

APPENDIX C

Legal Authorities and Guidance

Water Resource Protection Plan 2019 Update

C Legal Authorities and Guidance

Table of Contents

C	Legal Authorities and Guidance	3
C.1	Legal Authorities Pertaining to Water Resource Management in Hawai'i	3
C.1.1	The Hawai'i State Constitution.....	3
C.1.2	The State Water Code (Hawai'i Revised Statutes Chapter 174C).....	4
C.1.3	The Hawai'i Administrative Rules	5
C.2	Principles of Water Resource Management in Hawai'i	6
C.2.1	The Public Trust Doctrine	7
C.2.2	The Precautionary Principle.....	8
C.2.3	Recognized Water Rights in Hawai'i.....	9
C.3	Goals and Objectives of the Commission on Water Resource Management	15
C.4	CWRM Programs	17
C.5	Summary	20

Figures

Figure C-1	Generalized Process for Determining Appurtenant Water Rights in Designated Surface Water Management Areas.....	12
Figure C-2	CWRM Organizational Chart	18

This page intentionally left blank.

C Legal Authorities and Guidance

This Appendix summarizes the legal authorities and guidance for water management set forth in the State Constitution, the State Water Code, and the Hawai'i Administrative Rules. The CWRM applies these legal authorities and guidance when implementing the State Water Code. Also presented are CWRM's goals and objectives for executing the agency's mandated responsibilities.

Following the summary of policies in **Sections C.1 and C.2**, **Section C.3** presents CWRM's goals and objectives for executing the agency's mandated responsibilities

C.1 Legal Authorities Pertaining to Water Resource Management in Hawai'i

This section discusses general water resource policies in the State Constitution, Hawai'i Revised Statutes, and Hawai'i Administrative Rules.

C.1.1 The Hawai'i State Constitution

The **Hawai'i State Constitution** is the document that defines the principles and authorities of the government of the State of Hawai'i. Created by a Constitutional Convention in 1949, it was adopted by the people on November 7, 1950, was confirmed by the U.S. Congress in March 1959, and went into effect on August 21, 1959 when a presidential proclamation was issued admitting the state of Hawai'i into the Union. It has been amended several times either through proposals adopted by the legislature or by constitutional convention and ratified by the people.

Article XI, Section 1 mandates that the State "conserve and protect Hawaii's natural beauty and all natural resources...and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." Additionally, under Article XI, Section 7, "The State has an obligation to protect, control, and regulate the use of Hawaii's water resources for the benefit of its people." With this statement, the Public Trust Doctrine was written into the State Constitution.

The Public Trust Doctrine is a concept relating to the ownership, protection and use of natural resources, where common resources such as water are to be held in trust by the State for the use and enjoyment of the general public. In Hawaii, the application of the Public Trust Doctrine in resource management considers both the public's right to use and enjoy trust resources, and the private property rights that may exist in the use and possession of trust resources; however, any balancing between public and private interests begins with a presumption in favor of public use, access, and enjoyment. See **Section 0** for more on The Public Trust Doctrine.

C.1.2 The State Water Code (Hawai'i Revised Statutes Chapter 174C)

Statutes are the written laws created and passed by a State's legislature. The **State Water Code**, enacted in 1987 as **Chapter 174C of the Hawai'i Revised Statutes (HRS)**, provides the legal basis for and establishment of the Commission on Water Resource Management (CWRM) and defines its responsibilities and authorities.

The Hawaii State Legislature (Legislature) incorporated the Public Trust Doctrine into the State Water Code. This section presents broad declarations of water resource protection and management policy that are embedded in the State Water Code and are employed by CWRM in program administration.

The State Water Code Declaration of Policy is as follows:

- *It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use. (HRS §174C-2)*
- *There is a need for a program of comprehensive water resources planning to address the problems of supply and conservation of water. The Hawaii water plan, with such future amendments, supplements, and additions as may be necessary, is accepted as the guide for developing and implementing this policy. (HRS §174C-2)*
- *The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest. (HRS §174C-2)*
- *The state water code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing water pollution and in the maintenance of high standards of water quality. (HRS §174C-2)*
- *The state water code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning. (HRS §174C-2)*

C.1.3 The Hawai'i Administrative Rules

The **Hawaii Administrative Rules (HAR), Title 13, Department of Land and Natural Resources, Subtitle 7, Water Resources** contains the rules and procedures adopted pursuant to the State Water Code for administering code provisions. The rules constitute procedural policies of CWRM that provide additional guidance for the implementation of the broad water management and use policies included in the State Water Code. The appropriate chapters from the HAR are briefly summarized below:

HAR Chapter 13-167: Rules of Practice and Procedure for the Commission on Water Resource Management

This chapter governs practice and procedure before CWRM under Chapter 91, HRS, the Constitution and water laws of the State, the Constitution and laws of the United States, and such other related acts as may now or hereinafter be administered by CWRM. The rules in this section are intended to secure the just, speedy, and inexpensive determination of every proceeding.

HAR Chapter 13-168: Water Use, Wells, and Stream Diversion Works

The primary purpose of this section is to carry out the intent of the State Water Code to assure maximum beneficial use of ground and surface waters of the State by establishing rules for reporting and gathering meaningful data on all water uses and sources. The rules in this section provide for the declaration and certification of all existing uses of surface and ground water; the registration of all existing wells and existing stream diversion works; the reporting of current uses of surface and ground water; the permitting of wells; the permitting of pump installations and repairs; and the permitting of stream diversion works. The *Hawaii Well Construction and Pump Installation Standards* (HWCPIS) were amended to the HAR in January 1997, allowing subsequent revision as necessary. The HWCPIS provides for the safe and sanitary maintenance and operation of wells, to prevent waste, and to prevent contamination of ground water aquifers.

HAR Chapter 13-169: Protection of Instream Uses of Water

The purpose of this chapter is to provide for the establishment of a statewide program to protect, enhance, and reestablish, where practical, beneficial instream uses of water, including the development and establishment of standards for instream flows and the creation of a permit system to regulate the alteration of stream channels.

HAR Chapter 13-170: Hawaii Water Plan

This chapter provides guidelines for preparation of the HWP. Interagency consultation is advised between appropriate county, State, and federal agencies. CWRM is further advised to set forth programs to conserve, augment, and protect water resources, and to consider any other elements necessary or desirable for inclusion in the Hawaii Water Plan.

HAR Chapter 13-170: Hawaii Water Plan, Subchapter 6, Integration of Plan Elements

This subchapter delineates implementation priorities and the structure of the HWP:

- Integration of the HWP is dependent on the creation of a master water resource inventory, designation of hydrologic units as identified in Section 13-170-20, and formulation of water quality criteria as described in Section 13-170-52.
- The WRPP and the WQP shall be created as soon as practicable in order that the State and county may use the information in preparing their respective plans.
- The WRPP shall incorporate, where applicable, data contained within the WQP for the purpose of protecting, conserving and augmenting the state’s water resources.
- Both the SWPP and each County WUDP shall be subject to the WRPP.
- The HWP shall guide CWRM in the designation of water management areas and in the issuance of permits as set forth in the State Water Code.

HAR Chapter 13-171: Designation and Regulation of Water Management Areas

The purpose of this section is to provide for the designation and regulation of hydrologic areas where water resources are being threatened by existing or proposed withdrawals or diversions of water, water quality problems, or serious disputes. The rules state, “[I]t shall be the duty of the [Water] Commission to designate areas for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface water in threatened areas to ensure the most beneficial use, development, or management of the water resources in the interest of the people of the State.”

C.2 Principles of Water Resource Management in Hawai‘i¹

Hawai‘i’s water law is an amalgamation of the ancient and historical Native Hawaiian water management system, surviving Kingdom law, and modern constitutional and statutory mandates. Water rights, therefore, exist in several forms and carry different obligations under the State Water Code and under common law. The following sections provide further discussion and insight as to the relationship between the Public Trust Doctrine, the State Water Code, and legal provisions for water rights.

¹ This publication is designed to provide general information prepared by professionals in regard to the subject matter covered. It is provided with the understanding that the publisher, authors, and editors are not engaged in rendering legal or other professional service herein. Due to the rapidly changing nature of the law, information contained in this publication may become outdated.

Although prepared by professionals, this publication should not be utilized by a lawyer as a substitute for his or her own research. The lawyer is solely responsible for analyzing and updating the information to ensure accuracy. This publication should not be used by non-lawyers as a substitute for professional legal or other advice. If legal advice or other expert assistance is required, the services of a professional should be sought.

The publisher, authors, and editors specifically disclaim any liability, loss or risk incurred as a result of the use and application, either directly or indirectly, of any information contained in this publication, whether or not negligently provided. All procedures and forms are suggestions only, and changes must be made depending on the specific circumstances in each case.

C.2.1 The Public Trust Doctrine

Hawaii is one of several states that have included the Public Trust Doctrine into its State Constitution. As stated earlier in **Section 0**, the Legislature incorporated the Public Trust Doctrine into the State Water Code as follows:

It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use. (HRS §174C-2)

Hawaii's constitutional, statutory, and administrative rule provisions for protecting public interests was reinforced by the Hawaii Supreme Court (the Court) decisions in the Waiāhole Ditch Contested Case (Waiāhole Water Case) proceedings (Docket No. CCHOA95-1) during the late 1990s and early 2000s. The Court's decisions emphasize the Public Trust Doctrine and the associated Precautionary Principle as essential to the application and administration of the State Water Code and have further helped to define current water rights in Hawai'i.

In its review of the Waiāhole Water Case, the Court held that:

- Title to the water resources is held in trust by the State for the benefit of its people;
- Article XI, sections one and seven of the State Constitution adopted the public trust doctrine as a fundamental principle of constitutional law in Hawai'i;
- The Legislature incorporated public trust principles into the State Water Code; and
- Nevertheless, the State Water Code did not supplant the protections of the Public Trust Doctrine, which the Court would continue to use to inform the Court's interpretation of the State Water Code, define its outer limits, and justify its existence.²

The Court has identified four trust purposes, three in the Waiāhole Water Case, and a fourth in its 2004 decision, *In the Matter of the Contested Case Hearing on Water Use, Well Construction, and Pump Installation Permit Applications, Filed by Waiola o Moloka'i, Inc. and Moloka'i Ranch, Limited*. These purposes are listed below and are equally protected under the law:

- Maintenance of waters in their natural state;
- Domestic water use of the general public, particularly drinking water;
- The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
- Reservations of water for Hawaiian Home Land allotments.

² 94 Haw. 97, at 130-133; 9 P3d 409, at 443-445

The Court also identified the following principles for the water resources trust:³

- The State has both the authority and duty to preserve the rights of present and future generations in the waters of the State;
- This authority empowers the State to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust;
- The State also bears the affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible;
- Competing public and private water uses must be weighed on a case-by-case basis, and any balancing between public and private purposes begins with a presumption in favor of public use, access, and enjoyment;
- There is a higher level of scrutiny for private commercial uses, with the burden ultimately lying with those seeking or approving such uses to justify them in light of the purposes protected by the trust; and
- Reason and necessity dictate that the public trust may have to accommodate uses inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values; offstream use is not precluded but requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of the State.

C.2.2 The Precautionary Principle

When scientific evidence is preliminary and not conclusive regarding the management of the water resources trust, it is prudent to adopt “precautionary principles.” The Court’s interpretation as explained in the Waiāhole Water Case is as follows:

- As with any general principle, its meaning must vary according to the situation and can only develop over time. At a minimum, the absence of firm scientific proof should not tie the Water Commission’s hands in adopting reasonable measures designed to further the public interest.
- The precautionary principle simply restates the commission’s duties under the State Constitution and the State Code. The lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiates the Water Commission’s affirmative duty to protect such purposes wherever feasible. Nor does its present inability to fulfill the instream use protection framework render the statute’s directives any less mandatory. In requiring the Water Commission to establish instream flow standards at an early planning stage, the State Water Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions,

³ Note that, while these principles are directed at surface water resources, they apply equally to ground water resources.

generalized assumptions, and policy judgments. Neither the State Constitution nor the State Water Code constrains the Water Commission to wait for full scientific certainty in fulfilling its duty toward the public interest in minimum instream flows.

The Court's linking of the Public Trust Doctrine to the precautionary principle offers significant guidance to water resource management. The tenets of the precautionary principle state that:

- There is a duty to take anticipatory action to prevent harm to public resources;
- There is an obligation to examine the full range of alternatives before starting a new activity and in using new technologies, processes, and chemicals; and
- Decisions should be open, informed, and democratic and include affected parties.

In this regard, "precautionary actions" may include:

- Anticipatory and preventive actions;
- Actions that increase rather than decrease options;
- Actions that can be monitored and reversed;
- Actions that increase resilience, health, and the integrity of the whole system; and
- Actions that enhance diversity.

The Public Trust Doctrine establishes a general duty to take precautionary actions and thus shifts the burden of proof to non-trust purposes and requires preventive action in the face of uncertainty.

C.2.3 Recognized Water Rights in Hawai'i

Water rights and uses in Hawaii are governed by the State Water Code⁴ and the common law. The State Water Code preserved appurtenant rights but not correlative and riparian rights in designated water management areas. Thus, when a ground water management area is designated, existing correlative uses within that area can be issued water use permits under the existing use provisions of the State Water Code, but unexercised correlative rights are extinguished. Similarly, when a surface water management area is designated, existing riparian uses within that area are eligible for water use permits as existing uses, but unexercised riparian rights are extinguished. Furthermore, the Hawaii Supreme Court has ruled that when there is an undisputed, direct interrelationship between the surface and ground waters, designation of a ground water management area subjects both ground and surface water diversions from the designated area to the statutory permit requirement.⁵ Presumably, permits would also be required for ground and surface water diversions when the interrelationship occurs in a surface water management area.

⁴ HRS 174C, §§ 174C-1 to 174C-101.

⁵ *In re Water Use Permit Applications*, 94 Haw. 97, at 173; 9 P3d 409, at 485 (2000).

While water use permits are required only in designated water management areas and the common law on water rights and uses continue to apply in non-designated areas, other provisions of the State Water Code apply throughout the state. Thus, for example, well construction and pump installation permits are required for any new or modified ground water use, and stream diversion and stream alteration permits are required for any new or modified surface water diversions. If the proposed stream diversion will affect the existing instream flow standard, a successful petition to amend the interim instream flow standard is also required.

C.2.3.1 Correlative Rights

Under the common law, owners of land overlying a ground water source have the right to use that water on the overlying land, as long as the use is reasonable and does not injure the rights of other overlying landholders.⁶ When the amount of water is insufficient for all, each is limited to a reasonable share of the ground water. Overlying landowners who have not exercised their correlative rights cannot prevent other landowners from using the water on the theory that they are using more than their reasonable share. They must suffer actual, not potential, harm. Only when landowners try to exercise their correlative rights and the remaining water is insufficient to meet their needs, can they take action to require existing users to reduce their uses.

C.2.3.2 Riparian Rights

Riparian rights are rights of land adjoining natural watercourses and are the surface water equivalent of correlative rights to ground waters; i.e., the use has to be on the riparian lands, the use has to be reasonable, and the exercise of those rights cannot actually harm the reasonable use of those waters by other riparian landowners. The Court had originally stated that the right was to the natural flow of the stream without substantial diminution and in the shape and size given it by nature,⁷ but later concluded that the right should evolve in accordance with changing needs and circumstances. Thus, in order to maintain an action against a diversion which diminishes the quantity or flow of a natural watercourse, riparian owners must demonstrate actual harm to their own reasonable use of those waters.⁸

C.2.3.3 Appurtenant Rights

Appurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple lands i.e., when land allotted by the 1848 Māhele was confirmed to the awardee by the Land Commission and/or when the Royal Patent was issued based on such award, the conveyance of the parcel of land carried with it the appurtenant right to water.⁹ The amount of water under an appurtenant right is the amount that was being used at the time of the Land Commission award and is established by cultivation methods that

⁶ *City Mill Co. v Hon. S. & W. Com.*, 30 Haw. 912 (1929).

⁷ *McBryde v Robinson*, 54 Haw. 174, at 198; 504 P.2d 1330, at 1344 (1973); *aff'd on rehearing*, 55 Haw. 260; 517 P.2d 26 (1973); *appeal dismissed for want of jurisdiction and cert. denied*, 417 U.S. 962 (1974).

⁸ *Reppun v Board of Water Supply*, 65 Haw. 531, at 553; 656 P.2d 57, at 72 (1982).

⁹ 54 Haw. 174, at 188; 504 P.2d 1330, at 1339.

approximate the methods utilized at the time of the Māhele, for example, growing wetland taro.¹⁰ Once established, future uses are not limited to the cultivation of traditional products approximating those utilized at the time of the Māhele,¹¹ as long as those uses are reasonable, and if in a water management area, meets the State Water Code’s test of reasonable and beneficial use (“the use of water in such a 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”). As mentioned earlier, appurtenant rights are preserved under the State Water Code, so even in designated water management areas, an unexercised appurtenant right is not extinguished and must be issued a water use permit when applied for, as long as the water use permit requirements are met (see **Figure C-1**).

C.2.3.4 Extinguishing Riparian or Appurtenant Rights

Unlike appurtenant rights, which are based in the common law, the Court has interpreted riparian rights as originating in an 1850 statute.¹² This has led to a curious inconsistency in that, while unexercised appurtenant rights are preserved and unexercised riparian rights are extinguished in designated water management areas, actions by private individuals can extinguish appurtenant but not riparian rights. Both appurtenant and riparian rights cannot be severed from the lands they are attached to, and such rights pass with the title to the land whether or not the rights are expressly mentioned in the deed. If the transferor of the land attempts to reserve the riparian right in the deed, the reservation is not valid and the right nevertheless belongs to the transferee as the new owner of the land.

The law with regards to appurtenant rights is not clear. The Supreme Court in *Reppun*¹³ held that where a landowner attempted to reserve an appurtenant right while selling the underlying land, the reservation is not valid and the attempt to reserve extinguishes the appurtenant right. In doing so, the Court reasoned that there is nothing to prevent a transferor from effectively providing that the benefit of the appurtenant right not be passed to the transferee.¹⁴ This difference is due to the Court’s interpretation that riparian rights had been created by the 1850 statute, so any attempt by the grantor to reserve riparian water rights in the deed when riparian lands are sold is invalid. Presumably, the inconsistency could be cured by legislation providing a statutory basis for appurtenant rights. In fact, the Court in the *Waiāhole Water Case* cited to the State Water Code’s recognition of appurtenant rights and legislative comment to the effect that “[a]ppurtenant rights may not be lost.”¹⁵ However, the Court did not explicitly discuss its prior *Reppun* decision, so it is unclear whether its *Waiāhole* decision overruled *Reppun*.

¹⁰ 65 Haw. 531, at 554; 656 P.2d 57, at 72.

¹¹ *Peck v Bailey*, 8 Haw. 658, at 665 (1867).

¹² 54 Haw. 174; 504 P.2d 1330.

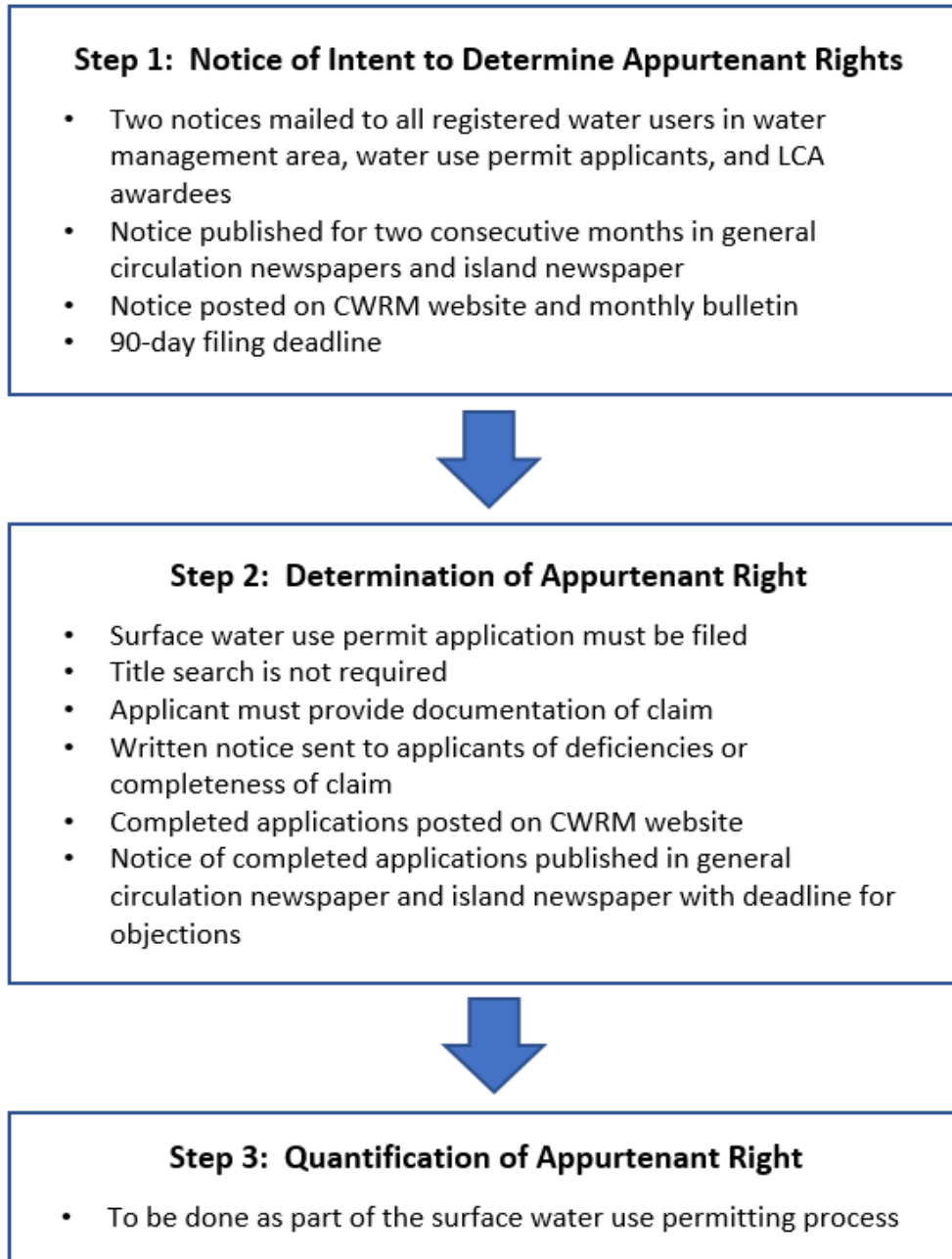
¹³ 65 Haw. 531, at 552; 656 P.2d 57, at 71 (1982).

¹⁴ 65 Haw. 531, at 552; 656 P.2d 57, at 71 (1982).

¹⁵ 94 Haw. 97 at 179, 9 P.3d 409 at 491 (2000).

In September 2011, CWRM approved a process for determining appurtenant rights in the newly-designated Na Wai 'Ehā Surface Water Management Area. The process below may be applicable to other designated surface water management areas; however, the legal process and requirements in non-designated areas will be different and have yet to be determined.

Figure C-1 Generalized Process for Determining Appurtenant Water Rights in Designated Surface Water Management Areas



C.2.3.5 Appropriated Uses

Appropriated uses are uses of surface or ground waters on non-riparian or nonoverlying lands. In the case of ground water, “[P]arties transporting water to distant lands are deemed mere ‘appropriators,’ subordinate in right to overlying landowners ... [T]he correlative rights rule grants overlying landowners a right only to such water as necessary for reasonable use. Until overlying landowners develop an actual need to use ground water, non-overlying parties may use any available ‘surplus’ (citations omitted).”¹⁶ For surface waters, “the effect of permitting riparian owners to enjoin diversions beneficial to others in the absence of a demonstration of actual harm may occasionally lead to wasteful or even absurd results... The continuing use of the waters of the stream by the wrongful diversion should be contingent upon a demonstration that such use will not harm the established rights of others.”¹⁷ Thus, appropriated uses are not based on water rights but are allowed as long as they are reasonable and do not actually impinge on correlative and riparian rights. Note that appurtenant uses would be a type of appropriated uses if they were not based on appurtenant rights, and that in fact, the history of appurtenant uses in the Kingdom of Hawaii has led to their establishment as water rights superior to riparian rights. Also note that when a water management area is designated, appropriated uses become superior to unexercised water rights, because appropriated uses become existing uses and are eligible for water use permits, while unexercised correlative and riparian rights are extinguished.

C.2.3.6 Obsolete Rights: Prescriptive and Konohiki Rights

Until 1973, surface waters were treated as private property and could be owned. Prescriptive water rights were the water equivalent of “adverse possession” in land ownership, where open and hostile occupation of another’s private property for a specified number of years entitled the occupier to take legal ownership, because it exercisable only against the ownership of other private parties and not against the government. Thus, under prescriptive rights, appropriated uses could ripen into a prescriptive right superior to riparian rights. (Some early Court cases viewed appurtenant rights as a type of prescriptive right.) In 1973, the Court voided private ownership of water resources and prescriptive rights because of public ownership of all surface waters.¹⁸ As for ground water, two early cases (1884¹⁹ and 1896²⁰) reflected the then prevailing law on surface waters that water could be private property, but those cases also concluded that prescriptive rights cannot be exercised against subterranean waters that have no known or defined course, i.e., you could not adversely possess what you could not see. In 1929, the Court adopted the correlative rights rule,²¹ in which the overlying landowners could not use the water as they pleased, because it was a shared resource.

¹⁶ 94 Haw. 97, at 178; 9 P3d 409, at 490 (2000).

¹⁷ 65 Haw. 531, at 553-554; 656 P.2d 57, at 72 (1982).

¹⁸ 54 Haw. 174; 504 P.2d 1330 (1973);

¹⁹ *Davis v Afong*, 5 Haw. 216 (1884).

²⁰ *Wong Leong v Irwin*, 10 Haw. 265 (1896).

²¹ *City Mill Co. v Hon. S. & W. Com.*, 30 Haw. 912 (1929).

Until 1973, “konohiki lands,” or lands whose title had passed from persons documented as konohiki, owned the “normal daily surplus water” in excess of waters reserved by appurtenant and prescriptive rights. (Despite a number of earlier cases, in 1930 the Court had concluded that riparian rights had never been the law in Hawaii.²² The 1973 Court, instead of overturning that decision, found a statutory basis for riparian rights in the 1850 statute.) In 1973, in addition to voiding any private property interest in water, the Court ruled that there can be no “normal daily surplus water,” because the recognition of riparian rights entitled owners of riparian lands to have the flow of the watercourse in the shape and state given it by nature.²³

C.2.3.7 Native Hawaiian Water Rights

The State Water Code, HRS §174C-101, contains the following provisions on native Hawaiian water rights:

- Provisions of this chapter shall not be construed to amend or modify rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapters 167 and 168, relating to the Moloka'i irrigation system. Decisions of the commission on water resource management relating to the planning for regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.
- No provision of this chapter shall diminish or extinguish trust revenues derived from existing water licenses unless compensation is made.
- Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, 'ōpae, 'o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.
- The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured by this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter. (The *exercise* of an appurtenant water right is still subject to the water use permit requirements of the Water Code, but there is no deadline to exercise that right without losing it, as is the case for correlative and riparian rights, which must have been exercised before designation of a water management area.)

²² *Territory v Gay*, 31 Haw. 376 (1930); *aff'd* 52 F.2d 356 (9th Cir. 1931); *cert. denied* 284 U.S. 677 (1931).

²³ 54 Haw. 174, at 198; 504 P.2d 1330, at 1344 (1973).

While recognized as a public trust purpose, protecting **Hawaiian traditional and customary practices** has proven to be a complex and difficult task and such protections have only begun to be addressed by State agencies, including the Commission. Earlier versions of the Water Resource Protection Plan recognize the protection of traditional and customary practices as a role of the Commission, but do not clearly state how this would be implemented.

In *Ka Pa‘akai O Ka‘aina v. Land Use Commission*,²⁴ the Hawai‘i Supreme Court recognized that the State has an obligation to protect Hawaiian traditional and customary practices to the extent feasible, and that the proponent of an action must show sufficient evidence that these types of practices are protected, if they exist in the location in question. Consequently, the Court required an assessment of the following:

- (1) “the identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) “the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and
- (3) “the feasible action, if any, to be taken ... to reasonably protect native Hawaiian rights if they are found to exist”

This “Ka Pa‘akai framework” was created by the Court “to help ensure the enforcement of traditional and customary native Hawaiian rights while reasonably accommodating competing private development interests.” The Commission is obligated to conduct a “Ka Pa‘akai analysis” of a proposed action requiring CWRM approval independent of the entity proposing the action. This analysis should be used to inform any decision on the impact of the proposed action on traditional and customary practices.

C.3 Goals and Objectives of the Commission on Water Resource Management

The general mission of CWRM is to protect and enhance the water resources of the State of Hawaii through wise and responsible management. Pursuant to this mission, CWRM applies broad resource management principles in its decisions, actions, declaratory orders, and program implementation. These principles are captured in the following list of CWRM goals and objectives. Other CWRM goals specifically pertinent to resource assessment, monitoring, regulation, conservation, and planning are discussed in Section 3 of the WRPP.

²⁴ *Ka Pa‘akai O Ka‘aina v. Land Use Commission*, 94 Hawai‘i 31, 7 P.3d 1068 (2000)

CWRM Goals:

- To protect the water resources of the State and provide for the maximum beneficial use of water by present and future generations.
- To develop sound management policies and a regulatory framework to facilitate decisions that are: a) proactive and timely, b) based on best available information and sound science, c) focused on the long-term protection and reasonable and beneficial use of both ground and surface water resources, and d) protective of water rights and public trust purposes.
- To achieve sound water-resource planning, extensive baseline and current data collection for ground and surface water, and statewide compliance with the State Water Code.

CWRM Objectives:

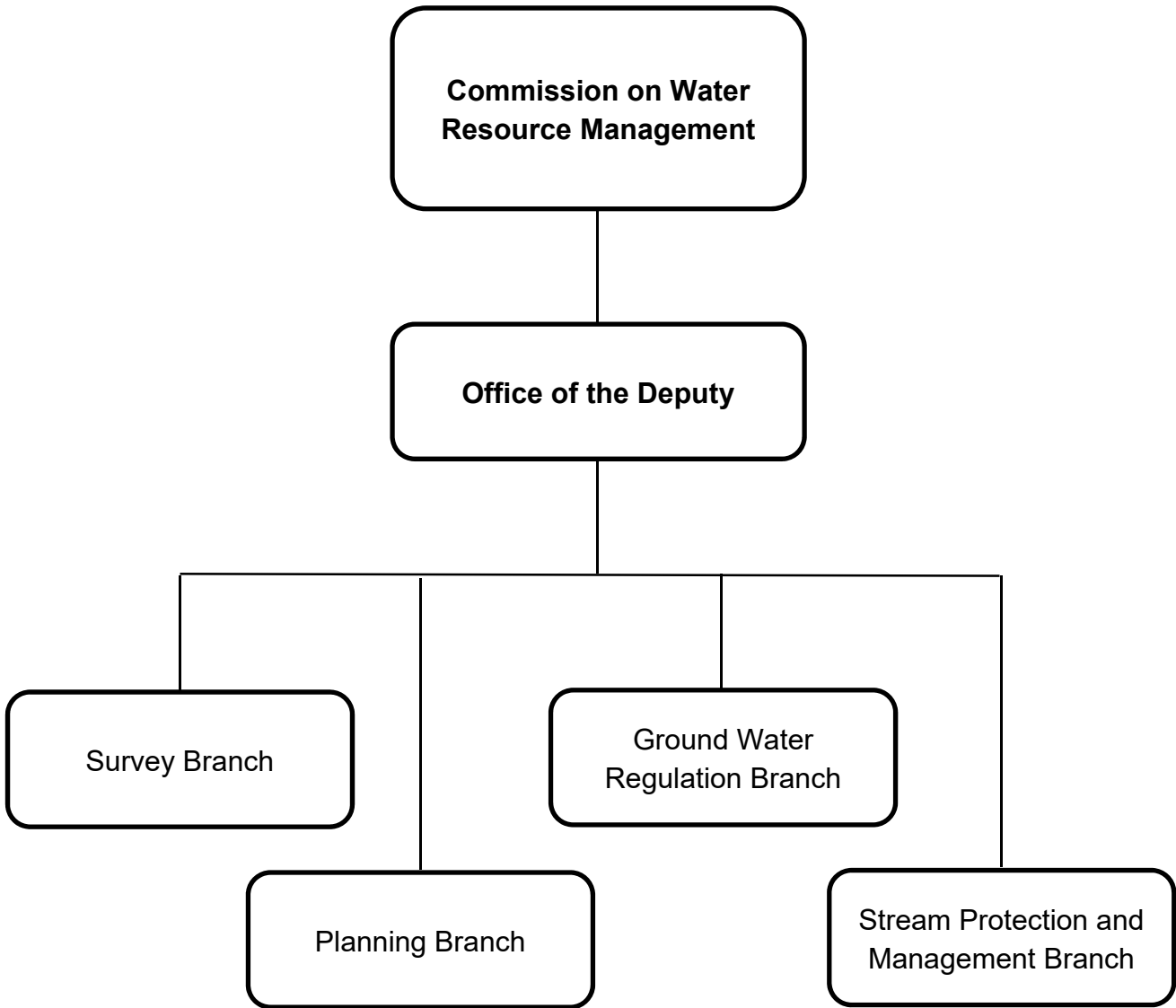
- Fulfill the State's responsibility, as trustee of water resources, to set policies, protect resources, define uses, establish priorities while assuring rights and uses, and establish regulatory procedures through the implementation and administration of the State Water Code.
- Seek legislative support, budget appropriations, federal funding, and grants to execute CWRM policies, goals, objectives, and programs, as they are defined and implied by the State Water Code and its directives for interpretation included in HRS §174C-2.
- Seek maximum beneficial use of the waters of the State with adequate provisions for the protection of public interest objectives, as declared in HRS §174C-2.
- Foster comprehensive water-resource planning for the development, use, protection, and conservation of water via implementing and updating the HWP, in accordance with the HWP requirements and objectives, as declared in the State Water Code and associated HAR.
- Fulfill the specific duties for research, resource protection, instream use protection, interagency cooperation, public education, program coordination, resource inventory and assessment, and determination of appurtenant rights, as declared in HRS §174C-5.
- Provide the regulatory and internal framework, including best use of information technology, for efficient ground and surface water management.
- Develop the best available information on water resources, including current and future water use monitoring and data collection, modeling activities, surface and ground water quality (chloride levels) and availability, stream flow, stream biota, and watershed health to make wise decisions about reasonable and beneficial use and protection of the resource.
- Support community-based management of water resources and develop short and long-range plans to avoid judicial and quasi-judicial disputes.

- Enhance and improve current stream protection and ground water protection programs for the benefit of future generations.
- Carefully consider the requirements of public trust uses, as determined by the Supreme Court's use of the Public Trust Doctrine to inform the Court's interpretation of the State Water Code.
- Administer and amend, as necessary, water use regulation programs to permit reasonable-beneficial uses of water in such a manner as to protect instream flows and maintain sustainable yields of ground water, as defined in the State Water Code.
- Execute, in conjunction with appropriate public, federal, State, and county agency consultation, CWRM's responsibility to designate areas of the State for the purpose of establishing administrative control where water resources may be threatened by existing or proposed withdrawals, diversions, or water use.
- Strive to protect and improve the quality of the waters of the State through the administration of ground and surface water protection programs, in conjunction with the DOH.

C.4 CWRM Programs

CWRM currently seeks to meet these goals and objectives primarily through programs administered by CWRM staff. The core responsibilities of CWRM staff include planning, surveying, regulating, monitoring, and conserving the State's water resources within established plans that have been adopted by CWRM. Staff resources are organized into four branches: Survey, Planning, Ground Water Regulation, and Stream Protection and Management (see **Figure C-2**).

Figure C-2 CWRM Organizational Chart



The general duties and activities of each branch are summarized below.

Survey Branch Responsibilities:

- Collect basic hydrologic data and general water resource information in coordination and cooperation with other agencies.
- Conduct water availability and sustainable yield analyses for aquifers and watersheds statewide.
- Conduct topographic surveys, research, and investigations into all aspects of water occurrence and water use.
- Establish criteria for use by CWRM to determine the existence of water shortages.
- Identify areas of the state where saltwater intrusion is a threat to freshwater resources, and report findings to the appropriate county mayor and the general public.
- Provide technical services in support of CWRM programs administered by the Planning, Survey, Ground Water Regulation, and Stream Protection and Management Branches.
- Recommend acquisition of real property and easements through purchase, gift, lease, eminent domain, or otherwise for water resource monitoring, management and resource conservation purposes.

Planning Branch Responsibilities:

- Develop comprehensive, long-range plans for the protection, conservation, and management of water resources.
- Prepare, administer, and coordinate the development of the HWP and regular plan updates.
- Assist in the development of plans, studies, and scientific investigations involving assessments of water supply and demand, and instream uses of water, including biological, ecological, aesthetic, recreational and hydrological aspects of Hawaiian stream systems.
- Formulate water shortage and drought management plans for implementation during periods of prolonged water shortage.
- Formulate water conservation plans and resource augmentation strategies to address water supply and demand, and resource sustainability.
- Review and analyze statewide data on water consumption by municipal, agricultural, industrial, commercial, domestic, and instream uses.
- Establish and maintain interagency coordination between federal, State, and county governments and the private sector; and provide planning-related oversight in the processing of permits and the setting of instream flow standards to protect beneficial instream uses of water, as mandated by law.

Ground Water Regulation Branch Responsibilities:

- Implement Water Commission policies, procedures, and rules on ground water development and usage established in conformance with the State Water Code.
- Establish minimum standards for the construction of wells and the installation of pumps and pumping equipment.
- Administer permit systems for the construction of wells and installation of pumps and pumping equipment.
- Administer the designation of water management areas and the processing of applications for ground water use permits.
- Administer the investigation and enforcement actions necessary for permit conformance, citizen complaints and in the resolution of ground water related disputes.

Stream Protection and Management Branch Responsibilities:

- Implement CWRM policies, procedures, and rules on stream protection and instream flow standards, appurtenant rights, surface water development, and surface water usage established in conformance with the State Water Code.
- Administer the designation of surface water management areas and the processing of applications for surface water use permits.
- Administer a permit system for the alteration of stream channels and diversion of stream flow.
- Administer a statewide instream use protection program, including the establishment and amendment of instream flow standards.
- Administer the investigation and enforcement actions necessary for permit conformance, citizen complaints and in the resolution of surface water related disputes.

C.5 Summary

As demonstrated by the extensive documentation and literature that resulted from the Waiāhole Water Case proceedings, it is difficult to briefly summarize the spectrum of water management and policy issues, and this section is not intended for such a discussion. This section provides an overview of existing water management policies and tools, as well as background information to assist in understanding the provisions of the State Water Code, its applicability, and the extent of water rights. The remaining sections of the WRPP are presented within this context. Additional discussion of the legislative and administrative context for water planning in Hawaii is provided in **Appendix B Planning Context for the WRPP**.