ORIGINAL

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

ANNA ELENTO-SNEED 3412-0
PAMELA W. BUNN 6460-0
Suite 1800
1001 Bishop Street
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: pbunn@ahfi.com

Attorneys for
OFFICE OF HAWAIIAN AFFAIRS

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI`I

`Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe`e, Waiehu, `Īao, & Waikapū Streams Contested Case Hearing	Case No. CCH-MA06-01 **OFFICE OF HAWAIIAN AFFAIRS' REBUTTAL BRIEF;** CERTIFICATE OF SERVICE

OFFICE OF HAWAIIAN AFFAIRS' REBUTTAL BRIEF

Office of Hawaiian Affairs ("OHA"), submits its Rebuttal Brief to the Responsive Briefs and submissions filed by the County of Maui Department of Water Supply ("the County" or "MDWS"), Wailuku Water Company LLC ("WWC"), and Hawaiian Commercial and Sugar Company ("HC&S"), which responded to the Opening Brief of Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc. (the "Community Groups"), in which OHA joined.

As an initial matter, OHA notes that, as was the case in the original contested case hearing, and on appeal, *no* party disputes that traditional and customary Native Hawaiian rights

have been and continue to be denied by the diversions of Nā Wai `Ehā water, or that those diversions deprive other public trust uses of adequate water. Nor does any party seriously contend that it is not feasible to protect the exercise of traditional and customary Native Hawaiian rights in Nā Wai `Ehā to a far greater extent than the Commission majority's Final Decision and Order did.

I. RESPONSE TO THE COUNTY

As it did in its Opening Brief, the County has gone out of its way to invent an issue it can successfully argue against. Although it cannot and does not dispute that recharge to the underlying aquifers, which are the main source of water for Central Maui, is a beneficial instream use of Nā Wai `Ehā water, the County argues that the 2010 USGS Nā Wai `Ehā Report (Ex. A-R1) does not spell out the specific relationship between increased recharge and sustainable yield, and therefore MDWS cannot voluntarily give up "its" surface water source in order to pump the same amount of water from its wells, for which it has no permit in any event. MDWS's 1/27/14 Responsive Brief ("MDWS RB") at 1-4. The County also takes issue with HC&S's model, to the extent it uses 1.5 mgd as MDWS's use, because MDWS's current use of `Īao surface water is 1.7 mgd. *Id.* at 8.[1]

Obviously, however, by pointing out the absurdity of the public paying WWC for public trust water, the Community Groups did not suggest that MDWS "should forego taking surface water from the `Īao-Waikapū Ditch, should let the water run down the stream, and then pump it from a well, due to the potential groundwater recharge." *Id.* at 3. That is a scenario the County imagined on its own.

[1] OHA does not address the issues raised by the County concerning Mr. Sevilla's testimony. MDWS RB at 4-8.

As OHA pointed out in its Responsive Brief, the Commission has *already determined* that the County's reasonable use of Nā Wai `Ehā water is 3.2 mgd, and that determination was undisturbed on appeal. Although unnecessary and redundant, OHA is willing to stipulate to that effect, and suspects the other parties would do so as well, if it would mean that several days of the contested case hearing do not have to be taken up by hearing the County's witnesses attempt to reestablish that which has already been decided.

II. RESPONSE TO WWC

WWC's Responsive Brief addresses three points, and misses the mark on each. First, it agrees that the delay in establishing the IIFS does indeed cause "significant harm and losses," but contends that WWC's loss of income, rather than the loss of traditional and customary Native Hawaiian rights and other public trust uses in Nā Wai `Ehā, is the cognizable harm. *Id.* at 1. This is not the first time that the Companies have displayed stunning insensitivity to the cultural and environmental deprivations their diversions have caused to the communities of Nā Wai `Ehā,[2] and undoubtedly will not be the last. In any event, if WWC is losing money, it is not because of these proceedings or the delay that the Commission majority caused by failing to fulfill its duties as the trustee of the public trust. Rather, it is because WWC built a business

[2] When then-General Manager Chris Benjamin presented HC&S's argument on its exceptions to the Hearings Officer's Proposed Decision, he remarked that "*the benefits of these proposed stream flows are unclear. These are species that are neither [endangered] nor threatened.*" Tr. 10/15/09 at 23, ll. 4-6 (emphasis added). Perhaps Mr. Benjamin, who did not hear the testimony of the many community members who testified, could be excused for his ignorance of the importance of water to traditional and customary Native Hawaiian rights and practices, and the constitutional protections those rights and practices and other public trust purposes enjoy. However, the obvious reason for the delay WWC complains of is that a majority of the Commission *actually agreed* with him, and declined to restore any water to `Īao or Waikapū Streams based on nothing more than the majority's conjecture that restoring flow to those streams might not increase the population of native amphidromous species.

predicated on a legal fallacy – its "ownership" of and control over the public trust waters of Nā Wai `Ehā.[3]

As OHA pointed out in its Responsive Brief, the Commission has already assumed and accepted that restoration of flow to Nā Wai `Ehā streams could have a significant negative financial impact on WWC. COL 240(b)-(d). The extent of that impact, if any, will not be determinable until after the Public Utilities Commission has approved a rate structure for WWC, but even if it were true that restoring flow to `Īao and Waikapū Streams would have a more severe impact on WWC than restoring flow to Waihe`e River, that would not give the Commission discretion to abrogate traditional and customary Native Hawaiian rights or appurtenant rights exercised along those streams. Thus, it is immaterial to these proceedings.

Second, WWC contends that the Community Groups did not identify the traditional and customary Native Hawaiian rights exercised in Nā Wai `Ehā on a stream-by-stream basis. WWC RB at 3-4. Not so. The witnesses who testified on behalf of the Community Groups or OHA regarding their exercise of traditional and customary Native Hawaiian rights and practices identified where they exercised those rights, or hoped to exercise them upon restoration of sufficient water. To the extent not repeated in the Community Groups' Opening Brief, that information is in the record.

---

[3] Indeed, Wailuku entered into Water Delivery Agreements fully aware of the risks of its business model, and recognized that designation as a water management area would end its exclusive control of Nā Wai `Ehā water. Many of its Water Delivery Agreements (as opposed to the more common Water Licenses, which are terminable on three days' notice) expressly prohibit the "buyers" of water from "request[ing], support[ing] or encourag[ing], directly or indirectly, the designation of any water management area or similar area or zone under the State Water Code," and give WWC the option to terminate the Water Delivery Agreement upon either designation or the adoption of an IIFS. *See, e.g.,* Exhibit D-58, §§ 4.05(a) & (c); D-87, §§ 4.07(a) & (c).

More significantly, as the Community Groups' pointed out in their Opening Brief, *id.* at 32-33, and WWC acknowledges, WWC RB at 3, the Hawai`i Supreme Court carefully reviewed the Commission's findings regarding the existence, scope, and extent of Native Hawaiian rights in Nā Wai `Ehā, and pronounced those findings "very thorough." *In re `Īao Ground Water Mgm't Area* ("*Nā Wai `Ehā*"), 128 Hawai`i 228, 248, 247 P.3d 129, 149 (2012). The Court's remand was not to document the existence of traditional and customary Native Hawaiian rights in Nā Wai `Ehā; those rights and practices, which have never been disputed, have been unequivocally established and subsequently acknowledged by the Hawai`i Supreme Court. Rather, the Court remanded because it agreed with the Community Groups and OHA that the Commission majority "did not discharge its duty with regard to *the feasibility of protecting* native Hawaiian rights, *id.* (emphasis added); thus, the Court's mandate was to "further consider[] the effect the IIFS will have on native Hawaiian practices, as well as the feasibility of protecting the practices," *id.* at 249, 287 P.3d at 150. To the extent that consideration requires stream by stream information on the traditional and customary Native Hawaiian rights exercised, or that would be exercised with sufficient water, the information is already in the record.

Finally, WWC attempts to address the 2010 USGS Nā Wai `Ehā Report (Ex. A-R1), but its point (if it actually has one) remains elusive. WWC observes that the USGS Report "did not include information that was provided during these proceedings, including the oral testimony of WWC and Hawaiian Commercial and Sugar Company witnesses," WWC RB at 4, but does not explain why it would expect a scientific report to include contested case testimony. The USGS Report is transparent regarding the methodology used (which was also discussed in stakeholder meetings that included WWC, *see e.g.,* Tr. 12/6/7 at 50, l. 17-51, l. 6), and the principal author of the USGS Report, Delwyn Oki, testified at length (subject to cross-

examination) regarding the report and its methodology, *see* Tr. 12/6/7 at 8-195; Tr. 2/21/08 at 25-73. WWC's nebulous and seemingly pointless musings on the "reliability" of the report warrant absolutely no credence.

III. RESPONSE TO HC&S

HC&S, like the County and WWC, does not dispute that the diversions have deprived, and continue to deprive, Nā Wai `Ehā of water for public trust purposes, including the exercise of traditional and customary Native Hawaiian rights and practices. HC&S raises only two points in response to the Community Groups' Opening Brief: it contends that the use of averages overstates the amount of water available for stream restoration, and that the Community Groups' use of the U.S. Fish and Wildlife Service WUPA for Waikapū Stream is "grossly misleading."

HC&S is not really arguing about the use of averages – after all, its own water use is stated as an average, and any water use permit ultimately issued to HC&S will also be based on an average. HC&S is using its point about averages in an unsuccessful attempt to disguise the argument that the Hawai`i Supreme Court and the Hearings Officer have already rejected – that the IIFS must be set at an amount that will insure there is always water available for offstream diversion. *See* HC&S RB at 2 ("If the IIFS is established at a flow that is equal to or greater than the amount that is actually available during low flow periods, then nothing will be left for off-stream uses").[4] That is ***exactly*** how the Commission majority set the IIFS in its Final D&O – as the residual after offstream needs were satisfied – which is why there are still no meaningful IIFS

[4] The Hawai`i Supreme Court, in *In re Waiāhole Ditch Combined Contested Case Hr'g* ("*Waiāhole I*"), 94 Hawai`i 153-54, 9 P.3d 403, 465-66 (2000), admonished that an approach that effectively assigns to the streams the water remaining after offstream uses are accommodated "largely defeats the purpose of the instream use protection scheme set forth in HRS § 174C-71."

five years after the original contested case hearing concluded.[5] The status quo suits HC&S just fine, which is obviously why it suggests repeating the same mistake made by the Commission majority.

An IIFS is not intended or required to ensure there is always water available for offstream uses; to the contrary, given that both stream flows and offstream needs are variable, an IIFS that adequately protects instream uses will inevitably result in times when there is insufficient water available for offstream uses. That is made clear by the Water Code, which specifically contemplates precisely that scenario:

> In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time or rate of diversion, uses of water from alternative sources, or any other solution;

HRS § 174C-71(1)(E).

As an initial matter, HC&S should not be heard to complain about days when there is insufficient Nā Wai `Ehā water to satisfy its irrigation needs given its continuing failure, more than three years after the Final D&O, to mitigate its unconscionable losses. As even the Commission majority recognized, HC&S could (and therefore must) recover the 6-8 mgd of Nā Wai `Ehā water that it allows to seep from Wai`ale Reservoir. D&O at 187 ("[t]he highest priority is leakage from HC&S's unlined Wai`ale Reservoir").

In any event, unlike the streams of Nā Wai `Ehā, which have no alternative source of water to satisfy traditional and customary Native Hawaiian rights, kuleana rights, and other public trust purposes, HC&S has the luxury of alternative sources of water. *Cf. Waiāhole I,* 94 Hawai`i at 165, 9 P.3d 403, 477 (2000) ("Unlike [] offstream uses, [] instream uses have no

[5] *See* Dissent at 2 (observing that "the majority assigns [to the IIFS] whatever is left after taking care of offstream uses").

alternatives at any cost"). HC&S now concedes, as it must, that it can feasibly pump 18.5 mgd from Well No. 7. Setting the IIFS at a level that ensures HC&S and will not have to use that alternative would simply repeat the error that has already delayed the establishment of the IIFS by years.

HC&S also seeks to exploit the stipulations regarding the implementation of the South Waiehu IIFS to somehow support its argument about "averages." HC&S RB at 2. The issue regarding South Waiehu Stream had nothing to do with averages – it had to do with lack of recent reliable flow data, a condition for which HC&S was partially responsible and which unfortunately still exists.[6] In any event, the exercise of traditional and customary Native Hawaiian rights by the kuleana users on South Waiehu Stream, who have no other source of water, is a public trust use that is superior to HC&S's private commercial use of Nā Wai `Ehā water, for which it has several alternative sources.[7] *See Waiāhole I,* 94 Hawai`i at 149, n.52, 9 P.3d at 461, n.52 (agreeing with Commission that "[i]n the future some existing uses may be subject to modification to satisfy superior claims (e.g., unexercised appurtenant rights)"). Presumably, given that HC&S has historically (as well as more recently) acknowledged in writing that its use is subject to the rights of kuleana users, it is not now claiming otherwise. *See, e.g.,* Ex. D-52 at 33, 38-39; C-20, at 164, 168-69; C-64, at 3.

---

[6] During the stay in the implementation of the IIFS, the Commission was going to collect flow data. *See* E-R15. According to the Commission staff, although data has been collected, it has not been, and cannot currently be, translated into a usable form. Accordingly, the flow of South Waiehu Stream is still not known. What is now known is South Waiehu Stream loses approximately 1 mgd to seepage between location of the former USGS gaging station and the HC&S diversion. *See* Exhibit A-R1 at 70.

[7] Indeed, the 2-3 mgd HC&S estimates (apparently erroneously) that it diverted from South Waiehu stream during dry weather, FOF 187, is only a fraction of the 6-8 mgd it estimates it loses through seepage from Wai`ale Reservoir, FOF 423.

HC&S's argument about Waikapū Stream is particularly ironic. HC&S contends that the Community Groups' use of the U.S. Fish and Wildlife Service ("USFWS") WUPA for water from Waikapū Stream to preserve wetland habitat for endangered bird species (Ex. C-R13) is "grossly misleading," because the Community Groups did not point out that USFWS was not requesting restoration of Waikapū Stream flow, but rather preservation of the status quo.[8] HC&S RB at 4. The irony is that, as even the passage quoted by HC&S makes clear, the status quo for USFWS requires it to pump groundwater in order to maintain a natural wetland, which is a public trust purpose. *Id.* For years, HC&S argued vehemently that it should not be required to pump groundwater to replace the water it diverts from Nā Wai `Ehā streams, but it accepts as normal that USFWS would have to pump groundwater to replace water that, but for HC&S's diversions, would be supplied by Waikapū Stream. In other words, the status quo at Kealia Pond, as in Nā Wai `Ehā, is that HC&S' diversion of Nā Wai `Ehā streams to satisfy its private commercial needs deprives public trust uses of water.

IV. CONCLUSION

OHA will address the feasibility of using recycled water to replace diverted Nā Wai `Ehā water in accordance with the schedule set forth in Minute Order 29.

In addition to the arguments herein, OHA joins in the arguments made in the Rebuttal Brief filed by Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc.

---

[8] Of course, as the Hawai`i Supreme Court recognized, the Commission majority did *not* maintain the status quo, but actually *reduced* the IIFS for Waikapū Stream below the 1988 IIFS. *Nā Wai `Ehā,* 128 Hawai`i 228, 231, n.2, 287 P.3d 129, 132, n.2 (2012).

OHA reserves the right to further comment and submit additional evidence based on the evidence and argument of the other parties in their rebuttal submissions and at the hearing, and based upon such further evidence as is discovered prior to the hearing.

Dated: Honolulu, Hawai`i, February 18, 2014.

ANNA ELENTO-SNEED
PAMELA W. BUNN
Attorneys for OFFICE OF HAWAIIAN AFFAIRS

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI`I

`Iao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe`e, Waiehu, `Iao, & Waikapū Streams Contested Case Hearing	Case No. CCH-MA06-01 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the foregoing to be served on the following persons by facsimile, hand-delivery or U.S. mail, postage prepaid (as indicated below) to their respective addresses:

	HAND-DELIVERED	FAXED	MAILED
DAVID SCHULMEISTER ELIJAH YIP Cades Schutte LLP 1000 Bishop street, Suite 1200 Honolulu, HI 96813 Attorney for Hawaiian Commercial & Sugar Company (HC&S)	☒	☐	☐
GILBERT S.C. KEITH-AGARAN Takitani & Agaran, Law Corporation 24 N. Church Street, Suite 409 Wailuku, HI 96793 Attorney for Wailuku Water Company LLC	☐	☐	☒
PAUL R. MANCINI Mancini, Welch & Geiger LLP 305 E. Wakea Avenue, Suite 200 Kahului, HI 96732 Attorney for Wailuku Water Company LLC	☐	☐	☒

ISAAC H. MORIWAKE D. KAPUA SPROAT SUMMER KUPAU-ODO Earthjustice 850 Richards Street, Suite 400 Honolulu, HI 96813 Attorney for Hui O Nā Wai `Ehā and Maui Tomorrow Foundation, Inc.	☒	☐	☐
JENNIFER M.P.E. OANA PATRICK K. WONG Department of the Corporation Counsel, County of Maui 200 South High Street Wailuku, HI 96793 Attorneys for County of Maui, Department of Water Supply	☐	☐	☒
JULIE H. CHINA Department of Attorney General 465 S. King Street, Suite 300 Honolulu, HI 96813	☒	☐	☐

DATED: Honolulu, Hawai`i, February 18, 2014.

PAMELA W. BUNN
Attorney for OHA