
HOUSE 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

6
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

14
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

19
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

24
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
29 since ancient times, and the streams have continued unabated
30 until the present day; and



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

5 WHEREAS, Hawaii's traditional land tenure system seemed ill
6 suited for the western mercantile economy emerging as a result
7 of these changes; and
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9 WHEREAS, on December 10, 1845, Kamehameha III established
10 and outlined the responsibilities of the Board of Commissioners
11 to Quiet Land Titles, otherwise known as the Land Commission, to
12 oversee the conversion of the ancient land tenure system to a
13 property system of private ownership; and
14

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

21 WHEREAS, although approximately forty-two hundred of the
22 13,514 applications for kuleana under the *Māhele* were not
23 approved, the Land Commission ultimately awarded 28,658 acres to
24 native tenants, less than one per cent of the lands available in
25 the islands; and
26

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

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

39 WHEREAS, in 1902, the Commissioner of Public Lands issued
40 lease number 538 to H. P. Baldwin, leasing lands in East Maui
41 until 1933 for the development, storage, transportation, or
42 other utilization of the water thereon, thereby allowing
43 construction of a ditch system; and
44



1 WHEREAS, this royal lease was issued subject to the
2 condition that there would be no interference with the vested
3 interests in water of land owners in Ke`anae, Wailuanui, or
4 other parts of East Maui; and
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6 WHEREAS, in 1904, Hawaiian Commercial and Sugar Company,
7 which was Alexander and Baldwin's Maui sugar plantation, while
8 continuing its out-of-watershed diversion of stream flow from
9 East Maui streams, successfully sued to enjoin Wailuku Sugar
10 Company's out-of-watershed stream flow diversions from the
11 Wailuku Stream based upon Hawaiian Commercial and Sugar
12 Company's claim of appurtenant rights connected with its
13 purchase of interests in nearby kuleana; and
14

15 WHEREAS, the Board of Land and Natural Resources presently
16 leases over thirty-three thousand acres of ceded lands to
17 Alexander and Baldwin's East Maui Irrigation Company, from which
18 it presently diverts an average of 60,000,000,000 gallons of
19 water per year from East Maui streams at one-fifth of a cent per
20 thousand gallons; and
21

22 WHEREAS, pursuant to article XI, sections 1 and 7, of the
23 Constitution of the State of Hawaii and section 174C-101, Hawaii
24 Revised Statutes, any diverter of water has the legal burden of
25 demonstrating that any diversion of water is not harming the
26 riparian and appurtenant water rights held by downstream taro
27 farmers or those rights traditionally and customarily exercised
28 for subsistence, cultural, and religious purposes, including
29 fishing, gathering limu, and the taking of o`opu, hihiwai, and
30 opa`e from streams; and
31

32 WHEREAS, the Hawaii Supreme Court has upheld these water
33 rights in four recent court decisions that required diverters of
34 water to carry the burden of demonstrating the absence of harm
35 to those with superior riparian, appurtenant, and traditional
36 rights to water; and
37

38 WHEREAS, the First Circuit Court has also ruled that any
39 diversion of water cannot injure others with appurtenant,
40 riparian, or traditional and customary native Hawaiian rights to
41 the same water; and
42

43 WHEREAS, members of Na Moku Aupuni O Ko`olau Hui, Beatrice
44 Kekahuna, Marjorie Walleth, and other East Maui taro farmers who



1 are native Hawaiian kuleana land owners, have appurtenant,
 2 riparian and traditional and customary native Hawaiian rights
 3 that are violated by Alexander and Baldwin's East Maui
 4 Irrigation Company's stream diversions; and
 5

6 WHEREAS, this deprivation of water rights has resulted in a
 7 chronic injury to the residents of Wailuanui and Ke`anae valleys
 8 and has directly impacted their capacity to continue traditional
 9 and customary practices, contrary to sound public policy and
 10 constitutional protections; and
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12 WHEREAS, the Board of Land and Natural Resources has, since
 13 at least May of 2001, failed to act to fully and timely protect
 14 the rights of these residents of East Maui; and
 15

16 WHEREAS, for the past year, staff of the Department of Land
 17 and Natural Resources has failed to timely implement the terms
 18 of the interim relief ordered by the Board of Land and Natural
 19 Resources while contested case hearings continued to give the
 20 East Maui taro farmers timely and prompt interim relief to cure
 21 the chronic problems related to inadequate releases of water to
 22 support their traditions and customs; and
 23

24 WHEREAS, the Commission on Water Resource Management is
 25 required under section 174C-71(2)(E), Hawaii Revised Statutes,
 26 to act upon any petition to amend interim instream flow
 27 standards for a stream within one hundred eighty days, guided by
 28 its duties to protect water resources under the public trust
 29 doctrine, in order to protect the integrity of fresh water
 30 stream ecologies, as well as riparian and appurtenant rights of
 31 traditional taro farmers; and
 32

33 WHEREAS, East Maui taro farmers filed petitions to amend
 34 interim instream flow standards for twenty-seven East Maui
 35 streams, currently subject to unmitigated diversions by the
 36 Alexander and Baldwin's East Maui Irrigation Company, to restore
 37 greater flows to protect their traditional and customary
 38 practices which depend on irrigation water for taro, subsistence
 39 gathering, and fishing practices; and
 40

41 WHEREAS, a scientific study by the United States Geological
 42 Survey enables the State Commission on Water Resources
 43 Management to predict the degree of restoration to a stream
 44 habitat with any given restoration of stream flow, thereby



1 eliminating the absence of any scientific basis for acting on
2 petitions to restore stream flow; and

3

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

10

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

15

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

21

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

30

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

41

42 (2) Immediately release all water now being diverted from
43 Pi`ina`au and Palauhulu streams, and their
44 tributaries, so that it may flow unimpeded past its



1 ditch system and into Ke`anae Valley for taro
2 irrigation unless Alexander and Baldwin's East Maui
3 Irrigation Company can demonstrate that any given
4 quantity of the water is not needed to keep water
5 temperature in any taro lo`i cultivated by members of
6 Na Moku below 77 degrees Fahrenheit;
7

8 (3) Immediately release all water now being diverted from
9 Honopou Stream so that it may flow unimpeded past its
10 ditch systems and into Honopou stream unless Alexander
11 and Baldwin's East Maui Irrigation Company can
12 demonstrate that any given quantity of the water is
13 not needed to keep water temperature in any taro lo`i
14 cultivated by Beatrice Kekahuna, Marjorie Wallett, or
15 their ohana, below 77 degrees Fahrenheit; and
16

17 (4) Immediately and affirmatively demonstrate, with clear
18 and convincing evidence, its actual water needs and,
19 within the constraints of available knowledge, the
20 propriety of draining water from public streams to
21 satisfy those needs, such as the practicability of
22 using alternative sources before authorizing the
23 diversion of water from the 33,000 acres of ceded
24 lands in the East Maui forest reserve, over which it
25 has jurisdiction to protect and manage for future
26 generations; and
27

28 BE IT FURTHER RESOLVED that the Board of Land and Natural
29 Resources is requested to explain in its report why the Board
30 does not have a regular system and protocol in place that would
31 promptly require the timely release of water into the disputed
32 streams that support the valleys of Honopou, Ke`anae and
33 Wailuanui unless, and until, Alexander and Baldwin's East Maui
34 Irrigation Company thoroughly demonstrates that the above taro
35 farmers and stream gatherers no longer require the stream flow
36 released from the Alexander and Baldwin's East Maui Irrigation
37 Company ditch system; and
38

39 BE IT FURTHER RESOLVED that as part of its report, the
40 Board of Land and Natural Resources is requested to determine
41 whether the staff of the Department of Land and Natural
42 Resources is capable of monitoring the effect of any water
43 diversions, now and in the future, allowed by the Board for any
44 violations of the common law, the constitution, or statutory



1 rights specified by the article XI, section 7 and article XII,
 2 section 7 of the Constitution of the State of Hawaii; section
 3 221 of the Hawaiian Homes Commission Act; and sections 171-58
 4 and 174C-101, Hawaii Revised Statutes, and thereafter, provide a
 5 simple, clear, and efficient process for investigating reported
 6 violations, and conducting timely and frequent reviews of any
 7 disputes that arise at regularly scheduled meetings of the Board
 8 of Land and Natural Resources so these water rights issues are
 9 promptly resolved; and

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

26
 27 BE IT FURTHER RESOLVED that certified copies of this
 28 Resolution be transmitted to the Chairperson of the Board of
 29 Land and Natural Resources and the Chairperson of the Commission
 30 on Water Resource Management.

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 32
 33

OFFERED BY: Meli Canall

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