

NO. 28970

IN THE SUPREME COURT OF THE STATE OF HAWAII

NA MOKU AUPUNI O KO'OLAU HUI,  
BEATRICE KEKAHUNA, and MARJORIE  
WALLET,

Petitioners,

vs.

LAURA H. THIELEN, in her official capacity  
as Interim Chairperson of the Commission on  
Water Resource Management and Interim  
Chairperson of the Department of Land and  
Natural Resources; and CHIYOME L.  
FUKINO, MEREDITH J. CHING, JAMES A.  
FRAZIER, NEAL S. FUJIWARA, DONNA  
FAY K. KIYOSAKI, and LAWRENCE H.  
MIIKE, in their official capacities as members  
of the Commission on Water Resource  
Management, KEN KAWAHARA, in his  
official capacity as the Deputy Director for the  
Commission on Water Resource Management,

Respondents.

Civil No. \_\_\_\_\_  
(Other Civil Action)

PETITION FOR WRIT OF MANDAMUS;  
MEMORANDUM IN SUPPORT OF  
PETITION; APPENDIX;  
DECLARATION OF ALAN T.  
MURAKAMI;  
EXHIBITS "1" THROUGH "47";  
CERTIFICATE OF SERVICE

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PETITION FOR WRIT OF MANDAMUS

MEMORANDUM IN SUPPORT OF PETITION

APPENDIX

DECLARATION OF ALAN T. MURAKAMI

EXHIBITS "1" THROUGH "47"

CERTIFICATE OF SERVICE

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PETITION FOR WRIT OF MANDAMUS

Petitioners NA MOKU AUPUNI O KO'OLAU HUI, BEATRICE KEKAHUNA, and MARJORIE WALLET hereby respectfully request that this Court issue a Writ of Mandamus to Respondents Commissioners LAURA H. THIELEN, CHIYOME L. FUKINO, MEREDITH J. CHING, JAMES A. FRAZIER, NEAL S. FUJIWARA, DONNA FAY K. KIYOSAKI, and LAWRENCE H. MIIKE to: (1) place the burden of proof on any diverter of these streams to show that those diversions are not causing harm to the precautionary principle, and Petitioners' appurtenant, riparian, and traditional and customary native Hawaiian rights, and the public interest, pursuant to the public trust doctrine, (2) take immediate action on Na Moku's petitions to amend IIFS for 27 streams in East Maui consistent with HRS § 174C-71(2)(E) in order to respect the interests of the holders of these rights, and (3) report back to this Court within 60 days on how it has implemented or is implementing this Court's order and on the status of any action taken on the petitions pursuant to the writ issued. Petitioners further request that, in order to assist these commissioners, this Court compel Respondent Commission on Water Resources Management Deputy Director KEN KAWAHARA to submit a staff report to Respondent Commissioners recommending specific interim instream flow standards that restore natural stream flow based on consideration of: (1) the requisite legal burden on any diverter of stream flow, (2) Petitioners' appurtenant, riparian, and traditional and customary native Hawaiian rights, and (3) the required analysis of available alternatives to these diversions the cumulative impacts generated by continued diversions, all in accordance with appropriate application of the public trust doctrine.

This petition is supported by the attached Memorandum in Support of Petition for Writ of Mandamus, the attached Declaration of Alan T. Murakami, and the attached exhibits.

DATED: Honolulu, Hawai'i, January 25, 2008.



---

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MOSES K. N. HAIA III  
Attorneys for Petitioners NA MOKU AUPUNI O  
KO'OLAU HUI, BEATRICE KEKAHUNA, AND  
MARJORIE WALLET

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MEMORANDUM IN SUPPORT OF  
PETITION FOR WRIT OF MANDAMUS

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....ii - iii

I. INTRODUCTION .....1

II. APPLICABLE FACTS .....1

III. SUMMARY OF REASONS FOR REQUESTING MANDAMUS RELIEF .....8

IV. STATEMENT OF RELIEF REQUESTED.....11

V. THE SITUATION PRESENTED BY THE COMMISSION’S CONTINUED  
INACTION SATISFIES THE REQUIREMENTS FOR A PETITION FOR A WRIT  
OF MANDAMUS.....11

    A. NA MOKU HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF,  
    ENSURED BY THE STATE WATER CODE AND THE HAWAII STATE  
    CONSTITUTION.....12

        1. Under the Stream Protection Program, the Commission must act on the  
        Requests to Amend Interim Instream Flow Standards Within 180 days .....13

        2. Under the Constitution, the Commission must act affirmatively and  
        Preemptively to investigate impacts on protected water rights and to  
        Protect appurtenant water rights and traditional and customary practices  
        Which rely on a sufficient amount of streamflow .....17

        3. Under HRS §§ 174C-5(15) and 174C-10, the Commission must timely resolve  
        any complaint for violation of constitutionally protected water rights.....28

    B. TIMELY ACTION ON NA MOKU’S PETITIONS IS NOT  
    DISCRETIONARY .....30

    C. NA MOKU LACKS OTHER MEANS TO OBTAIN THE RELIEF .....33

VI. CONCLUSION.....34

EXHIBITS “1” THROUGH “47”

APPENDIX

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Aged Hawaiians v. Hawaiian Homes Comm'n</i> , 78 Haw. 192, 202 (Haw. 1995) .....	33
<i>Barnett v. Broderick</i> , 84 Hawai'i 109, 929 P.2d 1359 (1996) .....	12
<i>Ctr. for Food Safety v. Johanns</i> , 451 F. Supp. 2d 1165, 1191 (D. Haw. 2006).....	17
<i>Environmental Defense Fund, Inc. v. Hardin</i> , 138 U.S. App. D.C. 391, 428 F.2d 1093 (D.C. Cir. 1970) .....	17
<i>Evans v. Takao</i> , 74 Haw. 267, 842 P.2d 255, 261 (1992).....	12
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973).....	22
<i>Heckler v. Chaney</i> , 470 U.S. 821, 105 S.Ct. 1649, 1655-56 (1985).....	31
<i>In re Kukui (Molokai), Inc.</i> , No. 24856, slip op. at 54-55 (Haw. Sup. Ct. Dec. 26, 2007) .....	21
<i>In Re Waiola O Molokai</i> , 103 Haw. 401, 83 P.3d 664; 685 (2004).....	12, 18, 21, 22
<i>In re Water Use Permit Applications</i> , 94 Hawai'i 97, 9 P.3d 405, 467 (2000) ( <i>Waiahole I</i> )...passim	
<i>In the Matter of Water Use Permit Applications</i> , 105 Haw. 1, 93 P.3d 643, 654 (2004) ( <i>Waiahole II</i> ) .....	passim
<i>In re Murchison</i> , 349 U.S. 133, 136; 75 S.Ct. 623,625 (1955).....	22
<i>Independence Mining Co. v. Babbitt</i> , 105 F.3d 502, 508 (9th Cir. 1997) .....	30,31
<i>Iowa ex rel. Miller v. Block</i> , 771 F.2d 347, 350 (8th Cir. 1985).....	31
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123, (Frankfurter, J., concurring) (1951) .....	22
<i>Kona Old Hawaiian Trails Group v. Lyman</i> , 69 Haw. 81, 734 P.2d 161, 168 (1987) .....	10, 33
<i>Offutt v. United States</i> , 348 U.S. 11 .....	22
<i>Preble v. Bd. of Trs. of the Employees' Ret. Sys.</i> , 111 Hawai'i 498, 143 P.3d 37, 47 (2006) .....	12
<i>Reppun v. Board of Water Supply</i> , 65 Haw. 531, 656 P.2d 57, 76 (1982) .....	18, 26
<i>Rex v. Justices of Bodmin</i> , [1947].....	22
<i>Richardson v. City and County of Honolulu</i> , 76 Haw. 46, 868 P.2d 1193, 1207 (1994) .....	13
<i>Robinson v. Ariyoshi</i> , 65 Haw. [641,] 658 P.2d [287,] 312 [(1982) .....	31
<i>Salling v. Moon</i> , 76 Hawai'i 273, 874 P.2d 1098, 1100 (1994) .....	30
<i>State v. Brown</i> , 70 Haw. 459, 776 P.2d 1182, 1187 (1989).....	22
<i>Sussel v. Honolulu Civil Serv. Comm'n</i> , 71 Haw. 101, 784 P.2d 867, 870 (Haw. 1989), .....	22, 23
<i>Telecommunications Research &amp; Action v. F.C.C.</i> , 242 U.S. App. D.C. 222, 750 F.2d 70 (D.C. Cir. 1984) .....	12
<i>United States v. Western Pac. R.R.</i> , 352 U.S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956) .....	33
<i>Williams v. Hawaii Medical Service Ass'n</i> , 71 Haw. 545, 798 P.2d 442, 444, reconsideration denied, 71 Haw. 666, 833 P.2d 900 (1990) .....	14
<i>Withrow v. Larkin</i> , 421 U.S. 35, 46-47 (1975) .....	22
 <b>Statutes</b>	
HRS Chapter 171 .....	28
HRS § 84-18 .....	6, 23
HRS § 91-14 .....	11, 34
HRS § 171-58(c).....	33
HRS §§ 174C-2 and -101 .....	8, 18
HRS § 174C-3; 174C-71(2)(E).....	21
HRS § 174C-5.....	4, 10, 30, 33,34

HRS §§ 174C-7.....	10, 33
HRS §§ 174C-5(15).....	28,30
HRS § 174C-10.....	10,28, 29, 34
HRS § 174C-54.....	16
HRS § 174C-63.....	29,30
HRS § 174C-101.....	29,30
HRS § 174C-71.....	passim
HRS § 174C-71(1).....	14, 15
HRS § 174C-71(2)(A).....	8,9, 14, 15
HRS § 174C-71(2)(E).....	passim
HRS § 174C-71(4).....	13
HRS §§ 183-11, 183-31.....	27
HRS Chapter 343.....	28

**Other Authorities**

R. Pound, <i>Administrative Law 75</i> (1942).....	23
M. Redish & L. Marshall, <i>Adjudicatory Independence and the Values of Procedural Due Process</i> , 95 Yale L.J. 455, 483-84 (1986).....	22
Gingerich, <i>Median and Low-Flow Characteristics for Streams under Natural and Diverted Conditions, Northeast Maui, Hawaii</i> , USGS Scientific Investigations Report 2004-5262 (2004) .....	25
House Concurrent Resolution (Resolution) No. 293, House Draft 1 (SLH 2005) ...	17,23, 24, 26, 27

**Rules**

HAR § 13-167-32.....	34
HRAP Rule 21(b).....	1

**Constitutional Provisions**

Hawaii Constitution, Article XI, § 1.....	17,18, 19
Hawaii Constitution Article XI, § 7.....	9,18,20,26,28,29,30
Hawaii Constitution Article XII, § 7.....	26

## MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

### **I. INTRODUCTION**

Pursuant to Rule 21(b), Hawai'i Rules of Appellate Procedure, Petitioners respectfully request that the Justices of the Supreme Court of the State of Hawai'i issue a Writ of Mandamus directed to Respondents LAURA H. THIELEN, CHIYOME L. FUKINO, MEREDITH J. CHING, JAMES A. FRAZIER, NEAL S. FUJIWARA, DONNA FAY K. KIYOSAKI, and LAWRENCE H. MIIKE of the Commission on Water Resource Management, compelling them to immediately act on Petitioners' pending petitions to amend interim instream flow standards for 27 East Maui streams in accordance with their duties under the public trust doctrine and HRS § 174C-71(2)(E).

Petitioners are Hawaiian taro farmers and native tenants of East Maui ahupua`a who also engage in traditional and customary native Hawaiian practices in and along streams in those ahupua`a for subsistence, religious and cultural purposes. In May of 2001, they filed petitions to amend interim instream flow standards in 27 streams along the East Maui coastline, which have been severely diminished by diversions for the past 131 years. This restoration of flow is necessary to support the continuation of traditional and customary gathering, fishing, and taro growing by means similar to those practiced by the Petitioners' ancestors in ancient times, a right protected by statute and the Constitution.

Despite the non-delegable and clear duty of the Commission on Water Resource Management (hereinafter, "CWRM" or "Commission") to act upon these petitions within 180 days, and in no instance beyond one year, the CWRM, without any basis, has either refused or failed to abide by this legislative mandate. Moreover, despite possessing the scientific basis for making its decision since January 2006, the CWRM has not made any decision. Having cooperated fully with the CWRM and with no other forum through which they may seek relief, Petitioners now, as a last resort, turn to this court for a writ of mandamus directing Respondents to act within 60 days on the subject petitions guided by the best scientific information available.

### **II. APPLICABLE FACTS**

A. Petitioners Beatrice Kekahuna and Marjorie Walleth are East Maui taro farmers who reside along Honopou Stream, and Na Moku Aupuni O Ko'olau Hui, Inc. is a non-profit corporation which represents taro farmers from Wailuanui and Ke'anae Valleys (hereinafter collectively "Na Moku"). Beatrice Kekahuna, Marjorie Walleth, the taro farmers represented by Na Moku and other native Hawaiian kuleana land owners in East Maui, are entitled to water based

on appurtenant, riparian, and traditional and customary native Hawaiian rights confirmed by and derived from a long and storied tradition of this relatively remote and culturally significant area.

B. Specifically, continuing a tradition that has persisted in Honopou, Ke`anae, and Wailuanui Valleys since time immemorial, Petitioners have grown, and still attempt to grow, taro that requires a steady flow of natural stream water fed by gravity to their taro (kalo) patches (lo`i) throughout the growing cycle of kalo. See, Exhibits 43 and 44.

C. In addition, in order to continue the ancient traditions of their Hawaiian ancestors and to maintain their subsistence lifestyles, Petitioners have relied, and continue to rely, on various forms of stream life (o`opu, opae, and hihiwai) and marine life (limu, fish, crab, and other crustaceans) dependent on flowing streams and fresh water input to the sea for their life cycle. *Id.*

D. The County of Maui specifically and specially recognized the persistence of taro farmers and subsistence gatherers of the Ke`anae/Wailuanui Valley communities, many of whom belong to Na Moku, in continuing the ancient traditions, like taro growing, of their ancestors for generations, by designating these communities as part of a “cultural landscape” deserving of protection from forces that might impact the basis for that designation. Testimony of Davianna Pomaika`i MacGregor, Phd., See, Exhibit 42 attached to the Declaration of Alan T. Murakami.<sup>1</sup>

E. Since the late 1800s, the governments of Hawai`i have allowed Alexander and Baldwin's subsidiary company, East Maui Irrigation Company, (collectively, “A&B/EMI”) to increase its diversions of East Maui streams to what is presently an average of 160 million gallons per day. These diversions include the 27 streams that are the subject of Petitioner’s applications for interim instream flow amendment. See, Exhibit 30.

F. A&B/EMI operates a system of diversions, intakes, ditches and tunnels that collect and transport water flowing on a total of over 33,000 acres of state ceded lands from the Huelo, Honomanu, Ke`anae, and Nahiku license areas in East Maui to 30,000 acres of sugarcane fields in Central Maui, for sugar plantation operations in Central Maui owned by Hawaiian Commercial and Sugar Company (“HC&S”). While the vast majority of water diverted irrigates HC&S’s sugar, some goes to Maui Land and Pine for the irrigation of pineapple, to Maui County for the domestic water needs of upcountry Maui, and to the irrigation needs of small farms in Kula. *Id.*

G. These stream diversions have progressively interfered with and/or obstructed the ability of these taro farmers and subsistence gatherers to grow taro and gather food items from the affected streams and along the affected East Maui coastline in the tradition and custom of their

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<sup>1</sup> All references to “Exhibits” indicate those exhibits attached to the Declaration of Alan T. Murakami.



native Hawaiian ancestors. Testimony of Beatrice Kekahuna (Exhibit 43); Testimony of Ed Wendt (Exhibit 44).

H. This progressive deprivation of water rights has resulted in a chronic and systemic injury to these native tenants of Wailuanui, Ke`anae, and Honopou valleys in East Maui by denying them, contrary to constitutional protections, statutory mandates, and sound public policy, a critical source of food and the capacity to continue traditional and customary practices. *Id.*

I. On May 24, 2001, Petitioners Na Moku filed petitions to amend interim instream flow standards (“IIFS”) with Respondents’ predecessors, in order to restore flows to 27 streams along the East Maui coastline (hereafter, “petitions”) upon which they rely to continue practices which they have traditionally exercised for subsistence and customary purposes. See, Exhibit 1.

J. On or about May 25, 2001, Petitioners also challenged the reissuance of permits or leases by the State Board of Land and Natural Resources to authorize A&B/EMI to take water from 33,000 acres of state ceded lands without regard for their rights. See, Exhibit 2.

K. On June 12, 2001, the CWRM staff rejected Na Moku’s 27 petitions for failure to provide adequate information. See, Exhibit 3.

L. On June 19, 2001, then deputy director Linnell Nishioka informed Na Moku by email that the deputy Attorney General assigned to the CWRM advised it that it had no legal power to determine appurtenant rights. See, Exhibit 4.

M. On June 22, 2001, Na Moku responded by seeking reconsideration. See, Exhibit 5.

N. On June 25, 2001, then deputy director Nishioka replied to Na Moku’s request for reconsideration by challenging the standing of the claimants and inadequacy of data in support of the petitions. See, Exhibit 6.

O. On June 27, 2001, then deputy director Nishioka transmitted the formal Attorney General opinion concluding that the CWRM had no jurisdiction to determine appurtenant water rights. See, Exhibits 7 and 8; compare, Exhibit 10.

P. On June 28, 2001 Na Moku submitted documentation to Respondent THIELEN’s predecessor of its standing to file the petitions. See, Exhibit 9.

Q. On July 1, 2001, Meredith J. Ching, Vice President of Government and Community Relations for Alexander & Baldwin, Inc. became one of the 7 members the CWRM, after being confirmed by the Senate during the 2001 legislative session. She continues to serve until today. See, webpage: <http://hawaii.gov/dlnr/cwrmm/cwrmmcomm.htm> (Exhibit 47).

R. On July 12, 2001, Na Moku rebutted the April 25, 2001 Attorney General opinion on the CWRM's lack of power to determine appurtenant water rights, citing to contrary legislative intent, and sought reconsideration of the reliance on that mistaken opinion. See, Exhibit 10.

S. On July 13, 2001, Na Moku continued to supply the CWRM with supplemental information in support of its 27 petitions to amend the interim instream flow standards along East Maui's coastline. See, Exhibit 11.

T. On July 13, 2001, on the basis of the supplemental information, the CWRM finally relented and accepted the 27 petitions. See, Exhibit 12.

U. On July 24, 2001, the CWRM, dismissing Petitioners' July 12, 2001 written rebuttal, affirmed its original position that it had no jurisdiction to determine appurtenant water rights. See, Exhibit 13.

V. On July 26, 2001, the Native Hawaiian Legal Corporation ("NHLC"), on Petitioners' behalf, confirmed that the CWRM was to focus its efforts to amend the IIFS for Honopou, Hanehoi, Waiokamilo, Kulani, Pi'ina'au, Palauhulu, and Wailuanui streams to restore streamflow to these streams as soon as possible. See, Exhibit 14.

W. On March 12, 2002, after a series of meetings, U.S. Geological Survey (USGS) chief Gordon Tribble outlined the process for the proposed 3-year stream flow study which the USGS, CWRM, Maui County Department of Water Supply, and A&B/EMI agreed to jointly fund to assist the CWRM in developing new instream flow standards.<sup>2</sup> See, Exhibit 15.

X. During the 2002 legislative session, the state Legislature amended HRS § 174C-5 to unequivocally add to the list of statutory CWRM powers the ability to determine appurtenant water rights of claimants seeking relief from the commission.

Y. Following the general election of 2002, a new state administration took over. Then CWRM deputy director Linnell Nishioka left that position and accepted a position with the same law firm which represented A&B/EMI in this matter.

Z. Between 2001 and 2007, the CWRM staff continued to request additional research from Petitioners to substantiate the basis for their claims.

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<sup>2</sup> The overall objectives of the 3-year study were to (1) assess the effects of existing surface-water diversions on flow characteristics for perennial streams in northeast Maui, (2) characterize the effects of diversions on instream temperature variations, and (3) estimate the effects that streamflow restoration (full or partial) will have on habitat availability for native stream fauna (fish, shrimp, and snails) in northeast Maui. The scientific information generated by the study was intended to allow CWRM to complete its work on documenting water rights and uses associated with northeast Maui streams and analyzing the economic effects of curtailing existing uses on the streams, and to then establish technically defensible instream flow standards for those streams. See, Exhibit 28.

AA. On August 5, 2003, NHLC continued to provide CWRM staff with additional documentation supporting the rights of its clients to appurtenant water rights. See, Exhibit 16.

BB. Despite this continued flow of information, CWRM staff failed to acknowledge receipt of the information provided until asked. See, Exhibit 17.

CC. The CWRM continued to request information in support of Na Moku's appurtenant rights claims, without demanding justification for A&B/EMI's diversions. See, Exhibit 18. 11/6/03

DD. On October 10, 2003, Petitioners won a circuit court reversal of the BLNR attempt to commit these public trust resources to EMI through their continued diversion under a set of 30-year leases without regard for their rights. *Na Moku Aupuni O Ko`olau Hui vs. State of Hawaii*, Civil No. 03 -1-0292-02 (Order Affirming in Part and Reversing in Part State of Hawaii Board of Land and Natural Resources' Findings of Fact and Conclusions of Law and Order, Dated January 10, 2003; Amended January 24, 2003 Regarding Petition Contesting Application for Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Ke`anae, Nahiku, and Huelo, Maui, October 10, 2003), attached as Exhibit 19.

EE. During the latter stages of the USGS stream flow study, the USGS requested that A&B/EMI cooperate with its study and agree to release certain controlled amounts of water into the streams being studied.

FF. On March 31, 2004, instead of complying with the USGS request to perform the requested controlled releases, A&B/EMI claimed this was not necessary since "stream flows naturally reach the desired flow levels" regardless of when and whether those flows would be achieved during the study period. See, Exhibit 20.

GG. USGS District Chief Tribble responded to A&B/EMI's foot dragging by attempting to explain the detailed rationale for the controlled releases, which were necessary in order "to provide technically defensible estimates of undiverted stream flows and aquatic habitat characteristics acceptable to all stakeholders." See, Exhibit 21.

HH. After the late former deputy director Linnell Nishioka accepted employment at the same law firm then representing A&B/EMI, Ernest Lau succeeded her. Mr. Lau was then replaced by Ms. Yvonne Izu, who had previously worked as private counsel in the same law firm then representing A&B/EMI.<sup>3</sup> See, Exhibit 22.

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<sup>3</sup> Prior to 2001, Yvonne Izu was an associate in the now-reconstituted law firm of Oshima, Chun, Fong, and Chung. Declaration of Alan T. Murakami. Ms. Izu left private practice to become a state deputy attorney general. *Id.* That firm represented A&B/EMI when Na Moku later filed its petitions to amend interim instream flow standards. At the end of 2002, the late Ms. Linnell Nishioka left her employment as deputy director of the CWRM upon the election

II. In a second attempt to explain the USGS rationale to all interested parties in this matter, USGS District Chief Tribble wrote deputy director Izu on May 26, 2004 to fully explain the necessity for the controlled releases sought as part of its stream flow study. See, Exhibit 23.

JJ. In 2004, Linnell Nishioka, former deputy director of the CWRM until 2002, was now representing A&B/EMI, and responded on its behalf to the USGS request.<sup>4</sup> Exhibit 24.

KK. On June 25, 2004, Maui Tomorrow, Inc. and Hui O Na Wai Eha filed their own petitions to amend IIFS for various Central Maui streams with the CWRM. See, Exhibit 25.

LL. Despite Na Moku's urging that the CWRM follow the "precautionary principle" affirmed by this Court for the exercise of trust duties, the CWRM never compelled A&B/EMI to conform to the USGS request for controlled releases, See, Exhibit 26.

MM. A&B/EMI never performed the requested controlled releases of the streams under study by the USGS.

NN. On November 14, 2004, then-deputy director Izu appeared poised to once again question the authority of the CWRM to recognize traditional and customary rights of cultural practitioners like Na Moku members and to question the legal burden on such practitioners to establish their rights before the CWRM. See, Exhibit 27.

OO. In 2004, the USGS submitted its Scientific Investigation Report 2005-5262 on stream flow characteristics and habitats in East Maui to the CWRM. See, Exhibit 28 and 29

PP. In response to growing concerns that the CWRM was not fulfilling its statutory mandates to protect streams from unbridled diversions, the 2005 Legislature adopted House

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of Governor Linda Lingle. She then took a position as counsel in the firm of Oshima, Chun, Fong, and Chung, the same firm from which Ms. Izu came. *Id.* On May 17, 2003, Ernest Lau became deputy director of the CWRM. Mr. Lau worked in that position only until May 10, 2004. *Id.* Upon his departure that year, on May 19, 2004, Ms. Izu was appointed as deputy director of the CWRM to succeed Mr. Lau. *Id.* After resigning in February 9, 2005, Ms. Izu ultimately returned to private practice, working for the same firm she left 5 years earlier, but now reconstituted as Ishikawa, Morihara, Lau, and Fong. *Id.* For the next two years, the CWRM operated with acting deputy directors, Dean Nakano and Roy Hardy, in charge of the staff. On June 18, 2007, Ken Kawahara became the current deputy director for the CWRM. *Id.*

<sup>4</sup> HRS § 84-18, which governs restrictions on employment by former government workers provides:

(a) No former legislator or employee shall disclose any information which by law or practice is not available to the public and which the former legislator or employee acquired in the course of the former legislator's or employee's official duties or use the information for the former legislator's or employee's personal gain or the benefit of anyone.

...

(c) No former employee, within twelve months after termination of the former employee's employment, shall represent any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency or subdivision thereof with which the former employee had actually served.

Concurrent Resolution 293, calling for the immediate resolution of all pending petitions for amending IIFS.

QQ. In late 2005, the USGS submitted its Scientific Investigation Report 2005-5213 on stream flow characteristics and habitats in East Maui to the CWRM. See, Exhibits 30 and 31

RR. Despite the submission of the USGS reports which provide the necessary data and analysis to act on Na Moku's 27 petitions, the CWRM has taken no action.

SS. In January 2006, the CWRM submitted its report to the Legislature, as directed in HCR 293. See, Exhibit 32.

TT. In February 2006, the CWRM, without regard for the earlier submission of Na Moku's 27 petitions and the results of the USGS study engaged in pursuant to these petitions, and without explaining why it would not then take action on those petitions, voted to hold contested case hearings instead on the independent Maui Tomorrow/Hui O Na Wai Eha petitions to amend interim instream flow standards. See, Exhibit 33.

UU. At its December 2006 meeting, the CWRM staff, instead of acting on the Na Moku petitions, voted to conduct a series of public hearings to gather more data and obtain more input from the affected communities during the last quarter of 2007, making no commitment to act on the 27 petitions in any given time period. See, Exhibit 34.

VV. On March 14, 2007, counsel for Na Moku, alarmed after noticing that Na Moku's petitions were not even listed on CWRM's web site as a pending action, wrote to CWRM staff to seek an update on what action, if any, the CWRM planned to take on the petitions following the completion of the USGS study. See, Exhibit 35.

WW. On March 23, 2007, in the parallel BLNR proceedings related to the proposed issuance of revocable permits to A&B/EMI, the BLNR granted Na Moku partial interim relief by ordering that, pending the outcome of the contested case hearing, "A&B/EMI shall decrease current diversions on Waiokamilo Stream such that the water flow can be measured below Dam #3 at the rate of 6,000,000 g[allons] p[er] d[ay]..." The BLNR also noted therein:

The Na Moku's parties' frustration with the CWRM's failure to act on its 27 petitions to amend IIFS may be understandable. The Circuit Court's October 10, 2003 Order in this proceeding, although acknowledging that the Board is not required to conduct a parallel investigation to that of the CWRM, holds that if there is no CWRM determination then the Board must proceed on its own or, if it lacks the requisite expertise, wait on CWRM or make its own application to the CWRM. **There is no certainty, however, that an application by the Board will necessarily result in the required determination of IIFS.**

(Emphasis added). See, Exhibit 36.

XX. On May 10, 2007, upon the request of the CWRM staff six years after the petitions were filed, Na Moku once again provided additional title information related to kuleana in Honopou Valley. See, Exhibit 39.

YY. In April and July, 2007, calling attention to recent decisions of this Court, Na Moku's counsel attempted to obtain commitments for more immediate action by the CWRM, in view of the long-past 180-day deadline to act upon the 27 petitions. See, Exhibits 37, 38 and 40.

ZZ. In response to a 2002 "No Ka Lo'i Conference" where kalo farmers' expressed desire to document current water use for kalo cultivation, and in view of disagreements over the sufficiency of different estimates for kalo irrigation water requirements, the USGS conducted a water use study across different parts of the islands, including Wailuanui, to document existing water uses by a sample of kalo farmers. See, Exhibit 45.

AAA. A&B/EMI's improper diversions coupled with the CWRM's unexplained and unsupportable inaction since receipt of the final USGS report in late 2005 effectively and improperly impact the abilities of Beatrice Kekahuna, Marjorie Wallet, and members of Na Moku, many of whom have very limited income, to plant kalo and to gather o'opu, opae, and hihiwai from the streams on which they and their ancestors have traditionally relied, and cause incalculable and irreparable harm. Petitioners' Direct Testimony of Beatrice Pualani Kekahuna, Exhibit 43 Petitioners' Direct Testimony of Edward Wendt, Exhibit 44

### **III. SUMMARY OF REASONS FOR REQUESTING MANDAMUS RELIEF**

On May 24, 2001, Na Moku filed with the CWRM petitions to amend interim instream flow standards for 27 East Maui streams. Under HRS § 174C-71(2)(A), any person with proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard. As practitioners of traditional and customary rights, such rights recognized by the Hawai'i State Constitution, Article XII, sec. 7, and the State Water Code, HRS §§ 174C-2 and -101, as being within the public interest, Na Moku has standing to seek restoration of these 27 streams through amendment of the IIFS for the protection of those interests. Recognized public trust purposes, such as traditional and customary native Hawaiian rights, far outweigh private commercial uses of water such as those carried out by A&B/EMI.

Under HRS § 174C-71(2)(E), the CWRM is required to take action on a petition by amending IIFS within 180 days of such application, or within 360 days with an approved

extension. Despite this requirement, the Commission has failed to take any action on Na Moku's 27 petitions within the six years that have passed since the filing date and, more importantly, within the last two years since it received sufficient scientific data in the form of the reports that comprise the USGS study. In fact, the Commission has never even bothered to act on any extension of the period in which to act.

As was agreed to by and between the CWRM, A&B/EMI, and the County of Maui, the USGS completed their Scientific Investigation Report 2005-5213 in mid-2005. This report provides information on stream flow characteristics and habitats in East Maui streams surveyed. The relationship between streamflow and habitat availability indicated that restoring even a small amount of water to a diverted stream can have a significant improvement on the habitat available. For example, restoring 10 percent of the median baseflow to a stream that is dry owing to diversion would provide about 40 percent of the expected natural habitat. See, Press Release, USGS, *USGS report measures effects of surface-water diversion on native fish habitat in northeast Maui* (Jan. 30, 2006), found at <http://www.usgs.gov/newsroom/article.asp?ID=1434>, also attached as Exhibit 31.

Despite this additional information, the Commission continues to point to uncertainty in setting the level of protection necessary for new IIFS and the need for more information. However, "uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." *In re Water Use Permit Applications*, 94 Hawai'i 97, 155, 9 P.3d 405, 467 (2000) (*Waiahole I*).

Thus, in this instance, there is arguably enough scientific certainty to establish *permanent* instream flow standards. In any event, the results of the USGS study provide sufficient certainty to amend *interim* instream flow standards in order to protect the public interest.

Since Na Moku filed their petitions in 2001 and the Commission's receipt of the second USGS report in late 2005, the CWRM has, in clear violation of the 180-day review period required by Hawai'i Revised Statutes § 174C-71(2)(E), arbitrarily failed to act on any of Na Moku's petitions. Instead, since the filing and ignoring specific calls for action by the 2005 Legislature and this Court, the CWRM has delayed processing of the petitions, even attempting to reject them for lack of information. It even appeared to have lost track of the 27 petitions, omitting it from its own website in 2007 until Na Moku's counsel noted the omission. In fact, arbitrarily ignoring the earlier filing by Na Moku and the USGS report conducted pursuant to Na

Moku's petitions, the CWRM has actually allowed petitions filed three years later to leap frog Na Moku's petitions by convening a contested case hearing to consider these later filed petitions.

The CWRM staff appears to have paid, at best, minimal administrative attention to Na Moku's petitions when periodically called upon to address its failure to follow its trust duties to act promptly. Notwithstanding its possession of sufficient scientific data to act on Na Moku's petition, it persists in continuing to ask for corroborative information, placing the burden of research on the petitioners while effectively yet illegally preserving A&B/EMI's diversions by default. In contrast, without any justification, the CWRM has never required A&B/EMI to justify its uses. Furthermore, despite numerous requests for explanations to substantiate the reasons for the delay, the CWRM has not provided any response other than to detail a plan in 2007 for soliciting public input, 6 years after the filing of the petitions and two years after obtaining sufficient scientific data to act on the petitions, when the statute does not require it.

The CWRM has either acted with gross disregard of its trust duties or has arbitrarily refused to act to amend the IIFS to remedy the violations of Petitioners' superior rights by A&B/EMI's stream diversions. In the meantime, Petitioners' very abilities to survive and sustain their culture continues to be unconscionably adversely affected.

Unless this Court compels the CWRM to take immediate action on Na Moku's petitions, Na Moku will be left without the relief it seeks, despite being entitled to some level of flow restoration to the 27 identified streams. The CWRM is entrusted with exclusive jurisdiction over the administration of the State Water Code under HRS §§ 174C-5 and -7. As the only administering agency, the CWRM has primary jurisdiction, if not the exclusive power, to establish and amend IIFS under HRS § 174C-71. *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 168 (1987).

HRS § 174C-71, provides the CWRM with authority to act on issues related to stream restoration. In addition, Na Moku has, pursuant to HRS §§ 174C-10 (on dispute resolution), attempted to exhaust all administrative remedies available to it, to no avail. In addition, in the companion proceeding before the BLNR, the BLNR has made it clear that it will not render a final decision on the issues before it unless and until the CWRM acts on these 27 petitions. Exhibit 36, at 36 -37; 45-46. Having invoked all these provisions and recognizing that the BLNR will also not act until the CWRM acts, Na Moku has no other means to administratively restore flows to the 27 East Maui streams besides petitioning the CWRM to amend its IIFS. Further, since the CWRM has violated HRS § 174C-71(2)(E) and refused to take action on Na Moku's petitions, there is no



final decision from which Na Moku can appeal under HRS § 91-14. Na Moku's only means to obtain relief is through this Court's power to issue a writ of mandamus compelling the CWRM to promptly comply with HRS § 174C-71(2)(E) and applicable state law.

#### **IV. STATEMENT OF RELIEF REQUESTED**

Na Moku respectfully requests that the Court issue a writ of mandamus, compelling the CWRM members to: (1) place the burden of proof on any diverter of these streams to show that those diversions are not causing harm to the precautionary principle, and Petitioners' appurtenant, riparian, and traditional and customary native Hawaiian rights, and the public interest, pursuant to the public trust doctrine, (2) take immediate action on Na Moku's petitions to amend IIFS for 27 streams in East Maui consistent with HRS § 174C-71(2)(E) in order to respect the interests of the holders of these rights, and (3) report back to this Court within 60 days on how it has implemented or is implementing this Court's order and on the status of any action taken on the petitions pursuant to the writ issued.

Petitioners further request that, in order to assist these commissioners, this Court compel Respondent Commission on Water Resources Management Deputy Director KEN KAWAHARA to submit a staff report to Respondent Commissioners recommending specific interim instream flow standards that restore natural stream flow based on consideration of: (1) the requisite legal burden on any diverter of stream flow, (2) the required analysis of available alternatives to these diversions and (3) the cumulative impacts generated by continued diversions, all in accordance with appropriate application of the public trust doctrine.

#### **V. THE SITUATION PRESENTED BY THE COMMISSION'S CONTINUED INACTION SATISFIES THE REQUIREMENTS FOR A PETITION FOR A WRIT OF MANDAMUS**

"A writ of mandamus and/or prohibition will not issue unless a petition demonstrates a clear and indisputable right to relief and a lack of other means to redress adequately the alleged wrong or obtain the requested action. Mandamus relief<sup>5</sup> is available to compel an official to

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<sup>5</sup> Rule 21(b), Hawai'i Rules of Appellate Procedure, provides:

**(b) Writs of mandamus directed to a public officer.** An application for a writ of mandamus directed to a public officer shall be made by filing a petition with the clerk of the supreme court with proof of service on the officer and the attorney general or the chief legal officer of the county, as applicable. The petition shall conform to the requirements of subsection (a) of this rule. Upon receipt of the prescribed filing fee, the appellate clerk shall docket the petition and submit it to the supreme court for a determination as to

perform a duty allegedly owed to an individual only if the individual's claim is clear and certain, the official's duty is ministerial and so plainly prescribed as to be free from doubt, and no other remedy is available." *Barnett v. Broderick*, 84 Hawai'i 109, 111, 929 P.2d 1359, 1361 (1996) (citations omitted). "Mandamus is an extraordinary remedy that will not issue unless the petitioner demonstrates (1) a clear and indisputable right to relief and (2) a lack of other means to adequately redress the alleged wrong or obtain the requested action." *Preble v. Bd. of Trs. of the Employees' Ret. Sys.*, 111 Hawai'i 498, 508, 143 P.3d 37, 47 (2006) (quoting *Evans v. Takao*, 74 Haw. 267, 279, 842 P.2d 255, 261 (1992)); *Telecommunications Research & Action v. F.C.C.*, 242 U.S. App. D.C. 222, 750 F.2d 70, 79-80 (D.C. Cir. 1984) ("TRAC"),

Petitioners have three bases for seeking relief through this petition. First, despite a clear and indisputable mandate to act on a petition for amending IIFS, the CWRM has neglected, failed or refused to act within the 180-day statutory deadline and, further, within a reasonable time after it has received sufficient data to do so. Second, clear judicial precedents directly applicable to the CWRM mandate prompt and timely action to establish IIFS. Third, despite a clear and indisputable mandate to investigate and appropriately act on complaints filed to resolve disputes between competing water users, especially where one has superior water rights, the CWRM has arbitrarily neglected, failed or refused to act on the complaints and requests to determine the appurtenant, riparian and traditional and customary native Hawaiian water rights of Petitioners, so they may enforce them. Taking timely action on Na Moku's petitions is not discretionary, as it is clear that statutory and judicial requirements mandated action long ago. Petitioners have no other means to obtain the relief they are entitled to from the CWRM, that relief being action on their 27 petitions to amend IIFS to adequately address the illegal diversions of water that deprive them of water to grow taro and support traditional and customary use of the affected streams.

**A. NA MOKU HAS A CLEAR AND INDISPUTABLE RIGHT TO RELIEF, ENSURED BY THE STATE WATER CODE AND THE HAWAI'I STATE CONSTITUTION**

Na Moku has clear and indisputable rights to relief that are ensured by the State Water Code and the Hawai'i State Constitution. In construing the applicable statutes, this Court will give effect to the intention of the legislature. The first source for that intention is "primarily from the language contained in the statute itself." *In Re Waiola O Molokai*, 103 Haw. 401, 422; 83 P.3d

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whether it will be entertained. If the court elects to entertain the petition, it will be handled in the same manner as a petition under subsection (a) of this rule.

664; 685 (2004) (holding that construing statutory language must be in the context of the entire statute and in a manner consistent with the statutory purpose). If the legislature has unambiguously spoken on the matter in question, then the inquiry ends with the clear language expressed in the statute. *Id.*

**1. Under the Stream Protection Program, the Commission must act on the Requests to Amend Interim Instream Flow Standards within 180 days.**

Procedurally, under the Water Code, the CWRM is required to “establish and administer a statewide instream use protection program” under HRS § 174C-71(1). This mandate requires setting instream flow standards “to protect, enhance, and reestablish, where practicable, beneficial instream uses of water.” HRS § 174C-71 (4). Under HRS § 174C-71(1), the Commission must set *permanent* instream flow standards to protect the natural resources associated with streams. In addition, under HRS § 174C-71(2)(A), any person with the proper standing may petition the commission to adopt an *interim* instream flow standard for streams in order to protect the public interest “pending the establishment of a permanent instream flow standard.”<sup>6</sup> The statute unambiguously requires the Commission to act upon such latter petitions within 180 days, subject to an extension for a like period:

(E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section *within one hundred eighty days* of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;

HRS § 174C-71(2)(E) (emphasis added). Thus, this statute requires the Commission to grant or reject a petition to amend<sup>7</sup> IIFS within 180 days of the filing date of the petition, or at most 360 days with an approved extension.

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<sup>6</sup> HRS § 174C-71(2)(D) requires the Commission to balance interests:

(D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses;

<sup>7</sup> While the statute literally requires CWRM action to “adopt” an interim instream flow standard (IIFS) when petitioned, there is no functional difference when the request is to “amend” the standard once already established. *Richardson v. City and County of Honolulu*, 76 Haw. 46, 60, 868 P.2d 1193, 1207 (1994) (holding that statutory construction dictates that an interpreting court should not adopt a literal reading of a statute “when such a construction would produce an absurd . . . result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.”). Given the statutory directive to “establish and administer a statewide instream use protection program” under HRS § 174C-71(1), restricting such prompt action for only the initial establishment of an IIFS would irrationally confine prompt action to only those instances. *In re Water Use Permit Applications*, 105 Haw. 1, 8-9, 93 P.3d 643, 650-651 (Haw., 2004) (holding that laws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other). Such an interpretation would be lead to absurd results, as in this instance,

The Legislature envisioned that the process for establishing permanent instream flow standards would involve a more complicated procedure based on more extensive notice to the public, investigation of the stream, consultation with various agencies, balancing of interests, and an opportunity for a public hearing. HRS § 174C-71(1)(D) and (E).

In contrast, under HRS § 174C-3, an "interim instream flow standard" is defined as "a temporary instream flow standard of *immediate* applicability, adopted by the commission *without the necessity of a public hearing*, and terminating upon the establishment of an instream flow standard." (Emphases added). Petitioners have invoked the procedures in HRS § 174C-71(2), relating to establishment of interim instream flow standards, by *amending*, the current *interim* instream flow standards, which the CWRM put into place in 1988 based on the status quo flows then appearing in each stream statewide. HAR 13-169-44, attached Appendix. In effect, the interim standards froze the level of flows required in all streams in the state on an interim basis until the Commission could meet the process standards prescribed in HRS § 174C-71(1):

... the Code envisions the establishment of bona fide "permanent" instream flow standards as an ultimate objective in its mandated "instream use protection program," HRS § § 174C-71(4), -5(3). ...

*In the Matter of the Water Use Permit Applications*, 94 Haw. 97, 150; 9 P.3d 409, 462 (2000) (*Waiahole I*). Thus, a completely diverted stream would remain dry under this 1988 standard.

These interim standards are supposed to continue to apply before the CWRM determines permanent flow standards, unless amended pursuant to HRS § 174C-71(2):

... we see no sound basis for preventing the Commission from amending *interim* standards to provide further protection where, according to the Commission, the *evidence generally demonstrates the need for increased flows*, but nonetheless falls short of the desired showing for establishing *permanent* standards.

94 Haw. at 151; 9 P.3d at 463 (emphases added). Since imposing interim standards for streams statewide in 1988 based on the status quo then, the CWRM left these streams in a depleted state due to the diversions then dewatering them. Simultaneously, many streams provided insufficient flow to support needs protected by the public trust. Accordingly, the Court sanctioned the amendment of IIFS to protect the public interest:

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where the CWRM appears content to indefinitely delay action despite the mandate and the presence of superior legal rights to water use. *Williams v. Hawaii Medical Service Ass'n*, 71 Haw. 545, 549, 798 P.2d 442, 444, reconsideration denied, 71 Haw. 666, 833 P.2d 900 (1990) (courts will not construe rules in manner which produces absurd result).

HRS § 174C-71(2)(A) calls for "petitions to adopt an interim instream flow standard for streams *in order to protect the public interest.*" ... Notwithstanding their temporary effect, therefore, interim standards must still provide *meaningful protection of instream uses.* ...

*Id.* (emphases added).

Critical of the CWRM's refusal to timely act on establishing permanent instream flow standards throughout the state, the *Waiahole I* Court viewed the situation in 2000 as urgent:

In order to effectuate the Water Code's framework for instream use protection, the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams. **In the meantime, the Commission shall designate an interim standard based on the best information presently available.** ...

*Waiahole I*, 94 Haw. at 156, 9 P.3d at 468 (emphasis added). Following a second appeal of the Commission's decision, the Court could not have been more pronounced or clear in its most recent 2004 rebuke for the delay in establishing *permanent* instream flow standards:

We take this opportunity, however, to remind the Water Commission that **seventeen years** have passed since the Water Code was enacted requiring the Water Commission to set permanent instream flow standards by investigating the streams. HRS § 174C-71. In addition, four years have passed since this court held that "the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams." *Waiahole I*, 94 Haw. at 156, 9 P.3d at 468. The fact that an IIFS is before this court evinces that this mandate has not yet been completed as of the Water Commission's D&O II.

*In the Matter of Water Use Permit Applications*, 105 Haw. 1, 12; 93 P.3d 643, 654 (2004) (*Waiahole II*) (emphasis added). Three years have passed since that decision.

Given the Court's concern for the failure to establish *permanent* instream flow standards, it is even more paramount that the CWRM affirmatively and timely amend *interim* instream flow standards when, based on current scientific information, the public interest and the public trust require it to do so. Pending the establishment of permanent standards, the *Waiahole I* Court allowed the CWRM in that case to amend *interim* instream flow standards of those streams in order to protect their public trust values.<sup>8</sup> *Waiahole I*, 94 Haw. at 157, 9 P.3d at 469. The *Waiahole I* Court did not treat petitions for interim instream flow standard amendments as a

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<sup>8</sup> The Court cited several factors suggesting that the interim standard should not be significantly reduced: "1) the lack of proper studies and adequate information on the streams; 2) the corresponding inability of the Commission presently to fulfill the instream use protection framework; 3) the substantial, largely uncontroverted expert testimony that the present instream flows represent the minimum necessary to sustain an adequate stream habitat; 4) the Commission's finding that, "in general, it is expected that additional flows to the streams would increase the native biota habitat"; and 5) the Commission's generous provision for immediate and near-term offstream demands under a "prima facie" standard" *Waiahole I*, 94 Haw. at 157, 9 P.3d at 469.

‘competing’ water use permit applications, which needed to be balanced with other applications under HRS § 174C-54.” *Id.* at 148, 9 P.3d at 460. Rather, cognizant of the higher priority for trust purposes, the Court remained conscious of and insistent on the need for properly timing the stream protection measures adopted. *Id.* at 154, 9 P.3d at 466 (“Every concession to immediate offstream demands made by the Commission increases the risk of unwarranted impairment of instream values, ad hoc planning, and arbitrary distribution.”).

Finally, in addition to the foregoing judicial pronouncements of the need for prompt protective actions to restore stream flows, and obviously frustrated by the CWRM’s failure to timely and fully address the public interest concerns in protecting stream resources from degradation due to diversions, the 2005 Legislature passed HCR 293, HD 1, *Urging The Commission On Water Resource Management To Fulfill Its Constitutional And Statutory Mandate To Protect Public Trust Instream Uses* (Haw. Sess. Laws 2005). The purpose of the resolution was to “urge the Commission on Water Resource Management to fulfill its constitutional and statutory mandate to protect public trust instream uses.” S. Stand. Com. Rep. No. 1819. Specifically, the Legislature declare “stream restoration to be essential to support and restore Hawaii’s natural, cultural, and recreational treasures for current and future generations.” HCR 293, HD 1, 23<sup>rd</sup> Leg., 2005 Sess. Laws Hawai’i. Seeking to implement constitutional protections for water resources and based on the intended purposes and function of the Commission, the Legislature found “that the Commission has not done enough to protect the State’s water resources and can do more to protect it as mandated by the Code and the constitution.” Thus, the Legislature adopted H. R. Conc. Res. 293, HD 1 to declare, *inter alia*, that it:

(1) Affirms the Legislature’s belief that stream restoration is essential to support and restore Hawaii’s natural, cultural, and recreational treasures for current and future generations;

(2) Urges the Commission to fulfill its constitutional and statutory mandate to protect instream uses; ...

Of course, that mandate had not changed since it was first enacted in 1987. In HCR 293, the Legislature called on the CWRM to “devote the staff and resources necessary to fulfill its constitutional and statutory mandate to protect public trust instream uses by:

(1) Establishing scientifically-based instream flow standards, including launching an immediate investigation into the scope and cost of studies required to establish such standards;

(2) **Promptly resolving all pending petitions to restore stream flows** such as those of the Na Wai Eha; . . .”

(emphasis added). The 2005 Legislature, in adopting HCR 293, added its legislative weight to the clear public policy enunciated by this Court to establish permanent instream flow standards.

As clearly confirmed above, Na Moku has a clear and indisputable right to relief in the form of action on their petitions to amend the IIFS for the 27 East Maui streams identified. Yet, despite its knowledge of the systemic harm to Petitioners attempting to exercise their constitutionally and statutorily protected water rights and the scientific basis to amend, the Commission refuses to act. See, Exhibit 40. These native tenant taro farmers have alerted the CWRM on numerous occasions of the harms to constitutional and statutory rights, to no avail. Exhibits 7, 9, 10, 11, 35, 38, and 40. The CWRM, having in its possession the USGS reports, has no discretion left to fail or refuse to act. It must, using the data provided by the USGS report, adopt interim standards to restore flow for the protection of rights previously enumerated.<sup>9</sup>

**2. Under the Constitution, the Commission must act affirmatively and preemptively to investigate impacts on protected water rights and to protect appurtenant water rights and traditional and customary practices which rely on a sufficient amount of streamflow.**

Art. XI, § 1 of the Haw. Const. mandates that, "for the benefit of present and future generations, the State and its political subdivisions shall protect and conserve . . . all natural resources, including . . . water . . . and shall promote the development and utilization of these resources . . . in a manner consistent with their conservation." It further declares that "all public natural resources are held in trust for the benefit of the people." See, Appendix 1. These provisions reflect the "intent to incorporate the notion of the public trust into our constitution." *In re Water Use Permit Applications*, 94 Hawai'i 97, 131, 9 P.3d 405, 443 (2000) (hereafter, "*Waiahole I*").

Under Hawai'i State Constitution, Article XI, section 7, the state is obligated to, *inter alia*, "protect, control and regulate" . . . ground and surface water resources, watersheds, and natural stream environments," and assure "appurtenant rights, and existing correlative and riparian uses"

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<sup>9</sup> It does not have the option of refusing to act. It cannot hide behind indefinite delay which is arbitrary and capricious. *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S. App. D.C. 391, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (holding that when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief). See, *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1191 (D. Haw. 2006).

of water. See, Appendix 1. Thus, Article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii. *Id.* at 132, 9 P.3d at 444.

In addition, through the Hawai'i State Constitution, Article XII, section 7, the state has established a policy to reaffirm those rights traditionally and customarily exercised for cultural, subsistence and religious purposes. See, Appendix 1. To implement these provisions, the Legislature enacted HRS §§ 174C-2 and -101 to recognize and protect water rights associated with promoting traditional and customary Hawaiian rights. *Id.* at 133, 9 P.3d at 445. See, Appendix.

Moreover, the Water Code does not supplant protections under the public trust doctrine. *Id.* at 130, 9 P.3d at 442. Under that doctrine, protecting and restoring stream flows in recognition of these rights are in the public interest. *Id.* at 155, 9 P.3d at 467. Thus, leaving stream flows in their natural state is a distinct "use" under this water resources trust. *Id.* at 136, 9 P.3d at 448. Furthermore, the Court has rejected any portrayal of retention of waters in their natural state as "waste." *Id.* at 137, 9 P.3d at 449, citing *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (citing article XI, section 1 as an acknowledgment of the public interest in "a free-flowing stream for its own sake"). Similarly, it has upheld "the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose." *Waiahole I*, 94 Haw. at 137, 9 P.3d at 449. The trust's protection of traditional and customary rights also extends to the exercise of appurtenant rights. *Id.*, note 34.

Furthermore, this Court has affirmed that the public trust over the state's water resources "effectively prescribes a 'higher level of scrutiny' for private commercial uses..." which "[i]n practical terms ... means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust." *Id.* at 142, 9 P.3d at 454 (emphasis added). In short, a diverter of natural stream flow has the burden of proving, that the proposed water use would not abridge or deny traditional and customary native Hawaiian rights.

This burden is crucial. It clearly means that the Commission cannot rest on the failure of petitioners to produce enough evidence to support their claims to protect their rights under the public trust doctrine. *Waiola*, 103 Haw. at 442; 83 P.3d at 705 (holding that "the absence of evidence that the proposed use would affect native Hawaiians' rights was insufficient to meet the burden imposed upon [an applicant for a new water use permit] by the public trust doctrine, the Hawai'i Constitution, and the Code."). It must demand a sufficient showing by a diverter's use of water that could impact traditional and customary practices to demonstrate that there will be no harm to those practices with the proposed water use. *Id.*



In dealing with public trust assets such as water, the state's trust duties amount to much more than simply acting as a "good business manager" of this crucial resource. *Id.* at 421, 83 P.3d at 684. Rather, this court will take a "close look" at an agency's action to determine if it complies with the public trust doctrine, and not merely rubber stamp agency action. *Id.* at 422, 83 P.3d at 685. In particular, the Court has been very pointed in prescribing the duty of the CWRM:

The constitution designates the Commission as the primary guardian of public rights under the trust. Haw. Const. art. XI, section 7. As such, the Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process. [citations omitted] Debates, in 2 Proceedings, at 857 (statement by Delegate Fukunaga) ("Thus, under [article XI, section 7], the State must take an active and affirmative role in water management."). ... The trust also requires planning and decisionmaking from a global, long-term perspective. [citation omitted] In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

*Waiahole I*, 94 Haw. at 143, 9 P.3d at 455.

Moreover, even where there is uncertainty in amending IIFS and the need for more information, as the CWRM appears to claim here, the precautionary principle requires interim action when necessary to protect the public interest in protecting the stream resources:

"Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt 'precautionary principles' in protecting the resource. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be the basis for postponing effective measures to prevent environmental degradation."

*Id.* at 154, 9 P.3d at 466.

These principles should provide for "reasonable 'margins of safety' for instream trust purposes when establishing instream flow standards." *Id.* at 156, 9 P.3d at 468. Thus, "uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." *Id.* at 155, 9 P.3d at 467. To adhere to its trust obligations, the CWRM:

... may make reasonable precautionary presumptions or allowances in the public interest. The Commission may still act when public benefits and risks are not capable of exact quantification. At all times, however, the Commission should not hide behind scientific uncertainty, but should confront it as systematically and judiciously as possible --

considering every offstream use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements

*Id.* at 159, 9 P.3d at 471.

The East Maui Irrigation system consists of 388 separate intakes, 24 miles of ditches, and 50 miles of tunnels, as well as numerous small dams, intakes, pipes and flumes along the East Maui coast. Exhibit 28 at 1; <http://www.hawaii.gov/dlnr/cwrm/current/iifsmaui1.htm>. Its design over the past century has allowed A&B/EMI to take up to 450 million gallons per day (“mgd”) and an average of 165 mgd. *Id.* These diversions along this complex ditch system largely dewater 110 streams along the East Maui coast by taking all of their base flow. *Id.* Some streams are diverted by A&B/EMI more than once, since certain streams gain water from springs downstream of higher elevation diversions. The vast bulk of this water is used for sugar operations. *Id.* The water diverted would otherwise support the irrigation of taro lo`i and the traditions and customs of the Hawaiian families who would normally fish along its coastline and gather o`opu, opae, and hihiwai from those streams to supplement their diets. See, Declaration of Beatrice Kekahuna (Exhibit 43); Declaration of Ed Wendt (Exhibit 44).

The CWRM should be deferring to the Petitioners’ needs for stream water, and *timely* acting on their behalf, rather than indefinitely refusing to review the status quo diversions to support commercial sugar operations in Central Maui.<sup>10</sup> The resulting denial of the exercise of constitutionally protected cultural rights is patently inexcusable. These are public trust purposes which the CWRM is under an obligation to timely respect and affirmatively protect with restored stream flows, especially where the A&B/EMI diversions support *commercial* uses of water, which have a lower legal priority. *Waiahole I*, 94 Haw. at 142, 9 P.3d at 454 (holding that “the public trust, by nature and definition, establishes use consistent with trust purposes as the norm or ‘default’ condition, [and] effectively prescribes a ‘higher level of scrutiny’ for private commercial uses”). The CWRM is not even as active as the proverbial “umpire” in taking action on amending *interim* instream flow standards. *Waiahole I*, 94 Haw. at 143, 9 P.3d at 455. It is already armed with the scientific information which suffices to establish *permanent* instream flow standards. It has utterly failed to “take the initiative in considering, protecting, and advancing public rights in the [water] resource” in the subject East Maui streams as this Court has required. *Id.*

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<sup>10</sup> In addition, this Court has previously rejected the viability of “any grant or assertion of vested rights to use water to the detriment of public trust purposes.” *Waiahole I*, 94 Haw. at 141, 9 P.3d at 453. Accordingly, it reaffirmed the power of the state “to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust.” *Id.*

The CWRM may *not* shift the burden of proving claims for water to support public trust purposes on the Petitioners like Na Moku and rest on the absence of such evidence to substantiate appurtenant water rights in order to do nothing and effectively yet improperly sanction A&B/EMI's continuing diversions. *Waiola*, 103 Haw. at 442; 83 P.3d at 705 (holding that the CWRM erroneously placed the burden on the native Hawaiian practitioners to establish that the proposed use would abridge or deny their traditional and customary gathering rights); see, also, *In re Kukui (Molokai), Inc.*, No. 24856, slip op. at 54-55 (Haw. Sup. Ct. Dec. 26, 2007) (holding that the absence of evidence of harm to a constitutionally protected trust purpose is insufficient to meet the burden on the applicant of a water use permit to show that there is no harm affecting that purpose).

Conversely, it cannot ascribe a lesser amount of scrutiny to diversions impacting public trust purposes, foregoing investigation of such impacts in favor of the status quo, which in effect favors commercial uses of water. *Waihole I*, 94 Haw. at 142, 9 P.3d at 454; *Waiola*, 103 Haw. at 442; 83 P.3d at 705. It cannot rely on indefinite planning and creation of processes, while ignoring legislative urgings and judicial guidelines. It cannot forego action merely to hold public hearings on setting IIFS when the statute specifically omits this procedural requirement. HRS § 174C-3; 174C-71(2)(E). Instead, it must act immediately and affirmatively with the information it has at hand, providing margins of safety to assure that its actions protect public trust purposes. *Waihole I*, 94 Haw. at 156, 9 P.3d at 468.

In reality, since June 22, 2001, when the petitions for these 27 East Maui streams were belatedly accepted, the Commission has failed to act to either grant or deny the petitions. The CWRM actually rejected the petitions initially, claiming it did not substantiate the standing of Petitioners to claim their rights. See, Exhibit 3 In doing so, the CWRM staff inexplicably flipped the legal burden of proof on its head, demanding evidence of petitioners' superior appurtenant water rights and traditional and customary practices and what level of current flow existed in the affected streams. Exhibits 3, 6, 7, 9, 10, 11, 12, 13, 14, 16-18, and 39. In effect the CWRM has compromised these rights without the "level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Waihole I*, 94 Haw. at 154, 9 P.3d at 466; see, also, *Waiola*, 103 Haw. at 442; 83 P.3d at 705.

The misinterpretations of the law by then deputy director Nishioka, as well as the opinion rendered by then-deputy attorney general Izu regarding the power of the CWRM to determine appurtenant rights and the applicable burden of proof persisted well beyond the decisions and

admonitions of this court on these points. Compare, *Waiahole I*, 94 Haw. at 142, 143, 156, 9 P.3d at 454, 455, 468; *Waiola*, 103 Haw. at 442; 83 P.3d at 705; and *Waiahole II*, 105 Haw. at 12; 93 P.3d at 654. This pattern of perplexing misjudgments by public officials charged with protecting a public trust resource and constitutional rights to water as to the applicable law confound logic or rational explanation.

"[T]here are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding." *Sussel v. Honolulu Civil Serv. Comm'n*, 71 Haw. 101, 107, 784 P.2d 867, 870 (Haw. 1989), quoting R. Pound, *Administrative Law* 75 (1942). "[A] 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136; 75 S. Ct. 623,625 (1955). As with courts, this principle applies to administrative agencies which adjudicate as well *Id.*, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). While any decision of a biased decisionmaker is unconstitutional, *Id.* at 47, disqualifying such decision-makers on grounds of actual bias alone may not cure the problem. *State v. Brown*, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989).

Rather, the justice system must "always [endeavor] to prevent even the probability of unfairness." *Sussel*, 71 Haw. at 107, 784 P.2d at 870, citing *In re Murchison, supra*. "Justice can perform its high function in the best way [only if it satisfies] 'the appearance of justice.'" *Sussel*, 71 Haw. at 108, 784 P.2d at 870, citing *Offutt v. United States*, 348 U.S. 11, 14 and *In re Murchison, supra*. Thus, "justice must not only be done but must manifestly be seen to be done." *Sussel*, 71 Haw. at 108, 784 P.2d at 870, citing *Rex v. Justices of Bodmin*, [1947] 1 K.B. 321, 325." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (Frankfurter, J., concurring) (1951)). A truly independent adjudicator is essential to attainment of justice. *Sussel*, 71 Haw. at 108, 784 P.2d at 870. "Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." *Id.*, citing M. Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84 (1986). This high standard for justice pays special attention to the perception of bias:

"Few situations more severely threaten trust in the [adjudicative] process than the perception that a [party] never had a chance because the decisionmaker may have owed the other side special favors." *M. Redish & L. Marshall, supra*, at 483.

*Sussel*, 71 Haw. at 109, 784 P.2d at 871.

Despite their various associations as agents or representatives of Alexander and Baldwin over the course of the years since Na Moku, et al. challenged this company's unbridled use of stream water from East Maui, Ms. Ching, Ms. Izu or Ms. Nishioka apparently violated no technical conflict of interest standard.<sup>11</sup> Nevertheless, Ms. Ching's high position with management of the biggest commercial water diverter in the state clashes with her public trust role as a CWRM commissioner and the promptness with which she must act to protect streams under HRS chapter 174C-71(2)(E). Similarly, the revolving door between the CWRM and the firm which represented A&B/EMI through which both Ms. Izu and Ms. Nishioka passed diminishes the appearance of justice, especially when viewed through the lens of the public trust. What cannot be definitively established at this time is how their collective influence on the failure to adopt/amend IIFS for East Maui streams over these past 6 years has been crucial.

However, the close associations with, and fiduciary duties to, the very company whose water use is being challenged in proceedings for which they bore or still bear responsibility for regulation is undeniable. The unexplained delays in acting by, as well as clashing actions and opinions with the demands of the public trust protection expected of, the CWRM collectively raises at least a perception, if not an appearance of impropriety. *Sussel v. Honolulu Civil Serv. Comm'n*, 71 Haw. 108, 784 P.2d at 870 (noting that in a quasi-judicial proceeding, "justice must satisfy the appearance of justice").

In July 2002, 15 years after the passage of the Stream Protection Program mandated by the 1987 Legislature, the CWRM established the Stream Protection and Management (SPAM) Branch, comprised of the Surface-Water Regulation and the Instream Use Protection Sections within its staff. Hawai'i State Commission on Water Resources Management, *Report to the Twenty-Third Legislature (2006 Regular Session) in response to House Concurrent Resolution (Resolution) No. 293, House Draft 1 (SLH 2005)* (hereafter, "Commission Report to 2006 Legislature"),<sup>12</sup> See, Exhibit 32. The establishment of the Instream Use Protection Section was supposed to mark the CWRM's commitment to assume a proactive role in surface water planning and resource assessment and protection. *Id.* Despite this purported act of sincerity in

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<sup>11</sup> For example, Ms. Nishioka did not formally represent A&B/EMI as its specific attorney, even though she remained with the firm serving as its counsel, until more than a year after leaving employment with the CWRM in 2002. However, her associates and superiors in her new law firm continued to serve as counsel for those entities during the interim when she was barred from taking that role under HRS § 84-18. (restricting ex-government attorneys from serving clients with whom they would have a conflict of interest for 12 months after leaving public sector employment). See, note 4.

<sup>12</sup> The report pages are not numbered.

implementing its statutory duty, the CWRM has simply continued to delay any action on restoring flows to streams as an interim measure pending this ongoing work to establish permanent instream flow standards as envisioned under HRS chapter 174C.

In July 2005, 18 years after the passage of the Stream Protection Program mandated by the 1987 Legislature, and following the admonitions of both the Hawai'i Supreme Court (twice) and the Legislature, the Commission's Stream Protection and Management Branch Instream Use Protection Section adopted its first Program Implementation Plan. Assertedly, the Plan is comprised of "the Branch's specific goals, strategic issues, actions, and work tasks." *Id.* Supposedly, "these elements identify the informational requirements and necessary steps that the Commission must take to establish a statewide IFS methodology, with the intention of providing consistency and transparency to the complexity of issues that the Commission is tasked with confronting." *Id.* The Program Implementation Plan attempts to:

- clearly delineate the steps that must be taken towards developing a comprehensive methodology of establishing quantifiable instream flow standards (IFS) statewide.
- serve as a guide to effectively implement the specific objectives outlined by the State Water Code.

*Id.*, Attachment A at 1.

This Program Implementation Plan was supposedly a critical step to lay out the foundational elements that would "guide the Stream Protection and Management Program towards proactively addressing instream flow standards statewide and improving the overall management of Hawaii's surface-water resources." *Id.* The goals, strategic issues, actions, and work tasks outlined in this Plan were designed "to provide consistency and transparency to the complexity of issues that the Commission is tasked with addressing." *Id.* Nevertheless, this Plan addresses a methodology for establishing *permanent* instream flow standards; it should not be an excuse for failing to act upon *interim* instream flow standards.

In merging its approach for the adoption/amendment of *interim* instream flow standards with that for *permanent* instream flow standards, the CWRM has ignored the daily plight of Na Moku in that interim period, choosing delay, engaging in endless and untimely planning, and hiding behind a claim of scientific uncertainty once again to avoid amending *interim* instream flow standards in the 27 streams. Other branches of government, to which critics and victims of inaction have turned in utter frustration, have bludgeoned the CWRM with criticism. HCR 293, HD 1, 23<sup>rd</sup> Leg., 2005 Sess. Laws Hawai'i; *Waiahole I*, 94 Haw. at 156, 9 P.3d at 468; *Waiahole*

*II*, 105 Haw. at 12; 93 P.3d at 654. Despite these unrelenting criticisms and calls for prompt and appropriate action, the CWRM has nevertheless resorted to “the least protection feasible [and] the absence of protection,” *Waiahole I*, 94 Haw. at 155, 9 P.3d at 467, despite the repeated admonitions of this Court to act “with utmost haste.” *Waiahole II*, 105 Haw. 1, 12; 93 P.3d 643, 654 (2004); *Waiahole I*, 94 Haw. at 156, 9 P.3d at 468.

As mentioned in the Commission Report to the 2006 Legislature, the Commission entered into its May 2002 cooperative agreement with the USGS to conduct a study of a specific set of the 27 streams located in East Maui. Exhibit 32, Commission Report to 2006 Legislature 10. The Study collected and analyzed data including, but not limited to, hydrology, geology, rainfall, and stream macrofauna. *Id.* The USGS, the Commission, DLNR’s Land Division, County of Maui Department of Water Supply, and Alexander and Baldwin, Inc jointly funded the Study. *Id.* The objectives of the three-year study were to: 1) Assess the effects of existing surface-water diversions on flow characteristics for perennial streams in Northeast Maui; 2) Characterize the effects of diversions on instream temperature variations; and 3) Estimate the effects that streamflow restoration (full or partial) will have on habitat availability for native stream fauna (fish, shrimp, and snails) in Northeast Maui. *Id.*

In mid-2005, the USGS released the first of two reports summarizing the study findings, which provides an in-depth analysis of streamflow conditions. *Id.*, Gingerich, *Median and Low-Flow Characteristics for Streams under Natural and Diverted Conditions, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2004-5262 (2004) (See, attached Exhibit 28). The second report, which the USGS submitted to the Commission in late 2005, focuses on the impact of streamflow upon native stream fauna. The results of these reports give the Commission the ability to predict the percentage of habitat restored through varying levels of flow restoration. Gingerich and Wolff, *Effects of Surface-Water Diversions on Habitat Availability for Native Macrofauna, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2005-5213 (2005) (See, attached Exhibit 30).<sup>13</sup>

This information has armed the CWRM with arguably enough data and scientific information to establish *permanent* instream flow standards for East Maui Streams. It has given

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<sup>13</sup> In this instance, the USGS Scientific Investigation Report 2005-5213 showed that restoring even a small amount of water to a diverted stream can vastly improve habitat to native fauna. Press Release, USGS, *USGS report measures effects of surface-water diversion on native fish habitat in northeast Maui* (Jan. 30, 2006), <http://www.usgs.gov/newsroom/article.asp?ID=1434>, also attached as Exhibit 31.

the CWRM with the scientific information it did not have when it amended *interim* instream flow standards for Windward O`ahu in the *Waiahole I* case, where this Court required action.

Yet, instead of performing its duty to protect streams in this instance, the CWRM has done little of substance. While it has proclaimed it will be conducting public hearings in the future to collect more data, gather more community input, and consult with affected parties, none of these steps is contemplated in fulfilling its obligations to “[p]romptly resolving all pending petitions to restore stream flows” as the Legislature requested in H.R. Con. Res. 293, HD 1. Despite the statutory deadline in HRS § 174C-71(2), over 2 years have elapsed since this legislative request. It has clearly dragged its feet instead of acting “with utmost haste” in establishing permanent instream flow standards that are meaningful to protect the public interest, as this Court urged. *Waiahole II*, 105 Haw. at 12; 93 P.3d at 654; *Waiahole I*, 94 Haw. at 156, 9 P.3d at 468. More significant, the CWRM’s failure to act is a direct violation of its trust obligation to protect stream flows from diversions for commercial uses where restoration is necessary to protect Hawaiian traditions and custom, including addressing the appurtenant rights to support taro cultivation and traditional and customary gathering rights protected by Article XI, § 7, and Article XII, § 7.

“When the same parcels of land are presently being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to establish a presumption that the amount of water diverted for such cultivation adequately approximates the quantity of the appurtenant water rights to which that land is entitled.” *Reppun v. Board of Water Supply*, 65 Haw. at 564, 656 P.2d at 78. Thus, lands with appurtenant water rights “are entitled to the quantity and flow of water which was utilized to irrigate crops prior to the diminution of the stream that damaged the crops.” *Id.*; see, *infra* at 33. Na Moku members, Ms. Kekahuna and Ms. Wallett are taro farmers with appurtenant rights, and practitioners of traditional and customary rights which require sufficient streamflow. Exhibit 43 (Testimony of Beatrice Kekahuna). They use means to grow taro that approximate those utilized at the time of the Mahele. These facts are undisputed. The potential that appurtenant rights attached to their lands may have been extinguished is not for these petitioners to disprove; it is the burden of A&B/EMI to establish to justify its diversion. As such, the commission cannot arbitrarily demand evidence of title and appurtenant rights when confronted with a request to amend IIFS for the 27 identified streams. Exhibits 16, 17, 18, 27, and 39. That request was made almost 7 years ago. Since then, Na Moku, et al. have been systematically and chronically injured by the continued diversion of water from these streams, particularly in Honopou, Wailuanui, and



Ke'anae Valleys, where their taro cultivation was traditionally cultivated in the tradition of their ancestors in a manner approximating that at the time of the Mahele. Exhibits 42, 43 and, 44. The CWRM must “make reasonable precautionary presumptions or allowances in the public interest” to accommodate these traditional practices. *Id.* at 159, 9 P.3d at 471.

The 1987 Legislature was also very clear that it intended to direct the CWRM “to implement instream flow standards when disposing of water from state watersheds, and when regulating use of lands and waters within conservation districts.” Conf. Comm. Rep. No. 118, in 1987 Senate Journal, at 886 (attached to Exhibit 11); *Waiahole I*, 94 Haw. at 148, 9 P.3d at 460. The Ko'olau Forest Reserve, from which waters are collected by A&B/EMI with the permission of the BLNR, is both a state watershed, Haw. Rev. Stat. §§ 183-11, 183-31, Exhibit 30 at 3, and conservation district largely owned by the State of Hawai'i and managed by its Department of Land and Natural Resources. *Id.*; see, also, Exhibit 45. Yet, the CWRM has ignored the parallel proceeding before its sister agency in charge of permitting the use of state watershed areas, apparently oblivious to its legislative direction to “implement instream flow standards” before the BLNR disposes of waters from these 33,000 acres.

In that parallel proceeding before the State Board of Land and Natural Resources, Petitioners are challenging the reissuance of BLNR permits or leases to authorize the taking of stream water from 2/3 of the 56,000 acres of watershed area being tapped by A&B/EMI in East Maui, or 33,000 acres of state ceded lands, without regard for their rights. See, Exhibit 30. During the 6 years of that separate legal battle, Petitioners won a circuit court reversal of the state attempt to sanction EMI diversions under a 30-year lease without regard for their rights. See, Exhibit 19. The October 2003 circuit court order required the BLNR to conduct its own *independent* investigation or analysis if the CWRM failed to establish instream flow standards and the BLNR wished to proceed with issuing 30-year leases of the watershed areas. *Id.*

Conversely, if the BLNR believed it does not have the requisite expertise to investigate, then it had to wait until the CWRM has acted *or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion. Id.* After a remand for determinations of issues related to the pending revocable permits, the State BLNR issued an interim order granting Petitioners partial relief, ordering, *inter alia*:

1. That the Board determine the status of pending petitions at the CWRM and *if necessary file an appropriate petition with the CWRM for determination of the petitions for amendment of the IIFS for the diverted streams* which are the subject of this action.

2. That if necessary the Board direct the Department of Land and Natural Resources to itself take all administrative steps necessary to assist the CWRM in the amendment of the IIFS, prepare an EA in accordance with HRS Chapter 343, and discharge its public trust and HRS Chapter 171 responsibilities.

See, March 23, 2007 BLNR Order (emphasis added), attached as Exhibit 36. However, the BLNR has not filed its own petition and Na Moku is unaware of any assistance the BLNR has provided its sister agency within its own department to amend IIFS, despite this oblique critique of the CWRM's failure to perform its duties. Declaration of Alan T. Murakami.

Finally, the CWRM has arbitrarily ignored these petitions while acting on more recent ones. For example, on June 25, 2004, Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. (hereafter, collectively "Na Wai Eha") filed a Petition to Amend Interim Instream Flow Standards for Waihe'e, Īao, South Waiehu, and Waikapu Streams in north Maui. See, CWRM webpage at: <http://www.hawaii.gov/dlnr/cwrn/current/iifismaui2.htm>, Exhibit 25. Na Moku's petitions predated those filed to restore the stream waters covered by the petitions to amend IIFS for Na Wai Eha by 3 years. Yet, the CWRM took up formal administrative processing of that latter petition first, arbitrarily ignoring and bypassing Na Moku's older requests. See, Exhibit 41. It is currently holding a contested case hearing on this Na Wai Eha petition, completely disregarding any deadlines for action applicable to either that petition or Na Moku's petitions. *Id.* While Petitioners welcome the CWRM's active, although belated response to that petition, the CWRM has never explained the disparate treatment of the instant petitions filed three years earlier involving comparable public trust interests. This disparity highlights the arbitrary nature of the CWRM's asserted stream protection program.

**3. Under HRS §§ 174C-5(15) and 174C-10, the Commission must timely resolve any complaint for violation of constitutionally protected water rights.**

Under the Water Code, the Commission has broad powers to protect those constitutionally guaranteed water rights having roots in the very origin of our current system of laws. Amongst those laws are appurtenant water rights, which the courts have repeatedly upheld throughout and since the days of the Mahele. Delegates to the 1978 Constitutional Convention reaffirmed those rights through Haw. Const., Art. XI, § 7, which obligates the State to "protect, control and regulate" ... ground and surface water resources, watersheds, and natural stream environments," and assure "appurtenant rights, and existing correlative and riparian uses" of water. See,

Appendix 1. The water code also preserves appurtenant rights and water rights supporting traditional and customary practices.<sup>14</sup> HRS § 174C-63.

In order to implement these provisions, the 1987 Legislature created the Commission under HRS chapter 174C. One of those provisions, in addition to the provisions for amending IIFS is HRS §174C-10 (emphasis added), giving the commission:

...jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final decision on any matter shall be made by the commission.

See, Appendix. In adopting this provision, the Legislature intended to

bring all water disputes before the Commission, rather than the courts, for **expeditious and inexpensive resolution** of conflicts both within and outside water management areas.

Your Committee believes that the Commission has the authority to and should adopt rules for the resolution of disputes which would include but not be limited to the **inexpensive and timely determination of appurtenant rights**, existing riparian uses, and existing correlative uses in disputes brought before the Commission; ...

Conf. Com. Rep. No. 118, 12<sup>th</sup> Legislature (Haw. 1987) (emphasis added), attached to Exhibit 11.

Despite Petitioners' explicit demand for timely and inexpensive relief citing this legislative history, the CWRM did little or nothing to diligently investigate and resolve the complaints of Petitioners' inability to secure their appurtenant rights or rights to water supporting their attempts to engage in traditional and customary subsistence gathering from streams. See, Exhibit 11. Contrary to providing "timely and inexpensive determination of appurtenant rights," the CWRM instead relied upon the opinion of a deputy attorney general previously associated with the law firm representing A&B/EMI, advising that the CWRM had no jurisdiction to determine appurtenant rights claims. See, Exhibit 7 and 8. Then deputy attorney general Izu incorrectly concluded in 2001, despite the clear legislative history on this issue, that the CWRM had no jurisdiction to determine appurtenant water rights. See, Exhibits 7 and 8. Petitioners at the time pointed out she was ignoring clearly contrary legislative intent on this point. See, Exhibit 10. Based on this smokescreen opinion, the CWRM delayed any determination of these rights and

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<sup>14</sup> The statute is unambiguously clear that appurtenant rights are to be "preserved" in the absence of any request for a water use permit, a reflection of the high priority the Article XI, § 7 assigns to these rights. HRS § 174C-63. Furthermore, HRS § 174C-101 codifies the public trust over water needed to continue traditional and customary practices, including subsistence gathering from the stream and growing taro.

pursued a legislative amendment as a supposed necessary step to give it jurisdiction. In the meantime, it also kept pressing Petitioners inappropriately to produce ever more and more information to establish their appurtenant rights claims, ignoring the legal burden on A&B/EMI to establish the absence of harm to Petitioners. See, Exhibits 4, 7-10, 16-18; HRS §§ 174C-63, 174C-101. See Appendix. Petitioners objected to this delayed approach that defied the applicable burden of proof, to no avail.<sup>15</sup> See, Exhibits 5, 9, 14, and 27.

The preexisting legislative mandates to act on Petitioners' petition and take jurisdiction over the chronic water disputes between Na Moku and A&B/EMI leave no doubt about what is required in this instance. In addition to acting on the petitions, the Court must stop the CWRM from dragging its feet at Na Moku's expense. The CWRM must invoke its dispute resolution jurisdiction and powers to determine and protect the appurtenant and traditional and customary rights of Na Moku, Ms. Kekahuna, and Ms. Walleit in an inexpensive and timely process. Under the current pattern of CWRM behavior, they cannot find the administrative relief intended under the water code, leaving them completely frustrated with the delay.

**B. TIMELY ACTION ON NA MOKU'S PETITIONS IS NOT DISCRETIONARY.**

"A duty is ministerial where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Salling v. Moon*, 76 Hawai'i 273, 275, 874 P.2d 1098, 1100 (1994) (internal quotations omitted). "An agency "ministerial act" for purposes of mandamus relief has been defined as a clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and "so plainly prescribed as to be free from doubt." *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997).

The CWRM cannot hide behind a defense that its unconscionable inaction is unreviewable because it is purely discretionary. Recognizing the need for a multi-year research which required "[c]onsistent long-term flows," the Court noted:

Until adequate scientific information becomes available, therefore, ongoing or further offstream allocations not only subject instream values to unknown impairment and risk, but also undermine efforts at effective research. **Conceivably, the Commission could**

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<sup>15</sup> After a year of unnecessary delay, in 2002, at the suggestion of the CWRM staff, the Legislature specifically amended HRS § 174C-5(15) to provide, inter alia, that the Commission: "Shall 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." This amendment, while perhaps clarifying the explicit power of the CWRM, added little to the scheme imposed earlier by statute and Article XI, § 7 of the Hawai'i Constitution. Even after the amendment, the CWRM made no progress in either amending IIFS or resolving the disputes.

**drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows. Needless to say, we cannot accept such a proposition.**

*Id.* at 158-59, 9 P.3d at 470-71 (emphasis added). In setting the outer limits of its holding, the Court presaged the situation in East Maui, where diversions are leaving streams dry indefinitely. Moreover, the admonition of this Court<sup>16</sup> in *Waiahole I* remains clear:

... if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time. See *Robinson [v. Ariyoshi]*, 65 Haw. [641,] 677, 658 P.2d [287,] 312 [(1982)] ("Underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.").

*Waiahole I*, 94 Haw. at 138, 9 P.3d at 450. In a public trust context such as this one, the CWRM cannot escape review of its inaction on the basis that it has the discretion NOT to act to protect public trust resources. The traditional agency discretion not to enforce a law is inapplicable. See, *Heckler v. Chaney*, 470 U.S. 821, 882 105 S.Ct. 1649, 1655-56 (1985).

Here, the Legislature has explicitly provided for the application of law, i.e. the 180-day deadline to act, which gives this court the ability to review the CWRM's unjustified inaction on the IIFS petitions. *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 350 (8th Cir. 1985) (holding that "[i]f [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under section 701(a)(2) [of the APA], and courts may require that an agency follow that law.").

The requested relief; that the Commission take action on Na Moku's petitions timely, i.e., within 180 days or, at the very least, once it has sufficient scientific data to do so, is clear, "positively commanded," and "so plainly prescribed as to be free from doubt." *Independence Mining Co.*, 105 F.3d at 508. It is a ministerial duty, not a discretionary one since HRS § 174C-71(2)(E) unambiguously prescribes the law to apply, i.e., the 180-day period in which to make a decision and clearly no later than the point at which it has obtained sufficient scientific data to do so. Besides, the Hawai'i Supreme Court has already ruled that *permanent* instream flow standards

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<sup>16</sup> The Court drew a clear line in the sand in dealing with the economic arguments for diversions that impacted the public interest in resource protection:

... the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction. See, e.g., HRS § 7-1 (codifying law of kingdom providing, inter alia, that "the springs of water, running water, and roads shall be free to all")

*Waiahole I*, 94 Haw. at 138, 9 P.3d at 450.

must be established regardless of scientific uncertainty in order to protect the public interest. *Waiahole I*, 94 Hawai'i at 155, 158-59, 9 P.3d at 467, 470-71 (holding that "the Commission's inability to designate more definitive instream flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes"). Accordingly, the Court has insisted that the CWRM apply "a methodology that recognizes the preliminary and incomplete nature of existing evidence" which necessarily "incorporates elements of uncertainty and risk as part of its analysis." *Id.* at 159, 9 P.3d at 471. It has twice chastised the CWRM for delaying establishment of *permanent* instream flow standards without justification. *Waiahole I*, 94 Haw. at 156, 9 P.3d at 468; *Waiahole II*, 105 Haw. at 12; 93 P.3d at 654. Surely, it goes without saying, the timeliness of establishing *interim* instream flow standards<sup>17</sup> is of even greater significance if the delays continue.

In this instance, the USGS has already conducted the required scientific analysis giving the CWRM the necessary tools to analyze the predicted response of the stream habitat to restored flows. It cannot be accused of guessing if restoration is ordered. If anything, these studies show the present state of the deteriorated habitat that the CWRM must address, suggesting any release is better than doing nothing. The CWRM has more information and analytic tools at its disposal in this instance than it did when the Waiahole Courts determined that the streams deserved to have the added flows caused by the shutdown of Oahu Sugar Company in the early 1990's.

In addition, in the past year, the USGS completed its water use study of existing taro growing areas, including three locations in Wailuanui Valley and one in Ke`anae Valley, which includes a portion of the petition area. Exhibit 46 at 42-43. Water-use and water-temperature data collected as part of this study provides baseline information on wetland kalo irrigation practices for a variety of geographic settings in the Hawaiian Islands. *Id.* at 2-3. This study recorded throughflow and temperature readings (every 15 minutes), documenting what water farmers were currently using, without regard for what amounts would be needed to sustain traditional farming of kalo. *Id.* at 3. It revealed that "most farmers believed that their supply of irrigation water was insufficient for proper kalo cultivation." *Id.* In Wailuanui/Ke`anae, some temperature readings

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<sup>17</sup> In *Waiahole I*, the Court noted several factors suggesting that the interim standard should incorporate much of the total then-existing instream flows: "1) the lack of proper studies and adequate information on the streams; 2) the corresponding inability of the Commission presently to fulfill the instream use protection framework; 3) the substantial, largely uncontroverted expert testimony that the present instream flows represent the minimum necessary to sustain an adequate stream habitat; 4) the Commission's finding that, "in general, it is expected that additional flows to the streams would increase the native biota habitat"; and 5) the Commission's generous provision for immediate and near-term offstream demands under a "prima facie" standard." *Waiahole I*, 94 Haw. at 157, 9 P.3d at 469.

dangerously approached or exceeded 25 degrees Celsius (77 degrees Fahrenheit), the threshold for cool water needed to avoid pythium rot so damaging to taro. *Id.* at 44, 48-57. All 15 outflow temperature measurements across the islands exceeded this figure. *Id.* at 58.

The information provided in the USGS reports and the ample archival information on Na Moku's appurtenant rights are more than enough for the Commission to establish new IIFS to protect the constitutional traditional and customary rights that are adversely affected by EMI's diversions. See, *supra* at 27. Even if the Commission still has a duty to establish *permanent* instream flow standards with more information, the statute requires action on Na Moku's petitions to amend *interim* instream flow standards immediately. Unlike in *Waiahole I* where the interim instream flows reflected a depleted stream flow, the CWRM must address an even more critical situation by restoring often-times nonexistent flows to largely dewatered East Maui streams.

Here, although A&B/EMI's diversions are governed by HRS § 171-58(c), the CWRM's failure to act on Na Moku's petitions effectively grants de facto and unquestioned authorization of A&B/EMI's unsanctioned diversions for commercial purposes. Such *carte blanche* and arbitrary inaction is the very evil targeted by the *Waiahole I* Court, the public trust doctrine, and the provision for a deadline to act in HRS § 174C-71(2)(E). The CWRM has lost any discretion to decline action after the passing of almost 7 years.

### C. NA MOKU LACKS OTHER MEANS TO OBTAIN THE RELIEF.

"'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.]'" *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). When this happens, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64 [.] *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192, 202 (Haw. 1995), citing *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. at 93, 734 P.2d at 168. The primary jurisdiction doctrine is designed to promote uniformity and consistency in the regulatory process. *Id.*

In this instance, Na Moku lacks other means to obtain the requested action on their petitions to amend IIFS because the Commission is the sole agency responsible for the general administration of the State Water Code under HRS §§ 174C-5 and -7. Establishing instream flow standards is part of a regulatory scheme under HRS chapter 174C which has been placed within the special competence of the CWRM. HRS § 174C-71. Any doubt about whether the CWRM

has this responsibility was unequivocally resolved when, in 2002, the state Legislature amended HRS § 174C-5 to unequivocally add to the list of statutory CWRM powers the ability to determine appurtenant water rights of claimants seeking relief from the commission. Moreover, the CWRM has sole administrative jurisdiction to resolve water disputes. HRS § 174C-10.

As a matter of primary jurisdiction, the CWRM must act upon Petitioner's requested relief before any court can address it. Also, since the Commission has not taken any action on the petitions there is no opportunity for appeal in the judicial system under HRS § 91-14. While HAR § 13-167-32 allows judicial review of the Commission's rules and orders under HRS § 91-14, the Commission's refusal to take action on Na Moku's petitions prevents an appeal in the judicial system. Without a final decision, Na Moku's sole remedy is this petition for a writ of mandamus to compel the Commission to comply with HRS § 174C-71(2)(E).

## **VI. CONCLUSION**

Na Moku respectfully requests that this Court issue a Writ of Mandamus to the members of the Commission, ordering them to: (1) place the burden of proof on any diverter of these streams to show that those diversions are not causing harm to the precautionary principle, and Petitioners' appurtenant, riparian, and traditional and customary native Hawaiian rights, and the public interest, pursuant to the public trust doctrine, (2) take immediate action on Na Moku's petitions to amend IIFS for 27 streams in East Maui consistent with HRS § 174C-71(2)(E) in order to respect the interests of the holders of these rights, and (3) report back to this Court within 60 days on how it has implemented or is implementing this Court's order and on the status of any action taken on the petitions pursuant to the writ issued.

Petitioners further request that, in order to assist these commissioners, this Court compel Respondent Commission on Water Resources Management Deputy Director KEN KAWAHARA to submit a staff report to Respondent Commissioners recommending specific interim instream flow standards that restore natural stream flow to each of the 27 affected streams based on consideration of: (1) the requisite legal burden on any diverter of stream flow, (2) Petitioners' appurtenant, riparian, and traditional and customary native Hawaiian rights, and (3) the required analysis of available alternatives to these diversions the cumulative impacts generated by continued diversions, all in accordance with appropriate application of the public trust doctrine.



DATED: Honolulu, Hawai'i, January 25, 2008.

A handwritten signature in black ink, appearing to read "Alan T. Murakami", written over a horizontal line.

ALAN T. MURAKAMI  
MOSES K. N. HAIA III  
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MARJORIE WALLET

# APPENDIX

## Constitutional Provisions

### Article XI

#### CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES

**Section 1.** For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

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#### WATER RESOURCES

**Section 7.** The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

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

### Article XII

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#### TRADITIONAL AND CUSTOMARY RIGHTS

**Section 7.** The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

## Statutory Provisions

### CHAPTER 91 ADMINISTRATIVE PROCEDURE

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**§91-14 Judicial review of contested cases.** (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency.

(b) [2004 amendment repealed June 30, 2010. L 2006, c 94, §1.] Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the

satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp, §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1; am L 1979, c 111, §9; am L 1980, c 130, §2; am L 1983, c 160, §1; am L 1986, c 274, §1; am L 1993, c 115, §1; am L 2004, c 202, §8]

## **CHAPTER 174C STATE WATER CODE**

### **[§ 174C-2] Declaration of policy.**

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

(b) There is a need for a program of comprehensive water resources planning to address the problems of supply and conservation of water. The state water use and protection plan, with such future amendments, supplements, and additions as may be necessary, is accepted as the guide for developing and implementing this policy.

(c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.

(d) The state water code shall be liberally interpreted to protect and improve the quality of waters of the State and to provide that no substance be discharged into such waters without first receiving the necessary treatment or other corrective action. The people of Hawaii have a substantial interest in the prevention, abatement, and control of both new and existing water pollution and in the maintenance of high standards of water quality.

(e) The state water code shall be liberally interpreted and applied in a manner which conforms with intentions and plans of the counties in terms of land use planning. [L 1987, c 45, pt of § 2]

**[§174C-3] Definitions.** As used in this chapter, unless the context otherwise requires:

"Instream flow standard" means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

"Instream use" means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:

- (1) Maintenance of fish and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;

(7) Maintenance of water quality;

(8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and

(9) The protection of traditional and customary Hawaiian rights.

"Interim instream flow standard" means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

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**[§174C-5] General powers and duties.** The general administration of the state water code shall rest with the commission on water resource management. In addition to its other powers and duties, the commission:

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(3) Shall establish an instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State;

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(13) Shall plan and coordinate programs for the development, conservation, protection, control, and regulation of water resources, based upon the best available information, and in cooperation with federal agencies, other state agencies, county or other local governmental organizations, and other public and private agencies created for the utilization and conservation of water;

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(15) Shall 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.

• • •

**§174C-7 Commission on water resource management.** (a) There is established within the department a commission on water resource management consisting of seven members which shall have exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code, except as otherwise specifically provided in this chapter.

(b) Five members shall be appointed by the governor subject to confirmation by the senate, in a manner prescribed in subsection (d). Each member shall have substantial experience in the area of water resource management; provided that at least one member shall have substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage such as those preserved by section 174C-101. The chairperson of the board of land and natural resources shall be the chairperson of the commission. The director of health shall serve as an ex officio voting member.

(c) The members of the commission shall serve without compensation but shall be reimbursed for expenses, including travel expenses, necessary for the performance of their duties.

(d) In appointing a member to the commission, the governor shall select from a list submitted by a nominating committee. The nominating committee shall be composed of four individuals chosen as follows: two persons appointed by the governor; one person appointed by the president of the senate; and one person appointed by the speaker of the house. The committee shall solicit applications and send to the governor the names of at least three individuals for each open position.

(e) Except as otherwise provided in this chapter, the commission shall be subject to sections 26-34, 26-35, and 26-36. [L 1987, c 45, pt of §2; am L 2003, c 184, §1]

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**[§174C-10] Dispute resolution.** The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this chapter. The final decision on any matter shall be made by the commission.

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**[§ 174C-13] Citizen complaints.** The commission should adopt, pursuant to chapter 91, procedural rules for the processing of citizen complaints including the right of appeal to the commission. If any person files a complaint with the commission that any other person is wasting or polluting water or is making a diversion, withdrawal, impoundment, consumptive use of waters or any other activity occurring within or outside of a water management area, not expressly exempted under this code, without a permit where one is required, the commission shall cause an investigation to be made, take appropriate action, and notify the complainant thereof. [L 1987, c 45, pt of § 2]

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**[§ 174C-54] Competing applications.** If two or more applications which otherwise comply with section 174C-49 are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest. [L 1987, c 45, pt of § 2]

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**[§174C-63] 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.

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## PART VI. INSTREAM USES OF WATER

**[§174C-71] Protection of instream uses.** The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

(1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;

(A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;

(B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be set for the stream, the reasons therefor, and the findings supporting the reasons;

(C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use;

(D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;

(E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, the University of Hawaii cooperative fishery unit, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;



(F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;

(2) Establish interim instream flow standards;

(A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;

(B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;

(C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;

(D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses;

(E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;

(F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;

(3) Protect stream channels from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses;

(A) The commission shall require persons to obtain a permit from the commission prior to undertaking a stream channel alteration; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit;

(B) Projects which have commenced construction or projects reviewed and approved by the appropriate federal, state, or county agency prior to July 1, 1987, shall not be affected by this part;

(C) The commission shall establish guidelines for processing and considering applications for stream channel alterations consistent with section 174C-93;

(D) The commission shall require filing fees by users to accompany each application for stream channel alteration;

(4) Establish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water. The commission shall conduct investigations and collect instream flow data including fishing, wildlife, aesthetic, recreational, water quality, and ecological information and basic streamflow characteristics necessary for determining instream flow requirements.

The commission shall implement its instream flow standards when disposing of water from state watersheds, including that removed by wells or tunnels where they may affect stream flow, and when regulating use of lands and waters within the state conservation district, including water development.

. . .

## **PART IX. NATIVE HAWAIIAN WATER RIGHTS**

**§174C-101 Native Hawaiian water rights.** (a) Provisions of this chapter shall not be construed to amend or modify rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapters 167 and 168, relating to the Molokai irrigation system. Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

(b) No provision of this chapter shall diminish or extinguish trust revenues derived from existing water licenses unless compensation is made.

(c) Traditional and customary rights of ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o`opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

(d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter. [L 1987, c 45, pt of §2; am L 1991, c 325, §8]

## **CHAPTER 183 FOREST RESERVES, WATER DEVELOPMENT, ZONING**

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**§183-11 Government land for forest reserves.** The governor may, with the approval of the department of land and natural resources, after a hearing or hearings as hereinafter provided, from time to time set apart any government land or lands, whether under lease or not, as forest reserves. On lands under lease the reserve shall not take effect until the expiration of the existing lease, or in any way affect the rights acquired under the lease. Any land or lands while so set apart shall not be leased or sold by the government or used in any way for any purposes inconsistent with this chapter. The governor may from time to time, with the approval of the department, after a hearing or hearings as hereinafter provided, revoke, modify, or suspend any and all the orders and proclamations or any part thereof, which set apart the lands.

. . .

**§183-31 Watershed areas.** The department of land and natural resources shall determine, after public hearing held in the same manner as provided in section 91-3, areas which are watersheds.

The term "watershed" as used in this part means (1) an area from which the domestic water supply of any city, town or community is or may be obtained, or (2) an area where water infiltrates into artesian or other ground-water areas from which the domestic water supply of any city, town or community is or may be obtained. [L 1949, c 274, §2; RL 1955, §19-21; am L 1965, c 96, §15; HRS §183-31]

## CHAPTER 205 LAND USE COMMISSION

. . .

**§205-2 Districting and classification of lands.** (a) There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. . . .

. . .

(e) Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.

## Hawai'i Administrative Regulations

**§13-169-44 Interim instream flow standard for East Maui.** The Interim Instream Flow Standard for all streams on East Maui, as adopted by the commission on water resource management on June 15, 1988, shall be that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard, except as may be modified by the following conditions:

- (1) Based upon additional information or a compelling public need, a person may petition the commission on water resource management to amend the standard to allow future diversion, restoration, or other utilization of any streamflow.
- (2) The commission reserves its authority to modify the standard or establish new standards, including area-wide or stream-by-stream standards, based upon supplemental or additional information.
- (3) In any proceeding to enforce the instream flow standard, the commission, its delegated hearing officer, or a judicial officer may abate the enforcement proceeding if, under the circumstances and weighing the importance of the present or potential instream values with the importance of the present or potential uses of the stream's water for noninstream purposes (including the economic impact of restricting such uses), the enforcement of the instream flow standard would:

- (A) Create a substantial hardship on a use existing on the effective date of this standard; or
- (B) Impermissibly burden a right, title, or interest arising under law.

- (4) Projects under construction or projects that have secured all discretionary permits required by appropriate federal, state, or county agencies prior to July 1, 1987 shall not be affected by the standard. [Eff. Oct. 8, 1988 ] (Auth: HRS Sec. 174C-8) (Imp: HRS Sec. 174C-2, 174C-3, 174C-5, 174C-71)

## Legislative Resolutions

HOUSE OF REPRESENTATIVES

TWENTY-THIRD LEGISLATURE,  
2005

H.C.R. NO. 293

STATE OF HAWAII

# HOUSE CONCURRENT RESOLUTION

URGING THE COMMISSION ON WATER RESOURCE MANAGEMENT to fulfill its constitutional and statutory mandate to protect public trust instream uses.

WHEREAS, Article XI, sections 1 and 7, of the State Constitution, recognizes and establishes that Hawaii's precious water resources are held by the State as a public trust for the benefit of present and future generations; and

WHEREAS, pursuant to this public trust mandate, the Legislature enacted the State Water Code (Code) as chapter 174C, Hawaii Revised Statutes (HRS), and created the Commission on Water Resource Management (Commission) to serve as the primary trustee of the State's water resources; and

WHEREAS, continuous stream flows from mauka to makai lands are essential for Hawaii's drinking water supply, productive watersheds, native stream life, estuaries and fisheries, traditional agriculture and aquaculture, and native Hawaiian rights and practices; and

WHEREAS, the Code requires the Commission to establish an "instream flow standard" on a "stream-by-stream basis whenever necessary to protect the public interest in waters of the State," as the Commission's primary tool to protect public trust instream uses, including resource protection, recreation, aesthetics, and traditional and customary native Hawaiian practices, and to fulfill its comprehensive, long-term planning, and regulatory function; and

WHEREAS, since the Code was enacted in 1987, the Commission has not established any significant, scientifically-based instream flow standards for the State; and

WHEREAS, for more than a century, public streams throughout Hawaii were diverted for private, commercial offstream uses, diversions which continue today despite their diminished use due to the decline of large-scale plantation agriculture and therefore result in wasted flows; and

WHEREAS, the flows of the Na Wai Eha or Four Great Waters which include the Waihee, North and South Waiehu, Iao, and Waikapu Streams and their tributaries, are still being diverted as they were at the height of the plantation era, despite a reduced demand for

water for commercial agriculture and the conversion of lands to residential development in central Maui; and

WHEREAS, the Na Wai Eha, traditionally famed in song and story, supported a thriving natural ecosystem and native Hawaiian community, and even in their presently depleted state, have been recognized as exceptional "blue ribbon" candidates for protection and restoration based on their ability to support aquatic, cultural, riparian, and recreational resources; and

WHEREAS, many members of the Maui community, including those with conservation and native Hawaiian interests, have worked tirelessly to restore the Na Wai Eha to revive its stream ecosystems and related public instream uses, and have urged the Commission carry out its constitutional and statutory mandate to end the wasteful diversions from the streams; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-third Legislature of the State of Hawaii, Regular Session of 2005, the Senate concurring, that the Legislature declares stream restoration to be essential to support and restore Hawaii's natural, cultural, and recreational treasures for current and future generations; and

BE IT FURTHER RESOLVED that the Commission is urged to devote the staff and resources necessary to fulfill its constitutional and statutory mandate to protect public trust instream uses by:

- (1) Establishing scientifically-based instream flow standards, including launching an immediate investigation into the scope and cost of studies required to establish such standards;
- (2) Promptly resolving all pending petitions to restore stream flows such as those of the Na Wai Eha; and
- (3) Ordering the operators of any stream diversions, including those from the Na Wai Eha, to discontinue any diversions that have no reasonable and beneficial purpose; and

BE IT FURTHER RESOLVED that in its efforts to accomplish this, the Commission is urged to meet with the following:

- (1) Parties who petitioned the Commission to restore stream flows to the Na Wai Eha, including Earthjustice, Hui o Na Wai Eha, and Maui Tomorrow;
- (2) Current operators of stream diversions in the Na Wai Eha, including the Wailuku Agribusiness Company, Inc.; and
- (3) Other interested groups, including the County of Maui and the Office of Hawaiian Affairs; and

BE IT FURTHER RESOLVED that the Commission is requested to submit a report of its progress and findings to the Legislature no later than 20 days prior to the convening of the Regular Session of 2006; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Chair of the Commission on Water Resource Management, the Board of Trustees of the Office of Hawaiian Affairs, Mayor of the County of Maui, the President of Wailuku Agribusiness Company, Inc., the President of Hawaiian Commercial & Sugar Company, and Earthjustice.

IN THE SUPREME COURT OF THE STATE OF HAWAII

NA MOKU AUPUNI O KO'OLAU HUI,	)	Civil No. _____
BEATRICE KEKAHUNA, and MARJORIE	)	(Petition for Writ of Mandamus)
WALLET,	)	
	)	
Petitioners,	)	DECLARATION OF COUNSEL;
	)	EXHIBITS "1" THROUGH "46"
vs.	)	
	)	
COMMISSION ON WATER RESOURCE	)	
MANAGEMENT; et al.,	)	
	)	
Respondents.	)	

DECLARATION OF COUNSEL

I declare under penalty of perjury that:

1. I am a staff attorney with the Native Hawaiian Legal Corporation and, in that capacity, represent Petitioners Na Moku Aupuni O Ko'olau Hui, Beatrice Kekahuna, and Marjorie Wallett, in this matter.
2. Attached as Exhibit "1" is a true and correct copy of the Petition to Amend Interim Instream Flow which my clients filed with the State of Hawai'i Commission on Water Resources Management (CWRM) on or about May 24, 2001, which I obtained and reproduced from the business records, maintained by my office.
3. Attached as Exhibit 2 is a true and correct copy of the First Amended Findings of Fact and Conclusions of Law and Order which the State Board of Land and Natural Resources (BLNR) issued and filed on January 24, 2003, which I obtained and reproduced from the business records maintained by my office.
4. Attached as Exhibit 3 is a true and correct copy of a June 12, 2001 letter CWRM deputy director Linnell Nishioka sent to my office, returning petitions filed on May 24, 2001, which I obtained and reproduced from the business records maintained by my office.
5. Attached as Exhibit "4" is a true and correct copy of a June 19, 2001 email Ms. Nishioka sent to my office regarding the power of the CWRM to determine appurtenant rights, which I obtained and reproduced from the business records maintained by my office.



6. Attached as Exhibit "5" is a true and correct copy of a June 22, 2001 letter from my office to Gilbert Coloma-Agaran regarding the reconsideration of the CWRM rejection of the petitions, which I obtained and reproduced from the business records, maintained by my office.

7. Attached as Exhibit "6" is a true and correct copy of a June 25, 2001 Letter from Ms. Nishioka to my office reacting to my clients' request for reconsideration of the CWRM decision to reject the Petitions referred to in paragraph 2, which I obtained and reproduced from the business records maintained by my office.

8. Attached as Exhibit "7" is a true and correct copy of a June 27, 2001 Letter from Ms. Nishioka to Moses Haia regarding the power of the CWRM to determine appurtenant rights, which I obtained and reproduced from the business records maintained by my office.

9. Attached as Exhibit "8" is a true and correct copy of an April 25, 2001 attorney general opinion letter from deputy attorney general Yvonne Izu to Gilbert Coloma-Agaran regarding the CWRM power to determine appurtenant rights, which I obtained and reproduced from the business records, maintained by my office.

10. Attached as Exhibit "9" is a true and correct copy of a June 28, 2001 Letter from NHLC to Gilbert Coloma-Agaran re Standing, which I obtained and reproduced from the business records maintained by my office.

11. Attached as Exhibit "10" is a true and correct copy of a July 12, 2001 letter from my office to Ms. Nishioka regarding the attorney general opinion on the CWRM power to determine Appurtenant Rights, which I obtained and reproduced from the business records maintained by my office.

12. Attached as Exhibit "11" is a true and correct copy of a July 13, 2001 letter from Moses Haia to Ms. Nishioka transmitting information and the Kanu O Ka Aina Study, which I obtained and reproduced from the business records maintained by my office.

13. Attached as Exhibit "12" is a true and correct copy of a July 13, 2001 letter from Ms. Nishioka to NHLC regarding the acceptance by CWRM of petitions to amend interim instream flow standards for 27 East Maui streams, which I obtained and reproduced from the business records maintained by my office.

14. Attached as Exhibit "13" is a true and correct copy of a July 24, 2001 letter from Ms. Nishioka to Moses Haia, affirming the CWRM position on determining appurtenant rights, which I obtained and reproduced from the business records maintained by my office.

15. Attached as Exhibit "14" is a true and correct copy of a July 26, 2001 letter from Moses Haia to Ms. Nishioka regarding the proposed controlled release of water from certain East Maui streams, which I obtained and reproduced from the business records maintained by my office.

16. Attached as Exhibit "15" is a true and correct copy of a March 12, 2002 email from USGS District Chief Gordon Tribble to Ms. Nishioka outlining the scope of a stream study, which I obtained and reproduced from the business records maintained by my office.

17. Attached as Exhibit "16" is a true and correct copy of an August 5, 2003 letter from NHLC to Ed Sakoda regarding appurtenant rights, which I obtained and reproduced from the business records, maintained by my office.

18. Attached as Exhibit "17" is a true and correct copy of an October 17, 2003 letter from NHLC to Ed Sakoda regarding documentation for appurtenant rights, which I obtained and reproduced from the business records maintained by my office.

19. Attached as Exhibit "18" is a true and correct copy of an undated letter from E. Lau to Moses Haia regarding information for an appurtenant rights determination responding to an August 5, 2003 letter, which I obtained and reproduced from the business records maintained by my office

20. Attached as Exhibit "19" is a true and correct copy of an October 10, 2003 First Circuit Court Order Affirming in Part and Reversing in Part State of Hawaii Board of Land and Natural Resources' Findings of Fact and Conclusions of Law and Order, Dated January 10,2003; Amended January 24, 2003 Regarding Petition Contesting Application for Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Ke`anae, Nahiku, and Huelo, Maui, which I obtained and reproduced from the business records maintained by my office.

21. Attached as Exhibit "20" is a true and correct copy of a March 31, 2004 letter from Garrett Hew to Ernest Lau, responding to the USGS proposed controlled releases, which I obtained and reproduced from the business records maintained by my office.

22. Attached as Exhibit "21" is a true and correct copy of a May 12, 2004 letter from G. Tribble to E. Lau regarding the USGS proposal for controlled releases, which I obtained and reproduced from the business records, maintained by my office.

23. Attached as Exhibit "22" is a true and correct copy of a May 25, 2004 email from then-A&B/EMI counsel Linnell Nishioka to G. Tribble regarding study costs, which I obtained and reproduced from the business records maintained by my office.

24. Attached as Exhibit "23" is a true and correct copy of a May 26, 2004 letter from G. Tribble to then-deputy director for the CWRM Yvonne Izu regarding controlled releases, which I obtained and reproduced from the business records maintained by my office.

25. Attached as Exhibit "24" is a true and correct copy of a May 27, 2004 email from L. Nishioka to G. Tribble regarding additional costs of study, which I obtained and reproduced from the business records, maintained by my office.

26. Attached as Exhibit "25" is a true and correct copy of a June 25, 2004 Petition to Amend Interim Instream Flow Standard filed by Earth Justice at the CWRM, which I obtained and downloaded from the website maintained by the CWRM and can be accessed at: <http://www.hawaii.gov/dlnr/cwr/current/iifsmmai2/Petition.pdf>.

27. Attached as Exhibit "26" is a true and correct copy of a June 30, 2004 letter from Moses Haia to Y. Izu regarding controlled releases, which I obtained and reproduced from the business records maintained by my office.

28. Attached as Exhibit "27" is a true and correct copy of a November 15, 2004 letter from Y. Izu to Office of Hawaiian Affairs Administrator Clyde Namuo regarding the burden of proof in water cases before the CWRM, which I obtained and reproduced from the business records maintained by my office.

29. Attached as Exhibit "28" is a true and correct copy of a report entitled, Gingerich, *Median and Low-Flow Characteristics for Streams under Natural and Diverted Conditions, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2004-5262 (2004), , which I obtained and downloaded from the website maintained by the U.S. Geological Survey Office at: <http://pubs.usgs.gov/sir/2004/5262/pdf/sir2004-5262.pdf>.

30. Attached as Exhibit "29" is a true and correct copy of the June 15, 2005 CWRM Agenda, which I obtained and downloaded from the website maintained by the CWRM at: <http://www.hawaii.gov/dlnr/cwr/agenda.htm>.

31. Attached as Exhibit "30" is a true and correct copy of a report entitled, Gingerich and Wolff, *Effects of Surface-Water Diversions on Habitat Availability for Native Macrofauna, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2005-5213 (2005), which I

obtained and downloaded from the website maintained by the U.S. Geological Survey Office at: <http://pubs.usgs.gov/sir/2005/5213/pdf/sir2005-5213.pdf>.

32. Attached as Exhibit "31" is a true and correct copy of a Press Release by the USGS, dated Jan. 30, 2006, which I obtained and downloaded from the website maintained by the U.S. Geological Survey Office at: <http://www.usgs.gov/newsroom/article.asp?ID=1434>.

33. Attached as Exhibit "32" is a true and correct copy of a report entitled Hawai'i State Commission on Water Resources Management, *Report to the Twenty-Third Legislature (2006 Regular Session) in response to House Concurrent Resolution (Resolution) No. 293, House Draft 1 (SLH 2005)*, which I obtained and downloaded from the website maintained by the CWRM at: [http://www.hawaii.gov/dlnr/cwrn/reports/CW2006\\_ProtectInstreamUses.pdf](http://www.hawaii.gov/dlnr/cwrn/reports/CW2006_ProtectInstreamUses.pdf).

34. Attached as Exhibit "33" is a true and correct copy of the February 2006 CWRM Minutes, which I obtained and downloaded from the website maintained by the CWRM and can be accessed by clicking on the hyperlink for the February 2006 minutes of the CWRM at: <http://www.hawaii.gov/dlnr/cwrn/agenda.htm>.

35. Attached as Exhibit "34" is a true and correct copy of the December 2006 CWRM Minutes, which I obtained and downloaded from the website maintained by the CWRM and can be accessed by clicking on the hyperlink for the December 2006 minutes of the CWRM at: <http://www.hawaii.gov/dlnr/cwrn/agenda.htm>.

36. Attached as Exhibit "35" is a true and correct copy of a March 14, 2007 email from Alan T. Murakami to then Acting Deputy Director for CWRM Dean Nakano regarding the delay in acting on Na Moku's petitions to amend interim instream flow standards, which I obtained and reproduced from the business records maintained by my office.

37. Attached as Exhibit "36" is a true and correct copy of a March 23, 2007 BLNR Findings of Fact, Conclusions of Law and Decision and Order related to contested case proceedings entitled *In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Ke`anae, Nahiku, and Huelo*, Dkt. No. 01-05-MA, dated March 23, 2007, which I obtained and reproduced from the business records maintained by my office.

38. Attached as Exhibit "37" is a true and correct copy of an April 4, 2007 email from then Acting Deputy Director for CWRM Roy Hardy to A. Murakami re plan to conduct further public hearings on outstanding petitions to amend interim instream flow standards (IIFS), which I obtained and reproduced from the business records maintained by my office

39. Attached as Exhibit “38” is a true and correct copy of an April 11, 2007 email from A. Murakami to R. Hardy regarding trust duties of the CWRM, which I obtained and reproduced from the business records maintained by my office.

40. Attached as Exhibit “39” is a true and correct copy of a May 10 2007 letter from NHLC to CWRM staff person Ed Sakoda regarding appurtenant rights documentation for kuleana along Honopou stream in East Maui, which I obtained and reproduced from the business records maintained by my office.

41. Attached as Exhibit “40” is a true and correct copy of a July 9, 2007 email from M. Wendt to Ken Kawahara regarding a meeting to discuss the CWRM’s failure to act on IIFS petitions, which I obtained and reproduced from the business records maintained by my office.

42. Attached as Exhibit “41” is a true and correct copy of the December 2007 CWRM Bulletin, which I obtained and downloaded from the website maintained by the CWRM and can be accessed by clicking on the hyperlink for the December 2007 Water Resources Bulletin at: <http://www.hawaii.gov/dlnr/cwrmbulletin/bull1207.pdf>.

43. The water that might otherwise flow in East Maui streams but for diversions by A&B/EMI, would support the irrigation of taro lo`i and the traditions and customs of the Hawaiian families who would normally fish along its coastline and gather o`opu, opae, and hihiwai from those streams to supplement their diets.

44. Accordingly, Na Moku has also challenged the issuance of permits or leases to A&B/EMI to take water from 33,000 acres of ceded lands within East Maui watersheds and is pursuing its claims in a separate contested case hearing, titled *In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Ke`anae, Nahiku, and Huelo*, Dkt. No. 01-05-MA before the State Board of Land and Natural Resources.

45. For that proceeding, I assisted in the preparation of written testimonies of Davianna Pomaika`i MacGregor, Beatrice Kekahuna, and Ed Wendt, who attested to the practices of taro farmers and subsistence gatherers of the Honopou, Ke`anae and Wailuanui Valley communities, in continuing the ancient traditions of their ancestors for generations.

46. Attached as Exhibit “42” is a true and correct copy of the Testimony of Davianna Pomaika`i MacGregor detailing her research on Ke`anae-Wailuanui, which formed the basis of

the County of Maui's designation of these communities as part of a cultural landscape deserving of special protection.

47. Attached as Exhibit "43" is the Testimony of Beatrice Kekahuna, which details the reliance she placed on the flow of Honopou Stream to support her taro growing along that stream and the traditional subsistence gathering and fishing in which she engaged as a regular part of her lifestyle growing up and living on her family's land along that stream.

48. Attached as Exhibit "44" is the Testimony of Ed Wendt, which details the reliance he placed on the flow of Waiokamilo, Wailuanui, and Kulani Streams to support her taro growing along in Wailuanui Valley and the traditional subsistence gathering and fishing in which he engaged as a regular part of his lifestyle growing up and living on land in that Valley.

49. I submitted Exhibits 42, 43, and 44, which I obtained and reproduced from the business records maintained by my office, as part of the record in that separate contested case hearing before the BLNR, in its contested case hearing Docket No. 01-05-MA..

50. These testimonies document the effect of stream diversions by Alexander and Baldwin and its subsidiary East Maui Irrigation Company, which have progressively interfered with and/or blocked the ability of these taro farmers and subsistence gatherers to grow taro and gather food items from the affected streams and along the affected East Maui coastline in the tradition and custom of their ancient Hawaiian ancestors.

51. Because of these diversions, which deprive Ms. Kekahuna and Mr. Wendt, along with other Na Moku members, of stream flow, they have found it increasingly difficult if not impossible to farm, fish, or gather in the ancient traditions of their ancestors.

52. Attached as Exhibit 45 is a Conservation District map for Maui created and maintained by the State Department of Land and Natural Resources (DLNR), which I downloaded from the website maintained by the DLNR and can be accessed by clicking on the webpage found on the internet at: [http://www.hawaii.gov/dlnr/occl/files/Subzones/12-05/maui\\_conserv\\_subz2005.pdf](http://www.hawaii.gov/dlnr/occl/files/Subzones/12-05/maui_conserv_subz2005.pdf).

53. Attached as Exhibit 46 is a true and correct copy of a report entitled, Gingerich, Yeung, Ibarra, and Engott, *Water Use in Wetland Kalo Cultivation in Hawai'i*, USGS Open-File Report 2007-1157 (2007), which I obtained and downloaded from the website maintained by the U.S. Geological Survey Office at: [Water Use in Wetland Kalo Cultivation in Hawai'i](#).

54. Attached as Exhibit "47" is a true and correct copy of the webpages containing biographies of the members of the Commission on Water Resources Management, which I obtained and downloaded from the website maintained by the CWRM and can be accessed at: <http://hawaii.gov/dlnr/cwr/cwrmmcomm.htm>.

55. Each of the foregoing documents are either part of the files, records, and materials maintained in the normal course of the business of my office and filed contemporaneously with its production or receipt or downloaded from official websites of the CWRM, DLNR, or USGS, as indicated.

56. I contacted the Charlie Ice, a staff member of the CWRM to ascertain and verify the periods of employment of various deputy directors, both acting and permanent, assigned to the Commission over the past 6 years, i.e., Linnell Nishioka, Ernest Lau, and Yvonne Izu, Dean, Roy Hardy, and Ken Kawahara. On the basis of the information he supplied me, I drafted the statements in the Memorandum in Support of the Petition for Mandamus outlining the periods of tenure for that position between 2002 and the present.

57. I also visited the office of the Hawaii Bar Association in order to verify employment information contained in past annual bar directories for Linnell Nishioka and Yvonne Izu prior to drafting the relevant statements concerning their involvements with the Commission and law firms they joined.

58. I did web searches for information related to the dates of changes to the Oshima, Chun, Fong and Chung law firm caused by the departure of its principal partner Alan Oshima.

59. Since the BLNR issued its March 23, 2007 order in the contested case proceedings on the proposed permitting of water use on ceded lands in East Maui, I have never been notified of any intent to actually provide any visible assistance to the CWRM to amend interim instream flow standards of the 27 streams for which Na Moku has pending petitions.

60. In addition, the BLNR has not filed any similar petition to modify interim instream flow standards for those 27 East Maui streams.

I declare under penalty of perjury that the foregoing statements are true and correct, to the best of my knowledge, information, and belief.

Dated: Honolulu, Hawaii, January 25, 2008.

  
Alan T. Murakami

# LIST OF EXHIBITS



## LIST OF EXHIBITS

1. May 24, 2001 Petitions to Amend Interim Instream Flow
2. January 24, 2003 BLNR Order
3. June 12, 2001 Letter from L. Nishioka to NHLC returning petitions
4. June 19, 2001 Email from L. Nishioka to ATM/MH re power to determine appt rts
5. June 22, 2001 Letter from NHLC to Gilbert Coloma-Agaran re reconsideration of rejection
6. June 25, 2001 Letter from L. Nishioka to NHLC reacting to request for reconsideration
7. June 27, 2001 Letter from L. Nishioka to MH re appt rts
8. April 25, 2001 AG Opinion Letter from Y. Izu to Gilbert Coloma-Agaran re Power to Determine Appurtenant Rights
9. June 28, 2001 Letter from NHLC to Gilbert Coloma-Agaran re Standing
10. July 12, 2001 Letter from NHLC to Linnel T. Nishioka re AG Opinion on CWRM power to determine Appurtenant Rights
11. July 13, 2001 Letter from M. Haia to C. Ice transmitting info and Kanu O Ka Aina Study.
12. July 13, 2001 Letter from L. Nishioka to NHLC re accepting petition to amend 27 IIFS
13. July 24, 2001 Letter from L. Nishioka to MH affirming position on determining appt rts
14. July 26, 2001 Letter from MH to L. Nishioka re focus of study and release
15. March 12, 2002 Email from G. Tribble to L. Nishioka outlining stream study
16. August 5, 2003 Letter from NHLC to Ed Sakoda re Appurtenant Rights
17. October 17, 2003 Letter from NHLC to Ed Sakoda re Documentation for Appurtenant Rights
18. Letter from E. Lau to MH re info for appt rts determination responding to 8/5/03 letter
19. October 10, 2003 Order Affirming in Part and Reversing in Part State of Hawaii Board of Land and Natural Resources' Findings of Fact and Conclusions of Law and Order, Dated January 10, 2003; Amended January 24, 2003 Regarding Petition Contesting Application for Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Ke`anae, Nahiku, and Huelo, Maui
20. March 31, 2004 Letter from G. Hew to Ernest Lau, responding to the USGS proposed controlled releases.
21. May 14, 2004 Email Letter from G. Tribble to D. Nakano re USGS study controlled releases
22. May 25, 2004 Email from L. Nishioka to G. Tribble re study costs
23. May 26, 2004 Letter from G. Tribble to Y. Izu re controlled releases

24. May 27, 2004 Email from L. Nishioka to G. Tribble re additional costs of study
25. June 25, 2004 Petition to Amend Interim Instream Flow Standard filed by Earth Justice
26. June 30, 2004 Letter from MH to Y. Izu re controlled releases
27. November 15, 2004 Letter from Y. Izu to C. Namuo re burden
28. Gingerich, *Median and Low-Flow Characteristics for Streams under Natural and Diverted Conditions, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2004-5262 (2004).
29. June 15, 2005 CWRM Agenda.
30. Gingerich and Wolff, *Effects of Surface-Water Diversions on Habitat Availability for Native Macrofauna, Northeast Maui, Hawaii*, USGS Scientific Investigations Report 2005-5213 (2005)
31. Press Release, USGS, *USGS report measures effects of surface-water diversion on native fish habitat in northeast Maui* (Jan. 30, 2006)
32. Hawai'i State Commission on Water Resources Management, *Report to the Twenty-Third Legislature (2006 Regular Session) in response to House Concurrent Resolution (Resolution) No. 293, House Draft 1 (SLH 2005)*
33. February 2006 CWRM Minutes
34. December 2006 CWRM Minutes.
35. March 14, 2007 Email from ATM to D. Nakano re delay in acting on IIFS
36. March 23, 2007 BLNR Order, *In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Ke`anae, Nahiku, and Huelo*, Dkt. No. 01-05-MA, Findings of Fact, Conclusions of Law and Decision and Order (State of Hawai'i Board of Land and Natural Resources, March 23, 2007)
37. April 4, 2007 email from Roy Hardy to A. Murakami re plan to conduct further public hearings on IIFS petitions.
38. April 11, 2007 email from A. Murakami to R. Hardy re trust duties of CWRM
39. May 10 2007 Letter from NHLC to Ed Sakoda re Honopou
40. July 9, 2007 email from M. Wendt to Ken Kawahara re 180-day deadline under Water Code
41. CWRM Water Resources Bulletin (December 2007) noting contested case hearing in CCH-MA06-1 – *In the Matter of Water Use Permit Applications for the Iao Ground Water*

*Management Area High-Level Sources and the Petition to Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao & Waikapu Streams.*

42. Testimony of Davianna Pomaikai MacGregor
43. Testimony of Beatrice Kekahuna
44. Testimony of Edward Wendt
45. State Department of Land and Natural Resources Conservation District Subzone Map for Maui
46. Gingerich, Yeung, Ibarra, and Engott, *Water Use in Wetland Kalo Cultivation in Hawai`i*, Open-File Report 2007-1157 (2007)
47. Commission on Water Resource Management Members Webpage