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COMMUNICATIONS SECTION

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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of:)	Case No.: CCH-MA06-01
)	
Iao Ground Water Management Area High-)	WAILUKU WATER COMPANY, LLC's
Level Source Water Use Permit Applications)	REMAND REBUTTAL BRIEF;
and Petition to Amend Interim Instream Flow)	CERTIFICATE OF SERVICE
Standards of Waihee, Waiehu, Iao & Waikapu)	
Streams Contested Case Hearing)	
)	

WAILUKU WATER COMPANY, LLC's REMAND REBUTTAL BRIEF

I. INTRODUCTION

This action is not the first judicial review of the diversion of waters from streams in the ili of Wailuku. In 1867, the Supreme Court of the Kingdom of Hawaii related that historically the parties were able to share the resource and that such sharing was not a difficult process. Peck v. Bailey, 8 Haw. 658 (1867). "[F]or many years, at least, it is evident that those interested have very amicably adjusted the same. These

parties, who are very intelligent men, can do it easily, and I trust they will do it in a friendly manner. " Id. at 673.

The concept of shared use likewise exists in the state Water Code which relates that the interests of instream uses and non-instream uses must be balanced. This balancing includes the economic impacts resulting from changes to instream and/or non instream uses. As such, the economic impact of a change in instream flow standards is relevant to this proceeding and necessary for a determination by the Commission on Water Resource Management (the "Commission").

A. The Economic Impact on Wailuku Water Company is Relevant.

Petitioners and the Office of Hawaiian Affairs ("OHA") take a joint position that the viability of Wailuku Water Company ("WWC") is not relevant to the remand proceeding. Devoid of rhetoric, the argument is 1) that the Commission determined conclusively that WWC will be negatively impacted by a change in instream flow standards, 2) that the viability of WWC is controlled by the Public Utility Commission ("PUC") and not these proceedings, and 3) that the economic impact to WWC which results from a change in instream flow standards is outside the scope of the remand proceedings.

These arguments reflect a failure to recognize the nature and value of a water distribution system both historically and today.

A historical background of a diversion system from the Kauaula Stream in West Maui, including the sharing of water, is detailed in Horner v. Kumuliliij, 10 Haw. 174 (1895). Ditches and auwais dug in very ancient times allowed water from streams to be shared by various lands. The claim in the case related to the division of the ahupuaas

and ilis into two principal groups of lands, each containing 11 properties. Water was then divided for distribution on an agreed upon time sequence. The case addressed the division of land and the timed application of water to the various divisions. The case reflects historically the critical reliance on the diversion systems for the kalo lands, the need for sharing of the resource, and the control and maintenance of the systems with reciprocal obligations by the parties.

Similar statements regarding the sharing of the resource were made in Peck v. Bailey, supra, which involved one of the streams in this matter.

Various parties in the kamaauwai [sic] have hitherto mutually agreed upon the diversion of water, and for the period the complainants participate with them. When there are various interests in the same flow of water, it is desirable for the parties to agree upon a suitable mode and arrangement to regulate and adjust the same, but if they are unable to agree, an admeasurement may be made by order of Court. This is by no means a new problem.

Id. at 665-666.

This concept of resource sharing is embodied in the public trust doctrine. Article XI, Section 1, of the Constitution relates that "All public natural resources are held in trust by the State of Hawaii." Our Supreme Court related that the state Water Code and the Commission do not override the public trust doctrine or render it superfluous; rather, the doctrine defines the Code's permissible outer limits, and justifies its existence. In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000) ("Waiahole I").

There are four public trust protected uses: (1) maintenance of waters in their natural state; (2) domestic water use of the general public; (3) Native Hawaiian and traditional and customary rights, including appurtenant rights; and (4) the preservation of

water for Hawaiian Home Lands. Waiahole I, 94 Haw. at 136-138, 9 P.3d at 448-450.

There are no priorities with regard to trust purposes. Waiahole I, 94 Haw. at 142, 9 P.3d at 454.

The WWC distribution system serves public trust uses as reflected in Tables 1, 3 and 4 of the Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated June 10, 2010. Table 1, page 202, reflects 17 kuleana ditch systems served by WWC. Fourteen of the kuleana ditch systems take from WWC's delivery system while three users take directly from a stream. The WWC system delivered 6.16 million gallons per day to the kuleana users. Tables 3 and 4, pages 204-209, identify 87 parcels that receive water through the WWC delivery system. Table 7 relates WWC delivery agreements in 2005 and 2006 at 1.42 MGD and 2.37 MGD respectively. The kuleana deliveries by WWC total 6.89 MGD for both years. The County of Maui's surface water deliveries were 0.71 MGD in 2005 and 1.08 MGD in 2006. Assuming that the County of Maui and the kuleana users have protected public trust purposes, such reflects that approximately 84% of distributions in 2005 were for public trust uses and 77% were for public trust purposes in 2006. The conclusion that flows from this evidence is that the delivery system plays an important part in servicing public trust protected uses.

Additionally, in the Na Wai Eha surface water management area, 132 applications for surface water use permits were submitted requesting 61.41 MGD. The water use permit applications reflect 90 existing users and 42 new users. It appears that fewer than a dozen applicants take directly from a stream, consistent with the record in this matter. Exhibit "6" of the Hearing Officer's recommended findings, conclusions and

decision reflected only 6 diversions in addition to the WWC and HC&S ditch diversions. As such, most of the appurtenant right applicants will receive water that must be transferred through the WWC delivery system. Consequently, the WWC delivery system will play an important role in servicing appurtenant right users.

The Commission's obligation is to weigh the competing public and private uses and to accommodate both instream and off stream uses where feasible. The Commission must consider the cumulative impact of existing and proposed diversion and to implement reasonable measures to mitigate impact. Waiahole I, 94 Haw. at 142-143, 9 P.3d at 454-455. To meet its obligations, the Commission must look at economic impacts of a change in instream flows. The Hearing Officer recognized that obligation when he directed WWC to address the economic impact of a change in instream flow standards. Obviously, such information assists the Commission in meeting its obligation and WWC complied with the Hearing Officer's request.

With regard to the Public Utilities Commission as a determinate factor in the viability of WWC, pricing alone does not determine viability. Price is one component of the matrix which includes the quantity and quality of that which is being distributed and the cost of the distribution service. It is naive to assume that pricing will create economic viability. Without a sufficient supply and a customer base for the distribution service and without an efficient distribution system commensurate with the customer base, pricing is a lonely step child. Maui County has many public and private utility services. Each has a common economic template. Each utility distribution system, public or private, and whether water, wastewater, and/or energy, have a paradigm of costs, infrastructure, customer base, and pricing. Each component is critical to the

viability. WWC's point regarding the PUC is that the PUC proceeding cannot occur until the instream flow standards are set. Delay in conclusion of these proceedings results in a negative economic impact on WWC and could be a factor in its viability.

B. What Limitation is Placed on the Commission in This Remand Proceeding?

Petitioners and OHA, in their Responsive Briefs, argue that the economic impact resulting from a change in instream flow standards on WWC cannot be considered because the scope of the remand proceeding is limited. Such arguments reflect a misunderstanding of the Commission's rights and obligations in a remand.

In Hulihe'e v. Heirs of Hueu, 57 Haw. 387, 556 P.2d 920 (1976), the Hawaii Supreme Court took the opportunity to explain the course which proceedings should take upon remand of a matter. Therein, the parties to the appeal sought rehearing with respect to findings neither briefed nor argued on appeal. In providing direction, the court stated:

The findings of the trial court to which we have referred were not before us and received no consideration on this appeal. Upon remand, whether or not any mention of these findings had appeared in our opinion, they would be subject to review and revision by the trial court. "A trial court may, after a remand for further proceedings, correct an error in its original findings as to a matter not passed on by the appellate court." [Citation omitted]. Such a correction in its findings may be made by the trial court without hearing new evidence. [Citation omitted]. If additional evidence is presented in further proceedings on remand, findings as to matters not passed on by the appellate court should be changed or modified in accordance with the trial court's determinations on the entire record. [Citation omitted].

Upon remand of this case, the trial court should determine its findings of fact and conclusions of law, with respect to the issues not dealt with in our opinion, on the basis of the

record in the prior proceedings and such further proceedings as may be had, without being bound in any way by its prior findings and conclusions on such issues. Since the remand will not be for a new trial, evidence which is in the record need not be again presented.

Id. at 388-389, 556 P.2d at 921. See also, *Power of Trial Court, on Remand for Further Proceedings, to Change Prior Fact Findings as a Matter Not Passed Upon by Appellate Court, Without Receiving Further Evidence*, 19 AL.R.3d 502 (1968) (if the lower court perceives an error in its own former proceedings, such as inconsistent findings of fact and the like, not touched upon by the appellate court, there would appear to be no reason why it could not change its former findings to any extent not prohibited by the appellate court's mandate.).

In its decision in this matter, the Supreme Court did address certain aspects of the Decision and Order. For example, the Supreme Court found that the Commission did not err in utilizing USGS figures as a starting point for its analysis. In re Iao Groundwater Management Area High-Level Source Water Use Permit Applications, 128 Haw. 228, 253, 287 P.3d 129, 154 (2010) (“Na Wai Eha”); likewise, the Supreme Court found that the Commission did not err in its use of model numbers proposed by Dr. Ali Fares at a starting point in articulating irrigation requirements. Id. at 156, 287 P.3d at 156.

However, the Court did not make any findings that would preclude the Commission from consideration of the economic impacts of a change in instream flow standards on WWC.

Rather, the Court noted that evidence of instream uses must be weighed against non-instream uses as required by H. Rev. Stat. § 174C-71(2)(D). That section states in full:

In considering a petition to adopt an interim instream flow standard, the Commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for non-instream purposes, including the economic impact of restricting such uses; . . .

H. Rev. Stat. § 174C-71(2)(D). (Emphasis added).

Not only does the argument of Petitioners and OHA run counter to the Supreme Court's directives concerning handling of matters on remand, such argument runs counter to the very section cited by the Supreme Court in directing that the Commission on remand "must undertake and articulate this analysis." Na Wai Eha, *supra* at 152, 287 P.3d at 251.

For these reasons, the argument raised by Petitioners and OHA to limit the matters than can be considered in this remand proceeding as to the economic impacts on WWC must be rejected. Furthermore, other arguments concerning limitation of the scope of the remand based upon a misunderstanding of remand procedures must likewise be rejected.

II. CONCLUSION

The Commission is given latitude in these remand proceedings consistent with its obligation to provide a reasoned decision supported by the record. As was the case more than 100 years ago, "when there are various interests in the same flow of water, ... [there is a need] to agree upon a suitable mode and arrangement to regulate and adjust the same." Peck v. Bailey, *supra* at 666. Then as now, the various interests must

BEFORE THE COMMISSION ON WATER RESOURCES MANAGEMENT

STATE OF HAWAII

I'ao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e, Waiehu, I'ao & Waikapu Streams Contested Case Hearing.

Case No. CCH-MA06-01

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on this date a copy of the foregoing was served by email, followed by U.S. mail, postage pre-paid to the following parties addressed as follows:

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