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BEFORE THE COMMISSION ON WATER RESOURCES MANAGEMENT

STATE OF HAWAI`I

In the Matter of Petitions to Amend Interim Instream Flow Standards for East Maui Streams	**PETITIONERS' MEMORANDUM IN OPPOSITION TO HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S MOTION TO CONSOLIDATE PETITIONS TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR EAST MAUI STREAMS AND COMPLAINT RELATING THERETO FILED MAY 29, 2008; CERTIFICATE OF SERVICE** **Hearing Date: September 24, 2008** **Time: 11:00 AM**

PETITIONERS' MEMORANDUM IN OPPOSITION TO HAWAIIAN COMMERCIAL AND SUGAR COMPANY'S MOTION TO CONSOLIDATE PETITIONS TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR EAST MAUI STREAMS AND COMPLAINT RELATING THERETO FILED MAY 29, 2008

I. INTRODUCTION

The Motion to Consolidate Petitions to Amend Interim Instream Flow Standards for East Maui Streams and Complaint Relating Thereto Filed May 29, 2008 by Hawaiian Commercial and Sugar Company (HC&S) is untimely and prejudicial to the interests of Petitioners Na Moku Aupuni O Ko'olau Hui, Beatrice Kekahuna, and Marjorie Wallett. (hereafter, collectively, "Na Moku"). With no explanation for its 11th hour ploy to again delay proceedings it purports it

wants to advance, HC&S advances arguments for delay that should be rejected. Given the precautionary principle, HC&S' burden to justify its diversions in view of the public trust nature of the water resources at stake, and the expiration of the statutory 180-day deadline to act on the underlying petitions, this Commission should deny the motion.

II. HC&S OVERVIEW OF REASONS FOR FILING MOTION

While there may not be an exact duty upon HC&S to proceed with due diligence in pursuing its interests during this administrative proceeding, it clearly had a duty to act in good faith. As a guide to the reasonableness of HC&S' conduct, this commission should consider the following analogous principle related to the statute of limitations:

> ...an essential part of an injured plaintiff's duty of diligence regarding the timely prosecution of his or her claim imposed by a statute of limitations is to seek legal advice regarding the presence and/or viability of a potential claim; ...

Ass'n of Apt. Owners v. Venture 15, Inc., 115 Haw. 232, 277 (Haw. 2007), citing *Hays v. City & County of Honolulu,* 81 Hawai'i 391, 399, 917 P.2d 718, 726 (1996). Furthermore, "[t]he exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded ... ." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672, 676 (S.C. 2000) (internal quotation marks and citation omitted).

A similar analogue is the doctrine of laches for the failure of a party to act diligently when it was presented with circumstances that would prompt a reasonable person to act.

> Some degree of diligence in bringing suit is required under all systems of jurisprudence." *Patterson v. Hewitt*, 195 U.S. 309, 317 (1904). "The doctrine of laches reflects the . . . maxim that 'equity aids the vigilant, not those who slumber on their rights.' 2 S. Symons, *Pomeroy's Equity Jurisprudence* § 418 (5th ed. 1941). Where applicable, it acts to bar a court from considering an equitable action. . . ." *Adair v. Hustace*, 64 Haw. 314, 320-21, 640 P.2d 294, 300 (1982) (footnote omitted). It is founded on "a perception that it is . . . equitable to defendants and important to society to promote claimant diligence, discourage delay and prevent the enforcement of stale claims." *Id.* at 321, 640 P.2d at 300 (citation omitted).

Small v. Badenhop, 67 Haw. 626, 640, 701 P.2d 647, 656 (Haw. 1985). Thus, a court of equity, therefore, will only consider a claim brought without unreasonable delay. *Id.*, 701 P.2d at 657.

More explicitly, the court will entertain a suit if it has been "brought without undue delay after plaintiff knew of the wrong or knew of facts and circumstances sufficient to impute such knowledge to him" and the time lapse has not "resulted in prejudice to the defendant." *Id.* (citations omitted).

The Commission should analyze the timing of HC&S' motion with these principles in mind, or there will be no end to the attempts to delay an already tardy process from proceeding to resolution. While HC&S glosses over many important details in its overview, its principal oversight is its mischaracterization of the timing and effect of its purported "legal quagmire." Memo in Support 4. It traces its dilemma to the failure of the state Board of Land and Natural Resources to act on complying with HRS chapter 343 as a prelude to issuing a long term water lease, which is in turn traceable to resolution of the pending interim instream flow standard (IIFS) petitions before this Commission. *Id.* at 3.

Given these stated foundations for its concerns, HC&S does not explain how its purported urgency in working its way out of this quagmire or its interest in resolving its economic uncertainty did not prompt it to more diligent and timely action (1) 7 years ago when the petitions were first filed, or (2) at the latest, 5 years ago, when Judge Hifo ruled that the BLNR could not proceed with issuing the 30-year lease HC&S still seeks without complying with HRS chapter 343. On at least the latter occasion, HC&S was fully on notice that its "quagmire" threatened its financial stability, yet it "slumbered" on its claims. If equity indeed aids the vigilant, HC&S should not be rewarded for its untimely request. HC&S knew of the supposed "wrong" in proceeding or knew of facts and circumstances sufficient to impute this knowledge to it. Yet it waited to the prejudice of not only Na Moku, which would experience further delay in a process already overdue; it allowed the CWRM staff to invest hours or time in processing the petitions over the course of the past 18 months in reliance on the absence of objection from HC&S until June 10, 2008. It produced 5 Instream Flow Standard Assessment Reports, as HC&S notes. Memo in Support 8. The DLNR's Division of Aquatic Resources also submitted its division reports on the health of the streams and the potential for habitat restoration. See, DLNR DAR Presentation, "DAR Stream Surveys in the East Maui Watershed, 2007-2008." Then HC&S waited over 2 more months to formally file this motion.

In addition, HC&S points to the December 2006 Commission decision to adopt the staff recommendation to proceed in the fashion it is now following as a decision "just recently

adopted." Memo in Support 7. Yet, it waited 20 months to react, during which time all other interested parties presumed that process would be followed. HC&S expressed no great sense of urgency during any of this period to resolve its legal quagmire, or to do it collectively, as it asks now. Clearly, the pending petitions filed in 2001 posed no greater collective threat on August 18, 2008 than they did on May 21, 2001, when they were filed, or on October 10, 2003, when Judge Hifo issued her written decision reversing the attempted BLNR issuance of a 30-year lease.

Nothing has changed since the December 2006 Commission decision to follow the current procedure it is following, except for the March 2008 publication that the Commission would be holding a public informational meeting on April 10, 2008 on the 5 hydrologic units constituting the core of the water sources for the taro irrigation concerns raised by Na Moku. Five months after the publication of that notice, HC&S belatedly file this motion, and suddenly suggest consolidation would be more efficient and account for the concerns it has for assuring consideration of the effects of any stream restoration on its "unified" irrigation system.

In fact, nothing now supports a greater sense of urgency to delay proceeding in the way the Commission has resolved to proceed than what faced HC&S or the Commission in 2001, 2003, December 2006 or March 2008. HC&S was quite content and happy to continue the status quo IIFS in perpetuity while taro farmers and subsistence gatherers suffered both financial harms from the failure of their traditional wetland taro crops due to insufficient stream flow caused by HC&S' (though its sister subsidiary company of Alexander and Baldwin, East Maui Irrigation Company's) diversions of over 100 streams in the East Maui watershed.

If in fact HC&S raised similar concerns in its June 10, 2008 letter to the commission at that time, it does NOT explain why it did not immediately file this motion then, rather than wait another 2 months to do so. In the meantime, Na Moku and its supporters participated in the April 10, 2008 public information gathering meeting, prepared material to submit in support of its position, and expended much effort and time in the hope of finally seeing administrative action on its petitions that should have been taken years ago. Simultaneously, the Commission staff has spent untold hours preparing for the review of the 5 hydrologic areas, developed a set of Instream Flow Standard Assessment Reports, and made arrangements for a public information gathering session on Maui on April 10, 2008, after published notice of its intention in March 2008.

Na Moku notes that in the Na Wai Eha contested case hearing, HC&S just recently made a belated request for admission of additional evidence late in that proceeding that ultimately delayed those proceedings. In that case, the belated request to add more evidence in its favor actually came after the evidentiary portion of the contested case hearing was already closed. See, Hawaiian Commercials and Sugar Company's Motion to Reopen Evidence and Offer of Proof, filed July 18, 2008 in In the Matter of `Iao Ground Water Management Area High-Level Source Water Use WUPAs and Petition to Amend Interim Instream Flow Standards of Waihee, Waiehu, Iao, and Waikapu Streams Contested Case Hearings, Case No. CCH-MA06-01. The hearing officer ultimately reopened the already closed hearing to allow HC&S to belatedly insert more evidence. Compare, *In Re Waiola O Moloka`i*, 103 Haw. 401; 436, n. 31, 83 P.3d 664, 699, n. 31 (2004) (upholding hearing officer's denial of late request for admission of documentary evidence made by intervenors on last day of evidentiary hearings in contested case involving request for a water use permit).[1] The effect of granting this motion would prejudice Na Moku's interest as described above, well beyond the 180-day statutory deadline to act upon the Petitions. HRS § a74C-71(2)(E). Accordingly, Na Moku urges the Commission to reject HC&S pattern of delaying proceedings with extraordinary requests that come late in the proceedings to be justly granted.

Accordingly, the Commission should consider this backdrop in the late filing of this motion in deciding whether to derail its intended process of resolving the issues involved in deciding on the subject IIFS petitions before it.

III. THE CONTRAST IN PROCESS FOLLOWED IN NA WAI EHA AND WAIAHOLE IS INAPPLICABLE TO THIS PROCEEDING.

The process being followed by the Commission for the Na Moku petitions involves requests to amend interim instream flow standards and a complaint of waste. Na Moku filed those petitions in an area which is NOT subject to the water management area (WMA) designation powers of the Commission under HRS 174C-41 et seq. In contrast, the combined proceedings involving Na Wai Eha and the Waiahole Ditch involved water use permits applications, as well as petitions for IIFS amendment and complaints of waste. Both areas

[1] See HAR § 13-167-56(b) ("the presiding officer shall have the power to . . . fix times for submitting documents,"), and HAR § 13-167-59(a) (hearing officer "may exercise discretion in the admission or rejection of evidence").

involved in those proceedings involved water use permit applications because both the `Iao aquifer and the island of O`ahu (except for the Waianae District) are both designated as water management areas, subject to the requirement for such permits. HRS § 174C-49. In contrast, East Maui is not a designated WMA.

This difference is crucial because HC&S relies on authorities for its consolidation argument which are only applicable to the regulatory functions inherent in its water use planning and permitting role under HRS chapter 174C. It is undisputed that the combined contested case hearings in the Waiahole Ditch matter centered on the competing applications for ***water use permits*** filed by the Leeward and Windward parties in that proceeding. In performing its regulatory function under a WMA, the Commission must undergo a thorough analysis of the criteria designated for approving such permits. HRS § 1743C-49. These criteria necessitate the rigor in analysis and comprehensive planning and management which HC&S discusses as grounds for consolidation. Accordingly, the Hawai`i Supreme Court approved the manner in which the Commission handled that proceeding. Na Moku agrees that the Court treated that choice of processing favorably in that circumstance.

However, in the absence of a designated WMA, the common law applies, and the Commission has no regulatory power over water uses as it might have in designated WMA's. Without the powers to regulate the water uses in the East Maui area, the Commission retains more limited power, such responding to requests to amend IIFS for streams and processing complaints of water waste. Compare, HRS § 174C-13, 174C-49, 174D-71. Those procedures involve making determinations that are always subject to the overarching state policy, grounded in the Constitution, that:

> ... 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.

HRS § 174C-2(c). In other words, this protection is required before the balancing between instream and offstream uses enumerated in HRS § 174C-71

Furthermore, HC&S has not explained how the questionable water demand of HC&S related to the Complaint of Waste is related to and will affect the independent determination by

the Commission on how much water is needed to support taro growing and the interrelated concerns for habitat restoration and traditional and customary gathering practices dependent on those healthy habitats in the affected streams. If anything, the Commission is perfectly capable of resolving those issues independently of each other, and perhaps with less confusion by focusing on the issues separately.

That the EMI diversions may be one "unified" system is irrelevant to either proceeding. HC&S relies heavily on the language of HRS § 174C-71(2)(D) to assert that the Commission must consider "the economic impact of restricting such uses." However, "the protection of traditional and customary Hawaiian rights" must come first, before the consideration of economic impacts of stream restoration. This is the end for which Na Moku has filed its petitions. See, Haw. Const., Art. XII, § 7;[2] HRS § 174C-101.[3]

IV. AS BROADLY AS HC&S MAY WANT ITS AUTHORITIES TO APPLY, IT CANNOT JUSTIFY THEIR APPLICATION TO THE INSTANT PROCEEDING.

Na Moku has no doubt that the agencies and courts to which HC&S cites can in its discretion consolidate proceedings to avoid administrative and judicial inefficiencies. However, its rationale to apply those principles to the instant one is faulty.

First, HC&S illogically extends its argument for consolidate to unrelated administrative agency proceedings that have little to do with the water resources protection. It analogizes this proceeding with those involving the regulation of labor, communications, law enforcement issues and claims. The dealings of federal commissions and other agencies not dealing with

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[2] Article XII, § 7 (Traditional and Customary Rights) provides:

> 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 Island prior to 1778, subject to the right of the State to regulate such rights.

[3] HRS § 174C-101 (Native Hawaiian water rights) provides in part:

> . . .
>
> (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.
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> (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]

water issues also has little relation to the justification for consolidating the petitions and joining them with the Complaint of Waste in one proceeding.

Moreover, the general principles of consolidating cases in court have little applicability in this circumstance. While HC&S makes much of the factors for consolidation related to "the efficiency and equity that arise when the parties or issues are identical, integrated, or interdependent," it does nothing to logically apply those principles in this instance. Similarly, while it relies on "considerations of efficiency and equity that arise when the parties or issues are identical, integrated, or interdependent," it cannot show this identity, integration, or interdependence outside of these features of the EMI ditch system. Memo in Support 20. In this sense, HC&S confuses the applicable law by applying it to its ditch system, not the issue before the Commission.

On the one hand, the petitions affecting the 5 hydrologic areas relate to streams that are uniquely the direct source of taro irrigation water for existing East Maui taro farmers. On the other, the other hydrologic areas are primarily potential resource areas for enhanced subsistence gathering and fishing along the mouths of those streams, since they do not serve currently farmed taro lo`i. To the extent that HC&S boldly states without foundation that each Petition "seeks restoration of an 'undetermined' amount of stream water 'sufficient for taro farming and/or gathering,' it is simply wrong. Memo in Support 22. In that sense, these issues, while related culturally, are not the same or closely related enough to justify the delay in proceeding with the 5 hydrologic areas. *Id.*

Moreover, the issues related to the waste being committed by HC&S bear no direct interrelation with whether EMI is allowing natural stream flow to stay in the diverted streams. EMI is depriving the streams, and the Hawaiians dependent on them to continue their traditional and customary practices, of water whether or not its sister A&B subsidiary HC&S is wasting water.

Finally, HC&S, in a narcissistic approach to its argument, attempts to make its irrigation system the centerpiece of any legal analysis, instead of the principles applicable to that analysis. For example, it cites to case law, analogizing the consolidation of claims against the management of an "integrated hotel system" to its request to consolidate the IIFS petitions and complaint of waste proceedings in this instance. Memo in Support 20. HC&S specifies that "the importance of EMI's integrated system of diversions, intakes, ditches, and tunnels" is the most notable issue.

Memo in Support 21. Its characterization of the nature of the ditch as an "issue" confounds its analysis and argument. This argument should, and must, be rejected.

Moreover, it does NOT follow that later consideration of the economic impact "can only be measured in the aggregate." Memo in Opposition 23. Taro farmers and Hawaiian subsistence gatherers have been systematically dispossessed of its access to resources dependent on naturally flowing streams over the decades of progressively increased diversions by EMI. This systemic harm could lend itself to a similar "aggregate" approach as HC&S urges. Nevertheless, taro farmers can show that their harms can be associated with the subject hydrologic areas over those decades as well. Moreover, HRS § 174C-71 contemplates and expedited, "stream-by-stream" procedure for establishing IIFS, apart from establishing permanent instream flow standards after a more rigorous analysis.[4] While the Commission may choose a "general instream flow standards applicable to all streams within a specified area," it is a matter within its discretion.

In contrast, HC&S confounds this authority with a need to deal with the economic impacts on the EMI ditch system in the "aggregate" or weighing the importance of instream and offstream uses "in light of the 'entirety of circumstances." Memo in Support 24. Its illogical application of the authorities it cites only engenders possible confusion of the true issues. The EMI system, whether unified or not, is NOT a reason for consolidation, as HC&S argues; it certainly wouldn't lead to serving the ends of the Commission, nor justice, without unduly

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[4] HRS § 174C-71 (Protection of instream uses) provides:

> 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:
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> . . .
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> (2) Establish interim instream flow standards:
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> . . .
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> (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;
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> (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;

delaying the proceedings. HAR § 13-167-31.[5] The governing statute for establishing IIFS does not support this argument.

There is no irrationality in approaching the 27 petitions incrementally, as much as Na Moku would want progress on these remaining petitions as well. The issues facing taro farmers are distinct from areas subject to habitat restoration through the amendment of interim instream flow standards. They enjoy appurtenant water rights and rights associated with the continuation of traditional and customary practices associated with taro farming that would not apply in the other hydrologic areas in which Na Moku members pursue subsistence gathering and fishing activities.

Additionally treating the complaint of waste as a separate proceeding is neither illogical nor inefficient. The issues involved in amending the IIFS for the 8 or 27 streams are independent of whether HC&S is wasting water. While a finding of waste is clearly relevant to any balancing of interests the Commission may do, amending the IIFS of any number of streams should be done independently of that legitimate concern when the Commission is making adequate provision for the protection of traditional and customary practices under the umbrella state policy. HRS § 174C-2(c).

V. THE ENDS OF JUSTCE WOULD NOT BE SERVED BY CONSOLIDATION AND DELAY

At the very best, HC&S offers arguments in support of consolidation but none supportive of mandating it or counseling in favor of consolidation given the distinction between issues related to taro farming and subsistence gathering. Accordingly, its reliance on its legal authorities in support of consolidation is incomplete, mistargeted, and imprecise.

HC&S persists on relying on *Waiahole I*[6] to argue for consolidation, ignoring the distinction in that proceeding, which involved the processing of water use permits in a designated WMA. Memo in Support 25. Conservation of Commission resources aside, there is

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[5] **§13-167-31 Consolidations.** The commission, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related, if it finds that the consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

[6] *In Re Water Use Permit Applications,* 94 Haw. 97, 9 P3d 409 (2000).

enough of a difference in the streams in the 5 subject hydrologic areas to avoid "repetition and confusion" that allegedly would result from multiple presentations of the same evidence. *Id.*

Finally, none of HC&S's arguments account for the prejudice Na Moku and the Commission staff will suffer should consolidation result in the delay HC&S is seeking. Na Moku's taro farmer members have already been prejudiced by the failure of the Commission to abide by the law's requirement that it act within 180 days of the May 2001 filing of the Petitions.[7] The Commission cannot continue to ignore the passage of time with no explanation for its untimely reaction to Na Moku's petitions.

Instead, HC&S cavalierly ignores this compounded effect of its request to consolidate. In fact, it ignores the distinction between the subject 5 hydrologic areas, which can directly support current active taro farming efforts if water were returned to those streams, and the other 19 streams which are primarily resource streams for the continuation of traditional and customary gathering and fishing practices. Memo in Support 26. Aside from the identity of Petitioners and counsel, HC&S points to little to support its argument to consolidate, resting on the complexity and the unified nature of the EMI ditch as its crutch. In doing so, it criticizes the Commission staff for its "preliminary" IFS reports and inability to make "meaningful recommendations regarding the importance of EMI's integrated ditch system." Memo in Support 8.

Its focus is on the wrong ball. The Commission staff is addressing the issues that arise as a result of the state policy to adequately protect traditional and customary Hawaiian rights and practices, as the Hawai`i Supreme Court emphasized needed its attention in these matters.

Under Hawai`i's Constitution Article XII, § 7, HRS § 1-1, and HRS § 7-1,[8] the reasonable exercise of ancient Hawaiian usage is entitled to protection. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995) certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). Moreover, this protection

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[7] HRS § 174C-71(2)(E) provides unequivocally:

> (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;

[8] The land upon which the water diverted is developed is ceded land. Both Marjorie Wallett and Beatrice Kekahuna are also native Hawaiian beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act and, as such, have a right to expect reasonable revenues from the lease of public lands subject to the provisions of the trust for the support of programs for "the betterment of the conditions of native Hawaiians." (Id.)

mandates that this Board consciously identify the traditional and customary practices subject to this protection, assess the potential impact of its permit decisions, and seek actively to reasonably protect those practices from interference. *Ka Pa`akai O Ka 'Aina vs. Land Use Commission,* 94 Haw. 31; 7 P.3d 1068 (2000).

This attention to protection in the water context is based on the established law that the diverter always has the burden of proof to justify the diversion. *In Re Water Use Permit Applications*, 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000) (*Waiahole I*) (holding that the Water Commission must "prescribe a higher level of scrutiny for private commercial uses . . ." meaning, in practical terms, that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the [public] trust."). In line with a long legal history of protecting the water rights of taro farmers, prior precedent,[9] and Haw. Const. art. XII, § 7,[10] the Court has steadfastly upheld the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.[11] The trust's protection of traditional and customary rights also extends to appurtenant rights.[12]

In its assessment of a water use permit application filed by Waiola O Molokai, the CWRM had to determine whether to grant a permit to allow the use of a new well that could impact the water discharging along the southern coast of Moloka`i, where extensive subsistence gathering occurs. *In Re Waiola O Molokai*, 103 Hawai'i 401, 442, 83 P.3d 664, 705 (2004). The Court, following *Waiahole I*, concluded, "an applicant for a water use permit bears the burden of establishing that the proposed use will not interfere with any public trust purposes; likewise, the Commission is duty bound to hold an applicant to its burden during a contested-case hearing." *103 Hawai'i at 441, 83 P.3d at 704*. This burden obligates the applicant:

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[9] See, *Kalipi v. Hawaiian Trust Co.*, 66 Haws. 1, 656 P.2d 745 (1982); *Public Access Shoreline Hawai'i v. Hawaii Planning Comm'n*, 79 Haw. 425, 438-447, 903 P.2d 1246, 1259-68 (1995), cert. denied, 517 U.S. 1163, 134 L. Ed. 2d 660, 116 S. Ct. 1559 (1996) [hereinafter PASH].

[10] Article XII, Section 7 provides:

> 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 Island prior to 1778, subject to the right of the State to regulate such rights.

[11] *Waiahole I*, 94 Haw. at 137, 9 P.3d at 449 (upholding "the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose."), citing Haw. Const., Art. XII, § 7; *PASH*; *Kalipi.*

[12] *Waiahole I*, 94 Hawai'i at 137, 9 P.3d at 449, citing *Peck v. Bailey*, 8 Haw. 658, 661 (1867) (recognizing "appurtenant rights" to water based on "immemorial usage"); See, generally Elizabeth Ann Hooipo Pa Martin et al., *Cultures in Conflict in Hawaii: The Law and Politics of Native Hawaiian Water Rights*, 18 U. Haw. L. Rev. 71, 147-79 (1996) (surveying various rights).

> ...to demonstrate affirmatively that the proposed well would not affect native Hawaiian's rights; in other words, *the absence of evidence* that the proposed use would affect native Hawaiian's rights *was insufficient to meet the burden imposed* upon [the applicant] by the public trust doctrine, the Hawaii Constitution, and the Code.

Id. at 442, 83 P.3d at 705 (emphases added and omitted).

Without regard for the applicable legal principles, the CWRM concluded, based on no "clearly articulated finding of fact" that there would be no harm to practitioners attempting to continue gathering activities simply because they had *not* demonstrated that harm would occur.[13] Reversing the Commission, with the applicable legal burden in mind, the Court concluded that this position "erroneously placed the burden on the Petitioners to establish that the proposed use would abridge or deny their traditional and customary gathering rights." *Waiola*, 103 Hawai'i at 442, 83 P.3d at 705. Instead, the Court held that Waiola O Molokai was obligated to demonstrate ***affirmatively*** that the proposed well would not affect native Hawaiians' rights. It concluded, "in other words, the ***absence of evidence*** that the proposed use would affect native Hawaiians' rights was ***insufficient*** to meet the burden imposed upon MR-Waiola by the public trust doctrine, the Hawai'i Constitution, and the Code." *Id.* (emphases added).

Similarly, in a *second* water use permit application by the same landowner, the Court faced a similar claim by cultural practitioners representing a long line of gatherers[14] that certain water uses by Molokai Properties, Ltd. subscribers were interfering with these same traditional

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[13] Specifically, in *Waiola*, the Commission concluded in its "COL No. 24":

> ...that no evidence was presented that the drilling of the well would affect the exercise of traditional and customary native Hawaiian rights. Nor does the Commission find that any evidence was presented that the proposed use will affect any access to the shoreline or the nearshore areas. Therefore, the Commission finds that the proposed use will not in any way diminish access for the purpose of practicing traditional and customary native Hawaiian rights in the project area, shoreline, or nearshore areas.

103 Haw. at 442, 83 P.3d at 705.

[14] The Court noted:

> The Commission found and concluded in its Decision and Order that "[t]he gathering of crab, fish, limu, and octopus are traditional and customary practices that have persisted on Molokai for generations." The population of the island of Molokai consists [*81] primarily of Hawaiians, many of whom "rely on the natural resources of the land and ocean[ ]" for such "subsistence activities" that include "gathering of marine resources including fish, shellfish, ula, he`e and limu to feed their ohana (extended family)."

In the Matter of the Contested Case Hearing on Water Use Permit Application of Kukui (Molokai), Ltd., 116 Haw. 481, 508, 174 P.3d 320, 347 (2007)

and customary practices.[15] In that decision, the Court, building on the *Waiola* precedent, once again found that the CWRM had misapplied the burden of proof, by concluding in Conclusion #40:

> ... no evidence was presented that the use of water from Well 17 would adversely affect the exercise of traditional and customary native Hawaiian rights. Nor does the Commission conclude that any evidence was presented that the existing or proposed uses would adversely affect any access to the shoreline or the nearshore areas. Therefore, the Commission concludes that the allocation will not in any way diminish access for traditional and customary native Hawaiian practices in the project area, shoreline, or nearshore areas.

In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui, 116 Haw. 481, 509, 174 P.3d 320, 348 (2007) [hereafter, "*KMI*"]. Citing heavily to *Waiola*, the Court rejected an almost identical conclusion[16] in that case, which also relied on the *absence of evidence* that the proposed use would affect native Hawaiian's rights. The Court concluded that this CWRM conclusion "was insufficient to meet the burden imposed upon [the applicant] by the public trust doctrine, the Hawaii Constitution, and the Code." *Id.* citing *Waiola,* 103 Haw. at 442, 83 P.3d at 705. The Commission's conclusion that "no evidence was presented" to suggest that the rights of native Hawaiians would be adversely affected erroneously shifted the burden of proof to cultural practitioners Caparida and Kuahuia. *Id.,* citing *Waiola*, 103 Hawai'i at 442, 83 P.3d at 705. Accordingly, the Court held that the Commission failed to adhere to the proper burden of proof standard to maintain the protection of native Hawaiians' traditional and customary gathering rights in discharging its public trust obligation. *Id.*, citing *Waiola,* 103

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[15] HRS § 174C-101(c) and (d) provides, in its entirety:

> (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.

[16] The CWRM Conclusion of Law #40 mirrors almost verbatim the Finding of Fact #24 that the *Waiola* Court rejected on identical grounds in that case:

> ... that no evidence was presented that the drilling of the well would affect the exercise of traditional and customary native Hawaiian rights. Nor does the Commission find that any evidence was presented that the proposed use will affect any access to the shoreline or the nearshore areas. Therefore, the Commission finds that the proposed use will not in any way diminish access for the purpose of practicing traditional and customary native Hawaiian rights in the project area, shoreline, or nearshore areas.

Haw. at 443, 83 P.3d at 706. To ensure there would be no confusion going forward the Court noted, "[t]o the extent that harm to a public trust purpose...is **alleged**, the permit applicant must demonstrate that there is, in fact, no harm, or that any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial. (Emphasis added). *Id.* at 499.

In this instance, Na Moku taro farmers, Marjorie Wallett and Beatrice Kekahuna, all have legal interests in ancient lo`i in Wailuanui-Ke`anae and Honopou on which their ancestors lived and grew taro for generations. As Hawaiians, they also have unresolved claims to the public lands that comprise the four license areas. But for the State's failure to restore stream flow being diverted by the EMI ditch, Na Moku, Marjorie Wallett and Beatrice Kekahuna and their `ohana would cultivate taro on these lands and exercise traditional and customary rights in and around all streams in the 5 hydrologic areas.

Consistent with prior common and statutory law, Na Moku has for years endeavored to convince the BLNR and the Commission to restore streamflow in streams within the Huelo, Nahiku, Ke`anae, and Honomanu license areas to their natural or sufficient levels so Petitioners may restore kalo cultivation in these lo`i and exercise their appurtenant, riparian and traditional and customary rights ensured by Hawai`i's Constitution Article XI, §§ 1 & 7, Article XII, § 7, and HRS § 174C-63.[17]

Hence, HC&S cannot complain about the Commission's staff inability to appreciate the financial impact of stream restoration on its operations. That concern is literally secondary to the public trust purposes for stream protection. Moreover, as HC&S established in its own 1904 litigation against a fellow sugar plantation, it has the burden of ***affirmatively*** showing no harm to downstream owners who have superior legal rights to water. *Hawaiian Commercial & Sugar Company v. Wailuku Sugar Company*, 15 Haw. 675 (1904) (ruling that Wailuku Sugar Co.'s diversions and resulting use of water could "not violate the requirement of the well established

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[17] Na Moku also represents the interests of certain of its members who are beneficiaries of the trust created by the Hawaiian Homes Commission Act ("Act") and have applied for pastoral and agricultural homesteads within the Ke`anae-Wailuanui ahupua`a. Pursuant to Section 213(i) of the Act, they have a right to expect reasonable revenues to support programs for native Hawaiians and, pursuant to Sections 101 and 221 of the Act, sufficient water to support homesteading.

Na Moku also represents the interest of its members who are beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act. As beneficiaries of this trust, Na Moku members have a right to expect reasonable revenues from the lease of trust lands to support programs "for the betterment of the conditions of native Hawaiians."

rule that such diversion shall be without injury to the rights of others."), citing *Lonoaea, et al. v. Wailuku Sugar Company and Claus Spreckels*, 9 Haw. 651 (1895). This Commission has never held HC&S to this self-imposed burden under the common law. It should not refrain from doing so now in this proceeding, as it determines it should proceed.

With the show now on the other foot, HC&S is hardly in any position to decry the failure to pay attention to its own private commercial interest under the common law it established 104 years ago.

VI. CONCLUSION

For all of the above reasons, the Commission should deny the motion to consolidate filed by HC&S.

DATED: Honolulu, Hawaii, September 18, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, a copy of the foregoing document will be served upon the following parties by electronic email and by U.S. Mail to their last known address.

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