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NO. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

Iao Ground Water Management Area	)	Case No. CCH-MA06-01
High Level Source Water Use	)	
Permit Applications and	)	APPEAL FROM THE COMMISSION ON
Petition to Amend Interim Instream	)	WATER RESOURCE MANAGEMENT'S
Flow Standards of Waihee, Waiehu,	)	FINDINGS OF FACT, CONCLUSIONS
Iao, & Waikapu Streams	)	LAW, AND DECISION AND ORDER
Contested Case Hearing	)	DATED JUNE 10, 2010
_____)		

**APPELLEE COMMISSION ON WATER RESOURCE MANAGEMENT'S  
ANSWERING BRIEF**

**STATEMENT OF RELATED CASES**

**APPENDICES A AND B**

**CERTIFICATE OF SERVICE**

DAVID M. LOUIE 2162  
Attorney General of Hawaii

DONNA H. KALAMA 6051  
JULIE H. CHINA 6256  
Deputy Attorneys General  
Department of the Attorney  
General, State of Hawaii  
465 South King Street, Room 300  
Honolulu, Hawaii 96813  
Telephone: (808) 587-2989  
Fax: (808) 587-2999  
Attorneys for Appellee COMMISSION ON  
WATER RESOURCE MANAGEMENT

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## I. INTRODUCTION

This case is a Hawaii Revised Statutes ("HRS") § 91-14 appeal of the Commission on Water Resource Management's ("Commission") amendment of the Interim Instream Flow Standard<sup>1</sup> ("IIFS") for four Maui streams ("Decision"). This appeal should be dismissed for lack of appellate jurisdiction. No contested case was required by law to be held nor were the rights, duties or privileges of specific parties determined. The Decision appealed from does not meet the requirements for an HRS § 91-14 appeal. In the event this Court finds that there is appellate jurisdiction, the Decision should be affirmed as the amended IIFS complies with all of the criteria for the setting of an IIFS.

This appeal should be dismissed for lack of appellate jurisdiction because the Decision does not meet the requirements of HRS § 91-14 as an appealable decision. In order to be entitled to appellate review of a decision resulting from a contested case, the contested case must have been "required by law" and it must have determined the rights, duties, or privileges of specific parties. Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 79 Hawaii 425, 431, 903 P.2d 1246, 1252 (1995) ("PASH"). The Decision met neither of these requirements.

Although the Commission opted to determine the IIFS through a contested case proceeding, it was not required to do so. A contested case is required by law if it is mandated by statute, rule, or due process. Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994) ("Bush"). No statute or rule requires the Commission to hold a contested case prior to setting an IIFS. Indeed, under both statute and rule not even a public hearing is

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<sup>1</sup> An IIFS is "a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard." Hawaii Revised Statutes ("HRS") § 174C-3. An instream flow standard is the quantity or flow of water or depth of water that is required to be at a specific location in a stream at a specific time of the year. Id.

required.<sup>2</sup> See HRS § 174C-3 (definition of “interim instream flow standard”); Hawaii Administrative Rules (“HAR”) §§ 13-169-2 (same), 13-169-40(e). A contested case is also not required by due process because an IIFS does not affect any property interest of an existing or potential water user.<sup>3</sup> See Koolau Agricultural Company, Inc. v. Comm’n on Water Resource Management, 83 Haw. 484, 496, 927 P.2d 1367, 1379 (1996) (“Koolau Ag”).

Similarly, the Decision did not determine the rights, duties, or privileges of specific parties. In amending the IIFS, the Commission did not determine how much water Hui/MTF, OHA, the County, kuleana users, or any other person was entitled to take from the streams. Instead, the Decision was to set the IIFS at a particular location in each stream and at a specific rate. ICA 192 at D&O A.1-4.<sup>4</sup>

In this case, a contested case was not required by law nor did it determine the rights, duties, or privileges of specific parties and, therefore, Hui/MTF, OHA, and the County have no right to an appeal under HRS § 91-14. See Keahole Defense Coalition, Inc. v. Board of Land and Natural Resources, 110 Hawaii 419, 430, 134 P.3d 585, 596 (2006) (“Keahole”).

In the alternative, even if this Court has jurisdiction, the IIFS set by the Commission satisfies the criteria set forth by law. See HRS § 174C-71(2)(D) and HAR § 13-169-40. In

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<sup>2</sup> A “public hearing,” as opposed to a contested case hearing, is “a hearing required by law in which members of the public generally may comment upon a proposed rule or application.” HAR § 13-167-2.

<sup>3</sup> Under the Water Code, HRS chap. 174C, one of the duties of the Commission is to “[e]stablish instream flow standards on a stream-by-stream basis whenever necessary to protect the *public* interest in waters of the State.” [emphasis added] HRS. § 174C-71.

<sup>4</sup>Citations to the record on appeal will be abbreviated as follows: “ICA \_\_ at PDF [FOF, COL, D&O] \_\_.” The ICA reference is to the JEFS online document number at which a scanned copy of the actual filing is located. The PDF reference is to the specific PDF page number(s) of that ICA document. The FOF, COL, D&O reference is to the paragraph number within the Commission’s Findings of Fact, Conclusions of Law and Decision and Order filed on June 10, 2010. “FOF,” “COL,” and “D&O” refer to the Findings of Fact, Conclusions of Law and the Decision and Order, respectively.



weighing instream values with non-instream purposes, the Commission balanced all evidence including the public trust, traditional and customary native Hawaiian rights, kuleana water uses, and alternate water sources. Having been granted the authority and discretion to set the IIFS by the legislature, HRS § 174C-71(2), the Decision should be accorded deference and affirmed. See Paul’s Electrical Service, Inc. v. Befitel, 104 Hawaii 412, 419-20, 91 P.3d 494, 501-02 (2004) (“Paul’s Electrical”). Thus, Hui/MTF’s, OHA’s, and the County’s challenges, however heartfelt, must be denied, and the Decision of the Commission affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

#### **1. Na Wai Eha Streams**

The Na Wai Eha streams, or “the four great waters of Maui” consist of Waihee River, Waiehu Stream, Iao Stream, and Waikapu Stream.<sup>5</sup> ICA 58 at PDF 67; ICA 156 at PDF 23; ICA 192 at FOF 80. “Due to the profusion of fresh-flowing water in ancient times, Na Wai Eha

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<sup>5</sup> The following is a glossary of acronyms used in this answering brief:

**COL:** Conclusions of Law within the Commission’s Findings of Fact, Conclusions of Law, and Decision and Order

**Commission:** Commission on Water Resource Management

**County:** County of Maui, Department of Water Supply

**Decision:** Commission's Findings of Fact, Conclusions of Law, and Decision and Order

**D&O:** Decision and Order within the Commission’s Findings of Fact, Conclusions of Law, and Decision and Order

**FOF:** Findings of Fact within the Commission’s Findings of Fact, Conclusions of Law, and Decision and Order

**HC&S:** Hawaiian Commercial and Sugar Company

**Hui/MTF:** Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc.

**IIFS:** Interim Instream Flow Standard

**mgd:** million gallons per day

**OHA:** Office of Hawaiian Affairs

**USGS:** United States Geological Survey

**WMA:** water management area

**WUPA:** water use permit application

**WWC:** WWC Company, LLC

supported one of the largest populations and was considered the most abundant area on Maui; it also figured centrally in Hawaiian history and culture in general.” ICA 192 at FOF 34; ICA 58 at PDF 85. Out of the 376 perennial streams it identified in Hawaii, the Commission has designated only 44 streams, including Na Wai Eha streams, as “Candidate Streams for Protection.” ICA 192 at FOF 63; ICA 70 at PDF 148; ICA 120 at PDF 91. The Commission also designated Na Wai Eha streams as “Blue Ribbon Resources,” meaning that they featured the “few very best resources” in their respective resource areas. ICA 192 at FOF 63; ICA 70 at PDF 148.

The Waihee River is the principal source of water in the Na Wai Eha area, and the northern-most of the Na Wai Eha streams.<sup>6</sup> ICA 192 at FOF 81, Figure 1. Running about 26,585 feet, it drains the slopes of the West Maui Mountains. ICA 192 at FOF 81.

Waikapu Stream is the longest and southern-most of the four streams. RA 192: FOF 84. It is about 63,500 feet in length. ICA 192 at FOF 84, Figure 4.

Iao Stream is the second longest of the four streams, running a distance of about 38,000 feet. ICA 192 at FOF 83, Figure 3.

Waiehu Stream runs about 23,700 feet, and is formed by the confluence of the North and South Waiehu Streams. ICA 192 at FOF 82, Figure 2.

## **2. Offstream Diversions**

In a single word, the Na Wai Eha water distribution system is complex. The Na Wai Eha water distribution system, which includes the streams, diversion intakes, reservoirs, connectors,

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<sup>6</sup> Attached as Appendix B to this answering brief is a diagram of the Na Wai Eha streams. ICA 192 at Figure 5.

kuleana<sup>7</sup> systems and gauging stations, is depicted in Figure 5 of the Decision. ICA 192 at Figure 5. There are nine active diversion intakes on the streams, two on Waihee River, one on North Waiehu Stream, one on South Waiehu Stream, two on Iao Stream, and three on Waikapu Stream. ICA 192 at FOF 161; ICA 60 at PDF 6. There are two major ditches in the system, Waihee Ditch and Spreckels Ditch, and several minor ditches. ICA 192 at FOF 169, 170, 172, 177. The northern sector of ditches which includes Waihee Ditch and Spreckels Ditch, as well as North Waiehu Ditch and Iao-Maniania Ditch, receives water from Waihee River, North Waiehu Stream, and Iao Stream. ICA 192 at FOF 175. The southern sector of ditches which includes South Waikapu Ditch, Reservoir No. 6 Ditch, and Iao-Waikapu Ditch, receives water from Waikapu Stream and Iao Stream. ICA 192 at FOF 176.

### **3. Water Users**

#### **a. Kuleana and Traditional and Customary Uses**

“Cultural experts and community witnesses provided uncontroverted testimony regarding limitations on Native Hawaiians’ ability to exercise traditional and customary rights and practices in the greater Na Wai Eha area due to the lack of freshwater flowing in Na Wai Eha’s streams and into the nearshore marine waters.” ICA 192 at FOF 49. Despite these limitations, some native Hawaiian practitioners continue to exercise traditional and customary practices including gathering stream life for subsistence and medicinal purposes, cultivating taro, and gathering material for hula, lua (ancient Hawaiian martial arts), and art. ICA 192 at FOF 50-51.

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<sup>7</sup> Peck v. Bailey, 8 Haw. 658 (Hawaii King. 1867) first recognized appurtenant rights. “[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land.” Reppun v. Board of Water Supply, 65 Haw. 531, 551, 656 P.2d 57, 71 (1983). Appurtenant rights are sometimes referred to as “kuleana rights.” See also Hawaii Revised Statutes § 174(c)-101(d) (1993) (“The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.”).

Other witnesses testified that they would like to expand the scope of their traditional and customary practices, including cultivating kalo, and planned to do so if there was more water in the streams. ICA 192 at FOF 55.

Many kuleana (or appurtenant) water users testified that they wanted Na Wai Eha water to cultivate wetland kalo, vegetables, trees, and plants for subsistence and cultural purposes.<sup>8</sup> ICA 192 at FOF 55, 60-62, 294. Several testified that they use the stream water for domestic uses. ICA 192 at FOF 318.

**b. County of Maui, Department of Water Supply**

The County receives water from the Iao-Waikapu Ditch, which is treated at its Iao Water Treatment Facility for domestic use. ICA 192 at FOF 238.

**c. Wailuku Water Company, LLC**

Respondent-Appellee Wailuku Water Company, LLC's ("WWC") predecessors are C. Brewer & Co., Limited, Wailuku Sugar Company, and Wailuku Agribusiness Company, Inc. ("Wailuku Agribusiness"). ICA 78 at PDF 24. Wailuku Sugar Company was formed and started cultivating sugar cane in 1862 and ditches to deliver water to the crops were first used that same year. ICA 192 at FOF 165, 166. Wailuku Sugar Company constructed the Wailuku Ditch System consisting of Waihee Ditch, Spreckels Ditch, South Waikapu Ditch, North Waiehu Ditch, Iao-Maniania, Iao-Waikapu, Kama Ditch, and Everett Ditch, to transport water from the West Maui watershed to the drier Central Maui and Waikapu plains to irrigate sugar cane and other crops. ICA 78 at PDF 24-25; ICA 192 at FOF 167-169. Wailuku Agribusiness ceased sugar planting operations in 1988. ICA 78 at PDF 26-28; ICA 315 at PDF 28-29. Wailuku Agribusiness then began cultivating pineapple and macadamia nuts, and later started delivering

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<sup>8</sup> These self-identified kuleana water users may or may not have appurtenant rights. ICA 192 at FOF 160. That determination will be made during the surface water use permitting process.

water to customers using the Wailuku Ditch System. ICA 78 at PDF 26, 28; ICA 317 at PDF 39-40.

**d. Hawaiian Commercial and Sugar Company**

Approximately 5,300 acres of the 35,000 acres that Respondant-Appellee Hawaiian Commercial and Sugar Company (“HC&S”) uses for sugar cane cultivation are located in the West Maui Fields. ICA 192 at FOF 417. See also ICA 60 at PDF 5; ICA 58 at PDF 156-57. The West Maui Fields provide the most productive yields of all HC&S’s cultivated lands, making them critical to the company’s viability. ICA 192 at FOF 524. The West Maui Fields consist of two groups of fields, the Waihee-Hopoi Fields and the Iao-Waikapu Fields. ICA 192 at FOF 418. HC&S uses Na Wai Eha water to irrigate the Waihee-Hopoi fields and the Iao-Waikapu fields. ICA 192 at FOF 260; ICA 60 at PDF 9-11. In addition to its diversions on South Waiehu Stream and Iao Stream, HC&S receives water from WWC. ICA 192 at FOF 259.

**B. Procedural Background**

**1. Na Wai Eha Ground Water Management Area**

The procedural history of this case dates back to 2003. In June 2003, the Iao Aquifer System Area exceeded ninety percent (90%) of the 12 month moving average set by the Commission as a trigger for ground water management area designation. HRS §§ 174C-41 (1993, Supp. 2010), 174C-44 (Supp. 2010). On July 21, 2003, the Commission designated the Iao Aquifer System a ground water management area. ICA 192 at FOF 1-2. Ground water in the Iao Aquifer system includes basal, caprock and high-level dike sources. ICA 192 at FOF 2. The diked, high-level water enclosed in the mountains above Na Wai Eha streams is a source of Na Wai Eha streams’ headwaters. See ICA 192 at FOF 86, 89.

The ground water management area designation triggered the filing of ground water use permit applications. ICA 192 at FOF 4; HRS § 174C-50 (1993, Supp. 2010). In September 2004, the Commission appointed a subcommittee consisting of Commissioners Lawrence Miike and James Frazier to convene a public hearing to hear objections to the water use permit applications. ICA 192 at FOF 4. Public hearings were held in October 2004 and April 2005. ICA 192 at FOF 6, 7.

A September 2005 public hearing was limited to basal and caprock well water use permit applications. ICA 192 at FOF 8. Contested cases were requested for various basal source water use permit applications. ICA 192 at FOF 8. Objections were withdrawn and the only issue left was the competing applications by the County and Kehalani Mauka for the Shaft 33 battery of wells. ICA 192 at FOF 10. The Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order in the basal source contested case hearing on January 31, 2007. ICA 192 at FOF 14. This decision has not been appealed and stands.

Ground water use permits for the basal sources that were not a part of the contested case were approved on February 15, 2006. ICA 192 at FOF 15. Ground water use permits for the caprock sources were approved on October 25, 2005. ICA 192 at FOF 15.

A public hearing was held on the high-level dike source water use permit applications in February 2006. ICA 192 at FOF 16. Written contested case requests on the water use permit applications were submitted by: (1) the County; (2) WWC; (3) HC&S; (4) OHA; (5) HUI/MTF; and (6) Ka Aha O Na Wai Eha Ku Moku O Mauiloa. ICA 192 at FOF 16. Ka Aha O Na Wai Eha Ku Moku O Mauiloa subsequently withdrew its request for a contested case hearing. ICA 192 at FOF 18.

On June 25, 2004, Hui/MTF filed, pursuant to HRS § 174C-71 (1993), a petition to amend the IIFS for Na Wai Eha streams. ICA 192 at FOF 3; ICA 40 at PDF 1-135. At the time of Hui/MTF's petition, the IIFS for Na Wai Eha streams was set as the flows that were in the streams on December 10, 1988.

On October 19, 2004, Hui/MTF filed pursuant to HRS § 174C-13 (1993) a waste complaint against WWC, then known as Wailuku Agribusiness, and HC&S. ICA 192 at FOF 5; ICA 44 at PDF 1-81.

## **2. The Contested Case Hearing**

On February 15, 2006, the Commission initiated a combined contested case on the IIFS petition, the high level dike water use permit applications, and the waste complaint. ICA 192 at FOF 16, 18; ICA 52 at PDF 3-9, 13-17. Even though a contested case hearing was not required to amend the IIFS, the Commission opted to address the IIFS petition in a contested case proceeding. HRS § 174C-71(2); HAR §13-169-40(e) ("Interim instream flow standards may be adopted by the commission without the necessity of a public hearing."); ICA 192 at FOF 18; ICA 52 at PDF 3-9.

Commissioner Miike was appointed as the Hearings Officer for the contested case. ICA 192 at FOF 19; ICA 52 at PDF 18-19.

Standing was granted to Hui/MTF, the County, OHA, HC&S and WWC. ICA 192 at FOF 10; ICA 56 at PDF 145. The parties were ordered to mediate the waste complaint before holding the contested case hearing. ICA 192 at FOF 18. The parties did not reach an agreement during the mediation. ICA 192 at FOF 20. Before a contested case hearing was held, however, Hui/MTF withdrew their waste complaint, ICA 54 at PDF 276-79, and the waste complaint was dismissed by the Commission without prejudice. ICA 192 at FOF 23.

The contested case hearing on the IIFS and the high level dike source water use permit applications was held on the island of Maui over 23 days from December 3, 2007 through March 4, 2008. ICA 192 at FOF 25. The evidence was later reopened to allow certain additional evidence to be submitted. ICA 192 at FOF 27-30. By the end of the contested case hearing, 77 witnesses had testified and more than 600 exhibits had been received in evidence. ICA 192 at FOF 30.

Hui/MTF, WWC, HC&S, and the County submitted their proposed Findings of Fact, Conclusions of Law, and Decision and Order in December 2008. ICA 192 at FOF 25; ICA 158 at PDF 284-399 (HC&S); ICA 160 at PDF 169-444 (Hui/MTF); ICA 162 at PDF 3-34 (County); ICA 162 at PDF 36-191 (WWC). OHA filed a joinder to Hui/MTF's proposed findings. ICA 192 at FOF 25; ICA 158 at PDF 274-283.

The Hearings Officer issued his Proposed Findings of Fact, Conclusions of Law, and Decision and Order on April 9, 2009. ICA 188 at PDF 1-221; ICA 192 at FOF 32. The Hearings Officer proposed restoring 14 million gallons per day (“mgd”) to Waihee River, 2.2 mgd to North Waiehu Stream, 1.3 mgd to South Waiehu Stream, 13 mgd to Iao Stream, and 4 mgd to Waikapu Stream. ICA 188 at COL 248-273.

The parties filed written exceptions to the Hearings Officer’s proposed findings in May 2009. ICA 192 at FOF 33; ICA 188 at PDF 233-269 (OHA); ICA 188 at PDF 270-333 (HC&S); ICA 188 at PDF 334-367 (HUI/MTF); ICA 188 at PDF 370-408 (WWC); ICA 188 at PDF 410-422 (County). The Commission heard oral argument on the parties' written exceptions in October 2009. ICA 192 at FOF 33; ICA 336 at PDF 1-121.

The Commission’s deliberative process was long, and involved much debate, discussion and review of the record. ICA 192 at D&O A.6. At the end of the deliberative process, the



majority of Commissioners reached an agreement on the IIFS which they felt represented the best balance of the mandated values and trust responsibilities. ICA 192 at D&O A.6. On June 10, 2010, the Commission, in its 6-1 Decision, amended the IIFS to restore 12.5 mgd to Na Wai Eha streams by restoring 10.0 mgd to Waihee River, 1.6 mgd to North Waiehu Stream, and 0.9 mgd to South Waiehu Stream. ICA 192 at COL 261, D&O A.1, A.2.

The Commission awarded the County ground water use permits for 1.042 mgd from the Kepaniwai Well (Well No. 5332-05) and 1.359 mgd from the Iao Tunnel (Well No. 5332-02), subject to the Commission's standard ground water permit conditions. ICA 192 at D&O B.1. The Commission awarded HC&S a one year ground water use permit for 0.1 mgd from the Iao Tunnel (Well No. 5330-02) in order to verify the actual quantity of water consumed. ICA 192 at D&O B.2. The Commission denied WWC's water use permit applications for Iao Needle Tunnel 1 (Well No. 5333-01), Iao Needle Tunnel 2 (Well No. 5333-02), and Black Gorge Tunnel (Well No. 5332-01). ICA 192 at D&O B.3.<sup>9</sup>

### **3. Na Wai Eha Surface Water Management Area**

If there are serious disputes respecting the use of surface water resources, the Commission can designate a surface water management area. See HRS § 174C-45. On March 13, 2008, the Commission designated the four streams of Na Wai Eha as a surface water management area effective April 30, 2008. ICA 192 at FOF 26. Surface water use permit applications for existing uses were due one year later. ICA 192 at FOF 26; HRS § 174C-50(c).

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<sup>9</sup> The Commission's decision on the high level dike WUPAs has not been appealed or briefed by Hui/MTF, OHA, or the County. HRAP Rule 28(b)(7) requires that "The argument, contain[ ] the contentions of the [appellee] on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. ... Points not argued may be deemed waived." HC&S and WWC also did not appeal the Commission's decision on the high level dike WUPA's. Therefore, the only matter on appeal is the amended IIFS.

Applications for new surface water uses may be filed at any time. See generally, HRS § 174C-48(a). The Na Wai Eha surface water use permit applications and kuleana water uses will be accommodated to the extent Na Wai Eha stream water is available pursuant to the amended IIFS. ICA 192 at COL 175.<sup>10</sup>

#### **4. The Appeal**

OHA and Hui/MTF filed appeals to the Intermediate Court of Appeals. ICA 202 at PDF 3; PDF 5. The County filed a cross-appeal. ICA 202 at PDF 6. HC&S and WWC have not appealed the Commission’s Decision.

Hui/MTF (ICA 434 at PDF 1-58), OHA (ICA 398 at PDF 1-50), and the County (ICA 395 at PDF 1-16) filed Opening Briefs on February 23, 2011.<sup>11</sup>

On April 18, 2011, Hui/MTF filed an application for transfer to the Supreme Court, which was joined by OHA. On June 23, 2011, the Supreme Court approved the application for transfer pursuant to HRS § 602-58(a)(1) (Supp. 2010).

### **III. STANDARD OF REVIEW**

#### **A. Jurisdiction**

“The existence of subject matter jurisdiction is a question of law that is reviewable *de novo* under the right/wrong standard.” Kaniakapupu v. Land Use Comm’n, 111 Hawaii 124, 131, 139 P.3d 712, 719 (2006) (citation omitted). “If a court lacks jurisdiction over the subject

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<sup>10</sup> The surface water permitting process is moving forward and information as to the current status can be found at the Commission’s web site:  
<http://hawaii.gov/dlnr/cwrn/nawaiehaswma.htm>.

<sup>11</sup> By order filed on April 11, 2011, the Commission was granted leave to file a unified answering brief no longer than 50 pages in length. ICA 467 at PDF 1-2. By order filed on April 28, 2011, the due date for all answering briefs was extended to July 9, 2011, which is a Saturday, making the due date July 11, 2011. ICA 475 at PDF 1; Hawaii Rules of Appellate Procedure (“HRAP”) 26(a).

matter of a proceeding, any judgment rendered in that proceeding is invalid. Therefore, such a question is valid at any stage of the case....” Kainiakapupu, 111 Hawaii at 132, 139 P.3d at 720 (citation omitted).

**B. Review of the Commission’s Decision**<sup>12</sup>

HRS § 91-14(g) (1993) states that:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

“This court’s review is ... qualified by the principle that the agency’s decision carries a presumption of validity[,] and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.” In re Waiola O Molokai, Inc., 103 Hawaii 401, 420, 83 P.3d 664, 683 (2004) (citing Konno v. County of Hawaii, 85 Hawaii 61, 77, 937 P.2d 397, 413 (1997)).

Administrative findings of fact are reviewed under the clearly erroneous standard, which requires the appellate court to sustain the agency’s findings “unless the court is left with a firm and definite conviction that a mistake has been made.” Bumanglag v. Oahu Sugar Co. Ltd., 78 Hawaii 275, 279, 892 P.2d 468, 472 (1995) (citation omitted). Administrative conclusions of

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<sup>12</sup> The standard of review under HRS chapter 91 applies only if this Court determines it has jurisdiction to determine this appeal pursuant to HRS chapter 91.

law, however, are reviewed under the *de novo* standard inasmuch as they are “not binding on the appellate court.” Id. (citation omitted). “Where both mixed questions of fact and law are presented, deference will be given to the agency’s expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency.” Dole Hawaii Div.- Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (“Dole”).

The court reviews the Commission’s decisions “pursuant to the deferential abuse of discretion standard.” Paul’s Electrical, 104 Hawaii at 419-20, 91 P.3d at 501-02 (holding that “[i]f the legislature has granted the agency discretion over a particular matter, then we review the agency’s action pursuant to the deferential abuse of discretion standard [] bearing in mind that the legislature determines the boundaries of that discretion”). Water, however, is a public trust resource and the public trust is a state constitutional doctrine, and therefore, “[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawaii rests with the courts of this state.” In re Water Use Permit Applications ... for the Waiahole Ditch Combined Contested Case Hearing, 94 Hawaii 97, 143, 9 P.3d 409, 455 (2000) (“Waiahole I”) (citation omitted).

#### **IV. ARGUMENT**

##### **A. There is No Appellate Jurisdiction**

The Court cannot reach the arguments raised by Hui/MTF, OHA, and the County on this appeal because there is no right of appeal from the Commission’s Decision amending the IIFS for Na Wai Eha. **No one requested a contested case hearing on the petition to amend the IIFS and one was not required by law.** See ICA 52 at PDF 3-9. As a threshold matter, every court must decide whether it has jurisdiction to decide the issues presented. PASH, 79 Haw. at

431, 903 P.2d at 1252. (citation omitted). “Moreover, subject matter jurisdiction may not be waived and can be challenged at any time.” *Id.* (citation omitted).

Hui/MTF and OHA rely on HRS § 91-14 as the basis for appellate jurisdiction. HRS § 91-14(a) provides that “[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter;” HRS § 91-14(a).<sup>13</sup>

Pursuant to PASH, 79 Hawaii at 431, 903 P.2d at 1252, four requirements must be met in order to appeal under HRS § 91-14 (1993): “first, the proceeding that resulted in **the unfavorable agency action must have been a ‘contested case’ hearing-i.e., a hearing that was 1) ‘required by law’ and 2) determined the ‘rights, duties, and privileges of specific parties’**”; second, the agency’s action must represent ‘a final decision and order’ or ‘a preliminary ruling’ such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved ‘in’ the contested case; and finally, the claimant’s legal interests must have been injured

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<sup>13</sup> Appellants also rely on HRS § 174C-60 titled, “Contested cases” as a basis for jurisdiction. ICA 358 at PDF 6; ICA 350 at PDF 2; ICA 354 at PDF 3. HRS § 174C-60 does not grant a right of appeal for IIFS determinations. As this Court has previously noted in Koolau Ag, “HRS § 174C-60 is another example of the inartful drafting found throughout the Code. Although it refers to ‘any contested case hearing in this section,’ section 174C-60, itself, does not provide for contested case hearings. Given the placement of the section, the reference to contested case hearings ‘under this section’ is probably a reference to hearings concerning the issuance, modification, or revocation of permits referred to in the sections immediately preceding HRS § 174C-60.” Koolau Ag, 83 Haw. at 492, 927 P.2d at 1372. See also, HAR § 13-167-65 (1988). Although HAR § 13-167-65 appears to grant a right of appeal from any “proceeding,” it is clear from its placement in the “contested case” subchapter of HAR Chapter 13-167 and from its authorizing statute, HRS § 174C-60, which is in the “regulation of water use” portion of HRS Chapter 174C, and not the instream portion, that HAR § 13-167-65 does not extend a right of appeal beyond the appellate jurisdiction granted by HRS § 91-14, and certainly does not grant a right of appeal for IIFS determinations.

– i.e., the claimant must have standing to appeal.” (Emphases added). Absent a right to a contested case hearing, a claimant lacks standing to appeal pursuant to HRS § 91-14. See Keahole, 110 Hawaii at 430, 134 P.3d at 596.

The analysis of whether Hui/MTF, OHA, and the County were entitled to a contested case hearing is a two-step process. First, the Court must determine if there is a right to a contested case, as defined in HRS § 91-1 (1993). Next, the Court must determine if a particular petitioner has standing to participate in the contested case hearing. There was no requirement for the Commission to hold a contested case hearing in order to amend the IIFS for the four Na Wai Eha streams. Accordingly, this Court does not need to reach the question of whether Hui/MTF, OHA, and the County had standing to participate in a contested case.

HRS § 91-1 defines a contested case as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.” An agency hearing refers only to such hearing “held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14.” HRS § 91-1. Hawaii’s courts have interpreted these definitions to mean that “[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties.” E&J Lounge Operating Co., Inc. v. Liquor Comm’n of the City and County of Honolulu, 118 Hawaii 320, 330, 189 P.3d 432, 444 (2008) (“E&J”) (quoting PASH, 79 Hawaii at 431, 903 P.2d at 1252).

**1. There Was No Requirement To Hold A Contested Case Hearing**

A hearing is required by law if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if a hearing is mandated by due process. Bush, 76 Haw. at 134, 870 P.2d at 1278. See also, HAR § 13-167-51

(1988) (“**When required by law**, the commission shall hold a contested case hearing upon its own motion or on the written petition of any government agency or any interested person who is properly admitted as a party pursuant to section 13-167-54.” (emphasis added)). A hearing was not required to be held, either by applicable statutes or rules or by due process, prior to the Commission amending the IIFS.

**a. There Was No Statutory Or Rule Based Requirement to Hold A Contested Case Hearing**

HRS § 174C-71 requires the Commission to establish and administer a statewide instream use protection program. As part of this instream use protection program, the Commission is required to establish instream flow standards when necessary for the protection of the public interest in the waters of the state. HRS § 174C-71(1). The Commission may also establish an IIFS pursuant to a petition of a party with proper standing in order to protect the public interest pending the establishment of a permanent instream flow standard. HRS § 174C-71(2). Nothing in HRS § 174C-71(2) requires the Commission to hold a contested case before establishing or amending an IIFS.

HAR ch. 13-169 is the administrative rules chapter regulating the protection of instream uses of water. HAR § 13-169-2 defines interim instream flow standard as “a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.” HAR § 13-169-40(e) likewise states that “interim instream flow standards may be adopted by the commission without the necessity of a public hearing.” When interpreting the HAR,

“[t]he general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule’s language. If an administrative rule’s language is unambiguous, and its literal application is neither inconsistent with the

policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule’s plain meaning.”

Waiola, 103 Hawaii at 425, 83 P.3d at 688 (quoting International Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986)). An agency’s interpretation of its own rules is entitled to deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose. Id.

The action which is the subject of this appeal is the amendment of the IIFS for the four Na Wai Eha streams. Under the applicable statutory and rule sections, no contested case was required to be held by the Commission prior to its making a decision to amend the IIFS. Indeed, no public hearing was required either.<sup>14</sup> “If the statute or rule governing the activity in question does not mandate a hearing prior to the administrative agency’s decision-making, the actions of the administrative agency are not ‘required by law’.” Lingle v. Hawaii Gov’t Employees Ass’n, AFSCME, Local 152, 107 Hawaii 178, 184, 111 P.3d 587, 593 (2005) (quoting Bush, 76 Haw. at 134, 870 P.2d at 1278). A contested case hearing was not required by statute or rule.

**b. There Was No Due Process Requirement To Hold A Contested Case Hearing**

“[I]n order to assert a right to procedural due process, [a plaintiff] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Accord Brown v. Thompson, 91 Hawaii 1, 10, 979 P.2d 586, 595, cert. denied, 528 U.S. 1010 (1999).

At the outset,

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<sup>14</sup> A “public hearing” is defined in HAR § 13-167-2 as “a hearing required by law in which members of the public generally may comment upon a proposed rule or application.”



A claim of a due process right to a hearing requires a two[-]step analysis: (1) is the particular interest which the claimant seeks to protect by a hearing “property” within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is “property” what specific procedures are required to protect it.

Brown, 91 Hawaii at 10, 979 P.2d at 595 (citations omitted).

Property rights are protected by the Constitution. They are not, however, “created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (“Board of Regents”). “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” In re Robert’s Tours & Transp., Inc., 104 Hawaii 98, 106, 85 P.3d 623, 631 (2004) (quoting Board of Regents).

Hui/MTF and OHA cite a footnote in Waiahole I, 94 Hawaii at 119-20 n.15, 9 P.3d at 431-32 n.15, as their basis for jurisdiction. ICA 358 at PDF 6; ICA 354 at PDF 7. Waiahole I is distinguishable from this case. After briefly stating that individual instream and offstream rights, duties, and privileges were at stake, the Waiahole I court concluded it had jurisdiction over the appeal pursuant to Pele Defense Fund v. Puna Geothermal Venture, 77 Hawaii 64, 68, 881 P.2d 1210, 1214 (1994). Pele Defense Fund involved Department of Health permits to construct geothermal wells and a power plant. The Court determined that when the issuance of a permit implicates property rights of other interested people, then there was a right to a contested case hearing. The Commission agrees that if the issuance of a permit affects a person’s property rights and the person has standing, then there is right to a contested case hearing. However, in

this case, no permits are being appealed and as discussed in the next section, amending the IIFS did not determine the rights, duties, or privileges of specific parties.

In Waiahole I, the Court was asked to review the Commission's decision that addressed both ground water use permits and an IIFS, whereas in this case, the only issue on appeal is the amended IIFS. While permits for existing uses may require a hearing under HRS § 174C-50(b), an IIFS does not. HAR § 13-169-40(e). The ground water use permits should not be used to piggyback jurisdiction when they are not before this Court.

To the contrary, when examining the due process interest in a similar proceeding, the designation of a water management area ("WMA"), the Hawaii Supreme Court stated:

Designation of a WMA, unlike water use permitting neither affects any property interest of existing or potential water users nor requires the determination of any individualized facts. Designation requires a determination, "after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water[.]" HRS § 174C-41(a). Ko'olau Ag simply has no property interest in the Commission's determination as to whether there is an overall threat to the water resources in Kahana.

Koolau Ag, 83 Haw. at 496, 927 P.2d at 1379. Amendment of an IIFS has similar considerations.

The purpose of establishing (or amending) an IIFS is to "protect the public interest pending the establishment of permanent instream flow standards." HRS § 174C-71(2)(A). Instream flow values are intended to describe the flows necessary "to protect the public interest in a particular stream." HRS § 174C-71(1)(C) (1993). In considering a petition for amendment of an IIFS, the Commission is required to "weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses." HRS § 174C-71(2)(D).

Flows are to be expressed in terms of “flows necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic or other beneficial instream uses in the stream and any other relevant and reasonable information required by the commission.” HRS § 174C-71(1)(C).

The Commission’s decision was based on its determination of the “public interest” in the stream flows and the flows necessary to protect a variety of instream uses. Hui/MTF, OHA, and the County do not have a property interest, rising to the level of an entitlement, in the determination of IIFS. See Waiahole I, 94 Hawaii at 148, 9 P.3d at 461 (instream flow standards perform the “function of guiding water planning and regulation by prescribing responsible limits to the development and use of public water resources.”) (citation omitted). A contested case hearing was not required by due process.

Inasmuch as the proceeding afforded by the Commission was not required by law (statute, rule, or due process), it was not a “contested case” within the meaning of HRS § 91-1, and Hui/MTF, OHA, and the County have no right to an appeal from the Decision of the Commission. Accordingly, this Court lacks jurisdiction to consider the appeal.

**2. Amending The IIFS Did Not Determine The Rights, Duties, Or Privileges Of Specific Parties**

The second prong of the inquiry as to whether a contested case hearing is required is whether the decision would determine the rights, duties, or privileges of specific parties. E&J, 118 Haw. at 330, 189 P.3d at 442. The decision by the Commission to amend the IIFS for the Na Wai Eha streams did not determine the rights, duties, or privileges of specific parties.

The determination of the rights, duties or privileges of a party has been found to be at issue in various cases in which a decision was made on an application for a license or entitlement. E&J, 118 Haw. 320, 189 P.3d 432 (appeal of a decision to deny a liquor license); PASH, 79 Haw. 425, 903 P.2d 1246 (consideration of an application for a special management

area permit); Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982) (appeal of decisions made by the Kauai Planning Commission, including the approval of a special management area permit). In those cases the courts found that such a license or entitlement would determine the rights, liabilities, or privileges of specific parties because either the license would “confer legal rights and privileges upon the licensee[.]” E&J, 118 Haw. at 331, 189 P.3d at 443, or “the applicant of the development permit sought to have the legal rights, duties, or privileges...relative to the development of land in which it [the applicant] held an interest declared over the objections of other landowners and residents of the area of proposed development.” E&J, 118 Haw. at 330-31, 189 P.3d at 442-43. These are not the sort of determinations that were made by the Commission in its Decision.

Although the IIFS petition was filed by Hui/MTF, the purpose of the IIFS petition, as provided in the statute, was “to protect the public interest pending the establishment of a permanent instream flow standard.” HRS § 174C-71(2)(A). In amending the IIFS, the Commission did not determine how much water Hui/MTF, OHA, the County, kuleana users, or any other person was entitled to take from the streams. Instead, the Commission’s decision was to set the IIFS at a particular location in each stream and at a specific rate. The Commission decided that the IIFS for Waihee River would be set at 10 mgd just downstream of the Spreckels Ditch diversion, the IIFS for North Waiehu Stream would be set at 1.6 mgd at a point immediately below the North Waiehu Ditch diversion, and the IIFS for South Waiehu Stream would be set at 0.9 mgd at a point immediately below the Spreckels Ditch diversion, and that the IIFS for Iao Stream and Waikapu Stream would remain as designated on December 10, 1988. ICA 192 at D&O A.1-4. The decision did not determine the legal rights or privileges for any specific party, nor did any party have their rights to the water declared over the rights or

objections of other parties.<sup>15</sup> There were no individualized findings in the Commission’s Decision regarding rights of particular parties to take water.<sup>16</sup> Because the IIFS decision of the Commission did not require the determination of the rights, duties, or privileges of specific parties, it does not meet the second prong of the test and a contested case hearing was not required to be held. Accordingly, the appeal should be dismissed for lack of jurisdiction.

**B. Even If This Court Has Jurisdiction, The Arguments Of Hui/MTF, OHA, And The County Are Misplaced Because The IIFS Complies With The Law**

Hui/MTF incorrectly claim that the Commission violated the public trust when it failed to restore any water to Iao Stream and Waikapu Stream, ICA 434 at PDF 28-32, disregarded all instream uses and values other than amphidromous<sup>17</sup> species (ICA 434 at PDF 32-35), and used the United States Geological Survey’s (“USGS”) proposed control flow figures for the amended IIFS, ICA 434 at PDF 36-39. Hui/MTF also incorrectly claim that the Commission violated the public trust by maximizing offstream diversions when it penalized the public trust for HC&S’s and WWC’s lack of proof, ICA 434 at PDF 43-45, failed to mitigate the impact of variable offstream demand, ICA 434 at PDF 45-46, and inflated HC&S’s acreages, ICA 434 at PDF 54-56. OHA incorrectly claims that the Commission violated the public trust when it failed to restore any additional water to Iao Stream and Waikapu Stream. ICA 398 at PDF 34-38.

Hui/MTF and OHA are mistaken because the Commission properly amended the IIFS after

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<sup>15</sup> There was no legal requirement that the ground water use permit applications for high level dike sources be addressed with the IIFS, and the Commission’s decision on the water use permit applications has not been appealed. The permits should not affect whether Hui/MTF, OHA, and the County had a right to a contested case hearing regarding the IIFS determination.

<sup>16</sup> The IIFS does not award a specific quantity of water to any individual water user, but instead, provides that flows shall be expressed in terms of variable flows of water. See HRS § 174C-71(1)(C).

<sup>17</sup>“Amphidromous” describes fishes that undergo regular, obligatory migration between freshwater and the sea at some stage of their life cycle. ICA 192 at FOF 65.

weighing the “importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restoring such uses.” HRS § 174C-71(2)(D); HAR § 13-169-40(c).<sup>18</sup>

**1. Legal Framework: Water Law and Amending the IIFS**

Ownership of all land and resources in the State was originally held by the sovereign and it was the sovereign who determined which interests could be conveyed to private parties. Jon J. Chinen, *The Great Mahele: Hawaii's Land Division of 1848*, 5-6 (Univ. of Haw. Press) (1958). In the case of Waiahole I, 94 Hawaii at 128-29, 9 P.3d at 440-41, the Hawaii Supreme Court recognized that, “in granting land ownership interests in the Mahele, the Hawaiian Kingdom expressly reserved its sovereign prerogatives ‘[t]o encourage and even to enforce the usufruct of the lands for the common good.’” Id. (citing with approval McBryde Sugar Co. v. Robinson, 54

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<sup>18</sup> OHA’s first point of error challenges the Commission’s final IIFS setting, not any findings of fact or conclusions of law. ICA 398 at PDF 24. OHA’s second point of error only challenges conclusion of law number 230. HRAP 28(b)(4) requires: “A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency.” “Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.” Id. OHA’s points of error should be disregarded to the extent they fail to comply with HRAP 28.

Hui/MTF’s points of error numbers 1, 2, 4a, 4c, and 4d only challenge the Commission’s conclusions of law. ICA 434 at PDF 21-22. The County’s only point of error seeks clarification of the language in several of the Commission’s conclusions of law. ICA 395 at PDF 7. “If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid.” Wisdom v. Pfleuger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983). “Findings of fact ... that are not challenged on appeal are binding on the appellate court.” Okada Trucking Co., Ltd. v. Bd. of Water Supply, 97 Hawaii 450, 458, 40 P.3d 73, 81 (2002). To the extent that the Commission’s findings of fact have not been challenged by OHA, Hui/MTF, and the County in their points of error, they are binding on this Court. And to the extent that the Commission’s conclusions of law follow from these unchallenged facts and are correct statements of the law, the Decision of the Commission must be affirmed.

Haw. 174, 184-186, 504 P.2d 1330, 1337-1339 (1973)). These limitations on ownership and the concomitant duty of the sovereign with regard to the natural resources of the State are recognized and set forth in Article XI, section 1 of the Hawaii Constitution which states as follows:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

Hawaii Const. Art. XI, § 1. Article XI, section 7 of the Hawaii Constitution further states as to water resources:

The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

Hawaii Const. Art. XI, § 7. Article XI, section 1 and Article XI, section 7 have adopted the public trust doctrine as a fundamental principle of constitutional law in Hawaii. Waiahole I, 94 Hawaii at 132, 9 P.3d at 444. The State Water Code expressly adopts the mandate of the Hawaii Constitution and establishes the Commission as trustee. HRS §§ 174C-2(a) (1993) and 174C-5 (Supp. 2010). There are four public trust purposes: (1) water resource protection which includes "maintenance of waters in their natural state," Waiahole I, 94 Hawaii at 136, 9 P.3d at 448; (2) domestic use protection, particularly drinking water, Waiahole I, 94 Hawaii at 137, 9 P.3d at 449; (3) "the exercise of Native Hawaiian and traditional and customary rights," Waiahole I, 94 Hawaii at 137, 9 P.3d at 449; and (4) the Department of Hawaiian Homeland's reservation of water, In re Waiola O Molokai, Inc., 103 Hawaii 401, 431, 83 P.3d 664, 694 (2004). **There are no absolute priorities under the water resources trust**, i.e. maintenance of waters in their natural state is not a categorical imperative, and in all cases, **the Commission "must weigh**

**competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.”** Waiahole I, 94 Hawaii at 142, 9 P.3d at 454

(citations omitted) (emphases added).

“Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard.” HRS § 174C-71(2)(A) (1993). “A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream use of water and any other relevant and reasonable information required by the commission.” HRS § 174C-71(2)(C). See also HAR § 13-169-40(b). HRS § 174C-71(2)(D) (1993) and HAR § 13-169-40(c) state:

**“In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses.”** (Emphases added.)

“Instream use” means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of fish and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;
- (7) The maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

HRS § 174C-3; HAR § 13-169-2.



“‘Instream flow standard’ means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” HRS § 174C-3 (1993, Supp. 2010). See also HAR § 13-169-2 (1988). “‘Interim Instream flow standard’ means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.” HRS § 174C-3; HAR § 13-169-2. “‘Noninstream use’ means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes.” HRS § 174C-3; HAR § 13-169-2.

The protection of instream uses is guided by the following general principles set forth in HAR § 13-169-20 (1988):

- (1) The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams should be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition.
- (2) A systematic program of baseline research is recognized as a vital part of the effort to describe and evaluate stream systems, to identify instream uses, and to provide for the protection and enhancement of such stream systems and uses.
- (3) Recognition shall be given to the natural interrelationship between surface and ground waters.
- (4) In determining flow requirements to protect uses or in assessing stream channel alterations, consideration should be given to the maintenance of existing non-instream uses of economic importance and the preservation of stream waters for potential non-instream uses of public benefit.
- (5) In order to avoid or minimize the impact on existing uses when preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of

project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solutions.

- (6) Expressions of the public interest should be sought in the implementation of this chapter.

“In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically **proven facts**, but also on **future predictions, generalized assumptions, and policy judgments.**”

Waiahole I, 94 Hawaii at 155, 9 P.3d at 467 (emphases added).

## 2. Na Wai Eha Stream Flows

One way to summarize stream-flow data is through the use of duration curves which show the percentage of time that specific stream flows were equaled or exceeded during a given period of record. ICA 192 at FOF 96. Thus, a Q50 flow, or median flow, is the flow that is equaled or exceeded 50 percent of the time and is “reflective of typical flow conditions.” ICA 192 at FOF 97; ICA 62 at PDF 123. The USGS has concluded that Q70 is an appropriate estimate of mean base flow for Hawaii streams. ICA 192 at FOF 102; ICA 62 at PDF 124. The Q90 flow is commonly used to characterize low flows in a stream. ICA 192 at FOF 104; ICA 62 at PDF 124. The Q100 flow is the lowest flow recorded in the stream. ICA 192 at FOF 104.

The Commission made the following findings regarding Na Wai Eha streams:

**Waihee River:** In the climate years 1984-2005<sup>19</sup>, the USGS stream-gauging station located near an altitude of about 605 feet upstream of all diversions recorded the following flows: Q100 was 14 mgd, Q90 was 24 mgd, Q70 was 29 mgd, and Q50 was 34 mgd. ICA 192 at 107; ICA 62 at PDF 137. The two main diversions on the Waihee River are Waihee Ditch which is about 0.6 miles downstream near an altitude of 600 feet, and Spreckels Ditch near an altitude

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<sup>19</sup> A climate year begins on April 1 and is designated by the calendar year in which it begins.

of about 400 feet. ICA 192 at FOF 108. The USGS estimated stream flow losses downstream of Spreckels Ditch diversion at 4 mgd. ICA 192 at FOF 109. “Estimated dry weather flow immediately downstream of the Waihee and Spreckels Ditch intakes commonly is on the order of about 0.1 mgd, but the stream may not have continuous surface flow from mauka to makai.” ICA 192 at FOF 111.

**Waikapu Stream:** Flow characteristics for Waikapu Stream during 1984-2005 climate years were estimated using record extension techniques and available historical data from Waikapu Stream near an altitude of about 880 feet. ICA 192 at FOF 133. Q100 was recorded as 3.3 mgd in October 1912. ICA 192 at FOF 133. From 1984-2005 the estimated Q90 flow was from 3.3 mgd to 4.6 mgd, the estimated Q70 was from 3.9 to 5.2 mgd, and the estimated Q50 was from 4.8 mgd to 6.3 mgd. ICA 192 at FOF 133. Waikapu Stream has minimal to no reproductive potential because it may not have flowed continuously mauka to makai prior to diversions because of extensive infiltration losses into the streambed. ICA 192 at FOF 137, COL 245. Even if it did flow mauka to makai, Kealia Pond and the delta below most likely inhibited recruitment. ICA 192 at FOF 137, COL 245.

**Iao Stream:** In climate years 1984-2005, the USGS stream-gauging station located near an altitude of about 780 feet upstream of all diversions recorded the following flows: Q100 was 7.1 mgd, Q90 was 13 mgd, Q70 was 18 mgd, and Q50 was 25 mgd. ICA 62 at PDF 142; ICA 192 at FOF 126. The two main diversions on Iao Stream are Iao-Waikapu Ditch and Iao-Maniania Ditch which are near an altitude of 780 feet, and the Spreckels Ditch which is about 2.4 miles downstream near an altitude of about 260 feet. ICA 192 at FOF 127. The USGS estimated that Iao Stream loses 6.3 mgd in reaches not lined with concrete downstream of the Iao-Maniania Ditch diversion. ICA 192 at FOF 129.

A significant portion of the lower reaches of Iao Stream was channelized and the stream bed and banks hardened with concrete by the United States Army Corps of Engineers for flood control and drainage. ICA 192 at FOF 83; ICA 62 at PDF 180; ICA 156 at PDF 26. “The Iao Flood Control Project starts about 2.5 miles above the mouth of Iao Stream and consists of a debris basin, a concrete channel that runs from the debris basin to just downstream of North Market Street, a 20-foot vertical drop, a broadened but unlined channel running to Waiehu Beach Road, and concrete wing walls running about one-half of the distance from Waiehu Beach Road to the mouth of the Stream.” ICA 192 at FOF 128. See also ICA 156 at PDF 26. In 2008, a \$30 million project was advertised to line the remaining Iao Flood Control Project channel. ICA 192 at FOF 128. “In the absence of ditch return flows and runoff during and following periods of rainfall, Iao Stream remains dry in some reaches downstream of the main diversion intake for the Iao-Maniania and Iao-Waikapu Ditches and does not flow continuously from mauka to makai.” ICA 192 at FOF 131.

**North and South Waiehu Streams:** Flow characteristics for North Waiehu Stream during 1984-2005 climate years were estimated using record extension techniques and available historical data during 1911-1917 from discontinued USGS gauging stations. ICA 192 at FOF 113. Q100 was measured at an altitude of 880 feet during March 1915 at 1.6 mgd. ICA 192 at FOF 113. For 1984-2005, the estimated Q90 flow was from 1.4 to 2.7 mgd, the estimated Q70 was from 2.3 to 2.7 mgd, and the estimated Q50 was from 3.1 to 3.6 mgd. ICA 62 at PDF 139; ICA 192 at FOF 113. Water is diverted by North Waiehu Ditch near an altitude of 860 feet. ICA 192 at FOF 114. The USGS estimated stream flow losses of 1.3 mgd between North Waiehu Ditch and the confluence of North and South Waiehu Streams. ICA 192 at FOF 115.

Flow characteristics for South Waiehu Stream during 1984-2005 climate years were estimated using record-extension techniques and available historical data during 1911-1917 from a discontinued USGS gauging station at an altitude of 870 feet. ICA 192 at FOF 119. Q100 was measured during July 1913 at 1.5 mgd. For 1984-2005, the estimated Q90 flow was from 1.3 to 2.0 mgd, the estimated Q70 was from 1.9 to 2.8 mgd, and the estimated Q50 was from 2.4 to 4.2 mgd. ICA 192 at FOF 119. No information is available on the estimated stream flow losses in South Waiehu Stream. ICA 192 at FOF 121. The USGS estimated that 0.6 mgd is lost between the confluence of North and South Waiehu Streams and the stream mouth. ICA 192 at FOF 121. “Waiehu Stream is commonly dry farther downstream near Lower Waiehu Beach Road, and therefore, Waiehu Stream does not flow continuously from mauka to makai.” ICA 192 at FOF 123.

Of the Na Wai Eha streams, Waihee River provided significant habitat for all life stages of native amphidromous species. ICA 192 at FOF 590. Waiehu Stream also showed signs of ecological connectivity.<sup>20</sup> ICA 192 at FOF 590. By comparison, the experts could not agree whether increased flows in Iao stream could mitigate the impediment to recruitment posed by channelization. ICA 192 at FOF 590-595. Finally, there was no definitive evidence that Waikapu Stream ever carried uninterrupted surface waters to the sea. ICA 192 at FOF 590.

### **3. Offstream Diversions**

The Commission made the following findings regarding offstream diversions from Na Wai Eha streams. The Waihee Ditch diversion on Waihee River is at approximately 620 feet elevation. ICA 192 at FOF 179. The Waihee Ditch intake has a design capacity of 60 mgd but is

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<sup>20</sup> Ecological connectivity exists if there is sufficient stream flow to allow a normal distribution of species in a watershed. ICA 192 at FOF 78.

set to divert 40 mgd. ICA 192 at FOF 180. WWC estimated that it diverted an average of 37.09 mgd in 2005 and 29.72 mgd in 2006. ICA 192 at FOF 210.

The Spreckels Ditch starts at its intake on Waihee Stream at 420 feet elevation. ICA 192 at FOF 184. The Spreckels Ditch intake, controlled by WWC, has a design capacity of 30 mgd, but is typically set at 12 mgd. ICA 192 at FOF 185.

The Spreckels Ditch also has intakes at South Waiehu Stream and Iao Stream which are controlled by HC&S. ICA 192 at FOF 186. The intake is not metered but HC&S estimated the intake to range from 2-3 mgd during dry periods to 10-15 mgd during wet periods. ICA 192 at FOF 187.

The North Waiehu Ditch on North Waiehu Stream has a capacity of 5 mgd, but is currently set at 1.5 mgd. ICA 192 at FOF 193. WWC estimated that it diverted an average of 1.41 mgd in 2005 and 1.38 mgd in 2006. ICA 192 at FOF 211.

The Iao Ditch on Iao Stream, has a capacity of 60 mgd, but is set to divert, at most, 20 mgd. ICA 192 at FOF 195. Control gates can be set to divert north to the Iao-Maniania Ditch or south to the Iao-Waikapu Ditch. ICA 192 at FOF 196. Of the 20 mgd diverted, the Iao-Maniania Ditch currently receives 2 mgd and the Iao-Waikapu Ditch receives 18 mgd. ICA 192 at FOF 197, 198. WWC estimated that it diverted an average of 13.69 mgd in 2005 and 13.53 mgd in 2006. ICA 192 at FOF 212. The HC&S intake on Iao Stream is not metered, but HC&S estimated the intake to range from 3-4 mgd during dry periods and 20 mgd during wet periods. ICA 192 at FOF 188.

The Waikapu Ditch off the top intake on Waikapu Stream has a capacity of 5 mgd but is currently set at 3 mgd. ICA 192 at FOF 199. WWC estimated that it diverted an average of 4.32 mgd in 2005 and 4.31 mgd in 2006. ICA 192 at FOF 213.

The Reservoir No. 6 Ditch takes water from the lowest Waikapu Stream intake. ICA 192 at FOF 200.

#### **4. Water Users**

The Commission concluded that, in all, there was 28.42 mgd in reasonable current and future water uses, minus alternate water sources. ICA 192 at COL 232, Table 13. The following is a breakdown of the Commission's analysis.

**Kuleana and traditional and customary water users:** Evidence was presented that almost all kuleana water users take their water from offstream ditches and pipes, and not directly from the streams. ICA 192 at FOF 159, Figures 1-5, Tables 1-6; ICA 146 at PDF 120. There are seventeen (possibly eighteen) ditch/pipe systems that deliver water to kuleana water users. ICA 192 at FOF 220, Table 1; ICA 146 at PDF 120. Kuleana water users are not charged for water. ICA 192 at FOF 160.

Only three kuleana water users who testified at the contested case hearing said that they take their water directly off a stream. One takes water from South Waiehu Stream, another from Iao Stream, and a third from Waikapu Stream. ICA 192 at FOF 163. The amount of their diversions is not measured. ICA 192 at FOF 226.

Water users testified that the amount of water currently delivered is insufficient and nearly all wished to increase their land under cultivation. ICA 192 at FOF 296, 335. The Commission determined that the number of future kuleana water users is unknown. ICA 192 at FOF 331. Not including the three diverters who take their water from the streams, the total amount of water diverted for kuleana use was determined by the Commission to be 6.84 mgd. ICA 192 at FOF 227, Table 7. The 6.84 mgd is delivered to kuleana land, a percentage of which is consumed by kalo loi, domestic and other uses, and the rest is returned downstream. ICA 192

at COL 220-221. The Commission concluded that the net consumptive reasonable use for kuleana lands is 1.71 mgd. ICA 192 at COL 60, 221.

**The County:** By agreement with WWC, the County receives up to 3.2 mgd from the Iao-Waikapu Ditch for a fixed transportation fee of \$0.48 per thousand gallons. ICA 78 at PDF 31; ICA 192 at FOF 239, COL 62, 133. The Commission found that the County's reasonable use of surface water is 3.2 mgd. ICA 192 at COL 224.

**WWC:** WWC has water delivery agreements with 34 entities totaling 8.228 mgd, in addition to its agreements with the County and HC&S. ICA 78 at PDF 29; ICA 192 at FOF 257, COL 63. The total amount of deliveries under the agreements was 1.42 mgd in 2005 and 2.37 mgd in 2006. ICA 192 at FOF 258, COL 63. Finding that 1.17 mgd had alternate sources, the Commission concluded WWC's reasonable use of surface water was 1.2 mgd. ICA 192 at COL 226.

**HC&S:** The 3,650 acre Waihee-Hopoi fields are irrigated by a gravity based system with Na Wai Eha water that is transported from the Waihee Ditch and the Spreckels Ditch to the Waiale Reservoir. ICA 192 at FOF 262, 268-285, 429. The average amount of water delivered to the Waiale Reservoir between 1993 and July 2007 was approximately 39 mgd. ICA 192 at FOF 283. The Commission concluded that the water requirement for HC&S's 3650 acres is 21.75 mgd. ICA 192 at COL 92, 227; ICA 88 at PDF 94-96.

Well No. 7 (U.S.G.S. No. 16) is also used to irrigate the Waihee-Hopoi fields, with the exception of Field 715 which cannot be reached by gravity flow. ICA 192 at FOF 262. The Commission concluded that Well No. 7 could provide alternate water for irrigation in the amount of 9.5 mgd. ICA 192 at COL 230.



The 1,120 acre Iao-Waikapu fields (excluding Field 920's 250 acres plus 40 additional acres) are irrigated with water principally from Iao Stream via the Iao-Waikapu Ditch and Waikapu Stream via the South Waikapu Ditch and Waihee Ditch. ICA 192 at FOF 266, 430. WWC reported providing 9.98 mgd in 2005 and 10.88 mgd in 2006 for irrigation of the Iao-Waikapu fields. ICA 192 at FOF 286. This amount was disputed by HC&S. ICA 192 at FOF 288. HC&S pays WWC a flat fee delivery charge per acre for water used on the Iao-Waikapu fields, which in 2005 was \$300 per acre per year. ICA 192 at FOF 519; ICA 317 at PDF 41. The Commission concluded that the water requirement for HC&S's 1,120 acres is 6.06 mgd. ICA 192 at COL 93, 227.

The Commission concluded that HC&S's total reasonable uses are 29.81 mgd, which consists of 6.06 mgd for Iao-Waikapu fields, 21.75 mgd for Waihee-Hopoi fields, and 2 mgd of system losses. ICA 192 at COL 231. Subtracting 9.5 mgd provided by Well No. 7 leaves a net reasonable use of 20.31 mgd. ICA 192 at COL 231.<sup>21</sup>

**5. The Commission Properly Weighed Instream Values with Non-Instream Purposes When Amending the IIFS**

In amending the IIFS, the Commission considered the present or potential instream values, ICA 192 at COL 44-49, the present or potential uses for non-instream purposes, ICA 192 at COL 53-93, alternate water sources, ICA 192 at COL 94-110, system losses, ICA 192 at COL 111-123, and the economic impact of restricting non-instream uses, ICA 192 at COL 124-154. The Commission analyzed the restorative potential for all four streams. ICA 192 at COL 207-217. The Commission looked at reasonable offstream uses. ICA 192 at COL 218-237. "In this

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<sup>21</sup> Maui Coastal Land Trust also testified in favor of restoring 1.5 to 2.5 mgd to Waihee River in order to restore its Kapoho wetlands. ICA 192 at FOF 340, 345, COL 61. The Commission concluded that there is an alternate water source available in the form of ground water beneath the wetlands. ICA 192 at COL 223.

CCH [contested case hearing], the purpose of estimating what are reasonable amounts of current offstream uses is to determine what might be the economic impact of restricting such uses, and is not determinative of the 'reasonable-beneficial' requirement for WUPAs [water use permit applications] under the surface water management area designation of Na Wai Eha. ... Thus, here, the Commission makes a general, collective assessment of the reasonableness of offstream uses and not the WUPA-specific assessment with the burden of providing information on the parties seeking water use permits.” ICA 192 at COL 218. The Commission assessed the economic impacts on users of diverted waters. ICA 192 at COL 238-240. The Commission balanced instream values and non-instream purposes. ICA 192 at COL 247-262. The Commission felt that adopting the first phase of the three USGS controlled releases proposed by the USGS offered the best approach for amending the IIFS.<sup>22</sup> ICA 192 at COL 246, 250, 254, 261; ICA 62 at PDF 136-37; ICA 303 at PDF 45-47. The amended IIFS for Waihee River is as follows:

- 1) above all diversions at gauging station 16614000 near an altitude of about 605 feet, the flow will remain as designated on December 10, 1988, currently estimated by USGS, based on data from 1984-2005, as Q90 of 24 mgd, Q70 of 29 mgd, and Q50 of 34 mgd;
- 2) just downstream of the Spreckels Ditch diversion, the flow will be 10 mgd, unless the flow at about 605 feet is less, at which time the flow will be the corresponding amount;

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<sup>22</sup> In 2006, the USGS initiated a study of Na Wai Eha streams. ICA 192 at FOF 599; ICA 62 at PDF 128. To that end, the USGS proposed a series of controlled releases in three stages into Waihee River, Waiehu Stream, and Iao Stream. ICA 192 at FOF 608. For Waihee Stream, USGS proposed flows downstream of Spreckels Ditch diversion of 10 mgd, 17 mgd, and 30 mgd. ICA 192 at FOF 611. For North Waiehu Stream, USGS proposed flows of 1.6 mgd, 2.2 mgd, and 2.9 mgd upstream of all diversions. ICA 192 at FOF 613. For South Waiehu Stream, USGS proposed flows of 0.9 mgd, 1.3 mgd and 1.6 mgd upstream of most diversions. ICA 192 at FOF 613. For Iao Stream, USGS proposed flows of 9.5 mgd, 16 mgd, and 22 mgd just downstream of Iao-Maniania Ditch. ICA 192 at FOF 615. Proposed controlled releases for Waikapu Stream were deferred. ICA 192 at FOF 617.

- 3) at the mouth of the River, the flow will be the corresponding amount, estimated at 6.0 mgd when reduced by losses into the streambed that are estimated as averaging 4 mgd, with estimates ranging from 2.1 to 5.9 mgd.

ICA 192 at D&OA.1.

The amended IIFS for North Waiehu Stream is as follows:

- 1) above all diversions near an altitude of 880 feet, the flow will remain as designated on December 10, 1988, currently estimated by USGS, based on record extension techniques of 1911 to 1917 data projected to 1984-2005, as Q90 of 1.4 mgd to 2.7 mgd, Q70 of 2.3 mgd to 2.7 mgd, and Q50 of 3.1 mgd to 3.6 mgd; and
- 2) 1.6 mgd immediately below the North Waiehu Ditch diversion, unless the flow at altitude 880 feet is less, at which time the flow will be the corresponding amount.

ICA 192 at D&O A.2.

The amended IIFS for South Waiehu Stream is as follows:

- 1) above all diversions near an altitude of 870 feet, the flow will remain as designated on December 10, 1988, currently estimated by USGS, based on record extension techniques of 1910 to 1917 data projected to 1984-2008, as Q90 of 1.3 mgd to 2.0 mgd, Q70 of 1.9 mgd to 2.8 mgd, and Q50 of 2.4 mgd to 4.2 mgd; and
- 2) 0.9 immediately below the Spreckels Ditch diversion, unless the flow at altitude 870 is less, at which time the flow will be the corresponding amount.

ICA 192 at D&O A.2.

The amended IIFS for the mouth of Waiehu Stream is as follows:

the corresponding amount, estimated at 0.6 mgd when reduced by estimated losses of 1.3 mgd between the North Waiehu Ditch and the confluence of North and South Waiehu Stream and 0.6 mgd between the confluence of North and South Waiehu Stream and the mouth.

ICA 192 at D&O A.2.

The Commission did not amend the existing IIFS for Iao Stream and Waikapu Stream.

RA 192: 259-261. The IIFS for Iao Stream remains as follows:

above all diversions near an altitude of 780 feet, the flow will remain as designated on December 10, 1988, currently estimated by USGS, on the basis of 22 years of complete records (climate years 1984-2005), as a Q90 flow of 13 mgd; a Q70 flow of 18 mgd; and a Q50 flow of 25 mgd.

ICA 192 at D&O A.3.

The IIFS for Waikapu Stream remains as follows:

above all diversions near an altitude of 880 feet, the flow will remain as designated on December 10, 1988, currently estimated by USGS, based on record extension technique of 1911 to 1917 data projected to 1984-2005, as Q90 of 3.3 mgd to 4.6 mgd, Q70 of 3.9 mgd to 5.2 mgd, and Q50 of 4.8 mgd to 6.3 mgd.

ICA 192 at D&O A.4.

The Commission concluded that Waikapu Stream most likely did not have continuous flow except under flood conditions in the pre-diversion period, and even if it did, Kealia Pond and delta would further inhibit recruitment. ICA 192 at COL 259. The Commission further concluded that Iao Stream's reproductive and full restorative potential was very limited or prohibited entirely due to the extensive channelization of the 2.5 miles of streambed above the mouth and a 20-foot vertical drop. ICA 192 at COL 259. Thus, the Commission did not amend the IIFS for Iao Stream and Waikapu Stream. ICA 192 at D&O A.3, A.4. The expectation was that with the amended IIFS, there will be more water at certain reaches and at the mouth of Waihee River and North and South Waiehu Streams. ICA 192 at COL 258. The Commission absolutely complied with its public trust duty and the law in amending the IIFS, and under the deferential abuse of discretion standard, its Decision should be affirmed. Paul's Electrical, 104 Hawaii at 419-20, 91 P.23d at 501-02.

This is not to say that the door is shut to a future IIFS amendment. The Na Wai Eha IIFS is a planning tool that may need to be amended. See Waiahole, 94 Hawaii at 151, 9 P.3d at 463. “This authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust.” Waiahole, 94 Hawaii at 141, 9 P.3d at 453. The IIFS was set having weighed the best evidence presently available to the Commission. If there are substantial changes to that information, the Commission will reassess the IIFS for Na Wai Eha streams. ICA 192 at D&O A.5.

OHA and Hui/MTF take issue that the IIFS set for Waihee River and North and South Waihee Streams were the USGS recommended controlled releases. ICA 398 at PDF 30; ICA 434 at PDF 38; ICA 192 at COL 261. OHA and Hui/MTF also claim that the Commission erred in failing to return any water to Iao Stream and Waikapu Stream. ICA 398 at PDF 34-38; ICA 434 at PDF 28-32. Yet neither Appellant has been able to make a recommendation based on anything more than an “informed guess.” At the close of the evidentiary portion of the contested case hearing, Hui/MTF, joined by OHA, recommended amending the IIFS as follows:

Waihee River: a) 25.5 mgd immediately downstream of the Waihee Ditch Diversion; b) 27.5 mgd immediately downstream of the Spreckels Ditch diversion; and c) at the mouth: the flow remaining in the stream after diversion of (1) up to 2.0 mgd to satisfy kuleana and T&C users downstream of the Spreckels Ditch diversion who take water directly from Waihee Stream and (2) up to 2.5 mgd for the uses of Maui Coastal Land Trust

North Waiehu Stream: 2.5 mgd immediately below the North Waiehu diversion

South Waiehu Stream: 2.5 mgd immediately below the South Waiehu diversion

Waiehu Stream mouth: the flow remaining after diversion of 0.07 mgd for the use of kuleana and T&C users

Iao Stream: a) 18.8 mgd immediately downstream of the Iao intake; and b) at the mouth: the flow remaining after the diversion of up to 2.0 mgd to satisfy kuleana and T&C users who take water directly from the stream

Waikapu Stream: a) 4.1 mgd immediately below the Reservoir 6 intake; b) at the mouth: the flow remaining after the diversion of up to 0.35 mgd for the uses of kuleana and T&C users who take water directly from the stream; and c) if Waikapu Stream flow has not reached Kealia Pond within 120 days from the effective date of the IIFS, then there shall be no IIFS at the mouth, and the IIFS immediately upstream of the Reservoir 6 intake shall be the amount remaining after the diversion of up to 0.35 mgd for the uses of kuleana and T&C users who take water directly from the stream.

ICA 192 at COL 170; ICA 160 at PFD 169-444; ICA 158 at PDF 274. These proposed amended IIFS are based on Hui/MTF and OHA's expert witness who recommended that the IIFS be established at 75 percent of the "annual median flow." ICA 192 at COL 186. And the basis for their expert's recommendation was **"an informed guess" and that it could be less.** ICA 192 at COL 188.

The Commission concluded that if the IIFS was set as proposed by Hui/MTF, and joined by OHA, "all offstream uses, including kuleana and traditional and customary uses, would have no access to water 15 to 35 percent of the time. In addition, for those periods of time in which flows above the IIFS are less than the amount of offstream uses (to be determined in the water use permit application process under the designation of the four streams as a surface water management area) there will be insufficient water for those offstream users." ICA 192 at COL 194, 204. The Commission conducted a proper balancing of interests, and it had the expertise and experience to do so. Deference should be given to the Commission's analysis of Hui/MTF and OHA's proposed IIFS. See Dole, 71 Haw. at 424, 794 P.2d at 1118.

While Hui/MTF and OHA argue for more water to be returned to the streams, their post-Decision stipulations to stay implementation of the IIFS while more studies are done is further

evidence that their arguments are without merit. If the Commission had adopted Hui/MTF's proposed amended IIFS, 2.5 mgd would have been restored to South Waiehu Stream. ICA 192 at COL 185. The Hearings Officer's proposed amended IIFS would have restored 1.3 mgd. ICA 188 at D&O A.2. Ultimately, the Commission amended the IIFS so that 0.9 mgd would be restored to South Waiehu Stream. ICA 192 at D&O A.2. The release of water to Waihee River, North Waiehu Stream, and South Waiehu Stream to implement the amended IIFS began on August 9 and 10, 2010. ICA 206 at PDF 33. As water was being restored to South Waiehu Stream, less water was available for diversion into the ditches and pipes used by the majority of kuleana water users. Thus, some parties raised concerns that implementation of the amended IIFS for South Waiehu Stream would result in harm to offstream kuleana water users. ICA 206 at PDF 33. At the request of Hui/MTF and OHA who purported to represent kuleana water users in the contested case hearing, the parties entered into a Stipulation and Order to suspend full implementation of the South Waiehu Stream amended IIFS for sixty (60) days, during which time there would be partial releases and monitoring to determine effects on certain users. ICA 206 at PDF 33. Following the first suspension period, Hui/MTF and OHA requested and the parties entered into a Second Stipulation and Order suspending implementation for another sixty (60) days. ICA 206 at PDF 55. Following the second suspension period, the parties entered into a Third Stipulation and Order on December 30, 2010. ICA 378 at PDF 1-11. There, the parties stipulated and the Commission ordered that:

1. Full implementation of the 6/10/10 D&O with respect to South Waiehu Stream shall be suspended for a period of one year (the "Data Collection Period") from the date hereof to enable the collection of stream flow data by Commission staff by means of measurements taken or recorded in the diversion ditch.

2. During the Data Collection Period, Commission staff shall collect and periodically disseminate to the Parties the flow measurements taken or recorded in the diversion ditch.

3. During the Data Collection Period, and subject to the procurement of any required permit approvals and suitable access from adjacent property owners, HC&S will proceed with the repair of the concrete apron of the diversion structure on South Waiehu Stream.

4. During the Data Collection Period, Petitioners and HC&S will continue to explore ways to improve the stream and kuleana diversion infrastructure and share with one another and with Commission staff such information as they may have and obtain regarding the South Waiehu Stream diversion and the needs of the kuleana users of South Waiehu Stream water, and will endeavor to agree on recommendations to the Commission for satisfying or modifying the 6/10/10 D&O prior to the expiration of the Data Collection Period.

Id. The stipulations to suspend implementation of the amended IIFS contradict Hui/MTF's arguments regarding the **urgent** need to restore additional water to the streams. See ICA 434 at PDF 17-18. Hui/MTF and OHA may have pursued stream restoration to the detriment of traditional and customary and kuleana water users who get their water not from the stream, but from a ditch or pipe diversion. The Decision by the Commission should be affirmed.

**C. Traditional and Customary Practices, Kuleana Uses, and the Public Trust Doctrine are Incorporated Into the Water Code, and Were Properly Considered by the Commission**

OHA incorrectly claims that the Commission failed to establish an IIFS that protects traditional and customary native Hawaiian rights and kuleana rights. ICA 398 at PDF 26-38. Specifically, OHA claims the Commission failed to make findings of fact and conclusions of law regarding traditional and customary native Hawaiian rights (ICA 398 at PDF 27-28), failed to consider traditional and customary rights and kuleana uses in the balancing of instream values and offstream uses (ICA 398 at PDF 29-34), and abridged native Hawaiian rights and violated



the public trust by failing to restore additional flow to Iao Stream and Waikapu stream (ICA 398 at PDF 34-38). Hui/MTF also incorrectly claim that the Commission failed to protect native Hawaiian rights to the extent feasible (ICA 434 at PDF 32-34) (Hui/MTF). Such matters are already encompassed within the Commission’s duty to consider the criteria listed in HRS § 174C-71(2)(D) and HAR § 13-169-40. And the Commission did so.

The public trust doctrine has been adopted in Hawaii as a “fundamental principle of constitutional law.” Waiahole I, 94 Hawaii at 132, 9 P.3d at 444. The doctrine is derived from Article XI, section 1 of the Hawaii Constitution, which provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

Hawaii Const. Art. XI, § 1. The public trust doctrine must be viewed in the context of the relevant statute. See Waiahole I, 94 Hawaii at 130-33, 9 P.3d at 442-45. In Waiahole I, the Court found that the public trust principles, and the agency’s public trust obligations, were already incorporated in the State Water Code. See Waiahole I, 94 Hawaii at 130, 9 P.3d at 442. **Thus, the criteria set forth in HRS § 174C-71 and HAR § 13-169-40 for the amendment of an IIFS embody the public trust doctrine, and a thorough and diligent assessment of those criteria necessarily addresses the public trust doctrine.** See Morimoto v. Board of Land and Natural Resources, 107 Hawaii 296, 308, 113 P.3d 172, 184 (2005) (where the Board of Land and Natural Resources (“BLNR”) correctly concluded that project would not cause substantial adverse impact on natural resources of project area, claim that BLNR’s decision violated Article

XI, section 1 of the public trust doctrine “present[s] no new arguments” and “does not implicate any error on the part of BLNR”).

The Hawaii Constitution also mandates that the State recognize and protect customary and traditional native Hawaiian rights. Article XII, section 7 provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Hawaii Const. Art. XII, § 7. Pursuant to the Hawaii Constitution and relevant statutes, the State is obligated to protect customary and traditional rights to the extent feasible. PASH, 79 Hawaii at 437, 903 P.2d at 1258. HRS § 174C-2(c) requires consideration of the customary and traditional rights and practices of native Hawaiians.<sup>23</sup> HRS § 174C-101(c) protects traditional and customary rights.<sup>24</sup> **Therefore, as with Article XI, section 1 and the public trust doctrine, consideration of the constitutional protections articulated in Article XII, section 7 is already subsumed within the Commission’s IIFS analysis under HRS § 174-71 and HAR § 13-169-40(c).**

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<sup>23</sup> “The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.” HRS § 174C-2(c).

<sup>24</sup> “Traditional and customary rights of ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one’s own kuleana and the gathering of hihiwai, opae, o`opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.” HRS § 174C-101(c).

The Commission's decision to amend the IIFS considered the evidence and testimony of traditional and customary native Hawaiian practitioners and kuleana water users. Specifically, traditional and customary practices were considered by the Commission. ICA 192 at FOF 34-62, 234, 556, COL 49, 170, 185-195, 205-217. Kuleana water uses were considered by the Commission. ICA 192 at FOF 55, 60-62, 158-160, 163, 173, 214-237, 293-300, 318-339, COL 53-61, 94, 111-119, 124-125, 134, 167, 170, 185-195, 218-222, 240, Figures 1-5, Tables 1-7. Kuleana water uses and traditional and customary practices can overlap and be one-and-the-same, for example kalo cultivation uses both kuleana water and is a traditional and customary practice. ICA 192 at FOF 55-56, 60-62. However, in this proceeding, the protection of traditional and customary native Hawaiian practices was recognized as an instream value, ICA 192 at COL 49, while the protection of appurtenant and kuleana water use was recognized as an offstream purpose because the majority of kuleana water users take their water from a ditch or pipe, ICA 192 at COL 49-51, 124. When amending the IIFS, the Commission made thorough balancing of both traditional and customary native Hawaiian practices and kuleana uses as required by law. The Decision by the Commission should be affirmed.

**D. Hui/MTF and OHA Incorrectly Place the Burden of Proof on HC&S And WWC**

Hui/MTF and OHA repeatedly misstate the burden of proof. ICA 434 at PDF 42, 48, 51-52; ICA 398 at PDF 29. HC&S and WCC did not have the burden of proof in this proceeding to amend the IIFS. The burden that Hui/MTF and OHA erroneously place on HC&S's and WWC's shoulders applies to water use permit applicants. Waiahole, 94 Hawaii at 160, 9 P.3d at 472 (“Under the public trust and the Code, **permit applicants** have the burden of justifying their proposed uses in light of protected public rights in the resource.”); HRS § 174C-49 (1993).

As the petitioners to amend the IIFS, it was Hui/MTF that carried an initial burden. The petition to amend the IIFS must, “set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission.” HRS § 174C-71(2)(C). Thereafter, if HC&S and WWC, as water users, carried any burden, then so did all kuleana water users, including Hui/MTF’s and OHA’s purported clients in the contested case hearing. But this was not the case.

The Supreme Court has said that the IIFS statute does not assign any burden of proof. Waiahole, 94 Hawaii at 153, 9 P.3d at 465. “We do not believe that the ultimate burden of justifying interim standards falls on the petitioner.” Waiahole, 94 Hawaii at 153, 9 P.3d at 465. Indeed, the Commission was so troubled by some parties’ focus on one user almost to the exclusion of broader water issues, that it felt the need to comment on it in the Decision. ICA 192 at D&O A.6. Unfortunately, this misstatement of the law continues on appeal.

Ultimately, the Commission had an affirmative duty under the public trust when amending the IIFS. Waiahole, 94 Hawaii at 153, 9 P.3d at 465. The Commission satisfied its obligation and its Decision should be affirmed in its entirety.

**E. The Commission Was Not Required To Determine Appurtenant Rights and Properly Did Not Do So When Amending The IIFS**

OHA argues that appurtenant rights should have been determined by the Commission during the course of the IIFS amendment. ICA 398 at 32-33. This argument lacks merit because the Commission was not required to determine appurtenant rights at this time. “[A]ppurtenant water rights are rights to use water utilized by parcels of land at the time of their original conversion into fee simple land.” Reppun v. Board of Water Supply, 65 Haw. 531, 551, 656 P.2d 57, 71 (1983). Although the Commission considered the testimony and exhibits submitted

by kuleana water users in weighing the present or potential instream values with the present or potential noninstream purposes, a determination of appurtenant rights was not required. HRS § 174C-71(2)(D); see discussion of kuleana uses supra.

Nor could the amended IIFS diminish or extinguish appurtenant rights. The State Water Code preserves appurtenant rights. HRS § 174C-63 (1993). “Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time.” HRS § 174C-63. The State Water Code also provides that, “The appurtenant water rights of kuleana and taro lands, along with those traditional rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.”<sup>25</sup> HRS § 174C-101(d).

If OHA sought a determination as to specific appurtenant rights, it needed to file an application for determination of appurtenant water rights. See HRS § 174C-63 . At the close of the evidentiary portion of the contested case hearing, there were no applications to the Commission from kuleana landowners for a determination of appurtenant rights. ICA 192 at COL 53. The Commission was not required to determine appurtenant rights and the Decision should be affirmed.

**F. The Consideration of Practicable Alternatives Is Not An IIFS Issue**

Hui/MTF and OHA claim that Well No. 7 was a practicable alternative that was not properly considered by the Commission. ICA 398 at PDF 38-49; ICA 434 at PDF 44-52. Hui/MTF also claim that the Commission did not consider the practicability of recycled water. ICA 343 at PDF 22.

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<sup>25</sup> But an attempt to reserve appurtenant rights when transferring land may have the effect of extinguishing the appurtenant right. Reppun, 65 Haw. at 552, 656 P.2d at 552.

While practicable alternatives may be considered in **other proceedings**, neither the statutes nor the administrative rules require an analysis of practicable alternatives **in setting the IIFS**. Nor is there any discussion of practicable alternatives in the IIFS section of Waiahole I, 94 Hawaii at 146-60, 9 P.3d at 458-72. Waiahole I distinguished between the statutory provisions for instream protection (e.g. IIFS) and water use regulation (e.g. water use permits) as follows: “Petitions for interim instream flow standard amendments are not among the water use permit applications ‘competing’ under HRS § 174C-54. The statute relating to instream use protection, HRS chapter 174C, part VI, or HRS § 174C-71, operates independently of the procedures for water use regulation outlined in HRS chapter 174C, part IV (1993 & Supp. 1999).” Waiahole I, 94 Hawaii at 148, 9 P.3d at 460.

Consideration of practicable alternatives will be part of the Commission’s review of surface water use permit applications. Permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. Waiahole I, 94 Hawaii at 160, 9 P.3d at 472. HRS § 174C-49(a) enumerates the conditions for a water use permit under the State Water Code. The applicant must prove that the proposed water use is a “reasonable-beneficial use,” HRS § 174C-49(a)(2), and is “consistent with the public interest,” HRS § 174C-49(a)(4). In the Matter of Water Use Permit Applications ... for the Waiahole Ditch Combined Contested Case Hearing, 105 Hawaii 1, 15, 93 P.3d 643, 657 (2004) (Waiahole II). “Reasonable-beneficial use” is defined as “the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and public interest.” HRS § 174C-3. Furthermore, permit applicants must “demonstrate the absence of practicable mitigating measures, including the use of alternative water sources” as part of the “reasonable-beneficial” and “consistent with the public

interest” permit requirements. Waiahole I, 94 Hawaii at 161, 9 P.3d at 473. Thus, the Commission did not err when it did not consider Well No. 7 as a “practicable alternative.”

Well No. 7 and recycled water, however, had a place in the setting of the IIFS when they were considered in the weighing of instream values with offstream purposes. See HRS § 174C-71(2)(D); HAR § 13-169-40(c). The Commission considered Well No. 7 and concluded that it could provide 9.5 mgd of irrigation water for HC&S. ICA 192 at 494-500, COL 103-106, 230. The Commission considered recycled water but dismissed it as an alternate source. ICA 192 at FOF 386, 501-506, COL 102, 106-110. Thus, these considerations played a part in the balance reached by the Commission. There is no error and the Decision of the Commission should be affirmed.

**G. The Decision and Order Is Clear and Does Not Need Clarification**

The County filed a cross-appeal seeking clarification of specific language in the Decision which states as follows: “amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder,” citing Waiahole I, supra, 94 Hawaii at 153, 9 P.3d at 465. ICA 192 at COL 175; ICA 395 at PDF 1-16. The Commission did not say that the IIFS is set without looking at offstream uses, as the County incorrectly concludes. ICA 395 at PDF 12. What the language means is that the IIFS is set before offstream uses are issued permits. Waiahole I sets forth the Court’s preference for setting instream flow standards before addressing permit applications, e.g. non-instream uses. See Waiahole I, 94 Hawaii at 149, 9 P.3d at 461 (“If the Commission decides instream flow standards and permit applications at the same time, private interests in offstream use will have already become ‘highly particularized,’ risking an ad hoc planning process driven by immediate demands.”). It does not mean that offstream uses are not examined. To the contrary, the Commission clearly stated, “[i]n this CCH [contested case

hearing], the Commission makes a collective finding on the reasonableness of these noninstream uses in order to meet its duty of weighing instream and noninstream uses to establish the IIFS; the Commission does not make the final determination of the amounts of noninstream uses that would meet the statutory requirements for water use permits, which will be addressed through the WUPA [water use permit application] process for Na Wai Eha as a surface water management area.” ICA 192 at COL 52. Conversely, it would be just as inappropriate for the Commission to reevaluate the IIFS during the upcoming surface water use permit proceedings. See In re Kukui (Molokai), Inc. Contested Case Hearing, 116 Hawaii 481, 493, 174 P.3d 320, 332 (2007). The Commission’s language is clear and no clarification is needed.

#### **V. RELEVANT STATUTORY PROVISIONS**

The constitutional, statutory, and rule provisions cited in this Answering Brief are set out verbatim in Appendix A.

#### **VI. CONCLUSION**

The appeal should be dismissed for lack of jurisdiction. In the alternative, the Findings of Fact, Conclusions of Law, and Decision and Order of the Commission on Water Resource Management dated June 10, 2010, should be affirmed in its entirety.

DATED: Honolulu, Hawaii, July 11, 2011.

/s/ Julie H. China  
JULIE H. CHINA  
Deputy Attorney General  
Attorney for Appellee COMMISSION ON  
WATER RESOURCE MANAGEMENT



## STATEMENT OF RELATED CASES

Counsel for the Commission on Water Resource Management is aware of one indirectly related case arising out of the setting of Interim Instream Flow Standards for streams in East Maui. The appeal, In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula, and Hanawi Streams, No. CAAP 10-0000161, is currently pending in the Intermediate Court of Appeals.

DATED: Honolulu, Hawaii, July 11, 2011.

/s/ Julie H. China  
JULIE H. CHINA  
Deputy Attorney General  
Attorney for Appellee COMMISSION ON  
WATER RESOURCE MANAGEMENT