

No. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAII

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Supreme Court

SCAP-30603

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IN RE IAO GROUND WATER) CASE NO. CCH-MA06-01
MANAGEMENT AREA HIGH-LEVEL)
SOURCE WATER USE PERMIT) APPEAL FROM THE FINDINGS OF FACT,
APPLICATIONS AND PETITION TO) CONCLUSIONS OF LAW, AND DECISION
AMEND INTERIM INSTREAM FLOW) AND ORDER DATED JUNE 10, 2010
STANDARDS OF WAIHE'E RIVER)
AND WAIHEU, IAO & WAIKAPU) COMMISSION ON WATER RESOURCE
STREAMS CONTESTED CASE) MANAGEMENT
HEARING)
))
_____)

APPELLEE WAILUKU WATER COMPANY, LLC'S ANSWERING BRIEF

APPENDICES "1"- "2"

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APPELLEE WAILUKU WATER COMPANY, LLC'S ANSWERING BRIEF

TABLE OF CONTENTS

	Page(s)
I. CONCISE STATEMENT OF THE CASE	1
A. The Course and Disposition of Proceedings to Date	1
B. Amending An IIFS - An Overview of the Process	4
II. STANDARDS OF REVIEW	7
A. Subject Matter Jurisdiction	7
B. Commission Decision	8
C. Statutory Construction	9
D. HRS Chapter 91	9
E. Agency Determinations Involving the Public Trust Doctrine	11
III. ARGUMENT	11
A. Is a CCH Required By Law to Amend or Establish an IIFS	13
B. Assuming That a CCH is Required by Law, What Burden of Proof Applies to the Participants	19
C. The County’s Cross-Appeal	22
D. Assuming That a CCH is Required by Law, are the Complained of Conclusions/Findings Supports by the Record	24
1. The Community Groups’ COLs/FOFs Contentions	24
a. The Iao and Waikapu Streams COLs	25
b. The Amended IIFS for Waihee River and Waiehu Streams COLs	29
c. The Failure to Protect Native Hawaiian Rights FOFs	32
d. The Burden of Proof FOFs and COLs	35
e. The Decision and Order is Not Arbitrary or Capricious	39
f. Summary on Community Groups’ COL/FOF Objections	40
2. OHA COL/FOF Contentions	41
a. COL 230 is Not Clearly Erroneous	41
b. Contended Failure to Consider Kuleana Rights	42
c. The Decision and Order is Not Arbitrary or Capricious	42
E. Incorporation of Argument of Appellees HC&S and the Commission	46
IV. RELEVANT PORTIONS OF CONSTITUTION, STATUTES AND ADMINISTRATIVE RULES	46
V. CONCLUSION	47
VI. STATEMENT OF RELATED CASES	50

TABLE OF AUTHORITIES

	Page(s)
I. CASES	
<u>Aames Funding Corp. v. Mores</u> , 107 Haw. 95, 110 P.3d 1042 (2005)	8
<u>Alvarez v. Liberty House, Inc.</u> , 85 Haw. 275, 942 P.2d 539 (1997)	10, 32
<u>Application of Kauai Electric Division of Citizens Utilities Co.</u> , 60 Haw. 166, 590 P.2d 524 (1978)	10
<u>Barnett v. State</u> , 91 Haw. 20, 979 P.2d 1046 (1999)	9
<u>Brown v. Thompson</u> , 91 Haw. 1, 979 P.2d 586 (1999)	8
<u>Bush v. Hawaiian Homes Com'n.</u> , 76 Haw. 128, 870 P.2d 1272 (1994)	14
<u>Camara v. Aagsalud</u> , 67 Haw. 212, 685 P.2d 794 (1984)	9
<u>Campbell v. DePonte</u> , 57 Haw. 510, 559 P.2d 739 (1977)	37
<u>County of Hawaii v. Ala Loop Homeowners, et al.</u> , 123 Haw. 391, 235 P.3d 1103 (2010)	15
<u>Dole Hawaii Division-Castle & Cooke Inc. v. Ramil</u> , 71 Haw. 419, 794 P.2d 1115 (1990)	10, 26
<u>GATRI v. Blane</u> , 88 Haw. 108, 962 P.2d 367 (1998)	10
<u>Hardin v. Akiba</u> , 84 Haw. 305, 933 P.2d 1339 (1997)	10, 23, 25
<u>Hawaii Government Employees Ass'n AFSCME Local 152, AFL-CIO v. Lingle</u> , 124 Haw. 197, 239 P.3d 1 (2010)	8, 17
<u>Hawaii Management Alliance Ass'n v. Insurance Com'r</u> , 106 Haw. 21, 100 P.3d 952 (2004)	7
<u>In re Application of Rice</u> , 68 Haw. 334, 713 P.2d 426 (1986)	8
<u>In re Waiola O Molokai, Inc.</u> , 103 Haw. 401, 83 P.3d 664 (2004)	13
<u>In re Water Use Permit Applications</u> , 94 Haw. 97,	

9 P.3d 409 (2000)	11, 13, 14, 20, 25, 29, 35, 39
<u>In Re Water Use Permit Applications</u> , 105 Haw. 1, 93 P.3d 643 (2004)	36
<u>Kaniakapupu v. Land Use Com'n</u> , 111 Haw. 124, 139 P.3d 712 (2006) ...	15, 16, 17, 18
<u>Konno v. County of Hawaii</u> , 85 Haw. 61, 937 P.2d 397 (1997)	8
<u>Koolau Agr. Co., Ltd. v. Commission of Water Resource Management</u> , 83 Haw. 484, 927 P.2d 1367 (1996)	13, 14, 16, 17, 18, 19, 24
<u>Leslie v. Estate of Tavares</u> , 91 Haw. 394, 984 P.2d 1220 (1999)	10
<u>Morgan v. Planning Dept., County of Kauai</u> , 104 Haw. 173, 86 P.3d 982 (2004)	43
<u>Paul's Elec. Service, Inc. v. Befitel</u> , 104 Haw. 412, 91 P.3d 494 (2004)	11, 39, 43
<u>Pauley v. BethEnergy Mines, Inc.</u> , 501 U.S. 680 (1991)	9
<u>Pele Defense Fund v. Puna Geothermal Venture</u> , 77 Haw. 64, 881 P.2d 1210 (1994)	8, 14
<u>Price v. Zoning Bd. of Appeals of City and County of Honolulu</u> , 77 Haw. 168, 883 P.2d 629 (1994)	10, 27
<u>Public Access Shoreline Hawaii v. Hawaii County Planning Com'n</u> , 79 Haw. 425, 903 P.2d 1246 (1995)	8
<u>Rife v. Akiba</u> , 81 Haw. 84, 912 P.2d 581 (1996)	11
<u>Sandy Beach Defense Fund v. City Council of the City and County of Honolulu</u> , 70 Haw. 361, 773 P.2d 250 (1989)	15
<u>State v. Toyomura</u> , 80 Haw. 8, 904 P.2d 893 (1995)	9
<u>Weinberg v. Mauch</u> , 78 Haw. 40, 890 P.2d 272 (1990)	27

II. CONSTITUTION, STATUTES, AND RULES

Haw. Constitution Article XI, Section 7 4

Haw. Constitution Article XI, Section 9 15

HRS § 1-16 9

HRS § 91 8

HRS § 91-5(5) 14

HRS § 91-14 15, 18

HRS § 91-14(g) 10, 23, 25

HRS § 91-14(g)(5) 32

HRS § 174C 4

HRS § 174C-2(C) 5

HRS § 174C-3 6, 16, 25, 49

HRS § 174C-5 5

HRS § 174C-7(a) 18

HRS § 174C-10 5, 18, 39

HRS § 174C-12 8

HRS § 174C-48 through 63 17

HRS § 174C-60 18

HRS § 174C-71 5, 19

HRS § 174C-71(1)(E) 7

HRS § 174C-71(2) 35, 38, 39

HRS § 174C-71(2)(C) 7, 49

<u>HRS</u> § 174C-71(2)(D)	7, 20
<u>HRS</u> § 174C-71(2)(E)	29, 39
<u>HRS</u> § 174-10	39
<u>HRS</u> § 343-5	16
Hawaii Administrative Rule § 13-169-40	5, 7, 47
Hawaii Administrative Rule § 13-169-41	47
Hawaii Administrative Rule § 13-169-43	47

I. CONCISE STATEMENT OF THE CASE

This Appeal flows from a Decision and Order of the Commission on Water Resource Management (the “Commission”) (a) amending interim instream flow standards (“IIFS”) for Waihee River and North and South Waiehu Streams; (b) maintaining existing IIFS for Iao and Waikapu Streams and (c) issuing groundwater use permits to Hawaiian Commercial & Sugar Company (“HC&S”) and the County of Maui (“County”) from the Iao Groundwater Management Area.¹ (ROA 192:12904 to 12906 and 12914 to 12915).²

A. The Course and Disposition of Proceedings to Date.

This matter began eight years ago. In July 2003, the Commission designated the Iao aquifer as a groundwater management area. (ROA 192:12722). As a part of the designation, existing and new users of groundwater were required to apply for use permits. (ROA 192:12722). Wailuku Water Company, LLC (“WWC”), HC&S and the County each applied for groundwater use permits for diked, high level well and tunnel sources (“GWUPAs”). (ROA 32:00510-00513; ROA 36:00769-00770; ROA 34:00620-00622; ROA 26:00001-00009; ROA 28:00141-00161; and ROA 38:00882-00885).

About one year later (in June 2004), Hui o Na Wai Eha and Maui Tomorrow Foundation, Inc. (the “Community Groups”) filed a Petition to Amend the Instream Flow

¹Wailuku Water Company, LLC (“WWC”) submitted four groundwater use permit applications (“WUPA”), three of which were denied and one of which was deemed incomplete by the Commission. (ROA 192:12915).

²Citation to the Record on Appeal (“ROA”) will be in two forms. For those documents that are not transcripts, the format will be “ROA xxx:ppppp.” The “xxx” will refer to the docket number of the electronically filed record. The “ppppp” will refer to the five digit bates number placed on each page of the ROA by the Commission. When citation is made to a transcript, the format will be “ROA xxx:ppp:ll.” The “ppp” will refer to the page number of the transcript and the “ll” will refer to the line number on the referenced page.

Standards for the surface waters of Waihee River, Iao Stream, Waiehu Stream, and Waikapu Stream (the “IIFS Petition”). (ROA 40:00991-01307).

In October 2004, the Community Groups filed a Complaint alleging WWC and HC&S were wasting waters whose source was the Waihee River, Iao Stream, Waikapu Stream and Waiehu Stream (the “Waste Complaint”). (ROA 44:01344-01424).

The Commission conducted three public hearings on the GWUPAs, the first of which occurred on October 28, 2004 and the last of which happened on February 2, 2006. (ROA 26:00083; ROA 26:00118-00119; and ROA 26:00133). Hui O Na Wai Eha, the County, WWC and The Office of Hawaiian Affairs (“OHA”) made written requests for a contested case hearing (“CCH”) on the GWUPAs. (ROA 56:02523-02531; ROA 56:02535-02543; ROA 56:02485-02517; and ROA 56:02518-02522). On its own motion, the Commission on February 15, 2006, ordered a CCH for the GWUPAs; although no party asked for a CCH on the IIFS Petition, the Commission on its own motion also directed that the IIFS Petition be considered in the GWUPAs CCH; the Commission also ordered that the parties engage in mediation of the Waste Complaint. (ROA 56:02569-02570).

About one month later (March 17, 2006), the Commission set the Waste Complaint for resolution in a separate CCH which was to proceed before the GWUPAs and the IIFS Petition. (ROA 52:01937-01941 and 01944). The same person was appointed hearing officer for both contested cases. (ROA 52:01942-01943).

The Community Groups withdrew their Waste Complaint on May 10, 2007. (ROA 54:02478-02481). The Waste Complaint was dismissed without prejudice by the Commission on May 31, 2007. (ROA 54:02482-02483).

On June 14, 2007, the hearing officer in the combined GWUPA and IIFS Petition CCH established prehearing deadlines concerning briefing, submission of written direct and rebuttal testimony and the exchange of exhibits; the hearing officer also set a date on which the parties would begin the presentation of oral testimony. (ROA 56:02664-02671). Oral testimony began on December 3, 2007 and continued for all or part of 23 separate days, the last of which was on March 4, 2008. (ROA 301:1:1-25; ROA 302:1:1-255; ROA 303:1:1-25; ROA 304:1:1-25; ROA ROA 306:1:1-25; ROA 307:1:1-25; ROA 309:1:1-25; ROA 310:1:1-25; ROA 311:1:1-25; ROA 313:1:1-25; ROA 314:1:1-25; ROA 315:1:1-25; ROA 317:1:1-25; ROA 318:1:1-25; ROA 320:1:1-25; ROA 321:1:1-25; ROA 322:1:1-25; ROA 324:1:1-25; ROA 325:1:1-25; ROA 327:1:1-25; ROA 328:1:1-25; ROA 330:1:1-25; and ROA 331:1:1-25).

On October 14, 2008, additional oral testimony was heard in the combined GWUPA and IIFS Petition CCH. (ROA 334:1:1-25). The evidentiary portion of the CCH was closed following the October 15, 2008 testimony. (ROA 334:237:8-9). The parties submitted proposed Findings of Fact, Conclusions of Law, and Decisions and Orders to the hearing officer on December 5, 2008. (ROA 158:10207; ROA 158:10211-10326; ROA 160:10327-10770; ROA 162:10773-10804; and ROA 162:10806-10961).

The hearing officer submitted his Proposed Findings of Fact, Conclusions of Law, and Decision and Order to the Commission on April 9, 2009. (ROA 188:12117-12335). Written exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Decision and Order were submitted on May 11, 2009. (ROA 188:12347-12383; ROA 188:12384-12447; ROA 138:12448-12481; ROA 188:12484-12522; and ROA 188:12524-12536). Oral argument before the Commission occurred on October 15, 2009. (ROA 336:11:3 to 115:7). The

Commission filed its Findings of Fact, Conclusions of Law, Decision and Order (the “Commission Decision”) on June 10, 2010. (ROA 192:12708-12955). The Commission Decision contained 617 findings of fact (“FOF”) and 276 conclusions of law (“COL”). (ROA 192:12708-12955).

The Community Groups and OHA appealed the Commission Decision on July 12, 2010. (ROA 198:13460-13709; ROA 194:12960-13208). The Community Groups asserted four points of error (involving the Decision and Order, 26 COL and 7 FOF). (Community Group Opening Brief pp. 14-15). OHA asserted two points of error (involving the Decision and Order and 1 COL). (OHA Opening Brief p. 19). On July 26, 2010, the County filed a cross appeal asserting one point of error requesting clarification of six COL.³ (County Opening Brief p. 3).

After filing their opening brief, the Community Groups made application to transfer this appeal to the Supreme Court, which application was joined by OHA. The application was granted on June 23, 2011.

WWC sought and received approval to file its unified answering brief on June 30, 2011. A table setting forth the significant dates is found in Appendix “1.”

B. Amending An IIFS - An Overview of the Process.

Chapter 174C, HRS, is the Hawaii State Water Code (the “Water Code”). It was created to implement article XI, section 7 of the Hawaii Constitution. The Commission was established within the Department of Land and Natural Resources to administer the Water Code,

³The Commission Decision included implementation directives. One of the implementation directives required increasing the IIFS for South Waiehu Stream. The result of that directive would be that certain of the “kuleana users” would not have stream water. The parties stipulated to a delay in the implementation of the amended IIFS for South Waiehu Stream to allow the kuleana users continued access to stream waters. (ROA 206:14501-14510).

HRS § 174C-5.

In adopting the Water Code, the legislature declared that the Water Code was to be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquiculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses with provision 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 for municipal uses, public recreation, public water supply, agriculture and navigation. HRS § 174C-2(C).

The Commission was given broad powers and jurisdiction to hear disputes regarding water resource protection, water permits or constitutionally protected water interests. HRS § 174C-10. The final decision on any matter under its jurisdiction is to be made by the Commission. Id.

Establishing or amending an IIFS is a process of reviewing data from various disciplines to determine the amount of water that is to remain in the stream(s). HRS § 174C-71. The process is not an exact science. The statutes and rules place the burden on the Commission to determine what data is needed, to acquire and analyze that data, to test the reliability of that data and to balance competing interests in order to best serve the public interest. HRS § 174C-71 and Hawaii Administrative Rules § 13-169-40 et seq. The data available for decision making is limited, is imprecise, and requires interpolation, consistent with the legislative recognition of the IIFS as a temporary or interim standard.

Supply side data which is reviewed includes historic flow records (which may be

incomplete), models of flow rate forecasting (which change and are refined over time), guesstimates of stream losses from seepage and stream gains from groundwater discharge (due to limited if any data) and guesstimated of the portions of the streams in which losses or gains will occur. The supply side data is further confused by expected and unexpected weather patterns.

Demand side data likewise is imprecise. Instream requirements are uncertain beyond a general desire for mauka to makai flow . Noninstream requirements are uncertain as surface water use permits are not granted in establishing or amending a IIFS. Certain uses exist, both instream and non-instream, that have priority under the public trust doctrine which require balancing.

The decision to amend an IIFS necessarily requires the Commission to apply a macro approach in resolving competing interests and recognizes that it will be a temporary standard upon which reliance cannot be placed by any of the competing interests. The statutory and regulatory guidelines place significant discretion in the Commission to create a standard that can be enforced, that can be tested for effectiveness, and that can be changed based upon continued monitoring of the IIFS and the availability of more complete or even new data.⁴

The criteria applied to the determination of an IIFS is quite different from the criteria the Commission is to apply to establish an instream flow standard (IFS). The Water Code requires that the Commission employ a much more aggressive approach to establish an IFS. The record to establish an IFS is complete only after the Commission satisfies its

⁴The definition of IIFS reflects the transient nature of the standard. IIFS “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.

investigative obligations under HRS § 174C-71(1) (E).

Conversely, to establish (or amend) an IIFS, there is no investigatory obligation of the Commission. Section 174C-71 (2)(C), HRS, proscribes in general terms the information that must be in the petition to establish or amend an IIFS. Section 174C-71 (2)(D), HRS, provides criteria for decision making. Sections 13-169-40 to 43, HAR, track the statutory mandates but provide no further guidance or clarification on the information necessary to establish or amend an IIFS.

Use of an adversary proceeding impedes rather than enhances the process. In an adversary proceeding, the record for decision making is a product of the party participants—each with their own individualized interests and perspectives. Experts provide information on biology and stream flows. Experts in adversary proceedings are not retained to provide independent opinions; generally their opinions favor the party which engaged the expert. If the Commission is limited to the record produced by the parties, the Commission’s ability to fulfill its statutory mandates is further constrained.

By its very nature, an IIFS is temporary, is based on a review of imprecise information, and results in a macro decision that is but a stop gap measure in the overall regulatory scheme.

II. STANDARDS OF REVIEW

A. Subject Matter Jurisdiction.

Subject matter jurisdiction is a question of law that may be reviewed at any time. Hawaii Management Alliance Ass’n v. Insurance Com’r, 106 Haw. 21, 100 P.3d 952 (2004). Appellate courts are obligated to determine whether they have jurisdiction to entertain a matter, even if the parties have not raised the issue prior to or within the appeal. Hawaii Government

Employees Ass'n AFSCME Local 152, AFL-CIO v. Lingle, 124 Haw. 197, 239 P.3d 1 (2010).

If a court lacks subject matter jurisdiction, its decision is void and without legal effect. In re Application of Rice, 68 Haw. 334, 713 P.2d 426 (1986).

The existence of subject matter jurisdiction is a question of law that is reviewed de novo under the right/wrong standard. Aames Funding Corp. v. Mores, 107 Haw. 95, 110 P.3d 1042 (2005). Appellate jurisdiction will be exercised over administrative contested cases under HRS Chapter 91. Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 881 P.2d 1210 (1994). A contested case is an administrative hearing that is required by law and determines the rights, duties or privileges of specific parties. Public Access Shoreline Hawaii v. Hawaii County Planning Com'n, 79 Haw. 425, 903 P.2d 1246 (1995). In order for a hearing to be required by law, it must be required by agency rule, statute, or constitutional due process. Id.

B. Commission Decision.

Section 174C-12, HRS, provides that judicial review of rules and orders of the Commission shall be governed by HRS Chapter 91. Under HRS Chapter 91, a decision of an agency carries a presumption of validity. Konno v. County of Hawaii, 85 Haw. 61, 937 P.2d 397 (1997).

Where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains a broad or indefinite meaning, persuasive weight will be given to the agency's construction of the statute. Brown v. Thompson, 91 Haw. 1, 979 P.2d 586 (1999). The judicial deference given to the agency's statutory interpretation reflects the sensitivity accorded to the proper roles of the legislative and judicial branches, as the resolution of any ambiguity is a question of policy rather than a question of law. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991).

The rule of judicial deference does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose in adoption of the statute. Camara v. Aghsalud, 67 Haw. 212, 685 P.2d 794 (1984).

C. Statutory Construction.

Statutes are interpreted to give effect to the intention of the legislature. Barnett v. State, 91 Haw. 20, 979 P.2d 1046 (1999). Legislative intent is obtained primarily from the language contained in the statute; the language must be read in the context of the entire statute and construed in a manner consistent with the purpose of the statute. Id.

If doubt, indistinctiveness, or uncertainty exists in the language of a statute, the statute is ambiguous. Id. Construction of an ambiguous statute allows the court to use legislative history as an interpretive tool or to consider the reason and spirit of the law and the cause which induced the legislature to enact the statute. State v. Toyomura, 80 Haw. 8, 904 P.2d 893 (1995) and HRS § 1-16.

D. HRS Chapter 91.

In reviewing the decision of an administrative agency arising from a CCH, the court may affirm, reverse or modify the decision or remand the matter with instructions for further proceedings on the grounds that the agency's findings, conclusions, decision or order are:

1. in violation of constitutional or statutory provisions; or
2. in excess of statutory authority or jurisdiction of the agency; or
3. made upon the 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.

HRS § 91-14(g) and GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998).

FOFs are reviewed under the clearly erroneous standard. Alvarez v. Liberty House, Inc., 85 Haw. 275, 942 P.2d 539 (1997). A FOF is clearly erroneous when the record lacks substantial evidence to support the finding, or despite substantial evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been made. Leslie v. Estate of Tavares, 91 Haw. 394, 984 P.2d 1220 (1999). Substantial evidence means credible evidence of sufficient quantity and probative value to enable a person of reasonable caution to support a conclusion. Id.

COLs are freely reviewed under a right/wrong standard to determine if the conclusion was in violation of a constitutional or statutory provision, was in excess of the statutory jurisdiction of the agency, or was affected by other error of law. Hardin v. Akiba, 84 Haw. 305, 933 P.2d 1339 (1997). COLs that present mixed questions of fact and law are reviewed under the clearly erroneous standard. Price v. Zoning Bd. of Appeals of City and County of Honolulu, 77 Haw. 168, 883 P.2d 629 (1994). If a mixed question of fact and law is presented, the court must give deference to the agency's determination due to the agency's expertise and experience in the particular field. Dole Hawaii Division-Castle & Cooke Inc. v. Ramil, 71 Haw. 419, 794 P.2d 1115 (1990).

If a FOF or a COL is invalid, inadequate or incomplete, the court should remand the matter to the agency for further proceedings. Application of Kauai Electric Division of Citizens Utilities Co., 60 Haw. 166, 590 P.2d 524 (1978).

When reviewing a determination of an administrative agency, a court must first decide whether the legislature granted the agency discretion to make the determination being reviewed. Paul's Elec. Service, Inc. v. Befitel, 104 Haw. 412, 91 P.3d 494 (2004). If the legislature granted the agency discretion over a particular matter, then the decision will not be

overturned unless it is arbitrary, capricious or characterized by a clearly unwarranted abuse of discretion. Id. The agency’s decision must be made with clarity to allow a reviewing court the ability to track the steps by which the agency reached its decision. Rife v. Akiba, 81 Haw. 84, 912 P.2d 581 (1996).

E. Agency Determinations Involving the Public Trust Doctrine.

In reviewing an agency decision affecting public trust resources, the presumption of validity of the decision will continue to apply. In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000) (“Waiahole”). However, in matters affecting public trust resources, the ultimate authority to interpret the public trust doctrine lies with the courts. Id. This means that the court will take a close look at the action to determine that it complies with the doctrine. Id.

III. **ARGUMENT**

This is an appeal of the Commission Decision that had two separate and distinct aspects: (1) a review of permit applications from three groundwater users; and (2) a request to amend the existing IIFS of five streams. The groundwater involved in this appeal is limited to high level sources in a single aquifer, the Iao aquifer. The surface waters involved in this appeal are the Waihee River, Iao Stream, Waikapu Stream and the North and South Waiehu Streams which are located in four separate hydrologic units.

No party appealed the Commission Decision on the issuance of GWUPAs.

Instead, the Community Groups and OHA appeal the amended IIFS promulgated by the Commission for Waihee River and the North and South Waiehu Streams and the Commission's denial of a request to amend the IIFS for Iao and Waikapu Streams.⁵ The Community Groups maintain that the failure of the Commission to amend the IIFS in the Iao and Waikapu Streams failed to protect and restore necessary instream uses and values and failed to protect Native Hawaiian and kuleana rights in those surface waters. (Community Groups Opening Brief p. 14). OHA maintains that the instream allocation by the Commission is inadequate to satisfy customary Hawaiian rights and practices. (OHA Opening Brief p. 19).

In support of their respective positions, the Community Groups and OHA assert that the Commission erred in failing to impose upon WWC and HC&S a part of the burden of proof mandated for water use permit applicants to show that their uses, for which they had not made permit applications in this matter, are reasonable and beneficial and that alternate sources were not available.

Despite the rhetoric displayed in the opening briefs of the Community Groups and OHA, this appeal is not an interaction of good versus evil – rather, it is a proceeding to balance competing environmental and economic interests in a manner that will benefit a community rather than in a manner that would benefit one or more special interests. When the amount of water available (supply) exceeds the existing and expected instream and noninstream uses (demand), the balancing required by the Water Code is simplified; the IIFS can be set at the total supply less the noninstream use demand. However, if demand exceeds supply, balancing

⁵The County filed a cross-appeal to “clarify” the scope of certain COL’s in the Commission Decision which is addressed in Section III, C below.

becomes much more complex, even to the extent that uses protected by the public trust doctrine compete for available water among themselves.

For example, certain uses that are protected under the public trust doctrine can occur both instream and noninstream. Instream uses protected by the doctrine include maintenance of waters in their natural state, recreational and ecological resource protection, and the exercise of Native Hawaiian and traditional and customary rights. See, Waiahole, supra at 136-137, 9 P.3d at 448-449. Noninstream uses protected by the doctrine include domestic use and the exercise of kuleana or native tenant rights. Id. at 137, P.3d at 449. Similarly, the reservation of water for lands controlled by the Department of Hawaiian Homelands (“DHHL”) is afforded public trust protection. In re Waiola O Molokai, Inc., 103 Haw. 401, 83 P.3d 664 (2004). No use afforded public trust protection is entitled to priority over another public trust use; instream public trust uses and noninstream public trust uses have equal priority. Waiahole, supra, at 146, 9 P.3d at 459.

While the technical issues of hydrology, biology, supply and demand factors, and implementation of any IIFS on a diverse and integrated distribution system are complex, the task before this Court (if it finds subject matter jurisdiction) is the same as that faced by the Commission: to examine whether an existing IIFS should be changed in light of the statutory framework of the Water Code and the information provided to the Commission.

A. Is a CCH Required By Law to Amend or Establish an IIFS?⁶

⁶The Commission Decision discussed whether a CCH was required or discretionary and determined that it was discretionary. (ROA 192:12912-12913). As such, the Commission determined that no property right existed that gave rise to a constitutional due process right. The Community Groups and OHA did not appeal this portion of the Commission Decision. This determination is consistent with Koolau Ag. Co., Ltd. v. Commission of Water Resource Management, infra.

Section 174C-12, HRS, states that a review of rules and orders of the Commission is governed by Chapter 91, HRS. Blind reliance on that section to mandate a CCH in a determination to amend an IIFS is misplaced.

In Koolau Agr. Co., Ltd. v. Commission of Water Resource Management, 83 Haw. 484, 927 P.2d 1367 (1996), the Court found that a CCH was not required in the context of designating a water resource management area. Id. at 493, 927 P.2d at 1376. The basis for the Court's ruling was that no property rights were involved in the designation. The impact on the property rights of users within the management area is triggered in the permit process, for which a CCH is required.

Similar to the management area designation process, the amendment or establishment of an IIFS will not impact property rights, a criteria for a CCH being required by law. A CCH is a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing. HRS § 91-5(5). Where property rights are impacted, substantive due process requires a hearing. Bush v. Hawaiian Homes Com'n., 76 Haw. 128, 870 P.2d 1272 (1994). Neither the Water Code, nor the rules adopted by the Commission, mandate a CCH in connection with the determination of an amended IIFS. Waiahole, supra at 119, 9 P.3d at 431, fn 15.

In a footnote at the beginning of its Discussion in Waiahole, the Court noted that a CCH was an agency hearing required by law that determines the rights, duties or privileges of certain parties. Id. at 120, 9 P.3d at 431, n. 15. Although not mandated by statute or rule, a CCH was deemed appropriate in Waiahole because of the "individual instream and offstream 'rights, duties, and privileges at stake'. Id., citing, Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 881 P.2d 1210 (1994) (a permit case). The two parties in Waiahole that sought to

amend the IIFS both filed permit applications to reserve waters for future use; the permit applications were filed before the petition to amend the IIFS. Waiahole, supra at 112, 9 P.3d at 424. As the amendment of the IIFS would impact the permit applications filed by petitioners, consolidation of the items into a CCH was deemed appropriate.

In the instant matter, neither the Community Groups nor OHA (the only parties that petitioned to amend the IIFS), filed water use permit applications. GWUPAs were filed by HC&S, WWC and the County; none of those parties filed or joined in the IIFS Petition. As such there were no permit applicants who had individual instream and/or noninstream rights at stake. Since no property rights were to be determined in the IIFS Petition, there was no right to request, nor any obligation to provide, a CCH. Consequently, there was no right to appeal the Commission Decision under HRS § 91-14. See also, Kaniakapupu v. Land Use Com'n, 111 Haw. 124, 139 P.3d 712 (2006).

The Community Groups and OHA may argue that they have a private cause of action under the Hawaii constitution to enforce environmental laws that allow for a clean and healthy environment, including the protection and enhancement of natural resources. See, County of Hawaii v. Ala Loop Homeowners, et al., 123 Haw. 391, 235 P.3d 1103 (2010) and Haw. Constitution Article XI, Section 9. However, the ability to enforce an environmental law does not rise to the level of a protected property right under the due process clause of the federal or state constitutions. Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989) (a property interest must be more than an abstract need or desire for a benefit, it must be a legitimate claim of an entitlement).

Other examples of this distinction have been recognized. For instance, the holder of appurtenant rights cannot demand a CCH in a matter in which the designation of a water

management area is being considered. Koolau Agr. Co., Ltd. v. Commission on Water Resource Management, supra. See also, Kaniakapupu v. Land Use Commission, supra, (a hearing that might lead to a proceeding that determines the rights, duties, or privileges of specific parties, does not of itself trigger a contested case hearing).

This result is well grounded. If standing to bring a private cause of action to enforce environmental laws created a protected property right, then any environmental assessment could be the subject of a CCH. Instead of the receiving agency acting based on the information that was obtained from the comment process, the receiving agency would be required to appoint a hearing officer to oversee the creation of a record by competing parties with their own agendas. This would supplant the agency's legislative mandate. HRS § 343-5. Instead of the agency preparing an environmental assessment as required by statute in order to determine if an environmental impact statement is required, the process becomes the product of parties with special interests creating an assessment. The effect is that the agency is removed from its role of preparer to that of reviewer. Completion of environmental assessments would become a prolonged process subject to judicial review at multiple levels.

The amendment of an IIFS relates to stream flows that will be required at a particular point (or to multiple points) in the stream. HRS § 174C-3. It is not a determination of the amount of water a specific party will receive or how a specific party will be impacted. Rather, like the designation of a water management area, each specific party that may be

impacted by the amended IIFS will have the ability to assert his, her or its rights in the permitting process.

The instant matter arose out of the designation of the Iao Aquifer Groundwater Management Area. (ROA 192:12722). Existing and new users were required to apply for a permit to use the groundwater and were required to establish that their use or proposed use met the statutory criteria. HRS §§ 174C-48 through 63. The permit application process is complex and involves at least five steps.⁷

In a Water Management Area, there are no common law property rights involved to maintain an existing use. The common law rights of individual instream and noninstream users are abrogated when a water management area is designated under which the uses and users are regulated. The usufruct is absorbed into the permitting process.

While interesting from an intellectual standpoint, why is there a concern over whether a petition to amend an IIFS requires a CCH. The reason for the concern is whether this Court has subject matter jurisdiction over this appeal. See, Kaniakapupu v. Land Use Com'n, supra. A court must examine whether or not it has jurisdiction to act upon a matter, whether or not that issue has been raised by the parties. Hawaii Government Employees Ass'n AFSCME Local 152, ALF-CIO v. Lingle, supra.

If a CCH was not required by law, then the method by which the Community Groups and OHA could seek a review of the Commission Decision would change, as would the standards of review applied to the determination. In Koolau Agr. Co. Ltd. v. Commission of Water Resource Management, supra, it was recognized that the Water Code was not artfully

⁷The complexity of the permit process is shown from the Commission's own flowchart of the permit process which is appended. See, Appendix "2."

drafted. It was further recognized that the right to a CCH under the Water Code was limited to a contested permit application. Id. at 495-496, 927 P.2d at 1378-1379. The legislature, in adopting the Water Code, intended to grant broad, extensive and exclusive jurisdiction to the Commission in making determinations involving water. Id. at 490, 927 P.2d at 1373 and HRS § 174C-10. Further, while the decisions and orders of the Commission are subject to judicial review, there are no provisions concerning the appellate review of an amendment of an IIFS, depriving this court of jurisdiction over decisions in which an IIFS was amended.

The amendment of an IIFS is essentially no different from the designation of a water management area. Neither determination mandates or arises from a CCH because neither is required to hold a CCH by administrative rule, neither is required to hold a CCH by statute, and neither proceeding determines the rights, duties, or privileges of the specific parties triggering the requirements of constitutional due process. Kaniakapupu v. Land Use Com'n, supra. Consequently, HRS § 174C-60 does not confer jurisdiction in the appellate courts and HRS § 91-14 does not confer jurisdiction in the circuit court. See, Ko'olau Ag. Co. Ltd. v. Commission of Water Resource Management, supra, at 493, 927 P.2d at 1376.

As with a water management area designation, an IIFS determination would not be judicially reviewable.

By operation of HRS § 174C-7(a), unless the legislature “specifically provide(s)” for an appeal, the Commission has “exclusive jurisdiction and final authority” over a WMA designation, which is indisputably a “matter relating to implementation and administration of the state water code.” Therefore, a WMA designation is not judicially reviewable.

Id. at 493, 927 P.2d at 1376.

Should the Commission act erroneously in amending an IIFS, that act would be subject to review by a mandamus action and subject to correction if the determination breached constitutional or statutory duties. Id., fn 8.

Consequently, as HRS § 174C-71 does not provide for a CCH, as there is no Commission administrative rule providing for a CCH in connection with the establishment or amendment of an IIFS, and as no constitutional due process rights are triggered as a specific user's rights will be addressed in the permit process. This court should conclude that it does not have subject matter jurisdiction and dismiss the appeals of the Community Groups, OHA and the County.

B. Assuming That a CCH is Required by Law, What Burden of Proof Applies to the Participants?

Assuming that this Court determines that constitutional due process requires a CCH, the Community Groups and OHA identified as points of error (and as their requested relief) that the Commission failed to require the noninstream users, and HC&S in particular, to meet a burden of proof concerning uses. The Community Groups and OHA maintain that two of the five criteria for the issuance of surface water use permits apply to a proceeding to amend an IIFS. The two criteria are (1) proving that the existing uses were reasonable and beneficial uses; and (2) proving that there were no practical alternatives to the use of the surface water by the non instream users.

The points of error raise the question of the respective burdens placed on participants and the Commission in an action to amend an IIFS. Stated another way: what is the burden on the petitioner; what is the burden on other participants; and what is the burden of the Commission. These questions in turn raise the question of whether the Commission is acting in

a quasi judicial role or quasi legislative role in making its determination on a petition to amend an IIFS.

From the Commission's standpoint as the decision maker, the petitioners have a statutory obligation to: (a) provide the data and information necessary to show what flows are necessary to protect and preserve beneficial instream uses; (b) to provide data and information on the importance of present or potential instream values; (c) to provide information and data on the present or potential use of water for noninstream purposes; and (d) to provide information and data on the economic impact of restricting noninstream uses. HRS § 174-71(2)(D). As the proponent of a change in the existing IIFS, a petitioner seeks a change of the status quo and thus should bear the burden of establishing certain matters on each stream, i.e.:

- (i) The specific instream flow needed to protect the public interest;
- (ii) The specific instream flow needed to adequately protect fishery, wildlife, recreational, aesthetic, scenic and other beneficial instream uses; and,
- (iii) The expected economic impact from restricting existing and potential water development in order to protect the beneficial instream uses.

As the Commission has the right to accept or reject the petition and to require the petitioner to provide such other information as may be necessary for the Commission to act on the petition, it is not unreasonable to require those seeking a change to provide such information, just like the prosecutor is required to establish reasonable suspicion to support a search of a criminal defendant. Surely our streams deserve no less constitutional protection than our citizens.

Once the Commission is satisfied that the petitioner provided sufficient

information on which the Commission can make an informed decision, the other participants should be allowed the opportunity to provide additional information to the Commission. Similar to that required of the petitioner, the noninstream users (or others who are interested in protecting the public interest) should be allowed the opportunity to provide information on the stream flows and uses necessary to protect the public interest and the anticipated economic impact, if any, resultant from the proposed change in stream flows.

If the matter is a contested case and the Commission is sitting in a quasi judicial forum, the Commission is bound by the record that is produced by the participants and cannot request additional information as mandated by the Water Code. Clearly, under the statute, the Commission can and should request the parties to produce relevant and additional information proper for the Commission's decision making role.

The Commission in amending an IIFS must resolve competing instream and non instream uses of water and must obtain reliable data concerning supply and demand factors to make its decision. However, the determination is not made based on specific users but rather requires a macro approach, a cumulative reasonable assessment, that balances necessary instream requirements (based on data and information) with noninstream uses, both current and potential (again based on data and information). If the amount of water available for noninstream use may be decreased by the Commission, then it must also conduct an analysis of the economic impacts of such reduction in water available to noninstream use.

In Waiahole, the court held that the ultimate burden of justifying interim standards rested with the Commission and not the petitioner. Id. at 153, 9 P.3d at 465. This is consistent with the legislative directives in the Water Code that the Commission is the ultimate decision maker. Except for matters involving use permits and a failure to act to designate a

water management area or the failure to amend an IIFS, there is no legislatively mandated right of review of that decision.

However, there is nothing within the Water Code concerning amendment of an IIFS that states (or infers) that non instream users must satisfy the criteria to obtain a surface water use permit to provide information to the Commission on which it can reach a decision. Nor it is an obligation or right of user participants to prove appurtenant or riparian rights. These must be addressed in the permit processing forum after the hydrologic unit is designated a water management area.

Although the Commission has significant discretion in its decision making process, its ultimate obligation is to comply with the statutory criteria and the constitutional dictates of the public trust doctrine. To satisfy these obligations, the Commission needs a record of such compliance.

Consequently, this court should conclude that the user participants in the IIFS matter had no burden of proof obligation to establish that their existing uses were reasonable and beneficial under the Water Code and had no obligation to establish that there were no practical alternatives to their users under the Water Code. Evidence on such matters in the record may be probative to the Commission's "cumulative reasonable assessment" of demand but not determinative on such matters.

C. The County's Cross-Appeal.

The County in its Cross-Appeal summation asks that this Court "clarify" two COLs in the Commission Decision that concern the disposition of waters not allocated to instream flows. Specifically, the County maintains "that the 'categorical' and inflexible approach articulated by the Commission in Conclusion of Law Nos. 174 - 175 may lead to

misunderstandings in the future if not clarified and corrected now.” County Opening Brief, p. 10.⁸

The County contends that COLs 18, 175, 183, 192 and 204 are erroneous on the ground that these conclusions stand for the proposition that an amended IIFS must be established first and then the remaining stream flows would be divided among noninstream uses. County Opening Brief, p. 7.⁹ To succeed, the County must establish that the COLs (a) violated constitutional or statutory provisions, (b) exceeded the authority of the Commission, or (c) were otherwise erroneous. HRS § 91-14(g) and Hardin v. Akiba, supra. Where the County’s argument misses the mark is a misreading of the COLs.

When the five COLs are read together, it is clear that the Commission states three concepts: a) that an IIFS is established; b) that the remainder of the stream flow is available for noninstream use under the permit process; and c) that any noninstream use that is not shown as reasonable and beneficial (or cannot meet the other permit criteria) will not be allowed. Not only do these concepts correctly state the Water Code, they also reflect the Court’s guidance from Waiahole. As such, the COLs do not violate statutory or constitutional provisions.

Likewise, as the legislature gave the Commission the exclusive jurisdiction to

⁸Although COL 174 was referenced as a position taken by the Commission, COL 174 restated the County’s proposed Decision and Order that the stream water remaining after allocation for certain non instream uses (kuleana needs, domestic water needs, and irrigation needs) be returned to the streams as the amended IIFS. (ROA 192:12873-12874 and ROA 162:10800).

⁹The COLs to which the County takes exception were identical to or substantially the same as those contained in the Hearing Officer’s Proposed Findings and Conclusions. (ROA 188:12236, 12277, 12279-12280, 12282, 12286-12287). The County made the same arguments in its exceptions to those COLs. (ROA 188:12529-12531). The Commission, which included the Hearing Officer, presumably considered and rejected the County’s arguments in rendering the Commission Decision.

determine IIFS, the COLs do not exceed the authority of the Commission. See, Koolau Agr. Co., Ltd. v. Com'n, supra, at 493, 927 P.2d at 1376.

Finally, the COLs are not otherwise erroneous statements of the law. COL 18 and 204 correctly state that the Commission must first determine the IIFS (which of necessity and in fact took into account the instream and noninstream uses protected by the public trust doctrine) and then will allow the remainder of the stream flow to be allocated to noninstream uses in accordance with the permitting process.

COL 175, 183 and 192 stated the Commission's review and analysis of IIFS proposals submitted by the County, WWC and the Community Groups/OHA respectively. The Commission provided its reasoning as to why those proposals did not comply with the Water Code. As such the COLs are not clearly erroneous.

The County, which bears the burden of showing that the COLs were contrary to statute or constitution, exceeded the Commission's jurisdiction, or were otherwise erroneous, failed to meet that burden. As such, the County's cross-appeal fails and the Commission's COLs must be affirmed.

D. Assuming That a CCH is Required by Law, are the Complained of Conclusions/Findings Supported by the Record?

1. The Community Groups' COLs/FOFs Contentions.

The Community Groups contend that 26 separate COLs and 7 FOFs are erroneous. As noted above, COL's are reviewed freely to determine if they a) are contrary to statute or constitution, b) exceed the jurisdiction of the Commission, or c) are otherwise erroneous. HRS § 91-14(g) and Hardin v. Akiba, supra. However, if the COL involves questions of fact and law, the standard of review is whether the COL is clearly erroneous in light

of the reliable, probative and substantial evidence of the whole record. Waiahole, supra at 119, 9 P.3d at 431. None of these grounds were established by the Community Groups.

a. The Iao and Waikapu Streams COLs.

The Community Groups first attack the Commission Decision on the Commission's analysis and conclusion that Iao and Waikapu Streams existing IIFS should not be amended. Specifically, the Community Groups argue that COLs 208, 209, 210, 211, 216, 217, 245, 259, 260 and 261 violate the public trust provision of the Constitution and the protection of instream uses under the Water Code by not amending the IIFS for Iao and Waikapu Streams. (Community Groups Opening Brief, p. 14). Reviewed under the clearly erroneous standard because they involved a mixed question of fact and law, the COLs are not improper.

COL 208 restates FOFs concerning the physical conditions in Iao Stream (i.e. the existence of lined channels and a 20 foot vertical drop) and concludes that the channelization may inhibit spawning, may not support spawning and may prevent spawning altogether. This review and conclusion is in line with the Water Code, the Constitution, and the record. The public trust doctrine requires the Commission to consider certain uses, one of which is ecological resource protection. Waiahole, supra at 136, 9 P.3d at 448. An amphidromous species is an ecological resource. The Water Code includes the maintenance of fish and wildlife habitats as an instream use. HRS § 174C-3. By COL 208, the Commission complied with the constitutional and statutory mandates to consider the physical conditions of Iao Stream and reach a conclusion on how those conditions impacted certain use.

The Community Groups argue that COL 208 is a ““finding of ultimate fact [that] must be supported by findings of basic fact which in turn are required to be supported by evidence in the record.””. (Community Groups Opening Brief, pp. 22 - 24, emphasis in original).

A party's dissatisfaction with a finding of "ultimate" fact does not allow this Court to substitute its judgment for that of the Commission unless the finding is clearly erroneous. Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, supra. The record provides more than adequate support for the Commission's conclusion that the channelization of Iao Stream is not conducive to recruitment of amphidromous species. See, ROA 156:09819-09820; ROA 306:209:19-25; ROA 307:37:1-20; ROA 307:38:13 to 39:1; ROA 307:114:6 to 115:1; ROA 334:145:1-7; ROA 334:150:12 to 153:8; ROA 334:154:1-7; ROA 334:159:16-21; and ROA 334:233:20 to 234:2.

Accordingly, COL is not clearly erroneous and thus is not improper.

The Community Groups attacked COLs 209 and 210 which are the Commission's review of its findings on recruitment of amphidromous species in Waikapu Stream, again based on a position that the COL was not supported by findings in the record. Community Groups Opening Brief pp. 24-25 and footnote 14. Just as with COL 208, the Commission complied with its statutory and constitutional mandates to consider the physical conditions of Waikapu Stream and to reach a conclusion on how such conditions impacted certain use.

What the Community Groups really attack is the conclusion as being contrary to the record. Again, there is more than ample evidence to support the Commission's conclusion. See, ROA 156:09815 and 09819-09820; ROA 306:210:15-21; ROA 307:28:16-21; ROA 62:03269-03270; and ROA 334:235:9 to 236:12. Based on the applicable standards COLs 209 and 210 are neither clearly wrong nor clearly erroneous.

The next COL purported to be in violation of statute or constitution is COL 211, This COL concerns Waiehu Stream. It is unclear why this COL was identified as a point of error since the Community Groups argument deals only with Iao and Waikapu Streams and does not address Waiehu Stream. Further, the Community Groups Opening Brief does not discuss COL

211 within the argument section, nor do the Community Groups ask the Court to grant relief on COL 211 or the Waiehu Streams. A point of error that is raised but not argued is waived.

Weinberg v. Mauch, 78 Haw. 40, 890 P.2d 272 (1990). As such, COL 211 must be affirmed.

The Community Groups next argue that COL 216, which they admit reiterates COL 208, is improper. COL 216 is a conclusion that the reproductive potential of the channelized lower stretches of Iao Stream is minimal. Just as with COL 208, the Commission in its COL 216 complied with the statutory and constitutional mandates to consider the physical conditions of Iao Stream and reached a conclusion on how those conditions impacted a specific use. Essentially, the Community Groups complain of the result reached; however, where the record supports the result reached, this Court will not substitute its judgment for that of the Commission unless the COL is clearly erroneous. Price v. Zoning Board of Appeals of City and County of Honolulu, *supra*. As with COL 208, the record contains ample support for the determination. *See*, ROA 156:09819-09820; ROA 306:209:19-25; ROA 307:37:1-20; ROA 307:38:13-39; ROA 307:114:6 to 115:1; ROA 334:145:1-7; ROA 334:150:12 to 153:8; ROA 334:154:1-7; ROA 334:159:16-21; and ROA 334:233:20 to 234:2. Based on such support, the COL 216 is not clearly erroneous and thus is not improper.

The result is the same for COL 217. COL 217 is a conclusion that Waikapu Stream may not have had continuous mauka to makai flows and that even if mauka to makai flow had existed, recruitment of amphidromous species may not have occurred due to the big delta between Waikapu Stream and the ocean. How this COL violates statute or constitution is not stated for an obvious reason; the COL is a mixture of fact and law and thus must be affirmed unless clearly erroneous. If there is support for the conclusion in the record, this Court will not substitute its judgment for that of the Commission. As with COL 210, there is ample record

support for COL 217, even if closely reviewed. See, ROA 156:09815 and 09819-09820; ROA 306:210:15-21; ROA 307:28:16-21; ROA 62:03269-03270; and ROA 334:235:9 to 236:12. The existence of this support dictates a finding that COL 217 is not clearly erroneous.

COL 245 is a reiteration of the decision making process under which the Commission determined the restorative potentials of Iao and Waikapu Streams were severely limited and minimal to none respectively. Such a conclusion likewise is a mixture of fact and law that must be affirmed unless clearly erroneous. The Community Groups contend the conclusion is flawed because it is not supported by basic facts. As COL 245 is based on COLs 205 to 217, as those COLs are supported by the record, and as this Court will not substitute its judgment for that of the Commission if a conclusion has support in the record, COL 245 likewise is proper.

COLs 259 and 260 are found in Section G.5.c of the Commission Decision. That subsection the conclusions reached by the Commission on whether and how the existing IIFSs should be amended. COLs 259 and 260 reiterate the analysis and conclusions stated by the Commission in COLs 208, 209, 210, 216, 217 and 245. No additional arguments are raised by the Community Groups as to why COLs 259 and 260 are clearly erroneous. As with the COLs on which COLs 259 and 260 are based, the COLs show that the Commission complied with statute and constitution rather than violated the same. Likewise, the record supports the conclusions and as such COLs 259 and 260 are proper unless this Court determines they are clearly erroneous. Given the substantial support in the record for the underlying findings, COLs 259 and 260 are not clearly erroneous.

- b. The Amended IIFS for Waihee River and Waiehu Streams COLs.

In the next series of COLs attacked by the Community Groups, the Commission is taken to task on its analysis and amendment of the IIFS for Waihee River and North and South Waiehu Streams. Specifically, COLs 246, 247, 248, 249, 250, 251, 252, 253, 254 and 261 are claimed to be in violation of constitution and statute by employing a backward and minimalist approach to stream restoration. (Community Groups Opening Brief, Point of Error 2, p. 14). As with the attack on the Commission’s COLs analyzing and explaining why the IIFS for Iao and Waikapu Streams should not be amended, the Community Groups attack on the amendment of the IIFSs for Waihee River and North and South Waiehu Streams fails because these COLs are not clearly erroneous.

The COLs in question are stated in Section G.5 of the Commission Decision which is its analysis and amendment of the IIFS for each stream. The Water Code requires the Commission to weigh 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 restricting of such uses. HRS § 174C-71(2)(E).

The constitution and Code, therefore, do not differentiate among “protecting,” “enhancing,” and “restoring” public instream values, or between preventing and undoing “harm” thereto. To be sure, in providing for instream uses, the Commission must duly consider the significant public interest in continuing reasonable and beneficial existing offstream uses. See, HRS § 174C-71(1)(E), 2(D); Debates, in 2 Proceedings, at 870 (statement by Delegate Waihee) (explaining that the language in article XI, section 7 requiring the legislature to “assur[e] appurtenant rights and existing riparian and correlative uses” enunciates a policy of protecting existing uses of, among others, “the small taro farmer as well as the agricultural users”). By the same token, the Commission’s duty to establish proper instream flow standards continues notwithstanding existing diversions.

Waiahole, supra at 150, 9 P.3d at 462. What is clear from the constitution and the Water Code is

that the Commission cannot give greater weight to protection than to restoration or give greater weight to prevention of harm than to undoing of harm. The Commission is tasked with reviewing instream and noninstream needs and uses, weighing the importance of each without differentiation, and establishing proper instream flow standards. If the COLs meet that review, this Court must affirm the Commission's conclusions.

The COLs of which the Community Groups complain are summarized as:

- 246 A statement that competing expert opinions on amending the IIFS were reviewed and that the IIFS proposed by the parties were reviewed and rejected, based on COLs 166 to 201.
- 247 A statement that the balancing of instream and noninstream uses must evaluate average irrigation requirements for noninstream use as well as high irrigation requirements for noninstream use
- 248 A statement that practical alternatives for kuleana lands, for WWC uses, and for HC&S Well 7 would be subtracted from the total reasonable noninstream uses, resulting in a demand of 38.74 to 39.66 mgd when noninstream requirements would be at their highest
- 249 A statement that stream flow and irrigation requirements correlated because when stream flows decreased, irrigation requirements increased
- 250 A statement that setting the IIFS for Waihee River and Waiehu Streams at the first phase controlled flow when balanced against streams flows that exist one-half the time would allow noninstream uses to be met half of the time.
- 251 A statement that setting the IIFS for Waihee River and Waiehu Streams at the second phase controlled flow when balanced against streams flows that exist one-half the time would not allow noninstream uses to be met for a significant portion of the time
- 252 A statement that setting the IIFS for Waihee River and Waiehu Streams at the third phase controlled flow when balanced against streams flows that exist one-half the time would not allow noninstream uses to be met at any time
- 253 A statement that setting the IIFS for Waihee River and Waiehu Streams at the first phase controlled flow when balanced against stream flows that exist ten percent of the time would allow noninstream uses to be met but setting the IIFS at the second or third phase controlled flows would not allow noninstream uses to be

met

- 254 A conclusion that adopting the first phase controlled flow as the IIFS for Waihee River and Waiehu Streams would provide the best balance between instream values and noninstream uses and that HC&S Well No. 7 would not be a reliable source throughout the year
- 261 A conclusion that the most credible proposal for amending the IIFS for Waihee River and Waiehu Streams is the first phase controlled flow a) as it provides the best balance between instream values and noninstream uses, and b) as it provides the only viable IIFS when stream flows are low and all available practical alternatives are in use

(ROA 192:12895-12899).

A fair reading of the foregoing COLs establishes that the Commission complied with and did not violate the constitution or the Water Code. The Commission did not differentiate between protection or restoration. The Commission did not differentiate between preventing harm and undoing harm. The Commission did not provide a preference between instream use and noninstream use.

What the Commission did was to determine the stream flow (supply), determine the beneficial noninstream use (demand), and examine those factors against expert's opinions and the parties proposals which were found to be lacking. The Commission went on to examine the instream and noninstream factors against a flow level that was proposed to provide data on stream hydrology and determined that flow level would result in the best balance of the competing interests. That analysis and that result is precisely that which the constitution and the Water Code demand of the Commission.

Instead of following the constitution and the Water Code, the Community Groups ask that one interest (instream values) is favored over other interests (noninstream uses). The Community Groups argue that the Commission must differentiate and favor undoing harm over

prevention of harm and must favor the instream uses over noninstream uses, including those noninstream uses that are protected under the public trust doctrine. There is no support for that position in the constitution, the Water Code or case law. The request to promote self interests over the statutory balancing mandate must be rejected.

c. The Failure to Protect Native Hawaiian Rights FOFs.

The Community Groups attack five FOFs and one COL on the basis that they violated the constitution. Specifically, the Community Groups claim that FOF 293, 294, 332, 335 and 336 and COL 220 failed to protect Native Hawaiian rights to the extent feasible and therefore violated the constitution. (Community Groups Opening Brief Point of Error 3, p. 14).

FOFs (and COLs presenting facts and law) are reviewed to determine if they are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record. HRS § 91-14(g)(5) and Alvarez v. Liberty House, Inc., supra. When the FOFs are reviewed under the applicable standard, the attack fails.

FOF 293 states that about 6.84 mgd currently is delivered to kuleana lands. (ROA 192:12764). The source for that finding was Table 7: Total Water Deliveries to All Users, 2005 and 2006. (ROA 192:12929). The Commission totaled the amounts delivered to kuleana land by WWC, HC&S and the Community Groups as determined in FOF 227. Id.

FOF 227, to which no objection was made by the Community Groups, was a compilation of FOFs 222 to 226, to which no objections were made by the Community Groups either. (ROA 192:12753-12754). Support for the FOFs is contained in ROA 74:04309-04311; ROA 186:12115; ROA 68:03762-03765; ROA 58:02809; ROA 68:03766-03784; ROA 138:08686-08688; ROA 90:05243-05254; ROA 148:09025-09031; and ROA 320:32:8 to 33:9. It is not possible to state that FOF 293 is clearly erroneous in view of the evidence of the whole

record.

Likewise, attack on FOF 294 fails. FOF 294, which summarized the Community Groups proposed FOFs D-1 to D-458, stated that nearly 50 persons who were connected with 135 acres of land, of which 45 acres were or were intended to be cultivated, wished to receive stream waters. (ROA 192:12764). The Community Groups fail to identify for this Court where this FOF is contradicted in the record.

The best the Community Groups can do is argue that “many other ‘ohana receive water besides those who testified.” Community Groups Opening Brief, p. 34. As there is no specificity on the number, no specificity on the acreage connected with that number, and no specificity on the proposed uses connected with the “many other ohana,” there is no reliable or probative evidence upon which this Court can state that the Commission’s FOF 294 was clearly erroneous.

The Community Groups contend FOF 332 is improper because the acreage of the kuleana lands was understated. As with FOF 294, the Community Groups base the objection on a claim that “many other ohana receive water besides those who testified.” *Id.* The Community Groups must establish that FOF 332 is clearly erroneous based on the reliable and probative evidence in the record. A statement that there are “many other ohana” is neither reliable nor probative. The testimony of witnesses stating the acreage with which they are connected, the acreage that they use and the acreage they propose to use is reliable and probative. (ROA 74:04309-04311; ROA 186:12115; ROA 68:03762-03765; ROA 58:02809; ROA 68:03766-03784; ROA 138:08686-08688; ROA 90:05243-05254; ROA 148:09025-09031; ROA 320:32:8 to 33:9). Argument does not create a clearly erroneous finding; the record supports the finding of the Commission and the Community Groups contention fails.

FOF 335 and 336 were claimed improper by the Community Groups on the basis that the Commission “dismissed [the community witnesses] requests for more water.” Community Groups Opening Brief p. 34. FOF 335 stated that WWC kuleana users complained of inadequate water. FOF 336 stated that the USGS study observed numerous return flows and leakages so that substantial losses through the ditches was likely occurring. It is unclear to WWC how those findings amount to a dismissal of requests for more water from community witnesses.

Rather, FOF 335 was a finding based on the reliable and probative evidence in the record that 6.84 mgd was delivered to 45 acres that were or were intended for use on kuleana lands. (ROA 74:04309-04311; ROA 186:12115; ROA 68:03762-03765; ROA 58:02809; ROA 68:03766-03784; ROA 138:08686-08688; ROA 90:05243-05254; ROA 148:09025-09031; ROA 320:32:8 to 33:9). The simple mathematics of dividing the number of gallons by the number of acres resulted in the number of gallons per acre in FOF 335. There is no reliable or probative evidence in the record that this calculation is clearly erroneous. Similarly there is no reliable or probative evidence in the record on the number of “many other ohana.” It would be clearly erroneous for the Commission to make any finding based on the speculation as requested by the Community Groups.

Finally, the Community Groups object to COL 220, presumably on the ground that it violates the constitution. COL 220 restates the findings of the amount of water delivered to kuleana lands, states the consumptive requirements for the production of kalo lo`i, and determined the net consumptive use for the kuleana lands. (ROA 192:12888). The Community Groups do not point this Court to any statute, to any constitutional provision, or to any part of the record that states the consumptive requirement conclusion violates statute or constitution or

is clearly erroneous. Again, the Community Groups objected to a conclusion with which they do not agree and contend that the Commission erred by refusing to inflate the noninstream use (demand) based on conjecture. While the Community Groups may not agree with a conclusion, unless that conclusion violates the Water Code, the constitution, or is clearly erroneous, the conclusion must stand.

d. The Burden of Proof FOFs and COLs.

Finally, the Community Groups raise as point of error 4 that the Commission failed to require noninstream users to prove that the uses were the “maximum reasonable-beneficial use.” Community Groups Opening Brief, pp. 14 - 15.

The point of error reflects an attempt to incorporate water use permit application burdens in an IIFS amendment proceeding. Section 174C-71(2), HRS, imposes no such burden on any party or on the Commission. As recognized in Waiahole, supra, the ultimate burden of justifying IIFS rests with the Commission. Id. at 153, 9 P.2d at 465.

The Community Groups base this position on a directive to the Commission in In Re Water Use Permit Applications, 105 Haw. 1, 93 P.3d 643 (2004) (“Waiahole II”). Such reliance is misplaced. The directive dealt with a burden of proof concerning practicable alternatives in review of a permit application. Id. at 15-17, 93 P.3d at 657-659. (Emphasis added). The instant matter does not involve a permit application; that is and will be the subject of the surface water use permit application determinations that are in process but are not included in this proceeding.

Review now turns to the COLs and FOFs to which the Community Groups object, applying the proper standards that exist in an IIFS amendment matter. Several of the COLs were reviewed previously and the arguments stated above are incorporated by reference with respect

to COLs 247, 248, 249, 250, 251, 252, 253 and 254. The remainder which are COLs 92, 106, 107, 108, 225, 229, and 230 together with FOF 260 and 500, will now be examined.

COL 92 concluded that certain water requirements for fields under cultivation by HC&S would require additional water because the company that provided an alternative source of water for irrigation ceased operations. (ROA 192:12847). As this is a COL which involved fact and law, it is reviewed under the clearly erroneous standard; in other words, is the COL clearly erroneous in light of the reliable probative evidence. The record establishes that the alternate source of water no longer exists. The water came from a pineapple canning operation which ceased further business. (ROA 192:12758). No entity resumed the canning operation. (ROA 320:161:20 to 162:16 and 174:20 to 175:1). As such, the source of water was no longer available. The COL determination to not include an alternate source of water that no longer exists is not clearly erroneous.

COLs 106 and 230 (and FOF 500), concern HC&S Well No. 7. When reviewed under a clearly erroneous standard, the COLs are proper. The reliable and probative evidence established that Well No. 7 could not be operated on a consistent and sustained basis. FOF 499, to which the Community Groups did not object, reflected that HC&S did not have adequate electrical power to run the pumps on Well No. 7 on a sustained basis. (ROA 192:12804). The Community Groups have not identified any reliable and probative evidence to establish that this conclusion is clearly erroneous. As the COL is not clearly erroneous based on the reliable and probative evidence as a whole, COL 106 is proper.

As to FOF 500, that finding states that increased pumping of Well No. 7 would exacerbate the degree to which sustainable yield of the Kahului aquifer is being exceeded. (ROA 192:12804). The Community Groups contend that the finding “is not evidence, but is

pure argument.” Community Groups Opening Brief p. 41. The contention ignores the record support of the finding based on testimony of a witness from the County (the Director of the County Water Department) and Exhibits offered by various parties. See, ROA 311:11:20-22 and 47:19 to 48:3; ROA 122:07045-07046; ROA 30:04679. To establish that a FOF is clearly erroneous, the objecting party must point to reliable and probative evidence in the record showing the finding is clearly erroneous or point out the lack of any evidence to support the finding. Campbell v. DePonte, 57 Haw. 510, 559 P.2d 739 (1977). The Community Groups point to no evidence and instead resort to rhetoric. Such attempt fails.

COLs 107 and 108 are conclusions concerning recycled County wastewater. (ROA 192:12850). The Community Groups argue that these COLs are wrong because they violate the constitution. (Community Groups Opening Brief pp. 46-47). As with the Community Groups other objections, the focus is not on an IIFS amendment proceeding but on a permit proceeding. Nothing within HRS § 174C-71(2) mandates the Commission to consider the practicability of recycled water. Likewise, nothing within the public trust doctrine requires the Commission to consider the practicability of recycled water. Moreover, as the COLs contain a mix of fact and law, they are reviewed under the clearly erroneous standard.

The Commission considered the use of recycled county wastewater in COLs 107 and 108. The conclusions reached by the Commission were based on FOFs 501 and 502, neither of which were made the subject of a point of error by the Community Groups. Both FOFs were supported by reliable and probative evidence in the record. The Community Groups have not pointed to any evidence in the record that is contrary and limit their “support” to an argument that the Commission has a “comprehensive trustee role to ensure these water resources do not go to waste,” (Community Groups Opening Brief p. 47). Argument, without more, does not

establish that a conclusion is clearly erroneous. The Commission considered the use and reached a conclusion with which the Community Groups did not agree. Such disagreement, without more, does not render a COL invalid.

Finally, the Community Groups contend that COLs 225 and 229, which are conclusions concerning WWC and HC&S system losses, violate constitution or statute. These conclusions are based on FOFs 375, 425 and COLs 122 and 123 to which the Community Groups did not object. As such, the findings upon which the COLs are based are not clearly erroneous.

The Community Groups are therefore left with establishing that the COLs violate statute or constitution. The sole support for their contention of a violation deals with the burden of proof that is applied in a permit case. As previously noted, in a proceeding to amend an IIFS, the permit application burdens of proof do not apply. Nothing within HRS § 174C-71(2) mandates that the Commission consider or not consider system losses. Likewise nothing within the public trust doctrine mandates that the Commission consider or not consider system losses. The Community Groups point to no part of the record that establishes the COLs are clearly erroneous. The Community Groups again failed in meeting their burden.

e. The Decision and Order is Not Arbitrary or Capricious.

The decision to amend an IIFS sets a minimum flow rate that is to be found in a stream until an IFS is established. The Water Code requires the Commission to weigh 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 restricting such uses. HRS § 174C-71(2)(E). The Commission is given broad powers and jurisdiction to hear disputes regarding water resource protection, water permits, and constitutionally protected

water interests. HRS §174-10. The final decision on any matter under its jurisdiction is to be made by the Commission. Id.

When reviewing the determination of an administration agency the court must decide whether the legislature granted that agency discretion to make the determination being challenged. See, Paul's Elec. Service, Inc. v. Befitel, supra. If the legislature granted the agency the power to act, the agency's decision will not be overturned unless it is arbitrary, capricious or characterized by a clearly unwarranted abuse of discretion. In reviewing an agency's decision affecting public trust resources, the presumption of validity of the decision will apply.

Waiahole, supra at 97, 9 P.3d 409 (2000).

The Community Groups do not maintain that the decision was arbitrary, capricious or characterized by a clearly unwarranted abuse of discretion. They maintain that the decision violated constitutional and statutory mandates in protections. (Community Groups' Opening Brief, page 16). In essence the Community Groups disagree with the conclusions and findings, however, under either the right/wrong standard or the clearly erroneous standard (as mixed questions of fact and law) the findings and conclusions must stand. The record provides more than adequate support for the findings and conclusions and clearly the court is not to substitute its judgment for that of the Commission.

The decision of the Commission does not involve arbitrary or capricious actions and the decision is provided with clarity and foundational support to allow the reviewing court to understand the foundation for the decision. The decision should stand as rendered.

f. Summary on Community Groups' COL/FOF Objections.

As noted above, the Community Groups object to a number of COLs and FOFs. However, the objections are based on a disagreement with the result reached and not based on

violations of statute or constitution and are not based on reliable and probative evidence that establishes the findings are clearly erroneous. Argument and rhetoric alone does not render improper COLs or FOFs. The fundamental truth is that this matter is not a permit application proceeding; it is a proceeding in which the Community Groups asked the Commission to amend the existing IIFS in five streams. The Commission was mandated by statute to balance the instream values with noninstream uses on a macro level. The Community Groups seek to import into these proceedings the surface water permit application process which is pending and not yet complete. The boundaries are clear and the objections are not well taken in this proceeding.

2. OHA COL/FOF Contentions.

OHA objected to the Decision and Order and a single COL. COL 230 was also the subject of an objection by the Community Groups and involves the ability of HC&S to use Well No. 7 as an alternative source.

a. COL 230 is Not Clearly Erroneous.

OHA, like the Community Groups, contends that the process to amend an IIFS incorporates burdens on noninstream users to show that alternate sources are not available. As noted in section D.1.d. above (and which arguments are incorporated by reference), no such burden is placed on the Commission or any participant in a proceeding by which an IIFS is established or amended.

Nevertheless, under the standard of review applied to a COL that presents a mixed question of law and fact, COL 230 is proper. Unless COL 230 is clearly erroneous in light of the reliable and probative evidence in the record, it must be affirmed.

COL 230 is based on COLs 103, 104, 105, 106 and 107 to which OHA did not object. COL 230 is also based on FOFs 107, 108, 215, 494, and 495 to which OHA did not

object.

Essentially, OHA argues that COL 230 is clearly erroneous by pointing to prior use of Well No. 7 by HC&S. However, as noted above, the Court gives deference to an administrative agency's COL which is a mixture of fact and law. OHA may disagree with the COL but in the absence of a showing by reliable and probative evidence that the COL is clearly erroneous, the COL must be upheld. It is difficult to state that OHA met that heavy burden when it did not object to or address the COLs and FOFs upon which COL 230 was based.

b. Contended Failure to Consider Kuleana Rights.

OHA contends that the Commission failed to consider kuleana rights in its weighing of instream values with noninstream uses in deciding whether to amend the IIFS. The basis for OHA's contention is that kuleana rights are property rights, referencing the same as appurtenant rights (OHA Opening Brief, p. 22).

While that distinction has application in the water use permit application process, it is not applicable in the IIFS process. Appurtenant rights are not adjudicated in the IIFS process. (ROA 192:12833 and 12848). With three exceptions, kuleana users take from the ditch system and not from the streams. (ROA 192:12921). Table 1 shows each of the kuleana systems for stream source that feeds a system, the ditch source that feeds the system, and the reservoir source that is utilized by the system. (ROA 192:12921). There are three users that do not take from the ditch system: Cerizo, Dewey and Pellegrino. (ROA 192:12921). Cerizo takes from the South Waiehu source (ROA 68:03762-03763), Dewey takes from the Iao source (ROA 68:03766-03784), and Pellegrino takes from the Waikapu source (ROA 58:02809). Only three of the kuleana systems divert water directly from Na Wai Eha streams; the other fourteen are connected to one of the primary distribution systems. (ROA 186:12016-12043; RA 68:03762-

03763; ROA 68:03766-03784; and ROA 58:02809). Some kuleanas use stream water for domestic and other users. (ROA 58:02807-02815). As noted in the next section, the Commission did not ignore but in fact considered the rights of those holding Kuleana lands in acting on the IIFS Petition.

c. The Decision and Order is Not Arbitrary or Capricious.

OHA also objected to the decision and order of the Commission. In attacking the decision and order, OHA maintains that the conclusion lacks a requisite clarity and that the Commission failed to demonstrate that it properly exercised the discretion vested in it by the legislature.

OHA contends that the discretion was not properly exercised because the Commission failed to appropriately consider Well No. 7 as a practical alternative for HC&S and because the Commission disregarded evidence that Native Hawaiians' ability to exercise their traditional and customary rights and practices were limited by the lack of fresh water flowing in the streams and in the near shore waters. (OHA Opening Brief, page 44).

The arguments concerning Well No. 7 were addressed above.

OHA acknowledges that the legislature granted the Commission discretion to make an IIFS determination and that the legislature granted the Commission broad powers to hear issues regarding resource protection and allocation.

Abuse of discretion is a decision by an administrative agency which has no foundation of fact or law. The boundaries of an agency's discretion are established by the legislature. Morgan v. Planning Dept., County of Kauai, 104 Haw. 173, 86 P.3d 982 (2004). The statutory boundaries assist a reviewing court in defining whether the administrative agency has abused its discretion. Paul's Elec. Service, Inc. v. Befitel, supra.

The Commission was given broad powers and exclusive jurisdiction by the legislature in matters involving water. So long as the Commission Decision contains findings and an analysis of the decision that allows a reviewing court to follow the analytical process, the Commission Decision will not be arbitrary, capricious, or characterized by an unwarranted exercise of discretion.

The record provides more than adequate support for the findings of fact and the Commission Decision sets forth the analytical process employed by the Commission.

A determination of appurtenant rights is not the subject of an amendment of an IIFS nor the practicality or impracticality of alternative sources a matter for resolution in an IIFS amendment proceeding. These issues will be entertained and resolved in surface water use permit proceedings.

In receiving and considering the evidence, the Commission did consider Native Hawaiian rights. The following are some of the portions of the Commission Decision in which these items were reviewed and considered.

- | | |
|---------------|--|
| FOF 220 - 237 | The Commission made findings on the locations, numbers, and amounts of waters used within seventeen kuleana ditch/pipe systems |
| FOF 293 - 304 | The Commission made findings on possible future uses of water for kuleana lands and wetlands restoration which would include associated cultural resources |
| FOF 318 - 339 | The Commission made findings on the uses of water for kalo cultivation |
| COL 19 - 20 | The Commission recognized that traditional and customary rights cannot be abandoned |
| COL 54 - 60 | The Commission reviewed facts and analyzed the amount of water necessary for use on kuleana lands |

COL 111 - 113	The Commission reviewed facts and analyzed the use of water on kuleana lands and for resource preservation and traditional and customary Hawaiian practices
COL 185 - 195	The Commission reviewed the IIFS proposed by OHA and analyzed that proposed IIFS in light of the facts and the law
COL 219	The Commission analyzed the reasonable noninstream use on kuleana lands
COL 240	The Commission analyzed the economic impact on traditional and customary practices and kuleana lands

OHA has not claimed that any of these FOFs are clearly erroneous or that any of these COLs are either wrong or clearly erroneous. The Commission Decision is based on all of the FOFs and COLs; it provides a reasonable assessment of the existing uses and future needs and identifies the standards and protocols for the protection of those rights. The Commission addressed Native Hawaiian/Kuleana rights throughout the Commission Decision.

The Commission quantified the evidence with regard to kuleana use. The demands were analyzed and water allocated to satisfy the demands. Following the IIFS decision, the Commission agreed to a stipulation of the parties to defer the IIFS for South Waiehu Stream because of the impact on kuleana users from the amended IIFS. (ROA 206:14501-14510).

The IIFS proceedings calculate reasonable assessments of the supply and demand factors. It is a macro approach to a stop gap measure. The surface water use permit proceedings take the next step to a micro level. In the surface water use permit proceedings, kuleana users and Native Hawaiians will have the opportunity to request use permits for the instream and non instream uses. At that time, a specific quantification of such rights will take place and the protection of those rights will follow from such determinations. Assuming that the use application is for a use protected by the public trust doctrine, such uses will have a priority over

a non-public trust use.

The decision and order of the Commission did not involve arbitrary or capricious actions of findings and the decision is provided with clarity and foundational support to allow the reviewing court to understand the decisions reached. As such the decision as rendered should stand.

E. Incorporation of Arguments of Appellees HC&S and the Commission.

To the extent not inconsistent with the arguments made by WWC, the arguments asserted by HC&S and the Commission are incorporated by reference and adopted by WWC.

IV. RELEVANT PORTIONS OF CONSTITUTION, STATUTES AND ADMINISTRATIVE RULES

HRS § 174C-71. Protection of instream uses

The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

* * *

(2) Establish interim instream flow standards;

- (A) 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;
- (B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;
- (C) 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 uses of water and any other relevant and reasonable information required by the commission;
- (D) 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 noninstream purposes, including the economic impact of restricting such uses;
- (E) The commission shall grant or reject a petition to adopt an interim instream flow

standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;

- (F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;

HAR § 13-169-40. Petition to adopt interim instream flow standard.

- (a) Pending the establishment of an instream flow standard for any stream(s) or stream reach(es), any person, with proper standing, may petition the commission to adopt an interim instream flow standard for such stream(s) or reach(es).
- (b) The petition to adopt an interim instream flow standard shall set forth data and information concerning the need to protect and conserve beneficial instream use(s) of the stream(s) or stream reach(es), and any other relevant and reasonable information required by the commission.
- (c) 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.
- (d) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general interim instream flow standard applicable to all streams within a specified area.
- (e) Interim instream flow standards may be adopted by the commission without the necessity of a public hearing.

HAR § 13-169-41. Review period.

The commission shall grant or reject a petition to adopt an interim instream flow standard under this chapter within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner, subject to the approval of the commission.

HAR § 13-169-43. Termination of interim instream flow standard.

- (a) Any interim instream flow standard adopted under this subchapter shall terminate upon the establishment of an instream flow standard for the stream(s) or stream reach(es) for which the interim instream flow standard was adopted.
- (b) Interim instream flow standards are by their nature temporary and subject to change. Consequently, any reliance upon the interim standards shall be at the water user's own risk.

V. CONCLUSION

The establishment or amendment of an IIFS is by its nature a temporary and immediate act. Unfortunately, the record in this matter shows that there was no immediate

action. Instead the Commission, and the participants, who desired to find a short-term fix, became embroiled in a labyrinth. . . the forest was lost for the sight of the trees, primarily due to a lack of clear cut direction.

There is no clear cut paradigm for an IIFS determination. The process should not result in pitting environmental values against economic values with on side clearly winning and the other end clearly losing.

Rather the community (in this matter, Maui) requires healthy, nourishing streams and sustaining economic sectors to support its population. The paradigm, if one exists, is a balanced community. Policies and regulations that strengthen the environment and enhance and stabilize its economic sectors are necessary and proper. The community needs and demands both.

The IIFS determination must be a stabilizing force that acknowledges both imperatives and serves them until the next phase (an IFS) is addressed, determined and implemented.

It is obvious that stream flows demand attention and restoration. But equally important is a recognition of the importance of agriculture, both large scale and diversified, to Maui. For agriculture to survive, there must be a reliable and cost effective supply of water. For the streams to survive, there must be a reliable instream flow.

If the IIFS objective is to not favor one component over the other, appropriate support for each must be given to allow each to grow, remain healthy, and prosper. The IIFS paradigm is not to create a tipping point of one over the other that could lead to a demise of either. Rather the result must be an appropriately considered even scale that is balanced.

By its nature, the IIFS process is a collective assessment of the instream and

noninstream needs. The declaration of policy in the Water Code relates that the Water Code shall be liberally interpreted to obtain maximum beneficial use of water provided that adequate protection is given to the preservation and enhancement of the waters. HRS § 174C-2(C).

The balancing template has been refined by court dictates on the public trust doctrine. However, the essence of the conundrum lives on. What is the appropriate balance of the supply and demand factors.

Here the Commission created an exhaustive record of data. The IIFS proceeding under statute is intended to be quick and temporary. The IIFS is to be established or amended within 180 days of the filing of the petition. An IIFS is clearly a short term, stop gap measure. In this matter the IIFS process has been anything but short term. The IIFS Petition was filed in July, 2004 and took 6 years to complete. The adversary process did not assist the Commission in meeting its legislative mandate of “immediate applicability.” HRS § 174C-3.

Despite the time taken, the Commission duly considered the facts, applied the law as it understood the law, and came to an IIFS determination. Challenges of failures to consider certain uses or users and attempts to apply water use permit application criteria are not well founded. The Commission Decision is a first step, temporary standard, and should be considered as such, consistent with the clear directive in the Water Code. It is a regulation that serves both ends of the equation. What is needed next are measures of responsiveness and accountability from both the private and public sectors to make the IIFS work as the temporary measure and to move on to the next phase, establishing an IFS.

The Court should affirm the Commission Decision so that the IFS process may be initiated.

VI. STATEMENT OF RELATED CASES

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; CAAP 10-0000161, pending in the Intermediate Court of Appeals of the State of Hawaii.

DATED: Kahului, Hawaii, July 11, 2011.

/s/ Paul R. Mancini
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