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COMMISSION ON WATER
RESOURCE MANAGEMENT

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WAILUKU WATER COMPANY LLC

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

OF THE STATE OF HAWAII

In the Matter of:)	Case No.: CCH-MA 06-01
)	
Iao Ground Water Management)	WAILUKU WATER COMPANY LLC'S
Area High-Level Source Water)	EXCEPTIONS TO HEARING
Use Permit Applications and)	OFFICER'S PROPOSED FINDINGS
Petition to Standards of)	OF FACT, CONCLUSION OF LAW,
Waihee, Waiehu, Iao & Waikapu)	DECISION AND ORDER; and
Streams Contested Case Hearing)	CERTIFICATE OF SERVICE
Petitioner,)	
)	
)	

WAILUKU WATER COMPANY LLC'S
EXCEPTIONS TO HEARING OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

By Minute Order 21 dated April 9, 2009, the Water
Resource Commission (the "Commission") directed the parties to
file written exceptions to the Hearings Officer's Proposed

Findings of Fact, Conclusions of Law, Decision and Order (the "HO FOF/COL"). WAILUKU WATER COMPANY LLC ("WWC") objects and takes exception to the HO FOF/COL on the grounds: (1) that the Hearings Officer ("HO") incorrectly applied the law to the facts of the case by failing to weigh instream and noninstream use in amending the Interim Instream Flow Standard ("IIFS"); (2) that the HO erred in making certain findings of fact ("FOF") and conclusions of law ("COL"); (3) that the HO erred in failing to make certain factual findings and reach certain legal conclusions that were supported by the record and existing law; (4) that the HO erred in excluding relevant evidence; (5) that the HO erred in making certain FOF that were recitations of the record and/or arguments rather than factual findings that would assist the Commission; and, (6) that the record created by the contested case hearing is insufficient under the Code to allow the Commission to modify the existing IIFS. WWC will address these objections/exceptions in turn.

I. THE HO INCORRECTLY APPLIED THE LAW TO THE FACTS OF THE CASE.

Establishing and amending Instream Flow Standards ("IFS") is governed by Chapter 174C, Haw.Rev.Stat., the State Water Code (the "Code" or "Chapter 174C"). One of the tasks given the Commission is implementation and administration of the Code. H.Rev.Stat. 174C § 174C-7(a). The Commission is also tasked with establishing instream flow standards ("IFS") for an

individual stream if it concludes that the stream requires an IFS; both the conclusion and the reasons supporting the conclusion must be stated in writing by the Commission.

H.Rev.Stat. 174C § 174C-71 (1)(B).

If an established IFS or IIFS is to be modified, the Commission:

shall weigh the importance of the present or potential **instream** values **with** the importance of the present or potential uses of water from the stream for **noninstream** purposes, including the economic impact of restriction of such uses.

H.Rev.Stat. § 174C-71(1)(E) (emphasis added). Use of the term "shall" is a legislative mandate¹ that does not allow the Commission discretion . . . the Commission must consider both instream and noninstream uses in modifying the IIFS for each stream. The concept of weighing instream and noninstream uses is well recognized:

The constitution and Code, therefore, do not differentiate among "protecting," "enhancing," and "restoring" public instream values, or between preventing and undoing "harm" thereto. 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); Debates, in 2 Proceedings, at 870 (statement by Delegate Waihee) (explaining that the

¹A statute is mandatory if its provisions relate to the essence of the task to be done or where substantial rights depend on compliance with the statute. Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 438 (2002).

language in article XI, section 7 requiring the legislature to "assur[e] appurtenant rights and existing riparian and correlative uses" enunciates a policy of protecting existing uses of, among others, "the small taro farmer as well as the agricultural users"). By the same token, the Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions.

In re Water Use Permit Applications 94 Haw. 97, 150, 9 P.3d 409, 462 (2000) (Emphasis added) ("Waiahole I"). Further, the Code mandates that the Commission, "[i]n order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, . . . shall consider physical solutions, including . . . changes in time and rate of diversion, . . . , or any other solution" H.Rev.Stat. § 174C-71 (1) (E). The Code in multiple locations directs this Commission to conduct a weighing of instream and noninstream uses in the amendment of the IIFS, suggesting that the time and rate of existing diversions must be considered. It is clear that the Code requires a balancing . . . the Code does not mandate that noninstream uses not be considered or that noninstream uses be terminated. Reviewing the HO FOF/COL reveals that the mandated weighing did not occur for four of the streams, and for the stream in which a weighing was applied, the application was arbitrary and unsupported.

A. The HO Methodology.

In proposing an amended IIFS, the HO applied the same

methodology to four of the streams: the amended IIFS was set at a flow level identified as Q_{90} ². However, in the Waihee Stream, the HO set the amended IIFS at the "minimum flow" or lowest recorded flow level. No reasoning was given for the use of minimum flow at Waihee as opposed to use of a Q_{90} flow, nor was any reasoning given as to why the Q_{90} levels were chosen over minimum flow levels at the other streams. This arbitrary approach is both inconsistent with the Code's requirement that the instream and noninstream uses be weighed and inconsistent in its application to the five streams in this matter.

1. Instream and Noninstream Uses Must Be Weighed.

The Code mandates that an amendment to an IIFS must be done on a stream-by-stream basis. Of necessity, this involves examining and quantifying the instream and noninstream uses of each stream. While the HO quantified existing and future noninstream uses as reasonable over all of the five streams, i.e. a cumulative total, no attempt was made to attach the noninstream uses to a particular stream. For example, the County of Maui Department of Water Supply was found to have 12.2 MGD of reasonable uses yet no attempt was made to attribute the use to any one stream or even to attribute the use to several streams. How the total reasonable uses of 44.65 MGD are to be attributed

² Q_{90} is the amount of water that flows at least 10 percent of the time.

over the five streams was not stated by the HO. Without quantification and attribution, the weighing mandated by Chapter 174C has not occurred.

Similarly, the instream uses must be quantified. It is improper for the HO to arbitrarily state that the amount of water flowing in a stream at least 10 percent of the time is the amount necessary to satisfy the Code's requirements for instream uses. Setting a standard based on how often a flow rate exists within a stream is arbitrary. Similarly, using the same flow standard for a highly channelized stream and an unchannelized stream is arbitrary. Yet the HO acted in that manner and arbitrarily set the cumulative instream use at 36.3 MGD.

The effect of failing to weigh instream and noninstream uses becomes readily apparent when supply and demand are examined. The instream uses are fully accommodated to the detriment of the noninstream uses to the end effect that the result violates the directives provided the Commission in Waiahole I, supra. Under the HO's proposed IIFS, fully one-sixth of the HO's reasonable and beneficial uses will not be met one-half the time, one-half of the uses will not be met 30 % of the time, and three-fourths of the uses will not be met 10 % of the time as is shown in the following table.

<u>Flow Level</u>	<u>Instream Uses</u>	<u>Noninstream Use</u>	<u>Deficit</u>
Q ₉₀ 46.3	36.3	44.65	34.65
Q ₇₀ 57.7	36.3	44.65	23.25
Q ₅₀ 73.1	36.3	44.65	7.85

See, HO FOF/COL COL 232, 233, 248, 251, 252, 259 and 266.

Failing to conduct the mandated weighing results in an incomplete analysis, provides and inadequate allocation for reasonable uses, and serves no constitutional, statutory, economic or practical purpose.

2. The HO's Unstated Partial Weighing.

Although not identified as such, the HO's IIFS reflects a partial weighing. As noted above, a different flow level was applied to state an amended IIFS for Waihee Stream. This apportionment is shown as follows:

<u>Stream</u>	<u>Q₉₀</u>	<u>Instream</u>	<u>Noninstream</u>	<u>IIFS</u>
Waihee	24.00	14.00	10	14.00
N. Waiehu	2.70	2.70	0	2.70
S. Waiehu	2.00	2.00	0	2.00
Iao	13.00	13.00	0	13.00
Waikapu	4.60	4.60	0	4.60
Totals	46.3	36.30	10	36.30

HO FOF/COL COL 248, 251, 252, 259, and 266. It is possible to determine a similar weighing that would affect the reasonable noninstream uses for the other four streams by determining the

percentage of noninstream uses accommodated at Waihee Stream and applying the same percentage to the noninstream uses related to the other four streams.

The first step in the process is to determine the allocation of reasonable noninstream uses to each of the five streams. This information can be derived from a review of two tables and 16 FOFs in the HO FOF/COL. When the reasonable noninstream uses are allocated among user groups based on source of supply, the result is:

<u>Stream</u>	<u>MDWS</u>	<u>Kalo Loi</u>	<u>HC&S</u>	<u>WWC</u>	<u>Total</u>
Waihee	9.0	4.99	5.49	2.62	22.10
N. Waiehu		0.16			0.16
S. Waiehu		0.68	3.0		3.68
Iao	3.2	0.17	13.10	1.40	17.87
Waikapu		0.84			0.84
Total	12.2	6.84	21.59	4.02	44.65

See, HO FOF/COL Table 9, Table 7, COL 218 - 233, FOF 227.

A allocation for the reasonable noninstream uses can be determined based on the Waihee Stream apportionment. The HO found that 10.00 MGD of the 22.10 MGD reasonable use should be apportioned from the Q₉₀ flow. Accordingly, about 45.2 % of the use was apportioned between noninstream and instream uses. In other words, the HO supplied about 45 % of his reasonable and beneficial noninstream uses from the Q₉₀ flows.

Let's assume that the same methodology of meeting a

percentage of reasonable noninstream uses is applied to the other streams. The reasonable noninstream uses to be accommodated from the Q₉₀ flows for each stream would be:

<u>Stream</u>	<u>Reasonable Use</u>	<u>Noninstream</u>	<u>Percentage</u>
Waihee	22.10	10.00	45.2 %
N. Waiehu	0.16	0.07	45.2 %
S. Waiehu	3.68	1.65	45.2 %
Iao	17.87	8.08	45.2 %
Waikapu	0.84	0.38	45.2 %
Total	44.65	20.18	45.2 %

Applying the same methodology to the remaining streams would result in the following amended IIFS for each stream:

<u>Stream</u>	<u>Q₉₀</u>	<u>Instream</u>	<u>Noninstream</u>	<u>IIFS</u>
Waihee	24.00	14.00	10.00	14.00
N. Waiehu	2.70	2.63	0.07	2.63
S. Waiehu	2.00	0.35	1.65	0.35
Iao	13.00	4.92	8.08	4.92
Waikapu	4.60	4.22	0.38	4.22
Total	46.30	26.12	20.18	26.12

Application of the mandated weighing in accordance with the methodology used by the HO for Waihee Stream results in a more equitable, reasonable and beneficial approach (as required by the Code and caselaw) when compared to the arbitrary approach used by the HO. Water remains in the streams, even with the estimated stream losses (essentially satisfying the HO's mauka to

makai criteria) and the reasonable uses are accommodated in a more equitable manner as shown below:

<u>Flow Level</u>	<u>Instream Uses</u>	<u>Noninstream Use</u>	<u>Deficit</u>
Q ₉₀ 46.3	26.12	44.65	24.47
Q ₇₀ 57.7	26.12	44.65	13.07
Q ₅₀ 73.1	26.12	44.65	2.33

Under these amended IIFS, the instream uses are met and the HO's noninstream reasonable uses are totally met over half the time and two-thirds of the noninstream uses are met seventy percent of the time.

In summary, (1) the HO failed to identify a reasonable and beneficial use allocation for each stream, (2) the HO failed to provide any reasonable balancing factor for four streams, (3) using the Waihee balancing factor for each stream supports the Code's requirement for weighing instream and noninstream uses, (4) although the utilization of the Waihee Stream factor results in serious shortfalls to noninstream uses (with somewhat dire consequences to agricultural, municipal, commercial and kuleana land uses), its application to each stream satisfies the criteria set forth by the Code for instream uses and attempts to provide a weighing at each stream and results in some balance to noninstream uses.

II. THE HO ERRED IN MAKING CERTAIN FOF AND COL.

The burden is on the HO to carefully consider, weigh

and determine the accuracy of the proposed findings and conclusions and whether they are supported by the evidence in the record. See, Continental Connector Corp. v. Houston Fearless Corp., 350 F.2d 23 (9th Cir. 1965). If accurate and supported by the record, the HO must adopt the FOF or COL. Similarly, if the proposed FOF or COL are not accurate or if the proposed FOF or COL are not supported by the record, the HO cannot adopt the proposed FOF or COL. In this action, the HO erred in making certain FOF and COL.

A. Water Available for Diversion under the Proposed IIFS Would Not Be Sufficient for Existing Uses or Reasonable Current and Future Uses (COL 282)

Two separate conclusions are made in COL 282: (1) that under the proposed amended IIFS the amount of water available for noninstream use would be sufficient for existing users if system losses are reduced and alternative sources are put in service; and (2) that new uses seeking a permit to receive water would be required to show that the new use can be accommodated by the available water source. The conclusion is erroneous.

The proposed amended IIFS would not be adequate to satisfy the reasonable uses identified by the HO, let alone all existing uses or any new uses. The following table demonstrates the deficit for WWC's Deliveries. At Q_{50} , Q_{70} or Q_{90} flow levels, neither Waihee Stream nor Iao Stream has sufficient water to satisfy existing users. The North Waiehu Stream may marginally

satisfy existing demand at a Q₅₀ flow rate but will have serious deficits at Q₇₀ and Q₉₀ flow rates.

Flow rate	Waihee		Iao		N. Waiehu	
	Existing Use	Deficit	Existing Use	Deficit	Existing Use	Deficit
Q ₉₀	34.24	24.24	13.68	13.68	1.41	0.91
Q ₇₀	34.24	19.24	13.68	8.68	1.41	0.91
Q ₅₀	34.24	14.24	13.68	1.68	1.41	0.01

See, WWC FOF 12, 413, 421, 426 and Ex. A-138.

The amended IIFS likewise would not satisfy the reasonable existing and future uses as found by the HO at the Q₅₀, Q₇₀, or Q₉₀ levels. The deficits would amount to about 16 MGD half the time, about 29 MGD a third of the time, and about 40 MGD ten percent of the time.

<u>Stream</u>	<u>Q₅₀ Deficit</u>	<u>Q₇₀ Deficit</u>	<u>Q₉₀ Deficit</u>
Waihee	1.90	7.10	12.10
North Waiehu	1.24	0.34	0.34
South Waiehu	0.78	2.18	2.48
Iao	5.87	12.87	17.87
Waikapu	0.86	0.24	0.84
Total Deficit	6.45	22.05	32.95

The conclusion that current and future reasonable uses would range from about 37 to 44 MGD was not analyzed in terms of sources to meet those uses. Clearly, there are inadequate supplies from the streams at Q₅₀, Q₇₀ and Q₉₀ to satisfy the

reasonable uses found by the HO. Acknowledging the deficits, the HO concluded that new uses would compete with existing uses in the WUPA process. For example, the County's new use of 9 MGD for domestic use would create a significant additional demand on the Waihee Stream. This new use alone would absorb 45% of the Q_{50} supply, 60% of the Q_{70} supply, and 90% of the Q_{90} supply. With the Kalo Loi now absorbing about 4.8 MGD from the Waihee Stream, two competing public trust uses for the Waihee Stream, cannot be satisfied. In addition Waihee Stream will be unable to satisfy other reasonable uses for non-public trust purposes under the HO's proposed IIFS.

B. Weighing and Apportionment in Setting IIFS (COL 182)

Another erroneous conclusion is that the IIFS can be set in excess of base flow without the weighing of instream uses with noninstream uses (balancing). In COL 182, the HO states:

Second, neither the definition of "instream flow standard" nor the weighing of instream values with noninstream uses: ... (3) prohibits establishing the IIFS above the base flow because that apportionment would not satisfy the Code's weighing of instream values with noninstream uses.

HO FOF/COL COL 182. The HO takes the position that the Code does not prohibit establishing an IIFS in excess of base flow because there is no obligation to weigh instream values with noninstream uses. It is unclear from the COL whether the HO concludes that no obligation to weigh instream and noninstream uses exists below

the base flow levels, that there is no prohibition to weigh 100% in favor of instream uses or that there is no obligation to calculate the economic impact and social impact to noninstream uses. However, it is clear that the HO's proposed amended IIFS do not weigh the instream values with noninstream uses at base flow and that the HO applied a "presumption" in favor of covering all instream uses before addressing noninstream uses.

The initial question is whether there is an obligation under the law to balance instream and noninstream values at various flow rates and to provide the reason and necessity to the allocation of water at such rates. The answer is "yes". The Code requires the instream and noninstream uses to be weighed without any limitation on whether the weighing is with regard to base flow, minimum flow, median flow or some other level.

IFS is defined as:

A quantity of flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreation, aesthetic, scenic, and other beneficial instream uses.

Section 174C-71(1)(E), H.Rev.Stat., in relevant part states:

In formulating the proposed standard, the Commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact for restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing or restoring instream

values, the Commission shall consider physical solutions, including water exchanges, modification of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources or other solutions.

Despite these provisions, the HO concluded the IIFS should be established at Q_{90} levels without weighing the noninstream uses; essentially all flows go to instream use and no flow goes to noninstream uses. The result was driven by a reliance on a presumption "in favor of the streams, whose maintenance in their natural states is a public trust purpose, and private commercial uses bear the burden of justifying their uses in light of the purposes protected by the just". (COL 183, citing COL 15).

Such blind reliance ignores the Code. No categorical imperative preferencing instream over noninstream exists in the Code. In fact, the public trust doctrine may have to accommodate noninstream uses, which is seemingly inconsistent with the mandate of protecting instream uses. Waiahole I supra at 141, 9 P.3d at 453. The Commission is mandated by the Code to take steps to avoid or minimize the impact on existing uses. This in itself requires the weighing of instream values with noninstream uses at all flow levels, including base flow levels.

If private commercial uses must justify their use in light of the public trust purposes, they do so at the water use permit level. If there is no water available for the uses at the

permit level (as is the case in Q_{90} and very little at the Q_{70} level) the justification (and permitting) process is illusory; if there is no resource available to distribute, justifying a right to the resource is meaningless.

Further, the public trust purposes exist at both ends of the equation. There are instream public trust purposes as well as noninstream public trust purposes. To conclude that the instream public trust purposes trump the noninstream public trust purposes without reason, regardless of the flow level, is arbitrary and capricious.

Following the proposed IIFS to conclusion, at Q_{90} levels for the streams, the Kalo Loi and municipal uses get no water-even at Q_{70} levels the allocation to public trust purposes is inadequate if not illusory.

No reason and necessity is given for the result. While the implication is that an amended IIFS set below base flow would not result in continued mauka to makai flows, the record appears clear:

1. It is questionable whether the Waikapu Stream even carried uninterrupted surface water to the ocean. (FOF 590, page 102, FOF 169, page 151).
2. Mauka makai flow in the Iao Stream is equally problematic. The prospects of an uninterrupted mauka makai flow, as well as recruitment in light of the channelization is doubtful. (FOF 83, page 16, FOF 590, page 102, FOF 591, pages 102-103).
3. The Waihee Stream maintains the mauka makai flow and it is the best candidate for recruitment.
4. Waiehu Stream maintains only a small portion of native amphidromous species. Larval draft survey

determined there were no amphidromous species at the mouth of the stream. The small populations were due to the relatively small size of the stream channel and impediments to upstream movement created by a vertical concrete apron just located below the highway culverts. No reproductive activity by neither species was found to exist at the Waihee Stream.

See, Exhibit E-53, pages 43 and 44.

Nothing exists in the IFS definition or the weighing of instream values with noninstream uses that require an amended IIFS achieve a continuous mauka to makai flow. The statute requires a quantity of water be present at specified times of the year to protect beneficial instream uses. See, H.Rev.Stat. § 174C-3. The flow rates and specified times must bear a reasonable and causal relationship to the beneficial uses and efforts at those rates must be maintained to avoid or minimize impacts on existing uses.

Reason and necessity dictates that at base flow or minimum flow some amount of water is critical to both instream and noninstream purposes and the viability of both instream and noninstream uses and purposes is placed in a surviving mode. Obviously, at such stage, weighing and balancing is necessary and paramount and the levels of apportionment must be guided by the standard of "reason and necessity" and must be an "equitable, reasonable and beneficial allocation." See, Waiahole I supra.

C. THE GOAL MUST BE AN EQUITABLE, REASONABLE AND BENEFICIAL ALLOCATION (COL 174)

The HO erroneously concludes that the goal of the IIFS process is to satisfy the instream uses first and then the "noninstream (off-stream) uses are met with the remainder". (COL 175), citing Waiahole I, 94 Haw at 153, 9 P.3d at 465.

MDWS's position that all reasonable and beneficial uses should be satisfied with stream waters and the remainder returned to the stream was rejected by the HO (COL 174). The HO maintains that the Supreme Court criteria in amending the IIFS is that the IIFS comes first, and the noninstream uses are met with the remainder (COL 175).

Both of these positions fail to acknowledge the symbiotic relationship between the IIFS process and the WUPA process. There cannot be a proper allocation of stream water to instream uses without consideration of noninstream uses; likewise there cannot be a proper allocation of stream water to noninstream uses without a proper consideration of instream uses. Nonsymbiotic independent considerations fail to comply with the dictates of the law.

The dictates of the law require the satisfaction of dual mandates of (1) protection and (2) maximum beneficial uses. See, Waiahole I supra at 139, 9 P.3d at 451. It is clear in the IIFS process that there is no "categorical imperative" to any particular use of water. See, Waiahole I supra at 142; 9 P.3d at 454. As related by the HO "private commercial uses may have to

bear the burden of justifying their uses in light of the purposes protected by the public trust". HO FOF/COL COLs 15 and 183. However, such principal, while it may be applicable in the WUPA process, is taken out of context when applied to the IIFS process. The goal of the IIFS process is to create a reasoned and practical balance between the instream uses and the noninstream uses - not to favor one use over the other use.

This must be so or the WUPA process cannot function. If an inadequate or no supply (as in the Q_{90} allocation) is allocated to noninstream uses, the WUPA process cannot achieve its requirements under law. It must be acknowledged that the noninstream uses include purposes protected by the public trust. If there is no apportionment for noninstream use at the IIFS level, there can be no resolution of noninstream public trust uses and non-public trust uses at the WUPA level. The clash between competing interests must be resolved at the permit process level. If there is no water to accommodate the clash, that process cannot properly function. Equitable reasoned allocation is the goal of the IIFS process and not the resolution of competing interests, where specific uses bear the burden of justifying their uses.

D. LEGAL OBLIGATION TO PROVIDE WATER TO KALO LOI -FOF 134

In FOF 134, the HO concluded that WWC may be legally obligated to provide water to kalo loi users. The obligation

would be through part of the WWC system that is built on or uses the auwais that have historically carried water from the streams to kuleana lands. The finding appears to be a COL rather than a FOF.

The legal obligation is created if (1) part of WWC's system uses the awai or is built on an awai and (2) the awai is historically used to deliver water to the kuleana lands. Such a conclusion is erroneous. WWC is not legally obligated to provide water to kuleana lands. The following facts govern this issue:

1. WWC and its predecessors have been in business for approximately 148 years;
2. WWC owns and manages approximately 13,000 acres of water shed lands and four large parcels in the Central-West Maui region.
3. Wailuku has also been the owner operator of the non-potable water system transporting and delivering non-potable irrigation water through its system of registered diversions, tunnels, ditches and reservoirs to various end users in the central Maui area.
4. Included in those end users are certain users (referenced by WWC as kuleana users) who have historically obtained ditch water through WWC's system.
5. There is no proof, oral or written, to determine that these kuleana users have appurtenant or riparian water rights.

Appurtenant water rights are those rights to the use of water utilized by parcels of land at the time of the original conversion into fee simple land. Reppun v. Board of Water Supply, 65 Haw. 531, 538 (1982).

Unlike riparian rights, appurtenant water rights are an incident of land ownership. Appurtenant water rights attach to the land, not to the individual. See, Reppun at 551.

Appurtenant water rights may apply to manmade water courses in addition to natural water courses. See also, Peck v. Bailey, 8 Haw. 658 (1867), which states in relevant part:

When a grantor has conveyed portions of an ahupuha'a to several persons...each grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the artificial water on their lands and all water which the lands had enjoyed from time in memorial.

Id.

As WWC's ditch system was created after the Mahele, no appurtenant rights attached at the time of the original conversion. As the auwais and their concomitant relationship to the ditch system post dated the Mahele, no rights attached at the time of original conversion. The appurtenant rights attached only at the time of the original conversion and since the WWC system did not then exist such rights cannot attach to the system contrary to the conclusion under FOF 134. The same principal with regard to appurtenant rights also applies to riparian water rights. The Hawaii Supreme Court has repeatedly affirmed that riparian water rights apply only to natural water courses. While Carter v. Territory of Hawaii, 24 Haw. 47 (1917) implies exceptions to the general rule concerning natural water courses

exists, the Carter exception only applies to auwais created before the Mahele.

The issues concerning the delivery of water to Kuleana lands through WWC's ditch system and the use of ditch system for traditional and customary rights of the ahupua'a tenants involves many components to which there is no clear legal precedent. The ambiguities are further compounded by the IIFS proposed standards where no water would be allocated for such uses at various flow levels, as well as the PUC regulatory process which may allocate cost for such usage.

III. THE HO FAILED TO MAKE FOF AND COL THAT WERE SUPPORTED BY THE RECORD

The burden is on the HO to carefully consider, weigh and determine the accuracy of the proposed findings and conclusions and whether they are supported by the evidence in the record. See, Continental Connector Corp. v. Houston Fearless Corp., 350 F.2d 23 (9th Cir. 1965). If accurate and supported by the record, the HO must adopt the FOF or COL. Similarly, if the proposed FOF or COL are not accurate or if the proposed FOF or COL are not supported by the record, the HO cannot adopt the proposed FOF or COL. In this action, the HO erred in failing to make certain FOF and COL that were proposed by WWC.

A. Failure to Include WWC's Proposed FOF and COL.

Each of the following FOF and COL were supported by the evidence contained in the record and were accurate. It was

erroneous for the HO to fail to adopt the following:

FOF: 32 - 35; 38; 39; 50; 66 - 67; 74; 76; 84 - 93; 96 - 102; 104 - 107; 109 - 116; 118; 124; 146 - 147; 150 - 151; 156; 160; 162 - 172; 174 - 189; 191; 195 - 196; 199; 201; 205; 209 - 210; 213 - 240; 242 - 254; 257 - 258; 262 - 269; 271 - 272; 275 - 276; 278 - 280; 282; 284 - 336; 339 - 341; 344 - 345; 347 - 411; 415 - 430; 433 - 444; 447 - 452; 455 - 458; 460 - 495; 498 - 538; 540 - 542; 544 - 561; 563 - 585; 588 - 591; 592 - 621; 623 - 628; 630 - 649; 651 - 654; 656; 659 - 681; 683 - 701; 703 - 751; 760; 762 - 775; 777 - 786; 789 - 801; 803 - 807; 810; 814; 818 - 831; and 833 - 925.

COL: 926 - 948

B. Disregard of Current and Future Reasonable and Beneficial Uses.

The HO failed to consider current reasonable beneficial uses and future reasonable beneficial uses in providing an allocation for current and future use. The HO's conclusions found as follows:

A. The reasonable current and future uses for WWC water delivery agreements to be:	2.02 MGD (COL 232)
B. The reasonable and beneficial users from the WWC delivery system, i.e. the golf course and coffee plantation.	2.02 MGD (COL 226)
C. The WWC water delivery agreements provided 2.37 mgd in 2006.	2.37 MGD (COL 226)
D. Disregarded or failed to consider new users requesting water from the surface water system.	4.00 MGD (WWC Proposed FOF 283)
E. Other than coffee and the golf course uses, other existing uses under the delivery agreement were either not reasonable and beneficial or had alternative sources of water.	No findings

The finding that only two of the current users are reasonable and beneficial and should be considered for the allocation of water under the IIFS was arbitrary and capricious. There were no findings as to reasonable and beneficial uses as to others who testified for the use of water under the current delivery agreements, nor the future users requesting water from the surface water system. For example, Wailuku Country Estates testified that its use was about 0.7 MGD currently, its owners would need 1 MGD in the future and that the owners had no alternative sources of water maintaining that their agreement with the County of Maui limited them for non-domestic use to the surface water system. Farrokh Irani WDT ¶ 11, pp. 3 - 4. Others testified concerning their long term use of the surface water system and its need for the viability of their business and the unavailability of alternative sources of water. Such testimony use was totally disregarded by the HO. See WWC's Proposed FOF 553, pages 93 and 94. The water delivery agreements (not including the HC&S water delivery agreements) from the Iao Stream create a delivery agreement demand of 2.25 MGD with Wailuku Country Estates maintaining an approximate use of 0.7 MGD.

With regard to Waihee Stream, Maui Tropical Plantation, Koolau Cattle Company, Maalaea Properties, Maui Cattle Company and Melia Orchids received Waihee Stream water through WWC's distribution system, each relied on past deliveries and testified

the need for expanded deliveries in the future with no alternative sources of water. See, WWC Proposed FOF 422.

C. Economic Impact Analysis Fails to Consider Private Property Rights (COL 235- COL 243)

In COL 240, the proposed findings reference possible economic impact to MDWS in the cost of acquiring the primary distribution system of WWC and HC&S. In COL 241, the proposed decision suggests that the largest current and potential users of the primary distribution system (the golf courses) and the coffee plantation may determine that its better option is to forego their operations with the lost opportunity cost associated with those decisions. This finding ignores the testimony of the users. For example, MMK, one of those with a WWC delivery agreement, maintains, preserves and operates two golf courses with about 189 employees, of which about 120 are full time, with an operational payroll of about \$5.2 milion. B. Russell Dooge WDT ¶ 14, p. 3 and TR Vol X, pp. 119 and 128. Without the availability of irrigation water, MMK would not be able to maintain its facilities, would be forced to shut down, and would be forced to terminate its employees. Id. The HO's COL 241 relates that the economic consequences for WWC's Water Delivery Agreements would be the extra costs, if any, of having to use other delivery systems, such as MDWS' system. This of course assumes that MDWS' system is available for such uses which is inconsistent with the testimony in the record.

Each of these conclusions and others related in (COL 235-243) creates various implications concerning private property rights.

Private property rights and interests are involved with and tied to the diversion transportation system. Kuleana users claim appurtenant rights; parties contracting from WWC maintain contract rights; the County of Maui maintains real property rights and contract rights; HC&S maintains real property rights, contract rights and economic enterprise rights; and Wailuku Water Company maintains real property rights including the ownership of the water sheds, the water flowing from the water shed and its diversion/transportation system, as well as its contract rights with its end users. All parties claim water rights.

In determining the IIFS the Commission must consider the importance of present and potential users of water for noninstream purposes, including the economic impact of restricting such uses. H.Rev.Stat. § 174C-71(2)(D). Diversions are to be restrained only after careful assessment of the interests and circumstances involved and a determination that such interests, after considering the relevant circumstances, need to be restrained. It is necessary to provide a delineation of those interest and circumstances involved. The appropriate scope of rights should be identified and the impact on those rights must be considered. See, Waiahole I supra at 178, 9 P.3d

at 490. In amending the IIFS, consideration must be given to the impact of any proposed IIFS on such private property interests and the economic impact on such interests.

When real property rights were initially recognized in the Great Mahele in 1848 certain of those rights vested including water rights. Subsequent constitutional amendments cannot retroactively abrogate vested rights.

[A] declaration of a change in the water law of Hawaii may be effective with respect to real property rights created in Hawaii after the *McBryde I* decision became final. New law, however, cannot divest rights that were vested before the court announced the new law.

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985).

Water rights, like other vested property rights, cannot be taken without due process of law. Likewise, contract rights cannot be abrogated without due process of law. The HO's reliance on the Public Trust Doctrine, as a creation of the State Constitution, does not override these established principles. All State action is subject to the Fifth Amendment of the United States Constitution. State Constitutions cannot trump the federal constitution and the State cannot infringe upon vested rights through its own Constitution where those rights are guaranteed by the Federal Constitution. Consequently such vested rights cannot be ignored and must be considered and the impact on such rights must be specified when proposing an IIFS that would

affect such rights.

D. Water Use Permit Applications (COL 297)

In COL 297 the HO concludes that WWC's WUPA for the Iao Tunnel was not complete and not included in the CCH. This is incorrect; WWC's WUPA was complete and was included in the CCH.

On December 16, 2003, WWC submitted WUPAs for four Iao Tunnels. Its application for Well No. 5332-02 requested 1.2 mgd for the permit. See, WWC Exhibit D-21. On February 4, 2004, WWC signed the application of the County of Maui for Well No. 5532-02 in which the County requested 1.418 MGD from the tunnel, this was subsequently revised to 1.359 MGD. See, WWC Exhibit D-22. As a result of discussions with the Commission staff, WWC was asked to provide additional information to amend its application for Well No. 5332-02, which it did revising the request to 1.359 MGD. See, WWC Exhibit D-23. At the public hearing on April 22, 2005, WWC explained the agreement that WWC has with the County of Maui for the use of the tunnel and requested the Commission accept WWC's revised application and the Commission issue only one use permit to WWC for the tunnel. The Commission staff sent a letter dated May 13, 2005 acknowledging receipt of WWC's completed application which assigned it WUPA No. 680. See WWC Exhibit D-27. At the April 22, 2005 hearing, the Commission staff assigned WWC a new WUPA No. 738 for Well No. 5332-02 so as not to conflict with the County of Maui's WUPA application. Consequently WWC's

application for Tunnel No. 5332-02 was part of the CCH.

WWC is acknowledged as the landowner for the real property which underlies the tunnel. The County submitted its amendment to its application without the approval of the landowner. The HO granted the County's application for tunnel at 1.359 MGD and apparently rejected WWC's application (although the HO's findings indicate that WWC's application was not part of the CCH) but provided no reasons for concluding that WWC's application was not part of the CCH or rejecting WWC's application. Since WWC has the ownership (real and personal) in the tunnel and the County's use is contractual, the permit should have been issued to WWC and not the County. See, WWC Exhibits D-8(a) through D-8(c); D-33 and D-37).

IV. THE HO ERRED IN EXCLUDING EVIDENCE.

WWC offered as evidence Exhibit D-48, a copy of a power point presentation that elaborated on the written testimony of Avery B. Chumbley. The presentation was a part of Mr. Chumbley's oral testimony and contained photographs, charts, and information not contained in his oral testimony. The HO committed error both by excluding the exhibit and by refusing to allow Mr. Chumbley to present WWC's position on the amendments to the IIFS. See, TR Vol XI (January 15, 2008) pp. 74 to 75. In an administrative proceeding, Hawaii law mandates that all offered evidence be received unless it is irrelevant, immaterial or cumulative. See,

H.Rev.Stat. § 91-10 and Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 953 P.2d 1315 (1998). At a hearing, the HO must admit any and all evidence limited only by considerations of relevancy, materiality and repetition. Id. Every party to present such evidence as may be required for a full and true disclosure of the facts. Id.

In this matter, the HO, by excluding EX D-48 and by preventing Mr. Chumbley from testifying on the issues before the HO deprived WWC of its rights.

V. THE HO ERRED IN MAKING IMPROPER FOFs.

A. Waikapu Stream IIFS.

The Decision and Order page 189 referencing Waikapu Stream dictates an amended IIFS at:

- 1) 4 mgd below the Reservoir 6 ditch diversion for 120 days from the implementation of the amended IIFS, unless the flow at 880 feet elevation is less, in which time the flow would be the corresponding amount;
- 2) If no flows reach Kealia Pond with a flow of 4 mgd at Reservoir 6, there will be no IIFS at Reservoir 6; and,
- 3) If the flows reach Kealia Pond, the amended IIFS below Reservoir 6 will be 4 mgd, and the IIFS at Kealia Pond will be the corresponding flow; if flows reach Kealia Pond but surveys find no recruitment, there will be no IIFS below the Reservoir 6 ditch diversion nor at Kealia Pond.

The Waikapu Stream amended IIFS is not supported by any evidence in the record. It is arbitrary and capricious and does not comply with the dictates of the law.

There is no gauging device in Waikapu Stream. Consequently the amended IIFS would require all water to flow uninterrupted toward Kealia Pond. There will be no diversions and there would be no noninstream uses. The decision is not justified by the record:

- 1) Waikapu Stream does not continue its flow to its mouth. (Exhibit E-53, page 44).
- 2) No recruitment or reproduction exists within Waikapu Stream. (Exhibit E-53, page 44).
- 3) Increase in the amount of water in Waikapu Stream above the existing IIFS would not increase the probability of recruitment or reproduction because of the lack of continuous flow to the ocean. (Exhibit E-53, page 39).
- 4) The present uses of Waikapu Stream are for agricultural purposes and are reasonable beneficial noninstream uses.

There is no evidence that there would be any benefit to amphidromous species under the proposed IIFS. It is purely arbitrary to set a monitoring period at 120 days. There is no ecological or physical connectivity involved in the Waikapu Stream. There is no evidence to show that a 4 MGD flow for 120 days will produce any results that may be beneficial to stream ecology. The HO in COL 110 concluded:

...when there is flow from Waikapu Stream to Kealia Pond during extensive periods of flooding, the water does not travel via a continuous channel through the pond and into the ocean, but instead, fans out into a big delta.

HO FOF/COL FOF 567.

The HO in COL 267 indicates that the 4 MGD is to

evaluate whether or not flows reach Kealia Pond under prediversion, dry weather conditions. Whether the flow reaches Kealia Pond does not establish a mauka to makai flow and as stated in HO's COL 268, Waikapu Stream is commonly dry downstream of all diversions because of infiltration losses into the stream bed (citing HO's COL 160) and it may not have flow continuously mauka to makai prior to the diversions because of the extensive infiltration of stream flow into the stream bed in its lower reaches.

The Decision and Order provides no economic and/or social analysis to establish the impact of the 120 day monitoring period. Clearly, there will be no noninstream uses during such time and there is no practical alternatives for water usage during that period of time. Of course, the sustained IIFS would provide essentially the termination of all noninstream uses from the stream. Certainly there is no weighing on balancing involved in either the 120 day test period or the sustained IIFS at 4 mgd.

The Decision and Order relates that if the flow reaches Kealia Pond but surveys find no recruitment then there will be no IIFS below Reservoir 6. The Decision and Order does not cite an implementation tool to conduct surveys to determine when and for how long they will take place and who will evaluate the results. When the surveys are completed, the Decision and Order doesn't relate who makes the decision with regard to the results of the

survey. Will the amended IIFS for Waikapu Stream then be subject to a new amendment process? Clearly at the end of the 120 day period, assuming the surveys are complete, the results and analysis of the surveys will continue for a longer duration. Does the amended IIFS terminate at the end of the 120 day period subject to the conclusions from the survey or does it continue until the survey results are completed and there is some administrative action to determine the results? Is there a requirement that a petition to amend the IIFS must then be filed in order to discontinue the 4 MGD flow? These questions are left dangling in the HO FOF/COL.

Also, the HO seems to have disregarded FOF 589, page 182 relating that the restoration of flows should begin at a low level and increase incrementally over time. Starting with a low level releases is supportive in determining the incremental contributions of the flow and their significance. See, HO's FOF 589. If a higher amount of flow is added in the first instance, there is no way to measure the response to lower flow levels. An incremental approach combined with the monitoring could test whether the additional flow to Waikapu would have a positive effect while avoiding or mitigating the impact on noninstream users.

- B. Inclusion of FOF Which Are Cumulative, Argumentative or Mere Recitation of Testimony is Erroneous.

The HO committed error by including FOF that were

cumulative of other findings, argumentative and not findings of fact, and mere recitations of testimony. The purpose of findings of fact is to allow the reviewing body to make an independent analysis of the issues raised in the case and applying appropriate rules of law. Verbatim recitations of the testimony of witnesses do not constitute findings of fact because they do not reflect a conscious between conflicting versions of the information in question that emerges from all evidence presented. See, In re Green, 67 N.C.App. 501, 313 S.E.2d 193 (1984).

The following FOF were cumulative:

FOF: 61, 294, 379, 399, 426, 560

The following FOF were argumentative:

FOF: 34, 35, 41, 42, 46, 50 - 54, 57, 231, 241 - 242, 247, 254, 256, 300, 313 - 314, 319 - 323, 328 - 329, 335, 338 - 339, 346 - 347, 376 - 377, 381 - 383, 385, 387 - 389, 392 - 397, 404, 406, 408, 410 - 411, 414, 416, 484 - 490, 492 - 493, 497, 504, 541, 546, 559, 569, 573, 594 - 595

The following FOF were mere recitation of testimony:

FOF: 49, 55, 58 - 59, 76 - 78, 101, 118, 225, 243, 249, 287 - 288, 295 - 298, 318, 333, 343 - 345, 491, 556 - 557, 577 - 582, 584 - 592

VI. THE RECORD BEFORE THE COMMISSION IS SO INCOMPLETE AS TO MAKE IT IMPOSSIBLE TO AMEND THE IIFS.

This action was initiated by a petition to amend IIFS filed by Hui o Na Wai Eha ("Hui") and Maui Tomorrow Foundation,

Inc. ("MTF") in June, 2004. On February 15, 2006, the Commission referred the action to a contested case proceeding, consolidated with a waste complaint that was initiated by Hui and MTF. The statutory provisions and applicable caselaw with regard to IIFS place the Commission in a quasi-legislative function as opposed to the quasi-judicial function of a contested case proceeding.

Establishing and amending IFS and IIFS is governed by Chapter 174C. Under the Code, the Commission must do the following:

- 1) consult with and consider the recommendations of the department of health (H.Rev.Stat. § 174C-71 (E))
- 2) consult with and consider the recommendation of the aquatic biologist of the department of land and natural resources (H.Rev.Stat. § 174C-71 (E))
- 3) consult with and consider the recommendation of the natural area reserves system commission (H.Rev.Stat. § 174C-71 (E))
- 4) consult with and consider the recommendations of the University of Hawaii cooperative fishery unit (H.Rev.Stat. § 174C-71 (E))
- 5) consult with and consider the recommendations of the United States Fish and Wildlife Service (H.Rev.Stat. § 174C-71 (E))
- 6) consult with and consider the recommendations of the Mayor of Maui County (H.Rev.Stat. § 174C-71 (E))

The HO FOF/COL does not reflect that any of these six steps were taken.

Further, the HO is mandated by statute to solicit and consider the views of "the appropriate county officials

responsible for planning, economic development and resource management." See, H.Rev.Stat. § 174C-11. The HO FOF/COL does not reflect that these requirements were met.

Until these mandated statutory processes are completed, the existing IIFS cannot be amended.

VII. INCORPORATION OF OBJECTIONS/EXCEPTIONS.

To the extent that any objections or exceptions of HC&S are not inconsistent with the positions taken by WWC, such objections and exceptions are incorporated by reference.

VIII. CONCLUSION

WWC maintains that the HO: (1) incorrectly applied the law to the facts of the case by failing to weigh instream and noninstream use in amending the IIFS; (2) erred in making certain FOF and COL; (3) erred in failing to make certain factual findings and reach certain legal conclusions that were supported by the record and existing law; (4) erred in excluding relevant evidence; (5) erred in making certain FOF that were recitations of the record and/or arguments rather than factual findings that would assist the Commission; and, (6) erred in that the record created by the HO in the contested case hearing is insufficient under the Code to allow the Commission to modify the existing IIFS.

The Commission is respectfully requested to: (1)

complete the record necessary to amend an existing IIFS pursuant to the Code; (2) based upon a complete record, apply the provisions of the Code to weigh instream and noninstream uses in setting the amended IIFS; (3) adopt an interim order to consider unauthorized diversions, modifications of existing diversions to meet amended IIFS, locations of gauging stations to implement amended IIFS, claims of negative impacts due to amended IIFS; (4) conduct a public hearing pursuant to the Code; and (5) create a final order after completion of items 1 to 4 above.

DATED: Kahului, Hawai'i, May 11 2009



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CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

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