Obviously such a fundamental decision should be made only after full input from the Hawaiian community on Moloka'i.

Another area requiring that difficult decisions be made is in the Waimea/Kamuela region on the Big Island. How can the homesteaders be provided with adequate water, and how should the decisions be made?

OHA also submits that mechanisms should be identified in the Water Code to ensure that funds can be found to enable DHHL to construct the infrastructure needed to deliver water to the homesteaders. One obvious approach would be to ensure that DHHL receive a share of the revenues from all water leases to non-Hawaiians that deliver to the non-Hawaiians water that could now be or will later be claimed by DHHL or by homesteaders.

Another major dispute involving Hawaiian water rights related to the Hawaiian Home Lands is whether these rights must be quantified at present in order to protect the rights of future Hawaiians. The Water Commission has tended to argue that the present claims of the homesteaders to water must be quantified so that the Commission can evaluate these claims in relation to the needs of other water users. But because future generations of Hawaiians may have different needs than can be predicted at the present time, an effort undertaken now to quantify these rights may not provide adequate protection for these future needs.

On Kaua'i, for instance, the county has been awarding water on a first-come, first-serve basis, and has been unwilling to reserve unquantifiable water rights. DHHL has contended that a water reservation is needed to assure the development of future Hawaiian Homes acreage on Kaua'i, but in spite of Act 325--which dictates a mandatory reservation of water for DHHL--the County has been unwilling to make that reservation.

The Traditional and Customary Rights--Section 174C-101 of the State Water Code. The language in Section 174C-101 is phrased in the negative--nothing in the Code shall be deemed to amend or modify or abridge or deny the rights of Hawaiians under the Hawaiian Homes Commission Act or under traditional and customary law. Although this language is important, it does not assist in clarifying the precise nature of these rights, nor does it establish a mechanism for resolving disputes that arise.

Paragraph (d) of Section 174C-101 provides the important statement that appurtenant rights are not lost if a permit related to these rights is not obtained. But it does not describe what landowners should do to obtain the water that they are entitled to pursuant to their appurtenant rights if their water has been diverted to other uses.

More fundamentally, these ancient and symbolically important taro-based rights must be modernized to provide water for 21st century Hawaiians. Although the concept of appurtenant rights reflects a commitment to recognizing the special relationship that exists between Hawaiians and the streams and rivers of the islands, they do not accurately reflect the reality of today's needs. Efforts are needed to make these rights meaningful for today and for the coming years.

OHA submits that Hawaiian water rights exist at present, whether or not permits have been obtained, and that they are not extinguishable. OHA further submits that representatives of the Hawaiian community must participate as decisionmakers on all occasions that decisions regarding the allocation of water are made.

The Administrative Rules of the State Water Code. These rules recognize in Section 13-171-27 that appurtenant rights are preserved and that permits for these rights will be issued upon application. If conflicts exist, contested case hearings will be held pursuant to Section 13-171-26, but it is not clear what principles will be invoked to resolve such conflicts. Appurtenant

rights permits apparently can be revoked under Section 13-171-24(4), although that provision appears to be inconsistent with the notion that appurtenant rights are "preserved."

It is also unclear what the effect of the reference in Section 13-171-27 to Section 13-168-5 means. Section 13-168-5 requires persons seeking to preserve their water rights to register their claim within a year after the promulgation of the Administrative Rules. If they fail to so register, what is the effect of this failure? A cancellation of the right to water would be inconsistent with H.R.S. Section 174C-101(d) as well as Article XII, Section 7, of Hawaii's Constitution. The link between Hawaiians and the fresh water resources of these islands is so basic that it should not be subject to unnecessarily intrusive governmental regulation.

And what about the priority rights of the Department of Hawaiian Home Lands and its homesteaders? Are they properly recognized in the Administrative Rules? Sections 13-170-60 and 13-170-61 on implementing Hawaii's Water Plan make no mention of the special rights of Hawaiians and Hawaiian homesteaders.

The Winters Doctrine. The jurisdictional foundation of the preferential rights of Hawaiians to water is based on the case of Winters v. United States, 207 U.S. 564 (1908), which held that an Indian reservation was entitled to all the water it needed for irrigation, livestock, and domestic use. In this case, a group of investors and farmers who acquired their land under the federal homestead and desert land use acts had dammed and diverted the Milk

River in Montana to create a successful farming community. But their actions restricted the water reaching the Fort Belknap Indian Reservation, which had been created by treaty between the United States and certain Indian nations. When the United States brought suit on behalf of the Indians, the Court ruled that the federal government had acquired, on behalf of the Indians, an appropriation of all water needed to fulfill the purpose of the reservation. The settlers were thus enjoined from diverting any substantial quantities of water from the Milk River.

The parallels between the Winters facts and the claims of Hawaiians has been described as follows:

The facts in the Fort Belknap case are analogous to the historical circumstances surrounding Hawaii's annexation and the transfer of sovereignty over its lands to the United States. In 1921, the United States Congress passed the Hawaiian Homes Commission Act, 1920, which created the Hawaiian Homes Commission as the executive board of the State Department of Hawaiian Home Lands. The department was charged with leasing tracts of these lands to native Hawaiians at nominal rentals on ninety-nine year leases. Under the conditions of the lease, the lessee would occupy and commence to use or cultivate the tract as his or her home or farm....As for water rights, the Act defines "surplus water" as government-owned water under a water license or privately-owned water in excess of the quantity required for the use of the licensee or owner. The department is authorized to use, free of charge, government water needed to supply the agricultural or domestic needs of lessees and to purchase or condemn private surplus water for the same purpose. Furthermore, the Act provides that all water licenses issued after its passage are subject to the condition that the licensee shall, upon demand of the department, grant to it the right to use, free of charge, any water which the department deems necessary to supply the livestock or the domestic needs of individuals on the leased tracts....

The parallels between the Hawaiian and the Fort Belknap circumstances are many. In both cases, the natives had originally held water rights to a generalized area. Most of the area was later ceded to the United

States. In both cases, certain lands were reserved by Congress for the benefit of the natives. The clear intention of the Congress in reserving the lands was to create stable, civilized agriculturally-based communities. In both Hawaii and Montana, lands not so reserved became part of the public domain. The only substantive difference between the two situations is that in Montana the land reservation was an integral part of the same instrument that ceded the lands to the United States - the 1888 treaty. In Hawaii, the reservation of the lands occurred through a special act of Congress in 1921, over twenty years after the formal transfer of sovereignty from the Republic of Hawaii to the United States (1898) and the establishment of the territory of Hawaii by the Organic Act in 1900.

This analysis suggests that under the implied-reservation-of-water-rights doctrine, lessees of tracts of Hawaiian Homes Commission land are senior appropriators of any water available as of July, 1921, in quantities sufficient to accomplish agricultural or domestic purposes for which the tract is occupied. Thus, the water rights provisions of the Hawaiian Homes Commission Act itself are consistent with the implied-reservation-of-water-rights doctrine, and the doctrine itself would appear to confer these rights even in the absence of such provisions.

Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori, and Ralph Yukumoto, Water Rights in Hawaii in Land and Water Resource Management in Hawaii 142, 258-59 (Haw. Dept. Budget & Finance 1979) (citations omitted).

The rights of Hawaiians to water are explicitly identified in Hawaii's statutes, but the Winters doctrine provides a fallback justification for ensuring these rights even if these statutes did not exist. And the Winters doctrine also teaches us that courts and governmental bodies should be generous in turning the general statutory rights into specific recognitions of the preferential position of Hawaiians to water rights.

Protection of Minimum Stream Flows in Order to Guarantee Gathering Rights. H.R.S. Section 174C-101(c) reaffirms the rights of native Hawaiians to gather 'opae, hihiwai, and 'o'opu, and an adequate in-stream flow is essential for them to thrive. The Water Commission has not yet provided the strong leadership required to protect the flow of Hawaii's streams, and has been unwilling to acknowledge these rights explicitly and to protect them. Although Sections 13-169-20(1) and 13-169-33(d) refer in general terms to ensuring adequate stream flow to protect fish and wildlife, no explicit reference is made to the 'opae, hihiwai, and 'o'opu, which are the resources that have traditionally come out of Hawaii's streams. One crucial step that needs to be taken is that adequate data need to be collected so that the streams can be monitored over time.

The failure to protect Hawaii's stream under the Water Code is attributable in part to a lack of jurisdictional coordination. Allocations of water are made by county water boards, water quality is within the purview of the Department of Health, and aquatic species control is the prerogative of the Department of Land and Natural Resources. Also troubling is the argument regularly raised that Hawaiian rights to water can only be assured if they can be quantified.

OHA submits that the Water Commission should exert a strong centralized authority to protect Hawaii's streams for present and future generations. As mentioned above, OHA also believe that Hawaiians should have reserved positions on the Commission so that

the interests of the Hawaiian community can be identified and protected.

One final, and also important, issue that relates to stream flow is the question of how we should address the loss of kuleana lands that resulted from the building of the Kohala Ditch on the Big Island, the Spreckels Ditch at Waihe'e, Maui, and other irrigation efforts. Hawaiians were forced to abandon their kuleanas because of the lack of water, and their kuleanas were then absorbed into the surrounding estates by adverse possession. These losses have compounded the current economic plight of many Hawaiians, and some program of compensation would appear to be appropriate.

Hawaiian Rights to Water Should Be Converted into Modern Concepts. In the case of McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 189 n.15, 504 P.2d 1330, 1340 n.15 (1973), the Hawaii Supreme Court said: "It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible." The Hawaiian rights that are traced to taro cultivation and important and secure today, but it makes sense to try to translate these traditional rights into modern concepts and practices. Hawaiians today, and perhaps even more so when the sovereign Native Hawaiian Government is established, have the right and responsibility to develop economic resources for their own prosperity. Water will be needed for many of the developments that the Hawaiians will consider. They are entitled to the water they

need to make these projects successful. See generally Allen H. Sanders, The Northwest Power Act and Reserved Tribal Rights, 58 Wash. L. Rev. 357 (1983).

Permits to Use Water Should Be Limited in Duration, and Fees Should Be Paid for These Permits. The Hawaiians traditionally did not view water as subject to ownership, but did feel that it should be allocated to individual farmers in terms of "rights" that were linked to the effort made by each individual to maintain the common auwai (irrigation ditches). OHA believes that the Hawaiian community should be sharing in the revenues generated by Hawaii's water because of their valid claims to the lands and resources of the Hawaiian Kingdom that were transferred without compensation to the United States at the time of annexation in 1898. In traditional times, the maka'ainana (commoners) received water only if they contributed to the common good by working to ensure that the auwai were properly maintained. Today, entities that receive large shares of the common-property water also should contribute to the common good--by contributing financially to a fund that would be used to pay for infrastructure needed to deliver needed water to Hawaiians and others.

The Water Code now authorizes the Water Commission to issue permits that are unlimited in duration if the use of the water does not change (H.R.S. Section 174C-55). Other states, by contrast, set durational limits on the water permits they issue. Florida, for instance, issues permits for only 20 years, except that government bodies or public works corporations can receive permits

of up to 50 years. New Jersey issues permits limited to 25 years. See Van Dyke, Chang, et al., Water Rights in Hawaii, supra, at 221-22. The advantage of limiting permits to a fixed term of relatively short duration is that it allows future generations to reconsider how this resource should be used in light of their needs and priorities and in light of the future availability of water.

OHA recommends that water permits should be issued for no more than 30 years. After that period, the water users can reapply for additional permits. If water supplies are adequate, they would be granted the renewal. If not, their requests would be evaluated along with the other demands for water. A 30-year permit (with the assumption that the permit will be renewed if the use remains a reasonable-beneficial one and if water supplies for competing uses remain adequate) is sufficient in economic terms to induce investments to develop water sources.

The Composition, Structure, and Power of the Water Commission.

As mentioned several times previously, the OHA Trustees submit that representatives of the Hawaiian community should have explicitly designated seats on the Water Commission to reflect the rights and responsibilities of Hawaiians regarding Hawaii's fresh water resources. H.R.S. Section 174C-7 currently requires that the Chairperson of the Board of Land and Natural Resources and the Director of Health automatically become members of the six-member Water Commission, with the other four members appointed by the Governor (from names forwarded by a nominating committee) and confirmed by the Senate. OHA submits that the size of the Water

Commission should be expanded to eight and that the Chair of OHA's Board of Trustees as well as the Chair of the Hawaiian Home Lands Commission should also be ex officio voting members of the Water Commission. When the sovereign Hawaiian government is established, representatives from this government should assume these seats on the Water Commission. This participation would ensure that Hawaiian concerns are considered and that every request for a water allotment would be weighed against the preferential rights and reservations of Hawaiians to water. This membership on the Water Commission would also ensure that Hawaiians had access to the needed technical information on sources of water, quantity of water, priority rights, points of diversion, purposes of use, and so on.

OHA also submits that the powers of the Water Commission should be strengthened so that, instead of the present crisis management approach, this body can undertake a comprehensive and holistic approach toward protecting and preserving Hawaii's water resources. As part of this comprehensive approach, the Commission should abandon its present first-come, first-serve approach and should be empowered (1) to make reservations for Hawaiian priority uses based on estimated uses, (2) to allow uses that are temporary and subject to reduction if Hawaiian priority uses increase, and (3) to deny uses where it is obvious that the requested use will infringe on Native Hawaiian uses.

Additional Recommendations. In line with the recommendations made above that the Water Commission should develop a comprehensive

approach toward protecting and preserving Hawaii's water resources through a policy of integrated watershed management, OHA submits that the Water Commission should designate the entire state as a water management area and should take a more active role in ensuring that Hawaii's waters are allocated in a fair and equitable manner that recognizes the preferential rights of Hawaiians.

Finally, OHA submits that special attention should be given to the water needs of Kaho'olawe, and that a plan should be developed immediately that would address how that water needs of that island are to be met.

Conclusion and Recommendations. The rights of Hawaiians to water must be given more concern and recognition by the Water Commission. We are moving toward a new era in which a sovereign Hawaiian government will operate autonomously, with its own resources and governing mechanisms. For the present, it is imperative that Hawaiian rights be recognized for present needs and preserved for future generations. The preferential rights of Hawaiians for water on Hawaiian Home Lands and for adequate stream flow and appurtenant rights must be given recognition and real meaning for coming generations of Hawaiians.

The specific recommendations offered by OHA in this paper can be summarized as follows:

1. The Water Commission should be expanded to eight members and the Chairs of OHA's Board of Trustees and of the Hawaiian Homes Commission should sit as ex officio voting members on this body.

2. The Water Commission should develop a comprehensive program to manage and protect Hawaii's fresh water resources. The Commission should designate the entire state as a water management area and should take a more active role in ensuring that Hawaii's waters are allocated in a fair and equitable manner that recognizes the preferential rights of Hawaiians. As part of this process, the powers of the Water Commission should be strengthened so that, instead of the present crisis management approach, this body can undertake a comprehensive and holistic approach toward protecting and preserving Hawaii's water resources.

3. The Commission should abandon its present first-come, first-serve approach and should be empowered (1) to make reservations for Hawaiian priority uses based on estimated uses, (2) to allow uses that are temporary and subject to reduction if Hawaiian priority uses increase, and (3) to deny uses where it is obvious that the requested use will infringe on Native Hawaiian uses.

4. It should be acknowledged that the rights of Native Hawaiians to water exist as rights without regard to whether they can be quantified.

5. The rights of Native Hawaiians under Section 221 of the Hawaiian Homes Commission Act and under H.R.S. Section 174C-101 should be clarified. More specifically, Hawaiian water rights should be modernized so that the symbolically-important traditional rights can be translated into rights that will be meaningful for

today's Hawaiians as they become more autonomous and enter into new economic endeavors.

6. Mechanisms should be identified in the Water Code to ensure that funds can be found to enable DHHL to construct the infrastructure needed to deliver water to the Hawaiian homesteaders. One obvious approach would be to ensure that DHHL receive a share of the revenues from all water leases to non-Hawaiians.

7. The Water Commission should address the loss of kuleana lands that resulted from the building of the Kohala Ditch on the Big Island, the Spreckels Ditch at Waihe'e, Maui, and other irrigation efforts, and should propose an appropriate solution to this problem.

8. Permits to use water should be limited in duration, and fees should be paid for these permits. OHA recommends that water permits should be issued for no more than 30 years. After that period, the water users can reapply for additional permits. If water supplies are adequate, they would be granted the renewal. If not, their requests would be evaluated along with the other demands for water.

9. Entities receiving permits for water should contribute financially for access to this common-property resource into a fund that would be used to build the infrastructure needed to deliver water to Hawaiians and others.

10. Special attention should be given to the water needs of Kaho'olawe, and that a plan should be developed immediately that

would address how that water needs of that island are to be met.