NO. SCAP 30603

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

Iao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao, & Waikapu Streams Contested Case Hearing	Case No. CCH-MA06-01 APPEAL FROM THE COMMISSION ON WATER RESOURCE MANAGEMENT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER DATED JUNE 10, 2010

INTERVENOR-APPELLANT OFFICE OF HAWAIIAN AFFAIRS' UNIFIED REPLY BRIEF

APPENDIX "1"

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

ANNA ELENTO-SNEED 3412-0
PAMELA W. BUNN 6460-0
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail: aes@ahfi.com
pbunn@ahfi.com

Attorneys for Intervenor-Appellant
OFFICE OF HAWAIIAN AFFAIRS

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I.

INTRODUCTION

Appellees the Commission on Water Resource Management ("CWRM" or "the Commission"), Hawaiian Commercial and Sugar Company ("HC&S") and Wailuku Water Company ("WWC") (collectively, "Appellees"[1]) tellingly do not even attempt to argue that CWRM fulfilled its affirmative duty to protect and promote traditional and customary Native Hawaiian rights ("T&C rights") and appurtenant (or "kuleana") rights in Nā Wai `Ehā to the extent feasible. They cannot, for an obvious reason – despite finding that Native Hawaiian T&C rights and kuleana rights were impaired by WWC and HC&S's dewatering of Nā Wai `Ehā Streams, and that restoration of flow to those streams is "critical" to the perpetuation and practice of Hawaiian culture in Nā Wai `Ehā, the majority adopted IIFS that clearly do ***not*** protect those

[1] "Appellees," as used herein, does not include Appellee/Cross-Appellant County of Maui Department of Water Supply ("MDWS"). OHA agrees with MDWS's argument that "CWRM's decision not to amend the IFIS for Īao Stream is erroneous and should be reversed," MDWS AB at 5, but not for the reason MDWS posits. As explained in OHA's Opening Brief ("OB"), the CWRM majority's decision not to restore water to `Īao or Waikapū Streams violated its obligations under the Hawai`i constitution, the public trust, and the Code. The fact that HC&S proposed a total IIFS of 16.5 mgd for Nā Wai `Ehā Streams, which included 4 mgd for `Īao Stream and 4 mgd for Waikapū Stream, RA336: 23, l. 25 – 24, l. 16; RA190:57, is certainly relevant to the feasibility of restoring flow to those streams, but the majority's refusal to do so is a violation of its duties without regard to HC&S's position. (Citations herein to the record on appeal follow the same conventions used in OHA's Opening Brief ("OHA OB"), *see id.* at 1, fn.1, and, unless otherwise indicated, are to the record in case no. 30603.)

rights to the extent feasible, in derogation of CWRM's obligations under the Hawai`i Constitution, the public trust doctrine, the State Water Code, HRS ch. 174C (1993 & Supp. 2010) (the "Code"), and the common law. Nowhere in the Final Decision or its Answering Brief does CWRM explain why,[2] nor does any Appellee attempt to refute the Hearings Officer's assertion, in his dissent, that the majority simply sacrificed public trust uses of Nā Wai `Ehā streams, including Native Hawaiian T&C rights and kuleana rights, to protect HC&S's private economic interests.

The failure to protect public trust uses in Nā Wai `Ehā to the extent feasible was not for lack of sufficient Nā Wai `Ehā water available to reach an *actual* "balance" – *i.e.,* one that protects Hawaiian T&C rights, kuleana rights, and other public trust uses[3] while still accommodating the actual water needs of the offstream diverters. The majority found, and Appellees do not dispute, that even after indulging every possible inference in favor the largest diverter, HC&S, in determining its actual water need (which information HC&S refused to provide on its own), HC&S diverted 20 million gallons per day ("mgd") ***more*** than it put to reasonable-beneficial use. That 20 mgd "excess" does not even include the additional Nā Wai `Ehā water that could practicably be replaced, at a cost less than other farmers pay for water, by Well No. 7, the non-potable well from which HC&S pumped an average of 21 mgd for more than a half a century as its primary irrigation source for the Waihe`e-Hopoi Fields. The majority failed to explain, and Appellees' answering briefs do not address, why it is not feasible to restore to Nā Wai `Ehā streams even the excess 20 mgd that HC&S diverts and simply squanders, let

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[2] The answer suggested by CWRM's answering brief, unfortunately, is that despite this Court's directives and admonitions to the Commission over more than a decade, starting with *In re Waiāhole Ditch Combined Contested Case Hr'g,* 94 Hawai`i 97, 143, 9 P.3d 409, 455 (2000) ("*Waiāhole I*"), CWRM remains deliberately uninformed of, or alarmingly indifferent to, its obligations as the trustee of the public trust in Hawai`i's water resources.

[3] T&C rights and kuleana rights are referred to together for convenience, based on this Court's recognition that the public "trust's protection of traditional and customary rights also extends to the appurtenant rights recognized in *Peck* [*v. Bailey*, 8 Haw. 658 (1867)]." *Waiāhole I,* 94 Hawai`i at 137, n.34, 9 P.3d at 449, n.34. However, by referring to these rights together, OHA does not mean to suggest that CWRM has the discretion **not** to protect kuleana rights if it determines it is not feasible to do so. As pointed out in OHA's Opening Brief, kuleana rights are property rights which enjoy near absolute protection. *See, e.g.,* OHA OB at 22 & fn.15. In recognizing kuleana rights as a public trust purpose, this Court noted that "[o]ur holding with respect to the public trust does not supplant any other protections of these rights already existing." *Waiāhole I,* 94 Hawai`i at 137, n.35, 9 P.3d at 449, n.35.

alone the additional 19 mgd that the Hearings Officer found could be practicably replaced by Well No. 7 with no capital costs to HC&S.

Without entering any findings of fact or conclusions of law regarding the feasibility of protecting Native Hawaiian T&C rights and kuleana rights, the majority adopted IIFS at a paltry total of 12.5 mgd for Waihe`e River and Waiehu Stream, and completely abandoned `Īao Stream and Waikapū Stream to HC&S and WWC without so much as acknowledging the T&C and kuleana rights of OHA beneficiaries along those streams. The majority's own description of its purported "balancing" demonstrates that the overriding, if not only, consideration in determining the IIFS was ensuring that HC&S's water needs would be satisfied even in a 1-in-54 year drought without having to pump Well No. 7 at even half its historical capacity.

Given that the majority did not even pretend that it had protected Native Hawaiian T&C and kuleana rights, and obviously did not, Appellees are reduced to arguing that the majority's violations of the public trust, the Hawai`i constitution, the Code and the common law are not judicially reviewable, and that HC&S and WWC had no burden to demonstrate that the water they diverted away from Nā Wai `Ehā public trust uses was being put to reasonable-beneficial use. The fact that CWRM has aligned itself with the offstream diverters in making these arguments, which contradict not only well-settled Hawai`i law but also the majority's own conclusions of law, merely serves to demonstrate the profoundly misguided view of its role that led the majority so far astray.

II.

THIS COURT HAS APPELLATE JURISDICTION TO REVIEW THE CWRM MAJORITY'S VIOLATIONS OF THE PUBLIC TRUST

Unable to credibly defend the substance of the majority's decision, CWRM, HC&S and WWC claim that this Court lacks appellate jurisdiction because the contested case hearing CWRM initiated, to which no one objected throughout the proceedings, was not a contested case hearing. With no apparent recognition of the irony, CWRM acknowledges that, "the ultimate authority to interpret and defend the public trust in Hawai[`]i rests with the courts of this state," CWRM Answering Brief ("AB") at 14 (quoting *Waiāhole 1,* 94 Hawai`i at 143, 9 P.3d at 455), but in the very next sentence posits that "[t]he Court cannot reach the arguments raised by Hui/MTF, OHA and the County on this appeal[.]" CWRM AB at 14. Although Appellees' desperation to avoid judicial review of the majority's blatant public trust violations is understandable, their contention that the Court lacks appellate jurisdiction is squarely foreclosed

by *Waiāhole I,* in which this Court unambiguously held directly to the contrary.

In *Waiāhole I,* this Court determined that it had jurisdiction to hear an appeal from a combined contested case hearing which, as in the instant case, considered both an IIFS petition and WUPAs (but unlike this case, also considered WUPAs for new, as well as existing, uses). 94 Hawai`i at 119-20, n.15, 9 P.3d at 431-32, n.15 (2000). Regarding whether the hearing that preceded the appeal was "required by law," the Court explained that, "while the statutes and rules do not require a hearing with respect to petitions to amend interim instream flow standards . . . or 'new' use applications . . . , ***constitutional due process mandates a hearing in both instances because of the individual instream and offstream 'rights, duties, and privileges' at stake.***" *Id.* (citing *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1993)) (emphasis added). As the Court's own language makes clear, Appellees' attempts to distinguish *Waiāhole I* on the grounds that jurisdiction in that case was predicated on the appeal of the existing use WUPAS, which were adjudicated but not appealed in this case, *see, e.g.,* CWRM AB at 19-20, WWC AB at 14-15, HC&S AB at 14-15, fn.6, are disingenuous, at best.

Moreover, in a related *Waiāhole I* holding that Appellees do not even attempt to distinguish, this Court "reject[ed] the contention that the Commission improperly amended the [IIFS] via adjudication instead of rulemaking."[4] In doing so, the Court observed that "the decisions at hand concerned the instream flow standards of particular streams," and agreed with ***the Commission's*** assessment 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. . . . [I]ndividual claims may need to be examined. The site-specific inquiry required in this case is not

[4] Rulemaking and contested case adjudication are the only alternatives available to CWRM pursuant to the Code, because section 174C-9 requires that "[a]ll proceedings before the commission concerning the enforcement or application of any provision of this chapter . . . shall be conducted in accordance with Chapter 91," *see also* HAR § 13-167-2, and the Hawai`i Administrative Procedures Act, HRS ch. 91 ("HAPA") provides only two administrative procedures: "quasi-legislative" rulemaking procedures, *see* HRS §§ 91-3 to 91-7, and "quasi-adjudicatory" contested case procedures, *see* HRS §§ 91-9 to 91-14. It is thus unclear where CWRM got the notion that it is free to invent its own extra-HAPA procedures for establishing IIFS, as it did in East Maui. D&O, p. 193. *See also* HC&S AB at 14 ("CWRM had discretion to resolve the IIFS Petition using any number of procedural vehicles") and Appendix B thereto at 2 (describing and graphically depicting the "adopted process," which is neither rulemaking nor contested case, that CWRM contrived to determine East Maui IIFS).

> compatible with rule making, ***but with a method which provides the due process procedures necessary to assess individual interests***.

Waiāhole I, 94 Hawai`i at 152, 9 P.3d at 464 (citation omitted) (emphasis added) (ellipses and brackets in original). Although CWRM has obviously changed its position since the Waiāhole contested case hearing, the requirements of due process do not vary depending on the views of whoever happens to be chairing or serving on the Commission at a particular time.[5] As set forth in more detail in OHA's Statement of Jurisdiction, RA354:1-10, and Opening Brief, RA398:1-50, individual instream and offstream rights, duties, and privileges were equally at stake in this case as in the Waiāhole IIFS determination and, as in that case, individual claims, including those of WWC and HC&S, needed to be, and in fact were, examined and directly affected by the outcome. For the same reasons that a hearing was required by law in *Waiāhole I*, constitutional due process required the contested case hearing held in this case.

In their IIFS Petition, Appellants Hui O Nā Wai `Ehā and Maui Tomorrow Foundation, Inc. (the "Community Groups"), claimed that their supporters' Native Hawaiian T&C rights and kuleana rights, among others, were impaired by WWC and HC&S's diversion of Nā Wai `Ehā streams, and sought upward amendment of the IIFS in order to exercise those rights. RA 40: 1-135, 16; *see also* RA 56: 92-96 (OHA's application to be a party in the contested case hearing),

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[5] CWRM is not the only Appellee to change position in an attempt to avoid judicial review. Although it now claims that "no party asked for a CCH on the IIFS Petition," WWC AB at 2, and that no contested case hearing was required because no rights or interests were at stake with respect to the IIFS, *id.* at 14-15, WWC, on February 13, 2006, filed a "Petition Requesting a Contested Case Hearing Before the Commission on Water Resource Management," in which it asserted that:

> In addition, the contested case hearing will document the instream flows to be allocated prior to the allocation of water under the water use permitting applications. The applicant has ***an interest and a right*** to create a Commission record to establish the proper instream flow standards prior to such allocations.

RA56: 2, 4 (emphasis added). WWC described the relief to which it deemed itself entitled as, *inter alia,* "to have the Commission establish the appropriate and proper instream flows prior to such allocations," and claimed that "***Applicant will be affected by the relief sought***, as well as all those who receive water through agreements with the Applicant[.]" RA56: 5 (emphasis added). HC&S, by letter dated February 13, 2006, informed the Commission that, although it was not requesting a contested case hearing, to the extent one was granted it was entitled to be a party because, with respect to the IIFS Petition and the Waste Complaint, it "has a ***significant interest*** in both proceedings as a landowner and one of the largest water users of the West Maui system that provides water to a critical portion of HC&S's agricultural operations on Maui." RA56: 49 (emphasis added).

HC&S AB at 5 ("Hui/MT represented that it was filing the IIFS Petition on behalf of certain individuals asserting kuleana rights to use water from the Nā Wai `Ehā Streams ("*Kuleana Users*") and practitioners of Native Hawaiian traditional and customary rights." (citation omitted)). Constitutional due process mandates a hearing whenever the claimant seeks to protect a "property interest," which does not mean a vested private property right, but rather is "a benefit to which the claimant is legitimately entitled." *Pele Defense Fund,* 77 Hawai`i at 68, 881 P.2d at 1214. "A person's interest in a benefit constitutes a 'legitimate claim of entitlement' if it is supported by contractual or statutory language that might be invoked in a hearing." *Alejado v. City and County of Honolulu*, 89 Hawai`i 221, 227, 971 P.2d 310, 316 (App. 1999) (citation omitted).

Native Hawaiian T&C rights and kuleana rights are protected by the public trust, *Waiāhole I,* 94 Hawai`i at 136-37 & n.34, 9 P.3d at 448-49 & n.34, the Hawai`i Constitution, *see* Art. XI, §7; Art. XII, § 7, and by statute, *see* HRS §§ 1-1, 7-1, 174C-63, 174C-101, including, of course, the very statute that "obligates the Commission to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians" or kuleana rights. *Waiāhole I,* 94 Hawai`i at 153, 9 P.3d at 465 (citing HRS §§ 174C-101(c) and -63). As this Court has stressed, "the rights of native Hawaiians are of great public concern in Hawai`i," and "[i]n order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable." *Ka Pa`akai O Ka`aina v. Land Use Comm'n., et al.,* 94 Hawai`i 31, 42, 46, 7 P.3d 1068, 1079, 1083 (2000). For CWRM, the trustee and "primary guardian" of the public trust in Nā Wai `Ehā's waters, to seriously argue that OHA beneficiaries have no "legitimate claim of entitlement," and thus no protected "property interest" in the exercise of Native Hawaiian T&C and kuleana rights, CWRM AB at 19, 21, demonstrates a deplorable disregard for these rights and starkly highlights the need for judicial review of IIFS decisions.

Even HC&S, citing *Waiāhole I*, acknowledges that "[a] decision establishing IIFS *hypothetically might*, but does not necessarily, grant, deny, affirm, or abridge the right of any individual to use water," in which case due process would require a hearing, but that is "an inquiry that must be performed on a case by case basis." HC&S AB at 16 (emphasis added) Lest it be given too much credit for being the only Appellee to even acknowledge that due process requires a contested case hearing when individual rights to use water may be affected, HC&S could not do otherwise. Notwithstanding that the public trust "precludes any grant or assertion of vested rights to use water to the detriment of public trust purposes," *Waiāhole I*, 94

Hawai`i at 141, 9 P.3d at 453, HC&S has threatened CWRM that requiring it to implement controlled releases or to comply with an IIFS that restores to Nā Wai `Ehā streams more water than HC&S deems acceptable "may constitute a State deprivation of private property without just compensation." RA114:5, n.3; RA188: 293, n.14.

Unwilling to abandon its strident but meritless "takings" claim, HC&S could not join with CWRM and WWC in arguing that there were no rights or interests at stake in an IIFS determination that would implicate due process.[6] Instead, HC&S has come up with a Kafka-esque argument that is equally offensive, and equally wrong. Acknowledging that Appellants "may" have a property interest in having sufficient water to satisfy their T&C and kuleana rights to cultivate kalo, HC&S argues that amending the IIFS could only improve the status quo, so there was no threatened deprivation of Appellants' property interest. HC&S AB at 18-20. In other words, HC&S essentially claims the IIFS proceeding could not deprive any interest of Appellants', because HC&S and WWC have already deprived them of the Nā Wai `Ehā water necessary to satisfy their rights and there is no more water that could be taken from them. Under HC&S's theory, only the offstream diverters were threatened with deprivation of their interests, so the IIFS proceedings were required by law as to them but not as to Appellants, and only the offstream diverters, but not Appellants, could appeal from the Final Decision.

As an initial matter, HC&S's contention that the status quo could only remain the same or be improved by the Nā Wai `Ehā IIFS proceeding is not correct. As OHA pointed out in its opening brief (and no Appellee disputed), the majority actually found a way to *reduce* the status quo IIFS for `Īao and Waikapū Streams, so that even the meager trickles that currently allow severely limited exercise of T&C/kuleana rights to cultivate kalo along those streams can now be diverted without restriction. OHA OB at 29, n.26, and 32-33 (describing efforts of the Duey and Pellegrino `ohana to practice their cultural traditions by cultivating kalo on `Īao and Waikapū Streams, respectively). More fundamentally, though, HC&S's "heads I win, tails you lose" argument is contrary to Hawai`i law.[7] In the Waiāhole IIFS proceedings, as here, the petitioners

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[6] WWC's novel theory that "our streams deserve no less constitutional protection than our citizens," WWC AB at 20, apparently does not, in WWC's view, confer a due process right to a hearing before the State imposes IIFS that would deprive the streams of their water.

[7] Although it apparently did not deem itself bound to follow it, even the majority recognized that, under Hawai`i law, "[t]raditional and customary rights cannot be abandoned, and are guaranteed even if the practice has not been continually practiced in an area." COL 20 (citation omitted). And, of course, "[t]he constitution and the Code [] do not differentiate among 'protecting,'

sought upward amendment of the IIFS for streams that had been dewatered for decades by a sugar plantation. Notwithstanding that the petitioners were not threatened with any *further* deprivation of their property interests, this Court held that "constitutional due process mandates a hearing" on an IIFS determination "because of the individual instream and offstream 'rights, duties, and privileges' at stake." *Waiāhole I,* 94 Hawai`i at 119-20, n.15, 9 P.3d at 431-32, n.15 (citation omitted).

In this case, as in *Waiāhole I,* Appellants claimed legal entitlement to restoration of Nā Wai `Ehā stream flow to satisfy their members and beneficiaries' Native Hawaiian T&C rights, kuleana rights, and other public trust uses. Given the "zero-sum" nature of water allocation, any water restored to Nā Wai `Ehā streams to meet increased IIFS and satisfy Appellants' rights could only come from reducing the diversions by HC&S and/or WWC, who claimed that they were legally entitled to maintain their existing diversion rates. Thus, despite Appellees' assertions to the contrary, s*ee, e.g.,* CWRM AB at 22, 23, WWC AB at 16, HC&S AB at 22-23, the IIFS proceeding was plainly one in which Appellants "sought to have [their] legal rights, duties or privileges [with respect to Nā Wai `Ehā water] declared over the objections of [HC&S and WWC]." *Pele Defense Fund, supra,* 77 Hawai`i at 68, 881 P.2d at 1214 (citation and internal quotation marks omitted). That being the case, "[t]hat the proceeding before the [Commission] was a contested case is obvious." *Mahuiki v. Planning Comm'n,* 65 Haw. 506, 654 P.2d 874 (1982).

Appellees seek to narrowly confine *Pele Defense Fund* to its specific facts – issuance of a permit implicating the applicant's property interest that would adversely affect the protected rights of other interested persons who followed the agency's rules governing participation in contested cases – which facts they contend are not present here simply because an IIFS determination is not permitting. *See, e.g.,* HC&S AB at 20-21, CWRM AB at 19-20; WWC AB at 16. Appellees' attempts to distinguish between the IIFS determination and permitting, however, instead demonstrate that the fundamental due process implications are identical.

For example, CWRM contends that, unlike permitting, "[i]n amending the IIFS, the Commission did not determine how much water Hui/MTF, OHA, the County, kuleana users, or any other person was entitled to take from the streams." CWRM AB at 22; see also HC&S AB at 21 ("[the D&O] does not even specify the amount of water that a particular user may withdraw

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'enhancing,' and 'restoring' public instream values, or between preventing and undoing 'harm' thereto." *Waiāhole I,* 94 Hawai`i at 150,

from the streams for offstream uses"), and WWC AB at 16 (IIFS does not determine "the amount of water a specific party will receive or how a specific party will be impacted"). That contention is demonstrably false. The majority correctly concluded that, to establish the IIFS, it needed to 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. Accordingly, it made individualized findings and conclusions regarding the uses by HC&S, WWC, and MDWS, and collective findings and conclusions regarding kuleana use, determining for each the amount of use that was reasonable-beneficial, by, *inter alia,* assessing waste and practicable alternatives. *See, e.g.,* RA 192: COL 42, 219-237. The majority summarized those findings and conclusions in a table identifying the "***current and future allowable diversions***" for kuleana users, MDWS, WWC, and HC&S. Table 18, D&O at 221 (emphasis added).

HC&S, for example, which used an average of 49.4 mgd of diverted Nā Wai `Ehā water prior to the establishment of the IIFS, FOF 283 (39 mgd for Waihe`e Fields); FOF 286 (10.43 mgd for `Īao-Waikapū Fields), now has a total "allowable diversion" of 29.8 mgd and, when there is less than 37.92 mgd of Nā Wai `Ehā water available after satisfying the IIFS, "HC&S must use up to 9.5 mgd from Well No. 7 to make up the difference," so its allowable withdrawal decreases to 20.3 mgd. D&O at 221 (emphasis added).[8] WWC claimed that its contracts with its customers required it to provide up to 11.188 mgd; the majority found that WWC's maximum delivery agreements with 34 customers totaled 8.288 mgd, and that the water actually used pursuant to WWC's water delivery agreements was 2.37 mgd in 2006. FOF 256 - 258. Pursuant to the Final Decision, WWC's "current and future allowable diversion" is 3.2 mgd, which includes 1.2 mgd for its "customers" and 2.0 mgd for system losses. Dec. at 221. Whether or not it is true, as HC&S coyly claims, that "[s]etting the IIFS at a certain level does not *necessarily* determine the amount of water that a particular person can or cannot withdraw," HC&S AB at 22 (emphasis added), in *this* case, setting the IIFS unquestionably determined the

[8] It is undisputed by Appellees that, due to a calculation error, the 6.06 mgd "allowable diversion" for the `Īao-Waikapū Fields should actually be only 5.91 mgd. *See* OHA OB at 25-26, fn.19. Although the 0.15 mgd difference is a trivial rounding error to HC&S, it is almost ten percent of the entire "allowable diversions" of 1.71 mgd for *all current and future kuleana* users in Nā Wai `Ehā. D&O at 221.

amount of water that HC&S, WWC, MDWS, and the collective kuleana and T&C rightholders can withdraw from Nā Wai `Ehā.

Even though the "allowable diversion" for current and future kuleana use was stated collectively,[9] the IIFS proceedings, contrary to Appellees' contentions, *see, e.g.,* CWRM AB at 20, clearly, albeit erroneously, determined the "rights, duties, or privileges" of specific kuleana/T&C users in addition to those of HC&S, WWC, and MDWS. At the June 14, 2007 prehearing conference, the Hearings Officer cautioned that appurtenant rights would be taken into account in setting the IIFS only to the extent that individual kuleana users proved the existence of their appurtenant rights, their intent to exercise those rights within a reasonable amount of time, and the amount of water required to satisfy their rights. RA 297: 35, ll. 6-10, 15-25. Accordingly, approximately fifty witnesses came forward with proof of their appurtenant rights, Native Hawaiian T&C rights, and/or riparian rights to Nā Wai `Ehā water for, *inter alia,* cultivation of kalo and other crops. (*See generally* FOF 294; RA 160: 246-309). Among them were OHA beneficiaries with unchallenged evidence that their kuleana parcels on `Īao and Waikapū Streams were planted in kalo at the time of the Māhele, such as Francis Allan Ornellas, *see, e.g.,* RA58:43-36, 101-105, and Hōkūao Pellegrino, *see, e.g.,* RA58: 50-58, 109-122.

By refusing to increase the IIFS for `Īao or Waikapū Streams, the majority directly determined the "rights, duties, or privileges" of the Ornellas and Pellegrino `ohana, among others. As CWRM acknowledges in its answering brief, "kuleana water users will be accommodated [only] to the extent Nā Wai `Ehā stream water is available pursuant to the amended IIFS." CWRM AB at 12. Pursuant to the amended IIFS for `Īao and Waikapū Streams, no water whatsoever needs to be available below WWC's diversions to satisfy the water rights appurtenant to the Ornellases' and Pellegrinos' kuleana lands, so their kuleana rights will not be "accommodated" at all, notwithstanding the majority's recognition that "the exercise of

[9] The 1.71 mgd allocated for all current and future kuleana/T&C users was estimated to be the "consumptive use" component of the 6.84 mgd reportedly being provided to kuleana users at the time of the contested case hearing. COL 220. The majority concluded that 6.84 mgd is a "reasonable" amount to satisfy not only the current needs of the kuleana users, but also the increased lo`i they would cultivate if there were enough water, *id.*, notwithstanding its express findings that the kuleana users testified virtually unanimously to the contrary, FOF 234, 296, 335. As discussed in OHA's Opening Brief (at 28-29), the majority's conclusion was based on an obviously flawed assumption which was brought to CWRM's attention but not corrected. No Appellee has credibly defended the patently erroneous conclusion that 6.84 mgd inflow, or 1.71mgd in consumptive use, is sufficient to satisfy all kuleana rights in Nā Wai `Ehā. (*See* section III.D *infra.*)

appurtenant rights [] have a higher priority over private commercial uses," COL 240 (a), and despite the guarantees of the Hawai`i constitution and the Code. On the other hand, the majority made sure to set the IIFS at a level low enough to assure that HC&S will have adequate water to irrigate its sugar cane during the worst drought on record without having to pump more than a fraction of its capacity from the nonpotable well that served as its primary water source for more than half a century (which it is not required to use at all *except* during drought conditions). *See, e.g.,* OHA OB at 25-26, COL 247-256. Thus, in reality, the IIFS proceeding determined that the constitutionally protected kuleana and T&C rights of OHA beneficiaries struggling to maintain their cultural traditions in Nā Wai `Ehā, and particularly along `Īao and Waikapū Streams, were trumped by HC&S's claim of a privilege to continue diverting public trust water for private commercial use.[10]

Appellees, in unison, invoke *Ko`olau Agricultural Company, Ltd. v. CWRM,* 83 Hawai`i 484, 927 P.2d 1367 (1966) ("*Ko`olau Ag.*"), in which this Court determined that there was no right to a contested case hearing on a Water Management Area ("WMA") designation. CWRM AB at 20; HC&S AB at 21-22; WWC AB at 14, 17-18. Because the IIFS determination in this case bears no resemblance to a WMA designation, Appellees' reliance on *Ko`olau Ag.* is obviously misplaced. A WMA is simply a binary decision whether or not to establish administrative control over water use in a given area through permitting. As the Court pointed out in that case, "[d]esignation of a WMA, unlike water use permitting[,] neither affects any property interest of existing or potential water users nor requires the determination of any individualized facts." 83 Hawai`i at 496, 927 P.2d at 1379. An IIFS determination, on the other hand, is "a fact-intensive, individualized determination" that "may directly affect downstream and offstream interests," for which "constitutional due process mandates a hearing . . . because of

[10] The issue in this appeal is not, as HC&S contends, HC&S AB at 21, the Commission's failure to act, but rather the majority's affirmative abdication of its duty to protect Native Hawaiian T&C and kuleana rights to the extent feasible. The majority recognized that "cold, free-flowing water is essential for kalo cultivation, which in turn is integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians and Hawaiians," FOF 60, and that "[r]estoration of mauka to makai flow to the streams is critical to the perpetuation and practice of Hawaiian culture in Nā Wai `Ehā," FOF 57, but nonetheless affirmatively chose HC&S's profits over restoration of adequate flow to Nā Wai `Ehā, or indeed any flow at all to `Īao and Waikapū Streams. *See* Dissent at 2 (the majority gave "absolute priority to one of the private commercial users in this contested case").

the individual 'rights, duties, and privileges' at stake," *Waiāhole I,* 94 Hawai`i at 152, 119-20 n.15, 9 P.3d at 464, 431-32 n.15 (citation omitted).

In *Ko`olau Ag.,* this Court also examined the consequences of an erroneous WMA designation, and concluded that those consequences "do not indicate a need for judicial review because the rights of individual water users are fully protected in the permitting process." 83 Hawai`i at 493, 927 P.2d at 1376. That is not the case with an IIFS determination which, unlike a WMA designation, is not necessarily followed by a permitting process. As this Court explained in *Waiāhole I*, "instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependant upon instream flows[,]" and instream use protection "operates independently of the procedures for water use regulation." 94 Hawai`i at 148, 9 P.3d at 460.

Moreover, even where, as here, a permitting process will follow the IIFS determination, it is simply not true, as WWC apparently supposes, that "[i]n the surface water permit proceedings, kuleana users and Native Hawaiians will have the opportunity to request use permits for the instream and non instream uses," so "protection of those rights will follow" from the permitting determinations. WWC AB at 44. As WWC itself recognized in its petition requesting a contested case, the IIFS determine "the instream flows to be allocated *prior to the allocation of water under the water use permitting applications."* RA56: 2, 4 (emphasis added). *See also Waiāhole I,* 94 Hawai`i at 148, 9 P.3d at 460 (explaining that, for the instream use protection framework to fulfill its purpose, "[CWRM] must designate instream flow standards as early as possible, . . . and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values"). There is no permitting process for instream uses, and CWRM itself claims that "it would be [] inappropriate for the Commission to reevaluate the IIFS during the upcoming surface water use permit proceedings." CWRM AB at 50. Thus, by establishing the IIFS, the majority has *already* determined that it will allocate only 12.5 mgd to "protect and promote the entire range of public trust purposes dependent on instream flows" in Nā Wai `Ehā, *Waiāhole I,* 94 Hawai`i at 148, 9 P.3d at 460, and that *no* beneficial instream uses or public trust purposes, including "[t]he protection of traditional and customary Hawaiian rights" or "[t]he conveyance of irrigation and domestic water supplies to downstream

points of diversion" for kuleana users, HRS § 174C-3 (definition of "instream use"), need be accommodated with respect to `Īao Stream or Waikapū Stream.[11]

As demonstrated by the majority's decision in this case, the consequences of an erroneous IIFS determination are severe: traditional and customary Native Hawaiian rights and kuleana rights can be abridged or completely denied, and not only public trust uses, but entire streams, can be abandoned in favor of the private profits of the politically powerful. Indeed, this case serves as a perfect example of why it is this Court, and not CWRM, that has "the ultimate authority to interpret and defend the public trust in Hawai`i[.]" *Waiāhole I,* 94 Hawai`i at 143, 9 P.3d at 455. Appellees have failed to cogently distinguish *Waiāhole I,* because it is indistinguishable. Here, as with the Waiāhole IIFS determination, the contested case hearing on the IIFS Petition was required by constitutional due process because of the individual rights, duties and privileges at stake and, because the contested case hearing was required by law, this Court has appellate jurisdiction to review the majority's decision pursuant to HRS § 91-14.[12]

III.

THE MAJORITY'S IIFS DO NOT PROTECT TRADITIONAL AND CUSTOMARY NATIVE HAWAIIAN RIGHTS AND KULEANA RIGHTS TO THE EXTENT FEASIBLE

No Appellee, including CWRM, contends that the IIFS established by the majority protect T&C rights and kuleana rights to the extent feasible, because they so demonstrably do not. Not only did the majority fail to make any specific findings or conclusions regarding the feasibility of protecting these rights, as required by *Ka Pa`akai,* nothing in its Final Decision indicates that it gave any consideration whatsoever to its "obligat[ion] to ensure that it does not

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[11] The majority's caveat that CWRM will reassess the IIFS for the Nā Wai `Ehā streams if it determines that there are substantial changes in water needs, D&O at 190, provides no reassurance. The only IIFS CWRM has ever established on its own were the status quo IIFS. In this case, CWRM did not issue a Final Decision until six years after the IIFS Petition was filed. FOF 3.

[12] Appellees do not argue that the majority's decision is not a "final decision," or that OHA and the Community Groups did not follow all CWRM's rules for participation in a contested case. HC&S's argument that Appellants lack standing to appeal because they are not "aggrieved" by the majority's decision, HC&S AB at 22-23, is simply a reprise of its "heads I win, tails you lose" argument that, since HC&S and WWC had already dewatered the streams, Appellants could not be injured by a decision that restored any amount of water. Confronted with a similar argument in *Ka Pa`akai*, this Court flatly rejected it as "untenable," *id.*, 94 Hawai`i at 42, 7 P.3d at 1079, and should do the same here.

'abridge or deny' traditional and customary rights of Native Hawaiians," or kuleana rights, *Waiāhole I,* 94 Hawai`i at 153, 9 P.3d at 465 (citations omitted). (*See* Section III.A.) That the Hearings Officer was unable to persuade a majority of his fellow Commissioners that "the Commission has a duty to take feasible actions to reasonably protect native Hawaiian rights," Dissent at 3, is beyond appalling, but certainly provides considerable insight into the fundamental failings of the majority's decision.

Appellees do not and cannot dispute that is demonstrably feasible to restore more than 12.5 mgd to Nā Wai `Ehā for the protection of Native Hawaiian T&C rights, kuleana rights, and other public trust uses in Nā Wai `Ehā; indeed, even HC&S proposed a total IIFS of 16.5 mgd for Nā Wai `Ehā Streams, which included 4 mgd for `Īao Stream and 4 mgd for Waikapū Stream. RA336: 23, l. 25 – 24, l. 16; RA190: 57. Returning to the streams even just the average amount that the majority found HC&S alone diverted but did not put to reasonable-beneficial use (in other words, *wasted*) would allow restoration of 20 mgd. Appellees' only response is their synchronized mantra – that the majority "balanced" the instream values with the offstream uses – but by the majority's own description of its so-called "balancing," it did not even consider protecting T&C rights, kuleana rights, and other public trust uses to the extent feasible; what the majority called "balancing" was simply a numerical exercise to minimize the IIFS by maximizing HC&S's diversions enough to accommodate record drought conditions. (*See* Section III.B.)

Even after maximizing HC&S's offstream diversions to accommodate record drought conditions, it would *still* be feasible to restore more water to protect Native Hawaiian T&C rights, kuleana rights, and other public trust purposes by requiring HC&S to use Well No. 7 (which HC&S has practicably pumped since 1927) as an alternative to diverting 19 mgd of Nā Wai `Ehā water, at a cost far less than other farmers pay for water. *See* Dissent at 5-6 (demonstrating feasibility of IIFS for Nā Wai `Ehā totaling 29.4 mgd). Instead, the majority, with no substantial basis in the record, no clear findings of fact or conclusions of law, no cogent analysis, and no determination that HC&S had met its burden to demonstrate the lack of practicable alternatives, simply proclaimed that "the practicable alternative from Well No. 7 is *deemed* 9.5 mgd," COL 230, based on "uncertainties" regarding matters on which HC&S had the burden of proof. CWRM does not argue that restricting the practicability of Well No. 7 was ***not*** arbitrary and capricious; its only response is that "the consideration of practicable alternatives is

not an IIFS issue," CWRM AB at 47, which is plainly contrary to Hawai`i law. (*See* Section III.C.)

The majority was not nearly so accommodating of Native Hawaiians seeking to practice their culture and exercise their Native Hawaiian T&C and kuleana rights in Nā Wai `Ehā. Not only did the majority fail to protect their rights, or even consider the feasibility of protecting them, in its "balancing" of instream values and offstream uses, it refused even to recognize the kuleana rights of witnesses who came forward with uncontested evidence that their kuleana land was in kalo at the time of the Māhele and the amount of water needed to satisfy their kuleana rights. CWRM's explanation for refusing to recognize these undisputed rights was that it "was not required to." CWRM AB at 46-47. With respect to the amount of water needed for kalo cultivation, despite unanimous and uncontroverted testimony to the contrary, the majority determined that 1.71 mgd is sufficient to satisfy the current and future needs of all kuleana/T&C users in Nā Wai `Ehā, based on an obvious calculation error that was brought to the majority's attention but not corrected. CWRM's Answering Brief does not address this error. (*See* Section III.D.)

Finally, Appellees do not even acknowledge, let alone dispute, OHA's contention (OHA OB at 29-33) that the majority's refusal to increase the IIFS for `Īao and Waikapū Streams denied the rights of Native Hawaiian `ohana like the Ornellases, the Dueys, and the Pellegrinos to grow kalo on their kuleana and other ancestral lands in flagrant violation of CWRM's obligation "to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians." *Waiāhole I,* 94 Hawai`i at 153, 9 P.3d at 465 (citation omitted). (*See* Section III.E.)

A. The Majority Violated its Constitutional and Statutory Obligations by Failing to Make the Findings and Conclusions Mandated by *Ka Pa`akai*

Although the majority's Final Decision is devoid of any findings or conclusions regarding the feasibility of protecting Native Hawaiian T&C rights, CWRM gamely but fatuously argues that the majority nonetheless "properly considered" these rights. CWRM AB at 42. *See also* HC&S AB at 44. Even assuming for the moment that all CWRM is obligated to do is "consider" T&C rights before abridging or denying them, that "consideration" is nowhere evident in the majority's Final Decision, including in the sections addressing its purported "Balancing Instream Values and Noninstream Uses," *see* COL 247-256, and summarizing its "Conclusions," COL 257-262. CWRM thus argues that the majority's consideration was ***implicit*****:** "[s]uch matters [as protection of T&C rights and kuleana rights] are already

encompassed within the Commission's duty to consider the criteria listed in HRS § 174C-71(2)(D) and HAR § 13-169-40. And the Commission did so." CWRM AB at 43. According to CWRM's tortured paralogism, the public trust doctrine, the constitutional provisions protecting traditional and customary Native Hawaiian rights, and the specific provisions of the Code requiring protection of such rights are all "subsumed within the Commission's IIFS analysis under HRS § 174C-71 and HAR § 13-169-40." CWRM AB 44. Therefore, "[w]hen amending the IIFS, the Commission made a thorough balancing of both traditional and customary native Hawaiian practices and kuleana uses as required by law," *id.* at 45, notwithstanding that no such "thorough balancing" of traditional and customary rights or kuleana rights is actually articulated anywhere in the Final Decision.

As an initial matter, CWRM is simply wrong that the public trust doctrine is "subsumed" within the Code. In *Waiāhole I,* this Court pointed out that "[o]ther state courts, without the benefit of such constitutional provisions, have decided that the public trust doctrine exists independently of any statutory protections supplied by the legislature," and cited, *inter alia, Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc.*, 105 Idaho 662, 671 P.2d 1085, 1095 (1983) ("[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.")). 94 Hawai`i at 132, 9 P.3d at 444. Explaining that "[t]his view is *all the more compelling here*, in light of our state's constitutional trust mandate," the Court held that:

> [t]he Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible "outer limits," and justify its existence. To this end, although we regard the public trust and the Code as sharing similar core principles, we hold that *the Code does not supplant the protections of the public trust doctrine*.

Waiāhole I 94 Hawai`i at 132-33, 9 P.3d at 444-45 (emphases added).

Moreover, CWRM knows better than to claim that it made findings and conclusions implicitly, having been *repeatedly* admonished by this Court that its analysis must be clearly articulated. *See, e.g., Waiāhole I,* 94 Hawai`i at 164, 9 P.3d at 475 ("[a] reviewing 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" (citation and internal quotation marks omitted)); *In re Wai`ola O Moloka`i Contested Case Hearing,* 103 Hawai`i 401, 432, 83 P.2d 664, 695 (2004) (the "presumption of validity [of agency decisions affecting public trust resources] presupposes that the agency has grounded its decision in reasonably clear FOFs and COLs"); *In re Waiāhole Ditch Combined Contested Case Hr'g,* 105 Hawai`i 1, 20, 93 P.3d 643, 662 (2004) ("*Waiāhole II*") ("the Water Commission is duty-bound to articulate its analysis with reasonable clarity"); *In re Kukui (Molokai) Contested Case Hearing,* 116 Hawai`i 481, 174 P.3d 320 (2007) ("[c]larity . . . is all the more essential in a case such as this where the agency 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"). The majority's failure to make *express* findings regarding the feasibility of protecting Native Hawaiian traditional and customary rights, just like its failure to actually protect them, is a violation of CWRM's statutory and constitutional obligations.

In *Ka Pa`akai,* this Court discussed the legal and historical framework for the protection of traditional and customary Hawaiian rights, and recognized that, "[i]n order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable." *Id.*, 94 Hawai`i at 46, 7 P.3d at 1083. The Court therefore provided an analytical framework "in an effort to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" *Id.* at 46-47, 7 P.3d at 1083-84. Pursuant to that framework, a State agency making a decision that could affect traditional and customary Native Hawaiian rights

> must – *at a minimum* – make specific findings and conclusions as to the following: (1) the identify and scope of "valued cultural, historical, or natural resources" in the [] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (emphasis in original). *See also id.* at 50, 7 P.3d at 1087 (explaining that "the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection").

Appellees piece together a smattering of findings and conclusions in the majority's decision that reference the cultural and historic importance of Nā Wai `Ehā streams and the exercise of some of the traditional and customary Native Hawaiian rights associated with them, *see* CWRM AB at 45, HC&S AB at 45, but cannot identify a single finding or conclusion regarding *the feasibility of protecting those rights*. That failure is particularly appalling given the majority's recognition, for example, that restoration of flow to Nā Wai `Ehā streams is "critical" to the perpetuation and practice of Hawaiian culture in Nā Wai `Ehā, FOF 58, and that "cold, free-flowing water is essential for kalo cultivation, which in turn is integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians and Hawaiians. FOF 60.[13] In *Ka Pa`akai,* the fact that the agency "entered a handful of findings potentially implicating native Hawaiian rights," 94 Hawai`i at 47, 7 P.3d at 1084, did not excuse the failure to make specific findings or conclusions regarding the feasibility of protecting those rights. The Court held in *Ka Pa`akai,* and should hold here, that "the [majority's] findings of fact and conclusions of law are insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians," and CWRM, "therefore, must be deemed, *as a matter of law*, to have failed to satisfy its statutory and constitutional obligations." *Id.*, 94 Hawai`i at 53, 7 P.3d at 1090 (emphasis added).

B. The Majority's Purported "Balancing" Failed To Protect Native Hawaiian T&C and Kuleana Rights and Other Public Trust Uses to the Extent Feasible

As an initial matter, Appellees' contentions that an IIFS determination should be a black box balancing in which CWRM has unreviewable discretion to make "policy choices" that it need not articulate, and in which commercial users have no burden to demonstrate even that the water they divert from public trust uses is put to reasonable-beneficial use, *see, e.g.,* HC&S AB at 26-31, are not only directly contrary to the framework this Court established in *Waiāhole I,*

[13] As pointed out in OHA's Opening Brief (p. 23), the majority attempted to undermine some of the Hearings Officer's proposed findings of fact regarding the exercise of traditional and customary rights in Nā Wai `Ehā by prefacing them with "[a]ccording to testimony," or "[t]estimony contended." However, as the majority acknowledged, the testimony regarding limitations on Native Hawaiians' ability to exercise traditional and customary rights in Nā Wai `Ehā due to the dewatering of the streams was "uncontroverted." *See, e.g.,* FOF 49. "By reciting testimony, a court or agency does not find a fact *unless the testimony is unrebutted*, in which case the court or agency should so state." *Crown Point Development, Inc. v. City of Sun Valley,* 146 P.3d 573, 578 (Idaho 2007) (emphasis added).

they are not even properly before the Court on this appeal. In conclusions of law from which HC&S and WWC did not appeal, the majority correctly concluded that, "[e]ach offstream user must prove that each specific use is reasonable-beneficial[,]" COL 12, and that "the burden ultimately lies with those seeking or approving [private commercial] uses to justify them in light of the purposes protected by the trust," COL 15 (quoting *Waiāhole I,* 94 Hawai`i at 142, 9 P.3d at 454). Nor did HC&S or WWC appeal from the majority's conclusion that, "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'" pursuant to HRS § 174C-71(2)(D), it first needed to determine whether the diversions were "justifiable – i.e., reasonable-beneficial uses," because "[t]he importance of such uses cannot apply to water that may be used in an unreasonable manner and/or amount, which would be contrary to the public trust's duty of both protection and maximum reasonable and beneficial use, COL 11, *supra,* and the Commission's duty to uphold that trust." COL 42.

Having identified the appropriate standards, the first step in the majority's analysis was to determine the extent to which the current and potential offstream uses were reasonable-beneficial, which also required it to consider the extent to which losses could be mitigated, and the extent to which there were practicable alternative sources. *See, e.g.,* COL 31-36, 94-123. With respect to HC&S, which diverted an average of 49.4 mgd from Nā Wai `Ehā, FOF 283, 286, the majority concluded, after arbitrarily adding five percent to Dr. Fares's water duty calculation, COL 91, and increasing HC&S's acreage by the 300 acres of scrub land that was formerly used to dispose of Maui Land and Pine's wastewater, COL 92, and adding 2.0 mgd as "assume[d]" system losses, COL 229, that HC&S's reasonable-beneficial current and future use, before considering the practicability of using Well No. 7, was only 29.81 mgd (actually 29.66 mgd, *see* fn.8). In other words, HC&S was diverting 19.6 (actually 19.8, *see* fn.8) mgd from Nā Wai `Ehā that it was not putting to reasonable-beneficial use, *which is more than the estimated median (Q_{50}) flows of North Waiehu, South Waiehu, and Waikapū Streams*, ***combined.***[14]

Having "deemed" Well No. 7 to be a practicable alternative for 9.5 mgd, COL 230 (*see* Section III.B, *infra*), the majority determined that the total reasonable-beneficial current and

[14] The estimated median flows of North Waiehu Stream, South Waiehu Stream, and Waikapū Stream, respectively, are 3.1 to 3.6 mgd, FOF 113, 2.4 to 4.2 mgd, FOF 119, and 4.8 to 6.3 mgd, FOF 132, for a combined total of 10.3 mgd to 14.1 mgd. The median flow of `Īao Stream is 25 mgd. FOF 126.

future offstream use of Nā Wai `Ehā water was 28.42 (28.27) mgd. D&O, p. 216. Even rounding up to 30 mgd to address the calculation error regarding the `Īao-Waikapū Fields (*see* fn.8) and to double the erroneous under-allocation for current and future kuleana use (*see* Section III.D.), when streamflows are at median, or typical, levels of 71.3 mgd, *see* FOF 97, D&O at 212, more than 40 mgd could be restored to Nā Wai `Ehā streams. Even after the majority put Well No. 7 off limits entirely except during drought periods, more than 30 mgd could be restored to Nā Wai `Ehā during typical flow conditions.

The majority never explained, and CWRM does not address in its Answering Brief, why it was not feasible to restore more than 12.5 mgd to protect Native Hawaiian T&C rights, kuleana rights, and other public trust purposes in Nā Wai `Ehā which, unlike HC&S, do not have an alternate source of water. The majority did not address either of the proposals in the Hearing's Officer's dissent, did not require the restoration of the 20 mgd HC&S wasted, or even the 16.5 mgd HC&S itself determined it could give up.

Instead, and without explaining why, the majority concluded that "[t]he balancing between instream values and non-instream uses must not only evaluate the balance when average uses are considered, but also what the balance might be at the high end of the irrigation requirements." COL 247. What the majority called "Balancing Instream Values and Noninstream Uses," COL 247-256, however, was not "balancing" at all, and conspicuously omitted any mention of any "instream value." It patently did not, as HC&S contends, assign "due weight to the interest of stream restoration," HC&S AB at 31; to the contrary, there is no indication that it assigned ***any*** weight to stream restoration. It was simply the majority's calculation of which of the three USGS controlled release levels, arbitrarily identified by the majority as its range of choices for the IIFS, would accommodate HC&S's irrigation needs in the driest year in the 54-year period of rainfall data that Dr. Fares used. *Id.; see also* OHA OB at 24-26. Even under the extreme drought scenario, the majority still had to fudge the numbers by limiting Well No. 7 to 9.5 mgd because, absent that limitation, restoration of 29.4 mgd would be feasible, and would accommodate HC&S's needs even during drought conditions. *See* Dissent, p. 5.

HC&S contends that stream restoration is a "policy judgment" entitled to deference, HC&S AB at 31, but deference to agency decisions "supposes that the agency has grounded its decision in reasonably clear FOFs and COLs." *Wai`ola,* 103 Hawai`i at 432, 83 P.3d at 695; *see also Waiāhole II,* 105 Hawai`i at 11, 93 P.3d at 653. Nothing in the Final Decision explains

what "policy judgment" the majority made in determining that, although it was demonstrably feasible to set the IIFS at a level that would fulfill CWRM's "duty to protect and promote the entire range of public trust purposes dependent on instream flows," *Waiāhole I,* 94 Hawai`i at 148, 9 P.3d at 460, it would instead minimize the IIFS to a level expressly calculated to protect a private commercial diverter from record drought, essentially using public trust resources to provide drought insurance (which HC&S already has).[15]

HC&S suggests that the "policy" was to enable HC&S to remain economically viable, HC&S AB at 29, 46, but even the majority claimed not to be impressed by HC&S's "all-or-nothing" scenario, COL 238, in which it claimed dire consequences to the Maui community "***if*** it were to cease operations as a result of significant reductions in the availability or irrigation water," HC&S AB at 7, with no analysis of the level of reductions that would lead to that result. As the Hearings Officer observed, "the relevant issue requiring analysis is the economic impact of decreasing the supply, or increasing the cost, of water to approximately 15 percent of HC&S's fields," and, "[i]n the absence of any information supporting its doomsday scenario, the Commission could not assume that HC&S's assertion overcame the presumption in favor of the public trust resource, the streams of Nā Wai `Ehā." Dissent at 6, 7. The Hearings Officer's own calculation was that a 29.4 mgd restoration would "equate to only 1.6 to 2.0 percent of its irrigation requirements for its entire 35,000-acre operations, and then only on an occasional basis." Dissent, 6-7.

"[E]ven when trust purposes themselves have no absolute priority, [the majority gave] absolute priority to one of the private commercial users in this contested case." Dissent at 2. As a result, "[t]he amended IIFS were the amounts of water remaining after *all* offstream requirements were met; i.e., a residual – not a balanced approach[,]" which "does not rise even to the level of the 'least protection feasible.'" *Id.* at 2, 3.

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[15] A&B's 2010 Form 10-K filed 2/25/11, of which the Court is asked to take judicial notice, reports that its Agribusiness sector earned an operating profit of $6.1 million in 2010, which included a $4.9 million gain "related to a crop disaster relief payment for drought experienced in prior years." *See* Alexander & Baldwin Inc 10-K report filed on 2/25/2011, *available at* http://www.alexanderbaldwin.com/investor-relations/financial-reports/sec-filings.php?p=4&g=Show All, p. 30. The fact that HC&S has returned to profitability suggests that its 2008 and 2009 harvest reduction program, which it planned in 2007 to address prior poor crop management decisions, and which caused some of the 2008 and 2009 losses that HC&S blamed on drought, was successful. *See* OHA OB at 14 & fn.12.

C. The Majority Erred By Arbitrarily Restricting HC&S's Use of Well No. 7 as an Alternative to Draining Nā Wai `Ehā Streams

CWRM makes no attempt to substantively defend the majority's arbitrary determination that only 9.5 mgd from HC&S's Well No. 7 is a practicable alternative to draining Nā Wai `Ehā streams, which are the sole source of water for Native Hawaiian T&C rights and kuleana rights in Nā Wai `Ehā. *See* OHA OB at 33-44. Instead, CWRM contends that, "[w]hile practicable alternatives may be considered in ***other proceedings,*** neither the statutes nor the administrative rules require an analysis of practicable alternatives ***in setting the IIFS.***" CWRM AB at 48 (emphasis in original). Therefore, "the Commission did not err when it did not consider Well No. 7 as a 'practicable alternative'," but Well No. 7 "had a place in the setting of the IIFS" (particularly given that CWRM's own rules require it to consider practicable alternatives when setting the IIFS, *see* HAR § 13-169-20(5)), so "[t]he Commission considered Well No. 7 and concluded that it could provide 9.5 mgd of irrigation water for HC&S." CWRM AB at 48.

Perhaps that makes sense to CWRM. More likely, CWRM is simply at a loss to explain the majority's reasoning due to the lack of cogent findings of fact and conclusions of law, and is trying to obfuscate the fact that it is making the same argument that WWC makes in one sentence – that in the IIFS proceeding, offstream diverters "had no obligation to establish that there were no practical alternatives to their uses under the Water Code." WWC AB at 22.[16] If

[16] Trying to "decode" the rest of WWC's argument regarding Well No. 7 is a frustrating exercise that ultimately leads nowhere. WWC claims that COL 230 is based on findings and conclusions to which OHA did not object, and thus OHA did not meet its "heavy burden" of showing that COL 230 is clearly erroneous. WWC AB at 40-41. Examining the findings and conclusions cited by WWC in support of COL 230, however, demonstrates the futility of trying to make sense of WWC's argument. WWC cites FOF 107 (concerning the flow of Waihe`e River), FOF 108 (concerning the elevations of the diversion structures on Waihe`e River), FOF 215 (that in the 1980s, WWC changed the kuleana delivery system by replacing ditches with pipes), FOF 494 (that from 1927 until the 1980s, Well No. 7 was HC&S's primary source of irrigation water for the Waihe`e-Hopoi Fields) and FOF 495 (that from 1927 to 1985, HC&S pumped an average of 21 mgd from Well 7, but has minimized its use unless it needs it and then pumps it heavily). How those findings support COL 230 is left unexplained. WWC also cites COLs 103 to 107, all of which are either findings of fact or recitations of HC&S statements. COL 103 is a summary of several findings of fact regarding HC&S's use of Well 7 and its configuration, which facts OHA does not challenge; COLs 104, 105 and 106 recite statements made by HC&S, and each is correct in that HC&S did make the statements attributed to it; and COL 107 is a finding of fact regarding the amount of recycled county wastewater that is unused and disposed of. Again, WWC makes no attempt to explain how these findings and non-findings support the majority's conclusion that Well No. 7 is a practicable alternative for only 9.5 mgd, which is far from

so, the attempt to muddle the argument is understandable, because as CWRM well knows, it is simply contrary to law. This Court has repeatedly explained that the requirement that offstream diverters demonstrate the absence of practicable alternative water sources "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*." *Waiāhole II,* 105 Hawai`i at 15, 93 P.3d at 657 (quoting *Waiāhole I,* 94 Hawai`i at 161, 9 P.3d at 473 (emphasis added). *See also Waiāhole I,* 94 Hawai`i at 143, 9 P.3d at 455 (explaining that, "[s]pecifically, the *public trust* compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, *including the use of alternative sources*" (emphases added)); *Kukui (Molokai),* 116 Hawai`i at 495, 174 P.3d at 334 (stating "[t]his court has, on multiple occasions, expounded on the necessity of considering alternative sources of water in balancing the distribution of a scarce public resource").

HC&S likewise has little to say in defense of the majority's arbitrary limitation on the practicability of Well No. 7. Like CWRM, HC&S cannot point to a scintilla of evidence of a "strain" on the Kahului Aquifer, and notably makes no attempt to address, or even mention, the majority's reliance on the current sustainable yield of the aquifer. COL 230. As OHA pointed out in its Opening Brief, CWRM has never considered designating Kahului Aquifer as a WMA and, despite its purported new concerns regarding a "strain" on Kahului Aquifer, and the order of magnitude exceedance of the nominal sustainable yield, has imposed no restrictions on HC&S's pumping from the aquifer *except* pumping for the purpose of replacing Nā Wai `Ehā water. OHA OB at 39-41. HC&S and its parent, A&B, hope to keep it that way. Given the majority's lack of encouragement for A&B's plan to build a surface water treatment plant for 9 mgd of Nā Wai `Ehā water, *see, e.g.,* COL 62, about half of which would be used as "source credits" for A&B's development projects on HC&S land with the balance sold to MDWS for municipal use (assuming an agreement could be reached with WWC), RA328:18, l. 13 – 21, l. 21, A&B is now exploring, as an alternative to Nā Wai `Ehā water, new wells in the purportedly "strained" Kahului Aquifer as the water source for its Wai`ale master planned community.[17] The irony presumably needs no explanation.[18]

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apparent.

[17] The Court is requested to take judicial notice of the *Wai`ale Draft Environmental Impact*

HC&S's primary argument regarding Well No. 7 is that "reconfiguring the well to expand its service area would be costly, and CWRM correctly considered cost as a factor in analyzing whether increased reliance on Well No. 7 is a practicable alternative." HC&S AB at 51. The argument is disingenuous, and HC&S knows it, because there is no need to reconfigure Well No. 7 to "expand its service area." Despite HC&S's relentless and continuing attempts to sow confusion, *see, e.g.,* RA86:36 at 37, ¶ 5; RA321:41, l. 9 – 42, l. 1, it is clear that, as presently configured, Well No. 7 can pump 14 mgd to HC&S's Waihe`e distribution ditch, from which it can reach all of the Waihe`e-Hopoi Fields except Field 715 and, *in addition* to that 14 mgd, can also pump water directly to the 800 acres comprising Fields 904, 908, and 909. FOF 496, COL 103, 104. That is why, with Well No. 7 configured exactly as it is now, HC&S was not limited to 14 mgd from Well No. 7 but pumped an average of 21 mgd from 1927 through 1985. FOF 495, 497. If HC&S limited itself to the inflated 5,958 gad that the majority found to be reasonable, Fields 904, 908, and 909 would use 4.77 mgd. Thus, *without any reconfiguration*, and without the need for an additional booster pump, Well No. 7 can pump 18.77 mgd to the Waihe`e-Hopoi Fields (excluding the 175-acre Field 715).[19]

HC&S accuses OHA of excluding from the capital costs the $777,650 HC&S claims would be required to upgrade its electrical equipment to meet MECO's standards. HC&S AB at 52. Actually, it was not OHA, but the CWRM majority, that disregarded those costs. Although

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Statement dated May 2011, Volume 1 of 2, http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Maui/2010s/2011-06-08-DEIS-Waiale-Volume-1.pdf, pp. 37-38.

[18] Also ironic, but on a less profound scale, is that HC&S accuses OHA of "misrepresentation" for saying that water from Kahului Aquifer is already non-potable, when it should have more accurately said that water HC&S pumps from the Kahului Aquifer using Well No. 7 is non-potable. FOF 494. *See* HC&S AB at 53, fn.24. Yet, HC&S accuses OHA of "semantic nit-picking" for pointing out the majority's complete lack of findings to support its conclusions. *Id.* at 35, fn.13.

[19] The capital costs of increasing the capacity of Well No. 7 to 28 mgd, HC&S AB at 52, are thus irrelevant. OHA addressed the capital costs in its Opening Brief only to demonstrate that, as this Court admonished in *Waiāhole I,* lump sum cost estimates of "millions of dollars" have "little meaning without evidence and analysis of the actual per-unit breakdown of those costs relative to the cost of [] other alternatives." 94 Hawai`i at 164-165, 9 P.3d at 476-477. OHA also pointed out, however, with the current infrastructure, 19 mgd (rounded up from 18.77 mgd) could be supplied to the Waihe`e-Hopoi Fields. OHA OB at 36 & fn.32. *See also* Dissent at 3.

the majority "found" that "HC&S concluded" that it would cost $777,650 to upgrade its electrical system, FOF 522, the majority did not adopt HC&S's conclusion, and instead concluded that pumping 9.5 mgd from Well No. 7 "will not require capital costs, only the cost of pumping." COL 230. HC&S did not appeal from that finding of fact (which was incorrectly denominated as a conclusion of law).[20]

HC&S also claims that it does not have sufficient electrical power to run the pumps for Well No. 7 on a consistent basis, because its firm power contract with MECO subjects it to monetary penalties if it fails to deliver the amount of power it is obligated to provide. HC&S AB at 52-53. Again, this claim has already been rejected by the majority, which declined to adopt HC&S's proposed FOF 134 (that the MECO power purchase agreement was a constraint on HC&S's ability to use internally-generated electrical power for pumping). *See* RA158: 355-56. There was good reason for the majority to reject that proposed finding. As pointed out in OHA's Opening Brief, the evidence showed that, during the first thirteen years after HC&S entered the power purchase agreement with MECO, which has never been amended other than to extend the length of its term, HC&S had sufficient internally-generated electrical power to pump an average of 84.1 mgd from all of its wells, and HC&S has identified no evidence in the record that, during that time when it was pumping 84.1 mgd, it was ever unable to meet its contractual obligations, or required to pay monetary penalties, to MECO. *See* OHA OB at 35 & fn.30. HC&S cut its pumping in half in 2004, not because of constraints on electrical power, but in order to sell more electrical power to MECO and reap the windfall of higher fuel costs, which increased the amount MECO was required to pay HC&S for electrical power. *Id.* at 35.

HC&S points out that it "raised the concern" (by which it apparently means it made an argument without adducing any evidence) during the contested case hearing that increased pumping of Well No. 7 could increase the salinity of the water. HC&S AB at 53. In its Answering Brief, HC&S argues at length about the "general principle that sustained pumping can increase the salinity of the pumped water over time," and quibbles about salinity data collected prior to 1942 by USGS. HC&S AB at 53-54. Given that the majority did not cite increasing salinity as its grounds for arbitrarily "deeming" Well No. 7 to be a practicable

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[20] HC&S still does not understand why lump sums are not helpful to the Court or, indeed, to HC&S. As a further example, *even if*, contrary to the majority's conclusion, MECO required HC&S to make upgrades to its electrical equipment costing $777,650, that capital cost, amortized over 10 years at 8%, would translate to a unit cost of only ***$0.012 per thousand gallons*** based on the 18.77 mgd that HC&S could pump without additional infrastructure.

alternative for only 9.5 mgd, it is not clear what HC&S's point is. That aside, the fact remains that the ***only*** evidence in the record concerning the salinity of water drawn ***from Well No. 7*** over time is the table on page 220 of that 1942 U.S.G.S. Report. RA100:58.[21] The only reason HC&S finds it necessary to argue about its interpretation of a 70-year old report that was mentioned in a footnote in OHA's Opening Brief is that HC&S failed to introduce evidence that is admittedly within its possession to support its argument that sustained pumping of ***Well No. 7*** will cause the salinity of the pumped water to increase. HC&S collects and maintains salinity data for its wells that are actively pumped, including Well No. 7. RA321:109, ll. 8-19; RA325:97, ll. 17-20. As OHA pointed out in its Opening Brief, the Well No. 7 salinity data from 1996 and 2000, when HC&S pumped Well No. 7 heavily for sustained periods, would either confirm HC&S's salinity argument or it would not. OHA OB at 37. The fact that HC&S chose not to introduce that evidence gives rise to the inference that it would not. *See, e.g., Morris v. Mitsubishi Motors North America, Inc.,* --- F.Supp. 2d ---, 2011 WL 1085873 (E.D. Wash.) (explaining that, "[w]here relevant evidence that would properly be a part of a case is within the control of a party in whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him" (citations, internal quotation marks and brackets omitted)).

Finally, HC&S argues that COL 230 is supported by the 2007 USGS report which stated that recharge was greater on sugar cane fields than on adjacent, non-agricultural lands, which USGS attributed to high irrigation rates on the sugar cane fields. OHA obviously does not dispute that there is higher recharge on irrigated land than on non-irrigated land, but as this Court stated in *Waiāhole I,* "general findings on the effects of irrigation on leeward aquifers," and others, "[do not] answer, with any reasonable degree of clarity, why it is not practicable . . . to use groundwater . . . as an alternative to diverting the sole source of water for windward streams[.]" 94 Hawai`i at 165, 9 P.3d at 477. Moreover, as HC&S itself has argued to CWRM (but does not acknowledge in its Answering Brief), and the USGS has documented, irrigation and rainfall are not the only sources of recharge to the Kahului Aquifer, which also receives flow

[21] HC&S apparently has difficulty reading or interpreting the table, so OHA has attached it as an appendix with the columns specific to Well No. 7 highlighted. What those columns show is that despite sustained heavy pumping, the salt content in water pumped from Well No. 7 decreased from 45 grains per gallon in 1927 to 31 grains per gallon in 1941. RA100:58.

from other aquifers. RA158:17; RA102:5, 6. That may be another reason why the modeling by USGS in the specific area underlying the Waihe`e-Hopoi Fields does not show a substantial difference in recharge between the 1980-1984 period, when HC&S was using flood irrigation, and the 2000-2004 period, when it was using drip irrigation. RA142:87, 91. What that modeling *does* show, but HC&S also does not address, is that during the same period, as water previously used by WWC was transported out of the watershed to HC&S's fields, recharge over the `Īao and Waihe`e Aquifers decreased dramatically. *Id.*

Arbitrarily limiting the use of Well No. 7 to 9.5 mgd directly reduced the restoration of water to Nā Wai `Ehā, based on nothing more than the majority's purported "uncertainties" about an imagined "strain" on the Kahului Aquifer. COL 230. Nothing in the Final Decision allows the parties or this Court to track the steps by which the majority reasoned that it should sacrifice public trust uses in Nā Wai `Ehā, including Native Hawaiian traditional and customary rights and recharge of Central Maui's primary drinking water source, due to "uncertainty" about the Kahului Aquifer, which has few if any users other than HC&S, has another source of recharge, and which CWRM has never before shown any concern about (and even now is not concerned enough about to limit HC&S's pumping from other wells in the aquifer). This Court has instructed CWRM that it "may compromise public rights in the resource pursuant *only to a decision made with the level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.*" *Waiāhole I,* 94 Hawai`i at 143, 9 P.3d at 455. The majority's Final Decision falls abysmally short of that standard.

D. The Majority Refused Even to Recognize Proven Kuleana Rights

The majority apparently supposed that if it failed to formally recognize kuleana rights, it would be free to impair them in setting the IIFS. Appellees offer no cogent defense of the majority's refusal to recognize the appurtenant rights of kuleana users who came forward with, and were subject to cross-examination on, uncontested evidence of their kuleana rights[22] and the

[22] These kuleana rightholders include Stanley Faustino (RA68:147-61); William "Kā'ū" Frietas (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); Brian Sarasin (RA96:47-52); Cordell Chang (RA104:24-25; RA108:59-63); Gordon Schwartz (RA118: 64-75); Maui Coastal Land Trust (RA68:162-223); Magdalen Ho'opi'i (RA92:1-44); Donnalee Singer (RA104:30-34; RA110:9-42); Alex

amount of water required to satisfy those rights. RA66:24-98. The evidence was obviously relevant to the determination of the amount of water needed in the streams for "conveyance of irrigation or domestic water supplies to downstream points of diversion," for the kuleana users, a beneficial instream use, HRS § 174C-3,[23] and the Code could not be clearer: the Commission "***[s]hall*** determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter." HRS § 174C-5(15).

The only reason given by the majority for failing to perform its mandatory duty was that no kuleana user had filed a petition, "as required by law." COL 53. The majority did not identify any "law" requiring a petition as the sole means of obtaining a determination of appurtenant rights, because there is none. Undaunted, in its Answering Brief CWRM simply substituted "application" for "petition" and disingenuously cited HRS § 174C-63[24] for the proposition that "[i]f OHA sought a determination as to specific appurtenant rights, it needed to file an application for a determination of appurtenant rights." CWRM AB at 47. According to CWRM, and notwithstanding its mandatory duty pursuant to section 174C-5(15), "[t]he Commission was not required to determine appurtenant rights," apparently because it says so.

Buttaro (RA88:168-73); Henry Maio (RA94:51-58); Evelyn Brito (RA88:151-67); Winifred Cockett (RA88:174-81); Alfred Santiago (RA96:24-46); Vernon Bal (RA88:144-50); Francis Allan Ornellas (RA58:43-46; RA58:100-05); Hōkūao Pellegrino (RA58:50-58; RA58:109-33); Warren Soong (RA116:157-64); Russel Gushi (RA90:57-66; RA304:17(l.12)-18(l.16)); Crystal Alboro (RA68:58-73); and Teruo Kamasaki (RA70:74-90), most of whom are Native Hawaiian and thus also have T&C rights.

[23] *See also* Douglas A. 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) (explaining that "[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").

[24] HRS § 174C-63 provides:

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

(emphasis added).

As CWRM knows (or certainly should know), section 174C-63 has nothing to do with "petitions" or "applications" for appurtenant rights determinations pursuant to section 174C-5(15).[25] Section 174C-63 is one of the provisions that "assur[es] appurtenant rights" as required by Article XI, section 7 of the Hawai`i constitution, by requiring the Commission to issue a water use permit to a kuleana rightholder "upon application," with no discretion to deny the permit. Of course, that simply begs the question of how one goes about getting CWRM's determination, pursuant to section 174C-5(15), that the water use permit application is based on "an existing appurtenant right." HRS § 174C-63. Indeed, CWRM's apparent confusion regarding these critical provisions of the Code it is charged with administering may explain why it has never made a single determination of kuleana rights pursuant to section 174C-5(15).

CWRM's further argument that the amended IIFS cannot diminish or extinguish appurtenant rights because the Code preserves such rights, CWRM AB at 47, is patent fatuity. Although obviously an IIFS cannot *extinguish* kuleana rights, it is equally obvious that the IIFS in Nā Wai `Ehā can and do *abridge* kuleana rights, particularly on `Īao and Waikapū Streams, by allowing HC&S and WWC to continue diverting the water source and thus depriving the kuleana rightholders of the water necessary to actually exercise their rights.

HC&S contends that recognition of appurtenant rights would be "premature" because it would "risk prejudice to kuleana landowners who wait until the WUPA stage to petition for determination of their appurtenant rights." HC&S AB at 45. As HC&S knows, however, kuleana rights are not "first come, first served," and nothing in the permitting part of the Code "shall be construed to deny the exercise of an appurtenant right by the holder thereof ***at any time***." HRS § 174C-63. As even the majority recognized, kuleana rights are protected by the Constitution and the Code whether or not they are being exercised at the time of WMA designation, and the exercise of kuleana rights has priority over other uses in the issuance of a water use permit. COL 23, 24. Indeed, in their 1994 Temporary Water Agreement, HC&S and WWC acknowledged that, in addition to the approximately 60 kuleana users on the ditch system, "[t]here may be unexercised Kuleana rights which may be exercised in the future. This Kuleana water has priority over any other uses, and the allocation between the parties to this agreement . . . will be calculated after deducting the Kuleana water use." RA128:43. Of course HC&S and WWC were simply restating what was decided in one of Hawai`i's earliest water cases: that the

[25] Among other reasons, because the adoption of HRS § 174C-63 preceded the adoption of HRS § 174C-5(15) by almost 20 years.

rights of the sugar plantations to divert water from Nā Wai `Ehā were "subject to the rights of tenants, which were afterwards confirmed by the Land Commission" to "certain taro patches and the water necessary for their cultivation." *Peck v. Bailey,* 8 Haw. 658, 662 (Hawai`i King. 1867). Given the priority of kuleana use under the Hawai`i Constitution and the Code, as recognized by HC&S and WWC since their 1924 Agreement, RA104:78-79, HC&S's contention that increasing the IIFS would make less water available for kuleana users, *see, e.g.,* HC&S AB at 45, is a canard.

With respect to the majority's glaring error in the calculation of the water needs of current and future kuleana users, *see* OHA OB at 28-29, only WWC addresses it, and in a way that is particularly ironic. The majority erroneously determined that the total 6.84 mgd that WWC reportedly delivers to kuleana users is a reasonable amount for all current and projected acreage in kalo lo`i in Nā Wai `Ehā, COL 220, even after acknowledging the undisputed evidence that it is not, FOF 234, 296, 335. The discrepancy was not, as the majority supposed, due to "substantial losses." FOF 336. It was because what the majority *actually calculated* was current and projected use of the kuleana witnesses who testified, FOF 332, not the current and future use of all kuleana users in Nā Wai `Ehā. For WWC to argue that "there is no reliable or probative evidence in the record on the number of 'many other `ohana'" with whom the testifying kuleana users must share the 6.84 mgd, WWC AB at 34, overlooks the fact that tables 3 through 7, D&O at 204-209, are from WWC's *own exhibits* identifying by name and TMK number other kuleana users on WWC's system. *See also* RA188:262-67. Knowing that the calculation was erroneous, and that 1.71 mgd is clearly not enough to satisfy the kuleana rights of all current and future kuleana users, the majority simply ignored it.

Appellees have sought in unison to exploit the stipulations regarding the implementation of the South Waiehu IIFS to their advantage, but their efforts neither advance their positions nor undermine Appellants'. Given the limited USGS flow data for South Waiehu Stream, *see* FOF 119, in proposing and establishing the IIFS, CWRM and the parties relied in part on the estimates provided by HC&S, which has controlled the intake on South Waiehu Stream since at least 1924, *see* RA104:44, 79, that it diverts "from a low of 2-3 mgd during dry periods to a high of 10-15 mgd during wet periods," and provides 0.25 mgd of that to kuleana users. *See* FOF 187, COL 164. The Hearings Officer recommended that the IIFS for South Waiehu Stream be set at 1.3 mgd, RA188:184, 217-18, which HC&S did not propose to change in its "alternate" IIFS proposal, RA336:23, l. 25 – 24, l. 16; RA190:57. The IIFS was ultimately

set at 0.9 mgd, D&O at 186, and, shortly before the implementation date, South Waiehu kuleana users who received water from HC&S expressed concern about their continued ability to receive water. RA378:1. It was not until the IIFS was actually implemented, when the flow in South Waiehu Stream was 1.01 mgd, that HC&S informed Appellants that its diversion structure could not precisely enough regulate to leave 0.9 mgd in the stream while diverting 0.1 mgd for the kuleana users, and that, even if such regulation could be achieved, the configuration of the kuleana pipe required HC&S to divert double the amount that it provided to the kuleana users. RA206:42. Therefore, Appellants proposed and entered into the stipulations to extend the implementation of the South Waiehu IIFS until HC&S could address the limitations of the diversion infrastructure and CWRM could collect actual flow data. RA378:1. CWRM, who was responsible for collecting this information in the first instance, fails to explain how the stipulation proves that Appellants' "arguments are without merit," or that they "may have pursued stream restoration to the detriment of traditional and customary kuleana water users," CWRM AB at 40-41, propositions that are far from self-explanatory.

E. The Failure to Restore Flow to `Īao and Waikapū Streams Abridged Native Hawaiian T&C and Kuleana Rights and Violated the Public Trust

CWRM does not even acknowledge, let alone dispute, OHA's contention (OHA OB at 29-33) that the majority's refusal to increase the IIFS for `Īao and Waikapū Streams denied the rights of Native Hawaiian `ohana like the Ornellases, the Dueys, and the Pellegrinos to grow kalo on their kuleana and other ancestral lands, *see* OHA OB at 32-33, in flagrant violation of CWRM's obligation "to ensure that it does not 'abridge or deny' traditional and customary rights of Native Hawaiians." *Waiāhole I,* 94 Hawai`i at 153, 9 P.3d at 465 (citation omitted). CWRM makes no attempt to reconcile the majority's refusal to restore any flow to `Īao Stream or Waikapū Stream with its finding that "[r]estoration of mauka to makai flow to the streams is critical to the perpetuation and practice of Hawaiian culture in Nā Wai `Ehā," FOF 58, or that "cold, free-flowing water is essential for kalo cultivation, which in turn is integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians and Hawaiians," FOF 60.

Nor does CWRM explain the glaring contradiction between the majority's refusal to restore any flow to these streams and its conclusion that "establishing continuous stream flow from mauka to makai provides the best conditions for re-establishing the ecological and biological health of the waters of Nā Wai `Ehā." COL 243. With respect to WWC's IIFS

proposal, which included 1.4 mgd for `Īao Stream and 0.4 mgd for Waikapū Stream, the majority concluded that it "reverses [the] presumption [in favor of the streams] and burden of proof [on private commercial users to justify their uses in light of the purposes protected by the trust] by allocating only a minor portion of the lowest recorded stream flows to make up the entire amended IIFS . . . without explaining its 'reason and necessity'." COL 183 (citing *Waiāhole I,* 94 Hawai`i at 141, 9 P.3d at 453). Having reached that conclusion, and the further conclusion that, "[e]ven if WWC's reasoning were consistent with the law, none of WWC's proposed IIFS would result in continued mauka to makai flows," COL 184, 199,[26] the majority restored no flow at all to `Īao Stream or Waikapū Stream, and made no attempt to explain the "reason and necessity" for impairing T&C rights, kuleana rights, and other public trust purposes.

Rather than address the issues raised, CWRM's entire "argument" regarding the majority's refusal to increase the IIFS for `Īao and Waikapū Streams consists of a single paragraph that simply restated three of the majority's conclusions of law and proclaimed that CWRM "absolutely complied with its public trust duty and the law in amending the IIFS, and under the deferential abuse of discretion standard, its Decision should be affirmed." CWRM AB at 38. However, as this Court has had occasion to remind CWRM before, deference to agency decisions "supposes that the agency has grounded its decision in reasonably clear FOFs and COLs." *Wai`ola,* 103 Hawai`i at 432, 83 P.3d at 695; *see also Waiāhole II,* 105 Hawai`i at 11, 93 P.3d at 653. The only thing "reasonably clear" about the majority's findings of fact and conclusions of law regarding its refusal to restore flow to `Īao and Waikapū Streams is that they are irreconcilably contradictory, and that they do not address the Native Hawaiian `ohana living along these streams who depend on their waters in order to exercise their T&C rights and kuleana rights.

HC&S at least tried to fashion an argument but, like CWRM, did not address the majority's outright denial of T&C rights and kuleana rights on `Īao and Waikapū Streams.

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[26] Although the majority castigated WWC for failing to "explain why it concluded that such a small portion of the lowest flows recorded should comprise the amended IIFS," COL 179, CWRM fails to even acknowledge, let alone explain, its conclusion that not only should no flow whatsoever should be added to the IIFS for `Īao and Waikapū Streams, but that the IIFS for these streams should instead be amended to allow ***further*** diversions. *Compare* Dec. at 186-187 (amended IIFS for `Īao Stream and Waikapū Stream) with HAR § 13-169-48 (1988 "status quo" IIFS), *and see* OHA OB at 29, fn.25. CWRM continues to blithely maintain that it "did not amend the existing IIFS for `Īao Stream and Waikapū Stream," CWRM AB at 38, notwithstanding that it plainly did.

HC&S AB at 34-38.[27] HC&S argues that the majority "reasonably concluded" that the restorative potential of `Īao and Waikapū Streams was low whereas the risk to offstream uses is high, and it was within CWRM's "statutory discretion" to strike the balance as it did. HC&S AB at 35 (citing COL 245). There are at least two obvious problems with that argument. First, of course, CWRM has no "statutory discretion" to abridge or deny Native Hawaiian T&C rights or kuleana rights, or to ignore all instream values other than potential for reproduction of amphidromous species when considering an IIFS petition, or to sanction the complete dewatering of streams. Quite the contrary. CWRM is statutorily mandated to: make "adequate provision" for, *inter alia,* "the protection of traditional and customary rights," HRS § 174C-2(c); ensure that T&C rights and kuleana rights are not "abridged or denied," HRS §§ 174C-101(c) & (d), 174C-63; weigh the importance of all "present and potential instream values" (which include, among many others, the exercise of traditional and customary Native Hawaiian rights and conveyance of water to downstream kalo growers) when considering an IIFS petition, HRS §§ 174C-71(2)(D); and "protect, enhance, and reestablish, where practicable, beneficial instream uses of water," HRS § 174C-71(4). Second, 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 I,* 94 Hawai`i at 163, 9 P.3d at 475 (emphasis added). Nowhere in the majority's decision (and certainly not in COL 245) did it purport to conclude that the risks of harm to the offstream diverters outweighed the benefits of restoring flow to `Īao and Waikapū Streams.

The grounds ***actually*** cited by the majority for failing to restore any flow at all to `Īao Stream was that "`Iao Stream's reproductive and full restorative potential is very limited or prohibited entirely due to the extensive channelization of the 2.5 miles of streambed above the mouth and the 20-foot vertical drop." COL 260. HC&S's attempts to distract attention from that conclusion are understandable, because there is no support for it in the record. Certainly, as HC&S contends, the record contains evidence of the channelization, which removes usable habitat for fish or shrimp, HC&S AB at 35*,* but that evidence does not address "reproductive

[27] WWC's argument regarding the IIFS for `Īao and Waikapū Streams, to the extent decipherable, varies little from its template: essentially that the conclusions of law regarding `Īao and Waikapū Streams (identified only by number) involve mixed questions of fact and law and are not clearly erroneous. WWC AB at 25-28. Like CWRM and HC&S, WWC does not dispute that the IIFS established by the majority for `Īao and Waikapū Streams abridge and deny Native Hawaiian T&C and kuleana rights. *Id.*

potential." It is also clear that COL 260 is not based on HC&S's expert's theory that "the concrete channel negatively affects recruitment ***irrespective*** of the flow of water in the channel," *id.* (emphasis added) (which theory is not supported, in any event, by either the cited testimony,[28] or the comparison to Honokohau Stream[29]), because the majority obviously did not credit Mr. Ford's theory and specifically concluded that it was unsupported by any data or survey. *See* FOF 591 – 595, COL 200.

Indeed, COL 260, regarding the limitations or prohibition on `Iao Stream's "reproductive potential," has nothing to do with recruitment at all. The majority concluded that "`Īao Stream ***can be restored to enhance recruitment and increase stream life***, but its reproductive potential is severely limited because of extensive channelization[,]" COL 245 (emphasis added), clearly making a distinction between recruitment and what it also called "reproductive (spawning) potential." COL 216. It is hardly "semantic nitpicking," as HC&S claims, HC&S AB at 35, n. 13, to point out the complete absence of any finding of fact to support the majority's pure speculation that the channelized area "may not support spawning,"

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[28] HC&S's consultant, Dr. Lindstrom, testified that it would require flow in the channelized portion of the stream in order for "bidirectional traffic" (i.e., larval drift down the stream and recruitment of post-larvae up the stream) to happen, and acknowledged that, if there was no water flowing in the channelized section, he could not say that it was the channelization that was impeding recruitment, but, as between channelization and lack of water, "I think they both affect it [recruitment] negatively, just in my opinion." RA334:39, l. 12 – 41, l. 3. Mr. Ford, HC&S's paid expert, was unaware of any study in Hawai`i demonstrating that channelization was more important than flow in terms of passage of amphidromous species, but testified that he "felt" that the channelized section was "very detrimental," and that there would be natural recruitment if the channelization was not there (which assumes, of course, that there would be flow). RA334: 151, l. 5 – 152, l. 25.

[29] HC&S cites Honokohau Stream in West Maui, where amphidromous species have been observed despite the presence of an intermittently dry stretch, in support of its untested theory that the channelization is more important than the lack of flow in inhibiting recruitment. HC&S AB at 35. However, HC&S's claim that the "primary" difference between Honokohau Stream and `Īao Stream is the channelized section in `Īao Stream, *id.* at 35-36, misleadingly fails to acknowledge the more significant difference – Honokohau Stream almost always has approximately 1.5 mgd of flow at the mouth, and `Īao Stream rarely has flow at its mouth. RA334: 149, ll. 6-24. As Mr. Ford testified, RA86: 87, ¶ 55; RA334: 149, l. 6 – 150, l. 11, and the majority expressly found, FOF 74, terminal flow (i.e., flow at the stream mouth) of sufficient duration and volume is necessary to attract and accommodate upstream recruitment of post-larval fishes, mollusks and crustaceans. Moreover, "[t]here is a direct correlation between streamflow and postlarval recruitment in Central Maui streams, such that increased streamflow correlates with increased recruitment at the stream mouth." FOF 75.

COL 208, particularly since that speculation, and the successive, equally unsupported leaps and bounds to the blanket conclusion that the "reproductive and full restorative potential" of `Īao Stream was "very limited or prohibited entirely," COL 260, were the sole grounds cited for failing to increase the IIFS for `Īao Stream.

Unable to find any support in the record for the majority's conclusions regarding "reproductive potential," HC&S continues to reframe COL 260, suggesting that what the majority actually meant was that `Īao Stream has "low restorative potential," or "poor rearing habitat" in the channelized section, HC&S AB at 36, and that the "gist" of the majority's findings is that "the prospects for restoring amphidromous species in `Īao Stream are grim." *Id.* at 35, fn.13. Not only are HC&S's alternate findings and conclusions ***not*** what the majority concluded, they are irreconcilable with the majority's ***actual*** conclusion that "***`Īao Stream can be restored to enhance recruitment and increase stream life***[.]" COL 245 (emphasis added).

With respect to Waikapū Stream, HC&S misleadingly contends that "CWRM correctly concluded that the restorative potential of the stream was low due to evidence that the stream did not flow continuously from mauka to makai even in its undiverted state." HC&S AB at 37 (citing FOF 590, COL 209). What the majority actually found was that "there is *no definitive evidence* that Waikapū Stream ever carried uninterrupted surface waters to the sea," FOF 590, from which it concluded that it "most likely" did not. COL 259. Although it recognized that restoration of flow would answer whether mauka to makai flow could be achieved, FOF 596, the majority indefinitely "deferred" that assessment. COL 259.

HC&S acknowledges this Court's express admonition in *Waiāhole I* that it could "not accept" the proposition that "the Commission could drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows, 94 Hawai`i at 158-159, 9 P.3d at 470-71, but contends that was not a "hard and fast rule," and the Court was equally concerned about the opposite extreme, "suspend[ing] all offstream uses, however reasonable and beneficial, for an indefinite period of time that, according to the Commission, may amount to years." *Id.* HC&S AB at 38. Obviously, however, only one of those unacceptable extremes is present here. Indeed, HC&S itself argued that "[a] period of no longer than 30 days is sufficient to determine if flows from Waikapū below the Reservior 6 ditch will reach Kealia Pond." RA188: 301.

HC&S claims that, as long as "CWRM has calculated the public benefits and risks involved" it may simply write off streams as a "policy matter," as it did with `Īao and Waikapū

Streams, and that "CWRM made such calculations in issuing the D&O." HC&S AB at 39 (citing COL 257-262). The "calculations" referred to, however, do not even acknowledge the "risks" to kuleana users and traditional and customary practitioners who seek to exercise their rights to cultivate kalo, which even the majority found is "integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians." FOF 60. Nor did the majority (or HC&S) articulate any "policy" that was advanced by denying the kuleana and T&C rights of Native Hawaiian `ohana living along these streams, or explain how such "policy" could override the clear mandates of the Hawai`i Constitution, the public trust doctrine, and the Code that obligate CWRM to ensure that they are not abridged or denied.

IV.

CONCLUSION

> Fresh water is the kinolau, or tangible, earthly manifestation of Kāne, one of the four primary gods. Fresh water would enable us, as Hawaiians, to continue exercising our cultural and traditional practices in a culturally meaningful way. Having water available would also ensure that we are able to pass these cultural traditions to younger generations. Without water in the streams, we cannot survive as a culture. . . . Restoring the water to Nā Wai `Ehā would ensure that cultural traditions and customs that define Native Hawaiians are perpetuated in this historically and culturally significant region.

Hōkūao Pellegrino, Noho`ana Farm, Waikapū. RA58:57-58, ¶¶ 36-37.

OHA respectfully submits that the Final Decision should be reversed and the Commission should be instructed on remand to consider the effect of its actions on traditional and customary Native Hawaiian rights and practices, and to enter specific findings and conclusions regarding (1) the existence and quantification of traditional and customary Hawaiian rights, including appurtenant rights as mandated by HRS § 174C-5(15); (2) the effect on or impairment of those rights by the diversion of Nā Wai `Ehā streams, and (3) the feasibility of protecting those rights in reestablishing IIFS for Nā Wai `Ehā streams.

Requiring the use of practicable alternatives is "intrinsic to the public trust, the statutory instream use protection scheme, and the definition of reasonable-beneficial.'" *Waiāhole I,* 94 Hawai`i at 161, 9 P.3d at 473. This Court has repeatedly "expounded on the necessity of considering alternative sources of water in balancing the distribution of a scarce public trust resource." *Kukui (Molokai),* 116 Hawai`i at 495, 174 P.3d at 334. CWRM should be directed on remand to require HC&S to use Well No. 7 to irrigate its Waihe`e-Hopoi Fields up to its historical average use of 21 mgd, subject to monitoring.

OHA joins in the arguments asserted by the Community Groups.

DATED: Honolulu, Hawai`i, September 6, 2011.

/s/ Pamela W. Bunn
ANNA ELENTO-SNEED
PAMELA W. BUNN

Attorneys for Intervenor Appellant
OFFICE OF HAWAIIAN AFFAIRS

Water pumped by the H. C. and S. Co., 1899 to 1941, in millions of gallons, and average grains of salt (NaCl) per gallon
(Data furnished by Hawaiian Commercial and Sugar Co.)

U.S.G.S. No. (pl. 1 & fig. 91)	14		15		16		17		18		19		20 & 25[a]		21 & 22[b]		23		24 & 26[c]		Total	Average
H.C. & S. Co. No.	K1		K3		7		8		6		5		Old 2 & new 2		Old 3 & new 3		Old 1		New 4 & old 4			
Year	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt	Water	Salt
1899																					[d]3,228	
1900																					[d]4,570	
1901																					[d]6,369	
1902											854		51		664		734		854		[d]4,450	
1903											574		68		775		256		574		[d]3,602	
1904											1,124		590		1,295		1,616		1,124		[d]7,073	
1905											637		160		1,111		557		637		[d]5,812	
1906											835		265		1,195		2,701		835		[d]3,820	
1907											804		0		268		1,361		304		[d]4,748	
1908											....		....		....		....		....		[d]12,487	
1909	794	46	774	64							3,200	55	159	28	687	50	1,509	112	770	165	7,959	75
1910	1,422	48	1,040	61							3,324	60	292	31	1,146	51	1,448	107	580	113	9,211	66
1911	88	46	1,131	57							3,327	52	248	32	900	50	1,329	97	1,185	117	8,268	68
1912	1,803	43	2,373	57							4,874	56	516	37	1,575	52	2,674	103	1,804	96	15,649	66
1913	1,636	49	1,903	55							3,830	55	492	40	1,231	65	1,442	92	1,248	100	11,812	64
1914	9	42	1,189	53							3,305	60	0	...	910	52	223	91	214	81	5,851	59
1915	837	69	2,101	54							4,188	60	540	39	1,072	50	890	109	1,239	92	10,957	66
1916	1,464	55	1,375	48							3,492	55	410	30	1,261	57	1,294	101	1,102	77	10,303	62
1917	1,955	55	2,316	52							5,438	54	731	41	1,295	57	2,244	104	1,981	96	15,366	66
1918	856	57	1,202	55							2,614	61	677	55	720	55	856	109	715	86	7,641	66
1919	2,230	59	3,203	50							5,723	63	1,679	78	1,023	58	1,871	110	2,284	89	18,013	70
1920	2,317	58	3,205	58							5,561	77	2,208	122	1,030	63	1,799	100	2,468	90	18,019	80
1921	1,885	56	1,751	50							3,953	78	1,905	117	1,108	84	1,608	109	1,622	89	13,892	79
1922	1,680	59	2,665	55							4,324	72	1,375	92	2,075	90	1,313	100	1,596	73	15,028	74
1923	1,765	61	2,678	57							4,197	73	1,048	110	2,117	94	1,364	100	1,657	82	15,425	70
1924	1,940	67	3,284	57							4,397	76	1,957	102	3,050	84	1,642	90	1,591	79	17,876	76
1925	2,723	71	3,447	55							4,622	78	2,462	102	2,881	83	2,251	87	2,596	78	20,383	77
1926	3,326	74	4,000	58							8,335	95	2,828	122	5,153	87	2,414	83	4,025	73	32,082	83
1927	2,026	73	3,816	58	5,081	45					5,131	80	264	142	3,003	91	1,768	84	2,775	78	24,515	74
1928	1,808	71	5,119	54	7,630	42					4,861	74	0	...	2,776	77	1,300	77	2,578	66	20,132	63
1929	2,261	75	5,129	57	7,316	47					4,145	72	2,364	46	3,179	75	1,745	71	2,243	64	28,415	60
1930	1,659	71	3,747	51	6,497	45					3,510	60	3,087	51	1,050	70			1,042	62	21,203	55
1931	2,598	72	5,850	49	9,709	44					5,571	62	4,407	48	2,861	68			1,790	54	32,786	53
1932	1,925	80	5,194	50	9,476	45					4,971	67	4,353	53	2,700	66			2,017	50	30,037	55
1933	3,011	80	6,373	49	11,531	45					7,200	71	5,377	57	3,971	65			3,102	56	40,001	57
1934	1,825	81	5,581	48	9,409	48			1,186	35	5,524	73	4,171	52	3,170	71			2,423	58	33,285	57
1935	2,359	80	6,110	48	10,122	48			6,050	45	2,786	58	4,979	54	3,940	70			3,019	55	39,386	54
1936	1,026	75	5,882	46	8,364	47			4,247	43	1,899	56	2,772	52	2,580	72			1,583	55	28,308	51
1937	1,040	68	4,970	44	6,768	39			3,097	37	1,070	50	2,473	43	353	60			1,169	44	21,540	43
1938	1,335	71	4,882	43	7,676	39			4,432	36	1,434	47	2,600	51	2,386	32			1,434	49	26,179	43
1939	1,398	69	5,141	41	7,321	35	1,785	48	1,762	36	1,455	45	2,827	44	2,203	32			1,306	44	28,201	40
1940	1,959	66	5,959	41	6,021	33	3,135	47	6,015	31	1,302	45	3,007	46	3,004	31			2,201	48	34,407	41
1941	1,463	59	5,204	31	6,169	31	3,434	40	5,124	34	1,724	43	3,328	29	2,514	28			1,605	42	32,500	39

[a] No. 20 (old 2) was discontinued for irrigation in 1928 and replaced with No. 25 (new 2) in 1929. No. 20 is still in use for cooling the Central power plant. No records of quantities pumped for cooling until 1940 when 2,191.37 million gallons were pumped. Pumpage in 1941 was 1,933.03 million gallons.
[b] No. 21 (old 3) was discontinued in 1937; subsequent records are for No. 22 (new 3).
[c] No. 26 (old 4) was discontinued in 1911; subsequent records are for No. 24 (new 4).
[d] Data for 1899–1901 from large ledger in Puunene office; 1902–1908 from published annual reports; totals in ledger for these years slightly different from the published totals.

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