

COUNCIL OF THE COUNTY OF MAUI
PARKS, RECREATION, ENERGY, AND
LEGAL AFFAIRS COMMITTEE

November 15, 2018

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Parks, Recreation, Energy, and Legal Affairs Committee, having met on October 30, 2018, makes reference to County Communication 17-6, from Council Chair Mike White, relating to litigation matters.

By correspondence dated October 4, 2018, the Department of the Corporation Counsel transmitted a proposed resolution entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON ANDREWS KURTH LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 15-17447, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT." The purpose of the proposed resolution is to authorize \$250,000 in additional compensation for special counsel Hunton Andrews Kurth LLP, formerly known as Hunton & Williams LLP, for the appeal in this case, for a total compensation not to exceed \$4,050,000.

By correspondence dated October 10, 2018, the Department of the Corporation Counsel transmitted a revised proposed resolution entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON ANDREWS KURTH LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 18-260, SUPREME COURT OF THE UNITED STATES." The purpose of the revised proposed resolution is to authorize \$500,000 in additional compensation for special counsel Hunton Andrews Kurth LLP, formerly known as Hunton & Williams LLP, for the appeal presently before the Supreme Court of the United States, for a total compensation not to exceed \$4,300,000.

COUNCIL OF THE COUNTY OF MAUI
PARKS, RECREATION, ENERGY, AND
LEGAL AFFAIRS COMMITTEE

Page 2

Committee
Report No. _____

Your Committee notes the First Amended Complaint in the case alleges violations of the Federal Water Pollution Control Act, also known as the "Clean Water Act," and other laws, arising out of the County's operation of injection wells at the Lahaina Wastewater Reclamation Facility, and seeks injunctive relief, penalties, and attorney's fees and costs. The case was designated Civil 12-00198 SOM-BMK before the United States District Court, District of Hawaii; and Docket 15-17447 before the United States Court of Appeals for the Ninth Circuit.

Your Committee also notes Section 3-6(6), Revised Charter of the County of Maui (1983), as amended, authorizes the Council to retain or employ, by a vote of two-thirds of its entire membership, special counsel for any special matter presenting a real necessity for such employment. Charter Section 3-6(6) also requires that the compensation, if any, to be paid for the services be specified. The Council previously approved the employment of special counsel by Resolution 12-127, and increased compensation limits by Resolutions 14-52, 14-99, 14-137, 15-35, 15-74, 15-101, 16-3, 16-69, 17-133, and 18-61.

The revised proposed resolution states that on February 1, 2018, a three-judge panel of the United States Court of Appeals for the Ninth Circuit entered judgment against the County in Docket 15-17447, upholding the Hawaii District Court's judgment. She said the County filed its Petition for Writ of Certiorari in the Supreme Court of the United States on August 27, 2018.

A Deputy Corporation Counsel provided an overview of the case. She said in 2012, groups represented by Earthjustice filed suit against the County, claiming the use of injection wells violated the Clean Water Act because the County did not have a National Pollutant Discharge Elimination System permit, and its excess recycled water, which is disposed of by way of deep underground wells, mixes with groundwater and flows seaward and eventually reaches the ocean.

COUNCIL OF THE COUNTY OF MAUI
PARKS, RECREATION, ENERGY, AND
LEGAL AFFAIRS COMMITTEE

Page 3

Committee
Report No. _____

She said the County's case is one of several cases brought in an attempt to extend the Federal Clean Water Act to groundwater that is hydrologically connected to a "water of the United States." The Act has historically applied only to surface water discharges into these types of water bodies.

She said there are conflicting decisions at the Federal appellate level. Therefore, the Department is hopeful the U.S. Supreme Court will consider the matter so that Federal law is applied consistently nationwide.

The Deputy further said the Ninth Circuit's decision has far-reaching impacts that may affect important green infrastructure projects and jeopardize the County's water reuse program.

Your Committee voted 6-0 to recommend adoption of the revised proposed resolution. Committee Chair Guzman and members Atay, Cochran, Crivello, Hokama, and Sugimura voted "aye." Committee Vice-Chair King and members Carroll and White were excused.

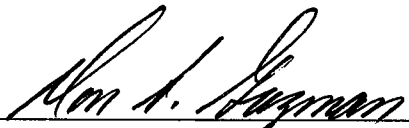
Your Parks, Recreation, Energy, and Legal Affairs Committee RECOMMENDS that Resolution _____, attached hereto, entitled "AUTHORIZING AN INCREASE IN FUNDING RELATED TO THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON ANDREWS KURTH LLP, IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI, DOCKET NO. 18-260, SUPREME COURT OF THE UNITED STATES," be ADOPTED.

COUNCIL OF THE COUNTY OF MAUI
**PARKS, RECREATION, ENERGY, AND
LEGAL AFFAIRS COMMITTEE**

Page 4

**Committee
Report No.** _____

This report is submitted in accordance with Rule 8 of the Rules of the Council.



DON S. GUZMAN, Chair

prl:cr:18001(20)ab:cmn

Resolution

No. _____

AUTHORIZING AN INCREASE IN FUNDING RELATED TO
THE EMPLOYMENT OF SPECIAL COUNSEL HUNTON ANDREWS KURTH LLP,
IN HAWAII WILDLIFE FUND, ET AL. V. COUNTY OF MAUI,
DOCKET NO. 18-260, SUPREME COURT OF THE UNITED STATES

WHEREAS, by Resolution No. 12-127, the Council authorized the employment of special counsel HUNTON ANDREWS KURTH LLP, formerly known as HUNTON & WILLIAMS LLP ("special counsel"), to represent the County of Maui in matters relating to Hawaii Wildlife Fund, et al. v. County of Maui; and

WHEREAS, by Resolution Nos. 14-52, 14-99, 14-137, 15-35, 15-74, 15-101, 16-3, 16-69, 17-133, and 18-61, the Council authorized increases in total compensation for trial preparation, motions, appeal and, if necessary, trial, for a total compensation of \$3,800,000; and

WHEREAS, on February 1, 2018, a three-judge panel of the United States Court of Appeals for the Ninth Circuit, entered judgment against the County in Docket No. 15-17447, upholding the Hawaii District Court's judgment in Civil No. 1:12-CV-00198 SOM-BMK; and

WHEREAS, on August 27, 2018, the County filed its Petition for Writ of Certiorari in the Supreme Court of the United States, Case No. 18-260; and

WHEREAS, the Corporation Counsel has requested authorization to raise the compensation limit for the employment of special counsel by an additional \$500,000 for appeal, for a total compensation not exceeding \$4,300,000; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That the Council hereby approves and authorizes an increase in compensation for the employment of special counsel by \$500,000, for a total compensation not exceeding \$4,300,000; and
2. That certified copies of this resolution be transmitted to the Mayor, the Corporation Counsel, and the Director of Finance.

APPROVED AS TO FORM
AND LEGALITY:



RICHELLE M. THOMSON
Deputy Corporation Counsel
County of Maui
LIT-4996