No. 30603

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

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

PETITIONERS-APPELLANTS HUI O NĀ WAI ‘EHĀ’S
AND MAUI TOMORROW FOUNDATION, INC.’S OPENING BRIEF

APPENDIX

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I. INTRODUCTION

Petitioners-appellants Hui o Nā Wai ʻEhā and Maui Tomorrow Foundation, Inc. (collectively, the "Community Groups"), appeal from the final Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order ("D&O") dated June 10, 2010 ("final decision") of a majority of the state Commission on Water Resource Management ("CWRM"). This case will decide the fate of Nā Wai ʻEhā, "The Four Great Waters" of Waiheʻe River and Waiehu, ʻĪao, and Waikapū Streams on Maui and the natural ecosystem and local and Native Hawaiian communities that depend upon them. Since the plantation era, two companies have freely drained these streams for their own private gain: 1) Wailuku Water Company ("WWC"), a former sugar plantation that sold off its farmlands and now pursues the business of selling diverted stream water to the public; and Hawaiian Commercial & Sugar ("HC&S"), the sugar plantation division of Alexander & Baldwin, Inc. ("A&B") (collectively, the "Companies"). Yet, despite the closure of the plantation that primarily used these stream flows, and despite the availability of sensible alternatives to stream diversions, the Companies continue to hoard and even waste the water, prolonging the deprivation of public and Native Hawaiian uses that have no other water source.

The Community Groups brought this action in 2004 to restore Nā Wai ʻEhā instream flows and values by enforcing the legal framework of the constitutional public trust doctrine and State Water Code ("Code"), Haw. Rev. Stat. ("HRS") ch. 174C (1993 & Supp. 2009), which the Hawaiʻi Supreme Court has set forth in In re Waiāhole Ditch Combined Contested Case Hearing, 94 Hawaiʻi 97, 9 P.3d 409 (2000) ("Waiāhole"), and its progeny. In 2009, the Hearings Officer-Commissioner issued a proposed decision to restore about half of the stream flows. In 2010, in the face of HC&S's threats to shut down, the majority of CWRM, against the vigorous dissent of the Hearings Officer-Commissioner, did an about-face and returned only the bare flows remaining after liberally accommodating HC&S's private offstream diversions -- including no flows whatsoever to ʻĪao and Waikapū Streams.

As detailed herein, the majority reached this extreme result by ignoring or advocating against public trust purposes and Native Hawaiian rights, and penalizing those interests for the Companies' strategically calculated failure to meet their legally mandated burdens of proof. The majority's final decision stands the entire legal framework of instream use protection -- and the very tenet of water as a public trust resource -- on its head. More than 30 years after the enactment of the Code's stream protection mandate, and 10 years after Waiāhole, the Community Groups respectfully request this Court to reverse the majority's decision and provide the protection of public and Native Hawaiian rights to water that CWRM still refuses to give.

II. STATEMENT OF THE CASE

A. Factual Background.

1. Nā Wai 'Ehā: "The Four Great Waters" of Maui

Nā Wai 'Ehā or "The Four Great Waters," refers to Waihe'e River and Waiehu, 'Īao, and Waikapū Streams, as well as the four ahupua'a (land divisions, watersheds) encompassing these waters, on the windward side of Mauna Kahalawai or the West Maui Mountains. FOF 80.[1] In Hawaiian culture, Nā Wai 'Ehā are "famed in song and story," as reflected in the traditional 'ōlelo no'eau (saying) and mele (song) "Nā Wai Kaulana" about "nā wai kaulana ia a o ku'u 'āina" ("the famous waters of my homeland"). RA40:19; RA58:67; RA70:143.

In traditional Hawaiian society, the Nā Wai Ehā region was "the primary ritual, political, and population center of Maui." RA58:67. "Due to the profusion of fresh-flowing water . . . Nā Wai 'Ehā supported one of the largest populations and was considered the most abundant area on Maui; it also figured centrally in Hawaiian history and culture in general." FOF 34. The region contains "the largest number of heiau [places of worship] among all Maui island communities[, which] underscores the cultural, historical, and political importance of this region." FOF 46. It

[1] "RAx:y" cites the record on appeal by docket number(s) (x) and, as applicable, the page number(s) of the pdf document of the docket entry (y). Any lines (l.) or paragraphs (¶) within a page are indicated in parentheses. The final decision (RA192) is cited by either page number(s) or specific "FOF" or "COL" number(s).

is also the site of the legend of the earth mother Haumea or Papa arriving in the Hawaiian Islands. RA58:71-73. This account, which chronicles the "broad historical sweep of Hawaiian social development," springs from the waters of Nā Wai 'Ehā. RA58:72-73.

Nā Wai 'Ehā developed a "rich history" of Hawaiian cultural practices dependent upon abundant fresh water resources. RA58:67, 85. Nā Wai 'Ehā waters produced "the largest continuous area of wetland taro cultivation in the islands." FOF 36. They also sustained many other traditional and customary practices such as gathering upland materials and stream and marine life, as well as religious ceremonies. FOFs 40, 52, 54; RA58:80-81. These practices spanned the entire circle of life for Hawaiians, who would hide both the newborn's piko (naval cord) and the deceased's bones in Nā Wai Ehā waters. RA302:21(l.22)-22(l.7); FOFs 43-44.

This society that developed over one thousand years suffered a severe decline beginning in the 19th century, as sugar plantations appropriated the land and water in Nā Wai 'Ehā. RA58:81. As early as 1866, an account in a Hawaiian language newspaper declared: "DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION." RA58:82. The author related the "current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane" and his prophetic fears that "Hawaiians of that place will no longer be able to eat poi, and that there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people." Id. (citations omitted). Other accounts documented the plantation landscape that "obliterated" and "ploughed under" lo'i kalo (taro complexes) and heiau. RA58:81-84.[2]

Today, while some Native Hawaiians persevere in exercising their cultural rights in Nā Wai 'Ehā under "significant challenges," FOF 51, "[c]ultural experts and community witnesses provided uncontroverted testimony regarding limitations on Native Hawaiians' ability to exercise traditional and customary rights and practices in the greater Nā Wai 'Ehā area due to the lack of

[2] See also RA116:179 ("The ahupua'a ideal, which was roughly analogous to ecosystem-based management, was subverted . . . most dramatically by diversion of water from streams for industrial scale agriculture, especially sugar cane cultivation.")

freshwater flowing in Nā Wai ʻEhā's streams and into the nearshore marine waters." FOF 49. This testimony uniformly established the need to restore Nā Wai ʻEhā stream flows for Native Hawaiians to reestablish and expand their cultural practices, "reconnect with their culture and live a self-sustaining lifestyle," and "restor[e] spiritual well-being and a state of ʻpono'" (rightness), FOFs 55, 57, 59. At heart, this "way of life with the river, with the ocean . . . it's who we are," "it makes us . . . feel more whole," and without it, "we lose who we are as a people," RA302:213(l.20)-217(l.3) (Kekona); RA304:106 (l.21)-109(l.4) (Santiago); FOF 58.

CWRM has designated all four Nā Wai ʻEhā waters as "Candidate Streams for Protection," a distinction it conferred on only nine streams total on the island of Maui and 44 of 376 perennial streams statewide. FOF 63. CWRM also designated each Nā Wai ʻEhā stream as "Blue Ribbon Resources," meaning that they featured the "few very best resources" under the evaluated aquatic, cultural, recreational, and riparian criteria. Id.; RA120:91.

Nā Wai ʻEhā waters are part of a "unified system" from mauka (mountains) to makai (ocean). RA116:179. In the region's upper reaches, discharges from dike-impounded ground water feeds stream flow. FOF 89. In the lower reaches, stream flow infiltrating through the stream beds recharges ground water aquifers and neighboring wetlands. FOF 90; RA62:121 (¶¶12-14) (Dr. Oki, USGS); RA70:91-92(¶¶1-3). Mauka to makai stream flow enables the life cycle of native amphidromous stream biota, which alternates between the stream and ocean. RA62:40; RA62:86(¶10); FOF 65. Stream flow into the estuary and ocean sustains marine life. RA:62:88 (¶14); RA 70:109-11(¶¶ 9,14).

The plantation-era diversion ditches destroy this cycle of water and life. Metal grates in concrete dams span the entire stream channel, taking most or all of the stream flows during non-freshet flow conditions. FOFs 558, 560. Thus, "[a]n overriding factor impairing the biological and ecological integrity of diverted Central Maui streams, compared to their non-diverted counterparts, is the disruption of natural flow via large-scale offstream diversions." FOF 68. The lack of instream flow diminishes or eliminates habitat and stream life from mauka to makai. FOFs 69-73.

Based on the scientific data provided by the United States Geologic Survey ("USGS"), total Nā Wai ʻEhā stream flows include: median or Q50 flows (the amount that was equaled or exceeded 50% of the time) of around 69-73 million gallons a day ("mgd"), Q70 flow (equaled or exceeded 70% of the time) of around 55-58 mgd, and Q90 flow (equaled or exceeded 90% of the time) of around 43-46 mgd. Final decision at 212.[3] The Companies typically take most or all of the stream flows during dry-weather conditions, leaving Na Wai ʻEhā waters dry downstream of the diversions. FOFs 560, 602; COLs 164, 213. See Appendix ("App.") (photos).

2. Plantation ditches and diversions

WWC and HC&S take Nā Wai ʻEhā stream flows via a plantation ditch system that includes nine active diversions on the streams. FOF 161; RA60:6. Most of these diversions feed into two main ditches, Waiheʻe and Spreckels. FOF 177. These ditches begin with diversions in Waiheʻe River and cut across the ahupuaʻa in parallel from north to south, receiving flows from other diversions. RA60:6; App. at 28. Waiheʻe Ditch, which is the more mauka ditch, extends past Waikapū to Maʻalaea in the south, while Spreckels Ditch ends in HC&S's Waiʻale Reservoir near Wailuku town. RA60:6. Waiheʻe Ditch can send flows into Spreckels Ditch; several smaller diversion ditches on ʻĪao, North and South Waiehu, and Waikapū Streams also feed into these main ditches. FOFs 178-92.

This ditch system historically supplied two sugar plantations: (1) WWC's predecessor Wailuku Sugar, and (2) HC&S, which belonged to the plantation-era "Big Five" companies C. Brewer and Alexander & Baldwin, respectively. FOFs 273, 277. In 1924, the two plantations entered into an agreement ("1924 agreement") to divide up Nā Wai ʻEhā stream flows. RA104:44-91; RA76:35. The plantations divided flows from Waiheʻe River by time of day, splitting the Waiheʻe Ditch 7/12 (14 hours of the day) to Wailuku Sugar and 5/12 (10 hours) to HC&S, and splitting the Spreckels Ditch 50-50 (12 hours each). FOFs 273, 277. In addition,

[3] Q_{50} stream flow is "reflective of typical flow conditions," FOF 97 (unlike average stream flow, which is skewed by floods). Q_{70} flow estimates the mean "base flow," or the ground water contribution to the stream, FOFs 98-102. Q_{90} flow is lower than mean base flows, FOF 104; RA62:124 (USGS ¶21).

Wailuku Sugar took the flows from North Waiehu, Īao, and Waikapū Streams, and HC&S took the flows from South Waiehu Stream. RA104:44, 73-74, 79; FOF 192.

This arrangement resulted in Wailuku Sugar taking the substantial majority of the diverted stream flows. An agreement between the Companies indicated WWC's "share," for example, to be around 76.7 percent (42.2 mgd of a total ditch flow of 55.0 mgd). RA128:71. Likewise, a WWC "white paper" calculated HC&S's "share" at around 23.4 percent (14.81 mgd of 63.24 mgd). RA106:16; RA317:145(l.2)-146(l.16) (Chumbley, WWC president). This is the only documentation in the record of the two plantations' proportional usage. HC&S omitted any records of the amount of Nā Wai 'Ehā water it received prior to 1991, by which time Wailuku Sugar was completely out of sugar production. RA60:7-8.

3. Kuleana and riparian water users

When the Companies initially divided Nā Wai 'Ehā stream flows, they recognized the superior water rights of native tenants, including the "appurtenant" rights of kuleana lands.[4] Thus, the Companies' 1924 agreement expressly acknowledged their diversions of stream flows were "subject to the existing rights of third parties therein," including "for all kuleanas of such third parties," and "any deficiency for such kuleanas shall be supplied by the [Companies] from the waters flowing in the . . . Ditch[.]" RA104:78-79. Every written document on the subject, including the Companies' agreements and WWC's white paper and water contracts, uniformly recognize the Companies' "obligations" and "commitments" toward "priority" kuleana water rights. RA188:357-61.

Over the years, however, the Companies systematically replaced and rerouted the native 'auwai (traditional irrigation channels) as they saw fit. RA188:358-59. Thus, today, many community members must access the stream water through the Companies' ditch system. Id. Some wish to reestablish their direct connection to the streams if possible. See, e.g., RA68:150 (¶9) (Faustino). Others directly connected to the stream are forced to make do with whatever

[4] See Peck v. Bailey, 8 Haw. 658, 661-62 (1867) (holding that WWC's diversions are "subject to the rights of tenants," including "taro patches and the water necessary for their cultivation").

flows remain after the Companies' diversions. See, e.g., RA68:125-30 (¶¶5-9,11-12,15-17) (J. Duey). Those who testified in this proceeding maintained that the Companies do not provide water sufficient for their needs and those of the ecosystem. FOFs 234, 296.

4. Wailuku Water Company

WWC's predecessor, the Wailuku Sugar plantation, formerly cultivated 5,250 acres in sugar cane. RA78:26(l.6) (Chumbley). Wailuku Sugar, however, phased out its sugar operations beginning in 1988. RA80:80; RA314:158(l.19)-159(l.2) (Chumbley). Renamed as Wailuku Agribusiness, the company cultivated some land in pineapple and macadamia nuts for several years, RA78:26(ll.7-10) (Chumbley), then "[s]tarting in 2001, . . . began to more aggressively sell its former sugar lands." RA80:80. The company retained only its watershed lands and plantation ditch system, RA315:156(ll.11-21) (Chumbley), and reformed as a "water company."

WWC's business plan was simple: continue its stream diversions and "provide that water to buyers when it sold them land." RA317:39(l.22)-40(l.1) (Chumbley); RA106:17. WWC's customers include the county, a golf course, current and proposed developments on former farmlands, and construction companies using Nā Wai 'Ehā water for dust control. See, e.g., FOFs 377, 383-85, 406, 397. Many of WWC's contracts, in fact, do not involve any current water use, but allow WWC to collect a "minimum charge" in return for a de facto reservation on WWC's customer list. FOF 514. WWC has consistently revealed the plantation-era view of water underlying its business: declaring its "Ownership of Flow," RA106:16; calling its customers "buyers," RA 186:1; RA130:73; referring to its ditches as "water sources" and "underperforming asset[s]," RA 186:7; RA315:53(l.13)-54(l.3) (Chumbley), and conceiving the instream flow standard as "the volume of water that's going to be left in the stream after the very last diversions," RA314:79(ll.4-9) (Chumbley).[5]

[5] This view is not only historically outmoded, but also contrary to governing Hawai'i law. See Waiāhole, 94 Hawai'i at 155, 9 P.3d at 467 ("reject[ing] the idea of public streams serving as convenient reservoirs for offstream private use"); Reppun v. Board of Water Supply, 65 Haw. 531, 550, 656 P.2d 57, 70 (1982) (establishing that the purpose of common law water rights did not include "the creation of an independent source of profit"); HRS § 7-1 (2009) (providing

In 2003, WWC indicated in a company "white paper" that WWC had an "unallocated flow" of around 30 mgd, 12.99 mgd of which it would retain as "future reserves" in connection with its land sales, and 17.25 mgd of which it proposed to sell to the county. RA106:16-17. In 2005, after the Community Groups initiated this action, WWC reported to its shareholders that "27.5 mgd would be available to new customers. At present, water not used by [WWC]'s existing customers is used by HC&S in their sugar operations." RA80:81.

5. HC&S

For most of its existence, HC&S cultivated about 3,950 acres of its roughly 35,000-acre sugar plantation with Nā Wai 'Ehā stream water. FOFs 427-28. This land, which HC&S owns, is referred to as the "Waihe'e-Hopoi" or "owned" fields. FOF 419. Beginning in January 1995, HC&S began incrementally leasing from WWC about 1,080 acres of former Wailuku Sugar lands. RA128:77-98; FOF 430. WWC later sold the leased land to a developer, from whom HC&S now leases the land under short-term, 6-year leases. FOFs 264-65, 383. This land is referred to as the "'Īao-Waikapū" or "leased" fields. FOF 264.[6]

Until Wailuku Sugar ended sugar operations in the late 1980s, HC&S's primary water for the Waihe'e-Hopoi fields was Well No. 7 ("Well 7"). FOF 494. This well is by far the largest of HC&S's 16 non-potable plantation wells, see, e.g., RA102:38-43, and is historically (and ostensibly even now) the largest well in the Hawaiian Islands. RA100:55. The well has a documented capacity of 40 mgd, id., and HC&S consistently used it at an average over 60 years of 21 mgd, FOF 495, compared to its portion of Nā Wai 'Ehā stream water of around 14.8 mgd, RA106:16; RA128:53.

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rights to resources including water, except that users "shall not have a right to take such articles to sell for profit").

[6] The Companies made it impossible to determine how the diversions may have changed between the end of Wailuku Sugar and the increase in HC&S acreages, because they failed to provide ditch flow records from 1987 through 1997, RA74:113 -- which exactly overlaps the time between when Wailuku Sugar ceased sugar operations in 1988 and when HC&S began cultivating the leased 'Īao-Waikapū fields from 1995 to 1997. See RA128:95.

After Wailuku Sugar ended sugar operations, the water it was diverting did not return to the streams. Instead, the Companies redirected the "excess" stream water to HC&S's fields. FOFs 273, 277. After gaining this "free" stream water, COL 136, HC&S "minimized" its use of Well 7. FOF 263. Rather than using its internally generated electricity to run the well as it always did, HC&S began selling the excess electricity to Maui Electric ("MECO") for windfall profits. RA321:190(l.19)-191(l.3) (Volner, HC&S vice president of agriculture operations).

In 1995, in connection with the lease of the ʻĪao-Waikapū fields from WWC to HC&S, the Companies entered into a "Temporary Water Agreement" to make "temporary changes" to their division of Nā Wai ʻEhā stream flows, so that HC&S and WWC, respectively, received 64 and 36 percent. RA128:41-42. In July 2003, however, WWC terminated the lease for the ʻĪao-Waikapū fields and notified HC&S that it was "no longer entitled to any water allocation pursuant to th[e] Temporary Water Agreement." FOF 541. The Companies had no other documented agreement for two years, until July 2005, when they sketched out a one-page deal. Id. Under this arrangement, HC&S pays WWC a flat, per-acre fee for water on the ʻĪao-Waikapū fields, the cost of which decreases the more water HC&S uses. FOF 433; RA184:66.

As with WWC, HC&S's view of stream water is that, other than the "operating cost," "the water is otherwise free." RA322:79(l.20)-80(l.22) (Holaday, A&B agribusiness president). Thus, HC&S "do[esn't] measure what our cost of water is." RA322:127(ll.8-13).

WWC estimates that HC&S currently uses around 79 percent of the diverted stream flows. RA78:29. The Companies view this redistribution as merely "temporary," however. RA:128:41; RA80:81. HC&S expects that as WWC enlists more customers, this "would mean less total available water for HC&S." RA321:130(ll.13-22) (Volner).

At the same time, A&B is seeking to join WWC in the water business. A&B is pursuing its "Waiale Water Treatment Facility" project, under which it would take 9 mgd that HC&S currently uses and instead use it to subsidize A&B's development projects, and in partnership with WWC, sell water to Maui County. RA328:18(l.13)-21(l.21) (Kuriyama, A&B CEO). HC&S advocated in this proceeding for CWRM to allocate 9 mgd for the project. RA158:379-

80. Meanwhile, A&B is proposing to develop thousands of acres of its plantation lands, RA136:62-124, including about a thousand acres in the fields HC&S irrigates with Nā Wai ʻEhā water, RA140:56; RA110:77; RA136:62-71.

B. Procedural Background.

This case has a protracted history. On July 21, 2003, CWRM designated the ʻĪao Aquifer as a water management area under the Code, requiring ground water users to file water use permit applications ("WUPAs"). RA192:15; see HRS ch. 174C, pt. IV (1993 & Supp. 2009). Pertinent to this case, Maui Department of Water Supply ("MDWS"), WWC, and HC&S filed WUPAs for high-level, dike-impounded ground water flowing into Nā Wai ʻEhā streams. RA26:1-9; 28:1-13; 34:2-5; 36:2-3; 38:2-5.

On June 25, 2004, the Community Groups filed their Petition to amend the Nā Wai ʻEhā interim instream flow standards ("IIFSs") under HRS § 174C-71 (1993) ("IIFS Petition"), requesting CWRM to increase the standards and "order the immediate return of all water that is not in actual and reasonable-beneficial use by [offstream users]." RA40:25, 11-12, 39.

On October 19, 2004, the Community Groups followed up with a citizen complaint against the Companies under HRS § 174C-13 (1993) ("Waste Complaint") documenting the dumping of diverted stream water and the discrepancy between the continued wholesale diversions and WWC's exit from agriculture. RA44:1-81. The Waste Complaint requested the immediate relief of ordering the diverters to "leave all water not being put to actual, reasonable and beneficial use in their streams of origin" and to detail their "diversions, actual needs and uses, and system losses." RA44:13, 29.

In Waiāhole, a similar complaint prompted immediate investigation and enforcement against the waste. See 94 Hawai'i at 112, 9 P.3d at 424. In this case, CWRM spent almost a year exchanging written correspondence with the Companies, in which it raised "information discrepancies or inadequacies" and repeatedly asked the Companies for "more careful, detailed examination" and "additional supporting data" on their water uses. RA98:88, 81, 78, 70-71, 51;

RA100:44, 36-37, 19; RA48:103.[7] In August 2005, CWRM staff reported that because of "problems with [WWC's] reported water use data," determining actual water uses was a "moving target at best." RA54:277; RA48:99.

On February 15, 2006, CWRM ordered a combined contested case hearing ("CCH") on the WUPAs, IIFS Petition, and Waste Complaint and appointed Commissioner Lawrence Miike as the Hearings Officer. RA52:3-5, 18-20; RA192:18. After a hearing on June 19, 2006, the Hearings Officer granted standing in the CCH to the Community Groups, Office of Hawaiian Affairs ("OHA"), MDWS, WWC, and HC&S. RA52:35; RA52:69. Pursuant to CWRM's order, the parties entered into mediation, which extended until October 2006 with no change in the status quo. FOF 20.

CWRM then turned to the Waste Complaint's request for "immediate relief." Beginning in early 2007, litigation proceeded for several months over (1) the disqualification of one of HC&S's attorneys who previously had participated in the case as CWRM's Deputy Director (which eventuated in her withdrawal), FOFs 21-22, and (2) the standards and procedures for the Waste Complaint CCH, RA52:95-111, 152-76. After receiving fundamental adverse rulings on the availability of any discovery and the applicable standard for waste, on May 10, 2007, the Community Groups withdrew their Complaint without prejudice in order to avoid further delaying their "goal of expeditious relief." RA54:278-79.

The CCH then turned to the IIFSs and WUPAs. After a pre-hearing conference on June 14, 2007, the parties submitted three rounds of written testimonies and briefs extending to November 16, 2007. RA58:1 to RA116:315. The CCH commenced on December 3, 2007 and continued over 23 hearings days, during which the Hearings Officer received dozens of witnesses' testimonies and hundreds of exhibits. FOF 25; RA292-336. On March 4, 2008, the

[7] Even before the 2004 filing of the IIFS Petition, CWRM requested in September 2003 that WWC provide "more detailed information" on "changes in irrigation practices over the years" and "documentation" of water users and acreages. RA98:97. See also RA98:90 (reiterating the request for information on "each use").

final hearing day, the Hearings Officer heard final arguments and closed the administrative record. RA331:102 ("The evidentiary phase of the contested case is now over.").

On March 13, 2008, in a related action initiated by the Community Groups in another Petition, CWRM designated Nā Wai ʻEhā waters as a surface water management area. FOF 26. CWRM took the action based on the statutory criterion that "serious disputes respecting the use of surface water resources are occurring," HRS § 174C-45(3) (1993). See CWRM, Commission Meetings, Archive, at http://hawaii.gov/dlnr/cwrm/newsevents_commissionmtg.htm (March 13, 2008 meeting minutes). Water use permit applications for existing uses alone exceed 55 mgd. See CWRM, Water Resource Bulletin 9-17 (February 2011), available at http://www.state.hi.us/dlnr/cwrm/bulletin/bull201102.pdf.

On July 18, 2008, as the post-hearing briefing in this case neared its conclusion, HC&S filed a motion to reopen the record to add a written report by its biological consultant who had already testified in December 2007. RA156:4-17. Over strong objections, RA156:80-116, the Hearings Officer granted the motion and held an additional day of hearings on October 14, 2008. RA334:1-242. This delayed the post-hearing submissions until December 5, 2008. FOFs 28, 31.

On April 29, 2009, the Hearings Officer issued proposed FOFs, COLs, and D&O ("proposed decision"). RA188:1-221. The proposed decision recommended restoring in the IIFSs a total of 34.5 mgd: 14 mgd to Waiheʻe, 3.5 mgd to Waiehu (2.2 and 1.3 mgd to North and South Waiehu, respectively), 13 mgd to ʻĪao, and 4 mgd to Waikapū (conditioned on the flows reaching Kealia Pond at the mouth). RA188:197-201. The parties submitted exceptions to the proposed decision on May 11, 2009. RA188:233-424.

On October 15, 2009, in the last step before its final decision, CWRM heard oral argument on the parties' exceptions. RA336:1-121. At the hearing, HC&S "offer[ed] an alternative IIFS that provides over 16 [mgd] to these four streams" with the intent to "provide for continuous flow in Waiheʻe and ʻĪao Streams." RA336:14(ll.1-14). In an unprecedented move, HC&S dispensed with argument by counsel and presented argument by A&B's Chief Financial Officer, who was newly appointed as HC&S's general manager, never previously appeared in

any of the proceedings, and in fact, professed unfamiliarity with the record. RA336:28(ll.17-23) (Benjamin). The presentation, by its nature, lacked any reference to the record and instead threatened "the shutdown of HC&S." RA336:24(l.17)-25(l.8). The Community Groups objected to the extra-record evidence in HC&S's exceptions and oral presentation, RA336:85(ll.4-24); see also RA336:25(ll.17-25) (Commissioner Miike anticipating the objection), but CWRM never ruled on that objection.

On June 10, 2010, a majority of CWRM issued a final decision, with Hearings Officer-Commissioner Miike dissenting. RA192. In an about-face from the proposed decision, the majority restored only 12.5 mgd total: 10 mgd to Waihe'e below the Spreckels Ditch diversion; and 2.5 mgd to Waiehu (1.6 mgd and 0.9 mgd to North and South Waiehu, respectively). Final decision at 185-87. Moreover, the majority left 'Īao and Waikapū without any restored flows. Id. As specified below, the decision's reasoning also substantially changed, many aspects of which appeared for the first time in the final decision.

The majority determined reasonable-beneficial offstream uses, minus practicable alternatives, to be 28.4 mgd, including 3.2 mgd for MDWS; 3.2 mgd for WWC, including 2.0 mgd of system losses; 20.31 mgd for HC&S, including 2.0 mgd of system losses; and 1.71 for consumptive uses for community kalo farming (excluding return flows). Final decision at 168-173, 221. In setting the IIFSs, however, the majority calculated and applied maximum diversion figures of 38.7 to 39.7 mgd, which omitted the use of HC&S's Well 7. Id. at 177-78, 220.

In dissent, Hearings Officer-Commissioner Miike, whose experience on CWRM includes serving as Commissioner and Hearings Officer in the three phases of the Waiāhole case in addition to presiding over this entire proceeding, Dissent at 7, cited Waiāhole's mandates in criticizing the majority for turning CWRM's public trust duties "on their heads" and providing the streams "the least protection feasible or no protection at all." Dissent at 2. The dissent explained how the majority "assign[ed] whatever is left after taking care of offstream uses," highlighting the majority's move to "arbitrarily reduce[]" HC&S's use of Well 7. Id. at 2-4. The majority, thus, treated instream flows "as leftovers, acting as a reservoir for future offstream

uses." Id. at 7. The dissent concluded, "[b]y its decision, the majority has failed in its duties under the Constitution and the [Code] as trustee of the state's public water resources." Id.

III. STATEMENT OF POINTS ON APPEAL

1. The CWRM majority violated the constitutional public trust's and Code's protections of instream uses by abandoning ʻĪao and Waikapū Streams. Final decision at 186-87; COLs 208-11, 216-17, 245, 259-61. This disposition and its rationale appeared for the first time in the majority's final decision, contrary to the Community Groups' consistent opposition to such action. See, e.g., RA160:38-60; RA188:364-66; RA160:438-43.

2. The majority reversed the public trust's and Code's protections of instream uses in its backward and minimalist approach to stream restoration and misuse of USGS's temporary flow release figures to justify this result. COLs 247-54, 261, 246. This approach, result, and rationale appeared for the first time in the final decision, contrary to the Community Groups consistent opposition to such action. See, e.g., RA160:38-60; RA160:438-43.

3. The majority's unlawful action specified in Point No. 2 above also violated its constitutional duties to protect Native Hawaiian rights to the extent feasible. This included the failure to render clear or any FOFs and COLs on the protection of such rights. FOFs 293-94, 332, 335-36; COL 220. Again, this approach and result newly appeared in the final decision, contrary to the Community Groups' consistent opposition to such action. See, e.g., RA160:56-60; RA188:361-62.

4. The majority reversed the public trust's and Code's mandates by maximizing offstream diversions and failing to hold private commercial users to their burden of proving maximum reasonable-beneficial use. This approach pervades the final decision and specifically manifests itself as follows:

a. The majority failed to consider and mitigate the impact of variable offstream demand on instream needs. COLs 247-54, 261. The majority's approach of using maximum offstream demand to dictate the IIFSs appeared for the first time in the final decision,

contrary to the Community Groups' consistent opposition to such action. See, e.g., RA188:345-50.

b. The majority failed to hold HC&S to its burden of proving that use of Well 7 is not practicable. COLs 230, 247-54; FOF 500; COL 106. The majority's effective elimination of Well 7 as a practicable alternative and its supporting rationale appeared for the first time in the final decision and reversed the proposed decision's determination of 14 mgd to be practicable, RA188:178, which the Community Groups also opposed as legally inadequate, RA188:353.

c. The majority failed to hold the Companies to their burden of justifying their system losses. COLs 225, 229. The Community Groups objected to this failure in the proposed decision, RA188:353, which the final decision continued.

d. The majority failed to consider the practicability of recycled water resources. COLs 230, 107-08. The majority's determination that no recycled water use is practicable appeared for the first time in its decision and reversed the proposed decision's determination that recycled water use is practicable, RA188:178, which the Community Groups supported, RA336:99.

e. The majority erroneously inflated HC&S's acreages by adding two new fields used only for wastewater disposal. COL 92; FOF 260 n.2. The majority took this action in its final decision via improper use of judicial notice, contrary to the Community Groups' opposition to including the fields. RA160:144-45.

IV. STANDARD OF REVIEW

Pursuant to HRS § 174C-12 (1993), HRS ch. 91 governs this appeal. HRS § 91-14(g) provides that the Court may "affirm," "remand . . . with instructions," or "reverse or modify" CWRM's decision and order if appellants' substantial rights have been prejudiced because the findings, conclusions, or decisions or orders are: (1) "In violation of constitutional or statutory provisions"; (2) "In excess of statutory authority or jurisdiction of the agency"; (3) Made upon

unlawful procedure"; (4) "Affected by other error of law"; (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." COLs are reviewable under (1), (2), (4), procedural issues under (3), FOFs under (5), and the agency's exercise of discretion under (6). Waiāhole, 94 Hawai'i at 118-19, 9 P.3d at 430-31.

The Community Groups' points on appeal involve CWRM's violation of constitutional and statutory mandates and protections. These questions of law are "freely reviewable by this court." Id. Moreover, any deference to agency decisions "presupposes that the agency has grounded its decision in reasonably clear FOFs and COLs." In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 432, 83 P.3d 664, 695 (2004).

The constitutional public trust "qualif[ies]" this general standard of review, insofar as "the ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts of this state." In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Hawai'i 1, 8, 93 P.3d 643, 650 (2004) ("Waiāhole II"). Thus, while the court will not supplant its judgment for CWRM's, it will take a "close look" to ensure compliance with the public trust and "not act merely as a rubber stamp for [CWRM] action." Id. "As such, [CWRM] may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Id.

V. LEGAL FRAMEWORK

The Hawai'i Supreme Court has detailed the constitutional and statutory public trust framework for protecting instream flows. In summary:

A. Public Trust Doctrine.

The water resources trust under art. XI, §§ 1 & 7 of the Hawai'i Constitution embodies a dual mandate of (1) protection, which ensures "the continued availability and existence of [trust] water resources for present and future generations," and (2) maximum reasonable and beneficial use, which is "not maximum consumptive use, but rather the most equitable, reasonable, and

beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" Waiāhole, 94 Hawai'i at 139-40, 9 P.3d at 451-52.

The public trust confers on the state "an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." Id. at 141, 9 P.3d at 453. Protected trust uses or purposes include "resource protection, with its numerous derivative public uses, benefits, and values," as well as the exercise of Native Hawaiian and appurtenant (or "kuleana") rights, but do not include private commercial uses. Id. at 136-37 & n.34, 9 P.3d at 448-49 & n.34.

The public trust establishes the "presumption" and "norm or 'default' condition" in favor of public trust purposes. Thus, private commercial uses require a "higher level of scrutiny," and "the burden ultimately lies with those seeking or approving [private commercial uses] to justify them in light of the purposes protected by the trust." Id. at 142, 9 P.3d at 452.

The public trust also incorporates the precautionary principle, which holds that scientific uncertainty "should not be a basis for postponing effective measures to prevent environmental degradation," but rather militates "in favor of choosing presumptions that also protect the resource." Id. at 154, 9 P.3d at 466. In other words, "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." Id. at 155, 9 P.3d at 467.

As trustee and "primary guardian of public rights under the trust," CWRM "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." Id. at 143, 9 P.3d at 455. While CWRM's duties "may not readily translate into substantive results," the "basic understanding of the trust" ultimately requires disposition of water resources "with procedural fairness, for purposes that are justifiable, and with results that are consistent with the protection and perpetuation of the resource." Id. at 141 & n.40, 190 n.108, 9 P.3d at 453 & n.40, 502, n.108) (quoting Debates in Committee of the Whole on Conservation, Control and Development of Resources, in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 866-67 (1980)).

B. Instream Flow Standards.

The Code mandates that CWRM "shall establish and administer a statewide instream use program" to "protect, enhance, and reestablish, where practicable, beneficial instream uses of water." HRS §§ 174C-71, -71(4), - 5(3) (1993 & Supp. 2009). Instream flow standards are CWRM's "primary mechanism" to fulfill its "duty to protect and promote the entire range of public trust purposes dependent upon instream flows." Waiāhole, 94 Hawai'i at 148, 9 P.3d at 460.

CWRM "must designate instream flow standards as early as possible . . . particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." Id. Even in cases of existing diversions, CWRM "may reclaim instream values to inevitable displacement of [the] diversions," and its "duty to establish proper instream flow standards continues." Id. at 149-50, 9 P.3d at 461-62.

"[T]he establishment of bona fide, 'permanent' instream flow standards [i]s an ultimate objective of [the Code's] mandated 'instream use protection program.'" Id. at 150, 9 P.3d at 462. CWRM must establish such permanent standards where, as here, there is "substantial conflict between instream and offstream interests either presently or in the foreseeable future." Id. at 147 n.49, 9 P.3d at 459 n.49. Interim standards are established pending the development of permanent standards, but "must still provide meaningful protection of instream uses" and "protect instream values to the extent practicable." Id. at 151, 155, 9 P.3d at 463, 467.

CWRM, and not citizen petitioners, bears the duty to establish instream flow standards. Id. at 153, P.3d at 465. In order to fulfill this duty, CWRM "shall conduct investigations and collect instream flow data . . . for determining instream flow requirements" and determine "requirements for beneficial instream uses and environmental protection," id. (citing HRS §§ 174C-71(4), -31(d)(2)).[8]

[8] See also Haw. Admin. R. ("HAR") § 13-169-20(2) (1988) (requiring a "systematic program of baseline research," which is "a vital part of the effort to describe and evaluate stream systems, to identify instream uses, and to provide for the protection and enhancement of such stream systems and uses"); Waiāhole, 94 Hawai'i at 153 n.56, 9 P.3d at 465 n.56 (observing that

C. Native Hawaiian And Kuleana Rights.

In addition to these public trust duties, the state bears the constitutional duty under Haw. Const. art. XII, § 7 "to protect customary and traditional rights [of Native Hawaiians] to the extent feasible." Public Access Shoreline Haw. v. Planning Comm'n, 79 Hawai'i 425, 437, 903 P.2d 1246, 1258 (1995). Thus, CWRM "may not act without independently considering the effect of their actions on Hawaiian traditions and practices" and, "at a minimum," making "specific findings and conclusions" on the existence of Native Hawaiian rights, the extent of their impairment, and feasible action to protect them. Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 46-47, 7 P.3d 1068, 1083-84 (2000). "The Code also obligates [CWRM] to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians" as well as appurtenant rights of kuleana lands. Waiāhole, 94 Hawai'i at 153, 9 P.3d at 465 (citing HRS §§ 174C-101(c), (d), -63).

VI. THE MAJORITY FAILED IN ITS PUBLIC TRUST DUTIES BY PROVIDING PUBLIC TRUST AND NATIVE HAWAIIAN RIGHTS LESS-THAN-MINIMUM OR NO PROTECTION.

An entire decade after the Hawai'i Supreme Court set forth the comprehensive legal framework in Waiāhole, the new CWRM majority in this case not merely repeated, but also exacerbated, the errors that Waiāhole corrected. The decisions in the two cases followed parallel paths. In Waiāhole, CWRM recognized the general correlation between stream flows and "support for biological processes in the stream and its ecosystem." 94 Hawai'i at 153, 114, 9 P.3d at 463, 426. Likewise, in this case, the majority found "overriding" harm from stream flow diversions, FOFs 68-73, and "a direct correlation between streamflow volume under non-freshet conditions and postlarval recruitment in Central Maui streams, such that increased streamflow correlates with increased recruitment at the stream mouth," FOF 75. Despite these acknowledged benefits, CWRM in Waiāhole maintained it was "difficult to quantify an instream

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the "methodology" of establishing instream flow standards begins with "investigat[ing] the ecology of the stream" and "evaluating the water flows needed for instream values").

flow that corresponds to a biological condition for a given flora and fauna," 94 Hawai'i at 114, 9 P.3d at 426; here, the majority declared "the precise volume and duration of stream flow needed to sustain the life cycle of amphidromous organisms is not known," FOF 79.

While in Waiāhole, CWRM at least nominally committed to conduct studies and amend the instream flow standards going forward, 94 Hawai'i at 183-84, 114, 9 P.3d 495-96, 426, here, the majority's Final Decision identifies no specific further efforts on the Nā Wai 'Ehā instream flow standards. There is no question, however, in either Waiāhole or this case, that CWRM must work towards establishing scientifically based, permanent instream flow standards given the "substantial conflict" over Nā Wai 'Ehā waters. Id. at 147 n.49, 9 P.3d at 459 n.49; see also id. at 156, 9 P.3d at 468 (directing that CWRM "shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for [the] streams").

In Waiāhole, in the face of ongoing scientific uncertainty about instream needs and without "proper findings as to the actual requirements for instream purposes," CWRM "effectively assigned to [the] streams the water remaining after it had approved the bulk of the offstream uses." 94 Hawai'i at 153, 9 P.3d at 465. As the Court emphasized, this "largely defeats the purpose of the instream use protection scheme" and "provides close to the least amount of instream use protection practicable under the circumstances." Id. at 154-55, 9 P.3d at 466-67. Here, the majority noted the scientific "unknown," then again committed the same errors as in Waiāhole, only magnified. While CWRM in Waiāhole at least attempted to improve appearances by creating a "buffer" of flows available for offstream use, which the Court struck down, id. at 117, 155-57, 9 P.3d at 429, 467-68, the majority here proceeded directly to a level even less than the "least amount of instream use protection practicable," including no protection whatsoever for 'Īao and Waikapū Streams.

In reaching this extreme result, the majority not only abdicated its constitutional duties, ignoring the public trust and Native Hawaiian rights and making deficient or no FOFs and COLs, it affirmatively advocated and imposed presumptions against the public trust and Native Hawaiian rights in unprecedented fashion. In sum, ten years after Waiāhole, the majority

regressed even further back than where CWRM started in that case, further "contradict[ing] not only [the majority]'s own findings and conclusions, but also the law and logic of water resource management in this state." Id. at 160, 9 P.3d at 472.

A. The Majority Erred In Abandoning ʻĪao And Waikapū Streams.

The majority violated the public trust in indefinitely leaving ʻĪao and Waikapū Streams, two of The Four Great Waters, in their dewatered status quo, without any restoration at all. The public trust applies to "all water resources, without exception or distinction," Waiāhole, 94 Hawai'i at 133, 9 P.3d at 445. The Code mandates that CWRM "shall" "[e]stablish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State." HRS § 174C-71(1); see also HAR § 13-169-30 (1988) (same). Interim standards do "not alter [CWRM's] duty to protect instream uses" and must "provide meaningful protection" and "protect instream values to the extent practicable." Waiāhole, 94 Hawai'i at 151 & n.55, 155, 9 P.3d at 463, 467 & n.55.

The majority, however, afforded no protection to the public interest in the waters of ʻĪao and Waikapū, but rather consigned these "public streams [to] serv[e] as convenient reservoirs for offstream private use," id. at 155, 9 P.3d at 467, and effectively ceded them to WWC, which controls the diversions on those streams, FOFs 174-76. To rationalize such wholesale abandonment of public streams, the majority unlawfully reversed its constitutional role as "primary guardian of public rights under trust" and ignored or advocated against these rights.

1. Neither the decision nor the record support abandoning the streams

First, no one who testified about instream needs proposed this result. The majority attempted to erect strawman "opposing opinions" between HC&S's paid consultants, led by Mr. Ford, and Dr. Benbow, who donated his time to share his career-long research of Nā Wai ʻEhā streams. COL 167(5), (6).[9] Yet, even Mr. Ford admitted: "any stream is a candidate for

[9] Compare RA62:84-85(¶¶4-8) (Dr. Benbow's "thousands" of hours of research, "hundreds of thousands" of data, and peer reviewed, published studies on Nā Wai ʻEhā streams),

restoration"; "I'm not saying that water shouldn't be returned to ['Īao] stream"; and "nowhere [do] we say restoration of flow would not be good for fish, or we don't say that you shouldn't restore flow. We're not disputing that." RA334:232(ll.18-21); RA334:158(ll.9-25); RA334:197(l.24)-198(l.2). The majority also glaringly omitted the testimony of the state's own Division of Aquatic Resources ("DAR"), whose chief biologist, Dr. Polhemus, emphasized: "every stream is important"; "we would like to regain ecosystem function in as many streams in this state as possible"; and "we just don't write-off any particular stream." RA307:171(ll.5-21); RA307:170(ll.17-20).[10] The majority, nonetheless, did "write off" 'Īao and Waikapū, failing even to mention DAR's testimony and going beyond what anyone testified or advocated.

The majority actually resolved the "opposing opinions" by "conclud[ing] that establishing continuous stream flow from mauka to makai provides the best conditions for re-establishing the ecological and biological health of the waters of Nā Wai 'Ehā." COL 243. Moreover, the majority specifically rejected the Companies' proposed IIFSs, which included up to 4 mgd for 'Īao Stream, because they would not "result in continued mauka to makai flows." COLs 184, 199. Instead, it adopted USGS's proposed figures for flow studies, which included 9.5 mgd for Īao, as the "best approach" for the IIFSs. COL 246; FOF 615. But see infra Part VI.B.2 (explaining how the majority misused USGS's figures to minimize restoration). These conclusions directly contradict the majority's decision to restore no flow to 'Īao.

The majority reached this nonsensical result by contorting reason, the record, and its own findings. The majority initially found that 'Īao's channelized lower area "may not support spawning in that area," but "[s]ufficient flow may allow recruitment through this area." COL 208 (emphases added). It also noted a 20-foot vertical drop in that area, but recognized "fish ladders can be constructed to bypass the vertical drop and allow recruitment of the stream life that have climbing abilities." Id.; see also COL 216 (reiterating the above). These findings

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with RA309:81(l.19)-83(l.7) (Ford); RA 334:93(ll.7-12) (Ford) (HC&S's consultants' "field trip," visits "once" or "twice," and one week of larval drift studies).

[10] The Code expressly identifies DAR as one the parties the CWRM "shall consult" in developing instream flow standards. See HRS § 174C-71(1)(E).

conform with the only actual evidence (as opposed to speculation) in the record.[11] The majority expressly recognized that "'Īao Stream can be restored to enhance recruitment and increase stream life[.]" COL 245; see also Dissent at 3 (emphasizing that the majority "agree[d] that the stream retained its potential for recruitment and growth of healthy populations of stream animals").

The majority then disregarded this factual foundation. It first stated that, notwithstanding the benefits of increased stream life, 'Īao Stream's "reproductive potential is severely limited because of extensive channelization" -- subtly omitting the previous reference to "that area." COL 245. Nothing in the record even suggests that channelization or limited reproduction in one area has any bearing on the reproductive potential in any other part of a stream.[12] CWRM then stretched this fallacy further, concluding "'Īao Stream's reproductive and full restorative potential is very limited or prohibited entirely due to the extensive channelization of the 2.5 miles of streambed above the mouth and the 20-foot vertical drop," COL 260, and finally ruling that the stream be abandoned.

Basic administrative law demands that "findings of ultimate facts must be supported by findings of basic facts which in turn are required to be supported by evidence in the record." In re Hawaii Elec. Light Co., 60 Haw.625, 642, 594 P.2d 612, 623 (1979) (footnote omitted).[13]

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[11] See, e.g., RA158:115-18; FOF 593 (DAR's ongoing monitoring documents recruitment); FOF 594 (studies document "substantial amphidromous migration when flow connected to the ocean for more than three or four days"); RA310:85(ll.1-25) (Rose Marie H. Duey's kama'āina testimony). Compare COL 200 (concluding that no information shows channelization is more important than lack of flow in terms of impact on recruitment).

[12] On the contrary, the peer-reviewed study on reproduction in the record linked 'o'opu reproduction with "persistent high stream flow conditions" and indicated that "maintenance of median flows with prolonged periods of elevated discharge are important to successful reproduction." RA158:249, 259-60.

[13] See also Save Ourselves, Inc. v. Louisiana Envt'l Control Comm'n, 452 So.2d 1152, 1159 (La. 1984) ("[T]he agency is required to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order issued."); Bond v. Vance, 327 F.2d 901, 902 (D.C. Cir. 1964) ("Not only must the ultimate findings flow rationally from the basic findings of fact, but the 'basic findings must also be supported by evidence.'" (alterations omitted)).

Such principles are universal, but "all the more essential 'in a case such as this where the agency performs as a trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and statute'" and "may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Waiāhole, 94 Hawai'i at 158, 143, 9 P.3d 470, 455. Here, like the proverbial "fish story" that grows with every telling, the majority's reasoning diverged from the record and reality at every step. These factual and logical leaps -- recasting 'Īao Stream from potentially limited in spawning in one area, to capable of increased stream life but limited or prohibited entirely in spawning, to suitable for outright abandonment -- fail to meet basic standards of reasoned decisionmaking, let alone heightened standards under the public trust.

The majority committed the same error with respect to Waikapū, leaping from "no definitive evidence" that the stream flowed to the sea, FOF 590, to negative conjecture that it "may not have," COL 217, and "has most likely not" so flowed, COL 259, despite evidence to the contrary.[14] In any event, the majority, at most, could only speculate that amphidromous species recruitment "may" or "might" not have occurred under pre-diversion conditions, COLs 210, 217, and both HC&S's consultants and the majority acknowledged that "restoration of flow would answer whether Waikapū Stream flows mauka to makai," FOF 596; COLs 169(7), 259.

Initially, the majority's implicit premise that if a stream does not naturally have continuous mauka to makai flow, then no flow is necessary, is absurd and would justify freely dewatering any and all non-continuous streams in the state. The constitutional and statutory

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The reasons for such requirements are well-recognized. See Gray v. Administrative Dir. of the Ct., 84 Hawai'i 138, 145, 931 P.2d 580, 587 (1997) (reviewing reasons); Hawaii Elec., 60 Haw. at 641-42; 594 P.2d at 623 ("The purpose . . . is to assure reasoned decision making by the agency and enable judicial review of agency decisions.").

[14] See RA116:170-74 (study opining that "[i]n a natural state, [Waikapū] was a continuous surface flowage throughout its course"); RA303:257(ll.5-15) (Pellegrio) (citing Native Hawaiian oral traditions of 'o'opu and 'ōpae living in Waikapū).

mandates to protect instream uses do not selectively exclude certain streams. Waiāhole, 94 Hawai‘i at 133, 9 P.3d at 445.

Moreover, even though the issue of Waikapū's natural flow was, at most, uncertain, and restoration of flow "would answer" this, the majority concluded that increasing flows to assess the issue "is not ruled out, [but] . . . can be deferred until some future time when the balancing of instream values and offstream uses might be more favorable to such a controlled restoration." COL 259 (emphases added). The majority offered no hint of when that "some future time" might be, or how the "balancing" might become more "favorable" as time passes and WWC enlists more customers; instead, it left the issue in indefinite limbo. The Hawai‘i Supreme Court, however, rejected such regulation by abdication, emphasizing that "as [CWRM] proceeds to develop permanent instream flow standards" based on "adequate scientific information," "[c]onceivably, [CWRM] could . . . leave a diverted stream dry in perpetuity, without ever determining the appropriate stream flows. Needless to say, we cannot accept such a proposition." Waiāhole, 94 Hawai‘i at 158-59, P.3d at 470-71.[15] The Court also emphasized that "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." Id. at 155, 9 P.3d at 467. The majority, however, did exactly what the public trust and precautionary principle forbids: using scientific uncertainty regarding Waikapū to justify the absence of protection, indefinitely.[16]

2. The majority's reasoning disregards all instream uses and values other than amphidromous species

In addition to failing by its own terms, the majority's rationale for abandoning ‘Īao and Waiakpū disregards all instream values besides amphidromous species. Instream flow standards must "protect and promote the entire range of public trust purposes dependent upon instream

[15] See also id. (rejecting the "prolonged deferral of the question of instream use protection"); Wai‘ola, 103 Hawai‘i at 442, 83 P.3d at 705 (holding that mere reference to an "absence of evidence" of harm does not meet the diverters' burden of proof).

[16] The majority committed similar error in the case of ‘Īao, except that, more than just citing scientific uncertainty, the majority affirmatively distorted the findings and record.

flows." Waiāhole, 94 Hawai'i at 148, 9 P.3d at 460.[17] Here, extensive, uncontroverted evidence established the need for flows restored to 'Īao and Waikapū to support the range of instream values, none of which the majority's faulty reasoning addressed.

Estuarine ecosystems: In Waiāhole, CWRM and the Court expressly recognized the interconnection between stream flows and estuarine ecosystems: consistent stream flow "carries the steady load of nutrients that is essential for estuarine productivity, and is essential to sustain the nutrient levels throughout the year." Id. at 158, 9 P.3d at 470. Here, scientists and cultural practitioners alike reaffirmed this principle, and community members made clear their uses of the nearshore area around 'Īao Stream to fish and gather limu (seaweed) which depend on stream flows. RA62:88(¶14) (Dr. Benbow); RA70:109-11(¶¶9,14) (Sevilla); RA68:116-19(¶¶4-6,9) (Bailey); RA70:92-93(¶¶5-6) (Kekona).

Wetland ecosystems: 'Īao and Waikapū also feed substantial coastal wetland ecosystems, as CWRM has documented. RA70:141-42. Waikapū Stream's delta is at the famous Kealia Pond wetlands, which is a federal wildlife refuge. FOF 567. Similarly, consistent flows through 'Īao Stream recharge the coastal wetlands and springs in Paukūkalo, which hold cultural and spiritual value as water sources for Native Hawaiian practices. RA70:91-92(¶¶1-4) (Kekona); RA70:106-09(¶¶1-8) (Sevilla); RA134:11(¶8) (Ivy).

Non-amphidromous native species: Besides amphidromous species, streams sustain hundreds of other native species, which comprise the "largest component in the native stream biota" and include the candidate endangered native damselflies. RA307:132-35, 192-94 (Dr. Polhemus, DAR); RA62:87-88(¶13) (Dr. Benbow).

Recreation, aesthetic values: CWRM has recognized 'Īao and Waikapū for their recreational and aesthetic values, RA70:146-47, which the diversions eliminate downstream. See App. at 11-26. As one example of the forgone benefits, in 2004, WWC destroyed a pool that had formed below its 'Īao diversion and was frequented by the public. RA68:131-32(¶¶19-20)

[17] See also id. at 136, 9 P.3d at 448 (recognizing the "numerous derivative public uses, benefits, and values" of resource protection); HRS § 174C-3 (1993 & Supp. 2009) (non-exclusive definition of "instream use").

(J. Duey); RA68:142, 138-39 (photos); App. at 15-16. Community members, including downstream residents, are unable to enjoy such values of flowing streams in ʻĪao and Waikapū. RA68:132(¶21) (J. Duey); RA58:55(¶28) (Pellegrino). See Waiāhole, 94 Hawai'i at 137, 9 P.3d at 449 (recognizing "the public interest in a 'free-flowing stream for its own sake'") (quoting Reppun, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20).

Scientific study: Scientists including Dr. Benbow and his colleagues would use restored flows for studies of the stream ecosystem, RA62:91-94(¶¶18-21), which the law requires to establish proper instream flow standards, see supra Part V.B. Likewise, numerous community members utilize ʻĪao and Waikapū for cultural education programs, which are limited by the lack of flows. RA58:54-55(¶¶24-28) (Pellegrino); RA68:59-60(¶¶4-6) (Alboro); RA70:109-10(¶¶10-13) (Sevilla); RA68:116(¶2) (Bailey).

Drinking water recharge: ʻĪao stream flows recharge the underlying ʻĪao Aquifer, Maui's principal drinking water source. FOF 90; COL 156; RA80:41(¶7). USGS estimated 6.3 mgd of recharge from ʻĪao Stream downstream of the diversion, RA62:142-43 (¶¶62-64) -- compared to the 20 mgd aquifer yield, RA80:42(¶15) -- which WWC precludes by its diversions, while selling the diverted water to the public.

Needs of downstream users: Numerous kuleana landowners and Native Hawaiian ʻohana downstream of the diversions on ʻĪao and Waikapū Streams documented their rights and needs for stream flows to enable kalo and other cultivation on their lands -- none of which was disputed. On ʻĪao Stream, these included ʻohana such as the Dueys, Ornellases and Horcajos in ʻĪao Valley and the Sevillas and Kekonas near the stream mouth. RA160:283-95, 420-21. On Waikapū Stream, this included ʻohana such as the Pellegrinos, Shimizus, Soongs, Gushis, Harders, Miyamotos, and Cerizos, most of whom rely on the ancient "North Waikapū" kuleana ʻauwai. RA160:295-301, 421-22.

In Waiāhole II, CWRM ensured that downstream rights and uses "would be accounted for" by adding flows to the IIFSs, which the Court acknowledged with approval, see 105 Hawai'i at 12, 10, 93 P.3d at 654, 652. Such provision or "conveyance" of flow for downstream users is

an express "instream use" under the Code, HRS § 174C-3. Here, in contrast, the majority recognized the downstream 'ohana's water needs, FOFs 233-35 (referencing many of the above 'ohana), 332; COL 220, but bizarrely restored no flows to meet them.

Native Hawaiian rights: The majority found "uncontroverted testimony regarding limitations on Native Hawaiians' ability to exercise traditional and customary rights in the greater Nā Wai 'Ehā area due to the lack of freshwater flowing in Nā Wai 'Ehā's streams and into the nearshore marine waters." FOF 49. The two examples the majority cited in that finding are the Kekona and Pellegrino 'ohana, who testified, respectively, on 'Īao and Waikapū Streams. RA302:214(ll.9-15) (Kekona); RA58:57(¶33) (Pellegrino).

These traditional and customary rights include gathering native stream life, which would benefit from the increase in stream populations the majority determined would occur in 'Īao. They also include: kalo cultivation and nearshore gathering, discussed above; gathering native plants along the streams, RA58:55-56(¶¶29-31) (Pellegrino); and spiritual practices such as pīpīwai, pīkai, and hi'uwai, or ritual purification in freshwater bodies, FOF 54; RA68:117-18(¶7) (Bailey); RA302:23(ll.1-14) (Dr. Tengan) -- all of which depend on flowing streams.

In sum, the majority forfeited all these instream values and Native Hawaiian rights by simply ignoring them. This cannot stand: CWRM "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process," Waiāhole, 94 Hawai'i at 143, 9 P.3d at 455, and "may not act without independently considering the effect of [its] actions on Hawaiian traditions and practices" in "specific findings and conclusions." Ka Pa'akai, 94 Hawai'i at 46, 7 P.3d at 1083. The majority abdicated its constitutional duties to the public trust and Native Hawaiians by preemptively "writing off" 'Īao and Waikapū Streams based on its contrived rationale limited to amphidromous species.

B. The Majority Violated The Public Trust Through Its Backward, Minimalist Approach To Stream Restoration.

The majority failed in its public trust duties in restoring only 12.5 mgd total to Nā Wai ʻEhā waters. This amounts to less than one-fifth of the "typical" (median or Q_{50}) stream flows of around 70 mgd, see supra note 3, less than one-half of 29.4 mgd the dissent found reasonable, Dissent at 4-7, and 25 percent less than even the 16.5 mgd that HC&S finally advocated. By any measure, 12.5 mgd is less than even the least protection practicable for the public trust in Nā Wai ʻEhā waters, and includes no protection at all for ʻĪao and Waikapū Streams. As explained below, the majority derived this IIFS amount via the same backward and minimalist approach to stream restoration that the Hawai'i Supreme Court already rejected in the Waiāhole case. The majority further erred in basing the IIFSs on USGS's figures for temporary flow release studies, which had nothing to do with recommending IIFSs or protecting instream values.

1. The majority reversed the public trust's protections.

In Waiāhole, the Court overturned CWRM for "effectively assign[ing] to [the] streams the water remaining after it had approved the bulk of the offstream use[s]" and "provid[ing] close to the least amount of instream use protection practicable under the circumstances." 94 Hawai'i at 153, 155, 9 P.3d at 465, 467. In Waiāhole II, the Court again overturned CWRM for arbitrarily providing the streams only half of the flows, while "agree[ing]" with CWRM that "a minimalist approach to restoring stream flows . . . is insufficient in light of [CWRM]'s duties and in the interest of precaution," 105 Hawai'i at 9-12 & n.9, 9 P.3d 651-54 & n.9. In this case, CWRM (except for the dissent, whose experience included the Waiāhole case), fell back to square one and worse, assigning instream uses the less-than-minimum "leftovers" after liberally accommodating private commercial uses.

The majority made little attempt to conceal its method, which boils down to two pages in its final decision under "Balancing Instream Values and Noninstream Uses," id. at 177-78. First, this section contains no mention, much less any "balancing," of instream values, but rather

focuses from the outset on HC&S's private offstream uses. COL 247. Second, as detailed in Part VII below, rather than holding HC&S to its constitutionally mandated burdens of proof, the majority eviscerated those burdens, inflating HC&S's needs to more than the maximum amount, then minimizing or eliminating HC&S's duty to use its primary alternative source, Well 7. COLs 248-253, 230. Last, the majority picked the instream flows based on whether they would accommodate this maximized offstream use scenario. COLs 253-54.

In plain and brazen terms, the majority repeated the error that Waiāhole already rejected. Instead of affirmatively protecting and promoting public trust instream uses and values "to the extent practicable" and adopting "presumptions that also protect the resource," the majority affirmatively maximized private offstream diversions to minimize any remaining instream flows. As Waiāhole made clear, and the dissent also emphasized, this turns the "law and logic" of Hawai'i public trust water resources on its head. 94 Hawai'i at 160, 9 P.3d at 472; Dissent at 2, 4 ("Such an approach does not rise even to the level of the 'least protection feasible.'").

The majority's approach contradicts even its own reasoning. The majority, in lip service only, purported to reject the Companies' proposals for advocating such an approach, under which:

> WWC reverses [the public trust's] presumption and burden of proof by allocating only a minor portion of the lowest recorded stream flows that make up the entire amended IIFS, with the major portion and any flows above the lowest recorded stream flows available for offstream uses. And WWC advocates this course of action without explaining its "reason and necessity."

COLs 183, 199. Yet, in an irreconcilable disconnect between its words and actions, the majority did exactly what it criticized the Companies for advocating, and restored even less flow than HC&S advocated.

Stream protection is not a "regulatory 'free-for-all' guided by the mere reminder of the necessity of 'balancing'" and the majority's subjective sense of the "public interest." Waiāhole, 94 Hawai'i at 190 n.108, 9 P.3d at 502 n.108. The law already establishes the framework for stream protection. The majority recited this framework, then proceeded to violate it.

2. The majority arbitrarily misused USGS's temporary flow release figures.

For the first time in the final decision, the majority cited and adopted "USGS's proposed controlled flows" as the "most credible proposals for amending the IIFS" and "the best balance between instream values and offstream uses." COL 261. The majority may have imagined that this fulfilled its trust duty to protect instream uses under its upside-down approach, but this only further exposed the majority's makeshift reasoning. First, USGS never provided any "proposals for amending the IIFS." Rather, in 2007, USGS requested preliminary, temporary flow releases for the specific purpose of facilitating its study of Nā Wai 'Ehā streams, which was ongoing at that time, but has now long concluded. RA303:46(l.4)-47(l.13); RA303:45(ll.9-24) (Dr. Oki) (making clear that field work would end by September 2008).[18] As USGS made clear, it designed these releases to study stream hydrology, including ground water recharge and physical habitat, and not any biological or other benefits. FOF 605; RA303:165(ll.17-20) (Dr. Oki). USGS, moreover, insisted that it was not providing any recommendation or opinion on the IIFSs. RA303:103-05; RA327:70(l.13)-71(l.6) (Dr. Oki). In sum, the purpose of USGS's requested releases concerned hydrologic data collection only. The request did not involve any IIFS "proposal," or any consideration of instream values, much less any "balanc[ing] between instream values and offstream uses."

The majority misused USGS's figures even further. USGS provided not one, but three graduated flow levels for each stream, which it designed to encompass a "fairly wide range of low flow conditions." RA303:47(ll.14-20) (Dr. Oki). The majority, however, seized on the bottom level as a stand-alone "proposal," automatically relegating the streams to the lowest end of this low flow range. In the case of Waihe'e River, for example, the first level of 10 mgd is 4 mgd or 30 percent lower than the lowest flow ever recorded of 14 mgd, which occurred on only 6 days between 1984 to 2005 (or about 0.08% of the time). RA62:124-25(¶23) (Dr. Oki). The

[18] Due to the Companies' opposition, the USGS has already completed and published the study last year without the benefit of its requested flow releases. See http://pubs.usgs.gov/sir/2010/5011/.

majority thus twisted USGS's proposal to justify the "minimalist approach to restoring stream flows" that both CWRM and the Court deemed "insufficient in light of the [CWRM]'s duties and in the interest of precaution." Waiāhole II, 105 Hawai'i at 9-12 & n.9, 9 P.3d 651-54 & n.9.

Finally, as noted above, USGS's proposal included flows for 'Īao Stream, and even the bottom-end flow levels that the majority expressly adopted as the "best approach" for the IIFSs included 9.5 mgd for 'Īao. COL 246; FOF 615. Thus, even assuming USGS's proposal provided a valid basis for the IIFSs, the majority violated its own professed "best approach" in restoring no flow to 'Īao.

The majority's misappropriation of USGS's proposed releases is just as arbitrary as the approach that the Hawai'i Supreme Court invalidated in Waiāhole II, where CWRM restored only half of the stream flows based on testimony that Hawaiians customarily did not divert more than half of the stream flows. See 105 Hawai'i at 10-11, 93 P.3d at 652-53. As the Court explained, this "half approach" rested on an "assumption" of sufficient protection of instream values that was "arbitrary and speculative," "lack[ed] vital information," and "left unanswered the question whether instream values would be protected to the extent practicable." Id. at 11, 93 P.3d at 653. Likewise, the majority erred by relying on USGS's proposal that had nothing to do with protecting instream values to the extent practicable, in attempting to justify minimal or no protection at all. In the end, the majority cannot mask that it pursued the very approach it purported to reject, and the law prohibits: leave the streams the less-than-minimum "leftovers" after offstream uses are liberally satisfied.

C. The Majority Failed To Protect Native Hawaiian Rights To The Extent Feasible.

For the same reasons above, the majority violated its constitutional duties to protect Native Hawaiians rights to the extent feasible under both the public trust and the independent mandate of article XII, § 7. The majority's overall minimalist approach also denied relief to long-disadvantaged Native Hawaiian rights and practices dependent on Nā Wai 'Ehā waters, and its misuse of USGS's flow figures also failed to protect these interests. Indeed, as highlighted in

its abandonment of ʻĪao and Waikapū Streams, see supra Part VI.A.2 ("Native Hawaiian rights"), the majority gave little or no indication whether it considered and protected these rights.

In Waiʻola, the Hawaiʻi Supreme Court reversed CWRM for failing to "render the requisite FOFs and COLs" on the protection of Native Hawaiian rights as a public trust purpose and, thus, "violat[ing] its public trust duty to protect [those] rights under . . . the Code, the Hawaiʻi Constitution, and the public trust doctrine in balancing the various competing interests in the state water resources trust." 103 Hawaiʻi at 431-32, 83 P.3d at 694-95; see also id. at 441-42, 83 P.3d at 704-05 (emphasizing that diverters bear the burden of establishing that they "would not abridge or deny traditional and customary native Hawaiian rights"). In Ka Paʻakai, the Court similarly held that all agencies must protect Native Hawaiian rights "to the extent feasible," by "at a minimum," rendering "specific findings and conclusions" on the existence of Native Hawaiian rights, the extent of their impairment, and feasible action to protect them. 94 Hawaiʻi at 47, 7 P.3d at 1084.

Here, the majority expressly recognized the existence of many traditional and customary practices in Nā Wai ʻEhā, which once "thrived," but now suffer "limitations" and "significant challenges" from the lack of stream flows. FOFs 34-54. The majority also cited testimony regarding the need to restore flows to promote and perpetuate Native Hawaiian culture and well-being. FOFs 55-60. For almost all of these traditional and customary rights, however, the majority failed to follow up with any specific FOFs and COLs establishing that it considered and protected them to the extent feasible and held the diverters to their burden of proof. For example, the majority recited Dr. Benbow's proposal, which included the principle that flow restoration to increase stream life should "tak[e] into account public uses such as Native Hawaiian gathering practices," COL 167(1), but then rejected his proposal, COLs 186-91, and made no other mention of gathering rights that would even suggest these rights factored at all into its decision. As discussed above, many other Native Hawaiian rights went completely unaddressed.

The Court "must judge the propriety of agency action solely by the grounds invoked by the agency," and "[t]he parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency." Waiāhole, 94 Hawai'i at 163, 157, 9 P.3d at 475, 469. The majority cannot dispose of Native Hawaiian rights by implication. Nor can the parties and Court, in the absence of clear FOFs and COLs, just assume the protection of Native Hawaiian rights -- in fact, all indications are to the contrary.

Moreover, in the one instance where the majority discussed water needs for Native Hawaiian rights, specifically in relation to kalo farming, it committed an obvious calculation error. The community witnesses receiving water from WWC's system, see supra Part II.A.3, widely testified that the amounts were insufficient. FOF 296. The majority, nonetheless, dismissed their requests for more water, FOFs 335-36, deeming that the 6.84 mgd WWC "currently" delivers is reasonable after dividing that amount by the acreages of only "those testifying at the [contested case hearing]," FOFs 293-94 (emphasis added), 332; COL 220. This plainly ignores the existence of many other 'ohana on WWC's system who did not testify, even though the majority documented all these 'ohana in its tables adopted from WWC as "persons receiving water." FOFs 229-33; Tables 3-6. Compare Tables 3-6, with FOF 233; RA160:246-309; RA98:23-25(¶¶2-4) (indicating several dozen community members in addition to those who testified). Instead of making reasonable inquiries or precautionary allowances in allocating water for Native Hawaiian and kuleana rights in light of its express recognition that many other 'ohana receive water besides those who testified, the majority simply ignored these other 'ohana and, thus, understated the total needs for Native Hawaiian and kuleana rights. Even when the majority did entertain Native Hawaiian rights, therefore, it failed to provide clear and logical findings that ensured protection of Native Hawaiian rights "to the extent feasible."

VII. THE MAJORITY FAILED IN ITS PUBLIC TRUST DUTIES BY MAXIMIZING OFFSTREAM DIVERSIONS AND NOT HOLDING THE DIVERTERS TO THEIR BURDENS OF PROOF.

A. The Companies Bear The Burden Of Justifying Their Diversions.

The majority's disregard of, and advocacy against, the public trust contrasted with its readiness to accommodate private diverters, especially HC&S, and dispense with their burden of proof. Under the constitutional public trust doctrine, the Companies bear the burden to "justify their [diversions] in light of the purposes protected by the trust." Waiāhole, 94 Hawai'i at 142, 9 P.3d at 454. CWRM, in turn, is "duty-bound to place the burden on [the Companies] . . . , requiring a higher level of scrutiny for private commercial water use," and "to hold [the Companies] to [their] burden." Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658.

The lack of a "more conclusive determination of necessary instream flows" sufficient for permanent instream flow standards "precluded the [Companies] from proving . . . the actual extent to which the diversions would sacrifice public values in the [Nā Wai 'Ehā] stream and estuary ecosystem" and rendered any offstream diversions "tentative at best." Waiāhole, 94 Hawai'i at 185, 161, 9 P.3d at 497, 473. This, however, "does not reduce the level of scrutiny [CWRM] must apply" or otherwise allow a "permissive view towards stream diversions, particularly while the instream flow standards remain[] in limbo." Id. at 160-61, 9 P.3d at 472-73.

The constitutional mandate of "maximum reasonable and beneficial use" is "not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" Id. at 139-40, 9 P.3d at 451-52; see COLs 12, 42 (requiring offstream users to prove their uses are reasonable-beneficial). Thus, "[a]t a very minimum, [the Companies] must prove their own actual water needs." Id. at 161, 9 P.3d at 473. They must also "demonstrate the absence of practicable mitigating measures, including the use of alternative water sources." Id. at 161-62, 9 P.3d at 473-74. The Companies, and not the public trust, must bear the burden of proof; if the

Companies fail to meet their burden, "[CWRM]'s analysis should . . . cease[]." Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658.

B. Background: The Majority Consistently Penalized The Public Trust For The Companies' Lack Of Proof.

Over the years that this case dragged on before CWRM, the Companies engaged in an endless pattern of divulging minimal, inconsistent, and even wrong information on their actual needs and alternatives. Instead, the parties advocating for the public trust bore the responsibility of providing substantive evidence against the Companies' bare claims. The Companies, still, never responded with any proof, but only idle criticisms and still more bare claims.

Particularly for HC&S, this gambit paid off in the majority's final decision. Rather than following the law and holding HC&S to its burden of proof, the majority did the opposite, penalizing the public trust for HC&S's lack of proof, and maximizing offstream use to minimize instream flows. In short, the majority enabled the Companies to nullify their constitutionally mandated burden of proof and shift it onto the public trust.

HC&S's failure to prove its own actual needs typifies this pattern:

- First, over several years and repeated inquiries from 2004, see supra Part II.B, HC&S quoted endlessly shifting figures for its claimed water use, ranging from 3,600 gallons per acre per day (gad) to more than 10,000 gad. RA160:132-36. Even HC&S's witness admitted "struggling" with the records' "problems." RA325:117(l.19), 112(ll.19-24) (Nakahata, HC&S crop control director).

- Instead, the Community Groups, OHA, and the County jointly provided analysis of HC&S's actual needs by Dr. Fares, the state's leading authority on agricultural water duties, who had developed a model for CWRM to calculate water duties utilizing over half a century of weather data. RA88:72-97. Dr. Fares calculated "optimal" water needs of 5,674 gad for HC&S's owned Waihe'e-Hopoi fields and 5,026 gad for its leased 'Īao-Waikapū fields. RA88:94-96; COL 75. These optimal amounts would meet or exceed crop irrigation requirements 80 percent of the time, which is the "industry standard." RA88:94-96; FOF 457.

- In response, HC&S simply nitpicked at the differences between Dr. Fares's model and its own model, without providing any calculations from its own model, FOF 490; COL 89. Instead, it cited a "requirements" figure that, on its face, overstated actual need, FOFs 490-93. It also began cataloging excuses why it "may" use excess water, without specifying, let alone justifying, how much excess it would ever use, FOFs 477-80; see RA160:136-40.

Lacking substantive proof from HC&S, the majority nonetheless pushed to inflate HC&S's uses as much as possible. Even after the majority (1) adopted the "industry standard" of 85 percent drip irrigation efficiency instead of HC&S's "assumed" 80 percent figure, COL 83, (2) observed that HC&S provided deficient data on its actual needs, COLs 81, 89, and (3) found that Dr. Fares's calculations could be as much as 30 percent more generous than calculations from HC&S's own model, which it failed to produce, COL 89, the majority still inflated Dr. Fares's figures by a random 5 percent to accommodate HC&S's various unsubstantiated excuses that "could account for" higher use, COLs 80, 91. See Dissent at 2, 3 (citing this "example of the majority consistently choosing presumptions in favor of HC&S and to the detriment of stream restoration," despite "the lack of data [that] was HC&S's own choosing").

Further, despite nominally adopting Dr. Fares's "industry standard" 80 percent figures, the majority used the 90-100 percent figures, or the amounts that would meet or exceed maximum needs during the entire long-term data period (plus an extra 5%), in order to "balance" instream and offstream uses and set the IIFSs. COLs 247-54; see FOF 457 n.5 (noting that "at the 100% rate, even though all acres would receive sufficient water all the time, more water than needed would be applied nearly all the time"). The majority thus negated the point of the 80 percent "optimal" figure, by simply superseding it with the maximum-plus figure. This approach of calculating offstream use at the maximum amount is unprecedented in CWRM practice, including the Waiāhole case, and appeared for the first time in the majority's final decision. It does not withstand review. See infra Part VII.C.

The same pattern occurred with respect to HC&S's required showing on alternatives, including Well 7, HC&S's principal water source before it gained WWC's "excess" stream water, see supra Part II.A.5. After HC&S first revealed the existence of this source during the contested case, it was the Community Groups and OHA who provided the publicly available information on the well, such as its documented 40 mgd capacity and HC&S's 21 mgd average

use over 60 years, including years in which HC&S used more than 30 mgd over an entire year. FOFs 494-95; RA100:55; RA102:44-45.

The majority, nonetheless, all but eliminated this main alternative based not on the "economic decision" that HC&S emphasized, RA321:120(ll.15-18) (Volner), but on tangential claims and speculation about well yield and salinity. The majority declared that "practicable" use from the source "is deemed 9.5 mgd." COL 230. It further pronounced that even this amount "will be subtracted in [its] analysis" and deemed unavailable except during times of maximum offstream need and minimum instream flows. COL 248. The majority thus twice drastically minimized the amount from Well 7, resulting in an absolute maximum use of 9.5 mgd and a long-term average use of some mere fraction of that amount. This, too, fails under the law. See infra Part VII.D.[19]

C. The Majority Failed To Consider And Mitigate The Impact Of Variable Offstream Demand.

Initially, the majority's approach of maximizing offstream use in setting the IIFSs is not only unprecedented, as noted above, but improperly reverses the public trust's and Code's protections, minimizes instream flows, and imposes the full burden of low-flow periods on public trust instream uses (without any of the benefit of higher-flow periods). The Court addressed such issues in Waiāhole when it vacated CWRM's decision for failing to consider the impacts of the annual variability of offstream demands on consistent instream flows and "the

[19] The majority offered even further insight into its mindset in its misguided discussion of Hawai'i water law at the outset of its IIFS "analysis," opining that: prior law "completed the privatization of surface waters in Hawaii," after which the Hawai'i Supreme Court "reversed course," COL 203; and "until 1973, surface waters in Hawai'i could be treated as private property, and those with such 'prescriptive' rights had superior rights to the common law 'riparian' rights," which CWRM's public trust duty "fundamentally turns on its head," COL 204. These conclusions clash against the governing rulings of the Hawai'i Supreme Court. See, e.g., Reppun, 65 Haw. at 539-48, 656 P.2d at 63-69 (rectifying such "fatally flawed," "fundamental mistakes" and "basic misconceptions"); Robinson v. Ariyoshi, 65 Haw. 641, 667-676, 658 P.2d 287, 305-312 (1982) (rejecting the majority's claim of "privatization"). Such legal opining has no place in CWRM's appointed role, but speaks volumes about the majority's approach and decision.

practicability of adopting specific measures to mitigate this impact." 94 Hawai'i at 171-72, 9 P.3d at 483-84. The Court ruled:

> In order to mitigate the impact of variable offstream demand on instream base flows, [CWRM] shall consider measures such as coordination of the times and rates of offstream uses, construction and use of reservoirs, and use of a shorter time period over which to measure average usage. If necessary, [CWRM] may designate the []IIFS so as to accommodate higher offstream demand at certain times of the year.

Id. at 172, 9 P.3d at 484. Here, the majority not only failed to consider the impacts of variable offstream demand, it vaulted directly to the maximum demand for purposes of setting the IIFSs. COLs 247-54. Further, the majority not only failed to consider the practicability of mitigating the impact on streams, it virtually eliminated HC&S's main mitigation measure, Well 7. COL 248. As the dissent pointed out, further discussed in the next section, the majority had no legitimate basis for minimizing the use of Well 7 even during dry periods, which are precisely when HC&S's store of ground water would help mitigate the impacts on the streams.

Nā Wai 'Ehā water is "the only source to supplement base stream flow and to satisfy [instream uses]," and "[u]nlike [HC&S's] offstream uses, [Nā Wai 'Ehā] instream uses have no alternatives at any cost" to this water. Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477. The majority's approach of maximizing offstream use to minimize stream flows must be rejected, and CWRM required to provide the analysis of instream use protection that is entirely missing from the final decision.

D. The Majority Arbitrarily Minimized HC&S's Well 7 Alternative.

The majority's nullification of Well 7 as a practicable alternative highlighted its complete reversal of the public trust's protections. Well 7, like HC&S's other plantation wells, is non-potable. FOF 494; RA158:16-17; RA100:62. No one but HC&S uses Well 7 water, and if HC&S does not use it, no one does. Yet, in contrast to Well 7's documented 40 mgd capacity and long-term average use of 21 mgd, the majority "deemed" only 9.5 mgd at maximum and some fraction thereof on average to be a practicable alternative to draining Nā Wai 'Ehā waters.

HC&S "has minimized the use of Well No. 7 ever since [Wailuku Sugar's parent] Brewer" went out of the sugar business, FOF 263, because WWC currently gives HC&S its unused "excess" Nā Wai 'Ehā flows. Using this "free" stream flow instead of pumping Well 7 enables HC&S to sell a corresponding amount of its internally generated electricity to Maui Electric for windfall profits. RA321:190(l.19)-191(l.3) (Volner). In other words, as HC&S admitted, it is a "good generalization" that its current nonuse of Well 7 "is simply an economic decision." RA321:120(ll.15-18) (Volner). HC&S, however, understands that this current windfall will diminish as WWC increases its water sales. RA321:130(ll.13-22) (Volner). More fundamentally, the law does not allow the Companies simply to "minimize" an alternative source for private profit, at the public trust's expense: Nā Wai 'Ehā waters are not the Companies' "convenient reservoirs," nor is the public "obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." Waiāhole, 94 Hawai'i at 155, 165, 9 P.3d at 467, 477; see also HRS § 174C-71(1)(E) (mandating consideration of alternative sources and any other solutions in restoring stream flows). The majority nonetheless allowed this scheme to hoard WWC's "excess" and maximize HC&S's profits to continue wholesale.

At an obvious loss to justify this, the majority, for the first time in the final decision, grasped onto an excuse regarding Well 7's yield and salinity that even HC&S gave only an idle afterthought. Throughout the case, HC&S claimed that it would compensate for reductions in Nā Wai 'Ehā water by forgoing electricity sales or reprioritizing pumping from its other wells to Well 7, RA321:120(ll.1-18) (Volner); RA160:152-54 -- and also tossed in the empty generalization that "[s]ustained pumping can, over time, increase the salinity of the pumped water," RA86:37(¶6) (Volner). In the absence of any proof from HC&S, however, the majority simply ad-libbed for HC&S's benefit.

In reaching its 9.5 mgd figure by halving HC&S's historical average Well 7 use (erroneously stated as 19 mgd, instead of 21 mgd, see FOF 495, half of which would be 10.5 mgd), the majority simply declared that "the practicable alternative . . . is lower than historic

rates" based on general findings on the plantations' switch from furrow to drip irrigation (FOFs 445, 215), along with the bare statements (citing no findings), that the aquifer's sustainable yield "is already being exceeded" and "increased pumping from Well No. 7 may exacerbate that strain." COL 230. The majority considered these "uncertainties" "in combination with [CWRM's] decision to place the full burden of remedying [ditch system] losses immediately upon HC&S." Id. The majority, however, missed the point that HC&S bears the burden of proof and, thus, the burden of any "uncertainties" regarding the practicability of using Well 7. The majority conspicuously never concluded whether HC&S met its burden, compare COL 123, but simply "deemed" the 9.5 mgd figure into existence without any reference to findings or evidence on the purported "strain" either now or as "may" occur with Well 7 use. See Dissent at 2, 4 (criticizing the reduction of well capacity to an "arbitrary 9.5 mgd").[20]

In further minimizing Well 7 use by deeming it "subtracted in [its] analysis" of IIFS "balancing," COL 248, the majority cited FOF 500, as well as COL 106, which restates the same. FOF 500 is the sole finding the majority provided on its excuse against using Well 7. It states in full: "HC&S also claims that any increased pumping of water from the Kahului aquifer to replace surface water [from Nā Wai 'Ehā streams] would both exacerbate the degree to which the sustainable yield is already being exceeded and reduce the recharge from imported surface water that sustains the aquifer." (Emphases added.) See also COL 106 (repeating what "HC&S states"). This statement, parroting what "HC&S claims" in meaningless, absolutist terms against "any" increased pumping, is not evidence, but pure argument. It does not constitute a proper

[20] The majority went even further astray in attempting to justify minimizing this alternative because it "plac[ed] the full burden" on other practicable alternatives. Setting aside that it did not actually do this, see infra Part VII.E, the law already mandates CWRM to place on diverters like HC&S the full burden of remedying any unjustified system losses, nothing more or less, and this does not grant CWRM an excuse to lower the legal standard and burden of proof with respect to other alternatives.

finding of fact.[21] The majority, in the end, lacked any proper findings to support its result, as the law requires. Hawaii Elec., 60 Haw. at 642, 594 P.2d at 623.[22]

Indeed, throughout this entire proceeding, HC&S never offered more than bare claims. Thus, the only evidence the majority cited in FOF 500 (none of which HC&S submitted) involved: (1) snippets of testimony about which aquifers underlie HC&S; (2) the aquifers' nominal sustainable yield figures; and most critically, (3) a 2008 letter (cited twice) from HC&S to CWRM, which directly refutes HC&S's and the majority's "claimed" concerns about exceeding Kahului aquifer's sustainable yield, RA158:16-17. The letter "takes exception" to the very sustainable yield figures FOF 500 cites, which ignore not only irrigation return, but also "ground water movement from adjacent aquifers." RA158:16.[23] Thus, "[o]ver the last twenty years," HC&S has pumped "40 mgd to as much as 112 mgd" from its plantation wells, "far in excess of the combined sustainable yield of between 7 and 8 mgd for the Kahului and Paia aquifers." RA158:17. Moreover, "all [the wells] have been in place and operated for many decades without any long term deterioration in water quality." Id. The majority cannot gloss over such contradictions, but "must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected" -- or, in this case, the evidence on which it

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[21] See Mitchell v. BWK Joint Venture, 57 Haw. 535, 536, 543, 560 P.2d 1292, 1293, 1297 (1977) (recitations of testimony do "not constitute findings of basic facts"); Dean v. Pelton, 437 N.W.2d 762, 764 (Minn. Ct. App. 1989) (recitation of party's "claims" "is not making true findings but merely reciting the parties' claims").

[22] See also supra note 13 and accompanying discussion; Pack v. Indiana Family & Social Servs. Admin., 935 N.E.2d 1218, 1228 (Ind. Ct. App. 2010) (reversing decision that "fails to reach findings of basic fact, which in turn makes any legal conclusions or findings of ultimate fact defective"); Perez v. U.S. Steel Corp., 426 N.E.2d 29, 32 (Ind. 1981) ("The requirement that findings of basic fact be entered insures that a careful examination of the evidence, rather than visceral inclinations, will control the agency's decision.").

[23] See also RA102:5-6 (USGS report documenting that "[g]round water in the isthmus improves in quality toward west Maui, where there apparently is significant underflow of good quality water from west Maui").

paradoxically purported to rely. Waiāhole, 94 Hawai'i at 163-64, 9 P.3d at 475-76 (citing cases).[24]

Indeed, during all this time, and even now having claimed "strain" on "already exceeded" conditions, CWRM has never intimated any possibility of designating Kahului aquifer as a water management area,[25] or any other measure to limit HC&S's use of its plantation wells. Yet, HC&S and the majority now turn around and feign concern about "uncertainties" for the purpose of denying as off-limits a major alternative to draining public streams. In other words, HC&S is free to pump whenever it likes, but not when it would uphold the constitutional public trust. This double standard against the public trust may be expected from a diverter like HC&S, but makes a mockery of CWRM's trustee duties. Cf. id. at 172-73, 9 P.3d at 484-85 (rejecting CWRM's attempt to flip-flop positions to "create an absurdity, or worse yet, circumvent [CWRM]'s constitutional and statutory obligations").

HC&S further belied its own claims by advocating for an allocation of 9 mgd of Nā Wai 'Ehā stream flows for A&B's proposed Wai'ale Water Treatment Facility. RA158:379-80. A&B asserted there "would be a directly calculable cost" of HC&S replacing the reduced stream water with well water, but admitted it "ha[s]n't done that analysis to date." RA328:24(l.11)-25(l.23) (Kuriyama). More importantly, HC&S never suggested that its well yields posed any limitation on replacing this proposed permanent reduction of 9 mgd of stream water.

The objective evidence also invalidates HC&S's and the majority's claim. The majority's IIFS "balancing" restricted Well 7 use to an absolute maximum of 9.5 mgd, but since the mid-1980s, even after the plantations switched to drip irrigation and HC&S purposefully minimized using Well 7 in favor of Nā Wai 'Ehā "excess" from Wailuku Sugar, HC&S exceeded

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[24] See also Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) (maintaining that "an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary action," and that "an agency cannot ignore evidence contradicting its position").

[25] See HRS § 174C-44 (1993 & Supp. 2009) (listing criteria for ground water designation, including whether withdrawals may reach "ninety per cent of the sustainable yield," withdrawals "are endangering the stability or optimum development of the ground water body due to upcoming or encroachment of salt water," or "chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses").

9.5 mgd for an entire month in 27 different months. RA102:44-45. This included two separate years, 1996 and 2000, during which HC&S had maximum months of 33.5 mgd (October 1996) and 31.3 mgd (June 2000) and used an average of 28.4 mgd and 20.7 mgd, respectively, over the entire five-month period from June to October. RA102:46-47. The majority, however, simply ignored the actual evidence and plucked its 9.5 mgd maximum out of thin air.

Ultimately, HC&S alone bears the burden of proving -- and not just "claiming" -- that using Well 7 is not practicable, and CWRM is "duty bound" to hold HC&S to its burden. HC&S, in fact, revealed that it collects data on the salinity of Well 7. RA325:97(ll.17-20) (Nakahata); RA321:109(ll.8-19) (Volner). If HC&S had genuine concerns about the effects of pumping Well 7, it was not only able, but obligated to produce that data to show any such effects.[26] HC&S, however, provided none of that data, could not state the salinity of Well 7 or any potential increase in Well 7 salinity, RA321:109(ll.8-19), 112(l.23)-113(l.3) (Volner); RA325:97(ll.17-20) (Nakahata), and insisted contrarily that its wells have continued "for many decades without any long term deterioration in water quality." RA158:17.

When HC&S failed to meet its burden, the majority's "analysis should have ceased," as the Court already admonished. Waiāhole II, 105 Hawai'i at 16, 93 P.3d at 658. Instead, the majority cited the "uncertainty" stemming from HC&S's lack of proof to justify drastic and arbitrary restrictions of the Well 7 alternative and escalations of stream diversions. The majority thus allowed HC&S to shift the presumption and burden against the public trust.

Finally, it bears noting that although HC&S emphasized the "economic decision" behind not using Well 7, the majority (and dissent) saw no problem in the economic practicability of using Well 7 insofar as it "[would] not require capital costs, only the costs of pumping." COL 230. HC&S quoted "costs" of pumping Well 7 (in the form of potential foregone electricity

[26] It is "a generally accepted principle of law" that "[w]hen a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Singh v. Gonzales, 491 F.3d 1019, 1024 (9th Cir. 2007). While this principle certainly applies here, it states nothing more than what the public trust already requires in placing the burden of proof on HC&S.

sales to MECO) that translated to around $0.20 per 1000 gallons or less, RA160:385, which is a fraction of the costs documented in Waiāhole. See 94 Hawai'i at 165, 9 P.3d at 477.[27] Moreover, HC&S acknowledged that the cost of water is one of the smallest factors in the overall cost of farming, even for those who have to pay for water. RA322:80(ll.12-17) (Holaday). The Court made clear that diverters like HC&S are not entitled to "a subsidy or guaranteed access to less expensive water," and stream restoration "need not be the least expensive alternative for [HC&S] to be practicable from a broader, long-term social and economic perspective." Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477. HC&S did not, and could not, meet its burden of proving Well 7 is not economically practicable, which is undoubtedly why the majority pursued the equally unavailing red herring of well yield and salinity.

E. The Majority Failed To Hold The Companies To Their Burden Of Justifying Losses.

The majority was equally arbitrary in failing to place on the Companies the "full burden" of justifying and remedying system losses, as its decision claimed, COL 230, and as the law requires in any event. The public trust places on offstream diverters the burden of justifying any system losses and adopting practicable mitigation, including repairs, maintenance, and lining of ditches and reservoirs. Waiāhole, 94 Hawai'i at 173, 9 P.3d at 485; COL 35. The majority expressly concluded that both Companies have "not established the lack of practicable mitigating measures to address these losses." COLs 121, 123. Yet, based on the empty record left by this failure of proof, which necessarily precluded any supporting findings, the majority simply "assumed" it should grant the Companies 2.0 mgd each and 4.0 mgd total -- almost half of what it restored to Waihe'e River and 1.5 mgd more than it restored to Waiehu Stream. COLs 225, 229.

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[27] Neither HC&S nor the majority justified capping Well 7 use based on HC&S's claimed additional capital costs. Like the "millions of dollars" offstream users quoted in Waiāhole, HC&S lump sum figures, see COL 105, have "little meaning without evidence and analysis of the actual per-unit breakdown of these costs relative to the cost of ditch water and other alternatives," 94 Hawai'i at 164-65, 9 P.3d at 476-77, and in any event, translate to mere pennies per 1000 gallons, RA160:385-88.

As early as 2005, CWRM requested the Companies to show "measures you are currently using to ensure efficient use of water" in response to the Community Groups' Waste Complaint. RA100:19. In 2007, during the contested case hearing, HC&S revealed that it loses up to 6 to 8 mgd from its Wai'ale Reservoir and 3 to 4 mgd from the rest of its system, including Reservoirs 91 and 92, FOF 423; RA321:59(ll.6-11) (Volner), and WWC claimed about 4 mgd of losses from its portion of the system, COL 225. Yet, the Companies never bothered addressing the practicability of stopping such waste. FOF 376; COL 123.

Given the Companies' persistent and deliberate inaction, the majority's assumption of 4.0 mgd of waste lacks basis in the record and findings, and ultimately the law. The presumption favors restoring the public trust, not granting the Companies extra amounts of water for unjustified losses.

F. The Majority Failed To Consider The Practicability Of Recycled Water.

The majority likewise erred in failing to address the practicability of using recycled water resources. The majority recognized these resources included "at least five mgd from the County of Maui's Wailuku/Kahului wastewater treatment plant," all of which is "unused and disposed of." FOF 501. HC&S simply declared that "the County currently has no existing infrastructure to deliver recycled wastewater to HC&S' fields," FOF 502, but the majority acknowledged that "private parties could construct their own pipeline to the plant," FOF 504 -- which is already happening at other plants in South and West Maui. RA318:154(ll.10-17), 126 (ll.11-20), 141(l.9)-142(l.1) (Parabicoli, county reclaimed water official). See also COL 33 (maintaining that "[a]n alternative source of water is not rendered impracticable simply because an offstream user does not own or control the source") (citing Waiāhole II, 105 Hawai'i at 17, 93 P.3d at 659).

The majority, however, simply repeated these observations in its conclusions, COLs 107-108, 230, then called it a day. This fails to establish that this alternative is impracticable. Indeed, infrastructure already exists to deliver recycled water from Maui Land & Pine's ("MLP's") cannery in Kahului to HC&S's Waihe'e-Hopoi fields, which demonstrates that such

infrastructure can be, and has been, built. See RA132:119; RA321:29(l.16)-30(l.15) (Volner). The majority, moreover, freely granted HC&S Nā Wai Ehā stream water to compensate for the supposed recent loss of the cannery water, see infra Part VII.G, yet failed to consider the feasibility of HC&S (or any other party) making use of other recycled resources.

As the county official in charge of recycled water emphasized, recycled water is a "long-term insurance policy for water resources, because it's dr[ought] proof" and "never stops flowing." RA318:153(l.15)-154(l.9) (Parabicoli). It is not only "a shame to throw it away," id., it is CWRM's comprehensive trustee role to ensure these water resources do not go to waste, but rather enable the restoration of "the only source" of water for public streams and uses that "have no alternatives." Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477; see also HRS § 174C-71(1)(E). The majority abdicated its fiduciary duties here as well.

G. The Majority Erroneously Inflated HC&S's Acreages.

The majority also erred in inflating HC&S's acreage and water allocation by belatedly adding in its final decision 300 acres for Fields 921 & 922, which are "sandy scrub land" that HC&S only cultivated with recycled water from MLP and never irrigated with Nā Wai 'Ehā water. The law strictly limits offstream use to proven "actual need," including actual acreages needed. See, e.g., Waiāhole, 94 Hawai'i at 161-62, 164, 9 P.3d at 473-74, 476; Waiāhole II, 105 Hawai'i at 25-26, 93 P.3d at 667-68; COL 12. Such proof is critical, since several hundred acres multiplied by sugarcane's generous water duties can total to millions of gallons per day.

At the Community Groups' urging, RA160:142-44, the Final Decision reduced HC&S's claimed acreage for the 'Īao-Waikapū fields by excluding the 250 acres of Field 920. COLs 93, 227. HC&S internally knew that Field 920 "is very sandy and has a low yield history," RA184: 64, yet for years it dumped on the field extreme water volumes ranging from 10,000 to 14,000 gad (2.5 to 3.5 mgd, or around a billion gallons per year), RA100:17; RA321:101(l.25)-104(l.3) (Volner).

Even while the majority, with one hand, returned water to the streams by excluding Field 920's 250 acres, with the other, it took even more water away by adding Fields 921 & 922's 300 acres. COL 92. In its Final Decision, the majority took "judicial notice" that the shift from MLP's pineapple operations to another company's fresh fruit operations "should not" result in the continuation of the wastewater source. FOF 261 fn.2. This is not a matter for judicial notice. See State v. Moses, 102 Hawai'i 449, 455, 77 P.3d 940, 946 (2003) (allowing judicial notice "only in very limited circumstances" involving "commonly known or easily verifiable" facts). Even assuming it is true, it does not justify freely granting HC&S more Nā Wai 'Ehā stream water. As the majority found, Fields 921 & 922, "like neighboring Field 920, are sandy 'scrub land.'" FOF 314. Moreover, even after gaining WWC's Nā Wai 'Ehā "excess" in the late 80s, HC&S had no plans to cultivate that area until it opened the fields specifically "to be a wastewater land application for Maui Pine's wastewater." Id.; RA321:27(ll.21-25) (Volner). In all the years of this case, HC&S never once mentioned these fields, FOF 427, until it began pushing to inflate its acreages during the hearing, RA160:144-46.[28]

Nā Wai 'Ehā trust resources are not free for the taking, on any acreage, however marginal, that HC&S would not mind irrigating with "free" water. See Waiāhole, 94 Hawai'i at 162, 9 P.3d at 474 (offstream diverters must demonstrate their "actual needs and . . . the propriety of draining water from public streams to satisfy those needs"). The allocation of precious Nā Wai 'Ehā stream water to replace a "wastewater land application" is contrary to the public trust's mandate of maximum reasonable-beneficial use, and all the more egregious given the majority's complete failure to consider any use of recycled water, see supra Part VII.F. This underscored again the disparity between the majority's indulgence of HC&S and disregard of the public trust.

[28] Setting aside whether Nā Wai 'Ehā stream flows are available for these fields, HC&S maintained that the wastewater supply was "sufficient" through 2007, FOF 316, including after the amount dropped to 0.78 mgd in 2006, FOF 315. In contrast to this sufficient amount, the majority allocated 1.8 mgd (5,958 gad over 300 acres). COL 92.

Ten years after Waiāhole, and after repeated reversals by the Hawai‘i Supreme Court, CWRM still rehashes and exacerbates the same errors, advocating for diverters rather than the public trust, and choosing expediency over long-term vision and long-delayed justice. The public trust mandate is becoming a "race to the bottom," in which diverters seek to provide the least possible or no proof, and water resources management increasingly slouches to lower levels. Meanwhile, the burden continues to fall on local and Native Hawaiian communities to seek relief from the Court's "ultimate authority" to uphold the public trust. See Waiāhole II, 105 Hawai‘i at 12, 93 P.3d at 654 (reiterating, in 2004, "that seventeen years have passed since the Water Code was enacted requiring [CWRM] to set permanent instream flow standards by investigating the streams"). Even if the CWRM majority's decision is vacated yet again in this case, just by repeating these same errors the majority will have further delayed relief to Nā Wai ‘Ehā communities for years. This cannot be the vision of the public trust that the constitutional framers and legislature intended. The Community Groups respectfully request this Court to reverse the final decision and ensure, once and for all, that the diverters' burden of proof be enforced and the constitutional public trust be respected and upheld.

VIII. CONCLUSION

> Hawai‘i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai‘i's territorial period, the decisions of our highest court, reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai‘i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai‘i. The result can be found in the decisions of the Hawai‘i Supreme Court beginning after Statehood. Thus, during my tenure on the Court, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases – and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.[29]

[29] KA LAMA KŪ O KA NO‘EAU: THE STANDING TORCH OF WISDOM vi-vii (2009) (quoting Chief Justice William S. Richardson).

Chief Justice Richardson's jurisprudence recognized the values that make Hawai'i truly special. It reflected an understanding that, in isolated island communities, natural and cultural resources like water and flowing streams are a public trust and an inalienable foundation of our indigenous culture and local lifestyles. Those values live on in the 21st century in the law of Hawai'i's highest court, which is also part of what makes Hawai'i special.

The outcome of this case will define Nā Wai 'Ehā's and Maui's water future. It will also decide much more: whether water resource management in Hawai'i will finally transcend the plantation-era mindset of streams as reservoirs for offstream use and begin meaningfully protecting these resources as a living legacy for all. While CWRM continues to struggle with its kuleana, the Community Groups appeal to this Court to uphold its kuleana and ensure that justice -- and Nā Wai Kaulana, The Four Great Waters of Maui -- will flow for present and future generations.

For the reasons stated above, the Community Groups respectfully request this Court to reverse the majority's final decision and require that CWRM: 1) reestablish Nā Wai 'Ehā IIFSs, including IIFSs for 'Īao and Waikapū Streams, to protect and restore to the extent practicable all instream uses and values and Native Hawaiian and kuleana rights in each of the waters, including reasonable margins of safety; 2) require HC&S to use Well 7 to the fullest extent practicable, up to its historically established 21 mgd use, subject to monitoring; 3) exclude any allowance for the Companies' system losses; 4) exclude the 300 acres of Fields 921 and 922; 5) mandate the development and use of recycled water in lieu of Nā Wai 'Ehā diversions; and 6) proceed forthwith to investigate instream uses and values and Native Hawaiian and kuleana rights in Nā Wai 'Ehā waters, as well as any and all alternatives and solutions for offstream uses, to establish permanent instream flow standards.

DATED: Honolulu, Hawai'i, February 23, 2011.

/s/ Isaac H. Moriwake
ISAAC H. MORIWAKE
D. KAPUA'ALA SPROAT
Attorneys for HUI O NĀ WAI `EHĀ AND
MAUI TOMORROW FOUNDATION, INC

STATEMENT OF RELATED CASES

Petitioners/Appellants Hui O Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc. are not aware of any pending related cases.

DATED: Honolulu, Hawai‘i, February 23, 2011.

/s/ Isaac H. Moriwake
ISAAC H. MORIWAKE
EARTHJUSTICE
Attorneys for HUI O NĀ WAI `EHĀ AND
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