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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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

Case No. CCH-MA 15-01

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER (AS TO
APPLICANT STATE PARKS)

CERTIFICATE OF SERVICE

PROPOSED

FINDINGS OF FACT, CONCLUSIONS OF LAW, &

DECISION AND ORDER


(AS TO APPLICANT STATE PARKS)

**Proposed Findings of Fact, Conclusions of Law,
& Decision and Order
as to Applicant State Parks**

Surface Water Use Permit Application (“SWUPA”) applicant the State of Hawaii Department of Land and Natural Resources, Division of State Parks (“State Parks”) submits the following Proposed Findings of Fact (“FOF”)¹, Conclusions of Law (“COL”), and Decision and Order (“D&O”) in the Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Āao and Waikapū Streams, Maui proceedings. The FOF, COL, and D&O are substantially based on the records maintained by the Commission on Water Resource Management (“CWRM”) in the Contested Case Hearing on Appurtenant Rights and Water Use Permit Applications which commenced on July 11, 2016.

If any statement denominated a COL is more properly considered a FOF, then it should be treated as an FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

DATED: Honolulu, Hawai‘i, February 17, 2017.



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¹ References to the record are enclosed in parentheses, followed by a party’s proposed Finding of Fact (“FOF”), if accepted. “Exh.” refers to exhibits accompanying written or oral testimony, followed by the exhibit number and page or table number, if necessary. Written testimony is referred to as follows: name of the witness, the type of written testimony, and the page number or paragraph of that testimony. “WDT” means written direct testimony or witness statement; and “WRT” means written responsive testimony or the written rebuttal testimony to the written responsive testimony. Oral testimony is referred to as follows: name of the witness, the date of the transcript (“Tr.”), and the page number.

I. FINDINGS OF FACT

A. Procedural Events Preceding SWUPA Quantification

1. On April 27, 2009, the State of Hawaii Department of Land and Natural Resources (“DLNR”), Division of State Parks timely filed an Application for Surface Water Use Permit for an existing and appurtenant right to water use at the ‘Īao Valley State Park within one year following the designation of the Nā Wai ‘Ehā, Maui, Surface Water Management Areas for approximately 5,000 gallons per day (gpd) of nonpotable water, and was assigned an application number - SWUPA No. 2304 (“State Parks SWUPA”).
2. The application stated that water diverted by pipe at the ‘Īao Valley State Park is used to irrigate four taro (kalo) lo‘is totaling about 500 square feet in the park garden area with educational features and viewing by the general public.
4. The State Parks SWUPA erroneously indicated the ‘Īao Valley State Park property and stream water diversion were both located on tax map key number as (2) 3-3-003:02, on the ‘Īao hydrologic unit (surface water code 6024).
5. After the CWRM’s public notice dated May 29, 2009, objections to the State Parks SWUPA were filed:
 - a. On June 16, 2009 by Hawaiian Commercial & Sugar Company (“HC&S”) to ensure that “competing applications are considered together and in relation to one another;
 - b. On or about June 22, 2009 by Wailuku Water Company, LLC (“Wailuku Water”) as a blanket objection; and

c. On June 22, 2009 by Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation for the failure of State Parks to provide documentation of claimed appurtenant rights.

6. However, a letter from then Office of Hawaiian Affairs administrator Clyde Nāmu‘o filed with CWRM on June 24, 2009 supported the State Parks application:

We urge that this use also be considered reasonable and beneficial and being consistent with the public interest. HRS § 174C-2(c) affords that the water code be liberally interpreted to allow domestic uses, agriculture, scenic beauty and the maintenance of proper ecological balance as all being maximum beneficial uses. As such, this applicant’s educational use in a state park is surely consistent with the public interest. This use is also economic, efficient and for a purpose, which speaks directly to the definition of a reasonable-beneficial use, as found in HRS § 174C-3.

OHA sees that the applicant is claiming appurtenant rights. The Constitution of Hawai‘i, in Article XI, Section 7, directs CWRM to establish criteria for water use priorities, while at the same time assuring appurtenant rights. As such, OHA advocates that the appurtenant rights demonstrated in this application be recognized by CWRM.

7. According to the CWRM’s August 24, 2012 public notice, any objections to provisional recognition for a water use application for appurtenant rights were due on September 19, 2012, but the Wailuku Water Company, LLC (“WWC”) filed an objection to the State Parks SWUPA on the basis that the application for appurtenant rights contained “materially false statements or representations” by the claimant, including an “ambiguity or possibly a mischaracterization on the water source for the appurtenant right” on September 21, 2012. WWC Objection, Sept. 21, 2012, pp. 1-3.

8. On November 20, 2014, State Parks filed a Re-submitted Application for Provisional Recognition of Appurtenant Rights Na Wai Eha Surface Water Management Area, Waihe‘e, Waiehu, ‘Īao, and Waikapu Streams, Maui, Hawai‘i which corrected the tax map key number for the state parks property to (2) 3-3-003:012, including other documentation regarding the

derivation of ownership to the ‘Īao Valley State Monument (‘Īao Valley State Park) parcel and documentation of appurtenant rights for the parcel.

9. Whether or not WWC’s objection was timely filed, the Hearings Officer’s initially determined the State Parks’ application as denied without prejudice due to “incorrect TMK” and no appurtenant right documentation (see Exhibit 7 to CWRM Hearings Officer’s F&R – Appurtenant Rights – Provisional Determination, Oct. 14, 2014), but the Hearings Officer later approved a provisional determination on Dec. 31, 2014. (*Id.* Exhibit 7 at p. 19. Dec. 31, 2014.)

10. No parties filed an objection to the State Parks SWUPA following the provisional determination approval.

11. No State Parks’ witness statements and testimony was withdrawn, and all exhibits indicated on the State Parks’ exhibit lists were entered into evidence without objection.

B. Quantification Requirements for Appurtenant Rights Claims

12. Under Minute Order #1 to CCH-MA 15-01 an applicant SWUPA must show: 1) the amount of land with the Land Commission Award (LCA) that was using water at the time of the LCA; and 2) the amount of water used on the specific portion of the LCA.

1. State Parks Land Area Using Water at the time of the LCA

13. The ‘Īao Valley State Park property is derived from 1.45 acres described in the 1854 LCA no. 3529, Apana 1 to Hana (Royal Patent 4059), and the remaining 4.735 acres from portions of the 1882 Royal Patent Grant no. 3343 to Claus Spreckels. Exhs. 2304-DLNR-2 (see Executive Order no. 2926, C.S.F. no. 18,293); 2304-DLNR-3, -4, -5a to -5d.

14. ‘Īao Valley State Park is located at the confluence of two streams, ‘Īao Stream and Kinihapai Stream, which merge to form the present-day Wailuku River (formerly known as ‘Īao River), and thus has riparian flow across and alongside park boundaries. Exhs. 2304-DLNR-8;

2304-DLNR-9 (“Iao Valley Water Rights”, HTS Plat 1079); P.(H.) McEldowney, 2/5/16 WDT at 8-9.

15. Information about historical usage of the park property is better known from the LCA portion than from those composed of portions of Royal Patent Grant no. 3343, as the latter grant of 24,000 acres in the ahupua‘a of Wailuku contained little indication or detail of crops cultivated or water usage on the massive grant of land. E.M. Collins, 3/16/16 WDT (supplemental) at 2, 3; Exh. 2304-DLNR-13.

16. Even without information of water usage contained in Royal Patent Grant no. 3343, there was still evidence of kalo cultivation – and thus water usage - found by state archaeologists conducting an informal survey of the portion of the park property from those grants. The findings were consistent with kalo cultivation in nearby apana, however, there is no information quantifying the extent of cultivation on non-LCA park parcels at this time. P.(H.) McEldowney 2/5/16 WDT, p. 5.

17. The language of LCA no. 3529, Apana 1 to Hana states that 1.45 acre is planted in kalo, stating in Hawaiian, “*Kalo ma ka ili Kahua*” which refers to kalo or wet land in the Ili of Kahua, with courses of the parcel description stated in relation to “*Kahawai*” (e.g., a stream, creek, river, or gulch, whether wet or dry). Exhibit 1 in Exh. 2304-DLNR-1; E.M. Collins, 2/5/16 WDT at 2, 3; Exh. 2304-DLNR-7.

18. Native testimony by Kuahine for Hana’s claim before the Land Commission indicates that “(apana) no. 1 is kalo land in Kahua” and “bounded mauka by the creek of Wailuku, by the pali. On the other two sides by the creek.” See Exhibit 3 in Exh. 2304-DLNR-1.

19. The description of the LCA amount of land area in kalo cultivation is lacking in the award documents, but may be inferred as a large percentage. Lilikala Kame‘eleihiwa, 7/11/16, transcr. pp. 62-63, 65 (assume the whole area was in lo‘i kalo if a kuleana award).
20. The topography of the ‘Īao Valley State Park has changed drastically over time, both due to construction of ‘Īao Valley Road, and the existing park infrastructure as influenced by erosion and repeated flooding since the 1880s. McEldowney 2/5/16 WDT, p. 5, 11; Exhibits 24 and 25 in Exh. 2304-DLNR-1.
21. In 1908, fifty-four years after the award of LCA no. 3529, a lawsuit by the Wailua Sugar Company against representatives of the Territorial Government and County of Maui indicated that the amount of land in kalo lo‘i was “about three-fourths of an acre”. Exh. 2304-DLNR-10, p. 2, ¶3.
22. Although inconsistent with OHA witness Lilikala Kame‘eleihiwa’s testimony inferring a larger acreage in kalo lo‘i cultivation, the 1908 lawsuit may provide a floor for inferences on minimum acreage in kalo cultivation at the time of the award of LCA no. 3529, Apana 1 to Hana. McEldowney, 2/5/16 WDT at 9-10.

2. Amount of Water Use on the State Parks Property LCA

23. OHA witness, taro farmer Paul Reppun, testified that wetland taro needs between 100,000 to 300,000 gallons per acre per day (gad) of new water flow for healthy cultivation. (Paul Reppun, WDT (Exh. OHA-1) at 2). Reppun also testified that a United States Geological Survey study (Exh. OHA-3) estimated 260,000 gad is needed for lo‘i complexes (assuming some lo‘i are fallow) while 350,000 gad is needed for individual lo‘i. P. Reppun, WDT (Exh. OHA-1) at 13.

24. Flow requirements in relation to capacity to cool the kalo in a series of lo‘i may vary such that a lo‘i farmed at the “top” (or head waters) may require less flow than lo‘i further down. P. Reppun, 7/11/16 Tr. at 152-153.

25. Assuming that water usage for lo‘i kalo on the State Parks property was consistent in producing healthy kalo at the time of LCA no. 3529, the estimate of water use for 0.75 acre of lo‘i kalo is between 75,000 gallons per day to 225,000 gallons per day but may be as high as 262,500 gallons per day if treated as an individual lo‘i. FOFs 21, 23 (calculated).

C. Reasonable-beneficial considerations under H.R.S. § 174C-50

26. Assuming application procedures are followed, issuance of a water use permit as an existing use is governed by Hawaii Revised Statutes (H.R.S.) § 174C-50, including whether the existing use is a reasonable-beneficial one (defined as “use of water in such quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.” H.R.S. § 174C-3).

1. The State Parks request is for an “economic and efficient utilization of a quantity of water”

27. Although records from the turn of the century indicate the 0.75 acre of lo‘i in ‘Īao Valley State Park should be entitled to an appurtenant right amount conservatively estimated between 75,000 to 225,000 gallons per day, only water necessary for current operations of the kalo demonstration project in the ‘Īao Valley State Park property is requested.

28. The area of lo‘i in ‘Īao Valley State Park was initially estimated at 500 square feet in the 2009 State Parks SWUPA, but lo‘i were more precisely and individually mapped in April of 2016 for a total area of 1,243 square feet (0.028 acre). McEldowney, Reply 5/31/16 WDT at 1.

29. Current estimates of water usage in the demonstration lo'i in the botanical garden at the 'Īao Valley State Park property are between about 3,000 to 39,000 gallons per day, influenced in part by differences in ambient stream flow in the adjacent Kīnihapai Stream. Russell Kumabe, 7/19/16 Tr. at 61, 64.

30. State Parks Planner Russell Kumabe testified to water needs in 'Īao Valley State Park for growing kalo as a demonstration project in the botanical garden as about 5,000 gallons per day if certain lo'i are allowed to lie fallow during parts of the year. *Id.* at 68-69. Water is supplied between lo'i by PVC pipes for accurate distribution by gravity flow, with outflow to a point where Kīnihapai and 'Īao Streams merge. R. Kumabe, WDT at 3.

31. Other plants growing in the 'Īao Valley State Park botanical garden are currently maintained by ambient rainfall and runoff. *Id.* at 3-4.

32. Recycled wastewater is not currently available as a source near the 'Īao Valley State Park, nor would such usage be consistent for medicinal or edible plants grown in the botanical demonstration garden in the park if posing a potential health hazard. *Id.*

33. As the mauka-most upstream user on the 'Īao hydrologic unit, the State Parks property may be a position least affected by temperature considerations. P. Reppun, 7/11/16 Tr. at 152-153.

2. The State Parks SWUPA is consistent with state and county land use plans

34. State zoning of the park property is in conservation.

35. The State of Hawai'i set aside 6.185 acres for public purposes for the 'Īao Valley State Park in 1978. Exh. 2304-DLNR-2 (Executive Order no. 2926).

36. The continued use of water to grow kalo in the ‘Āao Valley State Park is not a change of land use from the time of the Great Mahele, and thus is consistent with state and county land use plans.

3. The allocation requested by State Parks is in the public interest

37. ‘Āao Valley State Park was set aside for public purposes as a state park in 1978 by Executive Order no. 2926. McEldowney, 2/5/16 WDT at 4; Exh. 2304-DLNR-2. Uses of water in the park, pre-dated the establishment of the State Water Code in 1987.

38. The state park includes sanitation facilities, a scenic viewpoint for ‘Āao Needle, and a botanical garden including interpretive displays and demonstration kalo lo‘i to show visitors what kalo looks like, how it is grown, and its importance to Hawaiian culture. R. Kumabe, WDT at 2.

39. Growth of kalo as demonstration project is consistent with the exercise of Native Hawaiian traditional and customary rights. *See* FOF 6, *supra*.

II. CONCLUSIONS OF LAW

1. The preponderance of the evidence standard applies to H.R.S. chapter 91 contested case proceedings such as this. *See* H.R.S. § 91-10.

2. Existing water uses may be continued if permitted by H.R.S. § 174C-50, which requires an application in accordance with H.R.S. §§ 174C-51 to -53, and the finding that the existing use is a reasonable and beneficial one.

3. The State Parks SWUPA was timely filed within one year of designation as a water use management area under Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Āao and Waikapū Streams.

4. Evidence to quantify of areas under cultivation in the ‘Āao Valley State Park since the time of the Great Mahele is increasingly scant, in part due to natural changes in topography over time reaching back to the late 1800s. FOF 20-22.

5. A 1908 case filed by Wailuku Sugar Company regarding water usage on the 'Īao Valley State Park property reasonably demonstrates that at least 0.75 acre of LCA no. 3529, Apana 1 to Hana, was more likely than not in continuous kalo cultivation from the time of the Great Mahele award.
6. Appurtenant right water usage for 0.75 acre of the 6.185 acres of the 'Īao Valley State Park, is a conservative estimate of land used for lo'i kalo, and an allocation of between 75,000 gad to 225,000 gad according to estimates of water flow necessary for healthy kalo cultivation. FOFs 19, 20, 25.
7. Use of water allocated for a demonstration project of lo'i kalo in 'Īao Valley State Park is a use of water in the public interest and under the public trust. *See* FOF 39.
8. Evidence admitted in these proceedings under the State Parks SWUPA met the burden of proof under H.R.S. § 174C-50 to establish both continued riparian usage and appurtenant rights to water use in 'Īao Valley State Park.
9. Uses of water in the 'Īao Valley State Park, which was set aside by executive order as a state park in 1978, pre-dated the establishment of the State Water Code in 1987. FOF 37.
10. Under the State Water Code (H.R.S. chapter 174C) adopted in 1987, appurtenant rights are preserved, contrary to the interpretation in *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982, recon. den. 1983) which indicated that appurtenant rights may be extinguished. H.R.S. § 174C-63. Any further appurtenant rights in water usage may be determined at a future date.

III. DECISION AND ORDER

1. The Hearings Officer finds, concludes, and recommends that the State of Hawai'i, Department of Land and Natural Resources Division of State Parks is entitled to appurtenant rights for the amount of 75,000 gallons per day for the 'Īao Valley State Park property located at TMK no. (2) 3-3-003:012.
2. However, as the Applicant has stated that a lesser amount is sufficient to current needs, the Hearings Officer recommends issuance of a surface water use permit to the State of Hawai'i, Department of Land and Natural Resources Division of State Parks in the amount of 5,000 gallons per day.

3. Any water not used under the permit shall be returned to the stream.

DATED: Honolulu, Hawai'i _____

LAWRENCE MIIKE, Hearings Officer

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications,
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CERTIFICATE OF SERVICE

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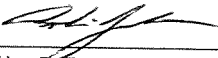
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