COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01
	)	HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S, EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017; TABLES 1 TO 5; ATTACHMENTS 1 & 2; AND CERTIFICATE OF SERVICE

HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017

TABLES 1 TO 5

ATTACHMENTS 1 & 2

AND

CERTIFICATE OF SERVICE

ISAAC H. MORIWAKE #7141
SUMMER KUPAU-ODO #8157
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813
Telephone No.: (808) 599-2436
Email: imoriwake@earthjustice.org
skupau@earthjustice.org

Attorneys for Intervenors:
HUI O NĀ WAI ‘EHĀ and
MAUI TOMORROW FOUNDATION, INC.

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HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017

Pursuant to Minute Order 12, Petitioner-Intervenor Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc. (together, the “Community Groups”), by their counsel Earthjustice, hereby respectfully submit their Exceptions to the Proposed Findings of Fact (“FOFs”), Conclusions of Law (“COLs”), and Decision and Order (“D&O”), dated November 1, 2017 (collectively, the “Proposed Decision”).[1] At the outset, the Community Groups express their sincere appreciation and respect for the tremendous amount of work by the Hearings Officer to process all the information in this case and draft the Proposed Decision. As reflected in the sheer

[1] Summary of citation format: The “2010 Decision” and “2014 Order” refer, respectively, to the Commission’s: FOFs, COLs, and D&O, filed on June 10, 2010; and Order Adopting: 1) Hearings Officer’s Recommendation on the Mediated Agreement Between the Parties; and 2) Stipulation re Mediator’s Report of Joint Proposed FOFs, COLs, D&O, dated April 17, 2014. Citations in this document also include references to evidence in the record and the “Hui-MT/OHA” Joint Proposed FOFs, COLs, and D&O, filed on February 17, 2017. Record citations include exhibits (“Ex.”), written testimonies (“WT”), and transcripts (“Tr.”) cited by pages and lines (“x:y”), and indicate if they relate to a previous phase (e.g., MA06-01, MA06-01 Remand).

volume of the document, this case is the most comprehensive top-to-bottom water rights adjudication in the expansive history of water law in Hawai‘i.[2] It will decide issues ranging from instream flows for Nā Wai ‘Ehā, the legendary “Four Great Waters” of Maui; to water rights and permits for individual ‘ohana including many living and farming in these valleys for generations; to the transition of Hawaiian Commercial & Sugar (“HC&S”) beyond the sugar plantation era. It will also address foundational legal issues related to the Commission’s first-ever and long-awaited recognition and permitting of Native Hawaiian traditional and customary (“T&C”) rights to cultivate kalo and appurtenant rights. In carrying out the full range of its constitutional and statutory trustee duties in this case, the Commission has a historic opportunity to lead the way toward a new “21st-century ahupua‘a” model for water resource protection and management based on the public trust and Native Hawaiian stewardship principles, not only for Nā Wai ‘Ehā, but for all of Hawai‘i nei.

Toward this end, the Community Groups believe the Proposed Decision provides an extensive initial foundation, but further work is necessary to fulfill the needs and promise of this landmark, precedent-setting case. The Community Groups, in partnership with the Office of Hawaiian Affairs (“OHA”), have engaged diligently in this process with that ultimate goal. The detail and care in these exceptions reflect not an unfavorable criticism, but a faithful effort to work with the Proposed Decision, refine approaches, correct legal errors, and fill in gaps, in order to maximize the effectiveness of the Commission’s decision, avoid needless appeals, and focus on moving productively forward. On each point, the Community Groups and OHA do not simply raise objections, but offer concrete and constructive solutions.

[2] For ease and efficiency of reference, the Community Groups have separately provided as Attachment 1 a comprehensive compilation of the laws governing this proceeding and the Commission’s decision.

As discussed in detail below, the necessary improvements and corrections in the Proposed Decision organize into four main areas. First, the interim instream flow standards ("IIFSs") for all four of Nā Wai 'Ehā's rivers and streams can and must incorporate more flows particularly during higher-flow periods, as well as adjustment provisions to allow sharing of water during lower-flow periods. See infra Part I. Second, the allocations among the proposed water use permit "Categories" need to be adjusted by correcting various determinations on legal rights, including T&C and appurtenant rights. See infra Part II. Third, several major overallocations to large diverters, particularly HC&S, must be corrected. See infra Part III. Fourth, the Commission's decision must incorporate essential provisions for implementation to ensure that it comes to life on the ground and in the community. See infra Part IV.

These Nā Wai 'Ehā proceedings have persisted for more than 13 years, during which important evolutionary progress has occurred. This decision by the Commission will be the most comprehensive step yet, and the Community Groups and OHA respectfully request that the Commission amend the Proposed Decision as recommended in these exceptions to continue to build on this foundation for Nā Wai 'Ehā's waters and communities and further realize the public trust mandate and vision upon which this Commission was founded.

I. THE IIFS MUST INCORPORATE MORE FLOWS, AS WELL AS PROVISIONS FOR ADJUSTMENT

While the Proposed Decision takes a positive step in increasing the IIFS for Waihe'e River from 10 to 14 mgd, the IIFSs for all Nā Wai 'Ehā waters need further refinement to fulfill the Commission's trust duties to restore instream flows and protect T&C rights to cultivate kalo "to the extent practicable," while balancing the public interest in reasonable-beneficial noninstream uses. Specifically, the Proposed Decision's total IIFS flow of 28.8 mgd is close to the lowest-end (Q_{99}) total Nā Wai 'Ehā streamflows of about 27.2 mgd, and only around half of

the base (Q_{70}) flows of 54.3 mgd.[3] Such static IIFSs at bare-minimum natural flow levels do not comply with the legal mandate to restore streamflows "to the extent practicable" during higher-flow periods; at the same time, they do not provide flexibility required to enable kalo cultivation and other reasonable-beneficial uses during the lowest-flow periods. The Commission should instead establish adjustable IIFSs in line with precedent and best practice both in Nā Wai ʻEhā and the Waimea River case on Kauaʻi, so that Nā Wai ʻEhā instream flows can be increased during higher-flow conditions, while adjusted to share water between instream uses, kalo cultivation, and reasonable-beneficial noninstream uses during lower-flow conditions.

In fact, the total flow levels of the Proposed Decision's IIFSs are at around the midpoint between the high and low levels of the Community Groups' and OHA's recommended IIFSs. This positive and promising alignment between the IIFS proposals highlights the opportunity in this case to establish IIFSs that continue to build on progress in this and other cases and improve best practices going forward. In sum, instead of the static 28.8 mgd total IIFSs for Nā Wai ʻEhā waters, the Community Groups recommend adjustable IIFSs that will range from a total of 37.7 mgd to less than 24 mgd, as explained below.

A. Summary Background and Context of Nā Wai ʻEhā's IIFSs.

Initially, it is important to review the backround and context for the IIFS determinations in this case. Through the course of the Nā Wai ʻEhā IIFS proceedings dating back to 2004, Nā Wai ʻEhā's IIFSs have thus far been amended twice. The first amendment in the 2010 Final Decision, limited to Waiheʻe River and Waiehu Stream, was a first, insufficient attempt to

[3] See Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Nā Wai ʻEhā, Maui, Hawaiʻi 44, 51-52 (2010), Ex. AR-1 (MA06-01 Remand) ("USGS Streamflow Report") (source for streamflow data). As USGS has explained,the Q_{70} flow estimates mean base flow for Hawaiʻi streams. See 2010 Decision FOFs 101-02.

consider the shift in water uses resulting from the end of the former Wailuku Sugar/Agribusiness plantation operations, and to address the Commission's constitutional and statutory duty to restore streamflows.[4] The second amendment in the 2014 Order, obtained through a mediated settlement after the Hawai'i Supreme Court vacated the 2010 Final Decision,[5] took a better step forward by restoring flows to all four Nā Wai Ehā waters and more fully addressing issues such as the practicability of using HC&S's Well 7 as an alternative to stream diversions.[6]

In this proceeding, the Commission has the follow-up opportunity to continue this progress in a further evolved context that includes, most significantly: (1) HC&S's closure of sugar operations and desired transition to diversified agriculture; and (2) the designation of Nā Wai 'Ehā as the state's first (and still only) surface water management area and the resulting community-wide permitting process, which has revealed a broader landscape of water uses in Nā Wai 'Ehā—not limited to the historically predominant diversions of the Wailuku Water Company ("WWC") and HC&S (together, the "Companies"), but also including other, historically un- or under-recognized uses and rights, including T&C and appurtenant rights.

[4] The 2010 Decision restored a total of 12.5 mgd below the Companies' diversions: 10 mgd to Waihe'e River, and 1.6 mgd and 0.9 mgd to North Waiehu and South Waiehu Streams, respectively.

[5] See 2014 Order at 24-25, COLs 20-21 (recognizing that the IIFSs were resolved by settlement to "enable the earlier interim protection of instream uses and Native Hawaiian practices without further delays in litigation," "particularly given this Proceeding involves the amendment of interim standards").

[6] The 2014 Order restored a total maximum of 24.8 mgd below the Companies' diversions: 10 mgd to Waihe'e River; 1.0 mgd to North Waiehu Stream (taking into account estimated seepage loss due to the relocation of the IIFS point further downstream); 0.9 mgd to South Waiehu Stream; 10 mgd to Wailuku River; and 2.9 mgd to Waikapū Stream. The Wailuku and South Waiehu IIFSs included provisions for sharing of flows during low-flow conditions.

As for the first major change of HC&S's closure, the Hawai'i Supreme Court in the directly analogous situation in the Waiāhole case emphasized that the sugar plantation closure:

> has provided the Commission a unique and valuable opportunity to restore previously diverted streams while rethinking the future of [the island]'s water uses. The Commission should thus take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.

In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) ("Waiāhole I") (emphasis added). In short, Nā Wai Ehā's IIFSs must be increased given the major reductions in HC&S's water needs (even assuming an eventual full transition to diversified agriculture), which previously accounted for the lion's share of Nā Wai 'Ehā diversions.[7] Indeed, the Commission may have an even more "unique and valuable opportunity" in this Nā Wai 'Ehā case because—in contrast to the Waiāhole case, which was the Commission's first-ever attempt to determine IIFSs—this case follows and builds on a decade of proceedings, studies, and testimonies regarding Nā Wai 'Ehā, all of which has helped provide a more holistic understanding of water resources stewardship not only in this region, but throughout Hawai'i.

As for the second major change of community-wide water use permitting, this proceeding is the first time the Commission is conducting a comprehensive permitting process for T&C and appurtenant rights, much of which would be exercised to cultivate kalo. The total water needs for kalo cultivation, including the flow-through amounts, collectively comprise one of the largest single categories of permitted water uses, totaling around 13 mgd. See attached Table 1. The

[7] See 2014 Order FOFs 44-45, COLs 12, 19 (setting the current IIFS based on a "balance between protecting instream uses and Native Hawaiian practices and accommodating reasonable beneficial noninstream uses" and identifying the predominant noninstream use of HC&S's sugar operations on 4,770 total acres, which accounted for total water requirements of 27.81 mgd).

community members with T&C and/or appurtenant rights include both (1) those who would receive water directly from the streams, downstream (or upstream) of the Companies' diversions, and (2) those who receive water through the Companies' ditch systems.[8] See attached Table 2 (listing the total proposed permitted downstream and upstream uses). In fact, the total water needs of priority rightholders downstream of the Companies' diversions are comparable to those of priority rightholders who receive water through the Companies' ditch systems. As explained below, the law requires the Commission to protect such downstream rights and uses by incorporating them into the IIFS, while also including adjustment provisions to protect the rightholders on the Companies' ditch systems, as explained below.

Finally, the ongoing permitting process and Proposed Decision raise another critical point related to the IIFSs. The Proposed Decision adopts an approach of "overallocating" the available water above the IIFSs by permissively granting WUPAs for not only existing but also new and expanded uses, while proposing to prioritize any overallocations via the "Category" system. Such a permitting approach shifts all the more importance onto the Commission setting robust, "no regrets" IIFSs now, at the outset, so that it can fulfill its legal duty to protect instream flows first and provide meaningful and responsible controls on offstream diversions.[9]

[8] See Hui-MT/OHA's Proposed FOFs pt. VII; Proposed COLs pts. I.I., V.E.1 for a thorough review of the history and background of how the Companies took over and unilaterally altered the traditional kuleana ʻauwai in Nā Wai ʻEhā, but continually and expressly recognized the priority rights of kuleanas and the obligation to supply them through the plantation ditch system.

[9] See Waiāhole I, 94 Hawai'i at 148, 9 P.3d at 460 (explaining the IIFSs' function of "prescribing responsible limits to the development and use of public water resources" and the need to designate IIFSs "as early as possible, . . . and particularly before [the Commission] authorizes offstream diversions potentially detrimental to public instream uses and values").

B. The Proposed Decision Does Not Restore Nā Wai ʻEhā Streamflows to the Extent Practicable.

1. The benefits of further instream flow restoration are undisputed.

At the outset, the factual and legal bases for increasing the IIFSs from the levels in the 2014 Order are undeniable in the Proposed Decision and the record. The Proposed Decision recognizes many of the instream uses and values supported by Nā Wai ʻEhā's waters. These include: habitat and passage benefits for native amphidromous species; Native Hawaiian T&C practices including gathering, fishing, spiritual practices and values, and downstream kalo cultivation; aesthetic values and recreational activities; support of non-amphidromous species; research and education; groundwater aquifer recharge; improved water quality; and maintenance of ecosystems such as estuaries, wetlands, and stream vegetation. See Proposed FOFs 233-88, COL 121. The Proposed Decision also recognizes the evidence, including testimonies of community members, regarding the positive benefits of the streamflow restorations to date. See Proposed FOFs 291, 295-301, COLs 122, 125-27. While the Proposed Decision is unclear whether it is suggesting that these improvements justify forgoing or minimizing further streamflow restorations, the record in no way supports such a conclusion. While community members have certainly vindicated long-standing expectations of the benefits of streamflow restoration, no one has suggested that the current IIFSs are all that are necessary, either in the abstract or in comparison with additional flows that can practicably be restored now.

Indeed, the record shows much more room for improvements through further flow restorations. Waiheʻe and Wailuku Rivers, in particular, are the two largest rivers of Nā Wai ʻEhā (and on Maui) and, because of their size, offer the most total habitat units based on the

Parham Report.[10] Yet, to date, the IIFSs have restored less flows to these two rivers as a relative proportion of their natural base (Q_{70}) flows, compared to the two other streams. The current IIFSs for North and South Waiehu Streams, for example, respectively represent 68% and 69% of those those streams' estimated Q_{70} flows. See USGS Streamflow Report at 11 (ditch elevations), 51, 70 (streamflows at various elevations). In contrast, the current 10 mgd IIFS for Waihe'e River is 36% of the Q_{70} flow of 28 mgd (and around half of the Q_{99} lowest-end flow of 18 mgd), and the current 10 mgd IIFS for Wailuku River is 59% of the Q_{70} flow of 17 mgd, although at flows less than 15 mgd, the IIFS is reduced to allow diversion of 1/3 or more of the streamflow. See id. at 44. The Parham Report highlights that Waihe'e River's 10 mgd IIFS restores only 11.1% of its natural habitat units. See Parham Report at 72; Proposed COL 122.

2. The Proposed Decision overstates offstream diversions and understates the IIFSs.

In adding only 4 mgd to the Waihe'e River IIFS, and leaving the IIFS levels for the other three Nā Wai 'Ehā streams unchanged from the 2014 Order, the Proposed Decision does not protect and restore Nā Wai 'Ehā streams to the extent practicable. The Proposed Decision, instead, leaves the IIFSs at historically bare-minimum levels, while permissively allocating water for offstream diversions. As explained below, further increases of the IIFSs are warranted and required because the Proposed Decision, among other misalignments: (1) overstates the total amount of offstream diversions, both by overallocating water to several major water users including HC&S, and by failing to differentiate between uses supplied by the Companies' ditch systems and uses downstream of the Companies' diversions; and (2) understates the total IIFS

[10] See Technical Report: Quantification of the impacts of water diversions in the Nā Wai 'Ehā streams, Maui on native stream animal habitat using the Hawaiian Stream Habitat Evaluation Procedure," dated December 31, 2013, Ex. F-1 (MA06-01 Remand) ("Parham Report").

amounts by failing to incorporate the increased instream flows required to satisfy downstream uses and rights, including flows for kalo cultivation.

First, as explained in detail in Part IV below, the Proposed Decision overstates the water needs of several major water users, particularly HC&S, by a combined total excess of up to around 12 mgd. This excess allocation is additional water that, under the Proposed Decision's balancing, should be incorporated into the IIFSs.

The Proposed Decision also overstates total offstream diversions by lumping together all permitted uses, regardless whether they are supplied through the Companies' ditch system, or are located downstream of the Companies' diversions. This distinction is key for purposes of setting Nā Wai 'Ehā IIFSs below the Companies' diversions, which specifically control the Companies' diversions and protect uses downstream of those diversions. The Proposed Decision, however, lumps together all permitted uses and appurtenant rights throughout Nā Wai 'Ehā in a combined total of 39.3 mgd, without any consideration of where they are located in relation to the Companies' diversions, and on which streams. See Proposed COLs 151, 153, 156. This inaccurately inflates the total diversions and skews the balancing for the IIFSs toward lower IIFS levels.

Moreover, the failure to distinguish between uses on, and downstream of, the Companies' ditch system directly understates the IIFSs because the law requires the IIFSs to incorporate the water needs for downstream water uses and rights. The Code expressly includes "the conveyance of irrigation and domestic water supplies to downstream points of irrigation" in the "instream uses" to be protected in the IIFS. HRS § 174C-3. Thus, in addition to flows required for instream values such as resource protection, the IIFS must also incorporate flows to sustain T&C rights to gather and fish, as well as supply downstream T&C and appurtenant rights to

cultivate kalo.[11] In the Waiāhole case, the Hawai'i Supreme Court specifically recognized the Commission's provision of additional flows in the IIFS so that "appurtenant rights, riparian uses, and existing uses would be accounted for." In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Hawai'i 1, 12, 10, 93 P.3d 643, 654, 652 (2004) ("Waiāhole II"). In contrast, in the original Nā Wai 'Ehā IIFS proceeding, the Court ruled that the Commission "did not discharge its duty" to protect Native Hawaiian rights where the Commission justified its IIFS determination based on issues regarding amphidromous species, but failed to consider downstream users' T&C rights to cultivate kalo. 128 Hawai'i at 248-49, 287 P.3d at 149-50.

The Proposed Decision recognizes and permits a total of up to 8 mgd of water uses downstream of the Companies' diversions, most or all of these for kalo cultivation based on priority T&C and/or appurtenant rights. See attached Table 2. In addition to all the other public trust uses that will be promoted through increased stream flows, these rights of downstream users, in themselves, require an increase in the IIFSs to ensure that the needs of downstream users will be protected in their own right, and not at the expense of other public trust uses that also depend on instream flows. The Proposed Decision, however, does not include any of these downstream rights in its IIFS determinations. Rather, after setting the IIFSs, the Proposed Decision adds an afterthought that "sufficient flows must be added for permitees and domestic users downstream of the IIFS locations" and proposes that "WWC and to a lesser extent, HC&S,

[11] See Douglas W. MacDougal, Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 46, 61-62 (1996) (recognizing that "[o]ther beneficial instream uses under the Water Code also go beyond this conservation purpose and encompass assuring sufficient water to allow the practice of traditional and customary Hawaiian rights," and that the "[instream flow] standards would incorporate conservation and all other 'beneficial instream uses,' including the conveyance of sufficient water downstream to allow taro growing on kuleana and taro lands") (emphasis added).

must maintenance [sic] a balance between upstream and downstream users while meeting the IIFS for instream purposes." Proposed D&O at 526, ¶¶ 38-40. This fails to comply with the legal requirements for IIFSs and unlawfully delegates to the Companies the protection of downstream rightholders that the Commission has a trust duty to provide in the IIFSs.[12]

3. The Proposed Decision also fails to protect rightholders on the Companies' ditch system.

In addition to providing higher flows in the IIFSs, the Commission must also protect the T&C and appurtenant rights of community members who, because of the Companies' plantation-era control over the 'auwai system, now rely on the plantation ditch system to receive their legally entitled water. See supra note 8. Notwithstanding that these community members' rights rely on the Companies' ditch system, they are still public trust uses co-equal with the instream uses, including the rights of downstream users, that the IIFSs must protect.[13] Moreover, unlike commercial non-public trust uses that have alternative measures and sources to manage the availability of streamflows (e.g., conservation, storage, groundwater), T&C and appurtenant rights "have no alternatives at any cost" to continuous flowing water from the traditional stream sources.[14] Thus, in setting the IIFSs, the Commission must protect the public trust rights of both those on the Companies' ditch system, and those downstream of the Companies' diversions, to the extent practicable.

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[12] See Ka Pa'akai o Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 52, 7 P.3d 1068, 1089 (2000) ("[T]he means to protect [T&C practices] may not validly be delegated by the [agency] to a private [party] who, unlike a public body, is not subject to public accountability.")

[13] See Waiāhole I, 94 Hawai'i at 142 n.43, 9 P.3d at 454 n.43 (the Commission "must still ensure that all trust purposes are protected to the extent feasible").

[14] Waiāhole I, 94 Hawai'i at 165, 9 P.3d at 477 (also recognizing that the restored stream flows are the "only source to supplement base stream flow and to satisfy any riparian uses, appurtenant rights, potential offstream agriculture in the affected area") (alterations omitted); accord Proposed COL 99.

In general, as the IIFS levels are increased to include higher percentages of natural lower flows, the probabilities that the supply of water to T&C and appurtenant rightholders, as well as other users, on the Companies' ditch system will be partially or entirely constrained during low-flow periods also increases. Conversely, setting the IIFSs near or below the lowest natural flow levels so that some or all users would be accommodated at all times is legally problematic because it relegates public trust instream uses to only the lowest flows available after other uses are accommodated and fails to protect instream uses to the extent practicable outside of the lowest flow periods.[15] The best approach to address this issue in compliance with the Commission's public trust duties is to provide for adjustable IIFSs, so that the IIFSs will provide higher instream flows during higher-flow conditions, but when streamflows drop below a certain low-flow threshold, the IIFSs will temporarily decrease to allow diversion of a portion of the total available flow.

Indeed, the Commission has already been building precedent and best practice for such adjustable IIFSs in these Nā Wai ʻEhā proceedings, as well as elsewhere such as the Waimea River case on Kauaʻi. These include the current IIFSs for South Waiehu Stream, which was set at 0.9 mgd but also provided 0.25 mgd to the kuleana ʻauwai during low flows, as well as Wailuku River, which incorporated adjustments during low flows to allow for partial diversions to accommodate MDWS's treatment plant and "kuleana users served exclusively by the ʻĪao-Waikapū Ditch." See 2014 Order at 26-27.

The Proposed Decision, however, not only fails to acknowledge the need and duty to protect T&C and appurtenant rightholders on the Companies' ditch system, but goes further to

[15] See id., at 155, 153, 9 P.3d at 467, 465 ("reject[ing] the idea of public streams serving as convenient reservoirs for offstream private use" and the approach of effectively restoring "the water remaining after . . . approv[ing] the bulk of the offstream use permit requests").

propose eliminating the existing IIFS adjustment provisions for South Waiehu and Wailuku. See Proposed D&O at 521-22, ¶¶ 20, 22.b.ii; id. at 524, ¶¶ 29, 31.b.i. The South Waiehu provision was developed and adopted through mutual cooperation and agreement of the parties in the original Nā Wai ʻEhā IIFS case, including the Communty Groups, OHA, and the Companies. See 2014 Order at 26-27, Ex. A. While it appropriately can be refined based on improved and updated information, there is no valid reason to rescind it altogether. Likewise, while the Wailuku River IIFS may not need to ensure MDWS its entire allocation at all times, nothing justifies completely cutting off the kuleanas dependent on the ʻĪao Ditch system during low-flow periods. In sum, the Commission should incorporate adjustment provisions in the Nā Wai ʻEhā IIFSs to provide necessary protection to T&C and appurtenant rights dependent on the Companies' ditch system.

C. The Community Groups' and OHA's recommended IIFS.

Based on the discussion above and the entire record over years of these Nā Wai ʻEhā proceedings, and building on the previous IIFSs and the Proposed Decision's IIFSs, the Community Groups and OHA recommend the following IIFSs to restore Nā Wai ʻEhā rivers and streams to the extent practicable, balancing the importance of present and potential instream uses and values with the importance of present or potential noninstream uses:

1. Waiheʻe River:

Waiheʻe River IIFS, just below the Waiheʻe and Spreckels Ditches: increase from 10 mgd to 18 mgd, with an adjustment provision as stated below.

Waiheʻe has the largest continuous flows in Nā Wai ʻEhā and the second most habitat units based on the Parham Report. See Parham Report at 98. The current 10 mgd IIFS is only around half of the lowest flows (Q_{99}) of 18 mgd. See USGS Streamflow Report at 44. The increased 18 mgd IIFS is equal to the Q_{99} flow and about two-thirds (64%) of the Q_{70} base flow

of 28 mgd. See id. The IIFS increase also incorporates flows for the water needs of downstream rightholders of around 2 to 3 mgd. See Table 2.[16]

The recommended adjustment provision for the Waiheʻe River IIFS adopts the approach for IIFS adjustment and sharing of low flows that the 2014 Order established for Wailuku River. When the average daily flow measured by the USGS gage is below 27 mgd for three consecutive days (18 mgd is 2/3 of 27 mgd), the IIFS decreases to two-thirds (2/3) of the stream flow, such that one-third (1/3) of the streamflow may be diverted, until the flow returns to 27 mgd or above.

2. Waiehu Stream:

North Waiehu Stream IIFS, just below the diversion structure above the Waiheʻe Ditch: increase from 1.0 to 1.5 mgd,[17] with an adjustment provision as stated below. South Waiehu Stream IIFS, just below the Spreckels Ditch diversion: increase from 0.9 mgd to 1.3 mgd, with an adjustment provision as stated below.

Despite Waiehu Stream's relatively smaller size, various studies have recognized the benefits of restoring flow to the stream for Native amphidromous species habitat. See, e.g., Parham Report at 72. These increased IIFSs for Waiehu Stream are at the same levels recommended in the Proposed FOFs, COLs, and D&O, dated April 9, 2009 ("2009 Proposed Decision"), which was based on the second of three levels in the USGS streamflow study's proposed release figures.[18] The 1.5 mgd IIFS for North Waiehu is about 83% of the estimated

[16] As community rightholders on the North Waiheʻe ʻauwai have testified during these proceedings, their ʻauwai may be able to access water directly from the river, but the details need to be resolved.

[17] The 1.5 mgd IIFS is equivalent to 2.2 mgd at the previous IIFS location below the North Waiehu Ditch, after subtracting 0.7 mgd of estimated seepage. See USGS Streamflow Report at 11, 51.

[18] See 2009 Proposed Decision at 187-88; see also Nā Wai ʻEhā, 128 Hawaiʻi at 252, 287 P.3d at 153 (summarizing USGS's proposed release figures). In its Nā Wai ʻEhā opinion,

Q_{70} base flow of 1.8 mgd at that location. See USGS Streamflow Report 11, 51. The 1.3 mgd IIFS for South Waiehu is equal to the estimated Q_{70} flow. See id. at 11, 70.

The recommended adjustment provisions for both North and South Waiehu Streams' IIFSs adopt the approach that the 2014 Order established for South Waiehu Stream to provide water during low streamflow periods to T&C and appurtenant rightholders who receive water from the plantation ditch system. For North Waiehu Stream, the supply of water to kuleanas from that stream has been cut off since 2011, and WWC has still failed to comply with the express requirement in the 2014 Order that WWC will "provide water to the kuleana property that previously was provided water from the North Waiehu Ditch" and "continue to service the Waiehu kuleana users from the Waihe'e Ditch." 2014 Order at 26; see also Proposed FOF 294, COL 128, D&O ¶ 53 (addressing WWC's ongoing noncompliance). WWC must comply with the 2014 Order and restore water supply to the North Waiehu kuleanas without further delay, after which the adjustment provision during low flows for North Waiehu Stream can be set based on further information on the necessary flow amounts for those kuleanas. For South Waiehu Stream, the Proposed Decision points out the need to account for other rightholders in addition to those identified in the 2014 Order. See Proposed D&O at 520-22. Moreover, as with the situation for the North Waiehu kuleanas, the water supply to the South Waiehu kuleanas has also been impaired.[19] The issue of restoring the water supply to the South Waiehu kuleanas should also be expeditiously addressed and resolved, after which the adjustment provision during low

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the Hawai'i Supreme Court affirmed that the Commission could use these USGS flow release figures as a "starting point" for its IIFS determinations. 128 Hawai'i at 253, 287 P.3d at 154.

[19] See Tr. 7/11/16 (Molina) at 173:3 to 174:18, 176:2 to 177:3 (explaining the impaired access to water from the plantation ditch system).

flows for South Waiehu Stream can be set based on further information on the necessary flow amounts for those kuleanas.

3. Wailuku River:

Wailuku River IIFS, just below the diversion for the ʻĪao-Waikapū and -Maniania Ditches: increase from 10 to 13 mgd, with an adjustment provision as stated below.

Wailuku River has the longest perennial channel of all the Nā Wai ʻEhā streams and, according to the Parham Report, offers the greatest amount of total available habitat units for Native amphidromous species. See id. at 71-72. The increased 13 mgd IIFS is at the same level as recommended in the 2009 Proposed Decision, based on the estimated Q_{90} flow. See id. at 188. The 13 mgd is about 76% of the Q_{70} base flow of 17 mgd. See USGS Streamflow Report at 44.[20] The 13 mgd also incorporates flows for the water needs of downstream rightholders of around 2 mgd. See Table 2.

The recommended adjustment provision for the Wailuku River IIFS continues the approach in the 2014 Order, with a minor modification. When the average daily flow measured by the USGS gage is below 19.5 mgd for three consecutive days (13 mgd is 2/3 of 19.5 mgd), the IIFS decreases to two-thirds (2/3) of the stream flow, such that one-third (1/3) of the streamflow may be diverted, until the flow returns to 19.5 mgd or above. The current adjustment provision allowed the diversion of "the greater of 1/3 of the stream flow or 3.4 mgd," which ensured 3.2 mgd for MDWS's treatment plant and 0.2 mgd for kuleanas on the ʻĪao ditch. See 2014 Order at

[20] Wailuku River has much more variable, less consistent below-median flows than Waiheʻe River. For example, Waiheʻe's Q_{99} flow of 18 mgd is more than half (53%) of the Q_{50} flow of 34 mgd, whereas Wailuku's Q_{99} flow of 8.4 mgd is about a third (34%) of the Q_{50} flow of 25 mgd. See USGS Streamflow Report at 44. Thus, the Wailuku River IIFS starts at a somewhat higher proportion of Q_{70} base flows (76%) in comparison to the Waiheʻe River IIFS (64%), but both are subject to adjustment during lower flows.

27. The recommended modified adjustment provision maintains the 2/3 - 1/3 sharing ratio but removes the 3.4 mgd floor or "guarantee" for specific users.[21]

The downstream Wailuku River IIFS, currently "near the mouth": relocate to "just below the Spreckels Ditch diversion" and adjust to 10 mgd based on the seepage loss up to this new location. The current IIFS of 5 mgd near the mouth took into account the estimated seepage of around 5 mgd between between the ʻĪao Ditch intake and the river mouth and meant that the Spreckels Ditch intake had to be shut off during flows less than the 10 mgd IIFS at the ʻĪao Ditches intake. See USGS Streamflow Report at 63-64, 71. Given the indicated difficulties in monitoring flow near the mouth, the downstream IIFS is relocated to just below the Spreckels Ditch intake. Based on the estimated seepage between the ʻĪao Ditches and the Spreckels Ditch of around 3 mgd or less, the IIFS just below the Spreckels Ditch, corresponding to the 13 mgd IIFS just below the ʻĪao Ditches, is 10 mgd. See id. at 9, 71.

4. Waikapū Stream:

Waikapū Stream IIFS, currently at the location established in the 2014 Order at around the 920-foot elevation: increase from 2.9 mgd to 3.9 mgd, with an adjustment provision as stated below. Also, in line with the IIFSs for all the other streams, relocate the IIFS to "just below the South Waikapū diversion." Based on estimated seepage and the tributary between the two points, the IIFS at this new, higher-elevation location should be about 1.2 mgd less, or 2.7 mgd. See USGS Streamflow Report at 72.

The increased 3.9 mgd IIFS aims to restore instream flows to the extent practicable in the middle reaches of Waikapū stream downstream of WWC's South Waikapū diversion, where

[21] The Community Groups have consulted MDWS and understand that it also takes exception to the Proposed Decision's total elimination of the adjustment provision and joins in the Community Group's and OHA's recommended adjustment provision.

T&C and appurtenant rightholders on the North Waikapū ʻauwai are located. Since the 2014 Order set the current IIFS, more downstream rightholders have come forward and total water needs have increased to almost 1 mgd. See Table 2. Moreover, the sole commercial user receiving water from the South Waikapū diversion, Waikapū Properties, plans to "get off of Waikapū stream water," Tr. 7/29/16 (Atherton) at 23:19-25, 25:18-22, and was only permitted 6,351 gpd from Waikapū Stream, see Proposed COL 306.v. The increased IIFS reflects these changes and provides additional flows to protect the downstream rightholders.

The recommended adjustment provision for the Waikapū Stream IIFS adopts the approach that the 2014 Order established for the South Waiehu IIFS to protect T&C and appurtenant rightholders who receive water from the plantation ditch system. During low-flow conditions, about 0.2 mgd will be provided to the South Waikapū kuleana ʻauwai, with the rest of the flows remaining in the stream.

The downstream Waikapū Stream IIFS, below the Waiheʻe Ditch diversion: direct the Commission staff, in consultation with DAR, U.S. Fish and Wildlife Service and the Keālia Pond National Wildlife Refuge, USGS, the Companies, the Community Groups and other relevant stakeholders, to conduct an investigation of downstream Waikapū Stream flow conditions and instream values based on controlled flow restorations and present the information to the Commission within a certain timeframe (e.g., one year) for further consideration and action on the IIFS. This investigation will include (1) the conditions under which Waikapū Stream flows to the coast, as may reflect on benefits to native amphidromous species, and (2) the full range of other instream values that may benefit from continuous or partial flows, such as the Keālia Pond wetland habitat.

While the issue of a downstream IIFS on Waikapū Stream has been repeatedly deferred for years, the Hawai‘i Supreme Court has admonished against "leav[ing] a diverted stream dry in perpetuity, without ever determining the appropriate stream flows"—and maintained it "cannot accept such a proposition." Waiāhole I, 94 Hawai‘i at 158-59, P.3d at 470-71. The Commission has long acknowledged that restoration of flow in the downstream reaches of Waikapū Stream would answer whether and under what conditions the stream flows from mauka to makai. 2010 Decision FOF 596, COLs 169(7), 259. Likewise, the USGS Streamflow Report acknowledged that its estimates of seepage in the lower reach of Waikapū Stream may not be accurate and contain much uncertainty, and that restoration of flow at different rates for periods sufficient to attain steady flow conditions would provide better information. USGS Streamflow Report at 77, 74, vi.

With the transition from sugar to any successor agricultural operations just beginning, there may never be a better opportunity than now to conduct such an investigation with controlled flow restorations. Indeed, since HC&S's closure, substantial excess ditch water has been continually dumped from the Waihe‘e Ditch into Waikapū Stream, to a point where it has benefitted the supply of water to Keālia Pond at the coast.[22] The Proposed Decision concludes the status quo is fine, and continued inaction on the downstream Waikapū IIFS is justified, see Proposed FOF 301, COL 127, D&O ¶¶ 35-36, but appears to misapprehend that the excess ditch water being discharged is from other diverted streams (predominantly Waihe‘e River) and is neither a natural flow condition for Waikapū Stream, nor a proper and lawful ditch management

[22] See Ex. OHA-48 (photographs of the dumped excess water); Tr. 10/14/16 (Strauch, CWRM) at 86:4 to 89:11; Tr. 7/28/16 (Dodd) at 14:19 to 15:7.

practice.[23] The excess ditch water discharges do show, however, that seepage investigations with controlled flow restorations can and should be conducted now, while such discharges are available and occurring.[24]

5. Conclusion re recommended IIFSs.

In sum, pending further investigation such as the IIFS below the Waiheʻe Ditch diversion on Waikapū Stream, adjustment provisions for the kuleanas on North and South Waiehu Streams, and verification of estimated seepage amounts particularly on Waiehu and Waikapū Streams, the IIFS amendments recommended above increase the Nā Wai Ehā IIFSs to a combined total of 37.7 mgd, subject to reduction during lower-flow periods. Based on USGS's data, at the Q_{99} flow, the IIFSs will be reduced by the adjustment provisions to around 12 mgd for Waiheʻe River (2/3 of 18 mgd), and 5.6 mgd for Wailuku River (2/3 of 8.4 mgd). Moreover, flows for kuleanas on the ditch systems will be provided in amounts to be determined for North and South Waiehu Streams, and in the amount of 0.2 mgd for Waikapū Stream.[25] As always, these IIFSs are interim standards subject to ongoing refinement, but build on the best available information and experience to date and seek to fulfill the Commission's duty to balance instream and offstream needs and protect both instream uses and rightholders on the Companies' ditch system to the extent feasible.

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[23] See Tr. 10/14/16 (Strauch, CWRM) at 86:4 to 89:11 (explaining that discharges of excess ditch water were occurring even while the diversion of Wailuku River was impaired by the 2016 flood).

[24] See Waiāhole I, 94 Hawaiʻi at 156, 9 P.3d at 468 (suggesting that the Commission could alternate flow releases among streams to study the effect of flow changes).

[25] The Q_{99} flow for North Waiehu, South Waiehu, and Waikapū Streams are an estimated 0.97, 0.84, and 2.7 mgd, respectively, which are below the IIFSs that are set above the Q_{99} flow. See USGS Streamflow Report at 51-52.

II. ALLOCATIONS AMONG THE WATER USE PERMIT CATEGORIES NEED TO BE ADJUSTED

The Community Groups generally support the Proposed Decision's approach of organizing water user permits in "Categories" for purposes of prioritizing allocations. The Proposed Decision appropriately classifies T&C rights for kalo cultivation as the highest Category 1,[26] appurtenant rights (for non-T&C purposes) as Category 2,[27] and other uses as Category 3. This tiered framework comports with the law recognizing the priority of T&C and appurtenant rights and provides a practical approach to prioritize uses particularly in situations of limited supply.[28] As explained below, however, the Proposed Decision contains various legal errors that affect the allocations to these various categories and necessitate corrections to proposed COLs and associated adjustments to the allocations.

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[26] T&C rights are protected at every level of the law, including the constitution, statues, and common law. See Haw. Const. art. XII, § 7; Haw. Rev. Stat. §§ 174C-2(c), -3, -101(c); Ka Pa'akai, 94 Haw. at 35, 7 P.3d at 1072; Waiāhole I, 94 Hawai'i at 137, 153, 9 P.3d at 449, 468; see also Attachment 1, pt. III. In establishing T&C rights as a protected trust purpose, the Hawai'i Supreme Court recognized the "original intent" of the trust of "preserving the rights of native tenants." Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449.

[27] Appurtenant rights are distinct from T&C rights and are addressed separately in the law. Compare HRS § 174C-101(c), with id. § 174C-101(d), -63. Appurtenant rights are "incidents of land ownership," Reppun v. Bd. of Water Supply, 65 Haw. 531, 551, 656 P.2d 57, 70 (1982), whereas T&C rights "flow from native Hawaiians' pre-existing sovereignty," Public Access Shoreline Haw. v. Haw. Planning Comm'n, 79 Hawai'i 425, 449, 903 P.2d 1246,1270 (1995) ("PASH"). The two may overlap when appurtenant rights are exercised for T&C purposes; indeed, Waiāhole I noted that the "[public] trust's protection of [T&C] rights also extends" to appurtenant rights—which logically refers to the exercise of appurtenant rights in a T&C context. See 94 Hawai'i at 137 n.34, 9 P.3d at 449 n.34; Proposed COLs 87-90.

[28] See Waiāhole I, 94 Hawai'i at 188, 9 P.3d at 500 (recognizing the need for the Commission to "prioritize among proposed uses . . . . in managing any scarce resource).

A. Category 1: The Proposed Decision Unduly Limits T&C Rights.

1. T&C rights to cultivate kalo do not require a direct lineal connection to the area.

The Proposed Decision legally errs in concluding that T&C rights to cultivate kalo are limited only to individuals "who can personally trace their practices in the subject area to a period prior to November 25, 1892," i.e., those who have a direct lineal connection to the area. See Proposed COLs 25-28; see also Proposed COL 90.a (imposing the same limitation on appurtenant rights exercised for T&C purposes). This proposed restriction mistates the law and would severely diminish T&C rights not only in this case, but throughout Hawai'i nei. In this case, it deprives 27 Native Hawaiian applicants of their priority water rights, reducing total water allocations for T&C rights to cultivate kalo from around 6.7 mgd to only around 1.3 mgd, as shown in the attached Table 3.

Contrary to the proposed COLs, T&C rights to cultivate kalo do not require a showing of direct ancestral lineage to the area in cultivation. Nothing in the long line of Hawai'i Supreme Court cases on T&C rights imposes any such express or implied requirement.[29] Rather, as established in this long-standing precedent, Native Hawaiian T&C rights are associated with "residency" or "tenancy" in an ahupua'a, or other T&C practice extending beyond the ahupua'a of residence. See Pele Def. Fund v. Paty, 73 Haw. 578, 618-20 & n.33, 837 P.2d 1247, 1271-72 & n.33 (1992) ("PDF"); PASH, 79 Hawai'i at 448, 903 P.2d at 1269. Native Hawaiians need only show that the T&C practice of cultivating kalo had been established in the ahupua'a by 1892. See, e.g., PASH, 79 Hawai'i at 447, 903 P.2d at 1268. Here, it is established and

[29] The only specific citation to any of the case law in the Proposed Decision is an excerpt from State v. Pratt (an inapplicable criminal case) cited in Proposed COL 26, which is actually a recitation of testimony in the lower court record, and not any kind of legal ruling by the Hawai'i Supreme Court.

undipusted that the entire Nā Wai ʻEhā region supported extensive T&C kalo cultivation practices in "compris[ing] the largest continuous area of wetland taro cultivation in the islands." Proposed FOF 272.[30] Based on that established custom in Nā Wai ʻEhā, Native Hawaiians have the right to cultivate kalo regardless whether they can trace their direct ancestry to a certain location.

Indeed, the Proposed Decision not only contradicts the law, but would impose sweeping impacts on Native Hawaiian T&C rights in general, by depriving Native Hawaiians any opportunities and rights to practice their culture in the present day if they have moved or been displaced from their ancestral lands, or any ability to move and continue to practice their culture in the future. This stands directly at odds with the recognized "fact that [Native Hawaiian tenants] were not 'serfs' tied to the land . . . but were free to leave at any time and begin their efforts anew in virtually any uncultivated area." Reppun, 65 Haw. at 541, 656 P.2d at 65.

The Commission must correct this legal error by (1) deleting Proposed COLs 25-28, and (2) recognizing "Priority 1" T&C rights to water to grow kalo for the applicants who are Native Hawaiian and seek to exercise T&C practices to cultivate kalo, as indicated in the attached Table 3.

2. Limiting T&C rights to cultivate kalo to one acre is arbitrary.

The Proposed Decision also diminishes T&C rights to cultivate kalo by arbitrarily limiting allocations for such rights to only one acre. The Proposed Decision initially creates this limit for the Duey ʻohana's SWUPA (No. 2243/2244N), see Proposed COL 272.p to s, but also applies it to other ʻohana who seek to cultivate more than an acre. After correcting the erroneous

[30] See also Tr. 7/11/16 (Kameʻeleihiwa) at 45:25 to 46:21 (recognizing Nā Wai ʻEhā as the "loʻi kalo capit[o]l of the world").

direct-lineage requirement above, this erroneous one-acre limit would reduce the T&C rights of 15 applicants by a total of about 19 acres, or 2.85 mgd based on the 150,000 gad figure. See Table 3 (listing numerous requested acreages above one acre).

The Proposed Decision observes that "no evidence was submitted in this CCH on productivity levels of kalo lo'i and average consumption of poi," but quotes testimony from the expert on Māhele history, Dr. Kame'eleihiwa, that "the highest and best use of the land (is) in lo'i kalo, and you can make ten to 15 times more food per acre." Proposed COL 272.q (quoting FOF 164). The Proposed Decision then summarily concludes that "a liberal allocation of kalo lo'i for 'ohana uses would be 1 acre." Proposed COL 272.r.

As the Commission may know, the Duey 'ohana have been requesting water for their lo'i kalo for at least 10 years, when John Duey submitted testimony in 2007 detailing his 'ohana's requested kalo cultivation based on T&C rights. See Duey WT 9/14/07 (MA06-01). As the Dueys explained, their 'ohana "eat[s] the taro we grow," "always eats a lot of poi," and has regular gatherings of more than 50 people, where they "always serve poi as the main staple." Id. ¶¶ 16-17. Their 'ohana also planned to "share with our friends and neighbors and sell any remainder as necessary to pay for basic expenses such as property taxes (which just doubled last year), gas, and fertilizer." Id. ¶ 16. Nothing in the Dueys' or any other community members' testimony in the extensive record supports a one-acre limit on subsistence kalo cultivation. The testimony the Proposed Decision cites explained the Hawaiians' traditional preference for lo'i kalo; it is not expert or lay practitioner testimony on kalo farming, and it says nothing about amounts of acreage for subsistence farming, let alone a one-acre limit.

Indeed, almost all the acreages that community applicants have requested are traditional kalo lands that were cultivated at the time of the Māhele for subsistence, and none of the

requested acreages are disproportionate from the size ranges of Māhele-awarded kuleanas. No one-acre limit applied at the time of the Māhele, or should legally apply now. The Code "obligates the Commission to ensure that it does not 'abridge or deny' [T&C] rights of Native Hawaiians," which expressly includes "cultivation or propagation of taro on one's own kuleana." Waiāhole I, 94 Hawai'i at 153, 9 P.3d at 465; HRS § 174C-101(c). Moreover, in line with what the Dueys explained, the 2010 Decision expressly recognized:

> [A] subsistence lifestyle can be maintained in today's cash economy, but with different demands on subsistence growers. In the old days, you could pay taxes to chiefs with taro. Those in-kind tax payments are no longer allowable, so even subsistence farmers would inevitably have to sell some of their taro for cash in order to pay taxes.

Id. COL 56.

In sum, where, as here, Native Hawaiian 'ohana are seeking to exercise their T&C rights on traditional kalo land in acreage amounts that do not unreasonably offend the intent of the T&C practice in today's context, imposing a limit like one acre is arbitrary and lacks basis in the record. COL 272.p to s for the Dueys and the corresponding COLs for the other 'ohana listed in Table 3 should delete or avoid this error, and these 'ohana's T&C rights should be recognized in full, for the acreages they requested.

B. Category 2: The Proposed Decision Contradicts Long-Established Precedent On Appurtenant Rights.

1. Resurrecting extinguished appurtenant rights is legal error.

The Proposed Decision also legally errs in seeking to resurrect appurtenant rights that have been reserved and extinguished under long-standing Hawai'i Supreme Court precedent. See Proposed Decision, Part II.D.4, COLs 75-86. Again, these proposed COLs misconstrue the law and improperly attempt to nullify binding precedent. As a result, the Proposed Decision substantially overcalculates total priority "Category 2" appurtenant rights by a total amount of

11.14 mgd (or 111.43 acres at the 100,000 gad applied by the Proposed Decision), compared to 16.06 mgd of valid, unextinguished appurtenant rights (160.63 acres at 100,000 gad), as shown in the attached Table 4. This results in diluting and diminishing the rights of other permittees, including those with actually valid appurtenant rights, and skewing the overall balance toward further offstream diversions.

The Hawai‘i Supreme Court expressly held in Reppun that reservations of appurtenant rights have "the effect of extinguishing them." 65 Haw. at 552, 656 P.2d at 71. This legal ruling is binding on agencies such as this Commission, which have the duty "to adhere to . . . , without regard to their views as to its propriety." State v. Brantley, 99 Hawai‘i 463, 483, 56 P.3d 1252, 1272 (2002).[31] Contrary to the Proposed Decision's assertions, nothing in the Constitution or Code nullifies or prohibits the ability and right of private parties in private land transactions to "provid[e] that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate," as the Court recognized in Reppun based on basic property principles. 65 Haw. at 552, 656 P.2d at 71 (brackets omitted) (quoting Restatement of Property § 487, cmt. b).

The Proposed Decision points to the clause in article XI, § 7 of the Hawai‘i Constitution calling for the creation of the Commission "which, as provided by law, shall . . . establish criteria

[31] Reppun is also judicial precedent that, under the legal doctrine of "stare decisis," the courts "should not depart from . . . without some compelling justification." State v. Romano, 114 Hawai‘i 1, 11, 155 P.3d 1102, 1112 (2007). Such precedent "has added force" when private citizens "have acted in reliance in a previous decision," and "overruling the decision would dislodge settled rights and expectations." State v. Garcia, 96 Hawai‘i 200, 206, 29 P.3d 919, 925 (2002); see also In re Allen, 35 Haw. 501, 524 (1940) (courts are "much more reluctant" to depart from precedent "when such declaration affects individual property rights and commercial transactions whereby such rights are acquired"). Here, the reservations of appurtenant rights were established in private commercial transactions in which the parties agreed on the property rights to be transferred and the corresponding sale prices to be paid. See, e.g., Tr. 7/29/16 (Atherton) at 88:18-89:13 (explaining that in the sale of land from WWC to Waikapū Properties, the parties specifically negotiated the terms for water rights to enable the buyer to drill wells).

for water use priorities while assuring appurtenant rights and existing riparian and correlative uses," among other functions. Proposed COL 80. To begin with, that cited clause, including the language "assuring appurtenant rights," is not self-executing—i.e., it has no force of law in itself, without follow-up legislative action.[32] In any event, nothing in that language or its history purports to alter any appurtenant rights or reservations of such rights.

Likewise, nothing in the text or history of the Code, including § 174C-63, purports to alter any appurtenant rights or reservations of rights, or overrule the Hawai'i Supreme Court's Reppun holding. In affirming that "[a]ppurtenant rights are preserved," § 174C-63 provides that "[n]othing in this part [relating to water use permitting] shall be construed to deny the exercise of an appurtenant right" and that "[a] permit for water use based on an existing appurtenant right shall be issued upon application." This language, expressed in the terms of a savings clause, describing the effect and limits of the Code's water use permitting system in relation to appurtenant rights. It does not substantively address or alter any underlying appurtenant rights or reservations of rights, or control any private transactions regarding such rights. In other words, § 174C-63 does not affirmatively establish or define any rights, or prohibit or invalidate any reservations of rights, but simply delineates the effect of the Code on existing common-law rights. Along these lines, § 174C-63 specifically refers to "existing" appurtenant rights. This indicates a recognition that appurtenant rights can be made not to exist, i.e., be extinguished; otherwise, the term "existing" would be superfluous.

[32] See Waiāhole I, 94 Hawai'i at 132 n.30, 9 P.3d at 444 n.30 (explaining that art. XI, § 7 is "self-executing to the extent that it adopts the public trust doctrine," but separately "also mandates the creation of any agency to regulate water use 'as provided by law,'" which by its terms is not self-executing and requires legislative action).

As stated, the Hawai‘i Supreme Court based its holding regarding extinguishment of appurtenant rights on basic common-law property principles regarding appurtenant easements. "Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed." Waiāhole I, 94 Hawai‘i at 130, 9 P.3d at 442. The Code indicates no such intent to abrogate Reppun. In direct contrast, the Code does articulate such intent to overrule the common law in § 174C-49(c), which provides that "[t]he common law of the State to the contrary notwithstanding, the Commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed" under certain conditions.

The Proposed Decision's upending of Reppun unilaterally and retroactively resurrects around 11 mgd of appurtenant rights that, until now, all parties to the original private transactions understood were extinguished. The Wailuku Country Estates development offers a prime example of the disruption the ruling would cause. The developer of that subdivision bought the land from WWC's predecessor 15 years ago, in 2002, subject to an express reservation of water rights, and that reservation is spelled out in numerous subsequent formal documents, including the "Public Offering Statement" notifying potential buyers of the sale of subdivision lots, the "Property Report" to buyers of lots, and the "Declaration of Covenants, Conditions, And Restrictions" for the subdivision.[33] Yet, now the Proposed Decision awards 4.379 mgd of appurtenant rights to the subdivision's irrigation company (as opposed to any individual lot owners), see Proposed COL 278.r, which places the subdivision's water allocation at an equal priority level as the rights of kuleana landowners who have maintained their lands

[33] See Hui-MT/OHA's Proposed FOFs C-158 to 160 for a review of these and other documents, including citations to the record.

with the water rights intact for generations. Nothing in the modern water rights framework in Hawai‘i justifies such a retroactive windfall for private parties like WCE and a wholesale reshuffling of the water rights landscape.

Finally, while the Proposed Decision suggests that the invalidation of Reppun and resurrection of extinguished appurtenant rights is somehow "in keeping with" the public trust doctrine, see Proposed COLs 85, 81-82, in fact, the Reppun precedent is fully consistent with the history of modern Hawai‘i Supreme Court decisions (including Reppun) that realigned the law from the plantation-era system based on Western notions of private property, toward a new framework based on the public trust—including Native Hawaiian T&C rights.[34] Appurtenant rights are an example of a customary practice that was translated to a property right, then further converted to a commodity that could be transferred and sold. See Reppun, 65 Haw. at 539-48, 656 P.2d at 63-69. Thus, as a part of its "rectification of basic misconceptions concerning water 'rights' in Hawaii," id. at 548, 656 P.2d at 69, the Court prohibited the transfer of appurtenant rights, yet allowed that "nothing would preclude the giving of effect" of the "inten[t] to extinguish those rights" in a private transaction. Id. at 552, 656 P.2d at 71. More fundamentally, however, the Court "made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty." Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d 287, 312 (1982). It is this public trust interest that forms the foundation for water resources protection and management in Hawai‘i today. This public trust framework does not conflict, but rather aligns, with the Court's rulings on the private

[34] See supra note 27, explaining the distinction between appurtenant rights, which are interests in real property, and T&C rights of Native Hawaiians.

interests in appurtenant rights and the legal effect of private transactions reserving and extinguishing such rights.

The Commission must correct this legal error by (1) correcting Proposed COLs 75-86 along the lines of the discussion above and Hui-MT/OHA's Proposed COLs 63-71, and (2) deleting the recognition of appurtenant rights for applications involving lands on which appurtenant rights have been reserved, as indicated in Table 4.[35]

2. Appurtenant rights of undisputed kalo lands within larger grants must be recognized.

The Proposed Decision commits another legal error in its blanket denial of any and all appurtenant rights on lands conveyed in konohiki awards or government grants, as opposed to kuleana awards. See Proposed COL 54. The Proposed Decision bases this denial on Dr. Kame'eleihiwa's testimony that she "had no opinion on [konohiki and government lands'] use of water at the time of the Māhele nor how to evaluate the proportion of the award or grant that might have been in kalo lo'i." Proposed COL 54.c. The recognition of appurtenant rights, however, is a legal determination, and the law establishes that appurtenant rights apply to "any" land cultivated during the Māhele, including "all the lands conveyed by the King, or awarded by the Land Commission." Peck v. Bailey, 8 Haw. 658, 661 (1867) (emphasis added); see id. at

[35] The Community Groups note that the Proposed Decision would also overturn Reppun in concluding that appurtenant rights of kalo lands are only entitled to 100,000 gpd, while recognizing actual need of 150,000 gpd for lo'i kalo uses. See Proposed COLs 67-71. Those COLs misapply testimony from Mr. Reppun that "[w]e need more today than before to some degree," to conversely justify reducing the amount of water used at the time of the Māhele. While the Community Groups reserve their position on a 100,000 gpd allocation for appurtenant rights generally, certainly in those cases where community members are exercising appurtenant rights for traditional kalo cultivation today, they fall squarely within Reppun's presumption that "the amount of water diverted for such cultivation sufficiently approximates the quantity of appurtenant water rights to which that land is entitled," 65 Haw. at 554, 656 P.2d at 72, and no valid basis exists for contrarily reducing their appurtenant rights to a lesser amount than they actually need, as Proposed COLs 67-71 posit.

662-63 (recognizing appurtenant rights to kalo lands conveyed via a konohiki grant). In legally defining appurtenant rights, Peck did not distinguish between types of conveyances: "If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance." Id. at 661. The Proposed Decision's wholesale exclusion of konohiki and government lands from the recognition of appurtenant rights is thus legally untenable.

As an example of this error, the Proposed Decision denies any appurtenant water rights to pōʻalima, or prime loʻi kalo lands cultivated for the chief,[36] just because they were derived from a konohiki award or government grant. See Proposed COL 54.a, b. While the Proposed COL observes that Dr. Kameʻeleihiwa did not express opinions on konohiki awards and government grants, neither did she opine that such lands were not cultivated. In fact, contrary to any such negative inference, Dr. Kameʻeleihiwa made clear that pōʻalima were prevalent in Nā Wai ʻEhā, and that all such lands were cultivated in loʻi kalo at the time of the Māhele. See Kameʻeleihiwa WT 2/5/16, ¶ 30; Tr. 7/11/16 (Kameʻeleihiwa) at 46:22 to 47:9. The Proposed Decision's exclusion of certain pōʻalima based on how they happened to be conveyed would deprive community members of appurtenant rights on lands that were not only undisputedly cultivated in loʻi kalo, but ostensibly among the most suitable and productive for that purpose. The Commission, instead, must recognize the historical and cultural understanding of pōʻalima and enable the exercise of (unextinguished) appurtenant rights on all such lands.

[36] See Provisional Order, Attachment A: Hearing Officer's Findings and Recommendation, dated October 14, 2014, at 4 (describing "poalima" as "land cultivated for the chief," and granting provisional recognition if native/foreign testimonies and native registers explicitly referenced "poalima"); Kameʻeleihiwa WT 2/5/16, ¶ 29 (pōʻalima were lands farmed by hoaʻāina for the aliʻi or konohiki); id. ¶ 30 (in Nā Wai ʻEhā, pōʻalima were cultivated in loʻi kalo, as opposed to any other crop); Tr. 7/11/16 (Kameʻeleihiwa) at 46:22 to 47:9 (wetland kalo was regarded as "the highest and best use of the land").

In its blanket exclusion of former konohiki and government lands, the Proposed Decision also disregards the extensive efforts by community members to prove their lands were cultivated at the time of the Māhele, where they faced the predicament that konohiki awards or government grants usually do not describe land or water uses.[37] For example, to prove that his ʻohana's parcels totaling 1.381 acres—part of the 24,000 acre grant to Claus Spreckels—were cultivated in loʻi kalo, Duke Sevilla submitted numerous forms of evidence, including: his own testimony that loʻi terraces are still visible on the land today; kūpuna knowledge of the area; LCAs for neighboring kuleana; an 1876 excerpt from the Hawaiian language newspaper Ka Lahui Hawaii; and an archaeological inventory survey. See Hui-MT/OHA Proposed FOFs B-626 to 631. These types of substantial, reliable, and unchallenged evidence of land and water use on community members' lands can be equally or more reliable than Māhele records and should be accepted to recognize their appurtenant rights.[38] In fact, the Proposed Decision does accept and rely on such non-Māhele-record evidence—e.g., testimony on the existence of loʻi walls—in recognizing appurtenant rights for other community members with kuleana land. See, e.g., COLs 215.c & e, 234.b.1&2, i. The Proposed Decision's contrary dismissal of such evidence for

[37] Konohiki awards and government grants did not require proof of cultivation to confer fee-simple ownership and therefore there was no need to describe land and water uses in these records. See Kameʻeleihiwa WT 2/5/16, ¶¶ 8-10, 16-17; Hui-MT/OHA's Proposed FOFs B-21 to 23.

[38] Cf. Diamond v. Dobbin, 132 Hawaiʻi 9, 34, 319 P.3d 1017, 1042 (2014); State v. Hanapi, 89 Hawaiʻi 177, 187 n.12, 970 P.2d 485, 495 n.12 (1998) (recognizing kamaʻāina testimony as valid proof of ancient usage). As the Community Groups and OHA pointed out in their framework for determining Māhele-period land and water uses, community members submitted three types of evidence: (1) physical evidence on the land, including archaeological, topographical, and natural land and water features; (2) kamaʻāina testimony, oral history, and historical records (other than Māhele records); and (3) Māhele records interpretation and analysis based on Dr. Kameʻeleihiwa's testimony. See Hui-MT/OHA Proposed FOFs pt. IV.A to C, FOFs B-8 to 23.

community members with land from konohiki and government conveyances is, again, arbitrary and inconsistent with the law.

Finally, the Proposed Decision states that "without identification of lands in kalo loʻi versus the acreage of the entire parcel, it may not be possible to reach a conclusion of the percent of the award or grant that had water rights, or the amount of award might be miniscule." Proposed COL 54.c.1. This suggests that, when kalo land is included in a larger konohiki or government conveyance, the appurtenant rights must be divided across all the acres of the entire conveyance.[39] Such an approach simply makes no sense: it would impose an impossible burden to document any and all water uses across grants that can span thousands of acres, then artificially spread those rights across the entire grant, even on lands that are unusable for cultivation; it would also atomize appurtenant rights into "miniscule" fractions that would be unusable for anyone owning smaller portions of the original grant. Most importantly, by spreading the appurtenant rights throughout an entire large grant, this suggested approach would contradict the law that appurtenant rights attach to the lands actually cultivated at the time of the Māhele and cannot be applied to other lands. See Reppun, 65 Haw. at 564, 656 P.2d at 78 ("Appurtenant water rights . . . may not be transferred or applied to lands other than those to which the rights appertain.").

For kuleana land, the Proposed Decision adopts a practical approach to deal with the fragmentation of original LCAs in present-day TMKs, in order to avoid "making their appurtenant rights practically unusable." Proposed COL 45-46. For TMKs larger than a few acres, the Proposed Decision makes a "case-by-case determination as to whether the appurtenant

[39] Thus, in the case of Mr. Sevilla above, the rights of his 1.381 acres of kalo land would be divided across all 24,000 acres of the entire Spreckels grant, resulting in a .006% interest.

right is limited to those portions of the TMK that are derived from the relevant LCAs," Proposed COL 46.a.ii, whereby the Proposed Decision properly limits the use of appurtenant rights to the specific location of LCAs within a larger TMK. See, e.g., Proposed COL 251.x & y (Hawaiian Islands Land Trust). Likewise, in the case of larger konohiki and government conveyances, such a practical and legally sound approach would support the case-by-case recognition of appurtenant rights for specific lands within those conveyances where cultivation at the time of the Māhele can be proven. This would enable traditional kalo lands to be productively cultivated today, consistent with the letter and spirit of the law. In sum, the Commission must recognize the appurtenant rights of undisputed kalo lands associated with konohiki and government grants, as listed in the attached Table 5.

C. Municipal Uses Are Not A Public Trust Purpose And Should Be Recategorized As Category 2.

While the Community Groups and OHA have not opposed the allocation of 3.2 mgd for MDWS's treatment plant either in the 2014 Order or in this case, we must take exception with the Proposed Decision's classification of MDWS's municipal use (or more precisely, WWC's commercial diversion of water for MDWS's use) as a "domestic" use and "public trust purpose" co-equal with Native Hawaiian water rights under Category 1. See Proposed COL 282.k. The Community Groups have thoroughly briefed how this misclassification contradicts settled law on water and the public trust and will summarize here and also include the full version with citations in Attachment 1, pt. X.

Under established, black-letter water law, "domestic" and "municipal" uses are distinct legal terms and categories. Waiāhole recognized "domestic" uses as a protected public trust purpose, quoting the "preference for domestic, or 'natural,' uses" from the authoritative treatise, Restatement (Second) of Torts § 850 cmt. c (1979) ("Restatement"). See 95 Hawai'i at 37, 9

P.3d at 449. As that same cited source explains: "The preference for domestic use does not extend to withdrawals by a municipality, water company or public district that supplies the domestic needs of inhabitants of a city or other service area." Restatement (Second) of Torts §850 cmt. c (emphasis added).[40] Likewise, the Code defines "domestic" and "municipal" uses separately and recognizes that municipal uses like MDWS's encompass not only aggregate domestic uses, but also "industrial" and "commercial" uses. Haw. Rev. Stat. § 174C-3. Thus, the Code specifically exempts "domestic consumption of water by individual users" from its water use permitting system, but grants no preferences or exemptions to municipal users. Id. § 174C-48(a).

Conflating municipal stream diversions (or WWC's diversions for MDWS) with a domestic "public trust use" under Waiāhole would constitute an unprecedented, fundamental deviation from the public trust doctrine. Indeed, the seminal "Mono Lake" case, on which the Waiāhole case extensively relied in its public trust discussion, rejected such an argument that the public trust encompassed "all public uses," including the "domestic" uses of the City of Los Angeles. National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 723-24 (Cal. 1983). As that case and the Waiāhole case emphasized, "the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands." Waiāhole I, 94 Hawai'i at 138, 9 P.3d at 450 (quoting National Audubon, 659 P.2d at 723-24).

Again, while the Community Groups and OHA do not oppose MDWS's permit, which is certainly for a public use in the public interest, that use is not a public trust use. That

[40] See also the extensive authorities from Hawai'i and elsewhere cited in Attachment 1, pt. X.

misclassification in Proposed COL 282.k should be deleted; rather than being categorized as Category 1, co-equal with Native Hawaiian rights that are recognized and protected as "the original intent" of the public trust, Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449, MDWS's use should properly be categorized as Category 2.

III. ALLOCATIONS TO SEVERAL MAJOR DIVERTERS ARE INFLATED

In this case involving water use permitting, applicants must comply with their full burdens of proof under the law, and the Commission is "duty bound to hold [the applicant] to its burden under the Code and the public trust doctrine." In re Wai'ola o Moloka'i, Inc., 103 Hawai'i 401, 426, 83 P.3d 664, 689 (2004); see also Attachment 1, pt. VII (reviewing the law on applicants' burdens of proof). As discussed below, however, the Proposed Decision liberally grants the inflated water claims of several major water diverters, particularly HC&S, and substantially overstates diversions of Nā Wai 'Ehā streamflows, contrary to the Commission's trust duties.

A. HC&S.

HC&S's sugar plantation was the predominant nonstream use "accommodat[ed]" by the current IIFSs under the 2014 Order, comprising 4,770 total acres (3,650 acres of the HC&S-owned Waihe'e-Hopoi fields, and 1,120 acres of the leased 'Īao-Waikapū fields) and total water requirements of 27.81 mgd. 2014 Order FOFs 44-45, COLs 12, 19. As history has established, including in the Waiāhole case and also in Nā Wai 'Ehā with the previous closure of Wailuku Sugar, the transition from sugar to diversified agriculture, if it actually occurs, results in vastly reduced agricultural water needs. The factual record in this case is no different.

Yet, similar to the controversial proposed decision in the East Maui case, this Proposed Decision grossly overallocates water to HC&S for its Waiheʻe-Hopoi fields[41] by: (1) rubber-stamping HC&S's inflated and unsubstantiated water use figures, including (a) its water duty figure of 4,776 gad, far in excess of any proven actual needs and almost double the 2,500 gad figure that the Commission established for diversified agriculture in Waiāhole and the Proposed Decision applies all other diversified agricultural uses in this case, and (b) its system losses figure of 2.15 mgd; and (2) minimizing HC&S's use of its main water source, Well No. 7, from up to 18.5 mgd to only 3 mgd. The Proposed Decision's total allocation of 15.65 mgd, see Proposed COL 358.w, actually looks to increase HC&S's Nā Wai ʻEhā diversions compared to the estimated 12.5 mgd it diverted for its sugar operations.[42]

1. HC&S's actual water needs.

In this case, HC&S has produced no actual, concrete plan for potential future diversified agriculture, but simply raised the speculative prospect of cultivating "bioenergy crops" on its Waiheʻe-Hopoi Fields, while admitting that it still does not know the economic viability of large-scale cultivation of such crops. HC&S's Open. Br. (labeled SWUPA "2205," but actually SWUPA 2206) at 2-3, 14. It claimed a water duty of 4,776 gad for "bioenergy tropical grasses, such as energy canes and banagrass" based on "a preliminary assessment arising out of the DoD [Department of Defense] Study," id. at 6, but provided no documents from that study and did not

[41] The ʻĪao-Waikapū fields are no longer leased by HC&S and instead are being partly cultivated by Waikapū Properties (Mr. Atherton) in diversified agriculture. See Proposed FOF 480.f.

[42] The 2014 Order stated reasonable needs for the Waiheʻe-Hopoi fields of 21.75 mgd and a maximum of up to 18.5 mgd of Well 7 use. See id. FOFs 44-45, 50, COLs 12-14. Although HC&S failed to provide information on its average use of Well 7, conservatively assuming average Well 7 use of half the maximum number, or 9.25 mgd, would result in net water requirements for the Waiheʻe-Hopoi fields of 12.5 mgd.

even know if preliminary results had been published. Tr. 7/29/16 (Volner) at 171:18 to 173:23. HC&S then elaborated that sorghum would likely be its "anchor crop," Proposed FOF 480.j, COL 358.j, but likewise provided no information on the water duty for sorghum. The available evidence in the record, however, indicates that water requirements of sorghum are a third or less than those of sugarcane. Ex. Nā Wai-38 at 3-5; Ex. Nā Wai-39 at 5. Another sorghum bioenergy project on Maui that HC&S admitted was "the same" concept as its proposal, Tr. 7/29/16 (Volner) at 193:5-21, planned to use recycled water at a rate of 1,389 gad. See Ex. Nā Wai-37 at 015-017; Ex. Nā Wai-38 at 2 (2.5 mgd of recycled water to farm up to 1,800 acres).

HC&S asserted that its "circumstances are very similar" to the transition to diversified agriculture in the Waiāhole case. In that case, in light of "a lack of data on actual uses for diversified agriculture," the Commission determined that 2,500 gad is a reasonable water duty for diversified agriculture, subject to being "evaluated periodically or upon request, based on the best available data and field experience." Waiāhole I, 94 Hawai'i at 162, 9 P.3d at 474. In the 20 years since, the 2,500 gad standard has proven to be fully sufficient and has never been requested to be amended or reevaluated. The Proposed Decision applies the 2,500 gad standard in this case to all other diversified agriculture (or applies even lower gad figures based on actual uses), yet arbitrarily grants HC&S's inflated and unsubstantiated 4,776 gad figure for far more speculative plans. If HC&S has met its burden for obtaining a water use permit (as opposed to a reservation for potential future use),[43] in no event should it be allocated more than the 2,500 gad deemed reasonable-beneficial for the transition to diversified agriculture in Waiāhole and all

[43] See Waiāhole I, 94 Hawai'i at 186, 9 P.3d at 498 (affirming the Commission's denial of a permit without prejudice to reapplication when the applicant "can demonstrate that actual use will commence within a reasonable timeframe" and pointing out that the Code provides for water reservations in such circumstances).

other diversified agricultural uses in this case. Applying 2,500 gad to the 3,650 acres of the Waiheʻe-Hopoi Fields would amount to 9.13 mgd, as opposed to the 16.6 mgd under the Proposed Decision.

2. Well 7.

Well 7 was historically the largest capacity well in Hawaiʻi and HC&S's main source for the Waiheʻe-Hopoi fields, supplying an average of 21 mgd over 60 years, and a maximum of 18.5 mgd under the 2014 Order. It is well-situated and -equipped to continue to supply agricultural water for the Waiheʻe-Hopoi fields, and should be utilized to the maximum extent practicable, recognizing that instream uses have no other alternatives to Nā Wai ʻEha streamflows.

The Proposed Decision rightly declines to accept HC&S's bare argument that using 18.5 mgd from Well 7 would make farming the Waiheʻe-Hopoi Fields uneconomical, pointing out HC&S's lack of proof "at what point pumping costs for Well No. 7 without offsetting income, would cause it to cease activities." Proposed COL 358.v.2.b.[44] The Proposed Decision, however, then arbitrarily caps the availability of Well 7 to 3 mgd, citing the underlying Kahului Aquifer's nominal sustainable yield based only on direct rainfall. Proposed FOF 480.r.1.e, COL 358.v.2.c, 358.w. The Proposed Decision also adds that if and when HC&S use of surface water reaches half the proposed permitted amount (about 7 mgd), "it will be required to use Well No. 7

[44] Indeed, HC&S provided no analysis that the cost of using Well 7 water (17.8 cents/1,000 gallons or less) was impracticable and admitted that, in the absence of such data, it "would not know what water costs can be borne." HC&S's Open. Br. at 14. The Hawaiʻi Supreme Court already invalidated the 2010 Order based on the lack of such analysis, holding that "the Commission erred when it made its decision regarding Well No. 7 based on cost while explicitly acknowledging that it did not have the data needed to truly analyze cost." Nā Wai ʻEhā, 128 Hawaiʻi at 262, 287 P.3d at 163.

to use Well No. 7 to the point that the brackish well becomes unsuitable for irrigation." Proposed COL 358.x.3.

Even HC&S did not claim such a 3 mgd limit, but rather indicated no significant adverse impact to the aquifer to date from up to 18.5 mgd of Well 7 use, see Proposed FOF 480.r.1.e.iii, COL 358.q.1.e.iii, and admitted that it is thus "relying primarily on economic factors" in arguing against the practicablity of Well 7 use, HC&S's Open Br. at 15. The Proposed Decision thus recognizes that "[c]ost is the only consideration that HC&S cites as making water from Well No. 7 not 'practically available,'" Proposed COL 358.v.2.b, yet contrarily proceeded to limit Well 7 use based on the 3 mgd nominal sustainable yield. This would effectively eliminate the use of all HC&S's wells, including in the East Maui case. Moreover, it disregards the evidence in this case, including HC&S's own insistence on the long-term quality of its wells and the "regional down gradient ground water movement" into the aquifer, which USGS has also documented. See Ex. C-90 at 2 (MA06-01) (HC&S letter); Ex. A-145 at 3-4 (MA06-01) (USGS report). The Hawai'i Supreme Court has already faulted the Commission's 2010 Decision for disregarding this evidence in attempting to impose arbitrary limits on Well 7. See Nā Wai 'Ehā, 128 Hawai'i at 260-61, 287 P.3d at 161-62.

While the Proposed Decision notes the reduction of agricultural irrigation and recharge from the transition from sugar to diversified agriculture, this does not justify reducing well use to fictitious bare minimum levels assuming only direct rainfall and zero agricultural irrigation. In fact, Well 7 was historically HC&S's main source for its Nā Wai 'Ehā-irrigated fields; in other words, HC&S used a greater proportion of water from the well than from Nā Wai 'Ehā streams.[45]

[45] See, e.g., Hui-MT/OHA's Proposed FOF C-3, COL 176 (reviewing the available evidence indicating HC&S's "share" of WWC's diversions, not including HC&S's 'Īao and

If the Commission is inclined to reduce well use based on a reduction of irrigation needs, it should at least maintain such relative proportions of well and stream water usage, rather than imposing arbitrary caps on well use. Thus, given the public trust presumption in favor of protecting Nā Wai ʻEhā instream uses, HC&S should be reasonably presumed able to use Well 7 for no less than half of its potential water needs, or 4.57 mgd of the total 9.13 mgd. Adding the 0.1 mgd of water from HC&S's ʻĪao Tunnel (see Proposed COL 358.v.1, w.1), totals 4.67 mgd from alternative sources and a net water requirement (actual need minus alternatives) of 4.46 mgd.

3. System Losses.

In its 2010 Decision, the Commission "place[d] the burden and motivation to address loss squarely upon the parties in control of those systems," such that "HC&S and WWC will have to aggressively address" system losses. Id. at 187. On appeal, the Hawai'i Supreme Court stated that the Commission's order to prevent losses from Waiale Reservoir was "commendable," but vacated and remanded the 2010 Decision's determinations regarding the Companies' other losses, directing the Commission to "'reasonably estimate' losses, mindful of its duty to 'protect instream values to the extent practicable.'" Nā Wai ʻEhā, 128 Hawai'i at 257-58, 287 P.3d at 158-59.

On remand, HC&S indicated that it has opted to bypass the Waiale Reservoir to avoid losses from that part of its system. See HC&S's Open. Br. at 7. Yet, to date, seven years after the 2010 Decision, it still has not provided information on actual losses from the rest of its system and the practicability of minimizing those losses. Instead, HC&S proposed a fixed

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South Waiehu diversions, was in the range of 12 to 15 mgd, compared to HC&S's historical average use of Well 7 of 21 mgd).

amount of losses of 2.15 mgd, which it calculated based on general seepage and evaporation figures from a handbook in the absence of any actual measurements of losses. See Proposed FOF 480.q.5, COL 358.p.3. And the Proposed Decision simply rubber-stamps HC&S's figure. Proposed COL 358.u, w.

This 2.15 mgd figure amounts to 13% of the 16.6 mgd irrigation requirements that the Proposed Decision erroneously grants, 24% of the 9.13 mgd actual need based on the 2,500 gad standard, and 48% of the 4.46 mgd corrected net water requirements subtracting Well No. 7 and ʻĪao Tunnel contributions. In contrast, HC&S's counterpart ditch operator in this case, WWC, has been able to achieve 4.97% losses, and the same handbook that HC&S cited states that a carefully managed, manually operated irrigation system should have system losses of 10% or less. See Chumbley WT 1/7/14 at 4:9-12 (MA06-01 Remand); Tr. 7/29/16 (Heu) at 120:5-18. By rubber-stamping HC&S's figures in the absence of actual proof, which HC&S bears the sole burden to provide, the Proposed Decision rewards HC&S and penalizes the public trust, and also eliminates any incentive for diverters to disclose and minimize losses.

If the Commission does not deny HC&S an allocation for waste altogether given the lack of proof, it should at least hold HC&S to a no less rigorous standard than WWC has been able to achieve, i.e., around 5%. In fact, this results in combined losses of around 10% for the water delivered to HC&S, which travels both through WWC's and HC&S's portions of the ditch system and is thus "double counted" for purposes of allocating losses. Again, HC&S's own cited source indicates standard losses of 10% or less for a well-managed system. Applying 5% to 4.46 mgd of net water requirements equals 0.22 mgd of losses, instead of the 2.15 mgd the Proposed Decision approves.

4. Total reductions in water needs with the transition from sugar.

In sum, assuming HC&S has met its burden of proof for a water use permit, its maximum amount of reasonable-beneficial use (based on numerous allowances beyond what HC&S has justified) should be 4.68 mgd: 9.13 mgd actual need, minus 4.67 mgd alternative sources, plus 0.22 mgd system losses. This is less than a third of the 15.65 mgd the Proposed Decision erroneously allocates, or a difference of 10.97 mgd. The Commission should reduce HC&S's permit accordingly and also take this difference into account in improving Nā Wai 'Ehā's IIFSs, as discussed in Part I.B.2 above.

Another informative comparison is the reduction in water needs with the close of sugar. For the Waihe'e-Hopoi fields, compared to the 12.5 mgd estimated net water requirements for sugar (21.75 mgd total needs minus an estimated average of 9.25 mgd of Well 7 contributions, see supra note 42), the current reasonable-beneficial use of 4.68 mgd results in a 7.82 mgd reduction. For the formerly leased 'Īao-Waikapū fields, compared to 6.06 mgd water requirements for sugar, the Proposed Decision permits a total of 1.82 mgd for diversified agriculture by Waikapū Properties, Proposed COL 306.v, resulting in a 4.24 mgd reduction. Thus, the total estimated reduction in water needs with a full transition from sugar to diversified agriculture is 12.06 mgd, which the Commission should also take into account in setting the IIFSs.

B. Wailuku County Estates.

The Commission has already made findings in its 2010 Decision regarding the agricultural development[46] Wailuku Country Estates ("WCE"). These include:

[46] See Ex. Nā Wai-23 (investigative article citing WCE as an example on Maui of "so-called agricultural subdivisions with buyers building luxury homes on land a typical farmer could never afford"); Exs. Nā Wai-24 to 27 (numerous examples of WCE residences).

► "'Farm plans' for [WCE] do not require agriculture, but alternatively allow 'conservation,' which involves landscaping activites like planiting trees and grass." 2010 Decision FOF 397.

► "WCE limits each lot owner to a daily average use of 2,200 gallons, which it stated is 'adequate.' WCE 'penalize[s]' lot owners who exceed their 'allotment' by imposing an extra charge for 'any excess over the allowable use.'" Id. FOF 400 (emphasis added). (In this proceeding, WCE indicated that it raised this per-lot limit to 2,666 gpd, see WCE's Open. Br. at 5; Proposed FOF 399.f.)

► "In addition to the water received from WWC, WCE lots receive up to 540 gpd from the county system." 2010 Decision FOF 401.

► "The County has accommodated agricultural development lots with 600 to 1,200 gpd, but limits further allocations so as not to provide excessive amounts of water to developments not engaged in bona fide agriculture." Id. FOF 402 (emphasis added). (The Proposed Decision reiterates this finding in Proposed FOF 310, COL 192.b.ii.)

► "The County does not have a policy to encourage new subdivisions to use surface water for irrigation, and [MDWS's Director] has made it clear to his department not to encourage such use." 2010 Decision FOF 403.[47]

The Proposed Decision, however, rubber-stamps WCE's claimed uses and permits a total of 680,000 gpd for its 184 resident lots, or 3,695 gpd per lot. See Proposed COL 278.s. Adding

[47] The 2010 Decision also recognized WCE's own admission that "since the County of Maui allows other agricultural property in central Maui to use county water, it is unlikely the County would deny such a petition" by WCE. Id. FOF 405. The 2010 Decision thus concluded that WCE had practicable alternatives to Nā Wai 'Ehā streamflows. Id. COLs 101, 226.

the 540 gpd that each WCE lot already receives from the county system, each WCE lot would receive 4,235 gpd, three to seven times more than the 600 to 1,200 gpd that both the 2010 Decision and the Proposed Decision recognized the County has determined appropriate for such developments, and almost 60% more than the 2,666 gpd limit that WCE itself imposes on its lot owners.

In granting WCE's claimed uses nearly in full, the Proposed Decision disregards the extensive gaps, errors, contradictions, and overstatments and misstatements in WCE's evidence, which the Community Groups and OHA pointed out in their proposed FOFs. See Hui-MT/OHA's Proposed FOFs C-169 to -180. The limited written descriptions that WCE submitted from individual lot owners, for example, did not match the figures in WCE's summary spreadsheets that the Proposed Decision uses to calculate water needs.[48] When WCE made the spreadsheet for its claimed new uses, "[t]here was some owners [WCE] could talk to, and other than that, [WCE] just calculated what we thought would work for people." Tr. 7/28/16 (Blackburn) at 48:4-11. For example, when a lot was vacant or had no existing use, WCE simply inputted a made-up use of "mac nuts." Id. at 110:15 to 111:16.

The Proposed Decision's disregard of WCE's demonstrably faulty and inflated claims fails to comply with the Commission's duty to "hold [WCE] to its burden under the Code and the public trust doctrine." Wai'ola, 103 Hawai'i at 426, 83 P.3d at 689. WCE's water use should instead be calculated based on standardized allocations such as the County's figure of 600 to 1,200 gpd for agricultural subdivisions that both the 2010 Decision and Proposed Decision

[48] Notable examples of the written descriptions included: "Various plants"; "I have some and have some more"; "Nothing now, in future"; "My roosters"; and "This is vacant land. We are planning to built a retirement residence." Tr. 7/28/16 (Blackburn) at 101:16 to 102:21, 107:7 to 109:20.

established (also recognizing that WCE already receives an additional 540 gpd from the county system). In no event should WCE be allocated more than its own per-lot limit (previously 2,200 gpd, now increased to 2,666 gpd) that it imposes on lot owners and acknowledges is "adequate." In sum, WCE's reasonable-beneficial use for its 184 resident lots should be no more than 220,800 gpd (based on 1,200 gpd) or 490,544 gpd (based on 2,666 gpd), and its permit should be reduced accordingly. This results in a 459,200 gpd or 189,456 gpd decrease from the 680,000 gpd that the Proposed Decision erroneously allocates.

C. Wahi Hoʻomalu.

The Proposed Decision grants large landowner Wahi Hoʻomalu ("WH") appurtenant rights and a Category 2 permit of 400,500 gpd to cultivate kalo, even more than WH's requested 363,500 gpd, see Proposed COL 339.m., j.2., and even though WH's owner, Mr. Russell, admitted that he has never farmed wetland kalo and would "talk to whoever can fulfill that, you know, can grow kalo" and "probably would work out a business, you know, relationship with them," but he "ha[s] not done anything of that sort." Tr. 9/20/16 (Russell) at 86:11-18; see Hui-MT/OHA's Proposed FOF C-256 & record citations. In contrast to community members who have the ability and concrete proposals to engage in farming and cultural practice,[49] WH's obscure someday intentions do not show that "actual use will commence within a reasonable timeframe," but rather amount to a speculative water grab. Waiāhole I, 94 Hawaiʻi at 186, 9 P.3d at 498.[50]

[49] See, e.g., Tr. 7/13/17 (Sakata) at 60:9-23; Tr. 7/18/17 (Ornellas) at 40:13 to 41:4 (answering the Hearings Officer's questions on how long it would take to open the planned loʻi).

[50] See also Tr. 7/19/16 (Russell) at 170:17-171:1 (Hearings Officer pointing out the need for "proof . . . that he can actually do that [farm kalo] on those kuleana lands" in relation to the "reasonable beneficial" standard). In its initial SWUPA, WH requested water to supply a 40-lot development. See SWUPA 2351, Table 1 and Addendum.

Even if the Commission were to enable such maneuvers by lowering the bar for permits to that level, the Proposed Decision errs in concluding that "[i]rrigation water would be supplied from the Waiheʻe Ditch . . . and from Wailuku River via the ʻĪao-Maniania Ditch," i.e., from WWC's diversions. Proposed COL 339.c. WH's kuleana parcels are on the south bank of South Waiehu Stream, above HC&S's Spreckels Ditch diversion. See Ex. Wahi-15 (TMK map). Appurtenant rights require "access to the specific surface waters that appurtenant lands historically and culturally had." 2010 Decision COL 94; accord Proposed COL 99. Moreover, WH is not like the community rightholders on the Companies' ditch system who have been historically forced to rely on the Companies' ditch system for their access to stream water. See supra note 8. In fact, WH itself takes exception to COL 339.c. to the extent it does not appear to permit water to be taken from the South Waiehu Stream. See WH's Exceptions, dated December 26, 2017, at 2.[51] If the Commission grants WH a permit for loʻi kalo based on appurtenant rights, it should recognize that such a diversion will occur upstream of HC&S's South Waiehu diversion; it should not permit, let alone require, WH to satisfy its appurtenant rights from WWC's diversions, which would diminish the flows of other streams.

The Proposed Decision would also grant WH a Category 3 permit for 420,000 gpd to irrigate the 168 acres of macadamia nut trees that it voluntarily stopped irrigating ten years ago, notwithstanding that it had access to water through its Water Delivery Agreement with WWC. COL 339.n; see Ex.OHA-24 (WH's water delivery agreement). Given Mr. Russell's testimony that even a decade after he stopped irrigating, the trees were growing and producing, but he did not harvest them, see Hui/MTF-OHA Proposed FOFs C-251, 258, permitting stream diversions

[51] In response to WH's exception to COL 339.k (concluding that appurtenant rights on Parcel 26 were extinguished), id. at 2, 3, the Community Groups and OHA note that WH's deed to that parcel does expressly reserve such rights. See Ex. OHA-21.

for such a contrived use is not reasonable-beneficial. In sum, WH's Category 2 permit should be denied without prejudice or deferred, or if granted, recognized as a use on South Waiehu Stream, and its Category 3 permit should be denied.

D. Makani Olu Partners.

The Proposed Decision would also contravene the reasonable-beneficial standard by giving Makani Olu Partners ("MOP") a Category 2 permit that includes 131,450 gpd for spraying 2,090 gad with water cannons over 62.9 acres of pasture. COL 300.r.2., r.5. While this reduces MOP's request for 7,700 gad, other applicants, including MOP itself, have conceded that they do not irrigate pasture at all, much less with this questionable water cannon method. In the 2004 Decision, the Commission found that Maui Cattle Company had tried, but discontinued such an "experimental" water use in the neighboring Mā'alaea area. Id. FOF 244, 382. In this case, MOP indicated that it grazes about 70 head on Waikapū Properties' ("WP's") Field 731, which is directly across Waikapū Stream from MOP's land. See Ex. 2207-Makani Olu-4 at 1 (map). On WP's land, the only water MOP needs for cattle grazing is 15 gallons per head/day for the cattle to drink, so WP withdrew its request for 7,700 gad for all of its fields that will be used for grazing cattle, including the fields used by MOP. See Hui/MTF-OHA's Proposed FOF C-141 & record citations; see also Proposed COL 306.j.4., j.5., k., q.1. Likewise, Mr. Jacintho of Beef & Blooms grazes cattle on WP's Field 733, which is adjacent to and south of Field 731, and his company has plans to expand his operation to other WP fields. Mr. Jacintho currently grazes cattle on a total of approximately 1,000 acres on Maui, none of which is irrigated. See Hui/MTF-OHA Proposed FOF C-142 & record citations. Given the established practice among such water users, including MOP itself on directly adjacent lands, spraying pasture with 131,450 gpd, on its face, is not "necessary for economic and efficient utilization" under the reasonable-

beneficial standard. MOP's permit should be reduced by the 131,450 gpd erroneously granted for this use.

IV. THE FINAL D&O MUST INCLUDE IMPLEMENTATION REQUIREMENTS

Despite including hundreds of pages to review individual permit applications, the Proposed Decision provides limited consideration and direction, or is completely silent, on critical details for implementing the IIFSs and water use permits. Even the 2010 Decision that the Hawai'i Supreme Court found substantively lacking included implementation requirements that are missing in the Proposed Decision. The increased scale and complexity of this case incorporating both IIFSs and WUPAs, and the now years of direct experience in this case on implementation needs and challenges, compels the need for clear and constructive direction from the Commission on implementation, both now and on a going forward basis. The Community Groups thus reiterate the recommendations on several critical implementation details including: (1) IIFS monitoring and reporting; (2) water use permit monitoring and reporting; (3) instream flow passage requirements; and (4) kuleana water access issues.

A. IIFS Monitoring and Reporting.

The Community Groups and OHA have recently documented the problems with monitoring and enforcement of Nā Wai 'Ehā's IIFSs in a complaint letter filed on November 6, 2017 ("IIFS Complaint Letter") and attach and incorporate it here. See Attachment 2. In short, the public trust requires the Commission not only to establish proper IIFSs, but to ensure effective IIFS monitoring and compliance.[52]

[52] Cf. Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2005) (emphasizing that the public trust duty requires an agency to "ensure that the prescribed measures are actually being implemented").

The 2010 Decision directed that "[i]nstallation and maintenance of stream gauges immediately below the main diversions identified in the IIFS shall be the responsibilities of the parties doing the diversions, as part of their responsibilities to report on the amount of their diversions and to ensure that the IIFS below their diversions are met." Id. at 188 (emphasis added). To date, the Companies have done nothing to comply with these responsibilities; rather the sole burden of gaging has fallen on the Commission's staff. The staff's gaging records have shown violations of the IIFSs on all Nā Wai 'Ehā streams, often continuing for months at a time. See Staff Report, dated October 3, 2016, at 8, 13, 19, 24. Without real-time gaging, however, these violations are revealed only after-the-fact, when Commission staff are able to manually retrieve the data. Tr. 10/14/16 (Strauch, CWRM) at 80:2 to 81:15, 89:17-24. Meanwhile, no action has been taken to enforce the IIFSs, even when ongoing violations have been reported. See IIFS Complaint Letter at 4-7.

In line with the IIFS's purpose as the "primary mechanism" to protect public trust instream uses, and the "openness, diligence, and foresight" demanded of the Commission as trustee, a system of real-time IIFS monitoring and reporting is required. Such a system is all the more indispensable for the implementation of adjustable IIFSs, because of the added complexities in calculating and adjusting the flows and monitoring and verifying compliance.[53]

Commission staff has indicated that real-time monitoring equipment and installation could be funded by private parties, which would cost $8-10 thousand per gage, and the Commission staff "could manage it afterwards." Tr. 10/14/16 (Strauch, CWRM) at 90:9 to 91:7.

[53] The USGS Streamflow Report also specifically indicated the need for long-term continuous-record stream-gaging stations upstream of diversions in Waiehu and Waikapū Streams and downstream of diversions in all streams to more accurately determine streamflows and recharge. Id. at vi.

The Commission unquestionably has the authority to require the Companies to fund such monitoring in part or full, particularly as a condition of their permits. In the Waiāhole case, the Court affirmed the Commission's decision to require diverters to fund stream studies, explaining that since the studies would help "determin[e] the effect of the diversions," it was fair to "require the permittees to provide a reasonable share of the costs." 94 Hawai'i at 185, 9 P.3d at 497.[54] Here, the monitoring requirement is even more directly related to the Companies' diversions than the stream studies requirement in Waiāhole. The Commission has the authority to require the Companies to provide for the necessary monitoring and reporting, as it already ordered in the 2010 Decision, and must institute such a requirement as necessary enable an effective real-time IIFS monitoring and reporting system.

B. Water Use Monitoring and Reporting.

As the flip side of IIFS monitoring and reporting, the Commission must also ensure effective water use monitoring and reporting, particularly for the Companies' ditch system diversions subject to the IIFSs. As both the Commission and the Hawai'i Supreme Court have made clear, the IIFS is "an absolute minimum required under any circumstances;" in addition, to avoid unlawful waste, any streamflows above the IIFSs must remain in the stream unless permitted and actually needed for offstream use. Waiāhole I, 94 Hawai'i at 156, 9 P.3d at 468. Thus, to ensure accountability by the diverters, mutual trust and cooperation among users, and public confidence in the administration of the IIFSs and permits, diverters must provide full transparency on their ditch diversions and end uses.

[54] See also id. at 184, 9 P.3d at 496 (recognizing the Commission's "wide-ranging authority to condition water use permits in accordance with its mandate to protect and regulate water resources for the common good").

In the Waiāhole case, the Commission took early action even before the contested case began to order the ditch operator to implement ditch monitoring and management practices and monthly reporting of uses and losses. See Ex. Nā Wai-1. The ditch operator complied by submitting a ditch monitoring and management plan and filing detailed monthly reports including ditch flows, all end uses, and even reservoir levels. See Ex. Nā Wai-2. Here, in this Nā Wai ʻEhā water management area, the Companies must comply with no less diligent monitoring and reporting requirements.

While, on the one hand, the Proposed Decision overlooks this established best practice for commercial ditch system reporting, on the other, in addressing the novel issue presented in this case of the level of reporting for individual community member permitees, the Proposed Decision imposes considerable requirements for monthly reporting of measurements of inflows and outflows at a "frequency and period . . . to report natural variances in flows due to crop cycles." See Proposed D&O at 530, ¶¶ 54-57. Such a requirement is bound to create confusion and failures in implementation, and the purpose and need for lay community members to undertake such burdens are unclear.[55] Instead, the Community Groups and OHA reiterate their recommendation that Commission staff, in consultation with community members and stakeholders, work out a simplified reporting system for community member permittees that avoids creating administrative and cost burdens, which could include periodic (e.g., quarterly) communications and inspections and technical assistance with measuring ʻauwai flows. See Hui-MT/OHA's Proposed COL 349.

[55] If the Commission is interested in gathering "more reliable and extensive information on losses" from loʻi kalo, Proposed D&O at 530, ¶ 57, it should take the lead in organizing a study like the 2007 USGS study on kalo water flows, Ex. A-12 (MA06-01), and providing community members with the necessary technical support to produce efficient and useful results.

C. Flow Passage at the Diversions.

The Commission also must reemphasize and enforce its requirement that the Companies restore flows at the diversion points, rather than at downstream ditch release points, to enable mauka-to-makai connectivity without dry stretches below the diversions. The Commission established Nā Wai ʻEhā's IIFSs "just" or "immediately" below the Companies' diversions or "at" the intakes. Moreover, the 2010 Order directed that "[n]ew diversion infrastructures . . . will have to be provided on all four streams. . . . Construction of bypasses of diversions that current[ly] disrupt stream flows will also be the responsibility of the diverters." Id. at 188. More than seven years later, compliance with this requirement has also fallen far short.

The Parham Report specifically criticizes the ongoing practice of diverting most of the stream flows except for a minimal amount of water passed over a small channel iron or plate on the dam, then releasing the bulk of the water downstream. As the Parham Report emphasized, this practice is simply one "of convenience" for the diverters, and remedying it should be a "high priority with any water return scenario." Id. at 100-01. Commission staff similarly maintained that "our goal [is] to prevent the amount needed to meet the IIFS from actually being diverted in the first place," and that the current measure of installing a small channel iron or plate over the grate is insufficient to meet the IIFS. Tr. 10/14/16 (Strauch, CWRM) at 115:5 to 116:11.

The public trust mandate to restore instream uses and values to the extent practicable applies not only to flow amounts, but also flow passage and connectivity. The public controversy in 2016 from WWC's attempt to redivert the Wailuku River channel after the flood created a fork around its diversion highlights the present opportunity and need for this Commission to ensure compliance with the IIFS at the diversion, without the previous 1000-foot

dry reach.[56] For all Nā Wai ʻEhā waters, the Commission must reiterate and enforce its directive that the Companies remediate their diversions to restore as much flow as practicable at the diversion point.

D. Rights to Water Courses or Access.

Finally, the Commission should be cognizant that its constitutionally and statutorily appointed role as "primary trustee" or "konohiki" of Nā Wai ʻEhā water resources includes addressing and resolving problems regarding rights to water access, or the means of receiving water, and not just rights to water amounts in a vacuum. The Community Groups and OHA provided extensive legal and historial analysis in their Proposed Decision documenting that water rights in Hawaiʻi necessarily include both a right to a water amount, and a right to a "water course" (e.g., ʻauwai) to access the water, and that the Commission has the authority and duty to protect both aspects in its comprehensive trustee role. See id. Hui-MT/OHA's Proposed FOFs pt. VII, COLs pts. I.I., V.E.1; see also Attachment 1, pt. IX. As a real-world example, kuleanas in North Waiehu have been made to rely on WWC's ditch system for their water supply since the plantation era, yet have been cut off from any water since 2011, even though the 2014 Order specifically requires WWC to "provide water to the kuleana property that previously was provided water from the North Waiehu Ditch" and "continue to service the Waiehu kuleana users from the Waiheʻe Ditch." 2014 Order at 26; see also Proposed FOF 294, COL 128, D&O ¶ 53 (addressing WWC's noncompliance and requiring WWC to sumit a plan and implementation schedule).

[56] See Ex. Nā Wai-43 (photograph of new river channel); Tr. 10/14/16 (Strauch, CWRM) at 116:12 to 118:12 (explaining the situation with the ʻĪao Diversion, including discussions of "modifications to the diversion to provide continuous flow").

Such water course or access issues have been simmering for years during these Nā Wai ʻEhā proceedings, but can no longer be ignored particularly in this comprehensive water management area. Yet, the Proposed Decision does just that by rejecting the Community Groups' and OHA's recommendation and request for Commission oversight, and instead delegating the implementation of water allocations to the Companies, Proposed D&O at 529-30, ¶¶ 50-53, and requesting that OHA take the lead in "helping kuleana occupants develop the social bonds" to cooperatively manage their ʻauwai, id. at 530-31, ¶¶ 58-63. This improperly abdicates the Commission's management role to the Companies, as stated above, and overlooks the Commission's necessary and mandated role to resolve problems, like the ongoing violations of kuleana rights in North Waiehu, between the Companies and kuleana rightholders.

At this time, given the need to remedy the primary flaws in the Proposed Decision, the Community Groups and OHA mainly seek to flag this issue for the Commission's attention and emphasize the need to address it sooner than later as part of the Commission's ongoing and evolving process to recognize and protect water rights in Nā Wai ʻEhā. At minimum, the Commission should make clear that it retains jurisdiction over this case as necessary to implement, enforce, and protect the water rights it has recognized in its decision.

V. CONCLUSION

Hahai pono i ke ala kukui me ka huli ao: Pursue the path of enlightenment through justice.[57] The Community Groups again thank the Hearings Officer for all his dedicated work in these proceedings, and the Commission for this opportunity to submit exceptions and offer constructive recommendations. For all the reasons stated above and in the Community Groups'

[57] Native Hawaiian Law: A Treatise vx (2015).

and OHA's Joint Proposed Decision, the Community Groups respectfully request that the Commission correct and improve the Proposed Decision as detailed under these four principal areas of: (1) refining the IIFSs to incorporate more flows, as well as adjustment provisions; (2) adjusting the allocations among the permit Categories based on corrected legal determinations; (3) reducing the inflated allocations to several major diverters; and (4) incorporating key implementation requirements.

DATED: Honolulu, Hawai'i, January 5, 2018.

ISAAC H. MORIWAKE
SUMMER KUPAU-ODO
Attorneys for HUI O NĀ WAI 'EHĀ and MAUI TOMORROW FOUNDATION, INC.

Table 1: Total Permitted for Kalo*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Lo'i (acre)	GPD (150,000 gad)	GPD (200,000 gad)	Total Permitted
Diannah Lai Goo	2365N	Waiheʻe	Waiheʻe Upstream	1.05	157,500		
			Waiheʻe Upstream Total	**1.05**	**157,500**	**0**	**157,500**
John Varel	3470N	Waiheʻe	Waiheʻe Downstream	1	150,000		
Joseph Alueta	2362N	Waiheʻe	Waiheʻe Downstream	2	300,000		
Hawaiian Islands Land Trust	2706N	Waiheʻe	Waiheʻe Downstream	9	1,350,000		
			Waiheʻe Downstream Total	**12**	**1,800,000**	**0**	**1,800,000**
Alfred Santiago	2273, 2274N	Waiheʻe	Waiheʻe Ditch System	1.5	225,000		
Greg Ibara	2245, 2246N	Waiheʻe	Waiheʻe Ditch System	0.027		5,400	
Jordanella Ciotti	2247, 2248N	Waiheʻe	Waiheʻe Ditch System	0.576		11,500	
Mary Ann Velez	2241, 2242N	Waiheʻe	Waiheʻe Ditch System	0.46	69,000		
Diannah Lai Goo	2233, 2234N	Waiheʻe	Waiheʻe Ditch System	0.724	108,600		
Richard Emoto & Roys Ellis	2227	Waiheʻe	Waiheʻe Ditch System	0.4	60,000		
Stanley Faustino & Kanealoha Lovato-Rodrigues	2228, 2229N	Waiheʻe	Waiheʻe Ditch System	0.67	100,500		
Micheal Rodrigues & William Freitas	2269, 2270N	Waiheʻe	Waiheʻe Ditch System	1.28	192,000		
Robert Barrett & Lester Nakama	2322, 2323N	Waiheʻe	Waiheʻe Ditch System	3.125	468,750		
Clifford & Cristal Koki	2252, 2253N	Waiheʻe	Waiheʻe Ditch System	0.736	110,400		
William La'a & Emmett & Renette Rodrigues	2324, 2325N	Waiheʻe	Waiheʻe Ditch System	1.64	246,000		
William Freitas	2364N	Waiheʻe	Waiheʻe Ditch System	0.5	75,000		
Kenneth Kahalekai	2249	Waiheʻe	Waiheʻe Ditch System	1.92	288,000		
Kau'i Kahalekai	2312	Waiheʻe	Waiheʻe Ditch System	2.776	416,400		
Ramsey Anakalea & Lester Nakama	2320, 2321N	Waiheʻe	Waiheʻe Ditch System	0.5	75,000		
John Varel	2262, 2263	Waiheʻe	Waiheʻe Ditch System	0.27	40,500		
Burt Sakata & Peter Fritz	2334, 2335N	Waiheʻe	Waiheʻe Ditch System	1.267	190,050		
Ka'iulani (Michael) Doherty	2225, 2226N	Waiheʻe	Waiheʻe Ditch System	2	300,000		
Thomas Texeira & Denise Texeira	2280, 2281	Waiheʻe	Waiheʻe Ditch System	0.15	22,500		
Piko Aʻo, LLC	2264, 2265N	Waiheʻe	Waiheʻe Ditch System	4.78	717,000		
Gordon Apo & Lester Nakama	2316, 2317	Waiheʻe	Waiheʻe Ditch System	0.73	109,500		
Cordell Chang	2221, 2222	Waiheʻe	Waiheʻe Ditch System	0.5	75,000		
Charlene & Jacob Kana	2313, 2314N	Waiheʻe	Waiheʻe Ditch System	1.153	172,950		
Bryan Sarasin, Sr.	2294	Waiheʻe	Waiheʻe Ditch System	0.009	1,350		
Diannah Lai Goo	2231, 2232N	Waiheʻe	Waiheʻe Ditch System	0.46	69,000		
Kathleen De Hart	2361N	Waiheʻe	Waiheʻe Ditch System	0.02	3,000		
Alfred Kailiehu, Jr. & Ina Kailiehu	2250, 2251N	Waiheʻe	Waiheʻe Ditch System	0.25276	37,914		

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 1: Total Permitted for Kalo*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Lo'i (acre)	GPD (150,000 gad)	GPD (200,000 gad)	Total Permitted
Nolan Ideoka & Lester Nakama	2318, 2319	Waiheʻe	Waiheʻe Ditch System	0.77	115,500		
			Waiheʻe Ditch System Total	**29.19576**	**4,288,914**	**16,900**	**4,305,814**
Jeff & Ramona Lei Smith	2369N	Waiehu	S. Waiehu Upstream	0.5	75,000		
Isabelle Rivera	2266, 2267N	Waiehu	S. Waiehu Upstream	2.42	363,000		
Regino Cabacungan & Kathy Alves	2219, 2220N	Waiehu	S. Waiehu Upstream	0.22	33,000		
Francisco Cerizo	2307, 2308N	Waiehu	S. Waiehu Upstream	0.46	69,000		
Wahi Ho'omalu	2351N	Waiheʻe	S. Waiehu Upstream	2.67	400,500		
			S. Waiehu Upstream Total	**6.27**	**940,500**	**0**	**940,500**
Lester Nakama	2326, 2327N	Waiehu	N. Waiehu Ditch System	1.1	165,000		
Lester Nakama	2328, 2329N	Waiehu	N. Waiehu Ditch System	0.7	105,000		
Peter Lee & Lester Nakama	2330, 2331N	Waiehu	N. Waiehu Ditch System	1.066	159,900		
Paul Higashino	2342	Waiehu	N. Waiehu Ditch System	2	300,000		
			N. Waiehu Ditch System Total	**4.866**	**729,900**	**0**	**729,900**
Renee Molina	2171	Waiehu	S. Waiehu Ditch System	0.125	18,750		
Jason Miyahira	2258	Waiehu	S. Waiehu Ditch System	0.5	75,000		
			S. Waiehu Ditch System Total	**0.625**	**93,750**	**0**	**93,750**
Ho'oululāhui, LLC	2243, 2244N	Wailuku	Wailuku Downstream	3	450,000		
Francis Ornellas	2370N	Wailuku	Wailuku Downstream	1.421	213,150		
Kimberly Lozano	2371N	Wailuku	Wailuku Downstream	0.1836	27,540		
Duke & Jean Sevilla, Christina Smith & County of Maui	2275	Wailuku	Wailuku Downstream Springs	20.33	3,049,500		
			Wailuku Downstream Total	**24.9346**	**3,740,190**	**0**	**3,740,190**
Gary & Evelyn Brito	2215, 2216N	Wailuku	Wailuku Ditch System	0.037		7,400	
Luke McLean	2204	Wailuku	Wailuku Ditch System	1	150,000		
Leslie Vida, Jr.	2188	Wailuku	Wailuku Ditch System	0.0365	5,475		
			Wailuku Ditch System Total	**1.0735**	**155,475**	**7,400**	**162,875**
Ione Shimizu	2276	Waikapū	Waikapū Downstream	0.032		6,400	
Katherine Riyu	2268	Waikapū	Waikapū Downstream	0.305	45,750		
Judith Yamanoue	2338	Waikapū	Waikapū Downstream	0.5	75,000		
Hōkūao & Alana Pellegrino	2332, 2333N	Waikapū	Waikapū Downstream	0.821	123,150		
T & Z Harders Family LTD	2240, 3467N	Waikapū	Waikapū Downstream	5	750,000		
Alan Birnie	2213, 2214N	Waikapū	Waikapū Downstream	0.0045		900	
			Waikapū Downstream Total	**6.6625**	**993,900**	**7,300**	**1,001,200**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 1: Total Permitted for Kalo*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Lo'i (acre)	GPD (150,000 gad)	GPD (200,000 gad)	Total Permitted
Ho'okahi Alves	2260, 2261N	Waikapū	Waikapū Ditch System	0.5	75,000		
John Minamina Brown Trust/Crystal Smythe, Trustee	2217, 2218N	Waikapū	Waikapū Ditch System	1.15	172,500		
			Waikapū Ditch System Total	**1.65**	**247,500**	**0**	**247,500**
			Grand Total	**88.32736**	**13,147,629**	**31,600**	**13,179,229**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 2: Total Permitted, All Uses, Off Ditch*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Proposed Decision Permitted (All Uses)
Diannah Lai Goo	2365N	Waiheʻe	Waiheʻe Upstream	157,500
			Waiheʻe Upstream Total	**157,500**
John Varel	3470N	Waiheʻe	Waiheʻe Downstream	150,000
Joseph Alueta	2362N	Waiheʻe	Waiheʻe Downstream	300,000
Hawaiian Islands Land Trust	2706N	Waiheʻe	Waiheʻe Downstream	1,350,000
			Waiheʻe Downstream Total	**1,800,000**
Diannah Lai Goo	2233 & 2234N	Waiheʻe	North Waihe'e 'Auwai**	108,600
Richard Emoto & Roys Ellis	2227	Waiheʻe	North Waihe'e 'Auwai**	60,000
Stanley Faustino & Kanealoha Lovato-Rodrigues	2228 & 2229N	Waiheʻe	North Waihe'e 'Auwai**	100,500
Michael Rodrigues & William Freitas	2269 & 2270N	Waiheʻe	North Waihe'e 'Auwai**	192,000
Robert Barrett & Lester Nakama	2322 & 2323N	Waiheʻe	North Waihe'e 'Auwai**	468,750
Clifford & Crystal Koki	2252 & 2253N	Waiheʻe	North Waihe'e 'Auwai**	110,400
William La'a & Emmett & Renette Rodrigues	2324 & 2325N	Waiheʻe	North Waihe'e 'Auwai**	246,000
William Freitas	2364N	Waiheʻe	North Waihe'e 'Auwai**	70,000
			North Waihee 'Auwai Total**	**1,356,250**
Jeff & Ramona Lei Smith	2369N	Waiehu	S. Waiehu Upstream	78,660
Isabelle Rivera	2266, 2267N	Waiehu	S. Waiehu Upstream	363,000
Regino Cabacungan & Kathy Alves	2219, 2220N	Waiehu	S. Waiehu Upstream	33,000
Francisco Cerizo	2307, 2308N	Waiehu	S. Waiehu Upstream	69,000
Thomas Cerizo	2343N	Waiehu	S. Waiehu Upstream	186,750
Wahi Ho'omalu	2351N	Waiehu	S. Waiehu Upstream	820,500
			S. Waiehu Upstream Total	**1,550,910**
Ho'oululāhui, LLC	2243, 2244N	Wailuku	Wailuku Downstream	455,000
Francis Ornellas	2370N	Wailuku	Wailuku Downstream	213,150
Kimberly Lozano	2371N	Wailuku	Wailuku Downstream	27,540
Noelani & Allan Almeida & Gordon Almeida	3623N	Wailuku	Wailuku Downstream Springs	3,270
Duke & Jean Sevilla, Christina Smith & County of Maui	2275	Wailuku	Wailuku Downstream Springs	1,249,500
			Wailuku Downstream Total	**1,948,460**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

**N. Waihe'e 'Auwai applicants may be able to access water directly from the stream

Table 2: Total Permitted, All Uses, Off Ditch*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Proposed Decision Permitted (All Uses)
Ione Shimizu	2276	Waikapū	Waikapū Downstream	6,400
Katherine Riyu	2268	Waikapū	Waikapū Downstream	45,750
Judith Yamanoue	2338	Waikapū	Waikapū Downstream	75,000
Hōkūao & Alana Pellegrino	2332, 2333N	Waikapū	Waikapū Downstream	125,000
T & Z Harders Family LTD	2240, 3467N	Waikapū	Waikapū Downstream	759,000
Alan Birnie	2213, 2214N	Waikapū	Waikapū Downstream	900
			Waikapū Downstream Total	**1,012,050**
			Grand Total	**7,825,170**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

**N. Waihe'e 'Auwai applicants may be able to access water directly from the stream

Table 3: Traditional and Customary Rights*

			Hui/MTF-OHA		Proposed Decision Category 1	
Community Member	**SWUPA #(s) (existing and new)**	**Stream**	**Lo'i (acre)**	**GPD (@150,000 gad)**	**Lo'i (acre)**	**GPD (per Table 2)**
Diannah Lai Goo	2365N	Waiheʻe	1.05	157,500	1.05	157,500
Joseph Alueta	2362N	Waiheʻe	2	300,000		
Winifred & Gordon Cockett	2223	Waiheʻe				
Alfred Santiago	2273, 2274N	Waiheʻe	1.5	225,000		
Diannah Lai Goo	2233, 2234N	Waiheʻe	0.724	108,600		
Stanley Faustino & Kanealoha Lovato-Rodrigues	2228, 2229N	Waiheʻe	0.67	100,500		
Michael Rodrigues & William Freitas	2269, 2270N	Waiheʻe	0.33	49,500		
Michael Rodrigues & William Freitas	2269, 2270N	Waiheʻe	0.98	147,000		
Clifford & Cristal Koki	2252, 2253N	Waiheʻe	0.736	110,400		
William La'a & Emmett & Renette Rodrigues	2324, 2325N	Waiheʻe	1.64	246,000		
William Freitas	2364N	Waiheʻe	0.5	75,000	0.5	75,000
Kenneth Kahalekai	2249	Waiheʻe	1.92	288,000		
Kau'i Kahalekai	2312	Waiheʻe	2.776	416,400	1.94	291,000
Kaiulani (Michael) Doherty	2225, 2226N	Waiheʻe	2	300,000		
Thomas Texeira & Denise Texeira	2280, 2281	Waiheʻe	0.15	22,500		
Piko Aʻo, LLC (Lori Lei Ishikawa)	2264, 2265N	Waiheʻe	4.78	717,000		
Gordon Apo & Lester Nakama	2316, 2317N	Waiheʻe	0.73	109,500		
Cordell Chang	2221, 2222N	Waiheʻe	0.5	75,000		
Charlene & Jacob Kana	2313, 2314N	Waiheʻe	1.153	172,950		
Diannah Lai Goo	2231, 2232N	Waiheʻe	0.46	69,000	0.46	69,000
Kathleen De Hart	2361N	Waiheʻe	0.02	3,000	0.02	3,000
Alfred Kailiehu, Jr. & Ina Kailiehu	2250, 2251N	Waiheʻe	0.253	37,950	0.25	37,915
		Waiheʻe Total	**24.872**	**3,730,800**	**4.22**	**633,415**
Paul Higashino	2342	Waiehu	2	300,000		
Jeff & Ramona Lei Smith	2369N	Waiehu	0.5	75,000		
Isabelle Rivera	2266, 2267N	Waiehu	2.42	363,000		
Regino Cabacungan & Kathy Alves	2219, 2220N	Waiehu	0.22	33,000		
Renee Molina	2171	Waiehu	0.125	18,750		
		Waiehu Total	**5.265**	**789,750**	**0.00**	**0**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 3: Traditional and Customary Rights*

			Hui/MTF-OHA		Proposed Decision Category 1	
Community Member	**SWUPA #(s) (existing and new)**	**Stream**	**Lo'i (acre)**	**GPD (@150,000 gad)**	**Lo'i (acre)**	**GPD (per Table 2)**
Gary & Evelyn Brito	2215, 2216N	Wailuku	0.037	5,550	0.04	7,400
Ho'oululāhui, LLC	2243, 2244N	Wailuku	3.08	462,000	1.00	151,667
Francis Ornellas	2370N	Wailuku	1.421	213,150	1.42	213,150
Kimberly Lozano	2371N	Wailuku	0.1836	27,540	0.18	27,540
Noelani & Allan Almeida & Gordon Almeida	3623N	Wailuku				3,270
Duke & Jean Sevilla & Christina Smith	2275	Wailuku	0.33	49,500		
Luke McLean	2204	Wailuku	1	150,000	1.00	150,000
Leslie Vida, Jr.	2188	Wailuku	0.0365	5,475	0.04	5,475
Donna Vida	2292, 2293N	Wailuku				
Claire Pinto	2303	Wailuku				3,300
		Wailuku Total	**6.0881**	**913,215**	**3.68**	**561,802**
Katherine Riyu	2268	Waikapū	0.305	45,750		
Judith Yamanoue	2338	Waikapū	0.5	75,000		
Hokuao & Alana Pellegrino	2332, 2333N	Waikapū	0.821	123,150		
Karl & Lee Ann Harders	2237	Waikapū				
Theodore & Zelie Harders Family Ltd P'ship	2238	Waikapū				
Theodore and Zelie Harders	2239	Waikapū				
T & Z Harders Family LTD	2240, 3467N	Waikapū	5	750,000	1.00	153,000
Theodore and Zelie Harders	2311	Waikapū				
Alan Birnie	2213, 2214N	Waikapū	0.0045	675		
Douglas Bell	2212	Waikapū				
Ho'okahi Alves	2260, 2261N	Waikapū	0.5	75,000		
John Minamina Brown Trust/Crystal Smythe, Trustee	2217, 2218N	Waikapū	1.15	172,500		
		Waikapū Total	**8.2805**	**1,242,075**	**1.00**	**153,000**
		Grand Total	**44.5056**	**6,675,840**	**8.90**	**1,348,217**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 4a: Valid (Unextinguished) Appurtenant Rights*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Valid Rights
Diannah Lai Goo	2365N	Waiheʻe	Waiheʻe Upstream	1.05
			Waiheʻe Upstream Total	**1.05**
John Varel	3470N	Waiheʻe	Waiheʻe Downstream	1.89
Hawaiian Islands Land Trust	2706N	Waiheʻe	Waiheʻe Downstream	3.2
			Waiheʻe Downstream Total	**5.09**
Winifred & Gordon Cockett	2223	Waiheʻe	Waiheʻe Ditch System	0.65
Alfred Santiago	2273, 2274N	Waiheʻe	Waiheʻe Ditch System	1.626
Greg Ibara	2245, 2246N	Waiheʻe	Waiheʻe Ditch System	1.171
Jordanella Ciotti	2247, 2248N	Waiheʻe	Waiheʻe Ditch System	0.23
Mary Ann Velez	2241, 2242N	Waiheʻe	Waiheʻe Ditch System	0.913
Diannah Lai Goo	2233, 2234N	Waiheʻe	Waiheʻe Ditch System	0.724
Richard Emoto & Roys Ellis	2227	Waiheʻe	Waiheʻe Ditch System	0.845
Stanley Faustino & Kanealoha Lovato-Rodrigues	2228, 2229N	Waiheʻe	Waiheʻe Ditch System	0.7
Micheal Rodrigues & William Freitas	2269, 2270N	Waiheʻe	Waiheʻe Ditch System	0.33
Micheal Rodrigues & William Freitas	2269, 2270N	Waiheʻe	Waiheʻe Ditch System	0.983
Robert Barrett & Lester Nakama	2322, 2323N	Waiheʻe	Waiheʻe Ditch System	3.125
Clifford & Cristal Koki	2252, 2253N	Waiheʻe	Waiheʻe Ditch System	1.2
William La'a & Emmett & Renette Rodrigues	2324, 2325N	Waiheʻe	Waiheʻe Ditch System	1.955
William Freitas	2364N	Waiheʻe	Waiheʻe Ditch System	0.388
Kenneth Kahalekai	2249	Waiheʻe	Waiheʻe Ditch System	2.617
Kau'i Kahalekai	2312	Waiheʻe	Waiheʻe Ditch System	2.705
Ramsey Anakalea & Lester Nakama	2320, 2321N	Waiheʻe	Waiheʻe Ditch System	0.6
Burt Sakata & Peter Fritz	2334, 2335N	Waiheʻe	Waiheʻe Ditch System	1.17
Ka'iulani (Michael) Doherty	2225, 2226N	Waiheʻe	Waiheʻe Ditch System	2.445
Thomas Texeira & Denise Texeira	2280, 2281	Waiheʻe	Waiheʻe Ditch System	0.327
Gordon Apo & Lester Nakama	2316, 2317	Waiheʻe	Waiheʻe Ditch System	1.4
Cordell Chang	2221, 2222	Waiheʻe	Waiheʻe Ditch System	1.25
Charlene & Jacob Kana	2313, 2314N	Waiheʻe	Waiheʻe Ditch System	1.57
Bryan Sarasin, Sr.	2294	Waiheʻe	Waiheʻe Ditch System	0.99
Diannah Lai Goo	2231, 2232N	Waiheʻe	Waiheʻe Ditch System	1.305
Kathleen De Hart	2361N	Waiheʻe	Waiheʻe Ditch System	0.5
Alfred Kailiehu, Jr. & Ina Kailiehu	2250, 2251N	Waiheʻe	Waiheʻe Ditch System	0.459
Nolan Ideoka & Lester Nakama	2318, 2319	Waiheʻe	Waiheʻe Ditch System	1
Cecilia Chang	2182	Waiheʻe	Waiheʻe Ditch System	0.5
			Waiheʻe Ditch System Total	**33.678**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 4a: Valid (Unextinguished) Appurtenant Rights*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Valid Rights
Isabelle Rivera	2266, 2267N	Waiehu	S. Waiehu Upstream	2.55
Regino Cabacungan & Kathy Alves	2219, 2220N	Waiehu	S. Waiehu Upstream	0.21
Francisco Cerizo	2307, 2308N	Waiehu	S. Waiehu Upstream	1.2
Wahi Ho'omalu	2351N	Waiheʻe	S. Waiehu Upstream	22.23
			S. Waiehu Upstream Total	**26.19**
Renee Molina	2171	Waiehu	S. Waiehu Ditch System	1.3
Jason Miyahira	2258	Waiehu	S. Waiehu Ditch System	2.08
			S. Waiehu Ditch System Total	**3.38**
Natalie Hashimoto & Carl Hashimoto	2363N	Waiehu	N. Waiehu Downstream	0.18
			N. Waiehu Downstream Total	**0.18**
Lester Nakama	2326, 2327N	Waiehu	N. Waiehu Ditch System	1
Lester Nakama	2328, 2329N	Waiehu	N. Waiehu Ditch System	0.7
Peter Lee & Lester Nakama	2330, 2331N	Waiehu	N. Waiehu Ditch System	2.132
			N. Waiehu Ditch System Total	**3.832**
Francis Ornellas	2370N	Wailuku	Wailuku Downstream	0.51
Noelani & Allan Almeida & Gordon Almeida	3623N	Wailuku	Wailuku Downstream	2.365
Duke & Jean Sevilla & Christina Smith	2275	Wailuku	Wailuku Downstream	1.381
			Wailuku Downstream Total	**4.256**
Gary & Evelyn Brito	2215, 2216N	Wailuku	Wailuku Ditch System	0.248
Kenneth Mendoza	2256, 2257N	Wailuku	Wailuku Ditch System	0.11
Luke McLean	2204	Wailuku	Wailuku Ditch System	0.855
Leslie Vida, Jr.	2188	Wailuku	Wailuku Ditch System	0.27
Donna Vida	2292, 2293N	Wailuku	Wailuku Ditch System	0.728
Claire Pinto	2303	Wailuku	Wailuku Ditch System	0.855
Makani Olu	2207/2208N	Wailuku	Wailuku Ditch System	50.69
			Wailuku Ditch System Total	**53.756**
Ione Shimizu	2276	Waikapū	Waikapū Downstream	0.265
Judith Yamanoue	2338	Waikapū	Waikapū Downstream	1
Warren Soong	2277	Waikapū	Waikapū Downstream	0.85
Hōkūao & Alana Pellegrino	2332, 2333N	Waikapū	Waikapū Downstream	2.805
T & Z Harders Family LTD	2240, 3467N	Waikapū	Waikapū Downstream	10.33
Theodore and Zelie Harders	2311	Waikapū	Waikapū Downstream	0.396
Douglas Bell	2212	Waikapū	Waikapū Downstream	0.34
Patricia Federcell	2230	Waikapū	Waikapū Downstream	1.78
			Waikapū Downstream Total	**17.766**
Ho'okahi Alves	2260, 2261N	Waikapū	Waikapū Ditch System	0.712
John Minamina Brown Trust/Crystal Smythe, Trustee	2217, 2218N	Waikapū	Waikapū Ditch System	1.25
Evelyn Kamasaki	2368	Waikapū	Waikapū Ditch System	0.71
George & Yoneko Higa	2366N	Waikapū	Waikapū Ditch System	1.361

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 4a: Valid (Unextinguished) Appurtenant Rights*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Valid Rights
Waikapu Properties	2205, 2356/2297N, 3471N, 3472N	Waikapū	Waikapū Ditch System	7.42
			Waikapū Ditch System Total	**11.453**
			Grand Total	**160.631**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 4b: Extinguished Appurtenant Rights Recognized By Proposed Decision*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Extinguished Rights Recognized
Joseph Alueta	2362N	Waiheʻe	Waiheʻe Downstream	0.4
Hawaiian Islands Land Trust	2706N	Waiheʻe	Waiheʻe Downstream	12.2
			Waiheʻe Downstream Total	**12.6**
Burt Sakata & Peter Fritz	2334, 2335N	Waiheʻe	Waiheʻe Ditch System	6.426
Piko Aʻo, LLC	2264, 2265N	Waiheʻe	Waiheʻe Ditch System	18.72
Lorrin Pang	2283	Waiheʻe	Waiheʻe Ditch System	1.42
John Varel (Koolau Cattle Co.)	2593N	Waiheʻe	Waiheʻe Ditch System	5.62
			Waiheʻe Ditch System Total	**32.186**
Jeff & Ramona Lei Smith	2369N	Waiehu	S. Waiehu Upstream	1.86
			S. Waiehu Upstream Total	1.86
Paul Higashino	2342	Waiehu	N. Waiehu Ditch System	1.258
			N. Waiehu Ditch System Total	**1.258**
Ho'oululāhui, LLC	2243, 2244N	Wailuku	Wailuku Downstream	2.287
Francis Ornellas	2370N	Wailuku	Wailuku Downstream	0.24
Kimberly Lozano	2371N	Wailuku	Wailuku Downstream	1.324
Duke & Jean Sevilla, Christina Smith & County of Maui	2275	Wailuku	Wailuku Downstream	3.994
			Wailuku Downstream Total	**7.845**
Katherine Riyu	2268	Waikapū	Waikapū Downstream	0.61
			Waikapū Downstream Total	**0.61**
Waikapu Properties	2205, 2356/2297N, 3471N, 3472N		Waikapū Ditch System	7.42
Suzuki	2155		Waikapū Ditch System	3.569
Makimoto	2156		Waikapū Ditch System	0.293
			Waikapū Ditch System Total	**11.282**
WCEIC	2189/2190N, 2196		Wailuku Ditch System	43.79
			Wailuku Ditch System Total	**43.79**
			Grand Total	**111.431**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

Table 5: Permits Affected By Erroneous Exclusion of Konohiki Awards and Government Grants*

COL	Community Member	SWUPA #(s) (existing and new)	Stream	Total appurtenant rights (lo'i acre)	Excluded in Proposed Decision (lo'i acre)	Notes
220	Diannah Lai Goo	2233, 2234N	Waiheʻe	0.724	0.724	Parcel 7 - pōʻalima of Kamāmalu award (LCA 7713:24)
221	Richard Emoto & Roys Ellis	2227	Waiheʻe	0.845	0.045	Parcel 12 - pōʻalima of Kamāmalu award
223	Michael Rodrigues & William Freitas	2269, 2270N	Waiheʻe	0.330 **	0.330	Parcel 16 - pōʻalima of Kamāmalu award
227	Robert Barrett & Lester Nakama	2322, 2323N	Waiheʻe	3.125	0.312	10% of Parcel 24 - 6 pōʻalima of Kamāmalu award
230	William La'a & Emmett & Renette Rodrigues	2324, 2325N	Waiheʻe	1.955	0.107	Parcel 3 - pōʻalima of Kamāmalu award (note: Parcel 2 is 1.848 (not 1.747) acre, see Hui/MT-OHA FOF B-247)
233	Kenneth Kahalekai	2249	Waiheʻe	2.617	0.240	10% of Parcels 2 and 3 - pōʻalima of Kamāmalu award
234	Kau'i Kahalekai	2312	Waiheʻe	2.705	0.886	Parcels 22 & 27 - pōʻalima of Kamāmalu award
239	Kaiulani (Michael) Doherty	2225, 2226N	Waiheʻe	2.445	0.120	Parcels 6 & 8 - pōʻalima of Kamāmalu award
242	Gordon Apo & Lester Nakama	2316, 2317N	Waiheʻe	1.400	0.060	Parcel 11 - pōʻalima of Kamāmalu award
245	Charlene & Jacob Kana	2313/2314N	Waiheʻe	1.570	0.125	10% of Parcel 18 - 4 pōʻalima of Kamāmalu award
			Waiheʻe Total	**17.716**	**2.949**	
264	Regino Cabacungan & Kathy Alves	2219, 2220N	Waiehu	0.210	0.210	Parcel 27 - Lunalilo award (LCA 8559:20)
266	Francisco Cerizo	2307, 2308N	Waiehu	1.200	1.200	Lunalilo award
			Waiehu Total	**1.41**	**1.41**	
279	Gary & Evelyn Brito	2215, 2216N	Wailuku	0.248	0.062	portion of pōʻalima
276	Duke & Jean Sevilla & Christina Smith	2275	Wailuku	1.381	1.381	Parcels 41 & 54 - Spreckels grant (RPG 3343)
			Wailuku Total	**1.629**	**1.443**	
308	Ho'okahi Alves	2260, 2261N	Waikapū	0.712	0.002	pōʻalima in Government Grant 1678:2
310	George & Yoneko Higa	2366N	Waikapū	1.361	0.320	Parcels 5 and 16 - government grants
			Waikapū Total	**2.073**	**0.322**	
			Grand Total	**22.828**	**6.124**	

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

**Does not include applicants' rights for other TMKs under same SWUPA

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01 ATTACHMENT 1: LEGAL FRAMEWORK FOR THIS COMBINED IIFS AND WUPA PROCEEDING

ATTACHMENT 1: LEGAL FRAMEWORK FOR THIS COMBINED IIFS AND WUPA PROCEEDING

This attachment compiles, for ease of reference, a comprehensive overview of the legal framework—including the constitution, Code, and common law, along with the body of Hawai‘i Supreme Court rulings—governing this consolidated instream flow standard and water use permitting proceeding. This compilation is mostly derived from Part I of the Community Groups’ and OHA’s Proposed Conclusions of Law in this case; it also includes an addendum reviewing the black-letter law that municipal uses like those of Maui Department of Water Supply are not “domestic,” “public trust” uses.

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I. PUBLIC TRUST DOCTRINE

1. The public trust doctrine is a fundamental principle of constitutional law in Hawai`i. *In re Waiāhole Combined Contested Case Hr'g*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("*Waiāhole I*"). The Code "does not supplant the protections of the public trust doctrine" or "override the public trust doctrine or render it superfluous." *Id.* at 133, 9 P.3d at 445.

2. The constitutional public trust "embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." *Waiāhole I*, 94 Hawai'i at 139, 9 P.3d at 451. The mandate of protection establishes the duty to "ensure the continued availability and existence of [Hawai'i] water resources for present and future generations." *Id.* "This disposes of any portrayal of retention of waters in their natural state as 'waste.'" *Id.* at 137, 9 P.3d at 449.

3. The mandate of maximum reasonable and beneficial use establishes the standard for water use in Hawai'i. *See Waiāhole I*, 94 Hawai'i at 139, 9 P.3d at 451 (analogizing this constitutional provision to laws mandating the maximum beneficial or highest and best use of water resources). This requires "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 140, 9 P.3d at 452.

4. Protected public trust purposes include: maintenance of waters in their natural state or resource protection, with its numerous derivative public uses, benefits, and values; domestic water use; and the exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights and reservations of water by the Department of Hawaiian Home Lands. *Waiāhole I*, 94 Hawai'i at 136-37 & n.34, 9 P.3d at 448-49 & n.34; *In re Wai'ola o Moloka'i, Inc.*, 103 Hawai'i 401, 429, 431, 83 P.3d 664, 692, 694 (2004).

5. The public trust does not include "private commercial use as a protected 'trust purpose.'" *Waiāhole I*, 138, 9 P.3d at 450. Indeed, the public trust "must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time." *Id.*

6. Under the public trust, the state's continuing authority over its water resources "precludes any grant or assertion of vested rights to the water to the detriment of public purposes" and "empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust." *Waiāhole I*, 94 Hawai'i at 141, 9 P.3d at 453.

7. Under the public trust, the Commission also bears the "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." *Waiāhole I*, 94 Hawai'i at 141, 9 P.3d at 453.

8. The public trust does not merely "recognize the necessity of a balancing process," but rather mandates that "any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment" and "establishes use consistent with trust purposes as the norm or 'default' condition." *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454; *see also id.* 155, 9 P.3d 467 (reiterating the "presumption in favor of public trust purposes").

9. Thus, the public trust "prescribes a 'higher level' of scrutiny for private commercial uses" and ultimately places the burden on "those seeking or approving such uses to justify them in light of the purposes protected by the trust." *Waiāhole I*, 94 Hawai'i at 142, 9 P.3d at 454.

10. In contrast to the balancing between public and private purposes, the public trust "assigns no priorities or presumptions in the balancing of public trust uses"; rather, the

Commission "must ensure that all trust purposes are protected to the extent feasible." *Waiāhole I*, 94 Hawai'i at 142 n.43, 9 P.3d at 454 n.43.

11. As "the primary guardian of public rights under the trust," the Commission "must not relegate itself to the role of mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455.

12. The public trust compels the Commission to examine the "cumulative impact of existing and proposed diversions on trust purposes." *Waiāhole I*, 94 Hawai'i at 143, 9. P.3d at 455.

13. The public trust mandates the Commission to "implement reasonable measures to mitigate the impact of offstream diversions, including the use of alternative sources of water." *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455.

14. The public trust requires planning and decisionmaking from a global, long-term perspective. *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455

15. The Commission "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 I*, 94 Hawai'i at 143, 9 P.3d at 455.

16. The Commission's duties under the constitution and Code also embody the precautionary principle, which holds that scientific uncertainty "should not be a basis for postponing effective measures to prevent environmental degradation"; rather, "a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."

Waiāhole I, 94 Hawai‘i at 154, 9 P.3d at 466. "[A]t minimum, the absence of firm scientific proof should not tie the Commission's hands in adopting reasonable measures designed to further the public interest." *Id.* at 155, 9 P.3d at 467.

II. INSTREAM FLOW STANDARDS

17. The Commission "has an affirmative duty under the public trust to protect and promote instream trust uses." *Waiāhole I*, 94 Hawai‘i at 153, 9 P.3d at 465.

18. The Code mandates that the Commission "shall establish and administer" an "instream use protection program" and "instream flow program," in order "to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State." Haw. Rev. Stat. ("HRS") §§ 174C-71, -71(4), 174C-5(3).

19. Instream flow standards ("IFSs") "are an integral part of the regulatory scheme established by the Code" and "serve as the primary mechanism" to fulfill the Commission's public trust duty "to protect and promote the entire range of public trust purposes dependent upon instream flows." *Waiāhole I*, 94 Hawai‘i at 147-48, 9 P.3d at 459-60.

20. An IFS is the amount of water "required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses." HRS § 174C-3. An interim instream flow standard ("IIFS") is a "temporary instream flow standard of immediate applicability" that "terminat[es] upon the establishment of an IFS." *Id.*

21. The Code identifies beneficial instream uses including, but not limited to: "maintenance of fish and wildlife habitats"; "outdoor recreational activities"; "maintenance of ecosystems such as estuaries, wetlands, and stream vegetation"; "aesthetic values such as waterfalls and scenic waterways"; "maintenance of water quality; "the conveyance of irrigation

and domestic water supplies to downstream points of irrigation"; and "the protection of traditional and customary Hawaiian rights." HRS § 174C-3.

22. Parallel to the constitutional duty to protect public trust purposes "wherever feasible," IFSs must protect and restore instream uses and values "to the extent practicable." *Waiāhole I*, 94 Hawai'i at 155, 9 P.3d at 467; *see also In re Waiāhole Ditch Combined Contested Case Hr'g*, 105 Hawai'i 1, 11, 93 P.3d 643, 653 (2004) ("*Waiāhole II*") (requiring the Commission to show "whether instream values would be protected to the extent practicable").

23. "[T]he Commission must designate [IFSs] as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." *Waiāhole I*, 94 Hawai'i at 148, 9 P.3d at 460.

24. The Commission must determine IFSs first, before "allowing diversions of instream flows." *Waiāhole I*, 94 Hawai'i at 156, 9 P.3d at 468; *see also id.* at 148, 9 P.3d at 460 (emphasizing that IFSs are not "competing" with permit applications, but rather operate independently of the permitting system). The methodology of establishing IFSs outlined by the Commission also begins with investigating and evaluating instream flows first. *See id.* at 153 n.56, 9 P.3d at 465 n.56.

25. "[T]he Code envisions the establishment of bona fide 'permanent' [IFSs] as an ultimate objective in its mandated 'instream use protection program.'" *Waiāhole I*, 94 Hawai'i at 150, 9 P.3d at 462. The Commission "must establish permanent [IFSs] of its own accord 'whenever necessary to protect the public interest in the waters of the State,'" *id.* at 153, 9 P.3d at 468 (quoting HRS § 174C-71(1)), including when, as in this case, 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.

26. "Any person with standing may petition the Commission to adopt an [IIFS] for streams in order to protect the public interest pending the establishment of a permanent [IFS]." HRS § 174C-71(2)(A).

27. While IIFSs are "adopted more quickly," this "does not the alter the Commission's duty to protect instream uses." *Waiāhole I*, 94 Hawai'i at 151 n.55, 9 P.3d at 463 n.55 (quoting the Commission). Rather, "interim standards 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; *Waiāhole II*, 105 Hawai'i at 11, 93 P.3d at 653 (same).

28. By definition, IIFSs must include all flows as "is 'practicable' to 'protect, enhance, and reestablish' instream uses . . . at least for the interim." *Waiāhole I*, 94 Hawai'i at 157, 9 P.3d at 469. The Hawai`i Supreme Court has "rejected the idea of public streams serving as convenient reservoirs for offstream private use." *Id.* at 155, 9 P.3d at 467.

29. In the *Waiāhole* case, the Hawai'i Supreme Court made clear that "the ultimate burden of justifying interim standards" does not fall on the petitioners. 94 Hawai'i at 153, 9 P.3d at 465. In the original *Nā Wai 'Ehā* IIFS proceeding, the court specified that in the context of IIFS petitions, the Code "does not place a burden of proof on any particular party"; rather "the burden in setting an IIFS is on the Commission to 'protect instream values to the extent practicable.'" *In re 'Īao Ground Water Mgmt. Area*, 128 Hawai'i 228, 253, 258, 287 P.3d 129, 154, 159 (2012) ("*Nā Wai 'Ehā*"). Nonetheless, in meeting this burden, the Commission must still comply with all the mandates of the constitutional public trust, including the presumption or default in favor of public trust purposes and the higher level of scrutiny for private commercial uses. *See also Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 174, 324 P.3d 951,

984 (2014) ("The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection.").

30. In determining IFSs, the Commission "shall weigh the importance of present or potential instream values with the importance of present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses." HRS §§ 174C-71(1)(E), -71(2)(D). At this stage, the Commission may "reasonably estimate" instream and offstream demands, "mindful of its duty to 'protect instream values to the extent practicable.'" *Nā Wai 'Ehā*, 128 Hawai'i at 258, 287 P.3d at 159.

31. While "work[ing] towards establishing permanent instream flow standards," the Commission must "designate [IIFSs] based on the best information presently available." *Waiāhole I*, 94 Hawai'i at 156, 9 P.3d at 468.

32. Scientific uncertainty "does not extinguish the presumption in favor of public trust purposes or vitiate this Commission's affirmative duty to protect such purposes wherever feasible." *Waiāhole I*, 94 Hawai'i at 155, 9 P.3d at 467. Thus, under the public trust and precautionary principle, "the Commission should consider providing reasonable 'margins of safety' when establishing instream flow standards" and incorporate them "into its initial determination of the minimum standard." *Id.* at 156, 9 P.3d at 468.

33. Moreover, apart from the flows mandated in IFSs, water not actually needed for reasonable-beneficial use must remain in the streams "to avoid unlawful waste." *Waiāhole I*, 94 Hawai'i at 118, 156, 9 P.3d at 430, 468.

34. The presence of "existing" diversions "does not relieve the Commission of its duty to consider and support the public interest in stream flows." *Waiāhole I*, 94 Hawai'i at 149,

9 P.3d at 461. "[T]he Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions." *Id.* at 150, 9 P.3d at 462.

35. "[E]xisting uses are not automatically 'grandfathered' under the constitution and Code, especially in relation to public trust uses." *Waiāhole I*, 94 Hawai'i at 149, 9 P.3d at 461. "[T]he Commission may reclaim instream values to the inevitable displacement of existing offstream uses." *Id.* "[E]xisting uses may have to yield" to "superior claims," including "public instream uses" and "unexercised appurtenant rights." *Id.* at 149 n.52, 9 P.3d at 461 n.52.

III. TRADITIONAL AND CUSTOMARY NATIVE HAWAIIAN RIGHTS

36. Traditional and customary Native Hawaiian rights ("T&C rights") are protected at every level of the law, including the constitution, statues, and common law. The Hawai'i Supreme Court "has stressed that the rights of native Hawaiians are a matter of great public concern in Hawaii." *Ka Pa'akai o Ka 'Aina v. Land Use Comm'n*, 94 Haw. 31, 42, 7 P.3d 1068, 1079 (2000) ("*Ka Pa'akai*") (internal quotations omitted).

37. Article XII, § 7 of the Hawai'i Constitution provides: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the rights of the State to regulate such rights."

38. Article XII, section 7 confers upon the Commission "the power to protect [Native Hawaiian] rights and to prevent any interference with the exercise of these rights." *Ka Pa'akai*, 94 Hawai'i at 45, 7 P.3d at 1082.

39. Article XII, § 7 correlatively "places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights." *Nā Wai*

ʻEhā, 128 Hawaiʻi at 247, 287 P.3d at 148 (quoting *Ka Paʻakai*, 94 Hawaiʻi at 45, 7 P.3d at 1082) (emphasis added).

40. The Commission "may not act without independently considering the effect of [its] actions on Hawaiian traditions and practices." *Ka Paʻakai*, 94 Hawaiʻi at 46, 7 P.3d at 1083.

41. The Commission "is obligated to protect customary and traditional rights to the extent feasible." *Public Access Shoreline Haw. v. Haw. Planning Comm'n*, 79 Hawaiʻi 425, 437, 903 P.2d 1246, 1258 (1995) ("*PASH*"); *Ka Paʻakai*, 94 Hawaiʻi at 35, 7 P.3d at 1072.

42. HRS § 7-1 establishes the rights of tenants to gather certain enumerated items and also the "right of drinking water, and running water, and the right of way." HRS § 1-1 more broadly codifies the doctrine of custom as it applies in Hawaiʻi, protecting traditional and customary practices that were established by 1892. *See PASH*, 79 Hawaiʻi at 437-442, 447-51, 903 P.2d at 1258-63, 1268-72.

43. The "exercise of Native Hawaiian and traditional and customary rights" is a protected public trust purpose under the constitutional public trust, which the Commission has an affirmative duty to protect to the extent feasible. *Waiāhole I*, 94 Hawaiʻi at 137, 9 P.3d at 449. In so holding, the Hawaiʻi Supreme Court reviewed the early law of the Hawaiian Kingdom and recognized the "specific objective of preserving the rights of native tenants during the transition to a western system of private property." *Id.* at 137, 9 P.3d at 449. The court made clear its intention to uphold this "original intent" of the public trust. *Id.*

44. The Code specifically identifies the "protection of traditional and customary Hawaiian rights" as an "instream use," HRS § 174C-3; mandates that "adequate provision shall be made for the protection of [T&C] rights," which "are declared to be in the public interest," *id.*

§ 174C-2(c); and "obligates the Commission to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians," *Waiāhole I*, 94 Hawai'i at 153, 9 P.3d at 465 (quoting HRS § 174C-101(c)).

45. The Code provides that protected T&C rights include, but are not limited to, "the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes." HRS § 174C-101(c).

46. Native Hawaiian T&C rights do not require ownership of land, but rather are associated with "residency" or "tenancy" in an ahupua'a, or other T&C practice extending beyond the ahupua'a of residence. *Pele Def. Fund v. Paty*, 73 Haw. 578, 618-20 & n.33, 837 P.2d 1247, 1271-72 & n.33 (1992) ("*PDF*"); *PASH*, 79 Hawai'i at 448, 903 P.2d at 1269. "[A]lthough a tenant may not own any land in the ahupua'a, since these rights are personal in nature, as a resident of the ahupua'a, he may assert any traditional and customary rights necessary for subsistence, cultural, or religious purposes." *PDF*, 73 Haw. at 619 n.33, 837 P.2d at 1271 n.33 (quoting 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 640).

47. The exercise of T&C rights "may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *PDF*, 73 Haw. at 620, 837 P.2d at 1272. "[C]ommon law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state." *PASH*, 79 Hawai'i at 448, 903 P.2d at 1269.

48. The T&C rights of Native Hawaiians cannot be abandoned, but "remain[] intact" even if a practice has not been continuous in a particular area. *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271.

49. The T&C rights of Native Hawaiians to cultivate kalo are distinct from appurtenant rights. The law recognizes and protects each of these rights independently. *See*, *e.g.*, HRS §§ 174C-101(c), (d); -63. T&C rights belong to "ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778," whereas appurtenant rights attach to "kuleana and taro lands." *Id.* § 101(c), (d). "[A]ppurtenant water rights are incidents of land ownership." *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 551, 656 P.2d 57, 70 (1982). In contrast, "[c]ustomary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty." *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270.

50. Given these distinctions, the Commission must recognize and protect T&C rights of Native Hawaiians to cultivate kalo, independently of any appurtenant rights that may or may not exist on the land. Indeed, such T&C rights to cultivate kalo are particularly pertinent and critical for the many Native Hawaiians who do not own any of the limited amounts of land with appurtenant rights awarded during the Māhele, or who own land where the appurtenant rights have been extinguished.

51. T&C rights to cultivate kalo are not limited to Native Hawaiians who have direct ancestral ties to the particular land they seek to cultivate, or the ahupua'a in which the land is located. In other words, Native Hawaiians need not show that their direct ancestors had established a T&C practice on the land or in the ahupua'a in question. Rather, Native Hawaiians need only show that a T&C practice of kalo cultivation had been established in the ahupua'a by 1892, based upon which Native Hawaiians would have a right to exercise such practice

regardless whether they trace their direct ancestry to the land or ahupua‘a. Nothing in the legal precedents on T&C rights require such a direct ancestral connection. Indeed, such a rule would significantly and unreasonably restrict the exercise of T&C rights by depriving Native Hawaiians any opportunities and rights to practice their culture in the present day if they have moved or been displaced from their ancestral lands, or any ability to move and continue to practice their culture in the future. This stands directly at odds with the recognized "fact that [Native Hawaiian tenants] were not 'serfs' tied to the land . . . but were free to leave at any time and begin their efforts anew in virtually any uncultivated area." *Reppun*, 65 Haw. at 541, 656 P.2d at 65.

52. In *Ka Pa‘akai*, the Hawai‘i Supreme Court admonished that "for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable." 94 Hawai‘i at 46, 7 P.3d at 1083. Therefore, "in an effort to effectuate the State's obligation," id., the court established the "analytical framework" requiring agencies like the Commission to make express findings regarding:

> The identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [Commission] to reasonably protect native Hawaiian rights if they are found to exist.

Nā Wai ‘Ehā, 128 Hawai‘i at 247, 287 P.3d at 148 (quoting *Ka Pa‘akai*, 94 Hawai‘i at 46-47, 7 P.3d at 1083-84).

IV. APPURTENANT RIGHTS.

53. "[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land." *Reppun*, 65 Haw. at 551, 656

P.2d at 71. "As use of the word 'appurtenant' indicates, it is water rights which pertain to or annexed to that particular parcel of land conveyed by the original grant from the King or Hawaiian government." *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 190-91, 504 P.2d 1330, 1341 (1973).

54. "Appurtenant water rights are incidents of land ownership," that constitute "an easement in favor of the property with an appurtenant right as the dominant estate." *Reppun*, 65 Haw. at 551, 656 P.2d at 70-71 (brackets omitted); *see also Peck v. Bailey*, 8 Haw. 658, 661-62 (1867).

55. "[T]he right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant." *McBryde*, 54 Haw. at 191, 504 P.2d at 1341.

56. The Hawai'i Supreme Court's ruling in *McBryde* "prevents the effective severance or transfer of appurtenant water rights. This position is consistent with the general rule that appurtenant easements attach to the land to be benefited and cannot exist or be utilized apart from the dominant estate." *Reppun*, 65 Haw. at 551-52, 656 P.2d at 71 (citing Restatement of Property § 487, cmt. b). However, a deed "that attempt[s] to reserve such rights ha[s] the effect of extinguishing them," because "'there is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate.'" *Id.* at 552, 656 P.2d at 71 (quoting Restatement of Property § 487, cmt. b) (brackets omitted).

57. "[T]he proper measure of [appurtenant] rights is . . . the quantum of water utilized at the time of the Mahele." *Reppun*, 65 Haw. at 554, 656 P.2d at 72; *see also McBryde*, 54 Haw. at 188-89, 504 P.2d at 1340. The Hawai'i Supreme Court, however, recognized that "requiring

too great a degree of precision in proof would make it all but impossible to ever establish such rights." *Reppun*, 65 Haw. at 554, 656 P.2d at 72. *See also Carter v. Territory*, 24 Haw. 47, 59 (1917) ("It is very difficult at this late day to show what quantity of water was used upon a particular parcel of land by ancient custom when it first became the subject of private ownership. Where the use of water upon land by ancient custom is shown by satisfactory evidence the right is not to be denied merely because the quantity has not been measured and cannot be proven.").

58. The court thus provided that when "the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to give rise to a presumption that the amount of water diverted for such cultivation sufficiently approximates the quantity of the appurtenant water rights to which that land is entitled." *Id.* at 554, 656 P.2d at 72. *See also Territory v. Gay*, 31 Haw. 376, 383 (1930) (explaining that sometimes "mere reference to the land in the award or in the records of the land commission as 'taro land' ('aina kalo' or 'loi kalo') or as 'cultivated land' ('aina mahi') has sufficed to lead to and to support an adjudication that that land was entitled to use water for agricultural purposes," and that testimony of witnesses before the land commission including such language "or other statements substantially to that effect, have sufficed to support a similar adjudication").

59. The Hawai'i Constitution, art. XI, § 7, directs the legislature to "provide for a water resource agency which, as provided by law, shall . . . establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses."

60. The Commission is statutorily mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of" the Code." HRS § 174C-5(15).

61. The Code provides: "Appurtenant rights are preserved. Nothing in this part [Part IV, "Regulation of Water Use"] shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application." HRS § 174C-63. Further, "[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter." HRS § 174C-101(d).

62. The Hawai'i Supreme Court noted that the public trust's protection of Native Hawaiian T&C rights "also extends to the appurtenant rights recognized in Peck." *Waiāhole I*, 94 Hawai'i. at 137 & n.34, 9 P.3d at 449 & n.34. *See also* Lawrence H. Miike, Water and the Law in Hawai'i 104 (2004) (indicating that the inclusion of appurtenant rights as a public trust purpose should refer to traditional and customary uses, "or else the purposes of the public trust could be easily subverted by the commercial uses of appurtenant rights, thereby turning the public trust on its head and making private gain a public purpose").

V. EXTINGUISHMENT OF APPURTENANT RIGHTS

63. In selling off its former agricultural lands in private land transactions, WWC's predecessor companies consistently reserved all water rights from the land, including appurtenant rights. While *Reppun* holds that such reservations have the effect of extinguishing appurtenant rights, certain parties argue in this case that the *Reppun* precedent has been overridden by the 1978 constitutional amendments and/or the 1987 enactment of the Code.

64. The Hawai'i Supreme Court's holding that such reservations of appurtenant rights have "the effect of extinguishing them," *Reppun*, 65 Haw. at 552, 656 P.2d at 71, is binding legal precedent that the Commission has the duty "to adhere to . . . , without regard to their views as to

its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." *State v. Brantley*, 99 Hawai'i 463, 483, 56 P.3d 1252, 1272 (2002). The court, in turn, "should not depart from the doctrine of stare decisis without some compelling justification." *State v. Romano*, 114 Hawai'i 1, 11, 155 P.3d 1102, 1112 (2007). "[S]tare decisis has added force when . . . citizens, in the private realm, have acted in reliance in a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations." *State v. Garcia*, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2002); *see also In re Allen*, 35 Haw. 501, 524 (1940) (citing the principle that courts are "much more reluctant to depart from the law as declared in a prior opinion when such declaration affects individual property rights and commercial transactions whereby such rights are acquired"). Here, the reservations of appurtenant rights were established in private commercial transactions in which the parties agreed on the property rights to be transferred and the corresponding sale prices to be paid. *See* Tr. 7/29/16 (Atherton) at 88:18-89:13 (explaining that in the sale of land from WWC to Waikapū Properties, the parties specifically negotiated the terms for water rights to enable the buyer to drill wells).

65. Nothing in the Constitution or Code nullifies or prohibits the ability of private parties in private land transactions to "provid[e] that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate," as the court recognized based on basic property principles. *Reppun*, 65 Haw. at 552, 656 P.2d at 71 (brackets omitted) (quoting Restatement of Property § 487, cmt. b).

66. Article XI, § 7 of the Hawai'i Constitution calls for the creation of the Commission that "as provided by law, shall . . . establish criteria for water use priorities while assuring appurtenant rights," among other functions. As an initial matter, this provision in the

Constitution is not self-executing. *See Waiāhole I*, 94 Hawai‘i at 132 n.30, 9 P.3d at 444 n.30 (explaining that art. XI, § 7 is "self-executing to the extent that it adopts the public trust doctrine" and separately "also mandates the creation of any agency to regulate water use 'as provided by law'"). In any event, nothing in this provision or its history purports to substantively alter any appurtenant rights or private transactions regarding appurtenant rights.

67. It also may be noted that the Hawai‘i Supreme Court issued its *Reppun* decision in 1982, four years after the 1978 constitutional convention, and even cited the constitutional amendments in article XI in its opinion, yet it did not indicate any limitation on its ruling regarding the extinguishment of appurtenant rights. *See Reppun*, 65 Haw. at 560 n.22, 656 P.2d at 76 n.22 (citing Haw. Const. art. XI, § 7); *id.* at 560 n.20, 656 P.2d at 72 n.20 (citing Haw. Const. art. XI, § 1).

68. Likewise, nothing in the text or history of the Code, including § 174C-63, purports to substantively alter any appurtenant rights or private transactions regarding appurtenant rights, or overrule the Hawai‘i Supreme Court's holding regarding extinguishment of appurtenant rights. In affirming that "[a]ppurtenant rights are preserved," § 174C-63 provides that "[n]othing in this part [relating to water use permitting] shall be construed to deny the exercise of an appurtenant right" and that "[a] permit for water use based on an existing appurtenant right shall be issued upon application." This provision, expressed in the terms of a savings clause, describe the effect and limits of *the Code's* water use permitting system in relation to appurtenant rights; it does not substantively address or alter any underlying appurtenant rights or reservation of rights, or control any private transactions regarding such rights.

69. Thus, § 174C-63 contrasts in purpose and function from the Kuleana Act, HRS § 7-1, which the Hawai‘i Supreme Court held was the statutory origin of riparian rights in Hawai‘i. *See Reppun*, 65 Haw. at 549, 656 P.2d at 69. Unlike § 7-1, § 174C-63 does not affirmatively establish or define any rights, or prohibit or invalidate any reservations of rights, but simply delineates the effect of the Code on existing common-law rights. Along these lines, § 174C-63 specifically refers to "existing" appurtenant rights. This indicates a recognition that appurtenant rights can be made not to exist; otherwise, the term "existing" would be superfluous.

70. The Hawai‘i Supreme Court based its holding regarding extinguishment of appurtenant rights on basic common-law property principles regarding appurtenant easements. *See Reppun*, 65 Haw. at 552, 656 P.2d at 71 (quoting Restatement of Property § 487, cmt. b). "Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed." *Waiāhole I*, 94 Hawai‘i at 130, 9 P.3d at 442. The Code indicates no such intent to abrogate *Reppun*. In contrast, the Code does indicate such intent to overrule the common-law in § 174C-49(c), which provides that "[t]he common law of the State to the contrary notwithstanding, the Commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed" under certain conditions.

71. Finally, it should be emphasized that *Reppun*'s recognition of the extinguishment of appurtenant rights is consistent with the principles underlying *Reppun* and other seminal Hawai‘i Supreme Court decisions that realigned the law from the plantation-era system based on Western notions of private property toward a new framework based on the public trust—including Native Hawaiian T&C rights, which the court recognized was the "original intent" of the trust. Appurtenant rights are an example of a customary practice that was translated to a

property right, then further converted to a commodity that could be transferred and sold. *See Reppun*, 65 Haw. at 539-48, 656 P.2d at 63-69. Thus, as a part of its "rectification of basic misconceptions concerning water 'rights' in Hawaii," *id.* at 548, 656 P.2d at 69, the court prohibited the transfer of appurtenant rights, yet allowed that "nothing would preclude the giving of effect" of the "inten[t] to extinguish those rights" in a private transaction. *Id.* at 552, 656 P.2d at 71. More fundamentally, however, the court "made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty." *Robinson v. Ariyoshi*, 65 Haw. 641, 675, 658 P.2d 287, 312 (1982). It is this *public trust* interest that forms the foundation for water resources protection and management in Hawai'i today. This public trust framework does not conflict, but rather aligns, with the court's rulings on the private interests in appurtenant rights and the legal effect of reservations of such rights.

VI. PROTECTION OF T&C AND APPURTENANT RIGHTS IN INSTREAM FLOW STANDARDS AND WATER USE PERMITTING

72. T&C and appurtenant rights bear importance to the determinations of both IFSs and SWUPAs. T&C rights and appurtenant rights exercised for T&C practices are public trust purposes, which the Commission must take the initiative to consider, protect, and advance "at every stage of the planning and decisionmaking process." *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455.

73. In the IFS context, T&C rights are among the "entire range of public trust purposes dependent upon instream flows" that IFSs must "protect and promote." *Waiāhole I*, 94 Hawai'i at 148, 9 P.3d at 460. As stated above, T&C rights include rights to gather and fish in stream and nearshore waters, as well as rights to cultivate kalo. *See* HRS § 174C-101(c). The

Code includes "protection of traditional and customary Hawaiian rights" and "conveyance of irrigation and domestic water supplies to downstream points of diversion" in its definition of "instream use" and mandates that "adequate provision shall be made for the protection of traditional and customary Hawaiian rights." *Id.* §§ 174C-3, -2.

74. Thus, in addition to flows required for instream uses and values such as resource protection, the IFS must also incorporate flows to sustain T&C rights to gather and fish, as well as supply T&C rights to cultivate kalo. *See* Douglas W. MacDougal, Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 46, 61-62 (1996) (recognizing that "[o]ther beneficial instream uses under the Water Code also go beyond this conservation purpose and encompass assuring sufficient water to allow the practice of traditional and customary Hawaiian rights, among other purposes," and that the "[instream flow] standards would incorporate conservation and all other 'beneficial instream uses,' including the conveyance of sufficient water downstream to allow taro growing on kuleana and taro lands").

75. In the *Waiāhole* case, for example, the Hawai'i Supreme Court specifically recognized the Commission's provision of additional flows in the IIFS so that "appurtenant rights, riparian uses, and existing uses would be accounted for." *Waiāhole II*, 105 Hawai'i at 12, 10, 93 P.3d at 654, 652. In contrast, in the original *Nā Wai 'Ehā* IIFS proceeding, the court ruled that the Commission "did not discharge its duty" to protect Native Hawaiian rights where the Commission justified its IIFS determination based on issues regarding amphidromous species, but failed to consider downstream users' T&C rights to cultivate kalo. 128 Hawai'i at 248-49, 287 P.3d at 149-50.

76. In the SWUPA context, the Code mandates that "[a] permit for water use based on an existing appurtenant right shall be issued upon application," HRS § 174C-63, and that T&C rights "shall not be abridged or denied," *id.* § 174C-101(c). Such rights, however, are still properly subject to the constitutional and statutory reasonable-beneficial mandate; *i.e.*, they do not allow the wasting of water. Nonetheless, where T&C and/or appurtenant rights are exercised to cultivate kalo or other traditional products according to traditional means, such water uses should qualify as *prima facie* reasonable-beneficial. Thus, T&C water uses should not be required to follow different standards of efficiency or seek alternative sources, apart from what traditionally applied to such uses. *See* Findings of Fact, Conclusions of Law, & Decision & Order, filed on June 10, 2010, COLs 94, 115 (Case No. CCH-MA06-01).

77. Moreover, as discussed below, other permit applicants bear the burden of showing that their proposed uses do not abridge or deny public trust purposes, including T&C and appurtenant rights, and the Commission bears the duty to hold applicants to their burden.

VII. WATER USE PERMIT APPLICANTS' BURDEN OF PROOF

78. While the Hawai'i Supreme Court stated that no particular party bore the burden of proof in the original *Nā Wai 'Ehā* IIFS proceeding, *see* 128 *Nā Wai 'Ehā*, 128 Hawai'i at 258, 287 P.3d at 159, this proceeding incorporates water use permit applications and thus is identical to the *Waiāhole* case and subject to all the legal requirements established in *Waiāhole* and other precedents involving water use permitting, including the permit applicants' burden of proof.

79. The burden of proof for permit applicants, particularly private commercial diverters, is established at every level of the law, including the constitution, the Code, as well as the common law. "Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. As stated above,

the public trust effectively creates this burden through its inherent presumption in favor of public use, access, and enjoyment." *Waiāhole I*, 94 Hawai'i at 160, 9 P.3d at 472. Similarly, under the common law, the "burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer." *Id.* at 142-143, 9 P.3d at 454-55 (quoting *Robinson*, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8).

80. "[A]n applicant for a water use permit bears the establishing that the proposed use will not interfere with any public trust purposes." *Wai'ola*, 103 Hawai'i at 441, 83 P.3d at 704. This includes the burden of proving "that the proposed water use would not abridge or deny traditional and customary native Hawaiian rights." *Id.* at 442, 83 P.3d at 705.

81. Permit applicants are "obligated to demonstrate affirmatively" that the use will not negatively affect trust purposes. *Wai'ola*, 103 Haw. at 441-42, 83 P.3d at 704-05. The mere "absence of evidence . . . [i]s insufficient to meet the burden imposed upon [the applicant] by the public trust doctrine, the Hawai'i Constitution, and the Code." *Id.* at 442, 83 P.3d at 705.

82. The Commission, in turn, is "duty-bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes." *Waiāhole II*, 105 Hawai'i at 16, 93 P.3d at 658; *accord Wai'ola*, 103 Hawai'i at 426, 83 P.3d at 689 ("[T]he Commission is duty bound to hold [the applicant] to its burden under the Code and the public trust doctrine.").

83. If the applicant fails to meet its burden, the "Commission's analysis should . . . cease[]." *Waiāhole II*, 105 Hawai'i at 16, 93 P.3d at 658. In other words, the Commission "is precluded from allowing a proposed use . . . in the absence of an affirmative showing that the use does not conflict with those [public trust] principles and purposes. . . . [A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a

public trust resource." *Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014).

84. The mandate of "reasonable-beneficial use" is established in both the constitutional public trust doctrine, and the Code. *Waiāhole I*, 94 Hawai'i at 138-40, 145-46, 9 P.3d at 450-52, 457-58.

85. Permit applicants' burden of proof under the Code includes the "reasonable-beneficial use" and "consistent with the public interest" requirements. *Waiāhole I*, 94 Hawai'i at 160, 9 P.3d at 472. The Code defines "reasonable-beneficial use" as the "use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest." HRS § 174C-3.

86. The reasonable-beneficial standard incorporates the "best features of both reasonable use and beneficial use" and "demand[s] examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question," which includes "public instream values" and "the public interest in stream flows." *Waiāhole I*, 94 Hawai'i at 160-61, 9 P.3d at 472-73.

87. Uncertainty pending the establishment of permanent instream flow standards does not allow a "permissive view toward stream diversions" or "reduce the level of scrutiny [the Commission] must apply." *Waiāhole I*, 94 Hawai'i at 158-611, 9 P.3d at 470-73. The Commission must still "requir[e] a higher level of scrutiny for private commercial water usage." *Waiāhole II*, 105 Hawai'i at 16, 93 P.3d at 658. It must review "every offstream use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements." *Waiāhole I*, 94 Hawai'i at 159; 9 P.3d at 471.

88. The Commission thus may decide in favor of "postponing certain uses, or holding them to a higher standard of proof." *Waiāhole I*, 94 Hawai'i at 159; 9 P.3d at 471. In the *Waiāhole* case, the Commission concluded that non-agricultural uses such as golf course and landscaping uses were subject to a "higher standard, in light of higher uses for windward surface water, including retaining water in the streams" and carried a "heavy burden to show why stream water should be diverted out of its watershed of origin." *Id.* at 168, 9 P.3d at 480.

89. Permit applicants "[a]t a very minimum . . . must prove their own actual water needs" and "must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources" and "the propriety of draining water from public streams to satisfy [the applicants'] needs." *Waiāhole I*, 94 Hawai'i at 161-62, 9 P.3d at 473-74.

90. "Informal" and "very general" claims are insufficient to satisfy an applicant's burden. *Waiāhole II*, 105 Hawai'i at 16, 93 P.3d at 658.

91. Each permit applicant must prove that each specific use is reasonable-beneficial by providing details on "acres to be used, the crops to be planted, and the water needed as to each group." *Waiāhole II*, 105 Hawai'i at 25, 93 P.3d at 667. "Absent [such] basic information," an applicant cannot meet its legal burden. *Id.* at 26, 93 P.3d at 668.

92. Demonstrating the absence of practicable alternatives is "intrinsic to the public trust, the statutory instream use protection scheme, and the definition of 'reasonable-beneficial' use, and is an essential part of any balancing between competing interests." *Waiāhole II*, 105 Hawai'i at 15, 93 P.3d at 657.

93. The Code expressly provides that "[i]n 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 and rate of diversion, uses of water from alternative sources, or any other solution." *Waiāhole I*, 94 Hawai'i at 149, 9 P.3d at 461 (quoting HRS § 174C-71(1)(E)); *see also* Haw. Admin. R. ("HAR") § 13-169-20(5).

94. An alternative is practicable if it is "available and capable of being utilized after considering cost, technology, and logistics." *Waiāhole II*, 105 Hawai'i at 19, 93 P.3d at 661.

95. An applicant's "inability to afford [an alternative], alone, would not render the alternative impracticable." *Waiāhole II*, 105 Hawai'i at 19, 93 P.3d at 661.

96. Whether an applicant owns or controls an alternative source "alone do[es] not render an alternative impracticable." *Waiāhole II*, 105 Hawai'i at 17, 93 P.3d at 659.

97. This Commission "is not 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 I*, 94 Hawai'i at 165, 9 P.3d at 477.

98. "Stream protection and restoration need not be the least expensive alternative for offstream users to be 'practicable' from a broader, long-term social and economic perspective." *Waiāhole I*, 94 Hawai'i at 165, 9 P.3d at 477.

99. Offstream users have the burden to prove any system losses (e.g., seepage, leakage, and evaporation) are reasonable-beneficial by establishing "actual need" and "the absence of practicable mitigating measures," including repairs, maintenance, and lining of ditches and reservoirs. *Waiāhole II*, 105 Hawai'i at 27, 93 P.3d at 669.

100. Whether or not a permit is required for system losses, offstream users, and ultimately the Commission, "must somehow account for" water lost or missing by adopting "provisions that encourage system repairs and limit losses." *Waiāhole II*, 105 Hawai'i at 27, 93 P.3d at 669.

101. In addition to meeting the constitutionally mandated standard of reasonable-beneficial use, an applicant for a water use permit under the Code must affirmatively demonstrate that its proposed use satisfies all the other criteria set forth in HRS § 174C-49(a). *Waiāhole I*, 94 Hawai'i at 160-61, 9 P.3d at 472-73; *Waiāhole II*, 105 Hawai'i at 15-16, 93 P.3d at 657-58.

VIII. STRUCTURE AND STEPS FOR DECISIONMAKING IN THIS COMBINED CONTESTED CASE HEARING

102. This combined contested case hearing consolidates an IIFS Petition and surface water use permits ("SWUPAs"). It also includes issues related to T&C and appurtenant rights, which are pertinent to determining both instream flow standards and water use permits. Based on the legal mandates above, the following discussion sets forth the steps for considering and resolving these various interrelated claims and issues in this case.

103. The Commission must determine the IIFSs first, protecting and promoting instream uses and values to the extent practicable. *See supra* ¶¶ 7-9, 22-29. At this stage, the Commission may reasonably estimate instream and offstream demands in weighing instream and offstream uses and providing reasonable margins of safety. *See supra* ¶¶ 30-32.

104. In determining the IIFSs, the Commission must also protect Native Hawaiian and T&C rights to the extent feasible. *See supra* ¶¶ 4, 7-11, 36-44, 52. These include rights to gather and fish, as well as rights to cultivate kalo, which may or may not be accompanied with appurtenant rights. *See supra* ¶¶ 42, 45, 49-50. Thus, the IIFS must incorporate additional flows to sustain T&C gathering and fishing rights, as well as to convey flows downstream to supply T&C rights to cultivate kalo and appurtenant rights. *See supra* ¶¶ 72-75.

105. Once it determines the IIFSs, the Commission then turns to considering individual claims of water rights and applications for water use permits. Given the protected status of T&C rights to cultivate kalo and appurtenant rights, these rights must be determined first in order to properly structure the permitting process. *See supra* ¶¶ 7-18, 35-45, 52, 61-62, 77-83.

106. The Commission must determine the existence and quantification of appurtenant rights for individual applicants, assuming the rights have not been extinguished. *See supra* ¶¶ 53-71. Likewise, the Commission must determine T&C rights to cultivate kalo for individual applicants, whether or not it is accompanied with appurtenant rights. *See supra* ¶¶ 36-45, 52, 49-50. Where a Native Hawaiian ‘ohana with T&C rights owns a kuleana with existing appurtenant rights, these rights may overlap for practical purposes. *See supra* ¶¶ 49-50. But even when the appurtenant rights are extinguished, Native Hawaiians still have a T&C right to water to cultivate kalo, which the Commission must ensure is not abridged or denied, and which other permit applicants have the burden to show are not abridged or denied by their proposed water uses. *See supra* ¶¶ 7-9, 36-45, 52, 80-83.

107. While T&C rights to cultivate kalo and appurtenant rights are properly subject to the constitutional and statutory reasonable-beneficial mandate, so long as the water uses based on T&C and/or appurtenant rights are reasonable-beneficial, permits must be issued as a matter of right. *See supra* ¶ 76. Where T&C and/or appurtenant rights are exercised to cultivate kalo or other traditional products according to traditional means, such water uses are *prima facie* reasonable-beneficial. *See supra* ¶¶ 76, 57-58.

108. Given the protected status and historical origins of T&C and appurtenant rights, the Code’s distinction between “existing” and “new” uses in relation to the date of water management area designation does not apply to water uses based on those rights. *See supra* ¶¶

36-45, 53-62. Rather, the Commission must protect and enable the exercise of T&C and appurtenant rights by issuing permits for all requested reasonable-beneficial water uses based on those rights, apart from any "existing" or "new" classification. *Id.*; *see also* Minute Order 1 at 2 (recognizing different categories of applicants, the first of which are "applicants whose appurtenant rights will have been confirmed," which "[i]ncludes their applications for both existing and new uses").

109. Once the Commission provides for T&C and appurtenant rights, it then must address SWUPAs for "existing uses" at the time of designation. HRS § 174C-50(b); *see also* Provisional Order at 2 (recognizing the order of first considering SWUPAs for water on parcels with appurtenant rights and quantifying reasonable beneficial use on those parcels, then considering "all other [SWUPAs] for existing uses"). Existing uses are not grandfathered or automatically issued permits. *See supra* ¶ 35. Existing water users must prove reasonable-beneficial use, HRS § 174C-50(b), which includes showing actual need, lack of practicable mitigation and alternatives, and the propriety of draining water from public streams to meet the offstream needs, as well as showing that the proposed use will not abridge or deny appurtenant or T&C rights. *See supra* ¶¶ 8-9, 77-100. Existing uses may need to yield to superior claims such as newly exercised T&C and appurtenant rights. *See supra* ¶ 35. The Commission, in turn, must hold applicants to their burden and review every proposed use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements. *See supra* ¶¶ 8-9, 11-16, 82-83, 87-88.

110. It may bear noting that existing uses are not tied to a particular quantity of water, in the way that appurtenant *rights*, for example, are tied to the quantity of water used at the time of the Māhele. Existing uses do not create such a right to the quantity of water being used at the

time of designation, but rather are allowed to continue only in a quantity, manner, and purpose that is reasonable-beneficial. *See* Haw. Rev. Stat § 174C-50(b); *supra* ¶¶ 84-86. Along related lines, for existing uses in agriculture, the Code allows for "replacing or alternating the cultivation of any agricultural crop with any other agricultural crop, which shall not be construed as a change in use." HRS § 174C-3 (definition of "existing agricultural use").

111. After the Commission resolves existing use SWUPAs, it then turns to new use SWUPAs. *See* Minute Order 1 (anticipating that "[b]ecause the amount of water being applied for under appurtenant rights and existing uses . . . it is likely that there will be no water available for new-use applicants"). In addition to proving reasonable-beneficial use, including all the requirements described above for existing uses, new use applicants must also show that their proposed uses satisfy all the other criteria under HRS § 174C-49(a), including but not limited to showing that the proposed use "[w]ill not interfere with any existing legal use of water." *See supra* ¶ 101. Here, as well, the Commission must continue to hold applicants to their burden and review every proposed use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements. *See supra* ¶¶ 8-9, 11-16, 82-83, 87-88.

IX. RIGHTS TO THE "WATER COURSE" OR "MEANS" OF WATER USE AND ACCESS

112. As the Hawai'i Supreme Court has explained, water rights are "not limited simply to a specified quantity of water," but also "include[] interests in the *means of any diversions* and the purposes to which the water was applied." *Robinson*, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8 (emphasis added). Specifically regarding appurtenant rights, the seminal *Peck* case held that such a right "constitutes an easement . . . as the dominant estate" over the rights of other lands. 8

Haw. at 662. This easement right "includes the *water courses* on [the grantee's] lands, *and* all the *water* which the lands had enjoyed from time immemorial." *Id.* (emphasis added). Thus, "if a riparian proprietor should interfere with an ancient *auwai, by which other lands had been watered* from time immemorial, he would be liable in damages, because this was clearly an *easement for the benefit of those lands* through which the ancient water course extended." *Id.* at 661-62 (emphasis added).

113. As *Peck* explained, "[t]he water courses on this Ahupua'a have existed on this have existed from time immemorial, and were doubtless made by the order of some ancient King, and when the late King conveyed these lands to the proprietors, the *rights of the water courses*, in their full enjoyment, was included as an appurtenance. . . . It is very evident that each party has *rights to the water courses running* through their lands." 8 Haw. at 671 (emphasis added). *See also Carter v. Territory*, 24 Haw. 47, 57-58 (1917) (explaining that ""[t]he ancient ditch systems connected with running streams became a permanent feature of the topography of the localities where they were constructed," and "the right to water therefrom passed as an appurtenance or incident without express mention").

114. In sum, *Peck* holds that appurtenant rights constitute an easement that includes not only the water itself, but also the "water course" or 'auwai—*i.e.*, the means of access or supply. Indeed, to enable the actual exercise of appurtenant rights, the two cannot be logically and practically separated, and one is meaningless without the other.

115. The Code broadly grants the Commission "jurisdiction statewide to hear *any dispute* regarding water resource protection, water permits, or *constitutionally protected water interests*, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final

decision on any matter shall be made by the commission." HRS § 174C-10 (emphasis added). The Code also expressly grants the Commission broad authority to "determine appurtenant rights, including quantification of the amount of water entitled to by that right." *Id.* § 174C-5(15). This authority to determine appurtenant water rights is not limited solely to the quantification of the water right; such an interpretation would nullify and render superfluous the language "determine appurtenant rights, *including* quantification." (Emphasis added.)

116. The legislative history of § 174C-5(15) confirms that it was added to the Code in response to the Attorney General's office advising the Commission that "determination of appurtenant water rights is directly tied to a determination of rights in land" and, thus, "under current law, the courts are the proper forums to determine appurtenant water rights." Stand. Comm. Rep. No. 102, in 2002 House Journal, at 1273. The legislature believed that "the Commission should be authorized to determine and quantify appurtenant rights: (1) To protect the exercise of appurtenant rights; and (2) To allow the Commission to allocate water in water management areas and to determine instream flow standards." *Id.* "Moreover, adjudicating appurtenant rights in the courts will probably be expensive and time consuming." *Id.* *See also* Stand Comm. Rep. No. 3136, in 2002 Senate Journal, at 1500 (expressing the intent to "facilitate the determination and administration of appurtenant water rights"). In sum, the legislative history does not indicate any intent to limit the scope of the Commission's authority in determining appurtenant rights, but rather shows that the legislature intended to directly address and rectify the issue raised by the Attorney General's office.

117. As the Hawai‘i Supreme Court pointed out in *Robinson*, *see* 65 Haw. at 649 n.8, 658 P.2d at 295 n.8, a long history of Hawai'i cases on water rights, including appurtenant rights, make clear that the determination of water rights includes not just a quantity of water standing

alone, but also the *means* (including location, method, and order of diversion and conveyance) of exercising the right. Indeed, most of these cases involve the former "Commissioners of Water Rights" during the kingdom and territory of Hawai‘i, which were the functional predecessors of this Commission.

118. In *Wailuku Sugar Co. v. Hale*, 11 Haw. 475 (1898), for example, the court affirmed a water commissioner's order requiring a water user to allow water to pass through his kalo land to another water user's adjoining kalo land, rejecting the argument that the commissioner lacked jurisdiction because the requested relief was "for the opening of a right of way of plaintiff's water through defendant's land and not a dispute as to any water." *Id.* at 476. Similarly, in *Kahookiekie v. Keanini*, 8 Haw. 310, 312 (1891), the court affirmed a water commissioner's order requiring a water user to remove a flume and cease other practices that impaired the flow to lower water users. Other cases like *Loo Chit Sam v. Wong Kim*, 5 Haw. 130, 131 (1884), and *Palolo Land & Improvement Co. v. Wong Quai*, 15 Haw. 554, 556-59 (1903), document extensive directives from water commissioners to open, remove, and modify diversions and ‘auwai, and to allocate flows from specific diversions and ‘auwai to water users.

119. In *Davis v. Afong*, 5 Haw. 216 (1884), the court rejected the argument that water commissioners could only "declare what the respective rights of the parties are" and had no authority to order removal of obstructions or restoration of water courses. *Id.* at 218. The court opined that "[w]e do not think the Legislature intended any such limitation of the jurisdiction of the Commissioners," or "intend[ed] to compel parties to establish their rights in one forum and oblige them to resort to another forum to have these rights enforced and protected." *Id.* Thus, the court affirmed that modifications that diminished flow in the ‘auwai must be removed and the ‘auwai must be restored. *Id.* at 224. In particular, the court emphasized that the interference

with the ʻauwai "is a *trespass upon the auwai* in which the plaintiffs have an *easement*. This easement goes to the extent that the *auwai is not to be cut, narrowed or interfered with by defendant to the injury of plaintiffs*." *Id.* (emphasis added). This reiterates the original understanding in *Peck* of appurtenant rights as an easement that includes the ʻauwai or right of access.

120. Along the same lines, given its broad, express authority to "determine appurtenant rights," HRS § 174C-5(15), and "to hear any dispute regarding . . . constitutionally protected water interests" and render a "final decision," *id.* § 174C-10, as well as its constitutionally established comprehensive water management role, the Commission has the authority to determine, administer, and protect appurtenant rights, including both the "water" itself and the "water course."

121. Stated another way, just as traditionally the "konohiki" bore the trust "'duty' to assist each of the deserving tenants," *Reppun*, 65 Haw. at 547, 656 P.2d at 68, the Commission bears that responsibility in the 21st century and must exercise it to protect the exercise of appurtenant rights in this case. *See Waiāhole I*, 94 Hawaiʻi at 179, 9 P.3d at 491 (recognizing the Code's legislative purpose of providing "a comprehensive regulatory system based on permits issued by the Commission in place of the common law regime of water rights administered by the courts").

X. ADDENDUM: MUNICIPAL USES ARE NOT "DOMESTIC," "PUBLIC TRUST" USES

122. The meaning of "domestic" use is a settled, black-letter rule of water law. The riparian system established in Hawaiʻi recognizes a "preference for domestic, or 'natural,' uses." *Waiāhole I*, 94 Hawaiʻi at 137, 9 P.3d at 449 (quoting Restatement (Second) of Torts § 850A

cmt. c (1979) ("Restatement")). By definition, such "natural" uses, as opposed to subordinate "artificial" uses, may not "materially diminish the supply of water or render useless its application by others." *Peck*, 8 Haw at 662; *see also Carter*, 24 Haw. at 66 (recognizing the distinction between "natural" and "artificial" uses and affirming, "we have no doubt that such is the law in [Hawai'i]").

123. As the Restatement further makes clear:

> The preference for domestic use does not extend to withdrawals by a municipality, water company or public district that supplies the domestic needs of inhabitants of a city or other service area. These large public and commercial users receive no preference and are subject to liability if the taking of their supplies unreasonably causes harm to other reasonable use of riparians.

Id. § 850A cmt. c. This rule is widely established in the treatises and case law. *See*, *e.g.*, A. Tarlock, Law of Water Rights & Resources § 3:59 at 3-103 to -104 (2010 rev. ed.) ("Tarlock") (municipal users "generally cannot invoke the domestic preference to acquire land and water rights to supply their inhabitants and claim an immunity from liability by injured riparians") (footnote omitted); 2 J. Sackman, Nichols on Eminent Domain § 5.05[2][a][vii], at 5-247 (rev. 3d ed.) ("Nichols") ("A private riparian proprietor has no right at common law to divert water . . . for the purposes of sale, and it would seem that a municipal or a public service corporation should stand in no better position."); *Pernell v. City of Henderson*, 16 S.E.2d 449, 451 (N.C. 1941) (recognizing "practical unanimity" in the rule that "[t]he use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right").

124. The Code also defines "domestic" and "municipal" uses separately and recognizes that municipal use encompasses not only aggregate domestic uses, but also "industrial" and "commercial" uses. HRS § 174C-3. The Code specifically exempts "domestic consumption of

water by individual users" from its water use permitting system, but grants no such priority or exemption to municipal users. *Id.* § 174C-48(a). Indeed, municipal uses involve large-scale extractions away from the stream and riparian lands and, thus, differ quantitatively and qualitatively from "natural" domestic uses. *See* Tarlock § 3:57 (recognizing the rationale for preferring "those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, such as drinking and other household purposes") (citation omitted); Nichols § 5.05[2][a][vii] (maintaining that a preference for municipal stream diversions would extend "far beyond the limits established by the common law" with potentially "ruinous effect"); *Pernell*, 16 S.E.2d at 451 (distinguishing domestic users from a municipality that "pipes [water] in large quantities into the city, and distributes and sells it to consumers for any purpose whatever for which it may be used").

125. In *Waiāhole*, this Hawai'i Supreme Court "recognize[d] domestic water use as a purpose of the state water resources trust" based on these riparian principles. *See* 94 Hawai'i at 137, 9 P.3d at 449. In addition to the Restatement, the Court cited Hawai'i authorities, including:

- HRS § 7-1, which established the riparian doctrine in Hawai'i, *see McBryde*, 54 Haw. at 191-98, 504 P.2d at 1341-44;
- the *McBryde* case, which "compar[ed] [§ 7-1] with authority in other jurisdictions recognizing riparian rights to water for domestic purposes"; and
- the *Carter* case, which "grant[ed] priority to domestic use based on riparian principles and [§ 7-1]."

Waiāhole I, 94 Hawai'i at 137, 9 P.3d at 449. The Court indicated no intent to overturn the long-standing definition of "domestic" use and designate municipal stream diversions as a protected

public trust purpose. Indeed, all the public trust purposes that the Court recognized, including domestic uses, had firm legal basis in Hawai‘i or other law. *See id.* at 136-38, 9 P.3d at 448-50.

126. Conflating municipal stream diversions with a domestic "public trust use" would constitute an unprecedented, fundamental deviation from the very concept of the public trust. It would essentially resurrect the argument the California Supreme Court rejected in the "Mono Lake" case, that the public trust encompassed "all public uses," including the "domestic" uses of the City of Los Angeles. *See National Audubon Soc'y v. Superior Ct.*, 658 P.2d 709, 723-24 (Cal. 1983). That case squarely dismissed such a "broad concept of trust uses," maintaining that the "*public trust is more* than an affirmation of state power to use public property for *public purposes*. It is an affirmation of the *duty of the state to protect the people's common heritage* of streams, lakes, marshlands, and tidelands." *Id.* (emphases added). The Court in *Waiāhole* adopted this reasoning without qualification and also held that "the trust protects public waters and submerged lands against . . . 'substantial impairment,' whether for private or public purposes." 94 Hawai‘i at 138-39, 9 P.3d at 450-51. Of note, the Court described the municipal diversions in *National Audubon* as a "public purpose," not a "public trust purpose." *Id.* at 140, 9 P.3d at 452. Contrarily establishing municipal stream diversions as a public trust purpose would eviscerate the public trust doctrine without precedent in the body of public trust law. *See id.* at 138, 9 P.3d at 450 (finding "no authority which supports this view of the public trust, except perhaps [one] dissenting opinion") (quoting *National Audubon*, 658 P.2d at 723-24).

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

November 6, 2017

VIA HAND DELIVERY AND ELECTRONIC MAIL
Chairperson Suzanne D. Case
Deputy Director Jeffrey T. Pearson
Members of the Commission on Water Resource Management
Kalanimoku Building
1151 Punchbowl Street, Room 227
Honolulu, Hawai'i 96813

Re: Lack of Compliance and Monitoring for the Waikapū Stream Interim Instream Flow Standard (2.9 mgd), Nā Wai 'Ehā, Maui (Case No. CCH-MA06-01).

Dear Chair Case, Deputy Director Pearson, and Members of the Commission:

On behalf of Hui o Nā Wai 'Ehā (the "Hui"), Maui Tomorrow Foundation, Inc. (together, the "Community Groups"), and the Office of Hawaiian Affairs ("OHA"), we are writing to (1) document for your attention and the record the past and ongoing violations of the Waikapū Stream interim instream flow standard ("IIFS") by Wailuku Water Company ("WWC"); (2) express our objections to the overall lack of attention and diligence toward ensuring compliance with the IIFS's legal mandate; and (3) reemphasize the need for a proper IIFS monitoring regime that includes timely public reporting, independent verification, and meaningful incentives for compliance and consequences for violations. We respectfully request that the Commission include this letter on the agenda for its next meeting for discussion and necessary action.

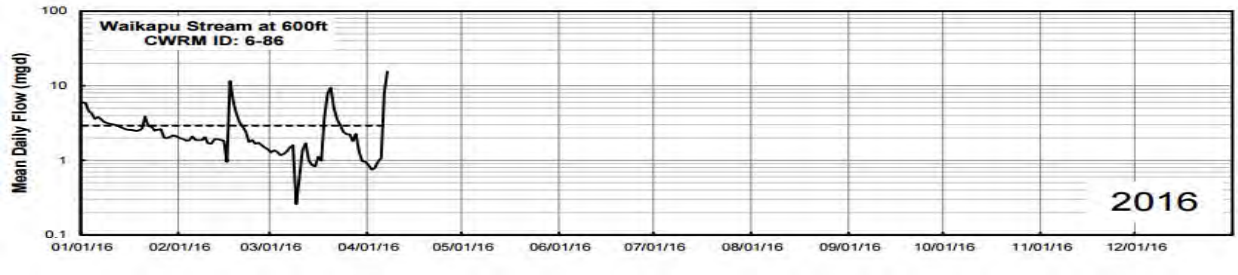
Past and Recent IIFS Violations

As summarized below, the lack of compliance with Nā Wai 'Ehā's IIFSs has been an ongoing problem and a cause for public concern since the current IIFSs were established by a 2014 settlement and order of this Commission ("2014 IIFS Order").[1] But recent flagrant violations, and the difficulties of community members in obtaining timely and effective responses and relief, have highlighted more than ever the need for corrective action.

[1] Order Adopting: (1) Hearings Officer's Recommendation On The Mediated Agreement Between The Parties; And (2) Stipulation Re Mediator's Report Of Joint Proposed Findings Of Fact, Conclusions Of Law, Decision And Order, filed on April 17, 2014 (Case No. CCH-MA06-01).

The 2014 IIFS Order established Nā Wai ʻEhā's IIFSs, including the 2.9 million gallons per day ("mgd") IIFS for Waikapū Stream,[2] by both an agreement between the parties, including WWC, and an order of the Commission. Since then, monitoring and reporting of IIFS compliance has been limited, and the available monitoring data has shown recurring and sometimes extended periods of non-compliance. Although Commission staff installed monitoring equipment, the data has been available only months after-the-fact, when the staff is able to visit the site to retrieve the data then upload it to the Commission's website.[3]

For Waikapū Stream, the data that were finally uploaded to the Commission's website in mid-2016 confirmed the Waikapū community's observations and concerns that the IIFS was not being met. (See graph below.) For almost three months during the recorded period, from the middle of January to the beginning of April 2016, instream flow was consistently (with the exception of several peaks) below the 2.9 mgd IIFS, dipping as low as 1 mgd or less.



Source: http://dlnr.hawaii.gov/cwrm/surfacewater/monitoring/

While these IIFS violations for Waikapū and other Nā Wai ʻEhā streams were already documented in the Commission's own publicly posted data, community members brought them directly to the Commission's attention during the August 2016 public meeting on the controversial proposed enforcement action against the Duey ʻohana. At the invitation of several Commissioners during that meeting, the Hui filed formal written complaints with the Commission on August 25, 2016, attaching the then-available data above, and requesting enforcement of the IIFS in Waikapū Stream and other Nā Wai ʻEhā Streams and implementation of improved, real-time monitoring and reporting of IIFS compliance.

After the filing of the Hui's complaints, additional data was uploaded to the Commission's website. (See graph below.) The currently available data shows the IIFS was not

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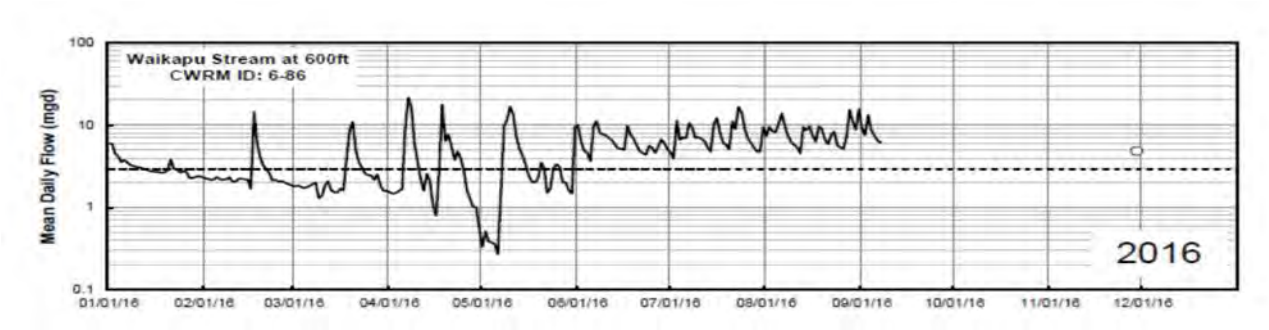
[2] Specifically, the 2.9 mgd IIFS is located at an elevation of around 950 feet, below the return of water from the South Waikapū Ditch and the confluence with a small tributary called Kalena, and above the intakes for the (now closed) Everett Ditch and the North Waikapū kuleana ʻauwai. *See* Commission Staff Report, dated October 3, 2016, at 4 (Case No. CCH-MA15-01) ("Staff Report").

[3] *See* Staff Report at 3-4 (indicating the dates of data retrieval and indicating, e.g., that there was no data retrieval from the Waikapū gauge between January 22, 2016 and April 8, 2016).

met for two more months in April and May 2016. The recording of data stopped in September 2016, when the gauge was washed away in a flood, and still has not resumed.



The Commission did not respond to the Hui's complaints until more than a year after they were filed (and only after several follow-up inquiries by the Hui). The Commission's letter dated August 31, 2017 did not acknowledge or even mention the lengthy period of IIFS non-compliance for Waikapū Stream, but instead limited its response to indicating the Commission's intent to replace the Waikapū gauge that had been washed away almost a year before, and to explore real-time gaging options, without providing a timeframe for either action.

Most recently, for the past month beginning in late September 2017, WWC has been blatantly violating the 2.9 mgd Waikapū Stream IIFS by shutting off any return of the streamflows that it diverts in its South Waikapū Ditch. Even with the ongoing lack of gaging in Waikapū, WWC's continuous failure to release *any* diverted water during normal non-rainy conditions constitutes an IIFS violation *on its face*.

The USGS Nā Wai 'Ehā report, which is the scientific record on which Nā Wai 'Ehā proceedings and dispositions (including the 2014 IIFS Order) have relied, indicates that at the IIFS location for Waikapū Stream, the contribution of the small Kalena tributary is only about 1.16 mgd on average (ranging from .99 to 1.47 mgd).[4] Thus, during non-rainy conditions, and particularly an extended period of dry conditions and low streamflows such as the past several months, WWC *must be continually releasing water* from its South Waikapū ditch to comply with the 2.9 mgd IIFS.[5] Everyone involved in producing the 2014 IIFS Order, including WWC and the Commission, is or should be fully aware of this basic fact; indeed, WWC agreed to, and the Commission approved and ordered, this requirement.

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[4] *See* USGS, Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Nā Wai 'Ehā, Maui, Hawai'i 64 (2010).

[5] The USGS report indicates a total flow at the IIFS location (including the Kalena tributary inflow) during low-end flow conditions of around 3.7 mgd (Q_{90}) to 2.7 mgd (Q_{99}). *Id.* at 72. Thus, at the lowest Q_{99} flow level of 2.7 mgd, total streamflow is below the 2.9 mgd IIFS, and WWC cannot divert any water.

During the time these violations have been occurring, Waikapū community members, including kalo farmers on the North Waikapū kuleana ʻauwai who depend on, and are legally entitled to, continuous streamflows, have observed extreme and abnormal low flows in the stream below the IIFS location.[6] This critically low flow, which is effectively limited only to the flow from the Kalena tributary, has severely diminished the supply of water to the kuleana ʻauwai and threatened the kalo and other crops cultivated by the ʻauwai users with appurtenant, Native Hawaiian traditional and customary, and other rights.

On October 9, 2017, the Hui alerted Commission staff to WWC's violations and provided photographic and video documentation showing that the sluice gate where diverted water was released back to Waikapū Stream was shut and locked, and no water was being returned to the stream. At the same time, 1.2 mgd was being sent to Reservoir No. 1, which was filled with water. *See* Exhibit 1, attached hereto (October 9, 2017 emails with attachments). A staff member indicated that WWC's President Mr. Chumbley had been contacted, but provided no resolution to the problem.

Thereafter, the Hui continued to send Commission staff photographs and videos on a daily basis showing no change in the situation—*i.e.*, WWC still not releasing any water and continuing to divert up to 1.8 mgd into a full reservoir. *See* Exhibit 2, attached hereto (dated photographs). On October 13, 2017, the Deputy Director met with members of the Hui and the Hui's attorney on Maui and assured them the IIFS would be enforced and the Hui would be kept informed. After 11 days passed with no response, the Hui followed up with the Deputy Director and was told that Mr. Chumbley had claimed that water was already being released not at the sluice gate, but at the adjacent spillway in the ditch. The photographs and videos the Hui sent, however, also included the spillway and showed that no water was being released from that point either. *See* Exhibits 1 & 2.

After the Deputy Director relayed Mr. Chumbley's claim that the spillway was releasing water, the Hui observed that WWC had finally started to release some water from that point. *See* Exhibit 3 attached hereto (photo dated October 19, 2017). Yet, the one streamflow measurement that Commission staff took on October 19, 2017, after this change occurred, indicated streamflows of only 2.67 mgd at the IIFS location. To date, despite continual community efforts since the beginning of October, the Hui is still aware of *no proof that WWC is complying* with the 2.9 mgd IIFS.

In sum, the Community Groups and OHA strongly object to WWC's flagrant, extended, and apparently still ongoing (absent proof that WWC ultimately bears the burden to provide) violations of the Waikapū Stream IIFS, as well as the Commission's less-than-urgent approach to enforcing the IIFS's legally binding requirement, halting clear violations, protecting community

[6] This coincided with a news report that WWC had cleared its South Waikapū intake of gravel and increased its diversions to 1.8 mgd. *See* http://www.mauinews.com/news/local-news/2017/09/after-the-flood-of-iao-valley/

members' water rights, and responding to their concerns and keeping them informed. Community members have spent considerable time and effort, shown extraordinary patience and restraint, and have tried everything (short of self-help) to constructively resolve this issue. The Commission ultimately must fulfill its public trust, modern-day "konohiki" responsibility to uphold its 2014 IIFS Order and the public trust.

While the Commission and stakeholders have acknowledged the value of settlements like the 2014 IIFS Order to resolve streamflow disputes, the Commission can undoubtedly appreciate that the viability of such agreements now and in the future critically depends on diligent compliance, monitoring, and enforcement. The Community Groups and OHA submit, and believe the Commission would agree, that the record of IIFS compliance for Waikapū and other Nā Wai 'Ehā streams falls woefully short in this regard.

The Community Groups and OHA understand that Commission staff is continuing to take occasional measurements of Waikapū Stream flows and is currently working on obtaining and installing real-time gaging on that stream and a few others across the state. While we appreciate these efforts, again, they still have not resolved whether the current IIFS violations have ceased, and more fundamentally, how the Commission can avoid similar situations in the future here and elsewhere.

Along these lines, the Community Groups and OHA offer several constructive recommendations:

Respect the IIFS as a Legally Binding, Bottom-Line Requirement

First, no one should need to be reminded that the IIFS is a legally binding mandate and "primary mechanism" to fulfill the Commission's public trust duties[7] and must be treated as such by diverters and above all by the Commission and its staff. While diverters are free to err in favor of restoring streamflows above the mandated IIFS (and in any event cannot divert any water that is not actually needed for reasonable-beneficial use), they are not at liberty to reduce streamflows below the IIFS. In short, the IIFS is "*an absolute minimum required under any circumstances*."[8]

Improve IIFS Monitoring and Reporting

Second, the Community Groups and OHA continue to emphasize the need for proper monitoring and reporting of IIFS compliance *now*, in every case where the Commission has established specific numeric IIFSs, as opposed to default "status quo" levels. The Community Groups and OHA appreciate the hard work of the Commission staff to conduct monitoring under

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[7] *In re Waiāhole Combined Contested Case Hr'g*, 94 Hawai'i 97, 148, 9 P.3d 409, 460 (2000).

[8] *Id.* at 156, 9 P.3d at 468 (emphasis added).

their time and resource constraints, yet such constraints must not be allowed to justify less than full compliance with the law. For example, if limited resources are an issue, then the Commission should more prudently allocate the burden of legal compliance toward the diverter, where it ultimately belongs. Specifically, the necessary gaging should be funded in part or full by the diverter, subject to verification by the Commission, rather than such basic compliance responsibilities being shouldered by Commission staff. Where violations or serious controversies are occurring, the diverter should be required to provide regular time-stamped pictures and other proof of compliance, rather than the burden of such reporting and proof falling on members of the public.

Indeed, in its 2010 Decision and Order in the original Nā Wai ʻEhā IIFS proceeding, the Commission made clear that "[n]ew diversion infrastructures and new gauges will have to be provided on all four streams," and that

> [i]nstallation and maintenance of stream gauges immediately below the main diversions identified in the IIFS *shall be the responsibility of the parties doing the diversions*, as part of their responsibilities to report on the amount of their diversions and to ensure that the IIFS below their diversions are met.[9]

To date, this requirement is still not being met. We request installation of real-time gauges on Waikapū and other Nā Wai ʻEhā Streams with numeric IIFSs, immediately.

Enforce the IIFS with Effective and Just Remedies

Third, commensurate with the IIFS bearing the full force of law, the Commission must address IIFS violations with more seriousness and urgency. Rather than allowing diverters to violate the IIFS at their convenience, through careless neglect or willful disregard, the Commission must ensure that diverters respect the IIFS as a bottom-line obligation (e.g., like paying taxes or reporting corporate financial information). Diverters must bear the responsibility to meet the IIFS under penalty of law and bear the burden to seek and justify any exceptions in advance, or any excuses for non-compliance after-the-fact. The Community Groups and OHA are aware that the Commission is currently considering rule changes to increase the levels of its enforcement penalties. Yet, we are not aware of a single instance of the Commission enforcing any IIFS violation, or even considering or mentioning the possibility of such enforcement with a diverter.

In engaging in IIFS enforcement more seriously, the Commission should also consider all just methods of enforcement in addition to penalties. As an example, in response to an extended period of IIFS non-compliance, particularly for irresponsible or willful violations like this one, the Commission should temporarily increase the IIFS to require the diverter to "make whole"

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[9] Findings of Fact, Conclusions of Law, and Decision and Order, filed on June 10, 2010, at 188 (Case No. CCH-MA06-01) (emphasis added).

other community and public users that it deprived. Thus, for example, where WWC filled its reservoir at the expense of the IIFS and downstream users, WWC should be required to reduce its diversions and/or release water from its reservoir under the temporarily increased IIFS to compensate for part or all of the water that it unlawfully diverted. While the Commission can discuss and decide among this and other enforcement options, it should be clear that the current ongoing practice of *no* enforcement at all provides *zero* incentive to comply and *zero* consequences for violations—and directly results in the poor compliance record seen today.

Engage and Communicate with Community Stakeholders in IIFS Compliance

Finally, the Community Groups and OHA emphasize the need for better consultation and communication with directly interested parties and community members with respect to IIFS implementation and enforcement. Particularly in time-sensitive situations where community members' legally protected water rights and cultural practices are being violated and cultivated crops are being threatened and damaged, the Commission must take the lead in responding and timely remedying the problem to maintain public order and confidence. The Commission should also provide community stakeholders regular and timely updates on progress, rather than forcing them to wait in the dark and repeatedly follow up, or find out later that the ball was dropped.

In general, the Commission should more productively engage community stakeholders such as the Community Groups and OHA as working *partners* in IIFS implementation. Nā Wai ʻEhā community members have generational ties to these communities and resources, as well as over a decade of successful work to establish these IIFSs, which should merit a certain level of trust and respect. As seen in this case, these community members are present and available "on the ground" in the community and are willing to go beyond the call to assist the Commission in IIFS monitoring and reporting. But the Commission must fulfill its part in seriously and effectively responding to such efforts and ensuring that the problem does not further devolve such that it undermines public confidence and compels further actions, including submitting letters like this.

Conclusion: Request for Consideration of This Letter at the Next Meeting

Thank you for your prompt attention to this matter. Given the long-standing nature of the problem and the critical point it has reached, *we respectfully request that the Commission include this letter on the agenda for its next meeting for discussion and necessary action,* including fining WWC for violating the Waikapū Stream IIFS and requiring the installation of real-time gauges for the Nā Wai ʻEhā IIFSs. Please feel free to contact us if you have any questions.

Very truly yours,

Isaac H. Moriwake
EARTHJUSTICE
Attorneys for Hui o Nā Wai ʻEhā &
Maui Tomorrow Foundation, Inc.

Pamela W. Bunn
ALSTON HUNT FLOYD & ING
Attorneys for Office of Hawaiian Affairs

Attachments: Exhibits 1 & 2
cc: CCH-MA06-01 service list (via U.S. mail)
Paul R. Mancini, Esq. (WWC)
David Schulmeister, Esq. (HC&S)
Caleb Rowe, Esq. (County of Maui)
Linda L.W. Chow, Esq. (Attorney General)

Pamela Bunn - Waikapū Stream IIFS Non Compliance (10-9-17)

From: Hui o Nā Wai ʻEhā <huionawai4@gmail.com>
To: Dean D <dean.d.uyeno@hawaii.gov>, <jeff.pearson@hawaii.gov>
Date: 10/9/2017 3:50 PM
Subject: Waikapū Stream IIFS Non Compliance (10-9-17)
Cc: Isaac Moriwake <imoriwake@earthjustice.org>, <kapuas@hawaii.edu>, Summer...

Aloha e Dean and Jeff,
since September 12, 2017, Waikapū kalo farmers and residents noticed a major drop in streamflow in the Waikapū Stream. They have noticed stream flows similar if not worse than it was prior the 2014 IIFS Releases (almost 2 years to the day). There is very little water flowing beyond the North Waikapū Kuleana ʻAuwai and at times, it seemed that there was more water flowing into the ʻauwai than in the stream. Kalo farmers modified the stone dam which had never had to be done before to allow more water to pass through.

Today, October 9, 2017, Hui o Nā Wai ʻEhā investigated this potential IIFS compliance issue by hiking up to the South Waikapū Dam Intake, Ditch and Reservoir #1. Upon arriving at the South Waikapū Ditch Return Gate which Wailuku Water Company is to provide sufficient return flow into the Waikapū Stream to meet the 2.9 mgd IIFS, it was observed that the sluice gate was completely shut, locked and that **NO (0%)** flow was returning to the Waikapū Stream below to meet the IIFS. Furthermore, the South Waikapū Intake Dam was diverting 100% of the Waikapū Stream and had no notch to allow passage of flow. The stream was dead between the Dam and Kalena Tributary. This means that the entire headwaters from the main part of the Waikapū Stream was 100% diverted and flowing to Reservoir #1. The only water in the Waikapū Stream flowing is from the Kalena tributary which is a very minimal flow at best.

Upon observing the WWC ditch flow gauge prior to the water dropping into Reservoir #1, it read 1.2 mgd.

Wailuku Water Company is not complying with the IIFS in Waikapū. There is no CWRM Staff gauge in Waikapū Stream to collect data since the flood of September 2016. This is a reoccurring trend in Waikapū and likely other streams (i.e. Waikapū below 2.9 mgd IIFS End of January 2016 - July 2016).

How is CWRM going to hold Wailuku Water Company accountable in these reoccurring situations of non-compliance. The law clearly defines that 2.9 mgd is to be in the Waikapū Stream at all times. We filed a complaint in August of 2016 around this exact same issue and in the response dated August 30, 2017, which we only received 2 weeks ago because it went to an old address on file, did not address the issue of non-compliance by Wailuku Water Company.

To render this situation, Hui o Nā Wai ʻEhā would like to kindly ask CWRM to address this issue with WWC immediately. Secondly, can Hui Leadership schedule a time soon for CWRM staff alongside to measure Waikapū Stream as to ensure that WWC is in compliance? Hui Leadership would like to be present as well. Furthermore, we would liketo engage with CWRM staff to address this archaic method of returning stream flow via a sluice gate and the lack of water passage over the

South Waikapū Dam Intake. WWC was to notch and allow water to pass by but there is no such evidence of this.

As mentioned numerous times, Hui o Nā Wai ‘Ehā is willing to work with CWRM on possible ways of addressing these issues. We have a wealth of knowledge of how these systems work and don't work and solutions to minimize constant bombardment of you folks which we know are understaffed.

Please advise ASAP as to how this current situation in Waikapū will be resolved. Pictures and video will be send immediately after this email. Mahalo nui.

Hōkūao Pellegrino (President)

Koa Hewahewa (Vice President)

Lucienne DeNaie (Secretary)

Lani Eckart-Dodd (Treasurer)

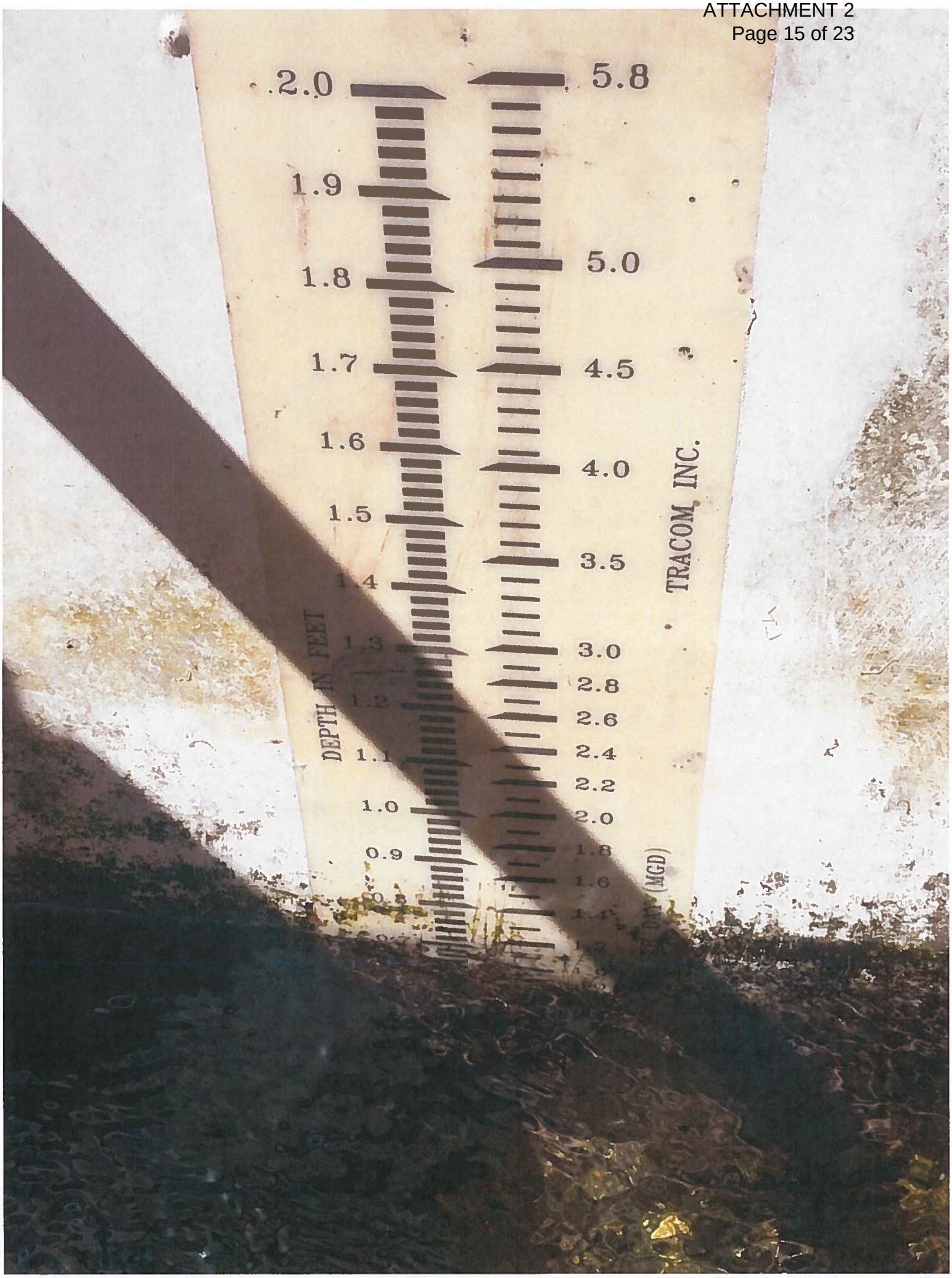
Hui o Nā Wai ‘Ehā
213 West Waikō Road
Wailuku, Hawai‘i 96793
Huionawai4@gmail.com
www.restorestreamflow.org
(808) 430-4534

Pamela Bunn - Pictures of South Waikapū Ditch Gate Release (10-9-17)

From: Hui o Nā Wai ‘Ehā <huionawai4@gmail.com>
To: Dean D <dean.d.uyeno@hawaii.gov>, <jeff.pearson@hawaii.gov>
Date: 10/9/2017 3:55 PM
Subject: Pictures of South Waikapū Ditch Gate Release (10-9-17)
Cc: Isaac Moriwake <imoriwake@earthjustice.org>, <kapuas@hawaii.edu>, Summer...
Attachments: 1.jpg; 2.jpg; 3.jpg; 4.jpg

Pictures dated 10-9-17 shows Wailuku Water Company releasing NO water back into the Waikapū Stream to comply with IIFS. Other photo shows 1.2 mgd flowing into Reservoir #1 from the South Waikapū Ditch.

Hui o Nā Wai ‘Ehā
213 West Waikō Road
Wailuku, Hawai‘i 96793
Huionawai4@gmail.com
(808) 430-4534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1.6
(MGD)
TRACOM, INC.

Pamela Bunn - Additional Photo (WWC Waikapū IIFS Violation 10-9-17)

From: Hui o Nā Wai ‘Ehā <huionawai4@gmail.com>
To: Dean D <dean.d.uyeno@hawaii.gov>, <jeff.pearson@hawaii.gov>
Date: 10/9/2017 11:23 PM
Subject: Additional Photo (WWC Waikapū IIFS Violation 10-9-17)
Cc: Isaac Moriwake <imoriwake@earthjustice.org>, <kapuas@hawaii.edu>, Summer...
Attachments: 1.1.jpg

Aloha e Dean and Jeff,
we wanted to share with you one more photo to show some perspectives that shutting the released flow in some respects had to have been deliberate. If you look at the middle of the sluice gate where the metal bar comes up, the wholes drilled in there are meant to be used in conjunction with the lock to adjust the release flow. Clearly you can see, it is shut completely and that they locked it at the highest hole not allowing for any flow to be released. This is wrong and violates the IIFS. Furthermore, we would like to reiterate that the amount of flow coming from Kalena Tributary has about a flowrate of about 1mgd. If Kalena is flowing at that capacity we are still short 1.9mgd.

We were taken back by the statement at the East Maui Hearing tonight that you called Avery and that he assured you that water was in the stream by the gauging area which as you said, doesn‘t exist anymore due to the 2016 flood. Taking his word over concrete evidence that we have documented is hurtful. No one ever said that there was no water in the stream, what we did say is that the stream is extremely low. People who live in the Waikapū Community for over 60 years and who have a keen knowledge of the characteristics of the stream know very well when something is not right. So when we investigated today, it was not a surprise at all to them that the sluice gate was shut off completely. If we never went up there to observe what was going on, who is to say that this wouldn‘t continue for months on end like we saw between the End of January 2016 to July 2016.

Calling Avery and asking him to "open" the sluice gate will still not satisfy the IIFS because there is no way of monitoring the flow. When will you and your staff come to Maui to enforce this ruling and hold WWC accountable? As mentioned in our last email, WWC has a track record of not complying, especially in Waikapū. You folks have collected and reported on that data. While we want this situation to be rendered immediately, we would like to ask that this is formally documented on the Commission side and that WWC receive a fine for this blatant violation. Waikapū Community members, kalo farmers, and Hui members are tired of these sort of shenanigans. Why is that amount even being diverted when the only users on that system are the South Waikapū Kuleana‘s which only have a certain amount that is drawn from the Reservoir and Mike Atherton who has already phased out most if not all of his diversified ag use on his property. We know he uses them for filling up small troughs for about 100 head of cattle but that is such a minimal use. The Reservoir is full to the brim and this concerns us as to what is going on here. Lastly, it should not be the responsibility of Hui o Nā Wai ‘Ehā to monitor our streams and IIFS, even though we do. It is the responsibility of the Commission Staff to ensure that WWC is not complying with the IIFS 24/7/365. Please advise as to what steps the Commission Staff will be taking on this important matter and the questions notated above.

na,
Hōkūao Pellegrino (President)

Koa Hewahewa (Vice President)

Lucienne DeNaie (Secretary)

Lani Eckhart-Dodd (Treasurer)

Hui o Nā Wai ‘Ehā
213 West Waikō Road
Wailuku, Hawai‘i 96793
Huionawai4@gmail.com
(808) 430-4534


Sluice Gate
Spillway
EXHIBIT 2
10/10/2017 5:55 PM


Spillway
Sluice Gate
10/10/2017 5:56 PM


10/10/2017 6:14 PM

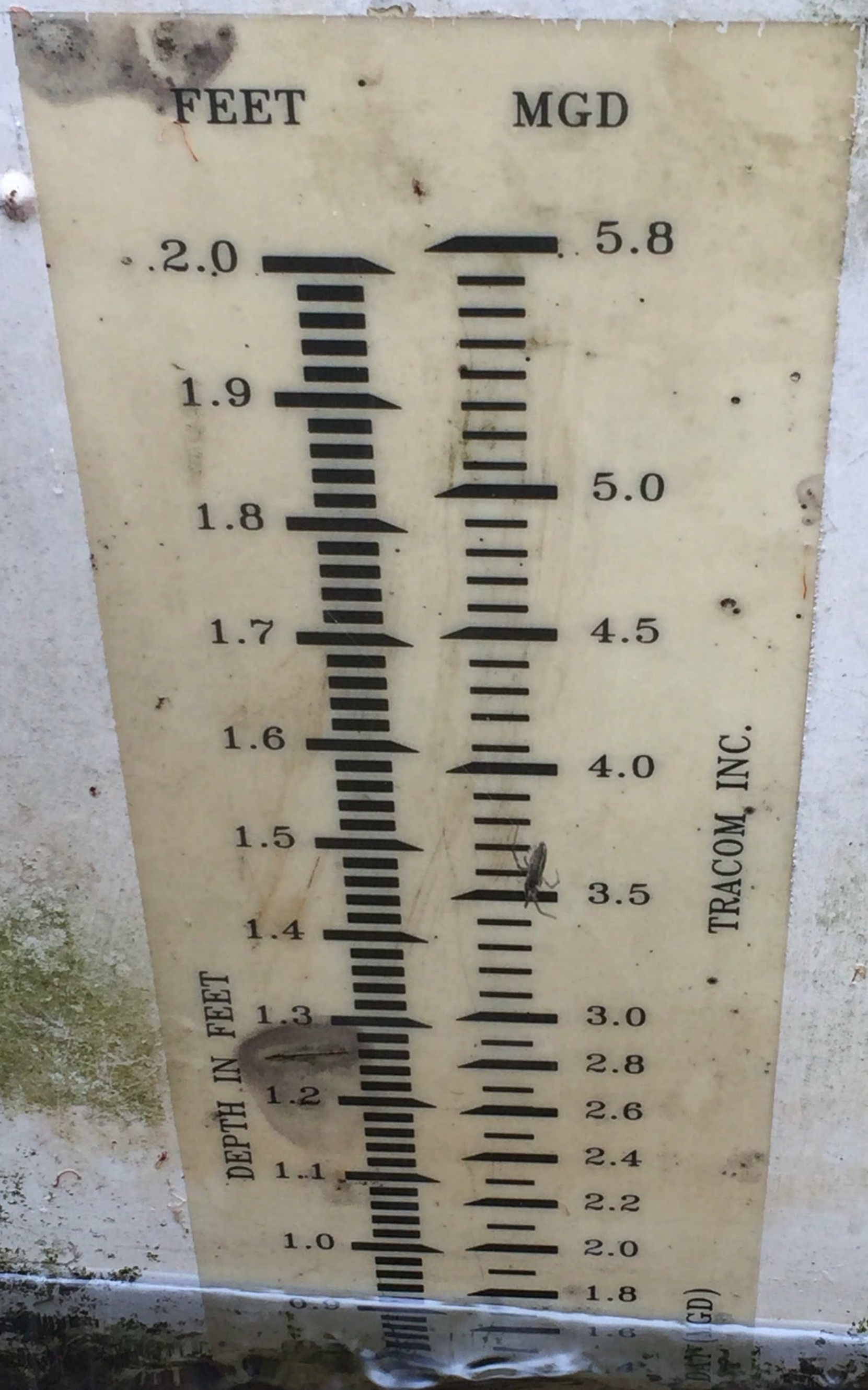

EXHIBIT 3

10/19/2017 5:04 PM

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, & Waikapū Streams, Maui.	)	Case No. CCH-MA15-01

CERTIFICATE OF SERVICE

On January 5, 2018, a copy of the foregoing document was served on the following parties by electronic service, as indicated below:

ELECTRONIC SERVICE

Name and Address	**Email Address**
Douglas Bell 1420 Honua Place Waikapu, HI 96793	sandi.doug@hawaiiantel.net
Doyle Betsill c/o Betsill Brothers P.O. Box 1451 Wailuku, HI 96793	teresa@bbcmaui.com
Francisco Cerizo P.O. Box 492 Wailuku, HI 96793	cerizof@gmail.com
Heinz Jung and Cecilia Chang P.O. Box 1211 Wailuku, HI 96793	cici.chang@hawaiiantel.net
Jordanella (Jorrie) Ciotti 484 Kalua Road Wailuku, HI 96793	jorrieciotti@gmail.com

Name and Address	Email Address
Fred Coffey 1271 Malaihi Road Wailuku, HI 96793	hawaii50peleke@yahoo.com
James Dodd P.O. Box 351 Wailuku, HI 96793	jimdodd47@gmail.com
Kathy De Hart P.O. Box 1574 Wailuku, HI 96793	kdehart17@gmail.com
John V. & Rose Marie H. Duey Hooululahui LLC Nani Santos 575 A Iao Valley Rd. Wailuku, HI 96793	jduey@maui.net nanisantos808@gmail.com
Stanley Faustino 384 Waihee Valley Road Wailuku, HI 96793	kanealoha808@gmail.com
William Freitas 2644 Kahekili Highway Wailuku, HI 96793	kapunafarms@gmail.com
Diannah Goo 2120 C Kahekili Hwy. Wailuku, HI 96793	ag2517@aol.com
Nicholas Harders Karl & Lee Ann Harders 1422 Nuna Pl. Wailuku, HI 96793	waikapu@me.com
Theodore & Zelie Harders T&Z Harders FAM LTD PTNSHP 1415 Kilohi St. Wailuku, HI 96793	
Greg Ibara 227 Kawaipuna Street Wailuku, HI 96793	gregibara56@gmail.com

Name and Address	Email Address
Evelyn Kamasaki Cynthia Ann McCarthy Claire S. Kamasaki 1550 Nukuna Place Wailuku, HI 96793	cmcmaui@live.com
Charlene E. and Jacob H. Kana, Sr. P.O. Box 292 Wailuku, HI 96793	char1151@hawaii.rr.com
Kimberly Lozano P.O. Box 2082 Wailuku, HI 96793	pauahi808@aol.com
Renee Molina P.O. Box 1746 Wailuku, HI 96793	myoheo@yahoo.com
Douglas Myers Alex Buttaro 1299 Malaihi Road Wailuku, HI 96793	upperwaiehu@yahoo.com
Lorrin Pang 166 River Road Wailuku, HI 96793	pangk005@hawaii.rr.com
Victor and Wallette Pellegrino 1420 Kilohi Street Wailuku, HI 96793	hokuao.pellegrino@gmail.com
L. Ishikawa Piko Ao, LLC 2839 Kalialani Circle Pukalani, HI 96768	lorilei@hawaii.edu
Michael Rodrigues 2518 W. Main Street Wailuku, HI 96793	mikerodmaui@yahoo.com
Burt Sakata 107 Waihee Valley Rd. Wailuku, HI 96793	waihee89@yahoo.com

Name and Address	Email Address
Bryan Sarasin, Sr. c/o Bryan Sarasin, Jr. P.O. Box 218 Wailuku, HI 96793	mauifishfarm@hawaiiantel.net
Duke & Jean Sevilla & Christina Smith 702 Kaae Road Wailuku, HI 96793	sevillad001@hawaii.rr.com
Jeff and Ramona Lei Smith P.O. Box 592 Wailuku, HI 96793	ohianui.ohana@gmail.com
Murray and Carol Smith P.O. Box 11255 Lahaina, HI 96761	murray@jps.net
Crystal Smythe John Minamina Bro 727 Wainee Street Lahaina, HI 96761	cytl@maui.net
Clayton Suzuki Linda Kadosaki Reed Suzuki Scott Suzuki P.O. Box 2577 Wailuku, HI 96793	csuzuki@wailukuwater.com
John Varel 191 Waihee Valley Road Wailuku, HI 96793	jvarel@fusionstorm.com
Michele and Leslie Vida, Jr. 135 Pilikana Place Wailuku, HI 96793	mikievida@hotmail.com
Leslie Vida, Sr. c/o Donna Vida 115 Pilikana Street Wailuku, HI 96793	dmlavida@yahoo.com

Name and Address	Email Address
Roger Yamaoka Kevin Yamaoka 1295 Old Waikapu Road Wailuku, HI 96793	rryamaoka@aol.com kty@hawaii.rr.com
Caleb Rowe, Esq. Kristin Tarnstrom, Esq. County of Maui Department of the Corporation Counsel 200 South High Street Wailuku, HI 96793 (County of Maui, Department of Water Supply)	caleb.rowe@co.maui.hi.us kristin.tarnstrom@co.maui.hi.us susan.pacheco@co.maui.hi.us
Colin J. Lau, Esq. Russell Kumabe Holly McEldowney 465 S. King Street, Room 300 Honolulu, HI 96813 (Department of Land and Natural Resources, Division of State Parks)	colin.j.lau@hawaii.gov russell.p.kumabe@hawaii.gov holly.mceldowney@hawaii.gov
Yvonne Izu, Esq. Garret Hew Wayne E. Costa, Jr., Esq. Kris N. Nakagawa, Esq. Morihara Lau & Fong LLP 400 Davies Pacific Center 841 Bishop Street Honolulu, HI 96813 (Hawaiian Commercial & Sugar Co.)	yizu@moriharagroup.com ghew@hcsugar.com wcosta@moriharagroup.com knakagawa@moriharagroup.com
Tina Aiu, Esq. Oahu Island Director Scott Fisher Hawaiian Islands Land Trust, P.O. Box 965 Wailuku, HI 96793	christina@hilt.org scott@hilt.org
Avery & Mary Chumbley 363 West Waiko Road Wailuku, HI 96793 (Makani Olu Partners LLC)	abc@aloha.net

Name and Address	Email Address
Jodi Yamamoto, Esq. Wil Yamamoto, Esq. Yamamoto Caliboso 1099 Alakea Street, Suite 2100 Honolulu, HI 96813 (MMK Maui, LP, The King Kamehameha Golf Club, Kahili Golf Course)	jyamamoto@ychawaii.com wyamamoto@ychawaii.com
Pamela Bunn, Esq. Alston, Hunt, Floyd & Ing 1001 Bishop Street, Suite 1800 Honolulu, HI 96813 (Office of Hawaiian Affairs)	pbunn@ahfi.com
Craig Nakamura, Esq. Catherine L.M. Hall, Esq. Carlsmith Ball LLP 2200 Main Street, Suite 400 Wailuku, HI 96793 (Wahi Hoomalu Limited Partnership)	cnakamura@carlsmith.com chall@carlsmith.com
Peter A. Horovitz, Esq. Kristine Tsukiyama, Esq. Albert Boyce Merchant Horovitz LLLC 2145 Wells Street, Suite 303 Wailuku, HI 96793 (Waikapu Properties, LLC and MTP Operating Company, LLC)	pah@mhmaui.com kkt@mhmaui.com albertboyce@gmail.com
Brian Kang, Esq. Emi L.M. Kaimuloa Watanabe Ing, LLP First Hawaiian Center 999 Bishop Street, 23rd Floor Honolulu, HI 96813 (Wailuku Country Estates Irrigation Company)	bkang@wik.com ekaimuloa@wik.com

Name and Address	**Email Address**
Paul R. Mancini, Esq. James W. Geiger, Esq. Avery Chumbley Mancini, Welch, & Geiger LLP RSK Building 305 Wakea Avenue, Suite 200 Kahului, HI 96732 (Wailuku Water Company, LLC)	pmancini@mrwlaw.com jgeiger@mrwlaw.com
Tim Mayer, Ph.D. Supervisory Hydrologist Water Resources Branch US Fish and Wildlife Service 911 NE 11th Avenue Portland, OR 97232-4181	tim_mayer@fws.gov
Lawrence H. Miike Hearings Officer 1151 Punchbowl Street, Room 227 Honolulu, HI 96813	lhmiike@hawaii.rr.com
Linda L.W. Chow, Esq. Deputy Attorney General 465 S. King Street, Room 300 Honolulu, HI 96813	linda.l.chow@hawaii.gov

DATED: Honolulu, Hawai‘i, January 5, 2018.

ISAAC H. MORIWAKE
SUMMER KUPAU-ODO

Attorneys for HUI O NĀ WAI ‘EHĀ and MAUI TOMORROW FOUNDATION, INC.