
HOUSE CONCURRENT RESOLUTION

REQUESTING THE BOARD OF LAND AND NATURAL RESOURCES AND THE COMMISSION ON WATER RESOURCE MANAGEMENT TO REPORT WHY EACH HAS NOT TAKEN PROACTIVE MEASURES TO ENSURE THE WATER RIGHTS OF EAST MAUI RESIDENTS AND TO ESTABLISH A SIMPLE, CLEAR, AND EFFICIENT PROCESS FOR INVESTIGATING VIOLATIONS OF WATER USE.

1 WHEREAS, before the annexation of Hawaii by the United
2 States in 1898, all of the land and natural resources were held
3 in trust for the benefit of the people by the high chiefs, known
4 as ali`i `ai ahupua`a or ali`i `ai moku, who oversaw the native
5 tenants' use of the land and natural resources; and

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7 WHEREAS, since the annexation, state agencies have assumed
8 oversight and management of the 1,800,000 acres of land "ceded"
9 to the United States under a trust in 1898; and

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11 WHEREAS, chapter 171, Hawaii Revised Statutes, authorizes
12 the Board of Land and Natural Resources to serve as the primary
13 trustee to prudently manage and dispose of these resources; and

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15 WHEREAS, chapter 174C, Hawaii Revised Statutes, designates
16 the Commission on Water Resource Management as the agency
17 responsible for protecting and managing all water resources,
18 including all water streams on ceded lands; and

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20 WHEREAS, taro farming, which utilizes natural water
21 resources available from valley floors and slopes on which taro
22 is cultivated, was the primary form of agriculture supporting
23 Hawaiians in pre-Western contact Hawaii; and

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25 WHEREAS, the adjacent ahupua`a of Ke`anae and Wailuanui
26 located on the northeast flank of Haleakala on the island of
27 Maui, supported intensive and extensive wetland taro cultivation
28 that was irrigated by water streams in these respective ahupua`a



1 since ancient times, and the streams have continued unabated
2 until the present day; and

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4 WHEREAS, western contact brought about significant changes
5 in both the traditional Hawaiian land tenure system and Hawaii's
6 social structure; and

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8 WHEREAS, Hawaii's traditional land tenure system seemed ill
9 suited for the western mercantile economy emerging as a result
10 of these changes; and

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12 WHEREAS, on December 10, 1845, Kamehameha III established
13 and outlined the responsibilities of the Board of Commissioners
14 to Quiet Land Titles, otherwise known as the Land Commission, to
15 oversee the conversion of the ancient land tenure system to a
16 property system of private ownership; and

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18 WHEREAS, on August 6, 1850, the Kingdom enacted the Kuleana
19 Act authorizing the Land Commission to grant fee simple title to
20 native tenants, or *hoa`āina*, together with rights to access land
21 and water necessary for the cultivation of taro and other
22 traditional and customary pursuits; and

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24 WHEREAS, although approximately forty-two hundred of the
25 13,514 applications for kuleana under the *Māhele* were not
26 approved, the Land Commission ultimately awarded 28,658 acres to
27 native tenants, less than one per cent of the lands available in
28 the islands; and

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30 WHEREAS, in contrast, by 1864, two hundred thirteen non-
31 native people in Hawaii had purchased over three hundred twenty
32 thousand acres of government land, subject to the rights of
33 native tenants; and

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35 WHEREAS, in 1876, the predecessors to Alexander and Baldwin
36 commenced construction of a system of ditches and tunnels that
37 now divert, on average, one hundred sixty million gallons of
38 water per day from East Maui streams to irrigate sugarcane
39 fields owned by Hawaiian Commercial and Sugar Company in Central
40 Maui; and

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42 WHEREAS, in 1902, the Commissioner of Public Lands issued
43 lease number 538 to H. P. Baldwin, leasing lands in East Maui
44 until 1933 for the development, storage, transportation, or



1 other utilization of the water thereon, thereby allowing
2 construction of a ditch system; and
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4 WHEREAS, this royal lease was issued subject to the
5 condition that there would be no interference with the vested
6 interests in water of land owners in Ke`anae, Wailuanui, or
7 other parts of East Maui; and
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9 WHEREAS, in 1904, Hawaiian Commercial and Sugar Company,
10 which was Alexander and Baldwin's Maui sugar plantation, while
11 continuing its out-of-watershed diversion of stream flow from
12 East Maui streams, successfully sued to enjoin Wailuku Sugar
13 Company's out-of-watershed stream flow diversions from the
14 Wailuku Stream based upon Hawaiian Commercial and Sugar
15 Company's claim of appurtenant rights connected with its
16 purchase of interests in nearby kuleana; and
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18 WHEREAS, the Board of Land and Natural Resources presently
19 leases over thirty-three thousand acres of ceded lands to
20 Alexander and Baldwin's East Maui Irrigation Company, from which
21 it presently diverts an average of 60,000,000,000 gallons of
22 water per year from East Maui streams at one-fifth of a cent per
23 thousand gallons; and
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25 WHEREAS, pursuant to article XI, sections 1 and 7, of the
26 Constitution of the State of Hawaii and section 174C-101, Hawaii
27 Revised Statutes, any diverter of water has the legal burden of
28 demonstrating that any diversion of water is not harming the
29 riparian and appurtenant water rights held by downstream taro
30 farmers or those rights traditionally and customarily exercised
31 for subsistence, cultural, and religious purposes, including
32 fishing, gathering limu, and the taking of o`opu, hihiwai, and
33 opa`e from streams; and
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35 WHEREAS, the Hawaii Supreme Court has upheld these water
36 rights in four recent court decisions that required diverters of
37 water to carry the burden of demonstrating the absence of harm
38 to those with superior riparian, appurtenant, and traditional
39 rights to water; and
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41 WHEREAS, the First Circuit Court has also ruled that any
42 diversion of water cannot injure others with appurtenant,
43 riparian, or traditional and customary native Hawaiian rights to
44 the same water; and



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WHEREAS, members of Na Moku Aupuni O Ko`olau Hui, Beatrice Kekahuna, Marjorie Wallett, and other East Maui taro farmers who are native Hawaiian kuleana land owners, have appurtenant, riparian and traditional and customary native Hawaiian rights that are violated by Alexander and Baldwin's East Maui Irrigation Company's stream diversions; and

WHEREAS, this deprivation of water rights has resulted in a chronic injury to the residents of Wailuanui and Ke`anae valleys and has directly impacted their capacity to continue traditional and customary practices, contrary to sound public policy and constitutional protections; and

WHEREAS, the Board of Land and Natural Resources has, since at least May of 2001, failed to act to fully and timely protect the rights of these residents of East Maui; and

WHEREAS, for the past year, staff of the Department of Land and Natural Resources has failed to timely implement the terms of the interim relief ordered by the Board of Land and Natural Resources while contested case hearings continued to give the East Maui taro farmers timely and prompt interim relief to cure the chronic problems related to inadequate releases of water to support their traditions and customs; and

WHEREAS, the Commission on Water Resource Management is required under section 174C-71(2)(E), Hawaii Revised Statutes, to act upon any petition to amend interim instream flow standards for a stream within one hundred eighty days, guided by its duties to protect water resources under the public trust doctrine, in order to protect the integrity of fresh water stream ecologies, as well as riparian and appurtenant rights of traditional taro farmers; and

WHEREAS, East Maui taro farmers filed petitions to amend interim instream flow standards for twenty-seven East Maui streams, currently subject to unmitigated diversions by the Alexander and Baldwin's East Maui Irrigation Company, to restore greater flows to protect their traditional and customary practices which depend on irrigation water for taro, subsistence gathering, and fishing practices; and



1 WHEREAS, a scientific study by the United States Geological
2 Survey enables the State Commission on Water Resources
3 Management to predict the degree of restoration to a stream
4 habitat with any given restoration of stream flow, thereby
5 eliminating the absence of any scientific basis for acting on
6 petitions to restore stream flow; and

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8 WHEREAS, for the past six years, the Commission on Water
9 Resource Management has failed, refused, or neglected to act on
10 petitions to amend the interim in-stream flow standards of
11 twenty-seven East Maui streams filed on behalf of these East
12 Maui residents despite repeated reminders and demands to follow
13 the statutory deadline to act; and

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15 WHEREAS, the Commission on Water Resource Management has
16 offered no rational basis for delaying action on the pending
17 petitions to amend interim instream flow standards and has not
18 provided any schedule for when action will be taken; and

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20 WHEREAS, the State's failure to timely act results in
21 ongoing harm to the superior water rights of these East Maui
22 residents and to the traditional and customary practices
23 guaranteed under the Constitution of the State of Hawaii and
24 other state law; now, therefore,

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26 BE IT RESOLVED by the House of Representatives of the
27 Twenty-fourth Legislature of the State of Hawaii, Regular
28 Session of 2008, that the Board of Land and Natural Resources
29 and the Commission on Water Resource Management are each
30 requested to submit a report to the Legislature not later than
31 twenty days prior to the convening of the Regular Session of
32 2009, explaining why each agency has not ordered Alexander and
33 Baldwin's East Maui Irrigation Company to:

- 34
35 (1) Immediately release all water now being diverted from
36 Wailuanui and Waiokamilo streams, and their
37 tributaries, and from the watershed mauka of the ili
38 of Kupau, so that it may flow unimpeded past its ditch
39 system and into Wailuanui Valley for taro irrigation
40 unless Alexander and Baldwin's East Maui Irrigation
41 Company can demonstrate that any given quantity of the
42 water is not needed to keep water temperature in any
43 taro lo'i cultivated by members of Na Moku below 77
44 degrees Fahrenheit;



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(2) Immediately release all water now being diverted from Pi`ina`au and Palauhulu streams, and their tributaries, so that it may flow unimpeded past its ditch system and into Ke`anae Valley for taro irrigation unless Alexander and Baldwin's East Maui Irrigation Company can demonstrate that any given quantity of the water is not needed to keep water temperature in any taro lo`i cultivated by members of Na Moku below 77 degrees Fahrenheit;

(3) Immediately release all water now being diverted from Honopou Stream so that it may flow unimpeded past its ditch systems and into Honopou stream unless Alexander and Baldwin's East Maui Irrigation Company can demonstrate that any given quantity of the water is not needed to keep water temperature in any taro lo`i cultivated by Beatrice Kekahuna, Marjorie Wallett, or their ohana, below 77 degrees Fahrenheit; and

(4) Immediately and affirmatively demonstrate, with clear and convincing evidence, its actual water needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs, such as the practicability of using alternative sources before authorizing the diversion of water from the 33,000 acres of ceded lands in the East Maui forest reserve, over which it has jurisdiction to protect and manage for future generations; and

BE IT FURTHER RESOLVED that the Board of Land and Natural Resources is requested to explain in its report why the Board does not have a regular system and protocol in place that would promptly require the timely release of water into the disputed streams that support the valleys of Honopou, Ke`anae and Wailuanui unless, and until, Alexander and Baldwin's East Maui Irrigation Company thoroughly demonstrates that the above taro farmers and stream gatherers no longer require the stream flow released from the Alexander and Baldwin's East Maui Irrigation Company ditch system; and

BE IT FURTHER RESOLVED that as part of its report, the Board of Land and Natural Resources is requested to determine



1 whether the staff of the Department of Land and Natural
 2 Resources is capable of monitoring the effect of any water
 3 diversions, now and in the future, allowed by the Board for any
 4 violations of the common law, the constitution, or statutory
 5 rights specified by the article XI, section 7 and article XII,
 6 section 7 of the Constitution of the State of Hawaii; section
 7 221 of the Hawaiian Homes Commission Act; and sections 171-58
 8 and 174C-101, Hawaii Revised Statutes, and thereafter, provide a
 9 simple, clear, and efficient process for investigating reported
 10 violations, and conducting timely and frequent reviews of any
 11 disputes that arise at regularly scheduled meetings of the Board
 12 of Land and Natural Resources so these water rights issues are
 13 promptly resolved; and

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 15 BE IT FURTHER RESOLVED that as part of its report, the
 16 Commission on Water Resource Management is requested to
 17 determine the level of budgeting and staffing required to
 18 promptly respond to complaints of interference with appurtenant
 19 water rights and in-stream flows necessary to support the
 20 continued ability of Hawaiians to pursue their traditional and
 21 customary practices dependent on adequate stream flow, and,
 22 thereafter, provide a simple, clear, and efficient process for
 23 investigating reported violations of these rights, and
 24 conducting timely and frequent reviews of any disputes that
 25 arise at regularly scheduled meetings of the Commission on Water
 26 Resource Management so these water rights issues, complaints,
 27 and disputes are promptly resolved, as envisioned by the
 28 Legislature pursuant to sections 174C-10 and 174C-13, Hawaii
 29 Revised Statutes; and

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 31 BE IT FURTHER RESOLVED that certified copies of this
 32 Concurrent Resolution be transmitted to the Chairperson of the
 33 Board of Land and Natural Resources and the Chairperson of the
 34 Commission on Water Resource Management.

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 36 OFFERED BY: Mele Carrall

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