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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,
Integration of Appurtenant Rights and
Amendments to the Interim Instream Flow
Standards, Na Wai Eha Surface Water
Management Areas of Waihee, Waiehu, Iao,
and Waikapu Streams, Maui

Case No. CCH-MA 15-01

WAILUKU COUNTRY ESTATES
IRRIGATION COMPANY'S AND
WAILUKU COUNTRY ESTATES
COMMUNITY ASSOCIATION'S
MEMORANDUM IN OPPOSITION TO
OFFICE OF HAWAIIAN AFFAIRS, HUI O
NĀ WAI 'EHĀ AND MAUI TOMORROW
FOUNDATION, INC.'S MOTION FOR
PARTIAL RECONSIDERATION OF
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER
FILED ON JUNE 28, 2021 FILED JULY 6,
2021; CERTIFICATE OF SERVICE

WAILUKU COUNTRY ESTATES IRRIGATION COMPANY’S AND WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION’S MEMORANDUM IN OPPOSITION TO OFFICE OF HAWAIIAN AFFAIRS, HUI O NĀ WAI ‘EHĀ AND MAUI TOMORROW FOUNDATION, INC.’S MOTION FOR PARTIAL RECONSIDERATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JUNE 28, 2021 FILED JULY 6, 2021

Applicants WAILUKU COUNTRY ESTATES IRRIGATION COMPANY (“Irrigation Company”) and WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION (“Association”) (collectively, “WCE”), by and through their attorneys, and pursuant to the Commission on Water Resource Management’s (“Commission”) Minute Order No. 18 dated July 26, 2021, respectfully submit their Memorandum in Opposition to the Office of Hawaiian Affairs (“OHA”), Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc.’s (collectively, the “Community Groups”) Motion for Partial Reconsideration of Findings of Fact, Conclusions of Law, and Decision and Order filed on June 28, 2021, filed July 6, 2021 (“Motion”) as to the second portion of the Motion which seeks reconsideration of the Commission’s Findings of Fact (“FOFs”), Conclusions of Law (“COLs”), and Decision and Order (“D&O”) filed on June 28, 2021 (“Final Decision”) pertaining to WCE’s appurtenant rights.

The second portion of the Motion argues that insofar as the Commission’s Final Decision, p. 273 at COL ¶ 89 concluded that “pursuant to [*Reppun v. Board of Water Supply*, 65 Haw. 531, 552, 656 P.2d 57, 71 (1982) (“*Reppun*)], a reservation of water rights contained in any of the applicants’ deeds had the effect of extinguishing those rights and those appurtenant rights *will not be recognized in this proceeding*,” the FOFs, COLs, D&O, and appendices in the Final Decision pertaining to WCE’s appurtenant rights are inconsistent with COL ¶ 89 and should be “corrected.” *See* Mot. at 2; Mem. Supp. Mot. at 10-11 and at Exhs. A-B. For the following reasons, the second portion of the Motion should be denied.

OHA and the Community Groups do not meet the standard for reconsideration under HAR § 13-167-64, which requires that OHA and the Community Groups establish that either: (1) new information not previously available would affect the result, or (2) that a substantial injustice would occur. *See* HAR § 13-167-64. OHA and the Community Groups do not rely on new information in seeking reconsideration of the Final Decision pertaining to WCE's appurtenant rights. Instead, they rely on portions of the existing record and, as such, do not provide new information not previously available to the Commission as required by the first part of HAR § 13-167-64. *See* Mot. at 2; Mem. Supp. Mot. at 10-11 and at Exhs. A-B.

In addition, under the requirements of the Final Decision, there is no substantial injustice in maintaining the Commission's findings on appurtenant rights. The Commission's Final Decision declined to adopt the Hearings Officer's conclusion that *Reppun* has been overridden by the 1978 constitutional amendments and 1987 State Water Code; however, the Commission also clearly intended to require the submission of applicable deeds to the Commission staff in order to make a formal determination on appurtenant rights. *See* D&O ¶ 198 (requiring "[a]ll permittees that have been awarded water based on appurtenant rights . . . to provide copies of deeds for their properties to the Māhele to confirm that no reservation of water rights have been made in their chain of title.>").

Reading these provisions of the Final Decision together¹ suggests that the Commission's conclusion regarding *Reppun* at COL ¶ 89 and recognition of WCE's appurtenant rights at FOF ¶ 399, COL ¶ 113, and Appendices 2 and 3 was intentional, given the requirement of D&O ¶ 198

¹ By analogy, it is well-established that "[l]aws in *pari materia*, or upon the same subject matter, shall be construed with reference to each other." Haw. Rev. Stat. § 1-16; *State v. Kimball*, 54 Haw. 83, 90, 503 P.2d 176, 180 (1973).

to provide the requisite information to the Commission staff for a formal determination on the applicability of any deed reservations.

Accordingly, under the circumstances, no substantial injustice will occur if OHA and the Community Group's request for reconsideration is not granted.

Finally, the second portion of the Motion should be denied in the interests of judicial and administrative efficiency and economy. In the event the Commission's interpretation of *Reppun*, e.g., COL ¶ 89, may be modified or vacated on any appeal that may be filed in this proceeding,² preserving the Commission's findings on appurtenant rights will obviate the need to re-establish such allocations in the event of a remand to the Commission for the purpose of determining such allocations. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1264, n.1 (9th Cir. 1984) (Reinhardt, concurring and dissenting) (noting that the district court made alternate findings of fact and conclusions of law "in the event that the court's ruling[s] . . . are reversed on appeal"); *United States v. Gill*, 748 F.3d 491, 506 (2d Cir. 2014) ("[g]iven the possibility of a future appeal and in the interest of judicial economy," remanding matter to district court to render findings of fact on both bases for collateral attack on deportation order even if only one basis was needed to determine whether the administrative proceedings were fundamentally unfair in some respect).

In the meantime, there is no substantial injustice or harm in keeping the Commission's allocations of water based on appurtenant rights in the Final Decision, and the Motion should be denied.

² WCE expressly reserves the right to appeal any aspect of the Final Decision.

DATED: Honolulu, Hawai'i, August 5, 2021.

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CERTIFICATE OF SERVICE

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On Thursday, August 5, 2021, I caused and true and correct copy of the foregoing document to be served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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