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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,)	Case No. CCH-MA15-01
Integration of Appurtenant Rights and)	
Amendments to the Interim Instream Flow)	
Standards, Na Wai Eha Surface Water)	WAILUKU WATER COMPANY LLC'S
Management Areas of Waihee, Waiehu,)	EXCEPTIONS TO HEARINGS OFFICER'S
Iao and Waikapu Streams, Maui)	PROPOSED FINDINGS OF
)	FACT, CONCLUSIONS OF
)	LAW, AND DECISION & ORDER;
)	CERTIFICATE OF SERVICE

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

Wailuku Water Company LLC ("WWC"), pursuant to Minute Order 12, submits its written exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision & Order filed on November 1, 2017 (the "Proposed Order").

A. Conclusions of Law 79 and 84.

Exception is taken to the Conclusions of Law ("COL") 79 and 84 in which the Proposed Order determines that appurtenant rights are not subject to reservation by deed based on HRS § 174C-63 and based on Hawaii Constitution Art. XI, § 7. These COLs are erroneous for the following reasons.

The COLs maintain that the Constitution adopted in 1978 and the State Water Code adopted in 1987 overruled the Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982) (“Reppun”). The effect of the COLs is to determine, contrary to Reppun, that appurtenant water rights are not subject to reservation by deed, cannot be reserved by a grantor of land, and that a reservation does not terminate the appurtenant water right.

Reppun is binding precedent. It is axiomatic that all courts in Hawaii and all administrative agencies in Hawaii must adhere to a Hawaii Supreme Court decision as precedent, even if the court or the administrative agency (or the hearings officer) holds a differing view.

The hearing officer provided provisional recognition of appurtenant rights in the contested case through the findings and recommendations dated August 30, 2013. The hearing officer’s proposed findings at pages 281 through 283 implement the provisional orders under the caption “Extinguishment of Appurtenant Rights”.

In Reppun, the grantor of land reserved all water rights, including riparian water rights and appurtenant water rights in the deed that transferred title to the land. The grantee maintained that neither riparian water rights nor appurtenant water rights could be severed from the title to the land. The trial court agreed with the grantee and held that the water rights could not be severed from the land, making the reservations of the water rights invalid.

The Hawaii Supreme Court agreed with the trial court’s decision that riparian water rights could not be severed from the land, but disagreed with regard to appurtenant water rights. The Court held that while appurtenant water rights could not be severed from the land, the reservation by the grantor effectively terminated the appurtenant water rights.

There is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate.

Reppun at 552, 656 P.2d at 71.

The Supreme Court referenced the appurtenant water right as “an easement appurtenant” and determined that the holder of the easement had the power to determine that the right would not be conveyed to the grantee of the land. By reserving the appurtenant water right to himself, the easement holder abandoned the appurtenant water rights since the rights could be used only on an identified property to which the easement holder no longer retained a property interest.

There is a distinction between riparian water rights and appurtenant water rights. A riparian water right relates to the accessibility of water streams, rivers or springs adjacent to lands. HRS § 7.1.

An appurtenant water right is in the nature of an easement granted when the land awarded by the Mahele was confirmed to an awardee by the Land Commission and/or when the Royal Patent was issued; the appurtenant water right granted a right to use water for growing taro to the user of a parcel of land. See, Tech v. Bailey, 8 Haw. 638, 651 (1867) and Carter v. Territory of Hawaii, 24 Haw. 47 (1917).

A riparian water right is not a transferable real property right. It is a right that attaches to the land, remains with the land, and is a right to be utilized by the occupier of the land. An appurtenant water right is in the nature of an easement recognized at the time of land commission awards. It references those rights that were enjoyed by and regarded as appurtenant to lands at the date when the lands first passed into private ownership.

In Reppun, the appurtenant water right was likened to “an easement appurtenant”. Reppun determined that the holder of an easement controlled the easement, and as such had the right to determine whether the easement passed to a subsequent grantee of the land. In Reppun the court concluded that it was the intent of the transferor not to pass the right onto the transferee of the land but since the right cannot be severed from the land, the right was extinguished.

The Supreme Court’s Decision references the RESTATEMENT Property § 487 (comment B), concluding that an appurtenant easement attaches to the land and cannot exist or be utilized apart from the land. However, a transferor can express an intent that the appurtenant right will not pass to a transferee, in which case the intent to not pass on the right will sever the appurtenant right. This legal principle was repeated in RESTATEMENT (Third) Property: Servitudes § 5.6 where the intent to prohibit the transfer can sever the appurtenant right.

The proposed COLs maintain that the holder of the appurtenant easement does not control the right and the right is affixed to the land similar to that of riparian water rights. The foundation for this position of law is the constitution and in HRS § 174C-63 which indicates that “appurtenant rights are preserved”. Neither the Constitution nor the statute in any way changes the nature of the appurtenant water right or the Reppun analysis of that right.

Notwithstanding the distinctive attributes of appurtenant water rights, Reppun unquestionably binds lower courts and administrative bodies, including this Commission.

B. Decision and Order Nos. 6, 7 and 9.

The Proposed Order in paragraph 8(b) of the Order section requires that the Waihee River “flow will be increased from 10 mgd to 14 mgd, unless the flow at about 605 feet elevation is less, at which time the flow will be the corresponding amount”. Paragraph 8(c) of the Proposed Order relates that “the flow will be the corresponding amount, increased from an

estimate 6 mgd to an estimate 10 mgd when reduced by losses into stream that are estimated at 4 mgd”.

Paragraphs 6 and 7 of the Proposed Order provide the basis to justify the increase in the IIFS for Waihee River from 10 mgd to 14 mgd. The Proposed Order suggests that since the permits granted from the Waihee River were only 8.3 mgd, since the IIFS for the Waihee River is 10 mgd, and since the lowest recorded flow for the Waihee River was 14 mgd, the IIFS should be increased by the difference between the IIFS and the lowest recorded flow because both of those numbers exceed the total amount allowed for permits issued. See, Table 2, page 528. This assumption neither is reasonable nor does it have an evidentiary foundation.

The gap in the logic employed to change the IIFS for Waihee River is that the 8.3 mgd does not reflect the total amount of Waihee River water that is needed to satisfy the allowed permit amounts. The Hearings Officer failed to take into account the demands from permittees who receive water from multiple sources. Table 2 reflects that there is a source allocation to “multiple sources” of 17.9 mgd. There is no analysis of the amounts that the multiple sources are to contribute to meet the 17.9 mgd attributed to the multiple sources.

The multiple sources are the Waihee River, the Waiehu Stream, the Wailuku River and the Waikapu Stream. Clearly, the Waikapu Stream and the Waiehu Stream provide a limited amount of the 17.9 mgd. Permits granted for Wailuku River of 6.42 mgd, coupled with the IIFS for Wailuku River and the average recorded flows for Wailuku River, cast serious doubt that Wailuku River contributes significantly to the 17.9 mgd. Even if those three sources contributed up to one-half of the 17.9 mgd, the amount required from the Waihee River would be 8.95 mgd. Coupled with the 8.3 mgd demand recognized by the Hearings Officer, the demand

on Waihee River to satisfy the permits granted would be 17.25 mgd, an amount that is 3.25 mgd greater than the lowest measured stream flow.

This analysis points out how the Hearings Officer's Proposed Order to increase IIFS for Waihee River is unreasonable. The analysis also points out the lack of a foundation for the recommendation. The record does not provide a basis on which the Commission or a reviewing Court can determine the amount of the 17.9 mgd that must be supplied by the Waihee River. Absent some finding in the Proposed Order, there is no basis upon which the increase in IIFS for Waihee Stream can be sustained.

The second assumption for the proposed orders is that the increase IIFS from the Waihee River would have a measurable impact in increasing the natural habitat units. The conclusion cites Finding 56 and Conclusions of Law 142, 143 and 167. Finding No. 56 relates that the minimum daily flow is 14 mgd. There is no basis in the record to justify the conclusions under Finding No. 6 and 7.

On October 3, 2016, Commission staff provided a report summarizing the work conducted by the Commission in establishing, implementing and monitoring measurable IIFS for the Na Wai Eha. (Commission Staff Report of October 3, 2016 ("Staff Report")). The Staff Report did not assess IIFS compliance on a 12-month rolling average basis. (Oral Testimony of Ayron Strauch on October 14, 2016 ("Strauch Oral") TR 11: 126:3-7). The Staff Report did not address the impact of stream flows on stream life and species in the stream. (Strauch Oral TR 11:126:14-17). Also, the report did not assess the impact of stream flows on wildlife in and around the streams; (Strauch Oral TR 11:126:18-21); did not assess the aesthetic qualities of the streams; (Strauch Oral TR 11:126:22-24); did not assess the impact of stream flows on the recreational qualities of the streams; (Strauch Oral TR:126:25 to 127:3), did not assess the

impact of stream flows on the water quality in the streams; (Strauch Oral TR:127:4-7) and did not assess the impact of stream flows and the ecology of the streams. (Strauch Oral TR:127:8:11).

The State Water Code (HRS Chapter 174C) imposes obligations on the Commission in its review of a request to set or amend an IIFS. These obligations include the collection of instream flow data to determine instream flow requirements, beneficial instream uses and environmental protection. HRS §174C-71(4). There is no evidence in the record of any investigations that address the impact of changed (or existing) stream flows on instream life and species, on the impact of stream life or wildlife in and around the streams, on the impact on the aesthetic quality of the streams, on the impact on the recreational qualities of the streams, on the impact on water quality, or on the impact on the ecology of the streams. This lack of evidence in the record prevents the Commission from amending the IIFS.

C. Decision and Order Paragraphs Nos. 40, 50, 51 and 52.

Exception is taken to Paragraph 40, Paragraph 50, Paragraph 51 and Paragraph 52 of the Orders section of the Proposed Order. Each of these paragraphs impose obligations on WWC which are to be performed by the Commission and not by a private party. Passing the obligation without statutory authority or rulemaking is improper.

Paragraph 40 improperly directs WWC to maintain a balance between upstream and downstream users while meeting the IIFS requirements, and, when stream flows are inadequate, to satisfy permit requirements to reduce water uses equitably amongst the users.

Paragraph 51 impermissibly directs WWC to allocate water between upstream and downstream users on the Waihee River, the Waiehu Stream and the Wailuku River (Waikapu Stream is excluded from the obligation). This paragraph also requires WWC to confer

with the Commission with regard to WWC's allocation of water between upstream and downstream users.

Paragraph 52 improperly directs WWC to prorate water based upon the category of users established by the Commission.

The proposed directives in these paragraphs are not within the jurisdiction of the Commission. The orders are not authorized by the Water Code and if such were authorized there are no rules promulgated by the Commission to implement the authorizations. The directives do not provide or even suggest sufficient standards in order to be subject to implementation by WWC.

In addition, the proposed directives are inconsistent with and fail to implement existing rules that are applicable to the Commission.

Section 13-171-27, HAR, indicates that a permit for appurtenant rights is subject to HAR Title 13, subchapters 4 and 5. Subchapter 4, which provides direction to the Commission in the event of water shortages, requires the Commission to formulate a plan for implementation during periods of water shortage in HAR § 13-171-40. Section 13-171-41, HAR provides the Commission with the criteria for declaring a water shortage. Section 13-171-42, HAR, requires the Commission to formulate a plan for implementation of water sharing during periods of water shortage. As part of such plan, the Commission is obligated to adopt a reasonable system of permit classifications according to the source of water, method of abstraction or diversion, use of water or a combination thereof. Section 13-171-43, HAR, obligates the Commission to publish a notice in a newspaper of general circulation throughout the area for the water shortage. Section 13-171-43, HAR, requires the Commission to cause each permittee in the area to be notified by regular mail of any change in the conditions of the

permittee's permit, any suspension thereof or any other restriction or use of water for the duration of the water shortage. Finally, HAR § 13-171-44 provides the protocols if water shortage is to be rescinded.

The directives within paragraphs 40 and 50 to 52 are not within the power of the Commission to delegate to a private party and such a delegation is inconsistent with the obligations of the Commission under its existing rules.

D. Conclusion.

Extinguishment of Appurtenant Rights. The Commission must consider and examine Reppun. The decision defines appurtenant rights distinctive to and inconsistent with the treatment provided in the Proposed Order. The question is whether the holder of an appurtenant water right has the power to sever it from the land. Existing law provides that the holder can sever the right from the land. The Proposed Order maintains that after July 1987 the holder cannot sever the appurtenant right from the land, contrary to the holding in Reppun. Reppun is binding upon the Commission and failure to follow the holding in Reppun would be erroneous.

The Increase in the IIFS for Waihee River from 10 mgd to 14 mgd. The Commission must consider and examine the record to determine whether there is appropriate evidence to order the increase in the IIFS as suggested in the Proposed Order. The Proposed Order reflects there will be shortages of water and that water for permits granted will not be available to the permit holders. Obviously, the question is the frequency of such shortages and the harm to those who need the water.

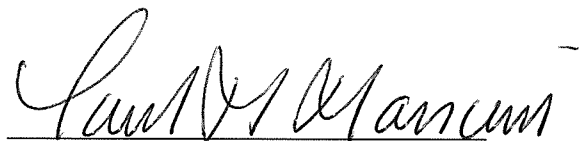
The record is not adequate to justify the change to the IIFS. Also, the amount of water granted for use among the collective permits (36.5 mgd) is a set number. If there is excess

water available to satisfy the existing IIFS and the permit allocation of 36.5 mgd, the excess is automatically left in the streams, a residual increase in the IIFS. If there is insufficient water, it would be improper to increase the IIFS in Waihee River.

It takes years to amend the IIFS and it is not possible to provide additional water from the streams to the permit holders without an extended process of amending the IIFS. If the additional 4 mgd is not needed to satisfy the permit requirements, then it will remain in the Waihee River.

Implementation Orders on WWC. The Commission must consider and examine whether the Commission has the authority to delegate its obligations to a private party under the Water Code and under the administrative rules that it adopted and to which it is subject. It is an abuse of the Commission's authority to delegate duties that were placed on it by the Legislature and further is an abuse of the Commission's authority to ignore administrative rules that it adopted and with which it must comply. Whether or not the Commission agrees with WWC, it cannot ignore the obligations placed on it by the legislature and cannot delegate those rights and obligations.

DATED: Kahului, Hawaii, January 5, 2018.



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Pursuant to Minutes Order No. 9, issued on November 29, 2016, as amended by Minute Order No. 11, issued on February 10, 2017, the original and five (5) copies of the foregoing document will be mailed to Kathy Yoda at the Commission on Water Resource Management on January 5, 2018, as well as an electronic copy by email. In addition, pursuant to Minute Order 4, dated March 7, 2016, copies will be emailed to the following parties who requested service by email, as set forth below, and service on parties who have not agreed to electronic service is via the Commission website:

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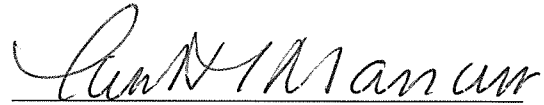
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DATED: Kahului, Hawaii, January 5, 2018.

A handwritten signature in cursive script, appearing to read "Paul R. Mancini", written over a horizontal line.

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