

RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT

2009 MAY 12 AM 9:35

DEPARTMENT OF THE CORPORATION COUNSEL 205

BRIAN T. MOTO 5421

Corporation Counsel

JANE E. LOVELL 7551

Deputy Corporation Counsel

County of Maui

200 South High Street

Wailuku, Maui, Hawaii 96793

Telephone No.: (808) 270-7740

Fax No.: (808) 270-7152

Email: jane.lovell@co.maui.hi.us

JON M. VAN DYKE 1896

Attorney at Law

4191 Round Top Drive

Honolulu, Hawai'i 96822

Telephone: (808) 9568509

Fax No.: (808) 956-5569

Email: jvandyke@hawaii.edu

Attorneys for Applicant/Intervenor

COUNTY OF MAUI, DEPARTMENT

OF WATER SUPPLY

S:\ALL\JEL\Water Use Permit cch-ma-06-01\High Level DWS CCH-MA06-01\revMay10CountyExceptions.doc

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

'Āao Ground Water Management Area)	Case No. CCH-MA06-01
High Level Source Water Use)	
Permit Applications and)	COUNTY OF MAUI, DEPARTMENT OF
Petition to Amend Interim Instream)	WATER SUPPLY'S EXCEPTIONS TO THE
Flow Standards of Waihe'e, Waiehu,)	HEARINGS OFFICER'S PROPOSED
'Āao, & Waikapū Streams)	FINDINGS OF FACT, CONCLUSIONS OF
Contested Case Hearing)	LAW, DECISION AND ORDER;
)	CERTIFICATE OF SERVICE
)	
)	

**COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S
EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER**

COMES NOW Applicant/Intervenor COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY ("DWS"), by and through its attorneys, BRIAN T. MOTO, Corporation Counsel, JANE E. LOVELL, Deputy Corporation Counsel, and JON M. VAN DYKE, Special Counsel, and hereby submits its Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, as follows:

1. DWS objects that the Hearing Officer's Proposed Findings of Fact (hereafter, "H.O. FOF"), Conclusions of Law (hereafter, "H.O. COL"), and Decision and Order (hereafter, "H.O. D&O") failed to include DWS's proposed Findings of Fact Nos. 7, 9, 11 - 12, 14 - 33, 35 - 38, 42 - 44, 48 - 49, 51 - 60, portions of 61, 62 - 72, 75, and 77 - 83; failed to include DWS's proposed Conclusions of Law Nos. 4 - 40; and failed to include the language and result contained in Part III.B. of DWS's proposed Decision and Order.

2. DWS objects to the H.O. FOF No. 150 and requests that, instead, DWS's proposed Finding of Fact No. 11 (supported by Exhibit B-4 and ¶ 17 of the Declaration of Jeffrey K. Eng dated September 14, 2007, hereafter, "Eng Declaration") be substituted as a more accurate and relevant statement.

3. DWS objects to the H.O. FOF No. 151 on the ground that it is incomplete, and therefore could be misleading. Water taken from `Iao Tunnel (Well No. 5332-02) by DWS is delivered by pipeline from DWS's `Iao Tunnel to the County water system. (DWS Proposed Finding of Fact No. 11; Exhibit B-4; Eng Declaration, ¶ 17.) The evidence in the record demonstrates that Wailuku Water Company ("WWC") has been taking "overflow" from the `Iao Tunnel without having timely filed a complete permit application for this purpose, as noted in

DWS's proposed Findings of Fact Nos. 56 and 57, and as correctly found in the H.O. D&O at page 192.

4. DWS objects to the H.O. FOF No. 153 only to the extent that it fails to state that WWC has been taking 250,000 to 350,000 gallons per day from the `lao Tunnel without having timely filed a complete permit application for this purpose, as noted in DWS's proposed Findings of Fact Nos. 56 and 57, and as correctly found in the H.O. D&O at page 192.

5. DWS objects to the H.O. FOF Nos. 212 and 292 on the ground that the total diversions of WWC from `lao Stream are greater than suggested in these proposed findings of fact. The severe impact of the WWC diversions was acknowledged by WWC's witness, Avery Chumbley, who stated (on page 9, ¶ 25 of his Supplemental Testimony dated November 16, 2007) that a 1,000 foot area below WWC's intake on Iao Stream is "typically dry." Part of this dry stretch is portrayed in Exhibit A-26B. Exhibit A-26A, showing the design of WWC's `lao Stream intake, and ¶¶ 7, 8, and 10 of the Written Direct Testimony of John Duey, dated September 5, 2007, also provide evidence of the magnitude of WWC's diversions from `lao Stream. Page 4 of the Written Direct Testimony of Clayton Suzuki, dated September 12, 2007, states that WWC's Iao Stream intake is capable of diverting 60 million gallons per day.

6. DWS objects to H.O. FOF 195 on the ground that the "intake that is set to divert at most 20 mdg" per the testimony of Clayton Suzuki is not the same intake that is rated at 60 mgd. Mr. Suzuki was referring to the intake "in the Nature Center area" (below the "typically dry stretch of Iao Stream" de-watered by the 60 mgd-rated initial diversion) when he testified that the intake was set to divert "at most 20 mgd." See WDT of Clayton Suzuki dated September 12, 20007 at p. 4, lines 4-8, p. 5, lines 9 – 10.

7. DWS objects to the presentation of the "Water Diverted" in Table 8 (and its

footnote 2), because it lists the “average” diversion by HC&S from `Iao Stream as 4 mgd, which is the figure reported by HC&S for the diversion during dry periods, while HC&S also acknowledged diverting about 20 mgd from `Iao Stream “during wet periods.” See Table 9 (citing to HC&S Proposed FOF 212). Table 8 (and the preceding sections that refer to it) should be adjusted accordingly.

8. DWS further objects to the presentation of the “Water Diverted” in Table 8 (and its footnote 2), because it lists the “average” diversion by HC&S from Waiehu Stream as 3 mgd, which is the figure reported by HC&S for its diversions during dry periods, while HC&S also acknowledged diverting 10 - 15 mgd from Waiehu Stream “during wet periods.” See Table 9 (citing to HC&S Proposed FOF 211). Table 8 (and the preceding sections that refer to it) should be adjusted accordingly.

9. DWS objects to the H.O. FOF Nos. 239 and 519 and H.O. COL 133 on the ground that they are not accurate in several respects. DWS’s Exhibit B-14 is the written agreement entered into between DWS and WWC for the delivery of water from the `Iao-Waikapu Ditch to DWS’s `Iao Water Treatment Plant. (WWC’s Exhibits D-8(i) and D-93 appear to be duplicates of the same agreement, albeit with handwriting on the cover page.) As shown on Exhibit B-14, the agreement was entered into on June 9, 2004 and expired on November 30, 2007 (rather than on November 30, 2010 as stated in the H.O. FOF Nos. 239 and 519). Paragraph 2 of the Agreement allowed DWS to take up to 3.2 million gallons per 24-hour period unless WWC provided notice that the flow in `Iao Stream had fallen below 11.5 million gallons of water for the previous 24-hour period, as measured at the U.S.G.S. gauging station located at the `Iao Stream at Kepaniwai Park near Wailuku. This agreement contained no provision that conditioned deliveries to DWS on stream flow in excess of “55 mgd at the USGS gauging station

above the WWC 'Iao Ditch Diversion" as incorrectly stated in the H.O. FOF Nos. 239 and 519. As shown by Exhibit B-23, this 2004 agreement was extended from December 1, 2007 to February 20, 2008. The agreement set a "fixed transportation fee" of \$0.48 per thousand gallons as shown in ¶ 3 of the Agreement (Exhibits B-14, D-8(i) and D-93). The statement in the H.O. FOF No. 519 that "[n]o evidence was introduced on whether or not there is a delivery fee" is, therefore, not accurate.

10. DWS objects to H.O. FOF No. 305 on the ground that it is not accurate. DWS did not introduce any evidence suggesting that DWS intended to increase the current capacity of the 'Iao Water Treatment Facility from 3.2 mgd to 4.0 mgd, and Exhibit D-93, does not support that conclusion. The cited written direct testimony of Avery Chumbley at page 9 states that "[m]y understanding is that the County of Maui was also planning to increase the current capacity of the Iao Water Treatment Facility from 3.2 MGD to 4.0 MGD." (Emphasis added). However, there is no evidence in the record substantiating Mr. Chumbley's "understanding" of DWS's purported past intentions, and nothing in the written agreements entered into between WWC and DWS (Exhibits B-14, B-23, D-8(i) and D-93) supports this "understanding," either.

11. DWS objects to H.O. FOF 500 on the ground that the Eng testimony cited does not support the conclusions drawn therefrom in H.O. FOF No. 500.

12. DWS objects to the H.O. COL Nos. 259 and 278 which state that the Amended IIFS for 'Iao Stream at the 780-foot level should be 13 mgd, because this figure is inadequate to permit DWS to operate its 'Iao Water Treatment Facility adequately on a continuous basis and thus to provide for the water needs of the people served by DWS's Central Maui System. This concern is heightened by the observation in the H.O. COL 262 that "[i]f the lands associated with the Duey ditch between the two diversions (see Figure 3) are issued water use permits, those

amounts will have to be added to the 13 mgd and count against the amounts available for offstream uses.” Because of the uncertainties regarding measurements, particularly during periods of prolonged drought, DWS is concerned that an IIFS set at the 13 mgd level would make it impossible for DWS to operate the ‘Iao Water Treatment Facility reliably. Instead, DWS requests that the IIFS for ‘Iao Stream above the first diversion be set at 11.5 mgd rather than 13 mgd. The 11.5 mgd figure has been used by DWS and WWC pursuant to the 2004 Agreement, Exhibit B-14, ¶ 2, and thus represents a long-established and workable figure. The higher figure proposed by the Hearing Officer is contrary to the duty to accommodate reasonable and beneficial offstream uses that fulfill public trust responsibilities, as explained in the paragraphs that follow, and will make it impossible during dry periods for DWS to provide water for the domestic needs of the residents of Central Maui reliably.

13. DWS objects to language in the H.O. COL No. 175, which states that “amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder” (citing In the Matter of Water Use Permit Applications . . . for the Waiahole Ditch Combined Contested Case Hearing (Waiahole I), 94 Hawai‘i 97, 153, 9 P.3d 409, 465 (2000)), and also objects to the language in H.O. COL Nos. 18 and 183 (“presumption in favor of the streams”); 192 (“amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder”); and 204, lines 23 and 24, which present the same erroneous approach toward establishing the IIFS. The Hearings Officer's proposed approach is directly contrary to statements made by the Hawaii Supreme Court in Waiahole I, statements that are, in fact, acknowledged and quoted with approval by the Hearings Officer earlier in his proposed conclusions of law. A careful reading of the page cited by the Hearings Officer (94 Hawai‘i at 153, 9 P.3d at 465) reveals no statement requiring the amendment of the IIFS to occur before any examination of offstream uses, and

certainly nothing that requires the setting of the IIFS without considering offstream public trust uses, such as the public water supply. In fact, a few pages earlier, the Hawaii Supreme Court states explicitly that evaluating offstream uses is an essential part of establishing the IIFS: “To be sure, in providing for instream uses, the Commission must duly consider the significant public interest in continuing reasonable and beneficial existing offstream uses. See HRS § 174C-71(1)(E), (2)(D) . . .” 94 Hawai`i at 150, 9 P.3d at 462 (emphasis added). The Court’s use of the word “must” in this sentence makes it clear that the Hearings Officer erred in rejecting the DWS Proposed D&O, Section III.B in the H.O. COL No. 173, and in the statement in H.O. COL No. 175 that “amending the IIFS comes first, and non-instream (offstream) uses are then met with the remainder.” Indeed, the Hawaii Supreme Court spoke approvingly of “the Commission’s generous provision for immediate and near-term offstream demands” as part of its efforts to establish the proper IIFS in Waiahole I, 94 Hawai`i at 147, 9 P.3d at 469.

14. DWS supports its objection in the previous paragraph by pointing out that when the Hawaii Supreme Court has suggested that existing offstream uses may have to be curtailed to protect instream values, it has consistently referred to “private” offstream uses, making it clear that the public trust values served by the delivery of water by DWS to residents of Central Maui have a higher status. See, e.g., Waiahole I, 94 Hawai`i at 140, 9 P.3d at 452 (explaining that National Audubon Society v. Superior Ct. of Alpine County, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983), was not directly applicable to Waiahole because that case “involved diversions for a public purpose, the domestic uses of the City of Los Angeles” while almost all the diversions involved in Waiahole were for private commercial purposes); id. at 142, 9 P.3d at 454 (affirming the Water Commission’s “conclusion that it effectively prescribes a ‘higher level of scrutiny’ for private commercial [offstream] uses”); id. (“any balancing between public and

private purposes begin with a presumption in favor of public use, access, and enjoyment”); *id.* at 149, 9 P.3d at 461 (referring to “private interests”); *id.* at 155, 9 P.3d at 467 (referring to “offstream private use” and “private parties”); *id.* at 159, 9 P.3d at 471 (indicating that “certain uses” and “desirable uses worthy of preservation by permit” can be preferred in granting permits for offstream uses); In the Matter of Water Use Permit Applications . . . for the Waiahole Ditch Combined Contested Case Hearing (Waiahole II), 105 Hawai‘i 1, 16, 93 P.3d 643, 658 (2004) (confirming that the Water Commission must require “a higher level of scrutiny for private commercial water usage”). DWS further points out that the language in the H.O. COL No. 175 is inconsistent with language in other conclusions of law proposed by the Hearings Officer. H.O. COL No. 14, for instance, clearly and correctly explains that “[t]here are no absolute priorities among these trust purposes,” referring to “maintenance of waters in their natural state” and “domestic water use of the general public” as among the “trust purposes,” and, therefore, that “protection of the resource [in its natural state] is not a ‘categorical imperative.’ Waiahole I, 94 Hawai‘i at 142, 9 P.3d at 454.” (Emphasis added.) H.O. COL No. 204, lines 6-7, correctly confirms that there is no “categorical imperative” for “stream restoration.”

15. H.O. COL No. 16 clearly and correctly explains that “[t]he Commission is to ‘weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law’ and ‘accommodating both instream and offstream uses where feasible.’ Waiahole I, 94 Hawai‘i at 142; 9 P.3d at 454.” This language is repeated in H.O. COL No. 204, lines 7 - 9.

16. H.O. COL Nos. 4 and 38 cite to HRS §174C-71(2)(D) and HAR §13-169-40(c) for the proposition that “in establishing the IIFS in the first place, the Commission must weigh the importance of the present or potential instream values with the importance of the present or

potential uses of water for nonstream purposes . . ." The quotation from Waiahole I, 94 Hawai'i at 141; 9 P.3d at 453, in H.O. COL No. 183 also makes it clear that "public instream uses and values" will not inevitably prevail over offstream diversions and that the public trust must "accommodate" such offstream uses. H.O. COL No. 193 properly explains that the IIFS must "strike a balance between instream values and offstream users."

17. DWS objects to the failure of the Hearings Officer to engage in this accommodation and weighing process even after explicitly recognizing that a balancing approach is required by the Water Code and by Hawaii Supreme Court decisions. DWS thus objects to the "categorical" and inflexible approach adopted by the Hearings Officer in H.O. COL Nos. 174 - 175. These proposed conclusions of law rejected DWS's proposal in DWS's Proposed Decision & Order, Section III.B that the water returned to the streams should be the amount remaining "after allocating sufficient water to meet the needs of what it had concluded were reasonable and beneficial offstream uses." See H.O. COL No. 173.

18. DWS particularly objects to the failure of the Hearing Officer to accommodate those noninstream uses that are consistent with public trust responsibilities and that meet the reasonable and beneficial requirements of the Water Code, such as the distribution of water by DWS for domestic uses. (See H.O. COL No. 13). The Hawaii Supreme Court has ruled that "domestic uses" of water are "among the highest uses of water resources" and has stated that "we recognize domestic water use as a purpose of the state water resources trust." Waiahole I, 94 Hawai'i at 137, 9 P.3d at 449 (citing, inter alia, Restatement (Second) of Torts §850A cmt. c (1979); McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191-98, 504 P.2d 1330, 1341-44 (1973), aff'd on reh'g, 55 Haw. 260, 517 P.2d 26 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974); Carter v. Territory, 24 Haw. 47, 66 (1917)). This conclusion was confirmed by the

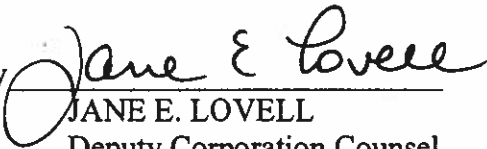
Board of Natural Resources in In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Kaena'e, Nahiku and Huelo, Maui, DLNR File No. 01-05-MA, Findings of Fact, Conclusions of Law, and Decision and Order at 41 (attached as Exhibit E-9 to HC&S's Opening Brief). Thus, DWS also objects to H.O. COL No. 259, subparagraph (2); 264; 275 – 277; 278, subparagraph (2), and 281 – 282.

19. The Hearing Officer correctly concluded in H.O. COL Nos. 62, 224, and 232 that the existing use of surface water by DWS in the `Iao Water Treatment Facility and the proposed Waiale Reservoir Surface Water Treatment Plant are “reasonable-beneficial uses,” but failed to ensure that sufficient water will be available to enable these surface water treatment facilities to provide water for the domestic water needs of the residents of Central Maui. DWS's existing and proposed surface water treatment facilities provide for “immediate and near-term offstream demands” to fulfill public trust responsibilities. They must, therefore, be considered and protected by the Commission as part of the process to determine the IIFS. Waiahole I, 94 Hawai`i at 157, 9 P.3d at 469.

20. DWS objects to H.O. COL 240, lines 6 – 9, on the ground that there is no supporting evidence in the record.

DATED: Wailuku, Maui, Hawaii, May 11, 2009.

BRIAN T. MOTO
Corporation Counsel
Attorneys for Applicant/Intervenor
COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY

By 
JANE E. LOVELL
Deputy Corporation Counsel
JON M. VAN DYKE
Special Counsel

METHOD OF SERVICE:

E-MAIL

U.S. MAIL

DAVID SCHULMEISTER
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
Attorney for Hawaiian Commercial
& Sugar Company (HC&S)

(dschulmeister@cades.com)

GILBERT S.C. KEITH-AGARAN
Takitani & Agaran, Law Corporation
24 N. Church Street, Suite 409
Wailuku, HI 96793
Attorney for Wailuku Water Company LLC

(gca@tonytlaw.com)

PAUL R. MANCINI
Mancini, Welch & Geiger
33 Lono Avenue, Suite 470
Kahului, HI 96732
Attorney for Wailuku Water Company LLC

(PRM@mrwlaw.com)

PAMELA W. BUNN
Paul Johnson Park & Niles
American Savings Bank Tower,
Suite 1300
1001 Bishop Street
Honolulu, HI 96813
Attorneys for Office of Hawaiian Affairs

(pbunn@pjpn.com)

D. KAPUA SPROAT
ISAAC H. MORIWAKE
Earthjustice
223 S. King Street, Suite 400
Honolulu, HI 96813
Attorneys for Hui O Na Wai Eha

(ksproat@earthjustice.org)
(imoriwake@earthjustice.org)

EDWIN T. SAKODA
State of Hawaii
Department of Land and Natural Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu, HI 96809

(Edwin.T.Sakoda@hawaii.gov)

DATED: Wailuku, Maui, Hawaii, May 11, 2009.

BRIAN T. MOTO
Corporation Counsel
JANE E. LOVELL
Deputy Corporation Counsel
JON M. VAN DYKE
Special Counsel

Attorneys for Applicant/Intervenor COUNTY OF
MAUI, DEPARTMENT OF WATER SUPPLY

By 

JANE E. LOVELL
Deputy Corporation Counsel