The Native Hawaiian Legal Corporation STRONGLY OPPOSES SB2884, a glaring example of special interest legislation that would allow automatic approval of any and all water permit applications in the name of “affordable housing”.

In Hawai‘i, water has always been considered a public trust resource to be managed for the benefit of present and future generations. Traditionally, water was treated as a community resource that belonged to everyone; it was respected and shared in such a way to address Native Hawaiians’ social, ecological, and spiritual needs. This traditional view is enshrined in our constitution and water code, which mandate that this fundamental resource be managed and used to fulfill specific public trust purposes – the maintenance of waters in their natural state, domestic water use, the exercise of Native Hawaiian traditional and customary rights, and the Department of Hawaiian Home Land’s (“DHHL’s”) reservations and use of water. See Kauai Springs, Inc v. Planning Comm’n of the County of Kaua‘i. 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014).

The concept of automatic approval of water permit applications blatantly contradicts these critical public trust purposes and undermines the Commission on Water Resource Management’s (“CWRM’s” or “Commission’s”) kuleana to uphold its constitutional duty to protect this fundamental resource for the benefit of the public now and in the future. See In Re Water Use Permit Applications, 94 Hawai‘i 97, 141, 9 P.3d 409, 453 (2000) (“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”). For years, various communities have worked to ensure water permits receive more scrutiny by going through a process to designate aquifers as water management areas. SB2884 would undo that good work, effectively “undesignate” the state, and remove the few protections for public trust water uses outside of designated water management areas. Significantly, although the title and preface of SB2884 indicates that its purpose is to facilitate affordable housing, its language
contains absolutely no restrictions on the types of water uses that would receive automatic approval. As drafted, this bill would allow automatic water permit approval everywhere for all sources and all purposes.

What also stands out in this bill is its clear aim to fast track an automatic approval of the highly contested “Ota well” in North Kona, despite the Commission’s prudent deferral of the application to more carefully analyze impacts on the shoreline, coastal waters, and Native Hawaiian traditional and customary practices. The Ota well—proposed by the Natural Energy Laboratory of Hawai’i Authority (“NELHA”) and the Hawai’i Housing Finance and Development Corporation as an expansion of NELHA’s ocean and science park and an affordable housing project—is the first major well proposed in the Keauhou aquifer since CWRM (1) denied a petition to designate the aquifer a water management area in 2017 and (2) imposed conditions requiring review of all future wells in the aquifer to determine their impact on the coast and on traditional and customary practices. NHLC represents Hui Ola Ka Wai, a group of practitioners and kia’i loko i’a from along the Kona coast, who raised concerns regarding the Ota well’s effect on the ecosystems of Kaloko fishpond and the hui members’ cultural practices. In response, the Commission voted to defer action on the application and is currently consulting with cultural practitioners to better understand potential impacts.

It is also completely misleading to tout Ota well as a means to provide affordable housing to the West Hawai’i community, as it will not provide water for the housing the community actually needs and can afford. Based on the Ota well proposal, half of the water drawn would be used for a new industrial park at NELHA and commercial development at Keahuolū (Kamakana Villages). Despite the public assertion that the remaining 50% of the water is reserved for affordable housing at Kamakana Villages, an undisclosed amount of that reservation is in fact being set aside for people making 140% of adjusted gross income—essentially market rate housing—while less than 3% of the total water drawn would be allocated to DHHL to develop its truly affordable homestead lots. These are the types of water uses this kind of special interest legislation will rubberstamp.

Not only does SB2884 greenlight actions that violate the public trust but it also improperly circumvents the authority of the very agency tasked with protecting Hawai’i’s water resources and promotes development at all costs without actually addressing our community’s housing crisis. While housing and economic development is indeed important, this is not the pono way. For these reasons, we ask the Committees to HOLD SB2884.

Mahalo for the opportunity to testify.

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