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DIVISION OF STATE PARKS

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-MA 15-01

STATE OF HAWAI'I, DEPARTMENT OF
LAND AND NATURAL RESOURCES,
DIVISION OF STATE PARKS' OPENING
BRIEF FOR RECOGNITION OF
APPURTENANT RIGHTS AND
APPLICATION FOR SURFACE WATER
USE PERMIT; CERTIFICATE OF
SERVICE

Hearing date: June 6, 2016
Hearings Officer: Dr. Lawrence Miike

State of Hawai'i, Department of Land and Natural Resources,
Division of State Parks' Opening Brief for Recognition of
Appurtenant Rights and Application for Surface Water Use Permit

I. INTRODUCTION

The State of Hawaii, Department of Land and Natural Resources, Division of State Parks (“State Parks”) applies to the Commission on Water Resources Management for a surface water use permit (SWUPA) to confirm and quantify both its appurtenant and existing uses of water from ‘Īao Stream to the ‘Īao Valley State Monument¹, Island of Maui, under the State Water Code and as recognized by Hawai‘i case law. Supporting documents for the application are contained in the State Park’s Re-submitted Application for Provisional Recognition of Appurtenant Rights to the Commission on Water Resource Management dated November 20, 2014, which is hereby incorporated by reference. Exhibit 2304-DLNR-1; Declaration of Phyllis (Holly) McEldowney.

As explained in Minute Order 1 to CCH-MA 15-01, an applicant for a SWUPA must show:

- 1) the amount of land within the LCA that was using water at the time of the LCA; and
- 2) the amount of water used on the specific portion of the LCA.

II. FACTUAL BACKGROUND

‘Īao Valley State Park is northernmost and closest to source waters of all applicants on Wailuku River (‘Īao Stream). Wailuku River begins as the confluence of the Kinihapai and ‘Īao streams. The state park is located immediately above the location that the streams merge.

A. Ownership of ‘Īao Valley State Park

The State owns the lands of the ‘Īao Valley State Park from: 1) Land Commission Award no. 3529, Apana 1 to Hana; and 2) portions of Royal Patent Grant no. 3343 to Claus Spreckels. Executive Order (EO) no. 2926, dated August 21, 1978, set aside government lands described in

¹ ‘Īao Valley State Monument is used interchangeably with ‘Īao Valley State Park. The latter preferred for brevity.

C.S.F. no. 18,293, for park purposes, and indicate the deeds of title for state ownership to the park parcel. See Exhibit 2304-DLNR-2.

1. Land Commission Award no. 3529, Apana 1 to Hana (Royal Patent 4059)

Land Commission Award (LCA) no. 3529, Apana 1 to Hana (“Apana 1”), Royal Patent 4059, was made on January 7, 1854. Exhibit 2304-DLNR-3. The Hawaiian Government acquired Apana 1 by a deed conveyance to the Minister of the Interior of the Government of the Hawaiian Islands in exchange for payment of \$1,000 to John W. Kalua, on May 11, 1899. The deed was recorded in Land Court under Land Office Deed 681, Liber 194, pages 483-484. Exhibit 2304-DLNR-4. The deeds conveying Apana 1 up to John W. Kalua are attached as Exhibits 2304-DLNR-5a to 2304-DLNR-5d.

a. The language of the LCA recognizes a grant of kalo land

The language describing the award of Apana 1 recognizes that the lands are adjacent to a water source, and planted in kalo (i.e., “kalo land”) and 1.45 acre. See Written Testimony of E. Mahoe Collins, Exhibit 2304-DLNR-7. Land Commission Award (LCA) no. 3529, Apana 1 to Hana (“Apana 1”), states in Hawaiian: “Kalo ma ka ili Kahua” referring to kalo or wet land in the Ili of Kahua. Certain courses of the parcel description are in relation to “Kahawai” which refers to “a stream, creek, river, or gulch, whether wet or dry”². *Id.*

b. Testimony of witnesses before the Land Commission confirms use of the Apana 1 for growing kalo

Testimony received at the time of the claim before the Land Commission included certain statements about the use of Apana 1 growing kalo. The English translation of the testimony include:

² Mary Kawena Pukui and Samuel H. Elbert, HAWAIIAN DICTIONARY, Revised and Enlarged Edition, 111 (1986).

Kuahine: I know the land of the Clt.³ They consist of 2 pieces in Wailuku, Maui.

No. 1 is a kalo land in Kahua.

No. 2 is a kalo land in Kahiki.

The Clt. rec'd these lands from Kailihiwa in 1837 and his title was never disputed.

No. 1 is bounded Mauka by the Creek of Wailuku, Haiku, by the Pali. On the other two sides by the Creek.

No. 2 is bounded Mauka, by the Creek of Wailuku, Waihee, by the Pali, on other two sides, by Nua's land.

Native Testimony Given on Hana's Claim to LCA 3529 (Vol. 7, pp. 455-456). See Exhibit 3 within State Parks Exhibit 2304-DLNR-1.

2. Royal Patent Grant no. 3343 to Claus Spreckels

The remaining portions of 'Īao Valley State Park are derived from grants to the State (or Territory) of Hawaii from successors to portions of Royal Patent Grant (RPG) no. 3433. The Ahupuaa of Wailuku was conveyed by the government under RPG no. 3343 to Claus Spreckels, pursuant to "the provisions of an Act of the Legislative Assembly of the Hawaiian Islands approved on the 21st day of July 1882 entitled An Act to Authorize the Commissioners of Crown Lands to Convey certain portions of such Lands to Claus Spreckels in Satisfaction of all claims he may have in such lands". The RPG was issued on September 30, 1882.

The parcels (Exhibits 2304-DLNR-6a to 2034-DLN4-6e respectively) granted back to the State derived from the Spreckels grant are:

- a. July 30, 1907 deed from Wailuku Sugar Company to Territory of Hawaii
- b. September 11, 1961 deed from Wailuku Sugar Company to State of Hawaii

³ Clt. = Claimant. Kuahine's testimony was in Hawaiian and translated to English (thus making it appear as if this were foreign testimony rather than kamaaina testimony).

- c. September 29, 1964 deed from Wailuku Sugar Company to State of Hawaii
- d. February 19, 1974 deed from County of Maui to State of Hawaii
- e. July 3, 1975 deed from Wailuku Sugar Company to State of Hawaii

Per the C.S.F. 18,293 map from Executive Order no. 2926, all of the above deeds of land except the 1964 deed (for a water tank) appear to overlap the boundaries of Apana 1⁴ or each other. All except the 1907 deed contained express reservations of water rights including appurtenant rights to the Wailuku Sugar Company. Executive Order (EO) no. 2926 states that the 6.185 acres of the park are subject to a reservation:

Reserving to the Wailuku Sugar Company, its successors and assigns, all water rights belonging or appurtenant to the above-described parcel of land.

However, an executive order is not a vehicle for granting private rights in land but only a declaration of management jurisdiction of state lands for a public purpose⁵, to a government agency. *See generally*, Haw. Rev. Stat. § 171-11. The legal effect of this statement in the EO was not a conveyance of 'Īao Valley State Park water rights to Wailuku Sugar Company, but only a tacit recognition of certain reservations contained in the prior deeds.

B. Water Sources in 'Īao Valley State Park

'Īao Valley State Park is in the Wailuku aquifer section on the Island of Maui. The state park is at the headlands of the confluence of two streams, 'Īao Stream and Kinihapai Stream which merge to form the present-day Wailuku River (formerly 'Īao River, sometimes referred to as 'Īao Stream), thus has riparian flow across and alongside park boundaries. *See* Exhibit 2304-DLNR-9; Hawaii Territory Survey map of "'Īao Valley Water Rights", HTS Plat 1079.

⁴ Wailuku Sugar Company provided a map which shows a corner of Apana 1 jutting out from the overlapped grants through Spreckels. That map is derived from the 1882 Survey of the Ahupuaa of Wailuku by Monsarrat which shows Apana 1 in a different location than configuration of the eventual Spreckels deeds. Exhibit 2304-DLNR-8. TMK plat 3-3-03 shows Apana 1 as separate from the Spreckels grants. Exhibit 22 in Exhibit 2304-DLNR-1.

⁵ State lands set aside for public purposes under the HRS §§ 171-11 and 184-2 (State park system) arguably constitute public natural resources which in the Hawaii Constitution are subject to the public trust.

Kinihapai Stream is the northerly “branch” merging with the more southerly “branch”, ‘Īao Stream.

In relation to the park parcel, Kinihapai Stream flows directly across the southwestern third of the property, while the ‘Īao Stream passes along the southwestern portion of the property. See C.S.F. no. 18,293 map, dated May 11, 1978, in Exhibit 2304-DLNR-2. The streams combine and flow along the southern and southeastern bounds of the park.

Kalo lo‘i on Apana 1 historically had appurtenant water rights supplied by ‘auwai diversions of Kinihapai Stream and to a lesser extent, by the Wailuku River. Present-day lo‘i water usage in the botanical garden portion of the state park is via polyvinyl chloride (PVC) pipes feeding designated demonstration kalo lo‘i when water is available. Written Testimony of Russell P. Kumabe.

C. Quantifying Water Use at the Time of the LCA

Fifty-four years after the LCA, a lawsuit for an injunction was filed before the First Circuit Court of the Territory of Hawaii by Wailuku Sugar Company (WSC) against representatives of the Territorial Government and County of Maui Government on August 29, 1908. Exhibit 2304-DLNR-10, Equity Division Case No. 1634 Complaint. WSC alleged that water meant for Apana 1 was being diverted from Wailuku and ‘Īao streams, and stored in a reservoir (on land the government had purchased from WSC) adjacent to Apana 1. The water from the reservoir was then allegedly distributed by a pipeline system to private residences in Wailuku town and also to residents of Kahului. Exhibit 2304-DLNR-10, 5th allegation, p. 5

1. Water usage for Apana 1 according to WSC's 1908 complaint

According to WSC's Bill of Complaint, Land Commission Award no. 3529, Apana 1 to Hana ("Apana 1"), which was later designated as Royal Patent 4059, is a 1.45 acre parcel of with about three-fourths of an acre planted in taro (kalo).⁶ Exhibit 2304-DLNR-10, p. 2, para. 3

WSC claimed that neither the Territory of Hawaii nor the County of Maui have any right to "any of the waters of the Wailuku Stream or Iao Valley other than the right to the water appurtenant as aforesaid to the taro land of said Apana 1, of Royal Patent number 4059". The allegation further stated that the water rights to the kuleana of Apana 1 of Royal Patent 4059, "do not exceed 20,000 gallons per twenty-four hours," but allege that the County/Territory was using far in excess of that. Exhibit 2304-DLNR-10, pp.7-8, para. 1, *see also* p. 10, para. 2

While court files show the case was set for trial in 1910, newspapers reported that a settlement was reached. On May 21, 1910, the *Maui News* reported that the parties agreed that for twenty-five years: 1) each acre of taro grown on land leased or owned by the County of Maui was entitled to 30,000 gallons per day; 2) the County agreed to lease WSC water rights to certain lots (including the "Kalua lot") for one dollar per year; 3) the Territory of Hawaii agreed not to lease further water development rights for Iao Valley (but may acquire lands with appurtenant water rights which may be transferred to WSC); and included 4) over 500,000 gallons per day of water for the County, with a future water purchase agreement by the County from WSC.⁷ If the same water "entitlement" for taro acreage is applied, then the 3/4 acre lo'i of Apana 1 would have been entitled to 22,500 gallons per day.

⁶ The same acreage of taro was duly reported in a local newspaper: the Kalua grant of Apana 1 contained an area of 1.45 acres, with "three-quarters of an [acre] of taro land". *From Taro Patch to Water Works System*, Hawaiian Gazette, September 4, 1908, p. 1 [Exhibit 10-A in Exhibit 2304-DLNR-1]

⁷ *Supervisors Meet Again, They Ratify Compromise of Wailuku Water Suit*, Maui News, May 21, 1910; *Homesteading and Labor Troubles Figure in Hearing This Week Before Secretary Fisher*, Honolulu Star-Bulletin, Oct. 3, 1912 [Exhibits 10-A, 10-B, and 12 in Exhibit 2304-DLNR-1]

2. Water usage calculation for 0.75 acre of kalo in Apana 1

Relying on prior expert testimony in the Nā Wai ‘Ehā case proceedings, estimates of up to 300,000 gallons per day of water are required for each acre of healthy kalo cultivated. Also, the Hawai‘i Supreme Court’s states that the Water Commission estimates that the adjusted amount of water flow of about 260,000 to 300,000 gallons [per acre] per day (gad) is required for kalo cultivation in contemporary kuleana plots in Nā Wai ‘Ehā. *In re ‘Īao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 287 P.3d 129 (FN 59).

a. Estimated appurtenant water usage in Apana 1 was 195,000 to 225,000 gad

Based on approximately 0.75 acre of kalo grown on Apana 1 at the time of the LCA and the above findings regarding contemporary kalo cultivation water requirements, the amount of appurtenant water usage for Apana 1 is estimated to be about **195,000 to 225,000 gallons per day** that the parcel is entitled to.

The contemporary range is at odds with the amount of water (20,000 gallons per day) to which Apana 1 was allegedly entitled as per complainant Wailuku Sugar Company during litigation near the turn of the twentieth century. This latter amount makes no pretense at establishing the quantity of water required for healthy kalo cultivation and gives no basis for how the volume was determined. In contrast, a 2010 study of water water use by wetland kalo cultivation in three primary sites in West Maui found that all required mean water use greater than 700,000 gallons per acre per day (gad), with the lowest mean water use being 450,000 gad and highest mean water use being at least 880,000 gad. See Summary, *Water Use of Wetland Kalo Cultivation in West Maui, Hawai‘i, 2010*, U.S.G.S. Pacific Islands Water Science Center studies (available online at <http://hi.water.usgs.gov/studies/kalo/references.html>).

b. Current water usage for lo'i kalo in botanical garden of Apana 1

Photographs of the water system were taken by CWRM staff in July of 2010. The inlet was observed to be a four-inch PVC pipe. Exhibit 2034-DLNR-11. As of January 1, 2016, no water is being diverted for kalo cultivation in the botanical garden area of 'Īao Valley State Park, in part due to the water inlet being above the current water level of Kinihapai Stream. Exhibit 2034-DLNR-12.

Calculations on the maximum flow were made, depending on the difference in elevation of the source pipe and the point that water exits from the pipe. Working with assumptions that the pipe is about 550 feet in length and has a difference in head conservatively estimated at 20 feet, the calculated maximum flow would be 0.8697 cubic feet per second (cfs), which equates to 562,102 gallons per day (GPD) or 390.35 gallons per minute (GPM).

The amounts of water indicated in Wailuku Sugar Company's litigation at the turn of the century are both insufficient and without basis in fact for an amount that is adequate for cultivation of kalo, as the amount was an order of magnitude less than modern day expectations. A lone redeeming datum from the litigation is the estimation that three-fourths of an acre of Apana 1 was used for cultivation of kalo. Although there is evidence that other portions of the park property were used for kalo cultivation (Written Testimony of Phyllis (Holly) McEldowney, re: archaeological survey disclosing remnants of kalo cultivation on park property, cultivation on adjoining LCAs), no evidence of cultivation on the specific Grant no. 3343 to Claus Spreckels, as the lands conveyed were vast amount of acreage.

III. LEGAL FRAMEWORK

A. Riparian water rights in the State Parks Parcel

The kuleana of Apana 1 to Hana had and continues to have appurtenant water rights that stem from the cultivation of kalo at the time of the Land Commission Award. According to *Reppun v. Board of Water Supply*, 65 Hawai'i 531, 656 P.2d 57, riparian rights are a statutory creation, as under HRS § 7-1, and not subject to severance. *Reppun*, Id at 549-550, 656 P.2d at 69-71.

Under the *Reppun* analysis of riparian water rights, an existing water use by a riparian owner to enjoy the beneficial flow of water as an incident of the estate, can use the water for such purposes as irrigation. According to HRS § 174C-50, such existing use, if timely established, must also be both reasonable and beneficial.

To qualify for an existing use, an application must be made within one year of the designation of a water use management area, unless a finding of good cause is made. A SWUPA was made on behalf of State Parks on April 27, 2009.

Water usage on the State Parks parcel by inference of land use in kalo, can be traced to the time of the Mahele as evidenced by the language of the LCA in Apana 1 to Hana.⁸ In the nature of kalo cultivation, most if not all of the flow taken in from Kīnihapai Stream is returned to Wailuku River, and any groundwater seepage acts as recharge, which due to the position of the parcel being at the confluence of rivers, is almost assuredly returning to the stream system.

Use of the water is a public use and as a demonstration project for kalo cultivation, intended for the education of all of the State's citizens and visitors who might visit the park.

B. Appurtenant water rights in the State Parks Parcel

The *Reppun* Court concluded that appurtenant water rights are incidents of land ownership, but an attempt at severance would result in the appurtenant rights for use being lost.

⁸ If Kuleana water rights can be traced for other portions of the LCA, then upon award, both there was evidence of use in taro in both Apana 1 and 2. Apana 2 being the larger of the two.

However, subsequent passage by the Constitutional Convention and the State Water Code has changed the foundation upon which that ruling stood.

As indicated in deeds of transfer regarding LCA 3539, Apana 1 to Hana, the 1.45 acre parcel was indicated as being kalo land. As a historic monument, the use in kalo cultivation has not been radically altered.

IV. CONCLUSION

We ask that an appropriate amount of water be allocated as an appurtenant right to the estimate of acreage in kalo at the time of the Mahele. As a conservative estimate, 50+ years later, the amount of acreage estimated was three-quarters of an acre.

DATED: Honolulu, Hawai'i, February 5, 2016.



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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

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

Case No. CCH-MA 15-01

CERTIFICATE OF SERVICE

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