

No. 30603

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII
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Intermediate Court of Appeals
30603

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| ʻĪao Ground Water Management Area) | Case No. 2015-01 2015-01 |
| High Level Source Water Use) | 02:31 PM |
| Permit Applications and) | APPELLEE/CROSS-APPELLANT |
| Petition to Amend Interim Instream) | COUNTY OF MAUI, DEPARTMENT OF |
| Flow Standards of Waiheʻe, Waiehu,) | WATER SUPPLY'S OPENING BRIEF; |
| ʻĪao, & Waikapū Streams) | CERTIFICATE OF SERVICE |
| Contested Case Hearing) | |

**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY'S OPENING BRIEF**

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**APPELLEE/CROSS-APPELLANT COUNTY OF MAUI, DEPARTMENT OF
WATER SUPPLY'S OPENING BRIEF**

COMES NOW Appellee/Cross-Appellant COUNTY OF MAUI, Department of Water Supply ("DWS" or "County"), by and through its attorneys, PATRICK K. WONG, Acting Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and JON M. VAN DYKE, Special Counsel, and hereby submits its Opening Brief, as follows:¹

I. CONCISE STATEMENT OF THE CASE

This cross-appeal is from a decision issued by the Commission on Water Resource Management ("Commission" or "Water Commission") following a contested case arising out of the designation of the Iao aquifer on Maui as a Groundwater Management Area pursuant to § 174C-41 et seq., Haw. Rev. Stat.

The contested case, governed by § 174C-60, Haw. Rev. Stat., addressed two separate issues. The Commission ruled on the Water Use Permit Applications for allocations of water from the "high level" portion² of the Iao aquifer submitted by DWS, Hawaiian Commercial & Sugar Company ("HC&S"), and Wailuku Water Company pursuant to §§ 174C-48 through 174C-54, Haw.

¹ All references to the Court's Electronic Record on Appeal are designated as "ERA" followed by the document number assigned to the electronic document, followed by the Bates-numbered page(s) and any additional identifying information, such as the date of a hearing transcript or the number of a Finding of Fact or Conclusion of Law.

² The water sources drawn from the "high level" portion of the Iao aquifer include tunnels such as DWS's Iao Tunnel (State Well No. 5332-02) and conventional wells such as DWS's Kepaniwai Well (State Well No. 53320-05.) See ERA Doc. # 192, Bates p. 12722, Finding of Fact No. 2; Bates pp. 12723 - 12724, Finding of Fact Nos. 16 and 17; Bates pp. 12743 - 12744, Finding of Fact Nos. 138, 150 - 153. The Commission had previously acted on Water Use Permit Applications for wells drawing groundwater from the caprock and basal portions of the aquifer. ERA Doc. # 192, Bates p. 12724, Finding of Fact Nos. 14 and 15.

Rev. Stat. The Commission also acted on a petition filed by Appellants Maui Tomorrow Foundation, Inc. and Hui O Na Wai Eha pursuant to § 174C-71, Haw. Rev. Stat. to amend the Interim Instream Flow Standards ("IIFS") for the Waihee River, and the Waiehu, Iao, and Waikapu Streams, which are known collectively as "Na Wai Eha."

Appellee/Cross-Appellant DWS participated in both phases of the contested case. DWS had standing as the municipal water purveyor and also as an applicant for Water Use Permits for DWS's Iao Tunnel and Kepaniwai Well. ERA Doc. # 292, 6/19/2006 Standing Hearing Transcript, pp. 11:12-15, 21:25 – 22:14, 30:13-19; see ERA Doc. # 192, Bates p. 12723, Finding of Fact No. 10.

Following conclusion of the contested case, the Commission approved Water Use Permits from the Iao aquifer's high level sources for intervenors DWS and HC&S, but denied the Water Use Permit Applications sought by intervenor Wailuku Water Company for some of the same sources. ERA Doc. # 192, Bates pp. 12899 – 12903.

The Commission also ruled on the petition to amend the Interim Instream Flow Standards for the Na Wai Eha streams. The Commission determined that some offstream uses, such as the County's use of surface water to serve the municipal water supply, were "reasonable and beneficial". ERA Doc. # 92, Bates p. 12840, Conclusion of Law No. 62. Ultimately, the Commission amended the Interim Instream Flow Standards for the Waihee River and for North and South Waiehu Streams by reducing existing diversions

from those sources to achieve a higher volume of water in certain reaches and at the mouth of those streams. ERA Doc. # 192, Bates pp. 12904 – 12905. The Commission did not amend the existing IIFS for Iao Stream or for Waikapu Stream, with the result that no additional water was required to be returned to those two streams. Id.

Timely appeals were filed by Petitioners Maui Tomorrow Foundation, Inc. and Hui O Na Wai Eha, ERA Doc. # 202, Bates pp. 13965 et seq., and by Intervenor Office of Hawaiian Affairs ("OHA"), ERA Doc. # 202, pp. 13964 et seq. A timely cross-appeal was filed by Applicant/Intervenor County of Maui, Department of Water Supply. ERA Doc. # 202, Bates pp. 13968 et seq. No notices of appeal or cross-appeal were filed by the remaining parties, Applicants/Intervenors HC&S and Wailuku Water Company.

II. CONCISE STATEMENT OF THE POINTS OF ERROR

The County filed a cross-appeal for the purpose of seeking clarification of certain language in the Water Commission's Findings of Fact, Conclusions of Law, and Decision and Order that suggest that the Interim Instream Flow Standards are to be determined without consideration of public trust offstream uses. DWS raised the issue below in the County's exceptions to the Hearing Officer's recommended decision.³ Specifically, DWS seeks clarification regarding the language in the Commission's Conclusion of Law Nos. 18, 173-175, 183 and 204, as explained below in Section V.

³ The Hearing Officer's recommended decision is found in the ERA Doc. # 188, Bates pp. 12117-12335. The County's exceptions to the Hearing Officer's recommended decision are found in ERA Doc. # 188, Bates pp. 12524-12536.

III. STANDARD OF REVIEW

Judicial review of a decision and order of the Commission on Water Resource Management is governed by Chapter 91, Haw. Rev. Stat. In reviewing the record, this Court may affirm, reverse, or modify the decision of the Commission, or may remand the case with instructions for further proceedings on the ground that the Commission's findings, conclusions, decisions, or orders are:

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

In the Matter of Water Use Permit Applications . . . for the Waiahole Ditch Combined Contested Case Hearing (Waiahole I), 94 Hawai'i 97, 118-119, 9 P.3d 409, 430-431, (2002), citing GATRI v. Blane, 88 Hawai'i 108, 112, 962 P.2d 367, 371 (1998); Poe v. Hawai'i Labor Relations Board, 87 Hawai'i 191, 194-95, 953 P.2d 569, 572-73 (1998).

The Commission's Findings of Fact are reviewed under the "clearly erroneous" standard. The Commission's Conclusions of Law are reviewed to determine if the Commission's decision was in violation of constitutional or

statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law. Id., citing Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997) (citations omitted); §§ 91-14(g)(1), (2), and (4), Haw. Rev. Stat.

IV. INTRODUCTION AND FACTUAL BACKGROUND

After receiving and considering extensive written and oral testimony and documentary evidence, the Hearing Officer recommended that DWS's Water Use Permit Applications be granted "for the existing use of 1.042 mgd⁴ for the Kepaniwai Well (Well No. 5332-05) and 1.359 mgd of the 'Iao Tunnel (Well No. 5332-02), subject to the standard conditions for a ground water permit." ERA Doc. # 188, Bates p. 12315. The Commission adopted the Hearing Officer's recommendation. ERA Doc. # 192, Bates p. 12914.

DWS relies on the water from these two high level sources to supply water for the residences and businesses served by the County's Central Maui System. ERA Doc. # 192, Bates p. 12777, Finding of Fact No. 364. The County's applications for these permits were timely, and were deemed to be complete in May 2004. ERA Doc. # 80, Bates pp. 4581-4581A, ¶ 11; id., Bates pp. 4715 - 4723, Ex. B-17. The Commission found that the County's use of the water from these sources met the legal criteria established in §174C-49, Haw. Rev. Stat., which require that the requested allocation (1) can be accommodated with the available water source, (2) is a reasonable-beneficial use, (3) will not interfere with any existing legal use of water, (4) is consistent

⁴ The abbreviation "mgd" stands for "million gallons per day."

with the public interest, (5) is consistent with state and county general plans and land use designations, (6) is consistent with county land use plans and general policies, and (7) will not interfere with the rights of the Department of Hawaiian Home Lands. ERA Doc. # 192, Bates pp. 12776-12778, Finding of Fact Nos. 360 – 372; ERA Doc. # 80, Bates p. 4581A, ¶¶13, 14. The Commission correctly concluded in Conclusion of Law Nos. 62, 224, and 232 that the existing uses of surface water by DWS are “reasonable-beneficial uses.” ERA Doc. # 192, Bates pp. 12840, 12888, 12891. The Commission also found that the County's use of up to 3.2 mgd of surface water was "reasonable and beneficial". ERA Doc. # 192, Bates p. 12840, Conclusion of Law No. 62.

The Water Commission also concluded in Conclusion of Law Nos. 272 - 276 that the Water Use Permit Applications submitted by intervenor Wailuku Water Company were incomplete, and denied them on that basis. ERA Doc. # 192, Bates pp. 12902 – 12903. DWS agrees with that conclusion, for the reasons stated by the Water Commission.

Throughout the contested case, DWS supported the concept of mauka-to-makai stream flow for all four streams. DWS continues to support that concept, including for Iao and Waikapu Streams, to which no additional flow was restored by the Commission's decision. However, DWS recognized that some diversions from the streams are needed at present and will be needed in the future to provide for public trust purposes such as the domestic water supply. DWS argued that public trust offstream needs must be considered along with public trust instream uses when Interim Instream Flow Standards

are amended. ERA Doc. # 192, Bates pp. 12529 – 12533. In its cross-appeal, DWS seeks clarification of language in certain of the Commission’s Conclusions of Law that appear to be inconsistent with the rulings of the Hawaii Supreme Court regarding the proper consideration of public trust instream and offstream uses when amending Interim Instream Flow Standards.

V. ARGUMENT

DWS requests clarification concerning the Commission’s Conclusion of Law No. 175, ERA Doc. # 192, Bates p. 12874, which states that “amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder”, citing Waiahole I, supra, 94 Hawai`i at 153, 9 P.3d at 465. DWS also seeks clarification regarding Conclusion of Law No. 18, ERA Doc. # 192, Bates p. 12832 (stating that water is allocated to offstream uses only after an IIFS is established); Conclusion of Law No. 183, ERA Doc. # 192, Bates p. 12876 (“presumption in favor of the streams”); Conclusion of Law No. 192 (“amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder”); ERA Doc. # 192, Bates p. 12879, and Conclusion of Law No. 204, lines 21-23 (“[u]nder current laws, the IIFS has to be determined first, and what water remains would be available for offstream uses”), ERA Doc. # 192, Bates p. 12883. The Commission's language in these Conclusions of Law appears to be contrary to the Hawaii Supreme Court's opinion in Waiahole I, and contradicts portions of the Waiahole I decision that are acknowledged and quoted with approval by the Commission elsewhere in its Conclusions of Law. Moreover, a careful reading of the portion of the Waiahole I opinion relied

on by the Commission (94 Hawai'i at 153, 9 P.3d at 465) reveals no statement requiring the amendment of the IIFS to occur before any examination of public trust offstream uses, such as providing for the public domestic water supply. In fact, the Hawaii Supreme Court has stated explicitly that "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)" Waiahole I, *supra*, 94 Hawai'i at 150, 9 P.3d at 462 (emphasis added).

When the Hawaii Supreme Court has suggested that existing offstream uses may have to be curtailed to protect instream values, it has consistently referred to "private" offstream uses, making it clear that the public trust uses of stream water have a higher status than commercial offstream uses. See, e.g., Waiahole I, *supra*, 94 Hawai'i at 140, 9 P.3d at 452 (explaining that National Audubon Society v. Superior Ct. of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983) was not directly applicable to Waiahole because that case "involved diversions for a public purpose, the domestic uses of the City of Los Angeles" while almost all of the diversions involved in Waiahole were for private commercial purposes); *id.* at 142, 9 P.3d at 454 (affirming the Water Commission's "conclusion that it effectively prescribes a 'higher level of scrutiny' for private commercial [offstream] uses"); *id.* ("any balancing between public and private purposes begins with a presumption in favor of public use, access, and enjoyment"); *id.*, 94 Hawai'i at 149, 9 P.3d at 461 (referring to "private interests"); *id.*, 94 Hawai'i at 155, 9 P.3d at 467

(referring to “offstream private use” and “private parties”); *id.*, 94 Hawai‘i at 159, 9 P.3d at 471 (indicating that “certain uses” and “desirable uses worthy of preservation by permit” can be preferred in granting permits for offstream uses); In the Matter of Water Use Permit Applications . . . for the Waiahole Ditch Combined Contested Case Hearing (Waiahole II), 105 Hawai‘i 1, 16, 93 P.3d 643, 658 (2004) (confirming that the Water Commission must require “a higher level of scrutiny for private commercial water usage”).

Moreover, the language in the Conclusion of Law No. 175 is inconsistent with language in the Commission’s other Conclusions of Law. Conclusion of Law No. 14, ERA Doc. # 192, Bates p. 12831, for instance, clearly and correctly explains that “[t]here are no absolute priorities among these trust purposes.” See, e.g., Waiahole I, *supra*, 94 Hawai‘i at 142, 9 P.3d at 454 (explaining that “maintenance of waters in their natural state” and “domestic water use of the general public” as among the “trust purposes,” and, therefore, that “protection of the resource [in its natural state] is not a ‘categorical imperative.’” (emphasis added)). Conclusion of Law No. 204, ERA Doc. # 192, Bates p. 12884, lines 3-4, correctly confirms that there is no “categorical imperative” for “stream restoration.”

Conclusion of Law No. 16, ERA Doc. # 192, Bates p. 12832 clearly and correctly explains that “[t]he Commission is to ‘weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law’ . . . ‘accommodating both instream and offstream uses where feasible.’ Waiahole I, *supra*, 94 Hawai‘i at 142, 9 P.3d at 454.”

This language is repeated in Conclusion of Law No. 204, ERA Doc. # 192, Bates p. 12884, lines 4-6.

Conclusion of Law No. 4, ERA Doc. # 192, Bates p. 12829 and Conclusion of Law No. 38, ERA Doc. # 192, Bates p. 12836 rely on §174C-71(2), Haw. Rev. Stat. and HAR §13-169-40 for the proposition that “in establishing the IIFS in the first place, the Commission must weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for nonstream purposes” The quotation from Waiahole I, supra, 94 Hawai‘i at 141, 9 P.3d at 453, in Conclusion of Law No. 183, ERA Doc. # 192, Bates p. 12876 also makes it clear that “public instream uses and values” will not inevitably prevail over offstream diversions and that the public trust must “accommodate” certain offstream uses. Conclusion of Law No. 193, ERA Doc. # 192, Bates p. 12879 properly explains that the IIFS must “strike a balance between instream values and offstream users.”

DWS asks the Court to clarify and confirm the obligation of the Commission to engage in this accommodation and weighing process, particularly with regard to competing public trust purposes, as required by the State Water Code and by Hawaii Supreme Court precedent. DWS submits 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.

It is particularly important to confirm that the Commission must accommodate those noninstream uses that are consistent with public trust responsibilities and that meet the reasonable and beneficial requirements of the Water Code, such as the distribution of water to the public by DWS for domestic uses. See Conclusion of Law No. 13, ERA Doc. # 192, Bates p. 12831. The Hawaii Supreme Court has ruled that “domestic uses” of water are “among the highest uses of water resources” and has stated that “we recognize domestic water use as a purpose of the state water resources trust.” Waiahole I, supra, 94 Hawai‘i at 137, 9 P.3d at 449 (citing, inter alia, Restatement (Second) of Torts §850A cmt. c (1979); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-98, 504 P.2d 1330, 1341-44 (1973), aff’d on reh’g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974); Carter v. Territory, 24 Haw. 47, 66 (1917)).⁵

VI. CONCLUSION

For the reasons stated above, DWS requests this Honorable Court to clarify that Interim Instream Flow Standards must be established through a balancing process that evaluates and considers all reasonable and beneficial uses of water, particularly public trust uses like the water provided to the public by municipal water authorities such as the County of Maui's Department of Water Supply.

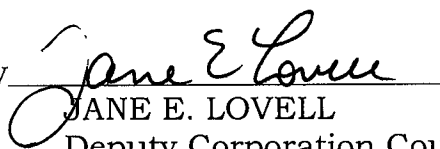
⁵ This conclusion was confirmed by the State Board of Natural Resources in In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Keanae, Nahiku and Huelo, Maui, DLNR File No. 01-05-MA, Ex. E-9 at p. 41, ERA Doc. # 60, Bates p. 3126, Conclusions of Law Nos. 4 and 5.

VII. STATEMENT OF RELATED CASES

Counsel for Cross-Appellant is aware of one potentially related case arising out of the setting of Interim Instream Flow Standards by the Commission on Water Resource Management for streams in East Maui. The appeal is currently pending in the Intermediate Court of Appeals, bearing case No. CAAP 10-0000161, entitled 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.

DATED: Wailuku, Maui, Hawaii, February 23, 2011.

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