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COMMISSION ON WATER RESOURCE MANAGEMENT

July 17, 2013
Honolulu, Hawaii

STAFF SUBMITTAL

Delegation of Authority to the Chairperson to Appoint a Hearing Officer for the Contested Case Hearing in the matter of *the Petitions to Amend the Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams, Maui, Hawaii.* (on remand CCH-MA13-01)

SUMMARY OF REQUEST:

Delegation of Authority to the Chairperson to appoint a Hearing Officer for the Contested Case Hearing in the matter of the Petitions to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams, Maui, Hawaii. CCH-MA13-01.

LOCATION: See Exhibit 1.

BACKGROUND:

On May 24, 2001, Native Hawaiian Legal Corporation ("NHLC"), on behalf of Na Moku Aupuni O Koolau Hui ("Na Moku"), Beatrice Kepani Kekahuna, Marjorie Walleth, and Elizabeth Lehua Lapenia¹, filed 27 Petitions to Amend the Interim Instream Flow Standards for 27 East Maui streams.

On September 25, 2008, the Commission amended the IIFS for eight (8) of the twenty-seven (27) streams. These amendments were not appealed and are in effect.

¹ The Commission was notified by letter on May 10, 2007, that NHLC "no longer represent Ms. Lapenia and are, therefore, no longer authorized to advance the claim with respect to the parcel identified as TMK: 2-9-008:31 or LCAw-S-1 Claimant: Naoo on her behalf."

On May 25, 2010, the Commission held a meeting to reach a decision on IIFS amendment for the remaining nineteen (19) streams. The Commission restored flow to six (6) streams: two (2) on an annual basis; and four (4) on a seasonal basis. The Commission decided that IIFS for the remaining thirteen streams would remain unchanged. Before the end of the May 25, 2010 Commission meeting, Na Moku's counsel orally requested a contested case hearing to challenge the decision.

On June 4, 2010, Na Moku filed a written Petition for a Contested Case Hearing on the Commission's decision pursuant to the Commission's Administrative Rule §13-167-52(a) which states:

A hearing on a contested matter may be requested by the commission on its own motion or upon the written petition of any government agency or interested person. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the commission meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the commission not later than ten days after the close of the public hearing or the commission meeting, whichever is applicable.

On October 18, 2010, the Commission met to consider Na Moku's Petition. The Commission's Acting Deputy Director filed a "Staff Submittal" recommending that the Commission *deny* Na Moku's June 4, 2010 Petition for Hearing. The October 18, 2010 meeting minutes state that a quorum of five commissioners attended the meeting and that the five commissioners unanimously voted to approve the Acting Deputy Director's "Staff Submittal" recommending denial of the Petition for Hearing.

On November 17, 2010, Na Moku timely filed a notice of appeal from the Commission's October 18, 2010 decision.

On appeal, Na Moku argued that the Commission erred in:

- (1) Concluding that Na Moku had no right to a contested case hearing; and
- (2) Reaching its underlying decision on the IIFS amendment for the nineteen streams at issue. Specifically, Na Moku argued the Commission failed to allocate the proper legal burden of proof and breached its public trust duties.

On November 30, 2012, the Intermediate Court of Appeals ("ICA") issued an opinion a) *vacating* the Commission's May 25, 2010 decision; and b) *remanding* the matter back to the Commission with instructions to 1) grant Na Moku's Petition for Hearing and 2) to conduct a contested case hearing pursuant to HRS chapter 91 and in accordance with state law. *In Re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams*, Intermediate Court of Appeals, Order, No. CAAP-10-0000161 (Nov. 30, 2012) (see Exhibit 2). The Hawaii Supreme Court did not review the ICA decision. The case is now back before the Commission on remand.

The Court concluded, *inter alia*, that the Commission erred in determining that 1) Na Moku had no right to a contested case hearing; and 2) there is no legal requirement to hold a contested case hearing on IIFS amendments.

The Commission must now conduct a contested case hearing consistent with the Court's decision and order.

ANALYSIS:

Contested case hearings are administrative trials that can be long and complex. The logistics of having the entire Commission conduct the whole hearing on Maui would be impractical and unfeasible. In the past, and in this case, the Commission delegated authority to the Chairperson to appoint a Hearing Officer to be both more efficient and expeditious in the conduct of the proceedings.

The Commission may appoint a Hearing Officer or master to hear and reach a preliminary decision on any matter concerning the implementation or administration of the State Water Code. Hawaii Revised Statutes, § 174C-1 I and §92-16(3); Hawaii Administrative Rules §13-167-56(d).

In this matter, an appointed Hearing Officer would be able to 1) meet with counsel for the parties to organize the proceedings; 2) rule on preliminary motions, prepare for, and conduct the hearing on Maui; 3) receive, review, and rule on all the relevant and material evidence; 4) hear all legal arguments on the issues remanded by the Hawaii Supreme Court; 5) prepare proposed findings of fact, conclusions of law, and a proposed decision and order; and 6) submit a proposed decision to the Commission for its consideration.

After the Hearing Officer's proposed findings of fact, conclusions of law and a proposed decision and order is submitted to the Commission, the parties will have an opportunity to file written exceptions and present oral argument to the Commission as a whole. The Commission then makes the final decision.

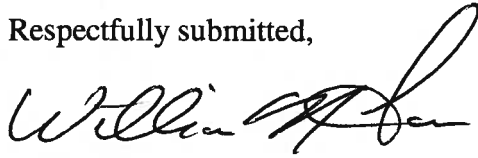
As a practical matter, the contested case hearing on Maui may take a number of weeks spread out over months, depending on the complexity of scheduling.

RECOMMENDATION:

Staff recommends that the Commission:

Delegate to the Chairperson the authority to appoint a qualified Hearing's Officer to conduct a Contested Case Hearing on Petitions to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams, pursuant to and consistent with the decisions of the Hawaii Supreme Court and the Intermediate Court of Appeals.

Respectfully submitted,

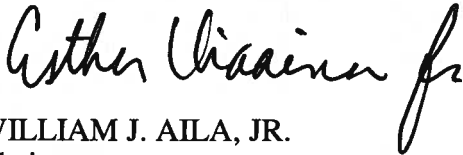


WILLIAM M. TAM
Deputy Director

Exhibit:

1. Map of Contested East Maui Streams
2. Decision of the Intermediate Court of Appeals (November 30, 2012)

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson

July 17, 2013 CWRM submittal:

Delegation of Authority to the Chairperson to Appoint a Hearing Officer for the Contested Case Hearing in the matter of *the Petitions to Amend the Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliuula, Puakaa, Waiohue, Paakea, Kapaula and Hanawi Streams, Maui, Hawaii* on remand in CCH-MA13-01.

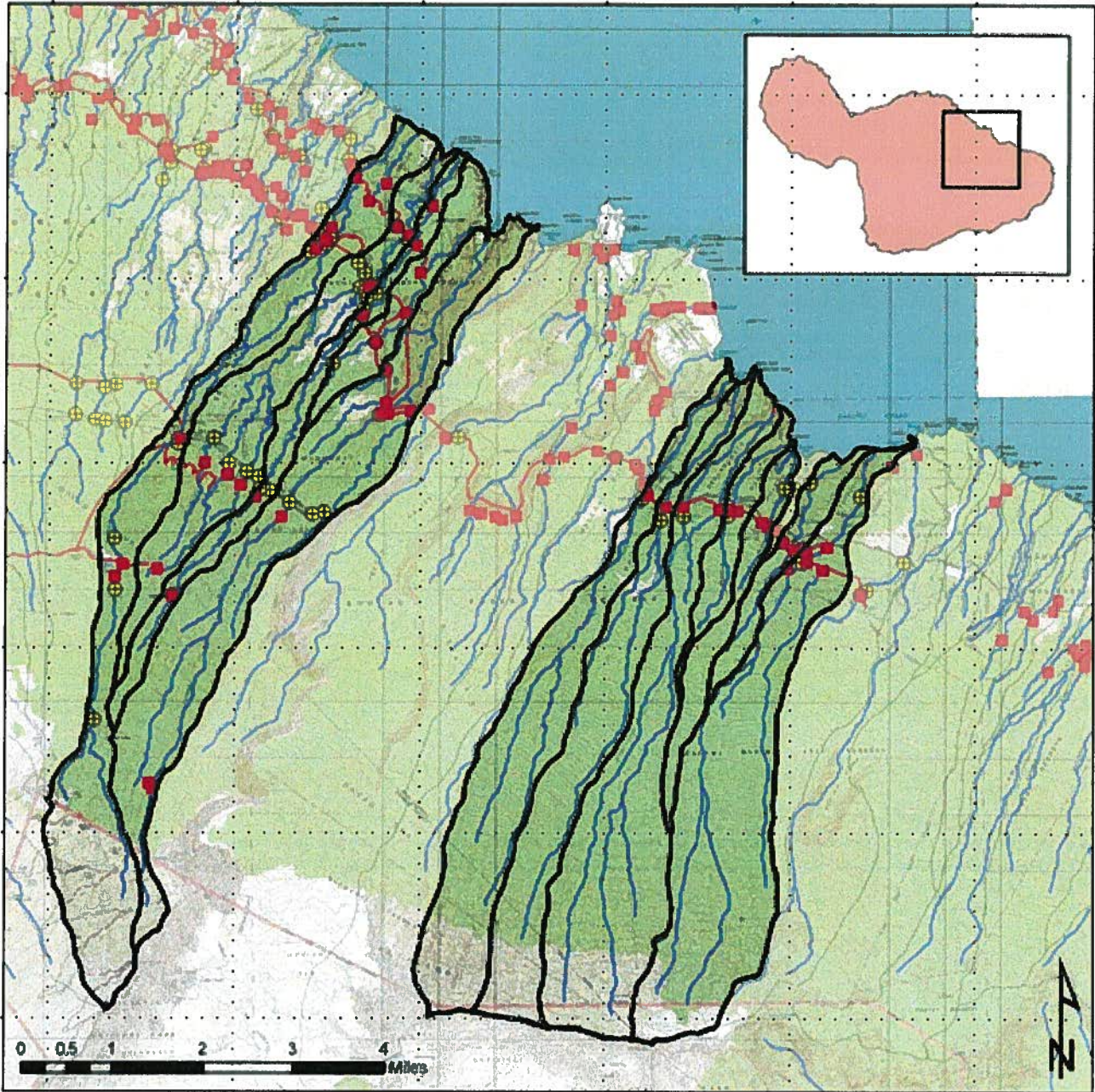


Exhibit 1

Electronically Filed
Intermediate Court of Appeals
CAAP-10-0000161
30-NOV-2012
09:12 AM

NO. CAAP-10-0000161

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

IN RE PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR
WAIKAMOI, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUKAA, WAIHUE, PAAKEA,
KAPULA & HANAWI STREAMS

APPEAL FROM THE COMMISSION ON WATER RESOURCE MANAGEMENT

MEMORANDUM OPINION

(By: Foley, Presiding J., Fujise and Leonard, JJ.)

Petitioner-Appellant Nā Moku 'Aupuni 'o Ko'olau Hui (Nā Moku) appeals from the Commission on Water Resource Management's (Commission) October 18, 2010 decision denying Nā Moku's Petition for a Contested Case Hearing on the Commission's amendment of interim instream flow standards (IIFS) for certain East Maui streams.

I.

On May 24, 2001, Nā Moku (a nonprofit corporation organized by native Hawaiian residents of East Maui ahupua'a¹), Beatrice Kekahuna, Marjorie Wallet, and Elizabeth Lehua Lapenia

¹ In Hawaiian, ahupua'a means a "[1] and division usually extending from the uplands to the sea[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 9 (1986).

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filed petitions to amend the IIFS for twenty-seven East Maui streams. On May 25, 2010, the Commission held an open meeting to reach a decision on IIFS amendment for nineteen of the streams.² The Commission restored flow to six streams (two on an annual basis and four on a seasonal basis) and decided that the IIFS for the remaining thirteen streams would remain unamended. Before the end of the May 25, 2010 Commission meeting, Nā Moku's counsel orally requested a contested case hearing to challenge the decision, and on June 4, 2010, Nā Moku filed a written Petition for a Contested Case Hearing Before the Commission on Water Resource Management (Petition for Hearing) pursuant to the Commission's administrative rules.³

On October 18, 2010, the Commission met to consider Nā Moku's Petition. The Commission's Acting Deputy Director filed a "Staff Submittal" recommending that the Commission deny Nā Moku's June 4, 2010 Petition for Hearing. The October 18, 2010 meeting minutes state that a quorum of five commissioners attended the meeting and that the five commissioners unanimously voted to approve the Acting Deputy Director's "Staff Submittal" recommending denial of the Petition for Hearing. On November 17, 2010, Nā Moku filed a timely notice of appeal from the

² On September 25, 2008, the Commission amended the flow standards for eight of the twenty-seven streams; these amendments are not part of this appeal.

³ Hawaii Administrative Rule § 13-167-52(a) states:

§13-167-52 Request for hearing. (a) A hearing on a contested matter may be requested by the commission on its own motion or upon the written petition of any government agency or interested person. An oral or written request for a contested case hearing must be made by the close of the public hearing (if one is required) or the commission meeting at which the matter is scheduled for disposition (if no public hearing is required). In either situation, the person or agency requesting the contested case hearing must file (or mail and postmark) a written petition with the commission not later than ten days after the close of the public hearing or the commission meeting, whichever is applicable.

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Commission's decision at the October 18, 2010 meeting.

On appeal, Nā Moku contends the Commission erred in:

(1) concluding that Nā Moku had no right to a contested case hearing; and

(2) reaching its underlying decision regarding IIFS amendment for the nineteen streams at issue. Specifically, Nā Moku contends the Commission failed to allocate the proper legal burden of proof and breached its public trust duties.

II.

In reviewing a denial of a request for a contested case hearing, the appropriate inquiry is whether the appellant has met the requirements of HRS § 91-14 (1993). Kaleikini v. Thielen, 124 Hawai'i 1, 16, 237 P.3d 1067, 1082 (2010). The requirements of Hawaii Revised Statutes (HRS) § 91-14 are as follows:

first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing—i.e., a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured—i.e., the claimant must have standing to appeal.

Pub. Access Shoreline Haw. v. Haw. Cnty Planning Comm'n (PASH), 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (emphases added).

Nā Moku, in requesting a contested case hearing, clearly met the last three requirements of HRS § 91-14. The October 18, 2010 meeting minutes represented a "final decision and order" for which judicial review was sought pursuant to HRS § 91-14(a).⁴ Nā Moku complied with the applicable agency rules in requesting a contested case hearing and sufficiently

⁴ See, Amended Order Accepting Application for Writ of Certiorari, Vacating ICA Order Dismissing Appeal for Lack of Jurisdiction, and Remanding Appeal to ICA, filed January 11, 2012 in SCWC-11-0001005.

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demonstrated standing to participate in a contested case. An association may be an aggrieved person with standing to challenge an agency's action if it can show that some of its members are "specially, personally and adversely affected by the agency's action." Life of the Land v. Land Use Comm'n, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979). Nā Moku demonstrated through unrefuted testimony that its members were native Hawaiians with traditional and customary rights, appurtenant water rights, and/or riparian rights to waters from the streams for, among other things, the cultivation of taro. Article XII, § 7 of the Hawai'i Constitution protects such rights, and Nā Moku's members demonstrated injury because their ability to exercise these rights has been adversely affected by the streamflow within the ahupua'a. Therefore, Nā Moku had an interest in a proceeding setting the IIFS for those streams.

Consequently, the remaining issue in this appeal concerns the first requirement of HRS § 91-14. The appellees contend there is no legal requirement to hold a contested case hearing on the IIFS amendments. "[P]ursuant to HRS S 91-14, in order for proceedings before an agency to constitute a contested case from which an appeal can be maintained, the agency must be required by law to hold a hearing before a decision is rendered." Lingle v. Hawai'i Gov't Employees Ass'n, AFSCME, Local 152, 107 Hawai'i 178, 184, 111 P.3d 587, 593 (2005).

An agency hearing can be "required by law" pursuant to statute, agency rule, or constitutional due process. Kaleikini, 124 Hawai'i at 17, 237 P.2d at 1083. Neither statute nor administrative rule mandates a hearing to establish an IIFS. However, in In re 'Iao Ground Water Management Area High-Level Source Water Use Permit Applications, 2012 WL 3535294 (2012), a related case arising out of the setting of IIFS for streams in West Maui, the Hawai'i Supreme Court held that the Commission's decisions setting or amending the IIFS can affect

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constitutionally protected property interests. Id. at *9-*11. In that case, the Commission had held a contested case hearing to resolve both petitions to amend the IIFS and related water use permit applications (WUPA) filed for the same area, and the petitioners sought judicial review of the Commission's decision and order setting the IIFS. Id. at *1. Although WUPA decisions require hearings, the appellees in that case claimed the Commission's IIFS decisions had no impact on the petitioners' property rights, and therefore there was no constitutional due process right to a contested case hearing (and no right to judicial review). Id. at *9, *40-*41. The supreme court disagreed, holding that the petitioners had established a protected property interest and thus had a due process right to a hearing on the Commission's IIFS determinations, independent of the WUPA decision. Id. at *11.

The petitioners in that case testified that their native Hawaiian members "live, work, and play" in the areas of the streams at issue, and they claimed the Commission's decision to restore a limited amount of water to the streams adversely affected their native Hawaiian rights and their ability to engage in traditional and customary gathering practices. Id. at *11-*12. The supreme court observed that these interests have a statutory basis in the water code, supporting the petitioners' entitlement to water for exercising traditional and customary rights. Id. at *12. The supreme court cited HRS § 174C-101 (2011 Repl.), which states:

§174C-101 Native Hawaiian water rights.

. . . .

(c) 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, opae, o'opu, limu, thatch, ti

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leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The 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.

The supreme court held the Commission's decision to retain the existing IIFS for two of the streams endorsed upstream diversions and determined the petitioners' individual water rights by affecting their access to water from those streams. In re 'Iao at *13. Consequently, the supreme court concluded the petitioners had a right to a contested case hearing on the Commission's IIFS amendment. Id.

In this case, Nā Moku asserts comparable interests, entitling it to an administrative hearing on the petitions to amend the IIFS. The President of Nā Moku, Edward Wendt (Wendt), stated that the organization's purposes include "promot[ing] the general welfare of the tenants and descendants of the original tenants of the ahupua'a of Keanae-Wailuanui [in East Maui] in social, spiritual, cultural, educational and economic affairs" and asserting its members' appurtenant and riparian water rights and their traditional and customary native Hawaiian rights. Wendt, a native Hawaiian resident and taro farmer in the ahupua'a of Wailuanui, testified that he and other Nā Moku members engaged in native Hawaiian traditional and customary practices such as taro cultivation, and that their ability to engage in these practices has been affected by the streamflow within the ahupua'a. A cultural expert and community members who owned or resided on land in the area of the East Maui streams submitted testimony to the Commission about similar interests in gathering

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hīhiwai,⁵ limu,⁶ o'opu,⁷ and ōpae⁸ from the streams and in fishing along coastlines into which those streams discharge fresh water.

Inasmuch as no contested case hearing was held but was required by law, the next issue is whether the hearing, had it been held, would have determined the "rights, duties, and privileges of specific parties." Kaleikini, 124 Hawai'i at 24, 237 P.3d at 1090. As in In re 'Iao, we conclude the Commission's decision to retain the existing IIFS and maintain diversions for thirteen of the streams determined individual water rights by limiting Nā Moku's members' access to water.

Consequently, pursuant to In re 'Iao, Nā Moku is entitled to a contested case hearing with the full procedural protections afforded by the Hawai'i Administrative Procedures Act (HAPA). "The adjudicatory procedures of [HAPA] apply to hearings which an agency is constitutionally required to provide." Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 131, 870 P.2d 1272, 1275 (1994). The May 25, 2010 meeting, at which the Commission reached an IIFS determination for the nineteen streams, did not comply with the adjudicatory procedures of HAPA. Among other things, the Commission did not produce a written decision accompanied by findings of fact and conclusions of law. See, HRS §§ 91-9 to 91-13 (1993). We consequently decline Nā Moku's invitation to address the merits of whether the Commission erred

⁵ In Hawaiian, hīhiwai means a "[e]ndemic grainy snail . . . in both fresh and brackish water[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 68 (1986).

⁶ In Hawaiian, limu means a "[a] general name for all kinds of plants living under water, both fresh and salt[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 207 (1986).

⁷ In Hawaiian, o'opu means a "[g]eneral name for fishes Some are in salt water near the shore, others in fresh water, and some said to be in either fresh or salt water." Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 290 (1986).

⁸ In Hawaiian, ōpae means a "[g]eneral name for shrimp[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 291 (1986).

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in reaching its determination on the petitions to amend the IIFS for the nineteen streams, as argued in the parties' briefs. This matter is to be properly presented, argued, and decided pursuant to an HRS chapter 91 contested case hearing conducted by the Commission, the body statutorily empowered to make this determination.

IV. CONCLUSION

The Commission on Water Resource Management's October 18, 2010 denial of Nā Moku's Petition for Hearing is vacated, and this matter is remanded to the Commission with instructions to grant Nā Moku's Petition for Hearing and to conduct a contested case hearing pursuant to HRS chapter 91 and in accordance with state law.

DATED: Honolulu, Hawai'i, November 30, 2012.

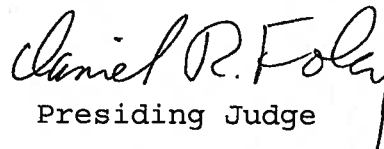
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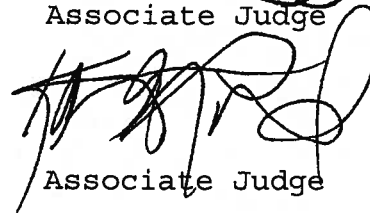
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for Appellee Hawaii Farm Bureau
Federation.


Presiding Judge


Associate Judge


Associate Judge