NO. SCAP-30603

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

IN RE ‘ĪAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT APPLICATIONS AND PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS OF WAIHE‘E RIVER AND WAIEHU, ‘ĪAO, AND WAIKAPŪ STREAMS CONTESTED CASE HEARING	)	Case No. CCH-MA06-01 APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED JUNE 10, 2010 COMMISSION ON WATER RESOURCE MANAGEMENT

PETITIONERS-APPELLANTS HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S UNIFIED REPLY BRIEF

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I. INTRODUCTION AND BACKGROUND

The answering briefs of appellees Commission on Water Resources Management ("CWRM"), Wailuku Water Company ("WWC"), and Hawaiian Commercial and Sugar ("HC&S) (collectively, "appellees") speak volumes in what they do not answer. Instead of responding to the merits of Hui o Nā Wai 'Ehā's and Maui Tomorrow Foundation's (collectively, the "Community Groups'") and the Office of Hawaiian Affairs' ("OHA's") appeals of the CWRM majority's final Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order (collectively, "final decision"),[1] appellees do everything they can to avoid doing so. Faced with the futile prospect of defending the final decision based on the legal framework this Court has established, appellees attempt one last-ditch move: overhaul the law wholesale. This includes not only eviscerating the fundamental legal protections of the public trust and Native Hawaiian rights beginning with the Hawai'i Constitution, but even eliminating this Court's jurisdiction and "ultimate authority to defend the public trust in Hawai'i," In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawai'i 97, 143, 9 P.3d at 409, 455 (2000) ("Waiāhole"), and the public's and Native Hawaiians' access to justice.

As detailed herein, appellees' arguments not only contradict their own positions throughout this case and in the final decision, but also fly in the face of this Court's express holdings and common sense. Particularly coming from CWRM, the constitutionally appointed "primary guardian of public rights under the trust," 94 Hawai'i at 143, 9 P.3d at 455, these arguments evince an appalling lack of understanding and care and only confirm the legal violations in the final decision. CWRM does a disservice not only to itself and the public trust in this case, but to the vision and legacy of past generations who sought to protect Hawai'i's precious water resources, and the hope of generations to come.

Hawai'i's modern law of water resources is an enduring legacy of Chief Justice William S. Richardson, under whose leadership this Court laid the foundation for the public trust based on indigenous Hawaiian principles, in a trilogy of cases beginning with McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), appeal dismissed and cert. denied, 417 U.S. 962 (1974). Like this case, McBryde v. Robinson involved two plantation companies freely

[1] "RAx:y" cites the record on appeal by docket number(s) (x) and, as applicable, the page number(s) of the pdf document of the docket entry (y). Any lines (l.) or paragraphs (¶) within a page are indicated in parentheses. The final decision (RA192) is cited by either page number(s) or specific "FOF" or "COL" number(s). "OB" and "AB," respectively, refer to the Community Groups' opening brief, and appellees' answering briefs.

diverting stream flows to the detriment and exclusion of other rights and interests. The principles the Court set forth almost 40 years ago resonate in this case today.

The Court emphasized that the plantations' rights to divert stream flows were ultimately contingent on "defin[ing] all the potentially affected interests in a watercourse" and "demonstrat[ing] that no aspect of these rights would be detrimentally affected." Robinson v. Ariyoshi, 65 Haw. 641, 649 n.8, 658 P.2d 287, 295 n.8 (1982) (Richardson, C.J.); see also id. at 671-72, 658 P.2d at 308-09 (referring to the "undelineated rights of others," "every other interest," and "previously undefined usufructory interests" in a watercourse). The Court rejected the plantations' view that "there existed no apparent common law restraint upon the right of private parties to drain rivers dry for whatever purposes they saw fit" as a "gross oversimplification of the interest involved." Id. at 676, 658 P.2d at 311. Rather, "[t]he reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of those waters." Id. "For while there indeed exist relative usufructory rights among landowners, these rights can no longer be treated as though they are absolute and exclusive interests in the waters of our state." Id. (emphasis added).[2]

For more than a century, WWC and HC&S (collectively, the "Companies") drained Nā Wai 'Ehā waters dry as they saw fit. Even after the closure of the primary plantation user of Nā Wai Ehā water, the former Wailuku Sugar, little has changed. Wailuku Sugar is now a "water company" with an "unallocated flow" that "would be available to new customers" of almost 30 million gallons per day ("mgd"). RA106:17; RA80:81. "At present," the Companies arrange for "water not used by [WWC]'s existing customers [to be] used by HC&S in their sugar operations," RA80:81, via "temporary," handshake deals. RA:128:41; FOF 541; RA184:66.

HC&S, meanwhile, has: (1) "minimized" use of its primary, non-potable water source for the fields at issue, Well 7, of which HC&S used a 60-year average of 21 mgd, FOFs 263,

[2] Accord Waiāhole, 94 Hawai'i at 190 n.108, 9 P.3d at 502 n.108 ("Inattention to [the public trust] may have brought short-term convenience to some in the past. But the constitutional framers and legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill-afford to continue down this garden path this late in the day."); Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908) (Holmes, J.) ("The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.").

494-95; (2) overwatered its fields up to 40 percent or more than its actual needs;[3] (3) lost up to 12 mgd from its ditch system, in addition to an estimated 4 mgd from WWC's portion of the system, amounting to more than 25 percent of the water deliveries to HC&S, FOF 423; COL 225; RA60:9. At the same time, HC&S continues to advocate for the "Wai'ale Treatment Facility," a project that would reallocate 9 mgd HC&S currently uses to subsidize development projects on HC&S plantation land, and in partnership with WWC, sell the leftover treated water to Maui County, RA328:18(l.13)-21(l.21). RA158:393; HC&S's AB at 30.

Through it all, the Companies have never been held accountable to all the other interests and rights in Nā Wai 'Ehā watercourses. Certain "kuleana" rightholders have received water from the Companies' ditch system because the Companies gave them no other choice. After years of plantation rule as de facto "konohiki,"[4] the Companies have deprived many (but not all) of these rightholders of the ability to access the water to which they are entitled except via the Companies' ditch system, and also failed to provide them with sufficient flows. See infra Part II.F. Moreover, in addition to their impacts on these particular rightholders, the Companies' diversions have entirely subverted many other rights and interests in Nā Wai 'Ehā waters. At bottom, this case is about all of the rights and interests in Nā Wai 'Ehā waters beyond just the Companies' diversions, whether or not connected to the Companies' ditches. The public trust protects them all.

Yet, it is these rights and interests to which the majority's final decision gives little or no protection. In comparison to the 67 mgd the Companies have historically diverted, FOF 209, the majority calculated the total reasonable uses, taking into account practicable alternatives, to be

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[3] Compare COL 66 (HC&S's calculated use of 7,716 gallons per acre per day ("gad") for the leased 'Īao-Waikapū fields and Field 920), with COLs 75, 91 (CWRM's determined actual need of 5,150-5,408 gad). This included dumping water on Field 920 -- which HC&S knew was "very sandy" and unproductive, RA184:64, and which it has slated for development, RA140:56; 136:62-68 ("Wai'ale") -- at rates more than double what CWRM found reasonable even with extra allowances. Compare RA100:17; RA321:101(l.25)-104(1.3) (HC&S's reported use of 10,000 to 14,000 gad), with COLs 75, 91 (actual need of 5,150-5,408 gad).

In similar fashion, WWC contracted with a customer to spray up to 1.0 mgd into the air over a pasture in arid Mā'alaea "20 hours a day," including "broad daylight" and "[h]igh noon," which the contract deemed "surplus" water. FOF 379; RA313:196(l.22)-197(l.19); RA124:157 (§1); RA190:92 (pictures). That land is also slated for development. RA78:19(¶¶14-15); RA140:56 ("Ma'alaea Mauka").

[4] See Reppun v. Board of Water Supply, 65 Haw. 531, 539-48, 656 P.2d 57, 63-69 (1982) (Richardson, C.J.) (explaining the historical distortion of the traditional Hawaiian role of the konohiki (manager) of stewardship and responsibility into the Western concept of private ownership).

28.42 mgd (23.51 mgd for the Companies),[5] even after arbitrarily minimizing use of Well 7 from 21 mgd to 9.5 mgd. Final Decision at 216 (Table 13). Yet, despite this almost 40 mgd difference between what the Companies take and what the majority determined reasonable, not including the 11.5 mgd the majority eliminated from Well 7, the majority restored a total of only 12.5 mgd to two Nā Wai ʻEhā waters, and zero to the two others.[6] As appellants explained in their opening briefs, the majority performed this mathematical sleight of hand by indulging HC&S's offstream diversions at every turn, maximizing offstream demand to all-time levels while minimizing practicable mitigation and alternatives, then leaving public trust instream uses with the little or no flows that were left over. OB 19-21, 29-30, 37-38. Now that the majority has preserved the Companies' control over the vast majority of Nā Wai ʻEhā stream flows, appellees seek to permanently deprive the public and Native Hawaiians of not only water, but even access to the courts. Their arguments highlight the reason for this Court's reassertion of the public trust 40 years ago, and the need to continue to fulfill this legacy and promise today.

II. CWRM'S AND THE COMPANIES' ENTIRE RESPONSE IS AN END RUN AROUND THE LAW AND THE MERITS OF THIS APPEAL

Appellees' entire response on appeal, including their "jurisdictional" argument, rests on overturning the established legal framework of the public trust and instream use protection. Appellees begin with the unremarkable observation that establishing interim instream flow standards ("IIFSs") "is not permitting," with which the Community Groups agree. Appellees, however, then wish to believe that "this changes everything," such that Waiāhole ceases to apply, the law and logic of the public trust and water resources stewardship in Hawai'i flip upside-down, the CWRM majority has unbridled and unreviewable discretion to do as it pleases based on its subjective sense of "the public interest," and the Companies have no obligation to justify their private commercial uses. In constructing their diverters' vision of utopia, appellees fail to grasp, or seek to avoid, core mandates that this Court already made clear in Waiāhole.

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[5] The majority's calculation included several math errors, including overstating HC&S's needs for its ʻĪao-Waikapū fields by .15 mgd, OHA's OB at 25-26 n.19, and understating the net consumptive needs for kalo (taro) cultivation as 1.71 mgd, see infra Part IV.C.3.

[6] In contrast, CWRM on the second remand by this Court in the Waiāhole case allocated a total ditch flow of 27 mgd as follows: 12 mgd to the IIFSs, 12.57 mgd to offstream uses, and 2.43 unallocated flow. See In re Waiāhole Ditch Combined Contested Case Hr'g, Findings of Fact, Conclusions of Law, & Decision & Order at 80 (CWRM July 13, 2006), available at http://www.state.hi.us/dlnr/cwrm/currentissues/cchoa9501/CCHOA95-3F.pdf (page 85 of pdf).

Appellees' jurisdictional and other legal arguments are steeped in their fundamentally flawed paradigm and require an initial review of the basic legal principles they seek to disregard or distort. This includes review of the public trust (Part II.A) and instream flow standards (Part II.B, C, D). It also responds to the appellees' legal non-sequitur that "IIFSs are not permits" (Part II.E) and their misdirected ploy to use the "kuleana" rightholders who receive water via the Companies' ditch system as leverage to minimize instream flows (Part II.F). This will place into full and proper context appellees' attempt to deprive this Court of jurisdiction (Part III.A) and undermine the fundamental requirements of reasonable-beneficial use and practicable mitigation and alternatives (Part III.B.2), and the Companies' burden of justifying their diversions (Part III.B.1). Subsequently, discussion will turn to the merits of this appeal (to the extent that appellees address them), which appellees have gone to such desperate lengths to avoid (Part IV).

A. The Constitutional Public Trust Establishes The Fundamental Mandates For Water Protection And Management In Hawai'i.

As appellees routinely ignore, the legal framework for instream use protection begins with the constitutional directives of the public trust doctrine. See Waiāhole, 94 Hawai'i at 133, 9 P.3d at 445 (holding that "the [State Water] Code does not supplant the protections of the public trust doctrine"). The constitutional public trust "embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." Id. at 139, 9 P.3d at 451. The mandate of protection establishes the duty to "ensure the continued availability and existence of [Hawai'i] water resources for present and future generations." Id. The mandate of maximum reasonable and beneficial use establishes the standard for water use in Hawai'i. See id. (analogizing this constitutional provision to laws mandating the maximum beneficial or highest and best use of water resources); COL 9 (recognizing the "constitutionally mandated standard of reasonable-beneficial use").[7] This requires "not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" Waiāhole, 94 Hawai'i at 140, 9 P.3d at 452.

CWRM has "an 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." Id. at 141, 9

[7] See also Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 893 (Cal. 1967) (recognizing that article XIV, § 3 of the California Constitution applies "by constitutional mandate the doctrine of reasonable use"); Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 670 (Fla. 1979) (maintaining that even before the passage of the comprehensive water management statute, water use "was bounded by the perimeters of reasonable and beneficial use").

P.3d at 453. These protected public trust uses or purposes include resource protection, as well as the exercise of "Native Hawaiian and traditional and customary rights," including "appurtenant" or "kuleana" rights (collectively, "T&C/kuleana rights"). Id. at 136-37 & n.34, 9 P.3d at 448-49 & n.34.[8] They expressly do not include the Companies' private commercial diversions. Id. at 138, 9 P.3d at 450.

Contrary to appellees' simplistic (and, here, painfully ironic) concept of "balance," the public trust does not simply "recognize[] the necessity of a balancing process," but goes further to establish a "presumption" and "norm or 'default' condition" in favor of public trust purposes. Id. at 142, 9 P.3d at 454; see also id. at 155, 9 P.3d 467 (reiterating the "presumption in favor of public trust purposes"). Thus, private commercial uses require a "higher level of scrutiny," and "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust." Id. at 142, 9 P.3d at 452.

B. Instream Flow Standards Must Protect All Public Trust Purposes, Including T&C/Kuleana Rights.

Instream flow standards[9] are CWRM's "primary mechanism" to fulfill its "duty to protect and promote the entire range of public trust purposes dependent upon instream flows." Id. at 148, 9 P.3d at 460. This "entire range" encompasses all uses and values connected with resource protection, as well as all T&C/kuleana rights. Contrary to the misimpression in the majority's final decision and appellees' arguments, these purposes are not coextensive, such that CWRM need only protect one to protect them all (or conversely, may abandon them all because it arbitrarily sees fit to abandon one). T&C/kuleana rights, for example, are exercised by individual rightholders, compared to other public trust rights which are available to the larger community. Moreover, in the case of T&C/kuleana rights to cultivate kalo, the water use extends beyond the stream channel per se, although most of the flows return to the stream for

[8] Appurtenant rights are a kind of customary right based on water use since "time immemorial," which attaches to land that was receiving water during the Māhele in the mid-1800s. Peck v. Bailey, 8 Haw. 658, 661 (1867). Such rights are not a Native Hawaiian right, although in this case many of the appurtenant rightholders are Native Hawaiian. In addition to their priority under the common law, appurtenant rights are "assure[d]" and "preserved" under the constitution and Code. Haw. Const. art. XI, § 7; Haw. Rev. Stat. ("HRS") §§ 174C-63 (1993), -101(d) (1993).

[9] The discussion of instream flow standards in the Community Groups' briefs follows the convention of "us[ing] the term 'instream flow standards' broadly to encompass both 'interim' and 'permanent' standards." Waiāhole, 94 Hawai'i at 147 n.48, 9 P.3d at 459 n.48.

other uses.[10] All these rights, nonetheless, are "public trust purposes dependent upon instream flows," which the state has a fiduciary duty to protect and promote in instream flow standards. Id. at 148, 9 P.3d at 460. See also id. at 142 n.43, 9 P.3d at 454 n.43 (emphasizing that CWRM must "ensure that all trust purposes are protected to the extent feasible") (emphasis added).

Consistent with this mandate, the Code defines "instream use" as including the "conveyance of irrigation and domestic water supplies to downstream points of diversion" and "protection of traditional and customary Hawaiian rights." HRS § 174C-3 (1993 & Supp. 2010). Accordingly, instream flow standards must include not only flows sufficient for resource protection in a vacuum, but also additional flows to sustain Native Hawaiian resource gathering and fishing and to provide for kalo cultivation. See Waiāhole, 94 Hawai'i at 157 & n.63, 9 P.3d at 469 & n.63 (criticizing CWRM's failure to address the need to restore flows to Waikāne Stream, including flows for "part-Hawaiian farmers . . . to support their desired levels of taro cultivation"); In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Hawai'i 1, 10, 93 P.3d 643, 652 (2004) ("Waiāhole II") (recognizing CWRM's provision of additional flows for downstream "appurtenant rights, riparian uses, and existing uses").[11]

C. Instream Flow Standards Must Protect And Restore Public Trust Uses To The Extent Practicable, Regardless Of Whether Or When Any Statutory Permitting Occurs.

Parallel to the constitutional duty to protect public trust purposes "wherever feasible," instream flow standards must protect and restore instream uses and values "to the extent practicable." Waiāhole, 94 Hawai'i at 155, 9 P.3d at 467; see also Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653 (reversing CWRM for failing to show "whether instream values would be protected to the extent practicable"). WWC and CWRM suggest that IIFSs allow less protection

[10] As this Court has recognized, traditional kalo cultivation "called for flowing water, most of which was not consumed by the land" and "most of which could be subsequently utilized by lower riparian users." Reppun, 65 Haw. at 541, 545, 656 P.2d at 64, 67. See also COL 220 (acknowledging the same).

[11] See also Douglas W. MacDougal, Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 46, 61-62 (1996) ("MacDougal") (recognizing that "[o]ther beneficial instream uses under the Water Code also go beyond this conservation purpose and encompass assuring sufficient water to allow the practice of traditional and customary Hawaiian rights, among other purposes" and that the "[instream flow] standards would incorporate conservation and all other 'beneficial instream uses,' including the conveyance of sufficient water downstream to allow taro growing on kuleana and taro lands"). This law review was authored by a partner in a law firm which was representing an offstream user in the Waiāhole case, see MacDougal, 18 U. Haw. L. Rev. at 1, yet it still acknowledges basic principles that are lost on the Companies and the current CWRM.

since they are "temporary," and since CWRM "may" amend them later. On the contrary, this Court (along with CWRM in better times) already settled that IIFSs' interim function towards the "ultimate objective" of establishing "bona fide 'permanent'" standards "does not alter [CWRM]'s duty to protect instream uses": rather, IIFSs "must still provide meaningful protection of instream uses" and "protect instream values to the extent practicable." Waiāhole, 94 Hawai'i at 150-51 & n.55, 155, 9 P.3d at 462-63 & n.55, 467; Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653 (same). Indeed, such protection is all the more critical given that, 24 years after the Code's enactment, CWRM has yet to establish a single permanent instream flow standard.[12]

Precisely because of the instream flow standards' primary role in protecting instream public trust purposes, the Code mandates CWRM to establish such standards "independently of" any designation of a water management area ("WMA") or issuance of a water use permit. Waiāhole, 94 Hawai'i at 148, 9 P.3d at 460. Thus, the instream use protection mandate governs all water uses in the state whether the statutory permitting or common-law rights system applies; that is, the mandate is universal and not contingent on any WMA designation. See also The Regulated Riparian Model Water Code § 3R-2-01 commentary at 82 (Joseph Dellapenna ed., 1997) (explaining that "the protected minimum flows or levels are to be protected from impairment by everyone using water in the State whether pursuant to a permit or otherwise"). Further, instream uses are not relegated to "competing" with permit applications or common-law water claims; rather, they command specific protection in instream flow standards. Waiāhole, 94 Hawai'i at 148, 9 P.3d at 460.[13]

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[12] See Waiāhole, 94 Hawai'i at 153, 9 P.3d at 465 (highlighting CWRM's duties to investigate and study instream flow uses and needs); Haw. Admin. R. ("HAR") § 13-169-20(2) (1988) (emphasizing the "vital" role of a "systematic program of baseline research" for the "protection and enhancement" of streams and instream uses). See also MacDougal, 18 U. Haw. L. Rev. at 64 (documenting, in 1996, that CWRM "has done very little in the way of setting permanent instream flow standards in Hawai`i" and "appurtenant rights for taro grown have not been systematically determined"); Waiāhole II, 105 Hawai'i at 12, 93 P.3d at 654 (reiterating, in 2004, "that seventeen years have passed since the Water Code was enacted requiring [CWRM] to set permanent instream flow standards by investigating the streams"). In addition to failing to establish any permanent instream flow standards, CWRM has yet to recognize a single appurtenant right.

[13] See also id. at 190 n.108, 9 P.3d at 502, n.108 (citing the numerous express protections of instream uses under the Code, which "abundantly demonstrates[] the legislature did not create such a system" in which "instream uses receive no different treatment than other uses" and are beholden to the permitting requirement).

D. CWRM And The Companies Have Undermined The Operation Of Instream Flow Standards, But Cannot Nullify The Legal Mandate.

"In order for the 'instream use protection' framework to fulfill its stated purpose . . . [CWRM] must designate instream flow standards as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." Id. at 148, 9 P.3d at 460. Such early designation: (1) fulfills the trust duty of protection and prevents "inadvertent and needless impairment" of instream uses; (2) avoids an "ad hoc planning process driven by immediate demands"; and (3) allows offstream users relief from "the unsettled question of instream flow requirements." Id. at 148-49, 9 P.3d at 460-61.

In this case, CWRM and the Companies have tried to undermine this mandate. For two decades since the Code's enactment, CWRM provided only its statewide, "rubber-stamp" IIFSs merely "ratify[ing] the major diversions already existing." Id. at 150 & n.54, 9 P.3d at 462 & n.54. Despite its recognition of Nā Wai 'Ehā waters as "Candidate Streams for Protection" and "Blue Ribbon Resources," FOF 63, CWRM made no efforts to establish any meaningful instream flow standards for Nā Wai 'Ehā or conduct any ecological or cultural studies until the Community Groups brought this action in 2004. Meanwhile, as detailed above, despite the closure of Wailuku Sugar, the Companies have deliberately sought to maximize Nā Wai 'Ehā diversions regardless of actual need, efficiency, and alternatives, while pursuing plans for land and water development and private profit. CWRM, in effect, ceded its planning and management function to the Companies.

Nonetheless, as this Court's rulings dating back to McBryde make clear, the Companies cannot negate the public trust by hoarding stream flows. Rather, the Companies' self-serving modus operandi has made the need to uphold the public trust all the more compelling. The Companies have no "vested rights" to monopolize Nā Wai 'Ehā water "to the detriment of public trust purposes." Waiāhole, 94 Hawai'i at 141, 9 P.3d at 453. Moreover, notwithstanding the Companies' persistent diversions (or because of them), CWRM cannot simply accept the Companies' imposed status quo, but must "protect, enhance, and reestablish" instream uses where practicable. Id. at 149, 9 P.3d at 461 (quoting HRS §§ 174C-5(3), -71(4)).[14] Thus,

[14] See also National Audubon Soc'y v. Superior Ct., 658 P.2d 709, 728 (Cal. 1983) (maintaining that "the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs," and "[t]he case for

CWRM "may reclaim instream values to the inevitable displacement of existing offstream uses," its "duty to establish proper instream flow standards continues," and "public instream uses are among the 'superior claims' to which, upon consideration of all relevant factors, existing uses may have to yield." Id. at 149-50 & n.52, 9 P.3d at 461-62 & n.52.

E. CWRM's And The Companies' Distinction Between Instream Flow Standards And Water Use Permits Misses The Point.

Appellees echo the coordinated refrain that instream flow standards are not statutory "permits," as if this somehow diminishes CWRM's authority and duty to protect public trust purposes and allows a more permissive view of the Companies' diversions. Not so. CWRM must protect and restore instream uses to the extent practicable in establishing IIFSs. In determining this maximum "practicable" protection, CWRM by law and necessity must determine whether any offstream diversions are reasonable-beneficial in relation to the protected instream uses -- regardless of whether or when any statutory permitting occurs. See HRS § 174C-71(2)(D) (1993); COLs 42, 11, 9; see also HRS § 174C-10 (1993) ("[CWRM] shall have jurisdiction statewide to hear any dispute regarding water use protection . . . or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a [WMA] under this chapter.").

This particularly holds true here, where the Companies are draining the streams dry, and CWRM therefore must weigh the restoration of public trust purposes in direct and immediate relation to the Companies' existing diversions. The suggestion that CWRM can or must defer this critical weighing of public trust uses and the Companies' diversions until the permitting process may serve the Companies' interests, now that CWRM has already left public trust uses dangling with less-than-minimum or no protection. But this stands the law on its head and deprives public trust purposes of their specific protections under the constitution and Code.[15]

If, as in this case, CWRM proceeds to permitting after establishing instream flow standards, CWRM would then determine whether to grant any permits for existing and new uses

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reconsidering a particular decision . . . is even stronger when that decision failed to weigh and consider public trust uses").

[15] See Waiāhole, 94 Hawai'i at 154-55, 9 P.3d at 466-67 (emphasizing that CWRM's failure to establish meaningful standards while making substantial allocations for offstream diversions "largely defeats the purpose of the instream use protection scheme" and "appears to provide close to the least amount of instream use protection practicable under the circumstances"); id. at 160, 9 P.3d at 472 (criticizing CWRM's interim "permissive view towards stream diversions, particularly while the instream flow standards remained in limbo," which contradicts "the law and logic of water resource management in this state").

based on any additional statutory permitting criteria (e.g., for new uses, whether the use is "consistent with state and county general plans and land use designations"), HRS § 174C-49(a) (1993), and any evaluation of "competing" claims as between offstream uses, id. § 174C-54 (1993). See COL 9 (recognizing that "[i]n addition to meeting the constitutionally mandated standard of reasonable-beneficial use," a permit applicant must satisfy the statutory criteria). If CWRM has diligently fulfilled its duties to establish sufficiently protective instream flow standards, it would have addressed the critical portion of the "reasonable-beneficial" inquiry for permits -- i.e., the weighing in relation to public trust uses. See Waiāhole, 94 Hawai'i at 148-49, 160-61, 9 P.3d at 460-61, 472-73.[16] As this Court has repeatedly emphasized, however, unless and until CWRM establishes this necessary foundation, any water resources management is a house built on sand.[17] Again, this underscores the importance of this case and the fallacy of appellees' attempt to minimize instream use protection because it "is not permitting."

F. CWRM And The Companies Are Obligated To Protect All T&C/Kuleana Rights.

Appellees also hold up as rhetorical fodder the T&C/kuleana rightholders who currently receive water via the Companies' ditch system, accusing appellants of seeking stream flow restoration against these rightholders' interests. CWRM further abandons any pretense of protecting T&C/kuleana rights and suggests that these rights stand in no different legal position than the Companies' commercial diversions. See, e.g., AB at 46 (arguing that "if [the Companies] carried any burden [of proof], then so did all kuleana water users, including [the Community Groups]'s and OHA's purported clients in the [CCH]"). These arguments underhandedly and unlawfully seek to use T&C/kuleana rightholders -- who even the Companies acknowledge have priority rights -- to deflect attention from the Companies' virtual monopoly over Nā Wai 'Ehā stream flows.

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[16] As this Court explained, the reasonable-beneficial standard, which derives from common-law principles, "demand[s] examination of [the Companies' diversions] . . . in relation to other public and private uses and the particular water source in question," and with respect to "possible harm to society through harm to the water body, and a balancing of any harm caused by the use against methods currently available to reduce or eliminate that harm." Id. at 160-61, 9 P.3d at 472-73 (some emphasis deleted).

[17] See id. at 161, 9 P.3d at 473 (observing that CWRM's failure to develop permanent standards beyond the preliminary standards in Waiāhole rendered all allocations "tentative at best"); id. at 185, 9 P.3d at 497 (explaining that "the lack of any previous comprehensive studies precluded the permittees from proving, and [CWRM] from determining, the actual extent to which the diversions would sacrifice public values in the . . . stream and estuary ecosystem"); see also HRS § 174C-49(a)(1) (statutory criterion whether the use "can be accommodated with the available water source" in the first place).

Initially, while appellees insinuate that appellants only "purport" to represent T&C/kuleana rightholders, the only reason CWRM has meaningful information about any of these rightholders is that the Community Groups and OHA devoted extensive time and resources to investigate, document, and advocate for their rights and needs, while the Companies and CWRM did nothing. RA98:2-15, 23-25(¶¶2-4); RA130:48-60; RA88:23-31; RA160:65-89, 246-313, 413-23. In short, as with other instream uses, it fell on others in this case to shoulder CWRM's duty to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." Waiāhole, 94 Hawai'i at 143, 9 P.3d at 455.

Many T&C/kuleana rightholders who receive water from the Companies' ditches do so because the Companies have given them no other choice. It is undisputed that over the years the Companies have unilaterally modified the kuleana 'auwai (traditional irrigation channel) as they have seen fit.[18] Just because years of unregulated plantation dominion over Nā Wai 'Ehā stream flow allocation have forced many of these rightholders into a position of reliance on the Companies' ditches, this in no way alters their priority rights to that water.

The T&C/kuleana rightholders on the Companies' system testified that they receive insufficient water and, thus, requested more flows. FOFs 234, 296.[19] Like CWRM's "status quo" IIFSs, the amount of flows the Companies have provided these rightholders is simply a

[18] See, e.g., RA315:142(l.6)-143(l.20) (WWC president). The "Waihe'e Valley North" 'auwai, for example, used to receive water directly from Waihe'e River, but several decades ago, WWC augmented its mauka diversions, then blocked the 'auwai intake and connected it to WWC's ditch system. RA68:148-49(¶¶3-4); RA310:13(ll.17-20), 16(ll.8-15); RA90:44(¶¶4-5); RA68:158-59 (pictures). See also RA70:75(¶3) (describing a similar situation in Waikapū Stream of WWC rerouting the kuleana 'auwai's direct connection with the stream to WWC's reservoir). In other cases such as the kuleana 'auwai around Wailuku, WWC replaced the 'auwai with plantation ditches and pipes, much of which it laid underground and beneath concrete, hindering access and maintenance and the flow of water. See, e.g., RA304:116(l.18)-118(l.16); RA88:175(¶¶4-5); RA304:33(l.4)-34(l.9).

[19] These include kuleana rightholders Stanley Faustino (RA68:147-61); William "Kā'ū" Freitas (RA90:43-56); Michael Rodrigues (RA96:13-23; RA304:86(ll.7-17)); Diannah La'i Goo (RA118:76-97); Roys Ellis (RA90:31-42; RA304:26(ll.6-19)); Kenneth Kahalekai (RA94:4-39; RA304:66(ll.2-6)); Kaniloa Kamaunu (RA94:40-50); Thomas Texeira (RA130:33-47); Burt Sakata (RA104:28-29; RA108:69-88; RA110:1-8); Donald Miyashiro (RA130:2-32); Charlene Kana (RA104:26-27; RA108:64-68); Cordell Chang (RA104:24-25; RA108:59-63); Magdalen Ho'opi'i (RA92:1-44); Donnalee Singer (RA104:30-34; RA110:9-42); Alex Buttaro (RA88:168-73); Evelyn Brito (RA88:151-67); Winifred Cockett (RA88:174-81); Alfred Santiago (RA96:24-46); Vernon Bal (RA88:144-50); Crystal Alboro (RA68:58-73); and Teruo Kamasaki (RA70:74-90). As the testimonies indicate, most of these 'ohana are Native Hawaiian and thus also have T&C rights.

historical figure and is not based on any analysis of actual needs. RA314:175(l.13)-177(l.24) (WWC president) (insisting that WWC simply "put[s] water into the kuleana ditches as we have in the past historically"). Most of these requested increased flows, again, would return to the streams and augment downstream flow for other users. See supra note 10.

In addition, many other T&C/kuleana rightholders seek to use Nā Wai ʻEhā water directly from the streams, but cannot because the Companies drain them dry. These included rightholders currently on the Companies' system[20] and others located downstream of the Companies' diversions.[21] Since CWRM has failed to conduct any instream use studies, including cultural surveys of T&C/kuleana rights, see supra note 12, it cannot say how many total rightholders may exist and what proportion are compelled to receive water from the Companies' system. In any event, the majority's final decision shortchanged all T&C/kuleana rightholders, including those on the Companies' system, and completely deprived downstream rightholders on ʻĪao and Waikapū Streams of their rights. OB Part VI.C., at 32-34.

Appellees' attempts to pit T&C/kuleana and other public trust rights against each other for the Companies' leftover flows is particularly egregious because even the Companies have uniformly acknowledged and documented that their diversions are subject to satisfying kuleana rights first. In their original 1924 agreement dividing Nā Wai ʻEhā stream flows, the Companies acknowledged their diversions were "subject to existing water rights of third parties therein," including "for all kuleanas of such third parties." RA104:74, 78-79. See, e.g., RA104:78-79 (stipulating as to Waiheʻe River flows that kuleana "rights shall as far as practicable . . . be supplied from the water flowing in [Waiheʻe River] . . . , and any deficiency for such kuleanas

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[20] These include kuleana rightholders Stanley Faustino (RA68:147-61; RA310:14-15), Diannah Laʻi Goo (RA304:45(l.19)-46(l.5), and Roys Ellis (RA304:26(ll.14-15)); most of which ʻohana are Native Hawaiian and thus also have T&C rights. See Robinson, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8 (recognizing that water rights include "interests in the means of diversion").

[21] These include kuleana rightholders Francis Allan Ornellas (RA58:43-46; RA58:100-05); Hōkūao Pellegrino (RA58:50-58, 109-33); Henry Maio (RA94:51-58); Duke Sevilla (RA70: 106-21); Philip Kekona (RA70:91-93); Alfred Santiago (RA96:24-46); Crystal Alboro (RA68:58-73); Warren Soong (RA116:157-64); Russel Gushi (RA90:57-66; RA304:17(l.12)-18(l.16)); Teruo Kamasaki (RA70:74-90); Maui Coastal Land Trust (RA68:162-223); and Gordon Schwartz (RA118: 64-75), most of which ʻohana are Native Hawaiian and thus also have T&C rights. Other T&C rightholders include Rose Marie Hoʻoululāhui and John V. Duey (RA68:143-46, 124-42); Kainoa Horcajo (RA58:47-49, 106-08); Roselle Bailey (RA68:115-119); Ramona Lei Waiwaiole Smith (RA70:122-32); Clyde Kahalehau (RA94:1-3); Joseph Alueta (RA68:74-114); Paul Higashino (RA70:1-3); Hōkūlani Holt Padilla (RA58:31-38); and Akoni Akana (RA58:39-42).

shall be supplied by the [Companies] from the waters flowing in the New Waihee Ditch."). Every subsequent document from the Companies addressing the issue confirms the same:

- The 1994 "Temporary Water Agreement," regarding "temporary changes" to the Companies' diversions in connection with the short-term leases of the 'Īao-Waikapū fields, acknowledges "Kuleana water has priority over any other uses," and the Companies' uses were limited to the amount of water "remaining after fulfilling Kuleana water users' rights." RA128:41-43.

- WWC's "white paper" documents the priority of "Kuleana Usage" and the "remaining capacity" "after . . . kuleana water obligations," RA106:16-17, and its letter to shareholders indicates that "the Company provides water to several kuleana users free of charge (a kuleana is a parcel of land that was growing taro at the time of the Great Mahele in 1848 and is entitled to water as an appurtenant right)," RA80:81.

- WWC's contracts with its customers expressly subject any water use to "priority use by Wailuku's kuleana obligations," RA130:75, 90; RA124:72, 180, 198, 274, 318, see also RA128:162 (reserving "any and all obligations which [WWC] may have at the date of this Agreement (whether now or hereafter ascertained) to let water flow downstream to satisfy appurtenant or other water rights"), and making clear that during shortages, "priority [is] given to kuleana users," RA:130:75, 90; RA124:72-73, 88, 91, 94, 97, 100, 103, 106, 109, 112, 115, 118, 121, 124, 127, 146, 149, 152, 155, 159, 162, 165, 168, 171, 174, 181, 198, 274, 319; RA317:101(ll.7-9), 106(ll.2-4).

Appellees grasp onto the stipulations regarding implementation of the South Waiehu IIFS, but their point is elusive. South Waiehu is the smallest Nā Wai 'Ehā stream and also the one with the least data. FOFs119-121. Based in part on HC&S's estimates, due to its lack of gauging, that it diverts "from a low of 2-3 mgd during dry periods to a maximum of 10-15 mgd during wet periods," the proposed decision recommended an IIFS of 1.3 mgd. FOF187; COL164; RA188:217 n.2, 184. While HC&S proposed to keep this recommendation, RA336:24(ll.4-8), the majority set an IIFS of 0.9 mgd. Final Decision at 186. Afterwards, kuleana rightholders whom HC&S supplies via its South Waiehu diversion (yet made no effort to present during the CCH) raised concerns about the impact on their ability to receive water via HC&S's ditch. RA378:1. Appellants entered into the stipulations in good faith to extend the IIFS's implementation to enable data collection and reconfiguration of the diversion. RA378:2-3; RA206:42. Appellees now try to use this against appellants, but only discredit themselves.

In sum, where even the Companies have recognized their obligations to satisfy kuleana rights first, appellees' attempts to exploit these rightholders as leverage to minimize the stream flows the Companies must restore is desperate and unseemly at least, and in CWRM's case, an

abject violation of its duties to protect all public trust uses. This should be put to an end by making clear the undisputed superior rights of all kuleana rightholders.

III. CWRM AND THE COMPANIES FAIL IN THEIR ATTEMPTS TO AVOID THE MERITS OF THIS APPEAL

A. CWRM's And The Companies' Jurisdictional Argument Is Spurious.

A correct understanding of the legal framework for instream use protection debunks appellees' claim that this Court has no jurisdiction over this appeal because this proceeding is not a contested case hearing ("CCH"). Like appellees' other attacks against this framework, this argument is nothing more than after-the-fact gameplaying. CWRM itself ordered and conducted the CCH, and not only did the Companies consent, they claimed "interests" in the CCH, including the IIFSs.[22] Appellees never contested jurisdiction in this appeal, but first raised the argument in their answering briefs. After all the time and resources CWRM and the parties spent adjudicating this case, and after this case reached this Court's doorstep, appellees unveil their elaborate theory that, actually, everything was just make-believe. Even now, they do not object to any aspect of CWRM's (or in CWRM's case, its own) proceedings in this case; rather, as CWRM lays bare, the sole purpose and import of this argument is to ensure that "[t]he Court cannot reach the arguments raised . . . on this appeal." CWRM's AB at 14.[23]

This "jurisdictional" argument subverts this Court's "policy which has always been to permit litigants, where possible, to appeal," and recognition of HRS § 91-14's "purpose to grant broad rights to judicial review [by] permit[ting] 'any person aggrieved' by a final decision or order of a government agency to seek review." Jordan v. Hamada, 62 Haw. 444, 451, 447, 616 P.2d 1368, 1373, 1371 (1980) (internal quotation marks omitted).[24] It also runs counter to the

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[22] In response to CWRM's then-pending proposal for a consolidated CCH, WWC claimed "an interest and a right . . . to establish the proper instream flow standards," sought the relief of "hav[ing] [CWRM] establish the appropriate and proper instream flows," and asserted it "will be affected by the relief sought." RA56:4-5. HC&S similarly claimed "a significant interest" in the CCH on the IIFSs. RA56:49.

[23] See Eric Yamamoto, Moses Haia & Donna Kalama, Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue, 16 U. Haw. L. Rev. 1, 29-30, 37 (1994) (critiquing "[p]rocedural maneuvers by governmental parties and rulings by the courts," which used "[t]he ostensibly neutral rhetoric of legal process . . . to adopt or employ restrictive procedural rules while foregoing meaningful analysis of the content of Native Hawaiian claims and their cultural context as well as the likely social impacts of court rulings").

[24] See also Hawaii Laborers' Training Ctr. v. Agsalud, 65 Haw. 257, 259, 650 P.2d 574, 576 (1982) ("The Administrative Procedure Act is a remedial statute designed to give citizens a

Court's respect for "the rights of native Hawaiians [as] a matter of great public concern in Hawai'i" and the "fundamental policy . . . that Hawai['']i's state courts should provide a forum for cases raising issues of broad public interest." Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 42, 7 P.3d 1068, 1079 (2000) (brackets omitted).[25] It aims to strip this Court of its "ultimate authority to interpret and defend the public trust in Hawai'i" and eliminate the "check and balance of judicial review [which] provides a level of protection against improvident dissipation of an irreplaceable res." Waiāhole, 94 Hawai'i at 143, 9 P.3d at 455.

More specifically, the argument runs headlong into this Court's ruling in Waiāhole. The Court expressly held that "while the statutes and rules do not require a hearing with respect to petitions to amend [IIFSs], . . . constitutional due process mandates a hearing . . . because of the individual instream and offstream 'rights, duties, and privileges' at stake." Id. at 120 n.15, 9 P.3d at 432 n.15 (citing Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994)). As it did in this case, CWRM ordered a CCH for the IIFS petitions in Waiāhole. This Court emphasized that "the decisions at hand concerned the instream flow standards of particular streams" and "agree[d]" with CWRM that:

> A petition to modify instream flows at specific locations is a fact-intensive, individualized determination at each site that may directly affect downstream and offstream interests. Individual claims may need to be examined. The site-specific inquiry required in this case is not compatible with rule making, but with a method which provides the due process procedures necessary to assess individual interests.

94 Hawai'i at 152, 9 P.3d at 464 (ellipses and brackets omitted).

Unable to deny this express holding, appellees go to convoluted lengths trying to evade it. They first attempt to distinguish Waiāhole by arguing that it involved a consolidated CCH on IIFS petitions and water use permit applications ("WUPAs"). This CCH also consolidated IIFSs

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fair opportunity to be heard before the official of the agency who is charged with passing on that case."); Kinkaid v. Board of Review, 106 Hawai'i 318, 323, 104 P.3d 905, 910 (2004) (recognizing that HRS § 91-14 "is a statute of broad application, governing judicial review of contested proceedings before government agencies generally"); Lingle v. Hawai'i Gov't Employees' Ass'n, 107 Hawai'i 178, 185, 111 P.3d 587, 594 (2005) (recognizing that "a basic purpose of [chapter 91] is to provide for judicial review of agency decisions and orders on the record, except where the right of trial de novo, including the right of trial by jury, is provided by law") (internal quotation marks omitted).

[25] See also Order Accepting Application for Transfer filed June 23, 2011 (transferring this appeal to this Court pursuant to the mandatory grounds for cases involving "[a] question of imperative or fundamental public importance," HRS § 602-58(a)(1) (Supp. 2010)).

with WUPAs,[26] and in any event, this Court in Waiāhole made clear that it had independent jurisdiction over IIFS petitions. Appellees, therefore, are relegated to trying to undermine or overturn this holding. Their arguments combine their mantra that "an IIFS is not a permit" with a tangle of sophistry divorced from the realities of this case and water resources management in Hawai'i. Notably, while CWRM and WWC stake out positions categorically at odds with this Court's holding, HC&S stops short and does "not . . . say that IIFS determinations can never adversely affect property interests," HC&S's AB at 16. Instead, HC&S tries to explain why due process should not apply in this case, laboriously constructing a theory that imparts a legal-sounding air, but collapses like a house of cards under scrutiny.

At the outset, appellees' arguments miss several fundamental and related points. First, water use involves rights and interests distinct from the "property" interests in land or even welfare benefits at issue in the cases appellees cite. As this Court has explained, "a simple private ownership model of property is conceptually incompatible with the actualities of natural watercourses." Robinson, 65 Haw. at 667, 658 P.2d at 305-06. Rather, water rights are "usufructory and correlative in nature," in recognition of "the necessity of preserving [the resource's] purity and flow for others who are entitled to its use and enjoyment." Id. Moreover, the public trust "precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes." Waiāhole, 94 Hawai'i at 141, 9 P.3d at 453. This understanding of water as so vitally important that no one can reduce it to private property, however, does not mean that rights and interests in water use deserve no due process, and that CWRM simply "supplant[s] the [Companies] . . . in the sense that [CWRM] is now free to do as it pleases with the waters of our lands." Robinson, 65 Haw. at 673, 658 P.2d at 310. Quite the opposite.

Second, HC&S's recurrent theme that due process protects only the "status quo" and does not apply where "the interest allegedly at risk is not vested or [is] an attempt to improve one's position," AB at 19, makes no sense under the law of water resources in Hawai'i. Contrary to HC&S's "Catch-22" view that others with interests in Nā Wai 'Ehā waters, including T&C/kuleana rightholders, have no protectable due process interests because the Companies

[26] The ground water regulated under permits is inextricably intermixed with Nā Wai 'Ehā surface water. FOFs 141-55; RA315:90(l.18)-92(l.2) (WWC president) (agreeing that the tunnel flows are "intermingled with the surface flows of the streams"). Appellees argue that appellants have not appealed the permits in this case, but cite no authority for their argument that once interconnected matters are consolidated in a single CCH, a court has jurisdiction to review the CCH only if specific matters are appealed.

currently happen to be taking all the water, "[t]he constitution and Code . . . do not differentiate among 'protecting,' 'enhancing,' and 'restoring,' public instream values, or between preventing and undoing 'harm' thereto." Waiāhole, 94 Hawai'i at 150, 9 P.3d at 462. HC&S's shrill railing against "grave," "far-reaching and profound," "radical," and "sword"-like Native Hawaiian rights aside, AB at 17-18, this Court has rejected HC&S's "gross oversimplification of the interest involved" in Nā Wai 'Ehā waters and its perspective of its diversions "as though they are absolute and exclusive interests in the[se] waters." Robinson, 65 Haw. at 676, 658 P.2d at 311.

Third, HC&S's fixation on due process for only the "status quo" overlooks the relevant issue in this case, that a determination of claims of legal rights and interests requires due process. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-31 (1982) (recognizing that due process protects legal "claims" or "causes of action"). Public trust uses are "'superior claims' to which, upon consideration of all relevant factors, existing uses may have to yield." Waiāhole, 94 Hawai'i at 149 n.52, 9 P.3d at 461 n.52. Whether such superior claims are connected to an existing water use, or are legally undisputed or resolved, is beside the point. Due process demands that such claimants have the "opportunity to be heard upon their claimed right[s]." Logan, 455 U.S. at 430.[27]

These basic insights provide the necessary context for understanding the meaning of due process in relation to water resources, this Court's holding in Waiāhole, and this case. Protectable due process interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577; see also Pele Def., 77 Hawai'i at 68, 881 P.2d at 1214 (referring to "a benefit to which the claimant is legitimately entitled"). Here, notwithstanding that Hawai'i law rejects claims of private property in water, it "support[s] claims of entitlement

[27] See also Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988) (observing that "[l]ittle doubt remains that such an intangible interest" as "an unsecured claim, a cause of action against [an] estate for an unpaid bill" is a protected due process "property" interest); Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (recognizing that even though the claimed right was "in dispute," "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing," but provides that procedural safeguard "whatever the ultimate outcome of a hearing"); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (recognizing that where welfare recipients "had not yet shown that they were, in fact, within the statutory terms of eligibility . . . . they had a right to a hearing at which they might attempt to do so").

to th[e] benefits" of Nā Wai 'Ehā stream flows. These include T&C/kuleana rights and public trust rights, which are claims "superior" to the Companies' private commercial diversions.

In this case the Community Groups and OHA presented numerous community members and 'ohana (extended families) with precisely such rights and interests in Nā Wai 'Ehā waters. See supra notes 19-21. These include:

- Appurtenant rights of those located downstream of the Companies' diversions and deprived of water, as well as those receiving water from the Companies' ditches and seeking more water, or seeking to receive water directly from the streams. The law protects these rights at every level and recognizes them as a form of "easement" and "limitation" on others' rights to divert stream flows. Peck, 8 Haw. at 661-62; Haw. Const. art. XI, § 7; HRS §§ 174C-63, -101(d); supra note 8. Each of these appurtenant rightholders diligently submitted all the Māhele documentation showing that their lands were historically in kalo, none of which any of the parties or CWRM have ever disputed.[28]

- Traditional and customary Native Hawaiian rights to cultivate kalo, gather stream and nearshore resources, and conduct spiritual practices, including the rights of landowners and residents on affected downstream riparian and ahupua'a (watershed) lands. The law likewise protects these rights at every level and recognizes them as "preexisting principles of State property law" that "carr[ied] over into" the existing system and "limited" other interests. Public Access Shoreline Haw. v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 452, 447-49, 903 P.2d 1246, 1273, 1268-70 (1995); Haw. Const. art. XII, § 7; HRS §§ 1-1 (2009), 174C-101(c), (d). The existence and validity of traditional and customary Native Hawaiian rights to Nā Wai 'Ehā stream flows is undisputed and expressly recognized in the final decision. FOFs 34-54.

- Public trust rights to Nā Wai 'Ehā water for other protected instream uses, including the rights of landowners and residents on affected downstream riparian and ahupua'a lands. Again, the law protects these rights at every level and recognizes them as a distinct "interest" and "limit[ation]" on other interests. Robinson, 65 Haw. at 674-76 & n.31, 658 P.2d at 310-11 & n.31; Marks v. Whitney, 491 P.2d 374, 381-82 (Cal. 1971) (deeming the "public trust easement"

[28] See Reppun, 65 Haw. at 554, 656 P.2d at 72 (declining to impose burdensome proof requirements on appurtenant rightholders and holding that water use for traditional kalo cultivation on the same parcel is presumed to sufficiently approximate the quantity of the right). Despite this undisputed evidence of these appurtenant rights, the majority's final decision failed to recognize any such rights based on the sham excuse that no one submitted any "petitions" for such recognition, COL 53 -- even though no law requires or describes any such "petition," and the community members effectively made such petition, see, e.g., RA160:246-309, 413-23. See COL 30 (paradoxically averring that "[a]ppurtenant rights must be recognized, the amounts of water accompanying the rights must be determined, and [CWRM] is the authority for doing so"). In any event, CWRM cannot avoid due process by simply ignoring these claims of right. See supra note 27.

a distinct "estate or interest in," "burden," and "servitude" on property); Haw. Const. art. XI, §§ 1, 7; HRS § 174C-2 (1993 & Supp. 2010).

Moreover, although HC&S sidesteps the issue, the Companies also have claimed interests in their existing diversions of Nā Wai 'Ehā stream flows. In hypocritical opposition to its arguments on appeal, HC&S threatened CWRM that restoration of instream flow would constitute a "taking" of their property. RA114:5 n.3; RA188:293 n.14. This Court has already rejected such claims. See Waiāhole, 94 Hawai'i at 141, 182, 9 P.3d at 453, 494. The Companies, rather, have claims of existing, reasonable-beneficial use, which are subject to state public trust authority and superior public trust rights and, thus, most comparable to a "license" or "welfare benefit" under the due process case law. See Aguilar v. Hawaii Hous. Auth., 55 Haw. 478, 495, 522 P.2d 1255, 1267 (1974) (holding that an interest in "continuing to receive the benefit of low cost housing and hence in not paying assertedly erroneous rent increases is substantial enough to require agency hearings"); Fuentes, 407 U.S. at 89 (driver's license is an "important interest" entitled to a hearing).

In this appeal, the Companies conveniently argue against any due process protections, although they assuredly would be insisting the opposite if the shoe were on the other foot, and they were asserting that CWRM unlawfully deprived them of water. Due process, however, does not depend on whether the Companies like the end result, or their overall chances with this CWRM. On the contrary, due process requires a hearing to resolve, in the first instance, the community members' and Companies' conflicting claims for Nā Wai 'Ehā water. Such is the hallmark of a CCH, where the parties in this case mutually "sought to have the legal rights, duties or privileges of [water] in which [they] held an interest declared over the objections of other landowners and residents." Pele Def., 77 Hawai'i at 68, 881 P.2d at 1214.[29]

Appellees indulge in further sophistry in arguing that IIFSs determine only a "level of flow" in the stream. CWRM cannot set IIFSs in a vacuum, but must weigh instream and offstream uses, determining the maximum "practicable" protection of all public trust instream uses, and conversely, any reasonable-beneficial offstream uses in relation to those public trust uses. See supra Part II.E. This determination, moreover, bears direct and immediate impacts on

[29] Unlike appellees, this Court, in requiring a hearing for IIFSs, did not split hairs over who is the "applicant" for any "permit," but focused on the interests "at stake" and potentially "affect[ed]." Waiāhole, 94 Hawai'i at 120 n.15, 152, 9 P.3d at 432 n.15, 464. Indeed, while the Community Groups brought the IIFS petition, CWRM has the ultimate duty to establish the IIFSs, and the Companies have the burden of justifying their diversions against the public trust. See infra Part III.B.2.

these instream and offstream uses, independent of whether CWRM issues actual "permits" or even designates a WMA. In this case, for example, since the Companies are draining the streams dry, restoration of instream uses will necessarily reduce their offstream uses and could preclude certain uses. On the other hand, the IIFSs could (and in this case actually did) provide public trust uses inadequate protection or none at all. A case in point is the majority's failure to provide any flows for the instream uses in ʻĪao and Waikapū Streams, including those of specific downstream landowners and users with T&C/kuleana and public trust rights. OB at 27-28.[30]

Appellees rely on Koʻolau Agric. Co., Ltd. v. CWRM, 83 Hawaiʻi 484, 927 P.2d 1367 (1996), for support, but that case had nothing to do with instream flow standards and only disproves their point by highlighting the differences between the WMA designation in that case and the IIFS determinations in this one. WMA designation is a "yes or no" decision whether to initiate the statutory permitting process in the first instance and, in itself, does not affect any water uses. See id. at 496, 927 P.2d at 1379 (concluding that no property interest existed in that initial determination "whether there is an overall threat to the water resources"). In contrast, the determination of IIFSs requires actual evaluation and weighing of various instream and offstream uses and results in direct and immediate impacts on those uses, regardless of whether any statutory water use permitting occurs.

In sum, appellees' result-driven contortions fail to negate this Court's holding in Waiāhole. Any view of reality, as opposed to makeshift theory, will confirm that, just as in Waiāhole, the IIFS determination in this case "is a fact-intensive, individualized determination at each site that may directly affect downstream and offstream interests" and, thus, requires "due process procedures necessary to assess individual interests." 94 Hawaiʻi at 152, 9 P.3d at 464.[31] This Court's holding is sound: "constitutional due process mandates a hearing [on petitions to

[30] These include kuleana rightholders Francis Allan Ornellas, Hōkūao Pellegrino, Duke Sevilla, Philip Kekona, Alfred Santiago, Crystal Alboro, Warren Soong, Russel Gushi, and Teruo Kamasaki, most of which ʻohana are Native Hawaiian and thus also have T&C rights, as well as T&C rightholders Rose Marie Hoʻoululāhui and John V. Duey, Kainoa Horcajo, Roselle Bailey, Hōkūlani Holt Padilla, and Akoni Akana. See supra note 21.

[31] Appellees cite the process that CWRM conducted in the East Maui case, which the majority called "quasi-legislative" and suggested is preferable to this CCH and also "island-style" (whatever that means). Final Decision at 193-95. The only "quasi-legislative" process in chapter 91 is rulemaking. See HRS § 91-1 (1993); see also Waiāhole, 94 Hawaiʻi at 151-52, 9 P.3d at 463-64 (ruling that CWRM properly amended IIFSs via CCH, instead of rulemaking). The procedure CWRM made up for the East Maui case is a legal non-entity.

amend IIFSs] because of the individual instream and offstream 'rights, duties, and privileges' at stake." Id. at 120 n.15, 9 P.3d at 432 n.15.[32]

Finally, this case also satisfies the other requirements of HRS § 91-14. See Kinkaid, 106 Hawai'i at 321-22, 104 P.3d at 908-09. For the same reasons constitutional due process requires a CCH, this CCH "determined the legal rights, duties, or privileges of specific parties," including the community members and the Companies. CWRM makes much ado about having ordered the CCH independently, rather than by request, yet its rules expressly authorize this. HAR § 13-167-51 (1988) (providing for CWRM to hold CCHs "on its own motion" or by written petition).[33] No one disputes that appellants participated in this CCH pursuant to all the applicable rules. Last, HC&S contests appellants' standing based on its same pretext that appellants have no grievance because the Companies had all the water. On the contrary, the public trust grants trust beneficiaries standing to have CWRM "recognize and declare the public trust easement on [the Companies' diversions]," and appellants are aggrieved by the majority's prejudicial failure to do so in accordance with the law. Marks, 491 P.2d at 381.[34]

B. CWRM And The Companies Fail In Their Attempt To Undermine The Basic Standards For Water Use Protection and Management.

Appellees seek not only to block the courtroom doors and deny review of the majority's final decision, but also to undermine the legal framework for instream use protection in order to

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[32] HRS § 174C-60 (1993), entitled "Contested Cases," provides for direct appeal of "any contested case hearing under this section" to the appellate courts. See In re Waiāhole Ditch Combined Contested Case Hr'g, 113 Hawai'i 53, 147 P.3d 837 (2006) ("Waiāhole III") (observing this section "authorizes an appeal of [CWRM]'s final decision and order in a contested case"). While CWRM argues that this section applies only to CCHs regarding permits, its regulations make no such distinction, see HAR § 13-167-65 (1988), and this Court has "discern[ed] no sound basis for demarcating decisions on certain matters for initial appeal to the circuit court under HRS § 91-14(a)." Waiāhole, 94 Hawai'i at 120 n.15, 9 P.3d at 432 n.15. Indeed, no sound reason supports applying a different appeals system for an IIFS (i.e., initial circuit court review) than would apply for even a single permit issued pursuant to that IIFS. See Waiāhole III, 113 Hawai'i at 55, 147 P.3d at 839 (holding generally that "jurisdiction to hear and determine appeals from [CWRM] filed after July 1, 2006 is with the [appellate courts]").

[33] The further irony here is that CWRM ordered the CCH after spending more than a year repeatedly and vainly inquiring the Companies about their diversions. See, e.g., RA98:88, 81, 78, 70-71, 51, 97, 90. The CCH procedure, besides affording the Companies due process, enabled CWRM and the parties to obtain and examine the facts on the Companies' diversions that the Companies were otherwise not predisposed to volunteering.

[34] See also A Model Water Code § 1.02 commentary at 84 (Frank E. Maloney et al. 1972) ("Model Code") ("Since each citizen is a beneficiary of the res, the courts could no longer deny him a forum on the ground that he lacked sufficient standing").

achieve effectively the same result. These arguments, as well, pay no mind to this Court's actual rulings, but simply attempt to wish them away.

The constitutional and statutory mandate is settled. CWRM must protect and restore instream uses and values as much -- not as little -- as practicable, and the default absent any showing otherwise is in favor of stream flows remaining in the stream to support public trust purposes. Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653; Waiāhole, 94 Hawai'i at 141-43, 9 P.3d at 453-55. Appellees, however, accuse appellants of "superimpos[ing] procedures" that appellees claim apply only in permitting. HC&S's AB at 23. Specifically, appellees seek to minimize the protection of instream uses by eliminating the basic legal requirements of reasonable-beneficial use and practicable mitigation and alternatives, and the Companies' burden of justifying their own diversions. Their arguments have nothing to do with "procedures," but rather oppose fundamental standards and principles that govern all water resources planning and allocation in this state, which are rooted in the Code and our very constitution.

As with the CCH issue, appellees sing a different tune than they did during what they now assert was a make-believe CCH.[35] Appellees, again, are not disputing these standards in connection with any appeal they have taken or anything CWRM did in this case, but simply in an attempt to skew the rules in their favor after the fact.

1. The law does not allow CWRM to adopt a liberal or permissive view towards offstream diversions in establishing instream flow standards.

As discussed above, appellees ignore the plain language of the Code and the reality of what CWRM must do (and in this case did, albeit erroneously) in setting IIFSs. See infra Part II.E. In determining the maximum "practicable" instream use protection by "weigh[ing] the

[35] After the Community Groups filed their IIFS petition in June 2004, CWRM spent more than a year pressing the Companies for information to "determin[e] whether or not all the water diverted by the ditch systems named in the [Waste] Complaint and [IIFS] Petition is being put to reasonable-beneficial use, and not being wasted." RA98:70-71; RA100:36-37; see also RA98:54-55, 51-52; RA100:19-20. After CWRM's unsuccessful inquiries led it to order a CCH, the Hearings Officer made clear that "the burden of proof and the types of proof to show reasonable and beneficial use and no practical alternatives would be the same as basically if we were applying for water use permit," and WMA designation would not "affect in any substantive way the conduct of the CCH, in the sense that . . . the IIFS process can go separate from a designation." RA297:5(l.4)-6(l.4). See also RA54:278-79 (voluntarily withdrawing the Waste Complaint based on the Hearings Officer's ruling that the IIFS CCH would apply the reasonable-beneficial use standard). Thus, during the CCH, all the parties invoked the reasonable-beneficial and practicable alternative standards, including the Companies. RA114:7, 9; RA58:144, 147; RA72:37; RA162:182-83.

importance" of instream values and offstream uses, "including the economic impact of restricting such uses" and solutions to "avoid or minimize the impact," HRS § 174C-71(2)(D), (1)(E) (1993), CWRM must determine whether and to what extent the Companies' diversions are reasonable-beneficial in relation to public trust instream uses. The law requires this evaluation of the Companies' diversions with respect to public trust purposes to occur when establishing valid IIFSs, not to wait until permitting.

In Waiāhole, this Court emphasized that CWRM's failure to conduct studies and establish proper, "permanent" instream flow standards makes any allocations "tentative at best," but "does not reduce the level of scrutiny it must apply" to offstream diversions. 94 Hawai'i at 161, 9 P.3d at 473. Thus, the Court criticized CWRM for applying a "prima facie" standard, "minimal scrutiny," and a "permissive view towards stream diversions, particularly while the instream flow standards remained in limbo," which contradicted "the law and logic of water resource management in this state." Id. at 160, 9 P.3d at 472. The same principle applies here, where CWRM likewise has failed to conduct studies and establish substantive instream flow standards, while the Companies have deliberately maximized their diversions.

This Court held that "[a]t a very minimum," while the proper instream flow standard remains an unsettled question pending necessary studies, offstream uses must show "actual water needs" and the "absence of practicable mitigating measures, including the use of alternative water sources." Id. at 161, 9 P.3d at 473. Appellees evidently oppose even these bare minimum requirements. On appeal, CWRM goes so far as to argue that the requirement of practicable mitigation and alternatives does not apply in determining IIFSs, AB at 47-49. The Court already settled this: "Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of 'reasonable-beneficial' use, and is an essential part of any balancing between competing interests." Id. at 161, 9 P.3d at 473 (citations omitted) (emphasis added); see also id. at 171, 9 P.3d at 483 (reiterating that "all users have a duty to seek practicable alternatives when faced with conflicting public interests").

In the final decision, the majority recited this Court's rulings regarding the "constitutionally mandated standard of reasonable-beneficial use," COLs 9, 11-12, 42, 262, and the requirement of mitigation and alternatives, COLs 17, 31-36, 262. Consistent with the law, it concluded that "each offstream user must prove that each specific use is reasonable-beneficial." COL 12. It also concluded that "[i]n its assessment of noninstream uses in this CCH, [CWRM] must also determine whether or not the amounts of water being diverted for noninstream

purposes are justifiable – i.e., reasonable-beneficial uses – in order to evaluate 'the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses.'" COL 42 (emphasis added).

Appellees, however, cite a single conclusion, COL 218, and suggest it establishes a new standard that is somehow less protective of the public trust or more generous to offstream diversions, without explaining how so. COL 218 states that the majority's evaluation of offstream uses in this case is "not determinative" for WUPAs, and "makes a general, collective assessment" of offstream uses in this case. Read in context with all the other COLs above, COL 218 appears simply to recognize that any offstream uses are not ultimately approved until permitted, not to adopt a more liberal standard for offstream diversions in this case. Accord COLs 40, 52 (explaining that CWRM does not "make the final determination of the amounts of noninstream uses that would meet the statutory requirements for water use permits"). Indeed, COL 218 makes clear that "[CWRM] will not recognize the economic impact on diverted water that is being used inefficiently, losses that could be prevented through practical actions, or waters that have practical alternatives." See also COL 262 (reiterating the same). Thus, the bulk of the final decision engages in a detailed accounting of kuleana and offstream uses of Nā Wai 'Ehā water, losses, and alternatives, FOFs 209-506, COLs 50-123, and a summation of total "reasonable uses," "practical alternatives," and "allowable diversions," COLs 218-37; Final Decision at 216, 221 (Tables 13 & 18). The problem with the majority's final decision, in short, is not the standards that CWRM recited and applied, but its failure to apply these standards in a principled manner based on the record.

In any event, the law flatly rejects appellees' suggestion that CWRM may establish instream flow standards by adopting a "permissive view" or "minimal scrutiny" of offstream diversions to the detriment of instream uses. Ultimately, any offstream uses must be reasonable-beneficial in relation to public trust instream uses, nothing more or less. Failing that standard, neither the Companies nor any other offstream user is entitled to divert public trust resources.

2. No one but the Companies bears the burden of justifying their private commercial diversions.

Appellees likewise misstate the law in arguing that the Companies do not bear the burden of proving reasonable-beneficial use and justifying their own diversions. The law imposes ongoing obligations on both CWRM and the Companies. These obligations do not suddenly spring into being only when a member of the public, observing that a stream resource is

impaired, petitions CWRM to amend an IIFS, or even later when CWRM may designate a WMA, and an offstream user applies for a permit.

This Court in Waiāhole already disposed of the notion that "the ultimate burden of justifying interim standards fall on the petitioner" -- i.e., the beneficiaries of the public trust who can least afford to bear it. 94 Hawai'i at 153, 9 P.3d at 465. Appellees attempt to twist this to mean that the Companies are free from obligations or burdens in the establishment of IIFSs. Strictly speaking, they are correct: the Companies are not "obligated" to show anything. But in the absence of proof of reasonable-beneficial use, the default is the protection of the public trust, not the perpetuation of unjustified offstream diversions. Id. at 142, 9 P.3d at 454.

Appellees' claim that this burden applies only in permitting, again, contradicts what CWRM actually concluded in the final decision, which repeatedly refers to and applies the Companies' burden of proof without limiting it to permits. Final Decision at 1, 131-32; COLs 12, 15, 35-36, 82, 121, 123, 183, 255. And again, the argument looks through the wrong end of the legal telescope.

Waiāhole held that the constitutional public trust establishes a "'higher level of scrutiny' for private commercial uses" and places "the burden ultimately [on] those seeking or approving such uses to justify them in light of the purposes protected by the trust." 94 Hawai'i at 142, 9 P.3d at 454.[36] The Companies' burden, like CWRM's obligations to establish instream flow standards, exists apart from any WMA designation and permitting. Thus, in Waiāhole, the Court reversed CWRM's designation of "buffer" instream flows available for offstream use because it "reverse[d] the constitutional and statutory burden of proof and establish[ed] a working presumption against public instream uses." 94 Hawai'i at 156, 9 P.3d at 468 (initial emphasis added); see also In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 442, 83 P.3d 664, 705 (2004) (recognizing "the burden imposed . . . by the public trust doctrine, the Hawai'i Constitution, and the Code) (emphases added). Indeed, as Waiāhole observes, even under the common law, apart from any WMA designation, the "burden of demonstrating that any transfer of water was not

[36] See also In re Kukui (Molokai), Inc., 116 Hawai'i 481, 505-06, 174 P.3d 320, 344-45 (2007) (reiterating that "[CWRM] must prescribe a higher level of scrutiny for private commercial uses" and "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the public trust") (brackets and internal quotation marks omitted); Model Code § 1.02 commentary at 82 (explaining that the public trust mandate under HRS § 174C-2(a) "recogni[zes] that state authorities and private citizens have a duty to other citizens to protect the res of the trust").

injurious to the rights of others rest[s] wholly upon those seeking the transfer." Id. at 142-143, 9 P.3d at 454-55 (quoting Robinson, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8).

CWRM's trust obligation is to advance public trust purposes "at every stage of the planning and decisionmaking process," id. at 143, 9 P.3d at 455, not to champion the Companies' private commercial uses, which is the Companies' own responsibility. In setting the IIFSs, CWRM must consider and weigh the Companies' offstream uses, but as a legal and practical matter, no one but the Companies has the burden to justify their own diversions in relation to public trust purposes. CWRM's obligation is to protect trust purposes, and "hold [the Companies] to [their] burden under the Code and the public trust doctrine." Wai'ola, 103 Hawai'i at 426, 83 P.3d at 689.

IV. CWRM AND THE COMPANIES FAIL IN THEIR ARGUMENTS ON THE MERITS.

A. Appellees' Arguments On The Merits Avoid The Merits.

Even when they purport to turn to the merits, appellees attempt to avoid the substantive issues regarding the majority's final decision. While each appellee differs somewhat in approach, they all end up going nowhere. CWRM resorts to ipse dixit: repeating what the majority did, proclaiming "balance" and "deference," and insisting the majority is right because it says so. See, e.g., AB at 38 (announcing that the majority "absolutely complied" with the law). WWC engages in a pointless routine of citing single FOFs or COLs (including those that do not find or conclude anything, but only recite arguments) and claiming there is "sufficient evidence" in the record for them. This exercise keeps WWC occupied, but disregards the points on appeal. HC&S takes the "shotgun" approach of cluttering its brief with snippets from the record (and even outside the record), most of which did not figure in the final decision's rationale and otherwise has no bearing on this appeal. HC&S may be hoping the Court will throw up its hands and affirm the majority out of confusion, but ignores that lack of clarity only invalidates the final decision.

Having built their case on their failed attempt to evade and change the law, appellees doom their arguments from the start. None of their briefs, for example, even mentions the mandate to restore Nā Wai 'Ehā waters "to the extent practicable," let alone tries to argue that the majority met this standard. Moreover, their attempts to rationalize the majority's final decision disregard settled principles of the Court's review. This Court "must judge the propriety of agency action solely by the grounds invoked by the agency, and that basis must be set forth

with such clarity as to be understandable." Waiāhole, 94 Hawai'i at 163, 9 P.3d at 475 (emphasis added).[37] These principles of clear, cogent agency decisionmaking apply with even greater force here, where CWRM "performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute," and the Court fulfills its own duty as "the ultimate authority to interpret and defend the public trust" and must take a "close look" at the final decision and "not act merely as a rubber stamp for [CWRM] action." Waiāhole II, 105 Hawai'i at 11, 8, 93 P.3d at 653, 650.[38]

The Community Groups' opening brief, along with Hearings Officer-Commissioner Miike's dissent, explains how the majority exacerbated the errors in Waiāhole and inverted the law by allowing its maximized allowances for the Companies' offstream diversions to drive its restoration of less-than-minimum or no flows for instream uses. The Community Groups reference these arguments below, to the extent that appellees address them at all.

B. Minimizing Instream Flow By Maximizing Offstream Diversions Is Neither "Balance," Nor Consistent With The Constitution Or Code.

As their primary smokescreen to obscure the merits, appellees insist incessantly that CWRM need only "balance" instream and offstream uses. This ignores both the law, which demands more than "the mere reminder of the necessity of 'balancing,'" Waiāhole, 94 Hawai'i at 190 n.108, 142, 9 P.3d at 502 n.108, 454, and the absurd disconnect between their "balance" rhetoric and what the majority did in leaving Nā Wai 'Ehā waters little or no remnant flows after indulging offstream diversions -- particularly HC&S's -- in every way possible.

In the same vein, HC&S equates the public trust with whatever the majority believes is in the "public interest," which it in turn equates with HC&S's private commercial interests. AB at

[37] See also Wai'ola, 103 Hawai'i at 432, 83 P.3d at 695 (emphasizing that any "deference" to agencies "presupposes that the agency has grounded its decision in reasonably clear FOFs and COLs"); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50, 48 (1983) (maintaining that "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," and "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion").

[38] See also Waiāhole, 94 Hawai'i at 143, 9 P.3d at 455 (explaining that CWRM bears "the duties of a trustee and not simply the duties of a good business manager" and is "judicially accountable for the dispositions of the public trust" to "[t]he beneficiaries of the public trust [who] are not just present generations but those to come"); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 490 (1970) (explaining that under the public trust doctrine, "a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate the resource to more restricted uses or to subject public uses to the self-interest of private parties").

26-30. Waiāhole, along with every other case that gives any meaning and effect to the public trust, rejects this view.[39] HC&S's argument also highlights the final decision's ultimate failing. The majority's "balance" in the final decision focused and hinged on maximizing offstream diversions, OB at 29-30; Final Decision at 177-78, and HC&S likewise attempts to defend this "balance" based on its claimed overriding interests in these offstream diversions. Since the Companies and the majority failed to justify these maximized diversions, their entire "balance" falls apart. OB Part VII, at 35-48; infra Part IV.D.

HC&S also continues to beat the drum of the "economic impacts" from a "shutdown" or "cessation" of its entire plantation, as it has done from the start of this case, and as it did to extraordinary result in its final oral argument on its exceptions to the proposed decision.[40] The majority, however, at least purported to recognize that such "all-or-nothing" arguments are unhelpful. FOF 546; COLs 154, 238; see also Dissent 6 (explaining that the "salient point" was "the economic impact of decreasing the supply, or increasing the cost, of water to approximately 15 percent of HC&S's fields," but instead "HC&S chose to leap to its doomsday scenario"). Moreover, the majority did not engage in any analysis of the incremental economic impact of reducing the use of Nā Wai 'Ehā stream water on the 15 percent (5,300 acres) of HC&S's plantation at issue, FOF 417 – over 1,000 acres of which is under only short-term lease, FOF 541, and 1,100 more acres of which is slated for development[41] -- because HC&S chose not to provide such analysis, COLs 154, 238, and because the majority negated the issue by over-accommodating HC&S's Nā Wai 'Ehā diversions beyond even what HC&S proposed. Only the

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[39] See id. at 138, 9 P.3d at 450 (maintaining that the public trust is "more than an affirmation of state power to use public property for public purposes" and "must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time"); id. at 190 n.108, 9 P.3d at 502 n.108 (rejecting the view of the public trust "in which the trust amounts to nothing more than what the present majority says it is, or in other words, 'the sum of competing social and economic interests of the individuals that compose the public,'" which "would render the public trust meaningless"); 1 William H. Rodgers, Jr., Envt'l L. (West) § 2:20(C) (Westlaw through Summer 2011) ("[I]t takes more than utilitarianism and conventional bigger pie economic arguments to transform public trust resource wealth into just another economic good.").

[40] In comparison to the Waiāhole case, where the eleventh-hour political maneuvers resulted in an increase of 3.79 mgd in offstream diversions, see 94 Hawai'i at 113, 9 P.3d at 425, in this case, there was a 22 mgd swing in the IIFSs between the proposed and final decisions.

[41] This includes Field 920's 250 acres as part of the "Wai'ale" project, 650 acres on Fields 918, 907, 917, 913, and 906 for "Ma'alaea Village," and 200 acres on Fields 741, 743, 745, and 747 for "Waikapu Village." RA136:62-79; RA327:172(ll.9-21), 175(ll.2-12); RA:140:56-57; RA110:77.

dissent bothered to examine any such potential impacts based on the evidence in the record, instead of HC&S's "doomsday scenario," and showed how a restoration of almost 30 mgd would "equate to only 1.6 to 2.0 percent of [HC&S]'s irrigation requirements for its entire 35,000-acre operations, and then only on an occasional basis." Id. at 5-7.[42]

C. The Majority Erred In Providing Public Trust Uses Less-Than-Minimum Or No Protection.

1. The majority erred in "writing off" ʻĪao and Waikapū and minimizing stream flow restoration in general.

The majority also erred in evaluating the instream part of its "balance." In a classic case of "give an inch, take a mile," appellees believe that the absence of a "categorical imperative" for resource protection (which CWRM once advocated) means the balance can now simply proceed to zero protection. Even assuming the public trust allows CWRM to abandon or destroy a stream, rather than just to "impair" its flow from its natural state,[43] such a drastic decision must compel far more "openness, diligence, and foresight" than the majority offered in its decision.

The Community Groups explained how the majority's decision to abandon ʻĪao and Waikapū Streams failed to meet basic standards of reasoned decisionmaking, much less the heightened standards under the public trust. OB Part VI.A.1, at 21-25. As for ʻĪao, the majority contradicted its own conclusion that continuous mauka-to-makai flow provides the "best conditions for reestablishing the ecological and biological health of the waters of Nā Wai ʻEhā," COL 243, and its rejection of the Companies' proposed flows for ʻĪao Stream specifically because they would not result in continuous mauka-to-makai flows, COLs 184, 199. The

[42] HC&S also gamely (and self-contradictorily) continues to push for the Waiʻale treatment plant proposal, which it portrays as a "domestic use." AB at 30. The final decision rejected the proposal as "too speculative." COL 62(ll.28-30). Moreover, as the Community Groups explain in detail in their answering brief to MDWS filed on July 11, 2011, WWC's diversion and sale of Nā Wai ʻEhā stream water to Maui County, and HC&S's parent's bid to join that business, are not a "domestic use," nor are they a "public trust purpose," any more than the analogous private commercial uses in the Waiʻola case were.

[43] See Waiāhole, 94 Hawai'i at 139 & n.36, 9 P.3d at 451 & n.36 (recognizing the express trust mandate of "protection" of public waters against "'substantial impairment,' whether for private or public purposes" and citing constitutional history specifically emphasizing "protection"); id. at 141 n.40, 9 P.3d at 453 n.40 (underscoring constitutional history that "disposition and use of these resources must be done with procedural fairness, for purposes that are justifiable, and with results that are consistent with the protection and perpetuation of the resource"). While the Court recognized that the public trust "may not readily translate into substantive results," id. at 141, 9 P.3d at 453, the Community Groups submit that if any result can ever violate the public trust, the majority's abandonment of ʻĪao and Waikapū Streams crosses that line.

majority, instead, began with a supposition limited specifically to ʻĪao's channelized area (it "may not support spawning in that area," COL 208 (emphasis added)), and then successively mutated it until it lost any resemblance to any finding or the record (ergo, the stream is suitable for outright abandonment and restoration of zero flows). Only HC&S responded to any of this, dismissing the issue as "language choice" and "semantic nitpicking." AB at 35 n.13. The requirement of a rational flow from the record to findings to ultimate conclusion is not semantics, but a sine qua non of agency decisionmaking and court review.[44]

As for Waikapū Stream, HC&S takes issue with the Community Groups' reading of this Court's directive that it "cannot accept" that "[c]onceivably, [CWRM] could . . . leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows" through proper studies. Waiāhole, 94 Hawai'i at 158-59, 9 P.3d at 470-71. What was once merely "conceivable" became actual when the majority cited "no definitive evidence" that Waikapū Stream flowed to the sea, FOF 590(ll.24-25), and refused to allow flows even to investigate the issue. The majority cannot simply cry "uncertainty" and defer restoration "until some future time" when it "might" revisit the matter. COL 259. "At all times, . . . [CWRM] should not hide behind scientific uncertainty, but should confront it as systematically and judiciously as possible – considering every offstream use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements." Waiāhole, 94 Hawai'i at 159, 9 P.3d at 471.[45] The majority failed to articulate, for example, what level and duration of flows may be required to resolve the uncertainty and how that may weigh with offstream interests, or when the "some future time" for restoration may be, and how that would not amount to indefinite and prejudicial delay as WWC proceeds to enlist more customers. The majority did not systematically "balance" anything, but simply abdicated its trust duties.

The Community Groups also emphasized that the majority's contrived reasoning based on amphidromous species unlawfully ignored all other instream uses and values, including:

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[44] See In re Hawaii Elec. Light Co., 60 Haw. 625, 641-42, 594 P.2d 612, 623 (1979) (explaining that this requirement "is no mere technical or perfunctory matter"; rather, its purpose is to "assure reasoned decision making by the agency and enable judicial review of agency decisions"); In re Kauai Elec. Div. of Citizens Utils. Co., 60 Haw. 166, 183-84, 590 P.2d 524, 537 (1978) (emphasizing that "far from a technicality . . . . , it is a fundamental of fair play that an administrative judgment express a reasoned conclusion"). See also OB at 23-24 & n.13.

[45] See also id. at 155, 9 P.3d at 467 (maintaining that uncertainty "does not extinguish the presumption in favor of public trust purposes or vitiate [CWRM]'s affirmative duty to protect such purposes wherever feasible" and "justifies neither the least protection feasible nor the absence of protection").

estuaries, wetlands, non-amphidromous native species, recreation, aesthetic values, scientific study, drinking water recharge, needs of downstream users, and T&C/kuleana rights. OB Part VI.A.2, at 25-28. As just one example, the majority focused on how Kealia Pond may pose a potential barrier to amphidromous recruitment, FOF 567; COL 210, yet disregarded the instream value of this wetland refuge in itself. RA116:173 (observing that Waikapū Stream "is the principal influent to Kealia Pond, and therefore to the western part of Maalaea Bay"). No one responded to these points, which independently invalidate the final decision.

The Community Groups also pointed out that the majority's overall "minimalist" approach to stream restoration contradicted not only the law, but also the majority's express rejection of the Companies' proposed approach to "restoration" because they restored "only a minor portion of the lowest recorded stream flows." COLs 183, 199, 204(ll.26-28). The majority also misused USGS's temporary controlled release figures, which had nothing to do with protecting instream uses to the extent practicable, in order to justify minimizing such protection. OB Part VI.B, at 29-32. Appellees do not respond to these points, either.

HC&S does digress at length about USGS's controlled releases request, to no intelligible point. HC&S apparently takes offense at the Community Groups' support for this request in their pre-hearing briefs, but does not explain why this matters at all now, given that the Companies managed to stonewall the proposal until after the field work for which USGS designed the temporary releases was over.[46] HC&S's grumbling, in any event, is legally groundless. Waiāhole makes clear not only that CWRM must expressly consider the need to restore flows "for meaningful studies of stream flow requirements," 94 Hawai'i at 159, 9 P.3d at 471, but also that such studies are for the Companies' benefit as much as anyone else's. See id. at 185, 9 P.3d at 497. The majority, however, skirted any discussion of the need for meaningful studies, and precluded them altogether in 'Īao and Waikapū. OB at 27 (citing examples of forfeited scientific study and cultural education values). Instead, the majority for the first time in

[46] This proposal originally arose from a collaborative effort of various public and private researchers, which USGS convened to plan and implement studies of Nā Wai 'Ehā waters. RA62:93-94(¶21); 116:116-18(¶¶3-4). The consensus of the group, including HC&S's paid consultants, supported controlled releases to support the studies, but the Companies refused these requests outright. RA62:93-94(¶21); RA116:118-19(¶7). In their pre-hearing briefs, the Community Groups supported USGS's request for immediate controlled releases for its then-ongoing study, RA62:34-39, which the Companies again opposed, RA86:4-6. By the end of the hearings, which HC&S caused to be reopened and delayed until October 2008, the September 2008 deadline for USGS's field work had already passed, RA303:45(ll.9-24), so the Community Groups indicated that USGS's proposal was moot. RA160:20-21.

the final decision arbitrarily appropriated USGS's figures without any connection to their specific and limited (and already moot) purpose, which ultimately "left unanswered the question whether instream values would be protected to the extent practicable." Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653.

2. Appellees' other red herring arguments lead nowhere.

Appellees pursue a bevy of other misleading tangents. HC&S makes much ado over the Community Groups not specifying a precise amount of desired flows. The law requires no such thing, nor did this Court demand this of the Waiāhole appellants in reversing CWRM (twice) for failing to justify that it restored streams to the extent practicable. See 94 Hawai'i at 153-55, 9 P.3d at 465-67.[47]

CWRM throws stones at the recommendations of Dr. Benbow, who donated his time to share his years of peer-reviewed research on Nā Wai 'Ehā streams, RA62:83-117(¶¶2-8,18-20), yet it is CWRM who for decades has failed to fulfill its duties to conduct necessary studies, see supra note 12. While Dr. Benbow pointed out that 100 percent of natural flow is biologically optimal, he sought to provide a principled alternate recommendation based on his research. RA62:94-96(¶¶22-27). CWRM dismisses this as an "informed guess" (as if this is something bad), AB at 39-40, ignoring that the majority made no "guess" on instream needs, much less an "informed" one, in misapplying USGS's temporary release figures, which USGS never intended as recommendations for the IIFSs. RA303:103(l.15)-105(l.19); RA327:70(l.13)-71(l.6).

HC&S tries to salvage what it can from its hired-gun consultants' testimony, but the fact remains that even they did not advocate "writing off" streams,[48] and others squarely opposed it, including the state's own chief biologist. RA307:170(ll.17-20). HC&S cites other portions of its consultants' testimony, but these did not figure into the final decision's actual rationale, or were rejected by it. For example, HC&S cites its consultants' one-week "larval-drift" survey, which

[47] HC&S also flails at the Hearings Officer-Commissioner's proposed decision, alleging "devastating effects" while citing HC&S's exceptions and appended extra-record material which the other parties had no opportunity to examine during the hearing. AB at 43-44; RA336:85(ll.4-24) (Community Groups' objection). The cited support is argument, not evidence, and the majority's final decision, not the proposed decision, is on appeal.

[48] HC&S's attempted spin aside, its lead consultant Mr. Ford conceded under cross-examination that he was "not saying that water shouldn't be returned to ['Īao] stream." RA334:156(l.18)-159(l.1). In fact, he made clear he was not making any flow recommendations pursuant to a work "scope change" by his client, and insisted that "there's nowhere [in his final draft report] that we say restoration of flow would not be good for fish, or we don't say that you shouldn't restore flow. We're not disputing that." RA334:197(l.4)-199(l.5).

was the sole additional field work HC&S had to offer in reopening the CCH seven months after it closed, RA334:93(ll.7-12), 94(ll.21-25), yet the final decision found that the survey was "just a snapshot," showed only species existence and not abundance, and "did not address the issue of the relative importance of channelization versus lack of flow" in ʻĪao. FOFs 570-76, 592; COL 169(6). HC&S also continues to advocate its consultant Mr. Ford's made-up concept of "ecological connectivity" -- that mauka-to-makai flow is overrated because amphidromous species are "present" in intermittent streams -- even though the consultant conceded that this rationale lacked any citation to authority, RA334:215(l.18)-217(l.17), and that he was saying only that "they're there," without saying anything about their health or abundance. RA309:91(ll.18-24), 78(l.23)-79(l.4); RA334:208(ll.14-23). The final decision ultimately rejected this view in "conclud[ing] that establishing continuous stream flow from mauka to makai provides the best conditions for reestablishing the ecological and biological health of the waters of Nā Wai ʻEhā." COL 243.

HC&S also argues that the relationship between instream flow and resulting benefit is "logarithmic," which justifies minimizing instream flow. This badly exaggerates what the final decision actually stated. Based on the testimony of HC&S's consultant, Mr. Payne, whose utter unfamiliarity with Nā Wai ʻEhā waters resulted in his testimony referring to their "biological, ecological integrity" being stricken, RA307:96(l.13)-101(l.12), the majority generally noted in FOF 589 that "in dry or very low-flow streams," the "first amounts of increased flow" result in "large increases in wetted habitat." (Emphasis added.) This says nothing about the quality of the habitat or the abundance of stream life, nor does it specify how much those "first amounts" of flow may be, and how much "less dramatic" the wetted habitat benefit may become, in these or any other streams. The final decision, in fact, found "a direct correlation between streamflow volume under non-freshet conditions and postlarval recruitment in Central Maui streams, such that increased streamflow correlates with increased recruitment at the stream mouth." FOF 75 (emphasis added). Given the limited value, at best, of the wetted habitat point, the final decision could only "note[]" it as a general afterthought and token consolation. COL 244.

HC&S repeatedly advocates a "regional approach" to Nā Wai ʻEhā restoration based on speculation that protecting one stream "could" compensate for abandoning others. First, the Code directs that IIFSs "may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area." HRS § 174C-71(2)(F) (1993) (emphasis added). This does not allow HC&S's "regional approach" of setting IIFSs for

certain streams to "compensate" for abandoning other streams in a region. Second, the final decision did not purport to adopt such an approach. Third, it did not make any findings that restoration of Waihe'e and Waiehu would compensate for no restoration of 'Īao and Waikapū, and how and to what extent that would occur. Fourth, it could not make any such findings because it minimized restoration across the board. Last, even if valid, HC&S's "regional approach" addresses only amphidromous species, and not all other instream uses.

3. The majority failed to protect all Native Hawaiian rights to the extent feasible.

The final decision gave short shrift to Native Hawaiian rights, OB Part VI.C, at 32-34, and appellees continue this treatment on appeal by declaring that such rights are "already subsumed" in its analysis of instream needs, and that protection of these rights can be implied in the final decision. See, e.g., CWRM's AB at 42-44 (declaring these "already encompassed" rights protected because "the Commission did so"). This legal misconception confirms the legal violation. CWRM has independent constitutional and statutory duties to protect Native Hawaiian rights,[49] and the determination of instream flows must take into account the specific, additional need to sustain the exercise of Native Hawaiian rights. See supra Part II.B. The Companies likewise have the burden to demonstrate their diversions are not injurious to Native Hawaiian and kuleana rights. See supra Parts III.B.2, II.F; Wai'ola, 103 Hawai'i at 429, 83 P.3d at 692 (reiterating the trust's protection of "public rights in trust resources . . . superior to[] the prevailing private interests in the resources at any given time" and the resulting "higher level of scrutiny" and "burden" of proof for private commercial uses).

The majority's rationale on amphidromous fauna not only failed on its own terms, it also failed to make any findings on the needs of Native Hawaiians gathering these resources. The majority also made no findings on other Native Hawaiian rights, including nearshore gathering and fishing, native plant gathering, and spiritual practices. Despite recognizing the existence of

[49] See Waiāhole, 94 Hawai'i at 137 n.35, 9 P.3d at 449 n.35 (clarifying that protection of T&C/kuleana rights under the public trust "does not supplant any other protections of these rights already existing"). CWRM has an independent duty under the constitution "to preserve and protect customary and traditional native Hawaiian rights to the extent feasible," which requires CWRM "at a minimum" to specifically document the existence of Native Hawaiian rights, the extent of their impairment, and feasible action to protect them. Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084; Haw. Const. art. XII, § 7. "The Code also obligates [CWRM] to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians." Waiāhole, 94 Hawai'i at 153, 9 P.3d at 465. CWRM also has independent duties to "assur[e]" and "preserve[]" appurtenant rights. See supra note 8.

these rights and the "significant challenges" and "limitations" they suffer, FOFs 34-61, the majority unlawfully disposed of all these rights by implication or total abdication.

As for flows for kalo farming, in addition to denying the rights of downstream rightholders on ʻĪao and Waikapū Streams, the majority understated the overall needs for taro farming. As the Community Groups explained, the majority committed a calculation error in deeming the status quo flows of 6.84 mgd (or net consumptive use of up to 1.71 mgd, COL 220) sufficient notwithstanding requests for more flows, by dividing that status quo figure by the acreages of only the T&C/kuleana rightholders who appeared at the CCH, and ignoring the undisputed existence of many others receiving water from the Companies' system. OB at 34. WWC disingenuously questions the existence of these "many others," but its own tables, which the majority adopted wholesale in the final decision, identify many of them by name.[50] CWRM's and the Companies' obligations to all T&C/kuleana rights required some affirmative protection of these additional rightholders by, for example, conducting reasonable inquiries or providing precautionary allowances or proportional further flows, given their undisputed existence. Instead, the majority simply pretended the additional rightholders and the information discrepancies in its decision did not exist and, thus, failed to provide the proper, legally mandated findings ensuring that it protected all T&C/kuleana rights "to the extent feasible."

D. The Majority Erred In Maximizing Offstream Diversions And Failing Hold The Companies To Their Burdens Of Proof.

The Community Groups contested the majority's unprecedented approach of setting IIFSs based solely on all-time maximum offstream demands, which failed to consider and mitigate the impacts of variable offstream demand on instream flows, as this Court required in Waiāhole. OB Part VII.C, at 38-39. The majority, for example, indicated that at the Q_{50} stream flow of 71.3 mgd, which is "reflective of typical flow conditions," FOF 97, a total restoration of 20.5 mgd would still leave 50.8 mgd available, compared to 26.6 mgd "total requirements" for offstream uses even after arbitrarily reducing Well 7 use to only 9.5 mgd (36.1 mgd if Well 7 use was excluded entirely). Final Decision at 219 (Table 16). The majority, however, proceeded to compare the low, Q_{90} stream flows with offstream requirements that included HC&S's all-time

[50] The final decision cited "[n]early 50 persons" who testified, including others not on the Companies' system. COL 233. In contrast, Tables 3-6 of the final decision (at 204-09), adopted from WWC's tables, RA74:116-18; FOFs 229-32, contain a list of TMKs and persons that, even after omitting entries with duplicate persons, identify almost 70 persons on the Companies' ditch system alone. See also RA98:23-25 (indicating about a dozen other known kuleana rightholders, some of whom declined to testify because of fears of retaliation).

maximum demands, and reasoned that, of the three USGS temporary release figures it arbitrarily adopted, only the lowest figure would entirely accommodate these maximized demands. COL 253; Final Decision at 220 (Table 17). It then declared this "the best balance." COL 254. This scheme ignored the Court's directive (and common sense) that CWRM must expressly "consider the impact of fluctuating diversions on instream base flows and the practicability of adopting specific measures to mitigate this impact." Waiāhole, 93 Hawai'i at 171-72, 9 P.3d at 483-84 (emphasis added). The majority simply assumed that the IIFSs must accommodate HC&S's maximum offstream demands first and always, and went further arbitrarily to minimize and eliminate HC&S's main "mitigation" measure (actually HC&S's long-standing main source) of Well 7. See Dissent at 2-7 (explaining that the majority "g[a]ve absolute priority to one of the private commercial users in this [CCH]," left in the streams "the amounts of water remaining after all offstream requirements were met," and treated the IIFSs "as leftovers, acting as a reservoir for future offstream uses"). Appellees fail to respond to this point as well.[51]

As for the majority's nullification of Well 7 by minimizing HC&S's use from the documented 40 mgd capacity and 21 mgd average to a 9.5 mgd maximum and, on average, some fraction thereof, OB Part VII.D, at 39-45, HC&S first evades the point. It regurgitates its bare lump-sum figures of capital costs and claims of limitations on power availability, but the majority only recited HC&S's figures and claims without making any actual findings, FOFs 498-99; COLs 105-06, and otherwise did not mention them except to note that its 9.5 mgd figure (as well as any further use up to 19 mgd) "will not require capital costs, only the costs of pumping." COL 230. HC&S's lump-sum figures, moreover, have "little meaning without evidence and analysis of the actual per-unit breakdown of these costs relative to the cost of ditch water and other alternatives" and actually translate to pennies per thousand gallons and a mere fraction of what other agricultural users pay. Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477; RA160:385-88. HC&S, indeed, admitted that its nonuse of Well 7 "is simply an economic decision," RA321:120(ll.15-18), but the majority conspicuously did not, and could not, justify granting

[51] HC&S rambles on about the majority's calculation of HC&S's actual needs figures with an additional 5 percent "bonus," when appellants and the dissent raised this only as background on how the majority consistently compensated for HC&S's lack of proof. OB at 36-37; Dissent at 2-3. Compare COL 82 (concluding that HC&S "has not taken the next step of providing what its reasonable irrigation requirements would be"), with COL 91 (adding an arbitrary 5% nonetheless). The Community Groups need not respond to this HC&S diversion other than to note that it engages in outright misrepresentation in citing as support the Hearings Officer-Commissioner's calculations in the proposed decision, AB at 50, which he readily admitted were a math error. RA336:72(ll.11-19); RA188:347-50.

HC&S an economic "subsidy or guaranteed access to less expensive water sources when [Well 7 is] available and public values are at stake." Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477.

HC&S fares no better in trying to defend the majority's actual rationale based on speculation about well yield and salinity. HC&S cites evidence (and, again, improperly tries to attach more) to support its general "principle" that "sustained pumping can increase salinity of the pumped water over time." AB at 53-54. The majority relied on none of this, but rather simply recited HC&S's "claims," FOF 500, COL 106, without making any legally valid FOFs or COLs. OB at 42-43 (citing cases). Even if the majority had bothered to make true findings, HC&S's generalized evidence would not have justified the majority arbitrarily and drastically minimizing the use of Well 7 (while committing a math error by halving the wrong number). FOF 459; COL 230. See Waiāhole, 94 Hawai'i at 165, 9 P.3d at 477 (holding that "general findings on the effects of irrigation on leeward aquifers," among others, failed to "answer, with any reasonable degree of clarity why it is not practicable . . . to use ground water . . . as an alternative to diverting the sole source of water for windward streams"); Waiāhole II, 105 Hawai'i at 20, 93 P.3d at 662 (rejecting the generalized rationale that reduced ditch flows would diminish the ditch's "economic and operational viability," which would "render all alternatives impracticable").

It is insufficient "for an agency to merely recite the terms 'substantial uncertainty' as justification for its actions," Motor Vehicle, 463 U.S. at 52, which is exactly what the majority did in citing "uncertainties" to justify minimizing Well 7 use. COL 230. Rather, "[t]he agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." Motor Vehicle, 463 U.S. at 52. Here, this evidence includes the directly contradictory evidence, such as HC&S's own letter to CWRM insisting that its wells have "operated for many decades without any long term deterioration in water quality" while producing "as much as 112 mgd," RA158:17, and the actual Well 7 pumping records showing many months of usage far in excess of 9.5 mgd, even after HC&S switched to drip irrigation. RA102:46-47. It also includes HC&S's calculated and telling nondisclosure of its data on the salinity of Well 7, which it admitted it maintains. RA325:97(ll.17-20); RA321:109(ll.8-19). Absent such proof necessary to meet HC&S's legal burden, the majority had no basis for minimizing HC&S's use of this practicable alternative to the public trust's detriment.

As for the Companies' system losses, OB Part VII.E, at 45-46, HC&S argues that "some" system loss is "not unreasonable," AB at 50, but neither the Companies nor the majority

provided any basis for establishing how much "some" would be in this case. Rather, the majority concluded the Companies failed to establish the lack of practicable measures to address these losses, COLs 121, 123, and declared it would "place the full burden of remedying losses immediately upon HC&S," COL 230, but then contrarily just "assumed" it should grant the Companies 4.0 mgd of losses. COLs 225, 229. The Companies, not the public trust, must bear the burden of the Companies' failure of proof, which has already stretched for years. See Kukui, 116 Hawai'i at 496, 174 P.3d at 335 (maintaining that the "failure to demonstrate the absence of practicable alternatives should have terminated the inquiry").

Appellees also have nowhere to go on the majority's failure to address the practicability of using at least 5 mgd of recycled water from the Wailuku/Kahului treatment plant. OB Part VII.F, at 46-47. The majority concluded "private parties could construct their own pipeline to the plant," COL 108, and found that HC&S in particular has used recycled water for years through existing infrastructure from Maui Land & Pine's Kahului cannery. FOFs 313-315 (citing RA321:29(l.16)-30(l.21); RA132:119). See also RA318:149(l.6)-150(l.6) (county recycled water official) ("I'm sure [HC&S] could use [county recycled water]."). Far from showing that recycled water use is not practicable, the majority all but established the opposite.

As for the majority's last-minute addition of Fields 921 & 922 via improper use of judicial notice, OB Part VII.G, at 47-48, HC&S claims the fields are not "scrub land," but the majority found the contrary. FOF 314. Neither HC&S nor the majority justified draining Nā Wai 'Ehā streams to replace HC&S's "wastewater land application" on these fields.

V. CONCLUSION

"[T]he arc of the moral universe is long but it bends toward justice."[52] More than 100 years after "S.D. Hakuole" in 1866 lamented that "Wailuku is being destroyed by the sugar plantation," RA58:81-82 (emphasis omitted), this Court in 1973 reaffirmed indigenous Hawaiian principles that water resources are a public trust, not the plantations' private property. After the people of Hawai'i elevated these principles to a constitutional mandate in 1978, and the legislature followed though in enacting the Code in 1987, this Court has continued to uphold these principles in numerous decisions beginning with Waiāhole in 2000. Ten years later, faced with the Hearings Officer-Commissioner's proposal to fulfill the law in this case, the Companies fell back on "shutdown" threats, and the majority sacrificed the public trust to over-

[52] A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS & SPEECHES OF MARTIN LUTHER KING, JR. 252 (James M. Washington, ed. 1986).

accommodate the Companies, then wholeheartedly joined their cause on appeal. While the majority's myopia, at minimum, has delayed justice for the public trust and Native Hawaiians in Nā Wai ʻEhā for years, appellees' arguments would turn back decades of progress for all of Hawaiʻi's people.

To say that the final decision needs "much more work" is a gross understatement. Waiāhole, 94 Hawaiʻi at 189, 9 P.3d at 501. As appellants and the dissent have explained, the final decision exacerbates the errors that Waiāhole already corrected, and stands the law's protections of public trust purposes and Native Hawaiian rights on their heads. The Four Great Waters of Maui never were the Companies' property to exploit as they saw fit; they were and continue to be a legacy for present and future generations and an inalienable part of what makes Hawaiʻi truly special. Though some may have lost sight of these principles, the march of history, the letter and spirit of the law, and the Community Groups' naʻau pono (deep sense of justice) remain steadfast.

For all the reasons detailed in appellants' opening and reply briefs, the Community Groups respectfully request this Court to reverse the majority's final decision and require that CWRM: 1) reestablish the Nā Wai ʻEhā IIFSs, including IIFSs for ʻĪao and Waikapū Streams, to protect and restore to the extent practicable all instream uses and values, including T&C/kuleana rights, in each of the waters, incorporating reasonable margins of safety; 2) require HC&S to use Well 7 to the fullest extent practicable, up to its historically established 21 mgd use, subject to monitoring; 3) exclude any allowance for the Companies' system losses; 4) exclude the 300 acres of Fields 921 & 922; 5) mandate the use of recycled water in lieu of Nā Wai ʻEhā diversions; and 6) proceed forthwith to investigate instream uses and values and Native Hawaiian and kuleana rights in Nā Wai ʻEhā waters, as well as any and all alternatives and solutions for offstream uses, in order to establish permanent instream flow standards.

DATED: Honolulu, Hawaiʻi, September 6, 2011.

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