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STAFF SUBMITTAL

Meeting: September 27, 2011
Honolulu, Oahu

Process for Determining Appurtenant Rights
Na Wai Eha Surface Water Management Area, Island of Maui

SUMMARY OF REQUEST:

The Chairperson recommends that the Commission on Water Resource Management ("Commission") adopt the proposed process (outlined in Exhibit 3) to determine appurtenant rights in the pending due process proceedings involving surface water for the Na Wai Eha (Maui) Surface Water Management Area.

LOCATION MAP:

The four Na Wai Eha streams (Waihee River, Waiehu, Iao, and Waikapu) are depicted on Exhibit 1 (attached).

LEGAL AUTHORITY

The Commission has the legal authority to determine appurtenant rights pursuant to HRS §174C-5(15) which provides that, in addition to its other powers and duties, the Commission "[s]hall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter." The Commission is also authorized to issue water use permits in regulated water management areas pursuant HRS chapter 174C, Part IV Regulation of Water Use. The obligation to respect appurtenant rights derives from the common law and from Haw. Const. article XI, section 7.

BACKGROUND:

On March 13, 2008, the Commission designated four Maui streams of Nā Wai `Ehā (Waihee River, Waiehu, Iao, and Waikapu) as a surface water management area. The effective date of designation was April 30, 2008, upon publication of the Public Notice.

Applications for existing use permits had to be filed within one year from the effective date of designation, or no later than April 30, 2009. New use applications may be filed at any time.

As of April 30, 2009, the Commission had received 125 applications for the Na Wai Eha *surface* water management area, as follows:

Existing Uses

- a. 115 applications were accepted to continue “existing” surface water uses (10 applications were incomplete and did not proceed);
- b. 69 of the 115 “existing use” applications claimed an appurtenant right.

Subsequently, the Commission received 72 applications for “new uses,” as follows:

New Uses

- c. 51 of the 72 “new use” applications claimed an appurtenant right;
- d. 21 of the “new use” applications simply applied for a “new use.”

Appurtenant rights are an incident of land ownership. 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.” *Reppun v. Board of Water Supply*, 65 Haw. 531, 554-556 (1982). The measure of an appurtenant right is the amount of water utilized at the time of the Mahele, generally, but not exclusively for taro cultivation. *McBride v. Robinson*, 54 Haw. 174, 187-191 (1973).

The Hawaii State Constitution, article XI, section 7, expressly protects appurtenant rights.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources. (emphasis added)

Haw. Cons. Art. XI, sec. 7.

In addition, the State Water Code specifically protects appurtenant rights.

Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.

HRS §174C-63.

While the Water Code establishes a one-year deadline from the effective date of designation to file an application for a permit to continue an existing use, appurtenant rights are exempted from this filing deadline. HRS §174C-50(c). In addition, the Water Code provides that

[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.

HRS §174C-101(d).

On August 20, 2000, the Hawaii Supreme Court issued its decision in *In the Matter of the Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiahole Ditch Combined Contested Case Hearing* (CWRM No. CCH-OA95-1), 94 Haw. 97, 9 P.3rd 409 (2000). The court recognized three public trust responsibilities regarding fresh water: 1) maintenance of waters in their natural state, 2) domestic water uses, and 3) the exercise of Native Hawaiian and traditional and customary rights.

The public trust protection of traditional and customary rights applies to traditional appurtenant rights first recognized 140 years ago in *Peck v. Bailey*, 8 Haw. 658, 661 (1867).

The Court extended the public trust responsibilities to a fourth purpose: reservations of water for the Department of Hawaiian Home Lands. *In the Matter of the Contested Case Hearing on Water Use, Well Construction, and Pump Installation Permit Applications Filed by Waiola O Molokai and Molokai Ranch, Limited* (CWRM No. CCH-MO96-1), 103 Haw. 401, 83 P.3d 664 (2004).

ISSUES AND ANALYSIS

The Commission has not yet adopted administrative rules to implement the appurtenant rights provisions in the Water Code. To date, the Commission has not taken any actions to determine appurtenant rights in a permit application.

However, to fully adjudicate applications for water use in the now designated water management area of Na Wai Eha, and to determine reasonable and beneficial offstream uses for which water use permits may be granted, the Commission must now set forth a process to determine appurtenant rights. The legal priority of appurtenant rights under the State Constitution and the Hawaii Water Code, the competition for the limited surface water resources in Na Wai Eha, and the obligation to protect and integrate instream and offstream uses under the Hawai'i Supreme Court's public trust jurisprudence now require that the Commission address the issue in a more comprehensive manner.

The Commission proposes to determine appurtenant rights for Na Wai Eha in a three (3)-step process:

1. Notice to potential claimants of the Commission's intent to process and recognize claims for appurtenant rights as part of the surface water use permitting process,
2. Determination of appurtenant rights, and
3. Quantification of appurtenant rights.

An outline of the proposed process is shown in Exhibit 3.

Step 1: Notice of Commission's Intent to Determine Appurtenant Rights in Na Wai Eha

The first step will be to notify all potential claimants of the Commission's intent to determine appurtenant rights. To date, the Commission has only noticed existing surface water users of their need to apply for surface water use permits to continue existing uses (Exhibit 2). The staff will compile a mailing list based on information from the registration program, pending existing and future surface water use applications, and LCA awards. Two notices will be mailed. Two notices will be published in two consecutive months in newspapers of general circulation in the state and on Maui. The notice will also be posted on the Commission's website and CWRM's monthly bulletin.

There appear to be kuleana parcels in Na Wai Eha currently using or planning to use Na Wai Eha surface waters under an appurtenant rights claim that have not yet filed for surface water use permit applications. In order to allocate limited surface water, and determine how much water is available for other offstream uses, a full accounting of all rights claims is necessary. Although appurtenant rights can not be diminished or extinguished by a failure to apply for a permit, the Commission encourages all potential appurtenant rights claimants to submit an application for a surface water use permit if they are currently using surface water (SWUPA-E Form) or plan to use surface water (SWUPA-N Form) so that multiple demands (including multiple appurtenant rights demands) are addressed with the best information.

The Commission will provide a 90-day filing deadline. Incorporating all appurtenant rights claims provides better protection for the parcel owners, better overall information, and greater certainty in the adjudication. Given changes in stream flows over time, it is possible that the sum of appurtenant rights claims may (by themselves) exceed available water supply during prolonged dry periods.

Step 2: Determination of Appurtenant Right

Following the Notice period, the Commission will proceed to determine whether a particular parcel of land has an appurtenant water right based on the evidence provided by each claimant. The question about how much water (i.e. quantity) may be used on the parcel will be decided separately and later in Step 3. Each claimant must submit a surface water use permit application (SWUPA-E for an existing use; a SWUPA-N for the future exercise of the appurtenant right).

While a title search is not required, the following information and documentation will assist the Commission in making a judgment about the appurtenant rights claim. The Applicant has the burden of a) coming forward with the documentation, and b) the initial burden of establishing his / her claim.

- Proof of ownership or occupancy;
- TMK map showing boundaries of all parcels for which an appurtenant right is being claimed;
- TMK map showing current auwai(s)/ditches, loi, and sources of water (i.e., stream or spring);
- Documents demonstrating that parcel was used as a residence or for cultivation at the time of the Mahele, including but not limited to:
 - Legible copy of the LCA (and number);
 - English translation of LCA;
 - Royal Patent (and number);
 - Name of original awardee.
- Kamaaina testimony and/or other Mahele documents;
- Other title history in support of claim;
- Map showing sources of water at the time of the Mahele;
- 1800's tax records;
- Current or historic photos of archaeological features or historic uses;
- Schematic maps or diagrams showing water flow in, through, and/or out of parcel;
- Current title or deed to parcel clarifying any terms or conditions regarding water
- List of future crops and the water flow requirements (total & net flow) to supplement information in application (SWUPA-E);
- Other relevant information that may assist the Commission in making its determination;

The Commission staff will review all applications and determine if the application provides the necessary information to be deemed complete for processing purposes. The Commission staff will notify applicants in writing of any deficiencies in their application. The Commission staff will also notify all applicants in writing whose applications are deemed to be complete for processing. All completed applications will be scanned and posted on the Commission's website. The Commission will publish a notice of completed applications in a newspaper of general circulation in the state and on Maui as required by law. The public notice will contain the name and address of the applicant, date of filing, source of water (stream name), hydrologic unit, and the parcel TMK. The notice will establish a deadline for written objections. The notice will be emailed to the Office of Hawaiian Affairs, Department of Hawaiian Home Lands, the Mayor's Office, and the Maui Department of Water Supply. All applicants shall be responsible for any costs associated with noticing their application.

As provided in the public notice, any interested person may file written objections. Those filing objections shall serve copies of the written objections on the applicant and the Commission.

Written objections should address and provide (as applicable): 1) documentation demonstrating that the parcel was not used as a residence or for cultivation at the time of the Mahele, 2) documentation demonstrating that the appurtenant right has been reserved or extinguished, and 3) evidence suggesting materially false statements or representations in application.

If no objections are filed, the Commission may proceed to act upon the application within 120 days of the application being deemed complete.

Upon the receipt of timely written objections, or if the staff has knowledge of issues which require further investigation or deliberation, the staff will submit to the Commission a recommendation that the appurtenant rights claim be resolved in the manner provided by law. This may include a contested case hearing. A contested case hearing is an independent process and not subject to the regular time limits.

Step 3: Quantification of Appurtenant Right

The third step will be to decide how much water is required on the parcel, when it is needed, and what (if any) conditions should apply (generally “quantification”). This determination will be done as part of the surface water use permitting process. While the measure of an appurtenant right is generally the amount of water utilized on the parcel at the time of the Mahele, the Courts recognize that quantification will depend upon current conditions. For example, hydrologic data indicate a trend towards decreasing rainfall and declining stream flows. Hydrologically, there may be less water available now (and in the future) than there was at the time of the Mahele (1848).

Since the Mahele, circumstances have changed and evolved. The ecosystem may be different. There are competing public trust needs. Reasonable and beneficial use requirements apply. Therefore, water quantities (which often vary by time, need, availability, and competing demands) need to be integrated into the entire water system.

While this submittal is specific to Na Wai Eha contested case, the process outlined here may have some applicability in other situations. However, the legal process and requirements in *non-designated* areas are different and must be analyzed separately.

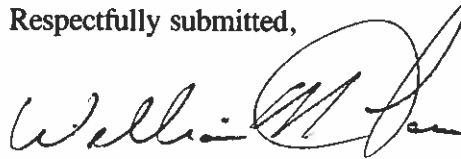
CHAPTER 343 – ENVIRONMENTAL ASSESSMENT (EA)

HRS chapter 343 does not apply to adjudications in contested case due process proceedings.

RECOMMENDATION:

That the Commission adopt the proposed process for noticing, recognizing, and determining appurtenant rights, and then deciding how much water such rights need and under what conditions, as set forth in this Submittal and the accompanying Exhibits.

Respectfully submitted,



WILLIAM M. TAM
Deputy Director

- Exhibit(s):
1. Location Map
 2. Public Notice of Na Wai Eha Designation as a Surface Water Management Area
 3. Outline of Appurtenant Rights Determination and Quantification -
Schedule and Process

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson



Department of Land and Natural Resources
 Commission on Water Resource Management
 Stream Protection and Management Branch

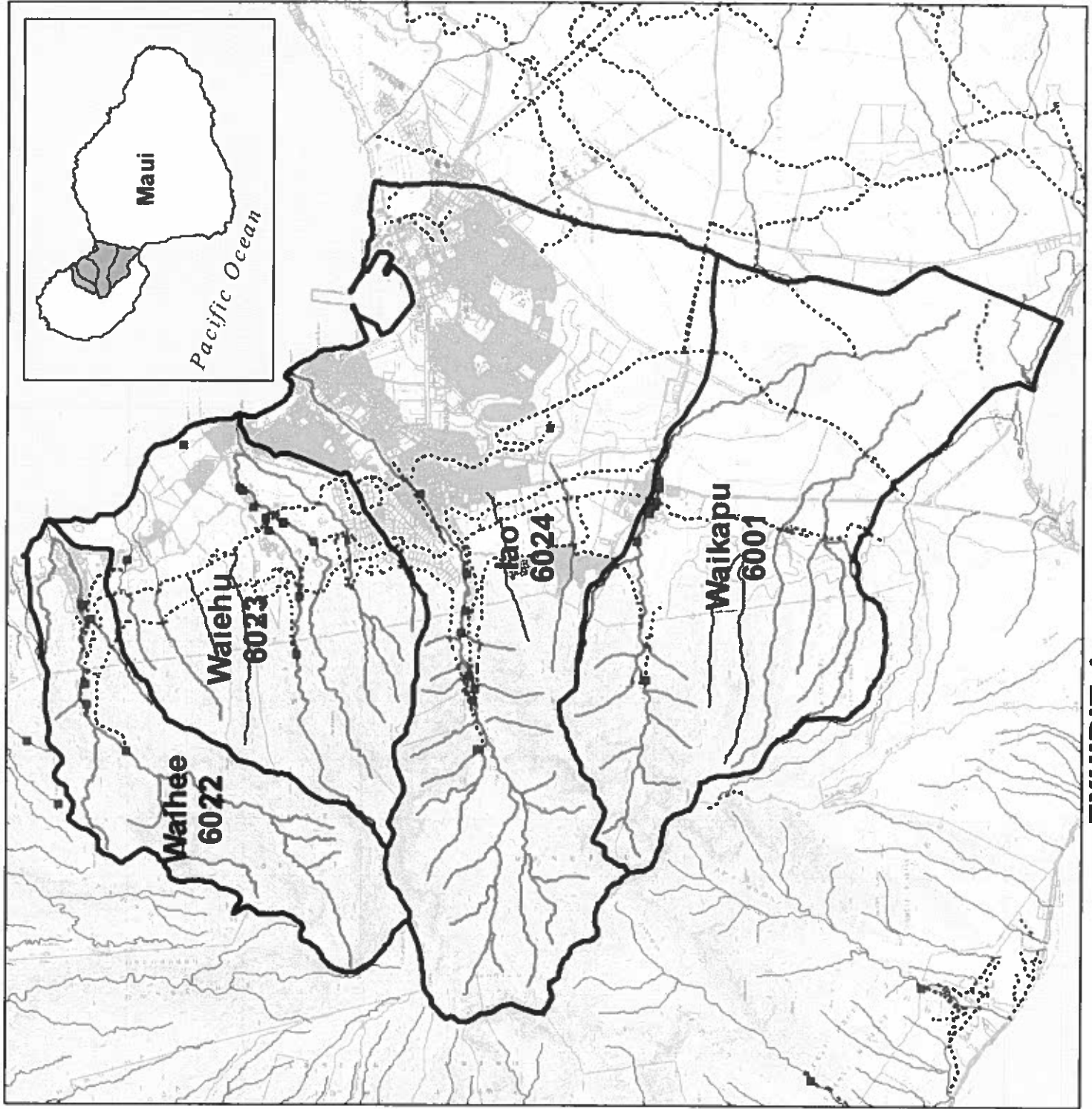
**Na Wai Eha, Maui
 Designated Surface Water
 Management Areas**

Legend

-  Hydrologic Units and Code
-  TMK Parcels
-  Streams
-  Irrigation System
-  Diversions

This map was produced by the Department of Land and Natural Resources (DLNR), Commission on Water Resource Management for planning purposes. It should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. Information regarding compilation dates and accuracy of the data presented can be obtained from DLNR.

Date: 04/29/2008
 Datum: North American Datum 1983



PUBLIC NOTICE

To Announce the
DESIGNATION OF THE SURFACE WATER HYDROLOGIC UNITS OF
WAIHEE, WAIEHU, IAO and WAIKAPU STREAMS (NA WAI EHA) AS
SURFACE WATER MANAGEMENT AREAS

By the
COMMISSION ON WATER RESOURCE MANAGEMENT

The Commission on Water Resource Management (Commission), on March 13, 2008, designated the surface water hydrologic units of Na Wai Eha in the Wailuku District of Maui, as Surface Water Management Areas, in accordance with Part IV (Regulation of Water Use) of the State Water Code, Chapter 174C, Hawaii Revised Statutes, and Title 13, Chapter 171 (Designation and Regulation of Water Management Areas), Hawaii Administrative Rules.

The State Water Code authorizes the Commission to designate water management areas for surface water use regulation where the Commission, after research and investigations, and consultation with the appropriate county mayor, county council, and county water agency, and after public hearing and published notice, finds that serious disputes respecting the use of surface water resources are occurring.

The land areas affected by the designation are located in the Wailuku District of Maui and include Tax Map Keys from: (2) 3-1-006:001 to (2) 3-8-087:093 and from (2) 4-1-001:017 to (2) 4-8-001:002 (see map).

In any water management area, no person shall make any withdrawal, diversion, impoundment, or consumptive use of water without first obtaining a water use permit from the Commission. However, no water use permit shall be required for domestic consumption of water by individual users, users on any Maui Department of Water Supply water system, and for the use of rain catchment systems to gather water.

Applications for water use permits to continue existing uses of surface water must be made within a period of one year from the effective date of designation, that is, between April 30, 2008 (the date this Public Notice is published) and no later than April 30, 2009. The Commission shall send notices to existing users who had declared their uses and/or registered stream diversions with the Commission and to persons who have obtained stream diversion works permits from the Commission, to file for applications for water use permits to continue their existing uses.

Except for appurtenant rights, failure to apply within this period creates a presumption of abandonment of the use, and the user, if the user desires to revive the use, must apply for a permit as a proposed new use. A proposed new user of surface water must apply for a water use permit and will be subject to the availability of surface water as determined by existing surface water use permits and the interim instream flow standards for Na Wai Eha.

Application forms for surface water use permits are available at the Department of Land and Natural Resources, Commission on Water Resource Management, Kalanimoku Building, Room 227, 1151 Punchbowl Street, Honolulu, HI 96813, or may be downloaded from the Commission's website at: <http://hawaii.gov/dlnr/cwrm/forms.htm>. If you have any questions regarding surface water use permit applications, please call the Commission's Stream Protection and Management Branch at (808) 587-0234, or toll-free from Maui at 984-2400 extension 70234.

COMMISSION ON WATER RESOURCE MANAGEMENT



LAURA H. THIELEN, Chairperson
KEN C. KAWAHARA, Deputy Director

Dated: April 10, 2008

Publish in: Honolulu Star Bulletin issue of April 30, 2008
Maui News Issue of April 30, 2008

NA WAI EHA

APPURTENANT WATER RIGHTS DETERMINATION

SCHEDULE AND PROCESS

Task	Action	Target Date	Responsible Party
1	Notice of CWRM Intent to Establish Appurtenant Right		
1.1	Compile mailing list <ul style="list-style-type: none"> • Stream diversions registrants • Surface water rights claimants • Existing and New SWUPA applicants • Principal contact for TMKs indicating LCA Award (or all owners listed in tax records where addresses can be found) 	10/11/11	CWRM
1.2	Notice to potential claimants (Step 1) <ul style="list-style-type: none"> • 2 notices will be mailed (second notice via registered mail) • 2 notices will be published in StarAdvertiser & Maui News at least once a month for 2 consecutive months • Post on CWRM website • Post on CWRM monthly bulletin • 90-day response deadline 	10/25/11 & 11/25/11 10/25/11 & 11/25/11 10/25/11 November bulletin	CWRM
2	Application for Appurtenant Rights Determination (Step 2)		
2.1	Complete CWRM Form SWUPA-E for <i>existing</i> uses; or SWUPA-N for <i>future</i> uses	2/25/12	Claimant

2.2	<p>Submit documentation</p> <ul style="list-style-type: none"> • Proof of ownership or occupancy • TMK map showing boundaries of all parcels for which an appurtenant right is being claimed • TMK map showing current auwai(s)/ditches, loi, and sources of water (i.e. stream or spring) • Documents demonstrating that parcel was used as a residence or for cultivation at the time of the Mahele, including but not limited to: <ul style="list-style-type: none"> ○ Legible copy of the LCA (and number); ○ English translation of LCA ; ○ Royal Patent (and number); ○ Name of original awardee; ○ Kamaaina testimony and/or other Mahele documents; ○ Other title history in support of claim; ○ Map showing sources of water at the time of the Mahele; ○ 1800's tax records; ○ Current or historic photos of archaeological features or historic uses; ○ Schematic maps or diagrams showing water flow in, through, and out of parcel; ○ Current title or deed to parcel clarifying any terms or conditions regarding water; • List of future crops and water flow requirements (total & net) to supplement information in application (SWUPA-E) ; • Other relevant information that may assist the Commission in making its determination 	2/25/12	Claimant
2.3	<p>Notice: Incomplete applications Applicants whose application is deemed incomplete will be notified in writing of the specific deficiencies in their applications.</p>		CWRM

2.4	<p>Notice: Completed applications</p> <ul style="list-style-type: none"> • Upon receipt of a completed application, notify the applicant by regular mail that the application has been accepted as complete for processing. Acknowledgement letter will instruct applicants to go to the CWRM website to view all completed applications. • Scan completed applications; post to CWRM website • Commission shall publish a notice of the completed application in the Star Advertiser and Maui News at least once a week for two consecutive weeks • Public notice contents: <ul style="list-style-type: none"> ○ Each Applicant's name and address. ○ Date of filing ○ Source of water (stream name) and hydrologic unit ○ TMK of parcel(s) ○ 10-working day written objection deadline • Email notice to OHA, DHHL, Maui Mayor, and Maui DWS • All applicants shall be responsible for their proportional costs associated with noticing their application. 	Upon receipt of completed application	CWRM
2.5	<p>Objections</p> <ul style="list-style-type: none"> • Within 10 working days after the last public notice, any interested person may file written objections. Such person shall serve copies of the written objections to the applicant and on the Commission. • Written objections should address and provide (as applicable): <ul style="list-style-type: none"> ○ Documentation demonstrating that the parcel was not used as a residence or for cultivation at the time of the Mahele ○ Documentation demonstrating that the appurtenant right has been reserved or extinguished; ○ Evidence suggesting materially false statements or representations in application 	10 working days after last public notice	Objector

2.6	<p>Commission Action to Recognize Appurtenant Rights</p> <ul style="list-style-type: none"> • If no objections are filed, the commission may proceed to act upon the application within 120 days of the application being deemed complete. • If objections filed, or the Commission has knowledge of issues which require further investigation or deliberation, the staff will submit to the Commission a recommendation that the appurtenant right claim be resolved in a manner provided by law. This may include a contested case hearing which is an independent process and not subject to regular time limits. 	120 days after completed application received	CWRM
3	<p>Quantification of Appurtenant Rights (Step 3)</p> <p>The third step will be to decide how much water is required on the parcel, when it is needed, and what (if any) conditions should apply (generally "quantification"). This determination will be done as part of the comprehensive surface water use permitting process for Na Wai Ehe.</p>		CWRM