

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878
Corporation Counsel
JENNIFER M.P.E. OANA 8018
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7740
Facsimile No.: (808) 270-7152
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CORPORATION COUNSEL
COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

Attorneys for COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

ʻIao Ground Water Management
Area High-Level Source Water
Use Permit Applications and
Petition to Amend Interim
Instream Flow Standards of
Waiheʻe, Waiehu, ʻIao &
Waikapu Streams Contested Case
Hearing

Case No. CCH-MA06-1

COUNTY OF MAUI, DEPARTMENT OF
WATER SUPPLY'S RESPONSIVE
BRIEF; SUPPLEMENTAL
DECLARATION OF DAVID TAYLOR;
DECLARATION OF BRIANNE SAVAGE;
DECLARATION OF DAVID CHING;
CERTIFICATE OF SERVICE

COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S RESPONSIVE BRIEF

COMES NOW COUNTY OF MAUI, Department of Water Supply
("DWS"), by and through its attorneys, PATRICK K. WONG,
Corporation Counsel, and JENNIFER M.P.E. OANA, Deputy
Corporation Counsel, and hereby submits this responsive brief
and the Responsive Witness Statement of County of Maui,

Department of Water Supply in the form of a Supplemental Declaration of David Taylor, a Declaration of Brianne Savage, and a Declaration of David Ching, pursuant to Minute Order No. 27, as follows:

- I. The studies of the effects of stream restoration to groundwater recharge do not yet show that a certain amount of stream restoration leads to an equal amount of groundwater available for well pumping.

The Opening Brief filed by Hui O Na Wai 'Eha and Maui Tomorrow Foundation, Inc. ("Hui/MT") contains an analysis on the effects of diversions on groundwater recharge. However, although the USGS has indicated that "[e]xisting surface-water diversions in Waihee River, 'Iao Stream, and Waikapu Stream are capable of reducing the amount of recharge during periods of low flow by more than 80 percent relative to undiverted conditions," USGS is also careful to say only that "[t]his potential loss in groundwater recharge may effect the quantity of groundwater that can be developed from the underlying aquifer...." Exhibit A-R1 at v (emphasis added). The USGS has not made any recommendations regarding the restoration of streamflow and changes to sustainable yields. Supplemental Declaration of David Taylor ("Taylor Supp. Decl.") at ¶ 5. The USGS report also does not specify by how much stream restoration would increase the sustainable yield of the 'Iao aquifer. Id.

Hui/MT goes on to state what it considers an ironic absurdity of this case: that [Wailuku Water Company's ("WWC's")] diversions of 'Iao Stream alone deprive the 'Iao aquifer of 4.8 mgd or more of recharge to support the County of Maui's surface water source, "[y]et, the County, and ultimately the people of Maui, must pay WWC to receive up to 3.2 mgd of that same diverted water." Hui/MT's Opening Brief at 31. This statement may lead to the unworkable presumption that DWS should forego taking surface water from the 'Iao-Waikapu Ditch, should let the water run down the stream, and then pump it from a well, due to the potential groundwater recharge. Although this may seem like an ideal resolution, studies have not yet shown a direct correlation between a certain amount of water being restored to the stream resulting in an equal amount of water available to be pumped from the 'Iao aquifer. Taylor Supp. Decl. at ¶ 6. Until that can be shown in theory, as well as practice, DWS cannot voluntarily give up its indispensable surface water source with the hope that it can pump the same amount of water from its wells. Taylor Supp. Decl. at ¶ 7. As stated in its Opening Brief, DWS's current water supply is inadequate for the inevitable future growth in the Central Maui System area and it would be detrimental to DWS if it were to lose - or voluntarily give up - any amount of water it can

currently obtain from the 'Iao-Waikapu Ditch. DWS's Opening Brief at 10; Taylor Supp. Decl. at ¶ 8.

Further, DWS does not have a groundwater use permit to pump this additional amount. Taylor Supp. Decl. at ¶ 9. DWS would have to apply for a groundwater use permit for this additional amount, however with the sustainable yield set at 20 mgd and the current permitted withdrawals in place, it is unlikely that DWS would be granted such a groundwater use permit at this time or unless the Commission on Water Resource Management ("CWRM") increases the sustainable yield of the 'Iao aquifer. Taylor Supp. Decl. at ¶ 10.

II. Hui/MT's Witness Duke Sevilla has no standing to make claims to the 'Iao Stream surface water for property identified as Tax Map Key No. (2) 3-3-001:001, as he is not the landowner and has no legal right to occupy this land.

Hui/MT's witness, Duke Sevilla, states in his written testimony that "[i]n May 2012, the County of Maui purchased [the property identified as Tax Map Key No. (2) 3-3-001:001] from [the Trust for Public Land]. Although the County owns this parcel, it recognizes Ke Ao I Ka Makani Ho'eha Ili as its community partner and the official steward of this 'aina." Testimony of Duke Sevilla at ¶ 5.

He further states, "[w]e plan to restore a total of 15 acres of lo'i kalo with water from 'Iao and Waiehu Streams;

about 75% of that would be irrigated with water from 'Iao and 25% with water from Waiehu. In addition, we would like to restore at least an acre of loko i'a (traditional fishpond) with water from 'Iao and Waiehu Streams as well." Id. at ¶ 8.

He further states, "[w]e also anticipate that if mauka to makai stream flow is restored to 'Iao and Waiehu Streams, it will help to recharge the more than twenty acres of wetlands on the property, which we would also like to rehabilitate." Id. at ¶ 9.

Upon reviewing Mr. Sevilla's written testimony, the County was surprised at his representations. First, as admitted in his written testimony, neither Mr. Sevilla nor Ke Ao I Ka Makani Ho'eha Ili own this property. Id. at ¶ 5; Declaration of Brianne Savage ("Savage Decl.") at ¶ 5. Rather, the County of Maui ("County") is the sole owner of that property, which falls under the jurisdiction of the County's Department of Parks and Recreation. Savage Decl. at ¶ 6.

Second, neither Mr. Sevilla nor Ke Ao I Ka Makani Ho'eha Ili possess a lease, license, or other instrument evidencing any formal legal right to occupy that property. Id. at ¶ 7. The County has not yet gone through the process of formally selecting a "steward" for this land. Declaration of David Ching ("Ching Decl.") at ¶ 5. There has not yet been a

clear determination that one particular group is going to manage the property. Id. at ¶ 6.

The County is strictly bound by the Maui County Code ("MCC") as to how real property owned by the County may be leased. Id. at ¶ 7. Chapter 3.40, MCC, governs the rental or lease of County property. Id. For example, pursuant to Section 3.40.060, MCC,

Unless expressly excepted in Section 3.40.180, no real property... owned by or under the jurisdiction of the county shall be leased, rented, or let except under contract let after public advertisement for sealed tenders in the manner provided in this chapter.

Section 3.40.060, MCC; Ching Decl. at ¶ 8.

Section 3.40.140 states:

All such contracts shall be in writing, shall be executed by the director of finance in the name of the county, and shall be made with the highest responsible bidder, if such bidder shall qualify by providing the security required in this chapter. If the highest and best bid or any other bid has been rejected, or if the bidder to whom the contract was awarded has failed to furnish satisfactory security, the director of finance may, in his discretion, award the contract to the next highest responsible bidder.

Section 3.40.140, MCC; Ching Decl. at ¶ 9. There has been no public advertisement for a lease of this property, nor any

written contract evidencing any legal right to occupy the premises. Ching Decl. at ¶ 10.

Further, Section 3.40.200 states:

... real property to be leased, rented, or set aside without any charge or at a charge below fair market value shall be considered a grant of public property and shall be submitted to the council as an application for grant award and considered by the council pursuant to Chapter 3.36.

Section 3.40.200, MCC; Ching Decl. at ¶ 11. There has been no grant of this property to Mr. Sevilla or his organization, and such issue has never been submitted for approval to the Maui County Council. Ching Decl. at ¶ 12.

Third, although there may have been an informal verbal arrangement for Mr. Sevilla or his organization to caretake the property, there was never any discussion between Mr. Sevilla or his organization and the County with regard to claims or requests for stream water from the 'Iao Stream for this particular piece of real property. Id. at ¶ 13. The County was unaware that Mr. Sevilla would be making any claims or requests in this proceeding with respect to the 'Iao Stream surface water. Id. at ¶ 14.

To the extent that his claims or requests would reduce the County's allotment of the 'Iao Stream surface water for its public water supply, DWS objects to Mr. Sevilla's

representations and intentions and expressly contends that Mr. Sevilla lacks standing to make his claims and requests with regard to this particular piece of real property because he and his organization are neither the owner, lessee, tenant, or grantee of the property. Id. at ¶ 15.

The County acknowledges that Mr. Sevilla can make his arguments for and with regard to his family property located in the area of the County's property and can make a general argument for and on behalf of himself and the community, however he may not speak on behalf of the County with regard to this particular piece of real property. Id. at ¶ 16.

III. DWS's current production is approximately 1.7 mgd at the Iao Water Treatment Plant.

The Opening Brief filed by HC&S contains an analysis on its model created to identify the general relationship between differing IIFS levels and the availability of irrigation water and resulting financial impacts to HC&S. HC&S's Opening Brief at 26. Its model inputs 1.5 mgd of surface water for DWS's public water supply. Taylor Supp. Decl. at ¶ 12. Although at times, DWS's historical average use was 1.5 mgd, there are also times when production is higher than that. Id. at ¶ 13. Currently, DWS is increasing its production to

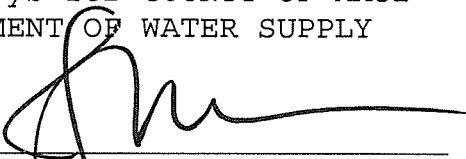
approximately 1.7 mgd and is requesting 3.2 mgd from the 'Iao Stream. Id. at ¶ 14.

DATED: Wailuku, Maui, Hawaii, January 27, 2014.

PATRICK K. WONG
Corporation Counsel
JENNIFER M.P.E. OANA
Deputy Corporation Counsel

Attorneys for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

By



JENNIFER M.P.E. OANA
Deputy Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878

Corporation Counsel

JENNIFER M.P.E. OANA 8018

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Maui, Hawaii 96793

Telephone No.: (808) 270-7740

Facsimile No.: (808) 270-7152

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Hearing

Case No. CCH-MA06-1

SUPPLEMENTAL DECLARATION OF
DAVID TAYLOR

SUPPLEMENTAL DECLARATION OF DAVID TAYLOR

I, DAVID TAYLOR, declare as follows:

1. I am the duly appointed Director of the Department of Water Supply of the County of Maui ("DWS"). My background and qualifications were set forth in detail in the original declaration that I submitted on behalf of DWS in this case on January 3, 2014.

2. I have personal knowledge of the facts stated in this Declaration, except as to matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.

3. This responsive witness statement in the form of a supplemental declaration is submitted in support of DWS's responsive brief pursuant to Minute Order No. 27.

4. I have reviewed the opening briefs filed by all of the parties in this case.

5. The opening brief filed by Hui O Na Wai 'Eha and Maui Tomorrow Foundation, Inc. ("Hui/MT") contains an analysis on the effects of diversions on groundwater recharge. I have also reviewed USGS's Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Na Wai Eha, Maui, Hawaii and have also contacted the USGS with regard to Hui/MT's claims. The USGS has not made any recommendations regarding the restoration of streamflow and changes to sustainable yields. The USGS report also does not specify by how much stream restoration would increase the sustainable yield of the 'Iao aquifer.

6. Studies have not yet shown a direct correlation between a certain amount of water being restored to the stream

resulting in an equal amount of water available to be pumped from the 'Iao aquifer.

7. Until that can be shown in theory, as well as practice, DWS cannot voluntarily give up its indispensable surface water source with the hope that it can pump the same amount of water from its wells.

8. DWS's current water supply is inadequate for the inevitable future growth in the Central Maui System area and it would be detrimental to DWS if it were to lose - or voluntarily give up - any amount of water it can currently obtain from the 'Iao-Waikapu Ditch.

9. Further, DWS does not have a groundwater use permit to pump this additional amount.

10. DWS would have to apply for a groundwater use permit for this additional amount, however with the sustainable yield set at 20 mgd and the current permitted withdrawals in place, it is unlikely that DWS would be granted such a groundwater use permit at this time or unless the Commission on Water Resource Management ("CWRM") increases the sustainable yield of the 'Iao aquifer.

11. The opening brief filed by HC&S contains an analysis on its model created to identify the general relationship

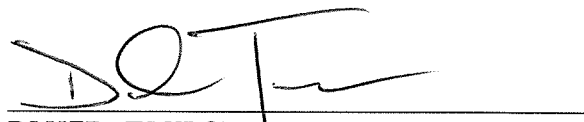
between differing IIFS levels and the availability of irrigation water and resulting financial impacts to HC&S.

12. Its model inputs 1.5 mgd of surface water for DWS's public water supply.

13. Although at times, DWS's historical average use was 1.5 mgd, there are also times when production is higher than that.

14. Currently, DWS is increasing its production to approximately 1.7 mgd and is requesting 3.2 mgd from the 'Iao Stream.

I declare under penalty of law that the foregoing is true and correct of my own personal knowledge and that this Declaration was executed on January 24, 2014 in Wailuku, Maui, Hawaii.



DAVID TAYLOR
Director
Department of Water Supply
County of Maui

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878

Corporation Counsel

JENNIFER M.P.E. OANA 8018

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Maui, Hawaii 96793

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Facsimile No.: (808) 270-7152

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Waikapu Streams Contested
Case Hearing

Case No. CCH-MA06-1

DECLARATION OF BRIANNE SAVAGE

DECLARATION OF BRIANNE SAVAGE

I, BRIANNE SAVAGE, declare as follows:

1. I am the duly appointed Deputy Director of the Department of Parks and Recreation of the County of Maui. I have served in this capacity since January 4, 2011.

2. I have personal knowledge of the facts stated in this Declaration, except as to matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.

3. This responsive witness statement in the form of a Declaration is submitted on behalf of the Department of Water Supply of the County of Maui ("DWS").

4. I have reviewed the Testimony of Duke Sevilla filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. on or about January 7, 2014 in the above-entitled matter.

5. Neither Mr. Sevilla nor Ke Ao I Ka Makani Ho'eha Ili own the real property described in Mr. Sevilla's written testimony, which property is also identified as Tax Map Key No. (2) 3-3-001:001.

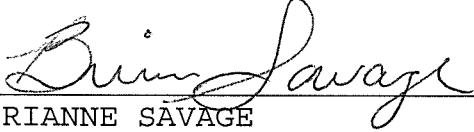
6. Rather, the County of Maui is the sole owner of that property, which falls under the jurisdiction of the County of Maui's Department of Parks and Recreation.

7. I am informed and believe that neither Mr. Sevilla nor Ke Ao I Ka Makani Ho'eha Ili possess a lease, license, or other instrument evidencing any formal legal right to occupy that property.

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I declare under penalty of law that the foregoing is true and correct of my own personal knowledge and that this Declaration was executed on January 24, 2014 in Wailuku, Maui, Hawaii.


BRIANNE SAVAGE
Deputy Director for the
Department of Parks and
Recreation
County of Maui

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878
Corporation Counsel

JENNIFER M.P.E. OANA 8018
Deputy Corporation Counsel
County of Maui
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Wailuku, Maui, Hawaii 96793
Telephone No.: (808) 270-7740
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Case Hearing

Case No. CCH-MA06-1

DECLARATION OF DAVID CHING

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I, DAVID CHING, declare as follows:

1. I am the duly appointed Deputy Managing Director of the County of Maui ("County"). I have served in this capacity since January 4, 2011.

2. I have personal knowledge of the facts stated in this Declaration, except as to matters stated on information and belief, and as to those matters, I believe them to be true. If called upon, I could testify competently thereto.

3. This responsive witness statement in the form of a Declaration is submitted on behalf of the Department of Water Supply of the County of Maui ("DWS").

4. I have reviewed the Testimony of Duke Sevilla filed by Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. on or about January 7, 2014 in the above-entitled matter.

5. The County has not yet gone through the process of formally selecting a "steward" for the real property described in Mr. Sevilla's written testimony, which property is also identified as Tax Map Key No. (2) 3-3-001:001.

6. There has not yet been a clear determination that one particular group is going to manage the property.

7. The County is strictly bound by the Maui County Code ("MCC") as to how real property owned by the County may be leased. Chapter 3.40, MCC, governs the rental or lease of County property.

8. For example, Section 3.40.060, MCC, states, "[u]nless expressly excepted in Section 3.40.180, no real property... owned by or under the jurisdiction of the county shall be leased,

rented, or let except under contract let after public advertisement for sealed tenders in the manner provided in this chapter."

9. Section 3.40.140, MCC, states, "[a]ll such contracts shall be in writing, shall be executed by the director of finance in the name of the county, and shall be made with the highest responsible bidder, if such bidder shall qualify by providing the security required in this chapter. If the highest and best bid or any other bid has been rejected, or if the bidder to whom the contract was awarded has failed to furnish satisfactory security, the director of finance may, in his discretion, award the contract to the next highest responsible bidder."

10. There has been no public advertisement for a lease of this property, nor any written contract evidencing any legal right to occupy the premises.

11. Further, Section 3.40.200, MCC, states, "... real property to be leased, rented, or set aside without any charge or at a charge below fair market value shall be considered a grant of public property and shall be submitted to the council as an application for grant award and considered by the council pursuant to Chapter 3.36."

12. There has been no grant of this property to Mr. Sevilla or his organization and such issue has never been submitted for approval to the Maui County Council.

13. Although there may have been an informal verbal arrangement for Mr. Sevilla or his organization to caretake the property, there was never any discussion between Mr. Sevilla or his organization and the County with regard to claims or requests for stream water from the 'Iao Stream for this particular piece of real property.

14. The County was unaware that Mr. Sevilla would be making any claims or requests in this proceeding with respect to the 'Iao Stream surface water.

15. To the extent that his claims or requests would reduce the County's allotment of the 'Iao Stream surface water for its public water supply, DWS objects to Mr. Sevilla's representations and intentions and expressly contends that Mr. Sevilla lacks standing to make his claims and requests with regard to this particular piece of real property because he and his organization are neither the owner, lessee, tenant, or grantee of the property.

16. The County acknowledges that Mr. Sevilla can make his arguments for and with regard to his family property located in the area of the County's property and can make a general argument for and on behalf of himself and the community, however

he may not speak on behalf of the County with regard to this particular piece of real property.

I declare under penalty of law that the foregoing is true and correct of my own personal knowledge and that this Declaration was executed on January 24, 2014 in Wailuku, Maui, Hawaii.



DAVID CHING
Deputy Managing Director
County of Maui

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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Waikapu Streams Contested Case
Hearing

Case No. CCH-MA06-1

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing document was duly served upon the following individuals by U.S. mail, postage prepaid, to their last known addresses as follows:

DAVID M. LOUIE, ESQ.
Attorney General
JULIE H. CHINA, ESQ.
Deputy Attorney General
State of Hawaii
465 King Street, Suite 300
Honolulu, HI 96813
Attorneys for the Commission on
Water Resource Management

ISAAC H. MORIWAKE, ESQ.
D. KAPUA SPROAT, ESQ.
SUMMER KUPAU-ODO, ESQ.
Earthjustice
850 Richard St., Suite 400
Honolulu, HI 96813
Attorneys for Hui O Na Wai Eha

DAVID SCHULMEISTER, ESQ.
ELIJAH YIP, ESQ.
Cades Schutte LLP
1000 Bishop St., Suite 1200
Honolulu, HI 96813
Attorney for Hawaiian Commercial
& Sugar Company

PAUL R. MANCINI, ESQ.
JAMES W. GEIGER, ESQ.
Mancini, Welch & Geiger LLP
RSK Building
305 Wakea Ave., Suite 200
Kahului, HI 96732
Attorneys for Wailuku
Water Company LLC

GILBERT S.C. KEITH-AGARAN, ESQ.
Takitani Agaran & Jorgensen, LLLP
24 N. Church St., Suite 409
Wailuku, HI 96793
Attorney for Wailuku
Water Company LLC

ANNA ELENTO-SNEED, ESQ.
PAMELA W. BUNN, ESQ.
Alston Hunt Floyd & Ing
American Savings Bank Tower, Suite 1800
1001 Bishop Street
Honolulu, HI 96813
Attorney for Office of Hawaiian Affairs

DATED: Wailuku, Maui, Hawaii, January 27, 2014.

PATRICK K. WONG
Corporation Counsel
JENNIFER M.P.E. OANA
Deputy Corporation Counsel

Attorneys for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

By 
JENNIFER M.P.E. OANA
Deputy Corporation Counsel