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BEFORE THE 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 and Waikapū Streams, Maui	Case No. CCH-MA15-01 **OFFICE OF HAWAIIAN AFFAIRS' (1) EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 1, 2017 and (2) JOINDER IN HUI O NĀ WAI 'EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON NOVEMBER 1, 2017**; CERTIFICATE OF SERVICE

OFFICE OF HAWAIIAN AFFAIRS' (1) EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 1, 2017 and (2) JOINDER IN HUI O NĀ WAI 'EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON NOVEMBER 1, 2017

Pursuant to Minute Order No. 12, dated November 1, 2017, and HRS § 91-11, Intervenor Office of Hawaiian Affairs ("OHA"), by and through its undersigned counsel, hereby

respectfully submits its Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on November 1, 2017 ("Proposed Decision") and joins in Petitioners Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc.'s Exceptions to the Proposed Decision ("Community Groups' Exceptions"), some of which are highlighted herein and all of which are incorporated herein by reference.[1]

The Proposed Decision represents the commitment of untold effort, time, and resources by the Hearings Officer, the Commission and its staff, and the Parties. More fundamentally, this proceeding, now in its thirteenth year, has required extraordinary patience and inspirational perseverance from the communities of Nā Wai 'Ehā, who have been deprived for generations of the right to practice their culture by the diversion of the stream flows that once made Nā Wai 'Ehā the most abundant area on Maui with one of the largest populations. See FOF 264.

The Hearings Officer has done a remarkable job in digesting and synthesizing the voluminous evidence in a complex, multi-faceted proceeding, and OHA is deeply appreciative and respectful of the tireless dedication with which he has approached this herculean task. Unfortunately, despite that dedication, there are several fundamental legal errors that must be corrected before the Proposed Decision could serve as a template for comprehensive water management consistent with the public trust. OHA urges the Commission to fulfill its role as the primary guardian of public rights under the public trust by correcting these legal errors now, in its Final Decision, rather than compounding the delay by requiring the Hawai'i Supreme Court *again* to rule on well-settled legal principles and remand the case to the Commission years from

[1] Petitioners Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. are hereinafter referred to as the "Community Groups" and cited as "Hui/MTF." Hui o Nā Wai 'Ehā's, Maui Tomorrow Foundation, Inc.'s, and Office of Hawaiian Affairs' Joint Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on February 17, 2017 is referred to and cited as "Hui/MTF-OHAs' Joint FOF, COL, and D&O." Unless otherwise indicated, citations to "FOF" or "COL" are to the proposed findings of fact or proposed conclusions of law in the Proposed Decision.

now to correct the errors. The Communities of Nā Wai 'Ehā have waited long enough, and deserve no less.

I. THE PROPOSED DECISION FAILS TO PROTECT THE RIGHTS OF NATIVE HAWAIIANS TO ENGAGE IN TRADITIONAL AND CUSTOMARY PRACTICES

A. The Proposed Decision Would Erroneously Impose A Legally Unsupported Limitation On The Exercise of Traditional and Customary Native Hawaiian Rights

The Proposed Decision appears to give long-overdue recognition to the exercise of the traditional and customary Native Hawaiian ("T&C") right to cultivate kalo, and OHA wholeheartedly endorses the prioritization of permits for T&C kalo cultivation ("Category 1") over permits for existing uses and the exercise of appurtenant rights for non-T&C purposes[2] ("Category 2") and new uses ("Category 3"). *See* COLs 199-202. The appearance of protection for T&C rights, unfortunately, is not the reality. In reality, notwithstanding that "the rights of native Hawaiians are a matter of great public concern in Hawai'i"[3], or that they enjoy constitutional,[4] statutory,[5] and common law[6] protection, or that their preservation was the "original intent" of the public trust,[7] the Proposed Decision would undermine and severely ***diminish*** protection for ***all*** T&C rights by redefining and limiting such rights only to individuals "who can personally trace their practices in the subject area to a period prior to November 25, 1892," COL 28 (emphasis in original), *i.e.*, those who can demonstrate that, prior to 1892, their

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[2] The Proposed Decision appropriately distinguishes between T&C rights to cultivate kalo and appurtenant rights (particularly those exercised for non-T&C purposes). *See* COLs 87-89.

[3] *Pele Defense Fund v. Paty*, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992) ("*PDF*").

[4] *See* Haw. Const. art. XII, § 7.

[5] *See, e.g.*, HRS § 7-1; HRS §§ 174C-2(c), -3, -101(c).

[6] *See, e.g., Ka Pa'akai o Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

[7] *In re Waiāhole Combined Contested Case Hr'g.*, 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000) ("*Waiāhole I*").

direct ancestors engaged in the same practice in the same location.[8] Nothing in Hawai'i's constitution, statutes, or legal precedents requires an ahupua'a tenant seeking to exercise his or her T&C right to cultivate kalo to show that his or her direct ancestors cultivated kalo in the same location prior to November 1892. All that must be shown is that the traditional and customary practice of kalo cultivation was established in the ahupua'a comprising Nā Wai 'Ehā prior to November 1892, which is both undisputed and undisputable. *See, e.g., Peck v. Bailey,* 8 Haw. 658, 673 (Hawai'i King. 1867) ("The original purpose of these water courses [in Wailuku] was to supply kalo patches, and the intention of the konohiki must have been to give all the kalo lands on this Ahupuaa rights of water at all times when needed").

The effect of imposing this extra-legal restriction is not hypothetical; the Proposed Decision would recognize T&C rights with respect to only 13 (***less than one third***) of the 40 Surface Water Use Permit Applications ("SWUPAs") submitted by Native Hawaiian applicants who established their T&C right to cultivate kalo under current Hawai'i law. *Compare* Proposed Decision, Table 2 (Category 1 permits) with Hui/MTF-OHA Joint Proposed FOF, COL, and D&O, Table 3. More than two thirds of those applicants would effectively be denied sufficient water to exercise their T&C rights to cultivate kalo by imposition of the imagined requirement of a direct ancestral connection to the land on which they seek to do so.[9] *Id.* And this requirement

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[8] *See* COL 27 (rejecting Hui/MTF-OHA Proposed COL 51, which is a correct statement of the law). *See also* COLs 90(a), 200(a).

[9] The restriction is not only contrary to Hawai'i law as explained below, it also appears to be arbitrarily applied. Perhaps the most glaring example is Kenneth Kahalekai (SWUPA 2249) and his daughter Kau'i Kahalekai (SWUPA 2312). The Kahalekai 'ohana are tenants of the ahupua'a of Waihe'e who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, Hui/MTF-OHA Joint FOF, COL, and D&O, COL B-278, and Kau'i Kahalekai now cares for some of the loi that Kenneth Kahalekai previously farmed, *id.*, COL B-276. Although the Proposed Decision recognizes that Kenneth and Kau'i Kahalekai are father and daughter, COL 234(a), it would award only Kau'i Kahalekai, but *not* Kenneth Kahalekai, a category 1 permit based on T&C rights, Proposed Decision, Table 2. The Proposed Decision does not explain how a daughter, but not her father, could have a direct ancestral connection to the 'ohana land.

is not limited to the T&C right to cultivate kalo, but would extend to other T&C rights as well.[10] Imposing the restriction would thus plainly violate the Commission's "affirmative duty to . . . preserve and protect traditional and customary native Hawaiian rights," *In re 'Īao Ground Water Mgm't Area*, 128 Hawai'i 228, 247, 287 P.3d 129, 148 (2012) ("*Nā Wai 'Ehā*") (citation omitted), and would do so notwithstanding the ***undisputed*** findings of fact regarding the integral nature of kalo cultivation to the cultural practices of Native Hawaiians and the importance of the exercise of T&C rights in preserving Hawaiian culture, *see, e.g.*, FOFs 276-288.

None of the cases cited in the Proposed Decision, *see* COL 28.a., supports limiting T&C rights to Native Hawaiians who are not only ahupua'a tenants, but whose ancestors were tenants of the same ahupua'a prior to 1892. *Kalipi v. Hawaiian Trust Company, Ltd., et al.*, 66 Haw. 1, 656 P.2d 745 (1982), was a case of first impression interpreting the gathering rights set forth in HRS § 7-1. The Hawai'i Supreme Court examined, in historical context, the meaning of "ahupua'a tenants" as used in article XII, section 7 of the Hawai'i constitution,[11] which the Court interpreted as imposing an obligation on it "to preserve and enforce such traditional rights" and which therefore "must guide our determinations." *Id.* at 4-5, 656 P.2d 748. The Court held that only "lawful occupants" of the ahupua'a, *i.e.*, "persons residing within the ahupua'a within which they seek to exercise gathering rights," were ahupua'a tenants entitled to enter

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[10] The right to gather o'opū from Waihe'e River, for example, would be restricted to those Native Hawaiians whose direct ancestors gathered from Waihe'e River prior to 1892, but could not be exercised by Native Hawaiian ahupua'a tenants whose direct ancestors moved from another ahupua'a and began gathering in Waihe'e River in 1900, more than five generations ago. COL 28 and fn.35.

[11] 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 right of the State to regulate such rights.

Haw. Const. art. XII, § 7 (emphasis added).

undeveloped lands within the ahupua'a to gather the items enumerated in HRS § 7-1, *id.* at 7, 656 P.2d at 749, ***without*** reference to ancestral ties to the ahupua'a.

That was still the definition of "ahupua'a tenant" when the Water Code was enacted in 1987 and provided, again without reference to where one's ancestors lived, that:

> Traditional and customary rights of ***ahupua'a tenants*** who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. ***Such traditional and customary rights shall include, but not be 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) (emphasis added).

Subsequently, in *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992) ("*PDF*") and *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("*PASH*"), the Hawai'i Supreme Court reaffirmed *Kalipi* and further explored the contours of the right of Native Hawaiians to go on private property to engage in subsistence, cultural or religious practices. The Court ***did not***, in either case, change what it meant to be an "ahupua'a tenant." In *PDF*, the Court noted that, "although 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. . . . [T]hese rights are associated with ***residency*** within a particular ahupua'a." *Id.*, 73 Haw. at 619 n.33, 837 P.2d at 1271 n.33 (emphasis added) (quoting 1 Proceedings of the Constitutional Convention of Hawai'i of 1078, at 640). And *PASH* not only did not restrict the exercise of T&C rights to those with a direct ancestral connection to the location in which the rights are exercised, it expressly did not decide even "(1) 'whether descendants of citizens of the Kingdom of Hawai'i who *did not* inhabit the islands prior to 1778 may also assert customary and traditional rights[;]' and (2) 'whether 'non-Hawaiian' members of an 'ohana' may legitimately claim native Hawaiian rights.'" *State v. Hanapi*, 89 Hawai'i at 186

n. 8, 970 P.2d at 494 n. 8 (1999) (quoting *PASH*, 79 Hawai'i at 449 n. 41, 903 P.2d at 1270 n. 41 (emphasis in original)).

The Proposed Decision also relies on criminal cases in which the Hawai'i Supreme Court considered the circumstances under which criminal defendants could assert T&C rights as a defense to criminal charges, COLs 25, 26, 28.a.4, circumstances obviously not at issue here. And even in those cases, the Court ***did not*** adopt a limitation of T&C rights to only those who can show a direct ancestral connection to the land on which the rights are exercised.

State v. Hanapi, for example, was an appeal from a criminal trespass conviction in which the defendant had asserted a constitutionally-protected Native Hawaiian right to be on his neighbor's land. The Hawai'i Supreme Court held that, to establish that his or her conduct was constitutionally privileged, a criminal defendant has the burden to show, at a minimum: (1) "he or she must qualify as a 'native Hawaiian' within the guidelines set out in *PASH*" (i.e., "descendants of native Hawaiians who inhabited the islands prior to 1778 . . . regardless of their blood quantum"[12]); (2) "that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice"; and (3) "the conduct must occur on undeveloped property." *Hanapi*, 89 Hawai'i at 185-86, 970 P.2d at 493-94. Notably, the *Hanapi* Court ***did not*** require a criminal defendant asserting privileged T&C conduct to prove that his or her ancestors engaged in the same practice on the same land prior to 1892.

Nor did the Court adopt that requirement in *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), on which the Proposed Decision relies. *See* COL 26. In that case, the Court "pick[ed] up where *Hanapi* left off," by articulating the analysis required once a defendant has made the *Hanapi* minimum showing. *Pratt*, 127 Hawai'i at 207, 277 P.3d at 301. The defendant appealed his conviction for residing in a closed area of Na Pali State Park, conduct he claimed was

[12] *PASH*, 79 Hawai'i at 449, 903 P.2d at 1270.

constitutionally privileged as a Native Hawaiian practice. The portion of the case cited in COL 26 is not a holding of the Court, but rather testimony of the Defendant's expert witness, Dr. Davianna McGregor, who had developed a list of the elements of traditional and customary Native Hawaiian practices, including that "the practitioner is connected to the location of the practice, either through a family tradition or because that was the location of the practitioner's education." *Id.* at 209, 277 P.3d at 303. The "connection" Dr. McGregor suggested was ***not*** limited to an ancestral connection going back to 1892 or earlier, and in the context of a Native Hawaiian seeking to grow kalo on his or her own land the "connection" between the practitioner and the location of the practice is patently obvious. In any event, the Hawai'i Supreme Court ***did not*** adopt Dr. McGregor's analysis; instead, the Court held that after the *Hanapi* showing is made, the trial court must balance the interests of the State and the Defendant, considering the totality of the circumstances. *Id.* at 213-218, 277 P.3d at 307-312.

Limiting T&C rights to Native Hawaiians who can show that their direct ancestors engaged in the same practice in the same location prior to 1892 not only lacks ***any*** support in Hawai'i law, it lacks any historical basis. The Proposed Decision posits a history where Native Hawaiians were not free to move from one ahupua'a to another without giving up their ability to sustain themselves physically and spiritually by growing kalo, gathering, and engaging in other traditional and customary practices. Historically, however, Native Hawaiian tenants "were not 'serfs' tied to the land by any particular obligation to the landlord, but were free to leave at any time and begin their efforts anew in virtually any uncultivated area." *Reppun v. Board of Water Supply*, 65 Haw. 531, 541, 656 P.2d 57, 65 (1982) (citation omitted). The Proposed Decision cites no historical evidence that so much as suggests that, when Native Hawaiians "beg[a]n their efforts anew" in a different ahupua'a, they were prohibited from engaging in the same traditional and customary practices as the other tenants of that ahupua'a. And just as there is no historical

basis for the proposition that any Native Hawaiian who no longer resides on his or her ancestral lands has no T&C rights, there is no present day justification for stripping Native Hawaiians of the ability to practice their culture if they move from place to place. Adopting the Proposed Decision's erroneous interpretation of T&C rights is irreconcilable with the Commission's constitutional duty to "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." Haw. Const. art. XII, §7.

The Commission should fulfill its constitutional obligation and affirmative duty to preserve and protect traditional and customary native Hawaiian rights by (1) deleting COLs 25 - 28 (which COLs should be replaced by Hui/MTF-OHA proposed COLs 36-52) as well as COLs 90(a) and 200(a); and (2) awarding "Category 1" permits to the Native Hawaiian applicants who are ahupua'a tenants and seek water to grow kalo on their land, as identified in Table 3 to Community Groups' Exceptions.[13] [14] These applicants satisfied every requirement for exercising their T&C rights to cultivate kalo that has been adopted either legislatively, *see* HRS §§ 1-1, 174C-101(d), or judicially, *see* cases cited *supra*.

B. The Proposed Decision Does Not Restore Streamflow to the Extent Feasible to Adequately Protect T&C Rights

The insufficiency of the IIFS recommended in the Proposed Decision has been described in detail in the Community Groups' Exceptions, *id.*, Section I, and will not be reiterated here. It does bear repeating, though, that IIFS set at the minimum (Q99) natural low flows fail to

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[13] The water allocations to T&C kalo growers in table 3 do not reflect the 1-acre limitation on T&C kalo cultivation that would be imposed on a few (but not all) T&C applicants by the Proposed Decision. *See* COL 272.p.-s. As set forth in the Community Groups' Exceptions, that limitation is arbitrary, lacks any legal or historical basis, and further diminishes T&C rights. *Id.*, Section II.A.2.

[14] For the reasons stated in Section II.C. of the Community Groups' Exceptions, the resulting increase in Category 1 permits should be partially offset by reclassifying the County of Maui's Category 1 permit for 3.2 mgd to a Category 2 permit.

adequately protect T&C rights as required by the Code. *See, e.g.*, HRS § 174C-2(c), -101(c). Exacerbating the lack of sufficient flows, the IIFS not only fail to protect T&C kalo growers downstream from the Companies' diversions, but the Proposed Decision would delegate the protection of those users to WWC and HC&S, the very companies which continued to divert and squander the public trust resources of Nā Wai 'Ehā rather than leave water in the streams for public trust purposes, and one of which, even now, brazenly refuses to comply with the IIFS.[15] *See, e.g.,* D&O at 526, ¶ 40 ("WWC and to a lesser extent, HC&S, must [maintain] a balance between upstream and downstream users while meeting the IIFS for instream purposes"). Of course, conveyance of flows to downstream users ***is itself an "instream use" to be protected by the IIFS***, HRS § 174C-3, and those downstream T&C kalo growers and appurtenant rights holders should have to rely on the good will of the very plantation companies which fought the Nā Wai 'Ehā communities so long and hard to retain control of these public trust waters.

Greater protection for T&C rights to fish, gather, engage in spiritual practices and cultivate kalo is demonstrably feasible, by adopting the adjustable IIFS proposed by the Community Groups and OHA and eliminating the obvious overallocations. Because it is feasible to provide greater protection for T&C rights, the Commission is obligated to do so. *See Ka Pa'akai, supra,* 94 Hawai`i at 35, 7 P.3d at 1072 (The Hawai'i Supreme Court "has made clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible") (citing *PASH,* 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43)). Even the Proposed Decision recognizes protection of T&C rights is "required to the extent feasible." *Id.* at 262, n.31 (citing *Ka Pa'akai*, 94 Hawai`i at 46, 7 P.3d at 1083).

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[15] *See* Hui/MTF-OHA's letter dated November 6, 2017, which was a topic of discussion at the December 19, 2017 Commission meeting.

Moreover, State agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Ka Pa'akai*, 94 Hawai`i at 46, 7 P.3d at 1083 (citation omitted). The Hawai'i Supreme Court, in *Ka Pa'akai*, explained that "the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection," *id.* at 1087, 7 P.3d at 50, and vacated an agency decision in which the agency "made no specific findings or conclusions regarding the *effects on* or the *impairment of* any Article XII, section 7 uses, or the *feasibility of the protection* of those uses." *Id.* at 1086, 7 P.3d at 49 (emphases in original). *See also, Wai`ola,* 103 Hawai`i at 432, 83 P.3d at 695 (vacating decision where Commission failed to render findings and conclusions regarding impairment of public trust use, which failure "violated its public trust duty to protect [the public trust use] in balancing the various competing interests in the state water resources trust").

Yet, even after the Hawai'i Supreme Court vacated the 2010 Decision and remanded to the Commission for, among other things, "further consideration of the effect the IIFS will have on native Hawaiian practices, as well as the feasibility of protecting the practices," *Nā Wai 'Ehā,* 128 Hawai'i at 249, 287 P.3d at 150, the Proposed Decision recommends IIFS that do not protect public trust instream and T&C uses to the extent feasible. This can be corrected by adopting the IIFS proposed by the Community Groups and OHA, which will provide higher instream flows during high streamflow conditions, and temporarily decrease the IIFS to allow some diversion when streamflow is below a threshold low flow. *See* Community Groups' Exceptions, Section I.C.

III. THE PROPOSED DECISION WOULD ERRONEOUSLY RECOGNIZE APPURTENANT RIGHTS THAT HAVE BEEN EXTINGUISHED AS A MATTER OF HAWAI'I LAW

The Proposed Decision would erroneously conclude that the Hawai'i Supreme Court's

decision in *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982) (*cert. denied, Board of Water Supply v. Nakata,* 471 U.S. 1014, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985)), was implicitly overruled or otherwise altered by the 1978 constitutional amendments and/or 1987 State Water Code, HRS Chapter 174C (the "Code") and therefore the Commission is free to ignore this binding legal precedent. *See* COLs 75-86. *Reppun* has been the law of Hawai'i for more than three decades, and has not been altered in any way by the Hawai'i Constitution or the Code. The Proposed Decision's rationale will not withstand appeal, but will add years of delay during which persons who knowingly purchased property without appurtenant rights will enjoy a windfall at the expense of public trust purposes.

In 1982, four years ***after*** the Hawai'i Constitution was amended to include, *inter alia*, article XI, section 7, the Hawai'i Supreme Court unambiguously ruled that any attempt by a grantor to reserve appurtenant rights when conveying the property to which the rights attached had the effect of extinguishing the appurtenant rights. *Reppun*, 65 Haw. at 552, 656 P.2d at 71. In *Reppun*, the land on which the plaintiff farmers cultivated kalo had been conveyed by deeds in which the Grantor purported to reserve all water rights; when the plaintiffs sought to enjoin BWS's diversions, BWS argued that it had purchased the water rights from Plaintiffs' Grantor. *Id.* at 535-36, 656 P.2d at 61-62. The trial court, relying on *McBryde v. Robinson,* 54 Haw. 174, 504 P.2d 1330 (1973) (*subs. history omitted*), held that Plaintiffs' water rights could not be severed from the land; the reservations and subsequent conveyances of the water rights to BWS were thus nullities. *Reppun*, 65 Haw. at 536, 656 P.2d at 62. The Hawai'i Supreme Court agreed with the trial court with respect to riparian rights: "the riparian rights purportedly reserved in the plaintiff's [sic – plaintiffs'] respective deeds were statutory creations. They were therefore not subject to reservation by deed; they were not the grantor's to reserve." *Id.* at 551, 656 P.2d at 70.

With respect to appurtenant rights, however, the *Reppun* Court reversed the trial court. Although it agreed that "the rule posited in *McBryde* prevents the effective severance or transfer of appurtenant water rights," the *Reppun* Court held that the trial court "erred in holding that the plaintiffs' lands retained appurtenant rights, inasmuch as ***they were effectively extinguished by the attempted reservation of such rights***." *Reppun,* 65 Haw. at 552, 656 P.2d at 71 (emphasis added). The Court explained that,

> while no appurtenant rights were effectively transferred in this case, the deed that attempted to reserve such rights had the effect of extinguishing them. For while easements appurtenant may not be utilized for other than the dominant estate, ***"[t]here 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]."***
>
> There appears to be no question here that the plaintiffs' grantors, in attempting to reserve the water rights to themselves in spite of the transfer of the lands, intended to extinguish those rights which would otherwise have attached to plaintiffs' lands. While the nature of the water rights involved necessarily precluded the former, ***nothing would preclude the giving of effect to the latter.***

Id. (emphases added, brackets in original, citation omitted).

The Proposed Decision concludes that "the 1978 constitutional amendments and the 1987 State Water Code now provide appurtenant rights with constitutional and statutory bases, respectively, and appurtenant rights can no longer be extinguished," COL 77, and that "the 1978 constitutional amendment trumps ambiguous decisional law" so *Reppun's* holding does not apply to any deed reservation post-dating 1978, COL 84. There are at least two flaws in that reasoning. As an initial matter, there is absolutely nothing ambiguous about *Reppun's* holding—it could not be clearer. More significantly, the Proposed Decision reflects a fundamental legal misunderstanding. Neither article XI, section 7 of the Hawai'i Constitution, nor anything in the Code, affects or alters the Hawai'i Supreme Court's holding in *Reppun* in any way, or through some kind of alchemy changes the common law basis for appurtenant rights to a constitutional or statutory basis.

The *Reppun* Court was obviously aware of article XI, section 7,[16] yet did not consider it relevant to its holding regarding the extinguishment of appurtenant rights; specifically, the Court did not limit its holding to pre-1978 deed reservations. The Court had no reason to discuss article XI, section 7 in connection with its appurtenant rights holding, because the provision has no bearing on the effect of a deed between private parties reserving appurtenant rights, which was the issue before the Court in *Reppun*.

Article XI, section 7 provides, in pertinent part:

> ***The legislature shall provide for a water resources agency which, as provided by law, shall*** set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; ***establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses*** and establish procedures for regulating all uses of Hawaii's water resources.

Const. Art. X1, § 7 (emphases added). Thus, by its plain language, Article XI, section 7 describes what the new water resources agency to be established by the Legislature can and cannot do, and prevents the ***Commission*** from eliminating appurtenant rights (or existing correlative or riparian uses) in the course of "establish[ing] criteria for water use priorities." The directive that "appurtenant rights and existing correlative and riparian uses" are to be "assured" is a mandate that those rights and uses be "grandfathered" in the framework of the new agency's creation of the mandated statutory water regime. The *Reppun* Court had no reason to discuss article XI, section 7 in its discussion of the effect of deed reservations, because that provision does not purport to (and could not) affect what ***private parties*** do in their deeds conveying land, which is what the Court addressed in concluding that "***nothing*** would preclude the giving of effect to" the intent of private parties "to extinguish those rights which would otherwise have attached to [transferred] lands." *Reppun,* 65 Haw. at 552, 656 P.2d at 71 (emphasis added).

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[16] *See Reppun*, 65 Haw. at 561, n.22, 656 P.2d at 76, n.22 (citing article XI, section 7's reference to "beneficial and reasonable uses").

Nor does the Code prohibit private parties from extinguishing appurtenant rights by deed. When the Legislature enacted the Code it was well aware of *Reppun* but nonetheless ***did not*** include any provision in the Code that would preclude private parties from extinguishing appurtenant rights when they convey land. Rather, pursuant to the mandate of article XI, section 7, the Legislature included § 174C-63, which provides that appurtenant rights "are preserved" and that "[n]othing 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." (Emphasis added.) Notably, HRS § 174C-63 specifies that a permit shall be issued upon application for "an ***existing*** appurtenant right." *Id.* (emphasis added). The word "existing" indicates legislative recognition that an appurtenant right could be made not to exist; otherwise, the word would be superfluous. *See Cty. of Kaua'i v. Hanalei River Holdings Ltd.*, 139 Hawai'i 511, 526, 394 P.3d 741, 756 (2017) ("courts are bound, if rational and practicable, to give effect to all parts of a statute, and [] no clause, sentence, or word shall be construed as superfluous, void, or insignificant"). As with the constitution, nothing in the Code contradicts, is inconsistent with, or purports to alter or overturn, the application of *Reppun*. Article XI, section 7 mandated that appurtenant rights (and existing correlative and riparian uses) not be eliminated by the adoption of a water regulatory regime, and the Code implemented that mandate.

Although they are "grandfathered" by the constitution and the Code, appurtenant rights do not now have a constitutional or statutory basis – they continue to be "incidents of ownership of land" with their basis in common law property principles. *Reppun*, 65 Haw. at 551, 656 P.2d at 70. "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 (emphasis added). There is absolutely no indication in the Code of a legislative purpose to supersede the

common law with respect to appurtenant rights[17]; to the contrary, the "savings" language in article XI, section 7 and HRS § 174C-63 expressly indicates an intent to ***preserve*** certain common law rights and uses in the face of the anticipated new statutory scheme.[18] *Reppun* remains binding legal precedent, unaltered by the 1978 amendment of the constitution or the 1987 enactment of the Code. As in 1982, when *Reppun* was decided, it remains the case today that "[t]here 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]." *Reppun*, 65 Haw. at 552, 656 P.2d at 71 (brackets in original).

Resurrecting extinguished appurtenant rights by effectively invalidating *Reppun* could add years to the delay already endured by OHA's beneficiaries in Nā Wai 'Ehā. Appurtenant rights determinations made in disregard of *Reppun*, as in the Proposed Decision, will simply invite reversal and require further proceedings on remand, years from now, to exclude the extinguished appurtenant rights, reorder the claims for water, and reconsider the IIFS in light of the water that can be used for public trust purposes rather than being allocated as a windfall to those who knowingly purchased land without appurtenant rights. OHA urges the Commission to simply follow the law as it currently exists and leave it to the Hawai'i Supreme Court to overturn *Reppun* if it believes there is a compelling justification for doing so.[19]

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[17] The Legislature certainly knew how to supersede the common law when that was its intent. *See, e.g.*, HRS § 174C-49(c) ("The common law of the State to the contrary notwithstanding," holders of use permits may transport water outside the watershed under certain conditions).

[18] The ultimate manifestation of that intent is the "bifurcated" nature of the Code, in which water use outside of designated water management areas continues to be governed only by the common law and water use within designated water management areas is subject to the permitting requirements of the Code.

[19] As a purely practical matter, persons who knowingly purchased land subject to a reservation of appurtenant rights are unlikely to appeal if the Commission follows *Reppun*. If there were such an appeal, however, it would be far less disruptive than an appeal from a decision resurrecting extinguished appurtenant rights, because nothing would need to change when the Hawai'i Supreme Court inevitably affirms the decision adhering to *Reppun*.

IV. GENERAL OBJECTIONS

A. OHA objects to the proposed rejection or partial rejection of all findings of fact and conclusions of law jointly proposed by the Community Groups and OHA that were not clearly accepted, on the grounds that each Hui/MTF-OHA proposed finding of fact is material to the issues in the case and is supported by the portion of the record cited in each proposed finding, and by the record as a whole, and each Hui/MTF-OHA proposed conclusion of law is an accurate statement of the relevant law.

B. OHA objects to the proposed conclusions of law in the Proposed Decision to the extent that they are inconsistent with, or do not include, each of the proposed conclusions of law jointly submitted by the Community Groups and OHA on the ground that each of the Hui/MTF-OHA proposed conclusions of law is an accurate statement of the relevant law.

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

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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, Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams, Maui	Case No. CCH-MA15-01 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

On January 5, 2018, I caused true and correct copies of the foregoing documents to be served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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