September 13, 2010

Mr. Clayton Suzuki
Wailuku Water Company, LLC
225 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Notice of Commission Action

Denial of Water Use Permit Applications (WUPAs) Nos. 684, 686, & 685
Iao Needle Tunnels (Well Nos. 5333-01 & 02) and Black Gorge Tunnel (Well No. 5332-01)
Incomplete WUPA No. 738 for Iao Tunnel (Well No. 5332-02) and
Exclusion and Voiding WUPA Nos. 681 & 682 for Waikapu Tunnels (Well Nos. 5132-01 & 02)

This letter serves as your official notice of action taken by the Commission on Water Resource Management (Commission) on the subject applications. By a majority vote of the Commission in their June 10, 2010 Decision and Order in CCH-MA06-01, the Commission made the following decisions:

1. Denial of Tunnel WUPAs

Denied Wailuku Water Company’s (WWC’s) water use permit applications (WUPAs) 684, 686, and 685, respectively, for Iao Needle Tunnels 1 & 2 and Black Gorge Tunnel, Well Nos. 5333-01 & 02 and 5332-01, respectively. “These three tunnels discharge into Iao Stream upstream of all diversions, and whatever amounts of water they discharge have been incorporated into the current IIFS for Iao Stream. Therefore, even if WWC were able to quantify the amounts discharged by the three tunnels, they are not being used by WWC as separate and distinct sources of water from WWC’s surface water diversions of Iao Stream and do not qualify for water use permits from the high-level, diked ground waters.”

2. Incomplete Water Use Permit Application for Iao Tunnel

“WWC’s WUPA for its portion of the Iao Tunnel (Well No. 5332-02) that it shares with Maui Department of Water Supply (MDWS) was not complete and not included in the contested case hearing (CCH). During the CCH, WWC attempted to amend its WUPA to cover the amount in excess of that used by MDWS, or 0.227 mgd. WWC may file a new-use WUPA for that amount.” Therefore, WUPA No. 738 has been voided, and a new application may be submitted (attached).

3. Exclusion and Voiding Waikapu Tunnel WUPAs

“WWC’s Well Nos. 5132-01 & 02 (Waikapu Tunnels 1 & 2) were excluded, because they are not subject to the Iao ground water management area designation.” Therefore WUPA Nos. 681 & 682 for these tunnels have been voided.

If you have any questions, please contact Charley Ice of Commission Staff at 587-0218.

Sincerely,

LENORE N. OHYE
Acting Deputy Director

Cl:ss
Attachment
PUBLIC HEARING NOTICE

Applications for Water Use Permits
Iao Ground Water Management Area, Maui

The following applications for water use permits for groundwater use in the Iao Ground Water Management Area were accepted for public hearing by the Commission at its meeting on September 22, 2004. The hearing originally commenced on October 28, 2004. It now continues on:

February 2, 2006, 1:00-4:30 pm (Thursday)
State Office Bldg 2, Conference Room B (3rd Floor)
54 South High Street, Wailuku HI 96793

The hearing officers will gather information on high-level sources (tunnels and the Kepaniwai Well). These applications will be combined with proceedings concerning a petition to amend the interim instream flow standard of four Wailuku District streams: Waihee, Waiehu, Iao, and Waikapu. Testimony should focus on practicable alternatives, water duties, Hawaiian rights, and definitions of public trust uses.

- High-level Sources:

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<th>Name</th>
<th>Well No.</th>
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<th>WUPA #</th>
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</table>

Applicants: Maui County Department of Water Supply (MDWS)
Hawaiian Commercial and Sugar (HC&S)
Wailuku Water Company, LLC
(note that the interests of Wailuku Agribusiness Company, Inc. (WACI) have been transferred to Wailuku Water Company, LLC, with the same respondents)

Materials related to the noticed items are available for review at the Wailuku Public Library, 251 South High Street, Wailuku, and at the Commission office located at 1151 Punchbowl Street, Room 227, Honolulu, and will also be available at this public hearing.

The hearing officers will close the hearing at the end of this session. Commission staff recommendations on these applications would then be forwarded to the Commission at a later date based on the available information.

Any person may testify or present additional information on the public hearing subject matter. If you have a legal interest that may be adversely affected by the proposed action, you have a right to request an administrative contested case hearing (Hawaii Administrative Rules §13-167-52(a)). However, you must make the request for such a hearing either orally or in writing by the close of the public hearing and file (or mail and postmark) a written petition for a contested case with the Commission within ten days after the date of the public hearing noticed here. Petition forms are available from the Commission.

If you do not make such a request or fail to file a timely written petition for a contested case hearing on a particular application noticed herein with the Commission, the consequence is that you will be precluded from later obtaining a contested case hearing and seeking judicial review of any adverse decision (HAR Chapter 13-167).

Disabled individuals planning to attend the public hearing are asked to contact the Commission at the above address or phone (Kauai) 274-3141 ext. 70214, (Maui) 984-2400 ext. 70214, (Hawaii) 974-4000 ext. 70214, (Molokai or Lanai) 1-800-GOV-INHI ext. 70214, or (Oahu) 587-0214 at least three days in advance of the public hearing or meeting to indicate if they have special needs that require accommodation.

COMMISSION ON WATER RESOURCE MANAGEMENT

DEAN A. NAKANO, Acting Deputy Director for PETER T. YOUNG, Chairperson

Dated: January 12, 2006

Publish in: Maui News issue of January 17, 2006
November 17, 2005

Mr. Peter Horovitz  
Mancini, Welch, & Geiger LLP  
33 Lono Avenue, Ste. 470  
Kahului, HI 96732

Dear Mr. Horovitz:

Request to Transfer Water Use Permit Applications

Thank you for your October 20, 2005 notice of transfer of interest in the water system of Wailuku Agribusiness Co., Inc. to Wailuku Water Company LLC.

We are amending the applications for water use permits filed with the Commission on January 2, 2004 (and as may have been subsequently amended) to reflect the new entity’s assumption of interest. The Commission referred these applications to public hearing at its regular meeting on September 22, 2004. The hearing will be continued at a date to be announced. These include:

<table>
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<tr>
<td>685</td>
<td>5332-01</td>
<td>Black Gorge Tunnel</td>
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</table>

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

DEAN A. NAKANO  
Acting Deputy Director

CC:ss  
c: Wailuku Water Company LLC  
Wailuku Agribusiness Co., Inc.
October 20, 2005

Via U.S. Mail

Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Request to Transfer Water Use Permit: Wailuku Agribusiness Co., Inc. to Wailuku Water Company LLC

To whom it may concern:

Enclosed please find a Request to Transfer Water Use Permit dated September 6, 2005 (the “Request”). The Request indicates an effective date, if allowed, of October 1, 2005. The permits and registrations at issue are set forth on Exhibit "A" attached to the Request.

The condition and purposes of the permits remain unchanged. Accordingly, pursuant to Hawaii Revised Statute §174C-59 it is our understanding that the enclosed Request suffices to transfer all listed permits and registrations to Wailuku Water Company, LLC. If this is not the case, or if you need any further information in order to affect the transfer, please contact me immediately so that we can address your requirements.

I look forward to hearing from you.

Very truly yours,

Mancini, Welch & Geiger LLP

Peter A. Horovitz

cc: Wailuku Water Company LLC
    Wailuku Agribusiness Co., Inc.
**State of Hawaii**

COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources

REQUEST TO TRANSFER WATER USE PERMIT

- Groundwater
- Surface Water

Instructions: Please print in ink or type and send completed application to the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809. The Commission may not accept incomplete applications. For assistance, call the Regulation Branch at 587-0225. For further information and updates to this application form, visit http://www.hawaii.gov/dlnr/cwrm.

CURRENT PERMIT HOLDER:

1. **(a) PERMITTEE**
   - Firm/Name: Wailuku Agribusiness Company Inc
   - Contact Person: Clayton S. Suzuki
   - Address: 255 East Waiko Road, Wailuku Hawaii 96793
   - Phone: 808-244-2208
   - Fax: 808-242-7068
   - E-mail: csuzuki@cbci1826.com

   **(b) LANDOWNER OF SOURCE**
   - Firm/Name: Wailuku Agribusiness Company Inc
   - Contact Person: Avery B. Chumbley
   - Address: 255 East Waiko Road, Wailuku Hawaii 96793
   - Phone: 808-244-7079
   - Fax: 808-242-7068
   - E-mail: abc@aloha.net

Signing below indicates that the signatories understand and have no objection to this water use permit transfer request.

**Signature**
**Date**

PERMIT TO BE TRANSFERRED TO:

2. **(a) PERMITTEE**
   - Firm/Name: Wailuku Water Company LLC
   - Contact Person: Clayton S. Suzuki
   - Address: 255 East Waiko Road, Wailuku Hawaii 96793
   - Phone: 808-244-2208
   - Fax: 808-242-7068
   - E-mail: csuzuki@cbci1826.com

   **(b) LANDOWNER OF SOURCE**
   - Firm/Name: Wailuku Water Company LLC
   - Contact Person: Avery B. Chumbley
   - Address: 255 East Waiko Road, Wailuku Hawaii 96793
   - Phone: 808-244-7079
   - Fax: 808-242-7068
   - E-mail: abc@aloha.net

Signing below indicates that the signatories swear that: 1) the conditions of use of the transferred permit including place, quantity, and purpose of the use remain the same. I also understand that a new water use permit will be issued to document this transfer and the old water use permit and number will be void and superseded.

**Signature**
**Date**

WATER USE PERMIT TRANSFER INFORMATION

3. **WATER USE PERMIT NO.**:
   - see attached exhibit "A"

4. **EFFECTIVE DATE OF TRANSFER**:
   - October 1, 2005

**WELL/STREAM DIVERSION NAME AND STATE NUMBER**:
   - see attached exhibit "A"

WUP TRANSFER FORM (01/20/2005)
### EXHIBIT "A"

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</table>
June 6, 2005

Mr. Dean Nakano, Acting Deputy Director
State of Hawaii Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Water Use Permit Applications
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel 1, Well No. 5332-01, WUPA No. 685

Dear Mr. Nakano:

Thank you for the opportunity to comment on these Water Use Permit Applications.

Waikapu Tunnels 1 & 2 are withdrawing from the high level dike complex of Waikapu aquifer and the Iao Needle Tunnels 1 & 2 and Black Gorge Tunnel from high level dike complex of the Iao aquifer. Withdrawals from high level dike sources should not be considered pumpage from the basal Iao aquifer and should be addressed in the proceedings for establishing in-stream flow standards for surface water in the Na Wai Eha area.

The total requested amount of water from the five tunnel sources is 19.5 acre-inches per week, plus 7.6 million gallons per week, for a total of 1,161,300 gpd. Irrigation demand for a total acreage of 4,352 would then be 267 gpd/acre which appears low. Actual irrigation demand from these sources and any additional sources for the stated acreage should be clarified.

There is no information in the applications to establish whether the proposed uses of water can be accommodated with the available water source; is a reasonable-beneficial use; will not interfere with any existing legal use; is consistent with the public interest, with state and county general plans and land use designations and county land use plans and general policies; and will not interfere with the rights of the Department of Hawaiian Home Lands.

"By Water All Things Find Life"
Please note that we have been limiting our pumpage to within 18 MGD for the purpose of preventing damage to the aquifer with the current configuration of pumpage. Existing demands would warrant greater withdrawals, if these could be managed without damage to the aquifer. We are also actively engaged in projects to improve the distribution of withdrawals. In the event that the Commission were to determine that Iao aquifer could safely yield more than 18 MGD, the County certainly has need for the additional source to serve both existing and anticipated demands as well as some pending Hawaiian Homelands projects. We are forced to expedite development in the Waihee aquifer to serve such demand otherwise. We ask that these concerns be considered when granting approvals for any uses other than bona fide existing needs.

Should you have any questions, please contact our Water Resources and Planning Division at (808) 270-7199.

Sincerely,

George Y. Teigan, Director

emb

c: Engineering Division
   Jane Lovell
   Ed Kushi
   Clayton Suzuki
May 13, 2005

TO: Honorable Micah Kane, Director
Department of Hawaiian Home Lands

Honorable Chiyome L. Fukino, M.D., Director
Department of Health

Mr. Clyde W. Namuo, Administrator
Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer

Honorable Dain P. Kane, Chairperson
County Council
County of Maui

Mr. George Y. Tengan, Director
Department of Water Supply
County of Maui

Mr. Michael W. Foley, Director
Planning Department
County of Maui

FROM: Peter T. Young, Chairperson
Commission on Water Resource Management

SUBJECT: Water Use Permit Application
Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Class
Attachment(s)

Response:

- We have no objections or comments
- Objections attached
- Only comments attached

Contact person: George Y. Tengan, Director
Phone: 270-7816
Signed

Date: 6/6/05
May 13, 2005

TO: Other Interested Parties
FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), Hawaii Revised Statutes, we transmit for your review and comment copies of water use permit applications for Wailuku Agribusiness Company, Inc.:

Existing Use
- Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
- Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
- Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
- Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached
Contact person: D. Kapua Sproat
Phone: 599-2436, ext. 16
Date: June 20, 2005
Signed:
June 20, 2005

BY U.S. MAIL & FACSIMILE TRANSMITTAL
Fax: (808) 587-0219

Peter T. Young, Chairperson
Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Objection to Wailuku Agribusiness Company's Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01, `Īao Ground Water Management Area, Maui, Hawai`i

Dear Chair Young and Acting Deputy Director Nakano:

On behalf of Maui Meadows Homeowners Association and Hui o Nā Wai `Ehā, Earthjustice objects to Wailuku Agribusiness Company, Inc.’s (“WACI’s”) water use permit application (“WUPAs”) numbers 681, 682, and 684-686 for undisclosed quantities of water from: Waikapu Tunnel nos. 1 and 2 (well nos. 5132-01 & 02); `Īao Needle Tunnels nos. 1 and 2

1 Maui Meadows Homeowners Association is an association of homeowners from the Maui Meadows subdivision in Kīhei. The association’s filing of a July 2001 petition resulted in the designation of the `Īao aquifer in July of 2003. Maui Meadows has been active in water and land use issues on Maui for many years and its members rely on the `Īao and Waihe`e aquifers to satisfy their water needs. The association’s members have also been working to ensure appropriate management of the groundwater resources within the `Īao and Waihe`e aquifers.

2 Hui o Nā Wai Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai`i’s natural and cultural resources and the practices that depend on them, including streams, oceans, estuaries, native flora and fauna, and related educational and scientific activities, especially the perpetuation of traditional and customary Native Hawaiian practices. Hui members live, work, and play in the `Īao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from `Īao, Waihe`e, Waiehu, and Waikapū streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.
Objection to WACI's Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01
June 20, 2005
Page 2 of 6

(well nos. 5333-01 & 02); and Black Gorge Tunnel (well no. 5332-01). Because WACI's applications wholly fail to satisfy their heavy burden of establishing that the proposed uses comply with all of the requirements of the law, we urge this Commission to deny the WUPAs. In the alternative, we ask this Commission to require WACI to resubmit completed WUPAs before holding mediated discussions or continuing the public hearing. We also request that any meetings or hearings be held on Maui to facilitate participation by our clients and other affected parties.

In In re Waiahole Combined Contested Case Hearing ("Waiahole"), the Hawai‘i Supreme Court strongly reaffirmed the public trust doctrine, which provides that all of Hawai‘i's waters are held by the State in trust for its people. 94 Haw. 97, 130-31, 9 P.3d 409, 442-43 (2000). The Court made clear that “[u]nder the public trust and the [State Water] Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resources.” Id. at 160, 9 P.3d at 472. Moreover, the Court flatly rejected the suggestion that private commercial uses, such as those proposed by WACI, are protected public trust purposes. Quite the opposite, the Court emphasized that the trust “prescribes a higher level of scrutiny for private commercial uses.” Id. at 142, 9 P.3d at 454 (quotations omitted).

To facilitate compliance with the public trust and other requirements of the Code, water use permit applicants must submit “completed applications with attachments” to this Commission. See Commission on Water Resource Management Application For Water Use Permit. All of WACI's WUPAs are fundamentally incomplete. For example, the “Source Information” sections were left partially blank, the “Use Information” sections were left entirely blank, none of the required maps showing source locations and proposed water use locations were attached, and no documentation was provided to establish that WACI's proposed uses meet the conditions for a permit. See id.; Haw. Rev. Stat. §§ 174C-49(a), 51. WACI failed even to indicate its proposed uses of water or the quantities of water requested.

Maui Meadows’ and Hui o Nā Wai ‘Ehā’s objections to Kehalani Mauka LLC’s and Hawaiian Commercial and Sugar Company’s (“HC&S”) WUPAs detailed the water use permit applicant’s heavy burden of justifying its proposed use in light of public trust purposes as well as this Commission’s affirmative burden to analyze and account for the impacts of its decisions on public trust resources. See Earthjustice’s Objection to Kehalani Mauka, LLC’s Water Use Permit Applications (filed Sept. 2, 2004); Earthjustice’s Objection to HC&S’ Water Use Permit Application (filed June 4, 2004). Additionally, these objections detailed the conditions necessary to secure a permit as set forth by Hawai‘i Revised Statutes § 174C-49(a). Id. Maui Meadows and the Hui will not rehash those arguments again here. Instead, this objection briefly summarizes why WACI's WUPAs are fundamentally insufficient and must be denied.
1. WACI failed to provide the factual information required by Haw. Rev. Stat. § 174C-51(4)-(7).

The law requires that a permit applicant such as WACI identify: the quantity of water requested; the proposed use of this water; the location of the water use; and the location of the well or point of diversion. Haw. Rev. Stat. §§ 174C-51(4)-(7). The sections of WACI’s WUPAs that were supposed to correspond to each of these requirements were left entirely blank. Additionally, WACI failed to attach the necessary USGS and property tax maps detailing the source and proposed use locations. Without this critical factual information, this Commission cannot complete the analysis and make the findings required by the State Constitution and the Water Code, and ratified by the Hawai’i Supreme Court. On this basis alone, WACI’s WUPAs must be denied.

2. WACI failed to establish that its proposed uses are consistent with the public interest, pursuant to Haw. Rev. Stat. § 174C-49(a)(4).

The law requires that a permit applicant such as WACI demonstrate that the withdrawal of water from Waikapu Tunnel 1, Waikapu Tunnel 2, ‘Iao Needle Tunnel 1, ‘Iao Needle Tunnel 2, and Black Gorge Tunnel is consistent with the public interest, including the protection of the streams and aquifers and the perpetuation of traditional and customary Native Hawaiian rights and practices dependent on these resources. See Waiāhole, 94 Haw. at 160, 9 P.3d at 472; Haw. Rev. Stat. § 174C(a)(4). WACI’s WUPAs are woefully inadequate and fail to identify, let alone analyze, any impact on even a single public trust use that relies on these important water sources. This omission is especially egregious given the potential impact of the proposed use on ground water resources (including domestic water supplies), streams and related traditional and customary Native Hawaiian practices, and other public trust uses.

Tunnels in this groundwater management area withdraw water that would otherwise flow into streams, eliminating a contribution of approximately 7.5 million gallons a day to stream flow. See William Meyer and Todd K. Presley, The Response of the Iao Aquifer to Groundwater Development, Rainfall, and Land-use Practices between 1940 and 1998, Island of Maui, Hawai‘i: United States Geological Survey Investigations Report 00-4223 (2001). Importantly, “discharge from the dike-impounded water body maintains perennial flow in Waihe‘e River and Iao, Waikapu, and North and South Waiehu Streams.” Id. These streams host a substantial population of native species, including varieties of ʻoʻo‘pu, according to the Hawai‘i Stream Assessment. Equally important, these streams have tremendous cultural and recreational significance. WACI’s failure to provide any information demonstrating that its undisclosed proposed uses are consistent with these important public interests is a fatal flaw in its WUPAs. See Waiāhole, 94 Haw. at 161, 9 P.3d at 473.
3. WACI failed to establish that the water source would accommodate its undisclosed proposed uses, pursuant to Haw. Rev. Stat. § 174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate its proposed use. See Haw. Rev. Stat. § 174C-49(a)(1). Not surprisingly, in light of WACI’s failure to identify its proposed uses and the quantities of water requested, WACI’s WUPAs cannot even pretend to address the condition of the water source or assess how its undisclosed proposed uses will be supported. Despite numerous indications that the ‘Iao aquifer is threatened by existing and proposed withdrawals of water, WACI’s WUPAs lack any analysis regarding whether the water source can accommodate the undisclosed proposed uses.

4. WACI failed to establish that its undisclosed proposed uses of water are “reasonable-beneficial,” pursuant to Haw. Rev. Stat. § 174C-49(a)(2).

a. WACI failed to demonstrate its actual water needs.

The law requires that permit applicants such as WACI demonstrate, as a minimum, that the requested allocations reflect actual need. See Waiāhole, 94 Haw. at 162, 9 P.3d at 474. (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public [resources] [] to satisfy those needs.”); Haw. Rev. Stat. §174C-50(f) (“A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use.”).

This Commission and the Hawai‘i Supreme Court made clear precisely the type of information necessary to establish WACI’s actual water need: the acreage in cultivation at any point in time; the type and amount of crop; the season and weather; and market forces. Waiāhole, 94 Haw. at 163-64, 9 P.3d at 475-76. While WACI’s WUPAs suggest that it needs water for agricultural purposes, WACI neglects to provide any basis for its requested allocations, failing even to mention what type of crops are or may be in cultivation. Consequently, WACI’s WUPAs fail to satisfy the requirements of the law.

b. WACI failed to analyze alternative sources of water.

WACI’s WUPAs also neglect to examine alternative sources of water. This analysis is necessary to fulfill the Commission’s duty as trustee of Hawai‘i’s water resources and WACI’s burden of proof.

Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement
reasonable measures to mitigate this impact, including the use of alternative sources.

_Waiāhole_, 94 Haw. at 143, 9 P.3d at 455. This analysis is essential for this Commission and the community at large to evaluate whether an applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Hawai‘i Supreme Court ruled:

> It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit.

_Waiāhole_, 94 Haw. at 162 n.65, 9 P.3d at 474 n.65. Accordingly, alternative sources and other physical solutions such as the potential modification of project operations must be set forth by WACI and examined by this Commission. The Code, the Commission’s prior decisions and orders, and the Hawai‘i Water Plan contain numerous examples of such alternatives. Because WACI failed to include the required alternatives analysis, Commission approval of WACI’s incomplete WUPAs is wrong as a matter of law.


The Code also requires that an applicant establish that its proposed use will not interfere with any existing legal uses of water and will not interfere with the rights of the Department of Hawaiian Home Lands. Haw. Rev. Stat. § 174C-49(a)(3), (7). WACI’s WUPAs fail even to address these issues, let alone establish that its undisclosed proposed uses are consistent with them.

6. Conclusion.

WACI’s WUPAs fail to meet the minimum requirements necessary to protect the ‘Īao aquifer and the streams where the water diverted by WACI’s tunnels would otherwise flow, to safeguard the public interest, and to facilitate meaningful decisionmaking by this Commission. WACI, and no one else, bears the burden of establishing that its WUPAs satisfy the requirements of the law. Given the high level of scrutiny required by the state constitution, Water Code, and public trust principles, this Commission can neither assume WACI’s WUPAs satisfy these requirements nor condone WACI’s abdication of its legal obligations.

Because the WUPAs fail to satisfy each of the conditions for a water use permit, Maui Meadows and Hui o Nā Wai ʻEhā respectfully urge this Commission to deny WACI’s WUPAs. In the alternative, we ask that this Commission order WACI to resubmit completed WUPAs, so that the community and this Commission can review and analyze the missing information before
Objection to WACI’s Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01
June 20, 2005
Page 6 of 6

any public hearing. Then, this Commission will have the opportunity to request further information, if necessary. Providing this required information sufficiently in advance of any meetings or hearings is essential to facilitate meaningful public comment and productive discussions between the affected parties. At the latest, we request that all additional information be provided at least one week prior to any scheduled meeting of the parties.

Please do not hesitate to contact us for further information.

Me ke aloha,

D. Kapua Sproat

cc: Randy Gentry, Maui Parks and Recreation (via email)
John V. Duey, Hui o Nā Wai ʻEhā (via email)
Jim Williamson, Maui Meadows Homeowners Association (via email)
Dr. Jonathan Likeke Scheuer, OHA (via email)
Deputy Corp. Counsel Jane Lovell, Maui County Dept. of Water Supply (via email)
George Tengan, Maui County DWS (via email)
Ellen Kraftsow, Maui County DWS (via email)
Linnel Nishioka, HC&S and Kehalani Mauka (via email)
Garrett Hew, HC&S (via email)
Avery B. Chumbley, Wailuku Agribusiness Co., Inc. (via email)
Clayton Suzuki, Wailuku Agribusiness Co., Inc. (via First Class U.S. Mail)
June 20, 2005

Peter Young, Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

RE: Water Use Permit Applications in the 'Īao Ground Water Management Area, Maui.¹

Dear Mr. Young and Commissioners,

The Office of Hawaiian Affairs (OHA) appreciates the opportunity to comment on these permits. OHA objects to these applications because they were accepted by the Commission despite being incomplete and for other reasons specified herein.

Before offering our comments, we would like to note a few relevant points:

1. We are here offering essentially the same comments and objections we have for all of the other applications submitted and circulated for the 'Īao Ground Water Management Area.
2. It is our understanding that our objection means that these permits will be considered in the ongoing proceedings on these other permits before the Commission, which is acceptable to OHA.
3. As our objections are the same and the hearings are the same, we include by reference and as applicable, the other communications we have sent to the Commission on these matters.
4. OHA has been working with Maui County officials to resolve our earlier objections and we believe that the County is making good faith efforts to address our concerns. We trust that this applicant will similarly rise to accept their statutory and constitutional burdens.

¹ Applications by Wailuku Agribusiness Corporation, Inc. (WACI) for:
Waikapu Tunnel 1 (Well No. 5132-01, WUPA No. 681, source TMK 3-5-03:01, location of use TMKs various)
Waikapu Tunnel 2 (Well No. 5132-02, WUPA No. 682, source TMK 3-5-03:01, location of use TMKs various)
'Īao Needle Tunnel 1 (Well No. 5333-01, WUPA No. 684. source TMK 3-5-03:01, location of use TMKs various)
'Īao Needle Tunnel 2 (Well No. 5333-02, WUPA No. 684. source TMK 3-5-03:01, location of use TMKs various)
Black Gorge Tunnel (Well No. 5332-01, WUPA No. 685, source TMK 3-5-03:03, location of use TMKs various)
5. Finally, we will note that these permits are for withdrawals that affect sources which would otherwise contribute to surface flow. Given the fact that the streams affected are dry in many places and times due to these and other withdrawals, and given the pending petitions to amend the interim instream flow standards in this area, we have particularly strong concerns with these permits.

OHA’s interests in these matters
As you are all well aware, the Office of Hawaiian Affairs was established at the same time and by the same body as the Water Commission, at and by the 1978 Constitutional Convention. Not only do the two organizations share the same origin, but many of our concerns overlap. The Commission is directed in its enabling statute that it “Shall cooperate with federal agencies, other state agencies, county or other local governmental organizations, and all other public and private agencies created for the purposes of utilizing and conserving the waters of the State…” (HRS §174C-5 (6)). Importantly, the Water Code also strongly states that any provision of the Code or its implementation shall not amend, modify, diminish, extinguish, abridge, or deny Native Hawaiian Water Rights (HRS §174C-101).

Concurrently, in OHA’s enabling statute it is directed that “It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs” (HRS §10-1 (b)). Moreover, in order to achieve our primary purposes of the betterment of conditions of native Hawaiians and Hawaiians (HRS §10-3 (1) & (2)), OHA was also created for “Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians (HRS §10-3 (4)).

Water, both ground and surface, has many historic, legal, cultural, economic, and other important values to native Hawaiians and Hawaiians, and as such both to OHA and the future Hawaiian Nation. OHA’s interest in water is both general across the islands and specific to this area and island. It is in light of the interests OHA has in water, and existing legal mandates outlined above, that OHA objects to these WUPA.

OHA’s primary objection

OHA has one central objection to these WUPAs as filed by the applicant and accepted by the commission. The applicant has utterly failed in their applications to establish that the proposed use of water meets the seven conditions for water use in a designated ground water management area. In each application, the applicant only provides two sentences that vaguely address these issues, under application item 13.

This failure raises issues for OHA that are among the bases for our objection. First, OHA is concerned that the Commission has even accepted the application as complete. As the Commission’s own diagram entitled “WATER USE PERMIT PROCESS” relates, acceptance of an application (and the consequent beginning of the time limits for action) should only occur when the above referenced requirements are addressed.

Secondly, the lack of information makes it difficult and burdensome for OHA to comment on whether the use will impact on protected Native Hawaiian Water Rights. This is a problem
because the Code, the WUPA form, and the Hawaii Supreme Court make it clear to the Commission (Waiāhole 94 Haw. 97, 161) that “Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource.” The applicant bears the burden of showing these conditions are met; this burden does not lie with the Commission or with any party objecting to the issuance of the permit. OHA notes that the absence of any meaningful information will make evaluation of the permit by the Commission also difficult and burdensome.

Mahalo for your attention to these matters. We acknowledge the hard work that the Commission has been undertaking for the ʻIao Aquifer, and we look forward to working together to protect these resources. If you have further questions, please contact Dr. Jonathan Likeke Scheuer at (808) 594-1946 or email him at jonathans@oha.org.

Sincerely,

Clyde W. Nāmu'o
Administrator

cc: Avery B. Chumbley and Clayton Suzuki, Wailuku Agribusiness (via First Class US Mail)
Randy Gentry, Maui Parks and Recreation (via email)
George Tengan, Ellen Kraftsow, and Jane Lovell, Maui County (via email)
John V. Duey, Hui o Nā Wai ʻEhā (via email)
Jim Williamson, Maui Meadows Homeowners Association (via email)
Kapua Sproat, Earthjustice (via email)
Linnel Nishioka, HC&S and Kehalani Mauka (via email)
Garrett Hew, HC&S (via email)
May 13, 2005

TO: Honorable Micah Kane, Director
    Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
    Department of Health
Mr. Clyde W. Namuo, Administrator
    Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable Dain P. Kane, Chairperson
    County Council
    County of Maui
Mr. George Y. Tengan, Director
    Department of Water Supply
    County of Maui
Mr. Michael W. Foley, Director
    Planning Department
    County of Maui

FROM: Peter T. Young, Chairperson
Commission on Water Resource Management

SUBJECT: Water Use Permit Application
    Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
    Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
    Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
    Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
    Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:

We have no objections or comments

Objections attached

Only comments attached

Contact person: Charley Ice, Scheuer
Phone: (808) 587-0251

Signed: [Signature]
Date: 6/20/05

May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), Hawaii Revised Statutes, we transmit for your review and comment copies of water use permit applications for Wailuku Agribusiness Company, Inc.:

Existing Use
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
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Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Class
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: D. Kapua Sproat

Signed: D. Kapua Sproat

Phone: 599-2436, ext. 16
Date: June 20, 2005
June 20, 2005

**BY U.S. MAIL & FACSIMILE TRANSMITTAL**

Fax: (808) 587-0219

Peter T. Young, Chairperson
Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Objection to Wailuku Agribusiness Company’s Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01, ‘Iao Ground Water Management Area, Maui, Hawai‘i

Dear Chair Young and Acting Deputy Director Nakano:

On behalf of Maui Meadows Homeowners Association and Hui o Nā Wai ‘Ehā, Earthjustice objects to Wailuku Agribusiness Company, Inc.’s (“WACT’s”) water use permit application (“WUPAs”) numbers 681, 682, and 684-686 for undisclosed quantities of water from: Waikapu Tunnel nos. 1 and 2 (well nos. 5132-01 & 02); ‘Iao Needle Tunnels nos. 1 and 2.

1. Maui Meadows Homeowners Association is an association of homeowners from the Maui Meadows subdivision in Kihei. The association’s filing of a July 2001 petition resulted in the designation of the ‘Iao aquifer in July of 2003. Maui Meadows has been active in water and land use issues on Maui for many years and its members rely on the ‘Iao and Waihe‘e aquifers to satisfy their water needs. The association’s members have also been working to ensure appropriate management of the groundwater resources within the ‘Iao and Waihe‘e aquifers.

2. Hui o Nā Wai ‘Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai‘i’s natural and cultural resources and the practices that depend on them, including streams, oceans, estuaries, native flora and fauna, and related educational and scientific activities, especially the perpetuation of traditional and customary Native Hawaiian practices. Hui members live, work, and play in the ‘Iao ground water management area. They rely on and routinely use ground water from the aquifer as well as surface water from ‘Iao, Waihe‘e, Waiehu, and Waikapū streams and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.
Objection to WACI’s Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01

June 20, 2005
Page 2 of 6

(well nos. 5333-01 & 02); and Black Gorge Tunnel (well no. 5332-01). Because WACI’s applications wholly fail to satisfy their heavy burden of establishing that the proposed uses comply with all of the requirements of the law, we urge this Commission to deny the WUPAs. In the alternative, we ask this Commission to require WACI to resubmit completed WUPAs before holding mediated discussions or continuing the public hearing. We also request that any meetings or hearings be held on Maui to facilitate participation by our clients and other affected parties.

In In re Waiāhole Combined Contested Case Hearing (“Waiāhole”), the Hawai‘i Supreme Court strongly reaffirmed the public trust doctrine, which provides that all of Hawai‘i’s waters are held by the State in trust for its people. 94 Haw. 97, 130-31, 9 P.3d 409, 442-43 (2000). The Court made clear that “[u]nder the public trust and the [State Water] Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resources.” Id. at 160, 9 P.3d at 472. Moreover, the Court flatly rejected the suggestion that private commercial uses, such as those proposed by WACI, are protected public trust purposes. Quite the opposite, the Court emphasized that the trust “prescribes a higher level of scrutiny for private commercial uses.” Id. at 142, 9 P.3d at 454 (quotations omitted).

To facilitate compliance with the public trust and other requirements of the Code, water use permit applicants must submit “completed applications with attachments” to this Commission. See Commission on Water Resource Management Application For Water Use Permit. All of WACI’s WUPAs are fundamentally incomplete. For example, the “Source Information” sections were left partially blank, the “Use Information” sections were left entirely blank, none of the required maps showing source locations and proposed water use locations were attached, and no documentation was provided to establish that WACI’s proposed uses meet the conditions for a permit. See id.; Haw. Rev. Stat. §§ 174C-49(a), 51. WACI failed even to indicate its proposed uses of water or the quantities of water requested.

Maui Meadows’ and Hui o Nā Wai ‘Ehā’s objections to Kehalani Mauka LLC’s and Hawaiian Commercial and Sugar Company’s (“HC&S”) WUPAs detailed the water use permit applicant’s heavy burden of justifying its proposed use in light of public trust purposes as well as this Commission’s affirmative burden to analyze and account for the impacts of its decisions on public trust resources. See Earthjustice’s Objection to Kehalani Mauka, LLC’s Water Use Permit Applications (filed Sept. 2, 2004); Earthjustice’s Objection to HC&S’ Water Use Permit Application (filed June 4, 2004). Additionally, these objections detailed the conditions necessary to secure a permit as set forth by Hawai‘i Revised Statutes § 174C-49(a). Id. Maui Meadows and the Hui will not rehash those arguments again here. Instead, this objection briefly summarizes why WACI’s WUPAs are fundamentally insufficient and must be denied.
Objection to WACI's Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01
June 20, 2005
Page 3 of 6

1. WACI failed to provide the factual information required by Haw. Rev. Stat. § 174C-51(4)-(7).

The law requires that a permit applicant such as WACI identify: the quantity of water requested; the proposed use of this water; the location of the water use; and the location of the well or point of diversion. Haw. Rev. Stat. §§ 174C-51(4)-(7). The sections of WACI's WUPAs that were supposed to correspond to each of these requirements were left entirely blank. Additionally, WACI failed to attach the necessary USGS and property tax maps detailing the source and proposed use locations. Without this critical factual information, this Commission cannot complete the analysis and make the findings required by the State Constitution and the Water Code, and ratified by the Hawai'i Supreme Court. On this basis alone, WACI's WUPAs must be denied.

2. WACI failed to establish that its proposed uses are consistent with the public interest, pursuant to Haw. Rev. Stat. § 174C-49(a)(4).

The law requires that a permit applicant such as WACI demonstrate that the withdrawal of water from Waikapu Tunnel 1, Waikapu Tunnel 2, lao Needle Tunnel 1, Tao Needle Tunnel 2, and Black Gorge Tunnel is consistent with the public interest, including the protection of the streams and aquifers and the perpetuation of traditional and customary Native Hawaiian rights and practices dependent on these resources. See Waiahole, 94 Haw. at 160, 9 P.3d at 472; Haw. Rev. Stat. § 174C(a)(4). WACI's WUPAs are woefully inadequate and fail to identify, let alone analyze, any impact on even a single public trust use that relies on these important water sources. This omission is especially egregious given the potential impact of the proposed use on ground water resources (including domestic water supplies), streams and related traditional and customary Native Hawaiian practices, and other public trust uses.

Tunnels in this groundwater management area withdraw water that would otherwise flow into streams, eliminating a contribution of approximately 7.5 million gallons a day to stream flow. See William Meyer and Todd K. Presley, The Response of the lao Aquifer to Groundwater Development, Rainfall, and Land-use Practices between 1940 and 1998, Island of Maui, Hawai'i; United States Geological Survey Investigations Report 00-4223 (2001). Importantly, "discharge from the dike-impounded water body maintains perennial flow in Waie'e River and lao, Waikapu, and North and South Waicu Streams." Id. These streams host a substantial population of native species, including varieties of 'o'opu, according to the Hawai'i Stream Assessment. Equally important, these streams have tremendous cultural and recreational significance. WACI's failure to provide any information demonstrating that its undisclosed proposed uses are consistent with these important public interests is a fatal flaw in its WUPAs. See Waiahole, 94 Haw. at 161, 9 P.3d at 473.
Objection to WAC’s Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5332-01
June 20, 2005
Page 4 of 6

3. WAC failed to establish that the water source would accommodate its undisclosed proposed uses, pursuant to Haw. Rev. Stat. § 174C-49(a)(1).

The Code requires each applicant to establish that a water source can accommodate its proposed use. See Haw. Rev. Stat. § 174C-49(a)(1). Not surprisingly, in light of WAC’s failure to identify its proposed uses and the quantities of water requested, WAC’s WUPAs cannot even pretend to address the condition of the water source or assess how its undisclosed proposed uses will be supported. Despite numerous indications that the ‘Iao aquifer is threatened by existing and proposed withdrawals of water, WAC’s WUPAs lack any analysis regarding whether the water source can accommodate the undisclosed proposed uses.

4. WAC failed to establish that its undisclosed proposed uses of water are “reasonable-beneficial,” pursuant to Haw. Rev. Stat. § 174C-49(a)(2).

a. WAC failed to demonstrate its actual water needs.

The law requires that permit applicants such as WAC demonstrate, as a minimum, that the requested allocations reflect actual need. See Waiahole, 94 Haw. at 162, 9 P.3d at 474. (“Notwithstanding the present and uncertain nature of the permitting process, therefore, permit applicants must still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public [resources] [] to satisfy those needs.”); Haw. Rev. Stat. §174C-50(f) (“A permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use.”).

This Commission and the Hawai‘i Supreme Court made clear precisely the type of information necessary to establish WAC’s actual water need: the acreage in cultivation at any point in time; the type and amount of crop; the season and weather; and market forces. Waiahole, 94 Haw. at 163-64, 9 P.3d at 475-76. While WAC’s WUPAs suggest that it needs water for agricultural purposes, WAC neglects to provide any basis for its requested allocations, failing even to mention what type of crops are or may be in cultivation. Consequently, WAC’s WUPAs fail to satisfy the requirements of the law.

b. WAC failed to analyze alternative sources of water.

WAC’s WUPAs also neglect to examine alternative sources of water. This analysis is necessary to fulfill the Commission’s duty as trustee of Hawai‘i’s water resources and WAC’s burden of proof.

Specifically, the public trust compels the state duty to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement
reasonable measures to mitigate this impact, including the use of alternative sources.

Waialae, 94 Haw. at 143, 9 P.3d at 455. This analysis is essential for this Commission and the community at large to evaluate whether an applicant has adequately established that its requested allocation would support a reasonable-beneficial use. The Hawai'i Supreme Court ruled:

It is axiomatic that the Commission must also consider alternative sources in permitting existing or new uses in the first instance, as a part of its analysis of the "reasonable-beneficial" and "consistent with the public interest" conditions for a permit.

Waialae, 94 Haw. at 162 n.65, 9 P.3d at 474 n.65. Accordingly, alternative sources and other physical solutions such as the potential modification of project operations must be set forth by WACI and examined by this Commission. The Code, the Commission's prior decisions and orders, and the Hawai'i Water Plan contain numerous examples of such alternatives. Because WACI failed to include the required alternatives analysis, Commission approval of WACI's incomplete WUPAs is wrong as a matter of law.


The Code also requires that an applicant establish that its proposed use will not interfere with any existing legal uses of water and will not interfere with the rights of the Department of Hawaiian Home Lands. Haw. Rev. Stat. § 174C-49(a)(3), (7). WACI's WUPAs fail even to address these issues, let alone establish that its undisclosed proposed uses are consistent with them.

6. Conclusion.

WACI's WUPAs fail to meet the minimum requirements necessary to protect the `Iao aquifer and the streams where the water diverted by WACI's tunnels would otherwise flow, to safeguard the public interest, and to facilitate meaningful decisionmaking by this Commission. WACI, and no one else, bears the burden of establishing that its WUPAs satisfy the requirements of the law. Given the high level of scrutiny required by the state constitution, Water Code, and public trust principles, this Commission can neither assume WACI's WUPAs satisfy these requirements nor condone WACI's abdication of its legal obligations.

Because the WUPAs fail to satisfy each of the conditions for a water use permit, Maui Meadows and Hui o Nā Wai `Ehā respectfully urge this Commission to deny WACI's WUPAs. In the alternative, we ask that this Commission order WACI to resubmit completed WUPAs, so that the community and this Commission can review and analyze the missing information before
Objection to WACI's Water Use Permit Applications for Well Nos. 5132-01 & 5132-02, Well Nos. 5333-01 & 02, and Well No. 5333-01
June 20, 2005
Page 6 of 6

any public hearing. Then, this Commission will have the opportunity to request further information, if necessary. Providing this required information sufficiently in advance of any meetings or hearings is essential to facilitate meaningful public comment and productive discussions between the affected parties. At the latest, we request that all additional information be provided at least one week prior to any scheduled meeting of the parties.

Please do not hesitate to contact us for further information.

Me ke aloha,

D. Kapua Sprout

cc: Randy Gentry, Maui Parks and Recreation (via email)
    John V. Duey, Hui o Nā Wai 'Ehā (via email)
    Jim Williamson, Maui Meadows Homeowners Association (via email)
    Dr. Jonathan Likckie Scheuer, OHA (via email)
    Deputy Corp. Counsel Jane Lovell, Maui County Dept. of Water Supply (via email)
    George Tengan, Maui County DWS (via email)
    Ellen Kraftsow, Maui County DWS (via email)
    Linnel Nishioka, HC&S and Kehalani Mauka (via email)
    Garrett Hew, HC&S (via email)
    Avery B. Chumbley, Wailuku Agribusiness Co., Inc. (via email)
    Clayton Suzuki, Wailuku Agribusiness Co., Inc. (via First Class U.S. Mail)
We have set July 11, 2005, a Monday, from 1:00 - 5:00 pm, for our meeting at Cameron Center. All who responded indicated that was an agreeable date. We hope it works for the others. We may not need that much time, but hope to sort things out comprehensively within that time. This will be your only notice. We will still conduct another full session of the public hearing, yet to be determined, which we anticipate would be the last.
May 13, 2005

TO: Harry M. Yada, Acting Administrator
   Land Division

FROM: Dean A. Nakano, Acting Deputy Director
       Commission on Water Resource Management

SUBJECT: Request for Comments
         Water Use Permit Application
         Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
   Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
   Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
   Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
   Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

CI: ss
Attachment(s)

Response:
( ) A water lease/permit is required of this applicant and an application for such will be requested by our division.
(XX) A water lease/permit is not required of this applicant.
( ) A water lease/permit has been obtained by the applicant through lease no.

(XX) This well project ( ) requires ( ) does not require a CDUP. If a CDUP is required it ( ) has ( ) has not been approved and ( ) is ( ) is not currently active.
( ) Other relevant Land Division rules/regulations, information, or recommendations are attached.
( ) No objections
XX) Other comments: Original source of private title is Land Commission Award 460:3 issued between 1845 and 1855.

Contact person: Gary MArtin Phone: 587-0421

Signed: _______________ Date: JUN 1, 2005
Charley,

My comments are added below.

========
Thanks, Skippy!
What we're trying to get at is the potential impact of diverting water from tunnels. We know that the tunnels flow unregulated into the stream, and that stream diversions for use on kula lands reduce the amounts for instream uses. Stream flow without tunnel augmentation may never be known, but a comparison of temperatures (for example), between different streams, with and without tunnel augmentation, would be a very useful piece of information (Do you notice lowered temps below where tunnels augment flow?)

Another way to think about the impact of tunnels is, if we had to reduce amounts of stream diversions, would it make sense to eliminate the amounts contributed by tunnels, namely to leave those amounts in the stream (not divert them)? If we reduce overall surface diversions by simply stopping all lao Stream diversions, what would that do for native species in lao?

========
I do not know where tunnels augment flow. That is why I have asked that the stream flow, diversions, and irrigation ditches be updated for flow amounts.

Yes, the stream flows are reduced along with water recharge. There needs to be better understanding that continuous streams have continuous saturation and contribute to water recharge in the flood plain. The amount of water recharge is likely being reduced by these water tunnels. The tunnels are accessing water which would historically be delayed in the ground for future storage and aquifer availability.

The fluctuations in available water will change with the seasons but there will not be a boom/bust type of condition that happens when intermittent stream beds dry into gulches. There must be consideration for riparian vegetation which helps stabilize and helps to cycle nutrients and reduce sediment from entering the stream.

I would be very cautious in just using temperature without understanding that water in the stream will be exposed and heated during its journey downstream. If there is a forest canopy, it will have cooler temperatures. If it is allowed to flow without a canopy cover like lower lao, there will be daily heating from the sun. Furthermore, if the stream has been channeled, the concrete helps exchange heat and can increase water temperatures to over 90°F in certain instances.

I think one of the first question that needs to be asked is whether surface water treatment will be continued for the future or would allowing the water to recharge the whole aquifer be cheaper in the long run for sustained well pumping.

How long does it take the water to get from the existing tunnel elevation into the aquifer. Currently, the only way of measuring the status of the aquifer is monitoring the salinity (chloride) level.

The immediate removal of surface diversions will require an amount of time for the stream to establish "saturation" which has been reduced in the past hundred years. Keeping and using the water within the watershed will likely improve the conditions for the aquifer.
Currently, without a continuous stream flow, native populations will continue to be fragmented with surviving populations. Recruitment is inconsistent so that droughts will continue to have devastating effects on maintaining healthy stream populations.

What I presented with the hiihiwai paper showed that even snail populations have continued to persist --though not in the numbers that people can gather for eating.

In the announcement for the permit applications, I noticed the applications will not be counted against basal sustainable yield. How was that determined? It appears the County Parks use will have less impact on the aquifer than the water tunnels for Wailuku Agribusiness.

Skippy
June 6, 2005

TO: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

FROM: Skippy Hau, Aquatic Biologist

SUBJECT: Water Use Permit Application Comments

Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02,
 WUPA Nos. 684 & 686
Black Gorge Tunnel, Well No. 5332-01, WUPA 685

I reviewed the applications and found the amount of water taken by various diversions unclear. Without sufficient information on diversion amounts and locations, the amount of losses from the irrigation system and the estimated amount of water recharge in the watershed cannot be determined.

Is there current documentation of the various irrigation ditches/auwai that are in use?

What is the irrigation water being used for? We followed several irrigation ditches and found some crossings where the streams were dry.

Before our May stream surveys, I talked with Mr. Clayton Suzuki about the diversions on 'Iao Stream. This year, we surveyed from the ocean and documented the channeled and intermittent conditions in 'Iao and Waiehu Streams.

Is the stream diversion for Kama ditch active? During our survey of 'Iao Stream, the water goes underground just past where I thought the Kama ditch intake was suppose to be located and no surface water is found until the debris basin of the Iao Flood Control Project.

Have these water tunnels impacted the amount of water recharge in the 'Iao aquifer?

We appear to be headed into another drought condition and without adequate water recharge, salinity will continue the increasing trend.

c: DAR - Oahu
TO: Aquatic Resources
Forestry and Wildlife/Natural Area Reserve System
Historic Preservation
State Parks

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Iao Ground Water Management Area, Maui

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Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:
( ) We have no objections or comments
( ) Objections attached
(✓) Only comments attached

Contact person: Skippy Hau
Phone: 243-5634
Signed: Skippy Hau
Date: 6/6/05
June 6, 2005

Mr. Dean Nakano, Acting Deputy Director
State of Hawaii Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Water Use Permit Applications
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel 1, Well No. 5332-01, WUPA No. 685

Dear Mr. Nakano:

Thank you for the opportunity to comment on these Water Use Permit Applications.

Waikapu Tunnels 1 & 2 are withdrawing from the high level dike complex of Waikapu aquifer and the Iao Needle Tunnels 1 & 2 and Black Gorge Tunnel from high level dike complex of the Iao aquifer. Withdrawals from high level dike sources should not be considered pumpage from the basal Iao aquifer and should be addressed in the proceedings for establishing in-stream flow standards for surface water in the Na Wai Eha area.

The total requested amount of water from the five tunnel sources is 19.5 acre-inches per week, plus 7.6 million gallons per week, for a total of 1,161,300 gpd. Irrigation demand for a total acreage of 4,352 would then be 267 gpd/acre which appears low. Actual irrigation demand from these sources and any additional sources for the stated acreage should be clarified.

There is no information in the applications to establish whether the proposed uses of water can be accommodated with the available water source; is a reasonable-beneficial use; will not interfere with any existing legal use; is consistent with the public interest, with state and county general plans and land use designations and county land use plans and general policies; and will not interfere with the rights of the Department of Hawaiian Home Lands.

"By Water All Things Find Life"
Please note that we have been limiting our pumpage to within 18 MGD for the purpose of preventing damage to the aquifer with the current configuration of pumpage. Existing demands would warrant greater withdrawals, if these could be managed without damage to the aquifer. We are also actively engaged in projects to improve the distribution of withdrawals. In the event that the Commission were to determine that lāo aquifer could safely yield more than 18 MGD, the County certainly has need for the additional source to serve both existing and anticipated demands as well as some pending Hawaiian Homelands projects. We are forced to expedite development in the Waihee aquifer to serve such demand otherwise. We ask that these concerns be considered when granting approvals for any uses other than bona fide existing needs.

Should you have any questions, please contact our Water Resources and Planning Division at (808) 270-7199.

Sincerely,

[Signature]

George Y. Tengan, Director

Emb

c: Engineering Division
   Jane Lovell
   Ed Kushi
   Clayton Suzuki

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C:\WPdocs\WUPAs\Well permit app comments\Wailuku Ag tunnels.wpd
May 13, 2005

TO: Honorable Micah Kane, Director  
Department of Hawaiian Home Lands  
Honorable Chiyome L. Fukino, M.D., Director  
Department of Health  
Mr. Clyde W. Namuo, Administrator  
Office of Hawaiian Affairs  
Attn: Mr. Jonathan Scheuer  
Honorable Dain P. Kane, Chairperson  
County Council  
County of Maui  
Mr. George Y. Tengan, Director  
Department of Water Supply  
County of Maui  
Mr. Michael W. Foley, Director  
Planning Department  
County of Maui

FROM: Peter T. Young, Chairperson  
Commission on Water Resource Management

SUBJECT: Water Use Permit Application  
Iao Ground Water Management Area, Maui

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Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. **Please respond by returning this cover memo form by June 6, 2005.** If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

**Response:**  
We have no objections or comments  
Objections attached  
Only comments attached

Contact person: George Y. Tengan, Director  
Phone: 270-7816  
Signed:  
Date: 6/6/05
June 6, 2005

Mr. Dean Nakano, Acting Deputy Director
State of Hawaii Department of Land and Natural Resources
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawaii 96809

Re: Water Use Permit Applications
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Should you have any questions, please contact our Water Resources and Planning Division at (808) 270-7199.

Sincerely,

George Y. Tengan, Director

Engineering Division
Jane Lovell
Ed Kushi
Clayton Suzuki

C:\WPdoc\WUPAt\Well permit app comments\Wailuku Ag tunnels.wpd
TO: Honorable Micah Kane, Director
Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
Department of Health
Mr. Clyde W. Namu~, Administrator
Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable Dain P. Kane, Chairperson
County Council
County of Maui
Mr. Clyde W. Namu~, Administrator
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Attn: Mr. Jonathan Scheuer
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Mr. George Y. Tengan, Director
Department of Water Supply
County of Maui
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Planning Department
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- Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
- Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans, or objectives specific to your organization or department only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Class: Attachment(s)

Response: ( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: George Y. Tengan, Director
Phone: 270-7816
Date: 6/6/05
May 13, 2005

TO: Aquatic Resources
    Forestry and Wildlife/Natural Area Reserve System
    Historic Preservation
    State Parks

FROM: Dean A. Nakano, Acting Deputy Director
    Commission on Water Resource Management

SUBJECT: Request for Comments
    Water Use Permit Application
    Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
    Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
    Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
    Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
    Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl:ss
Attachment(s)

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: Laureen Tanaka
Signed: Kauai

Phone: Date: JUN - 2 2005
TO: Peter T. Young, Chairperson  
Commission on Water Resource Management  
Department of Land and Natural Resources

FROM: Anthony J.H. Ching, Executive Officer

SUBJECT: Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681  
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682  
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686  
Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

We have reviewed the subject applications forwarded by your transmittal dated May 13, 2005.

Based on the representation of the well sites on the accompanying map, we have determined that they are all located within the State Land Use Conservation District. To the extent that the establishment of permitted activities or uses within the Conservation District is under the jurisdiction of the Department of Land and Natural Resources pursuant to chapter 183C, Hawaii Revised Statutes, we have no comments to offer as to whether the wells' designation is appropriate for the proposed uses.

With respect to the tunnels themselves, we would require a map with the alignment of the tunnels clearly identified before we are able to determine their land use designation.

Thank you for the opportunity to comment on the subject applications. As requested, we are returning the cover memo for the subject applications.

Please feel free to contact Bert Saruwatari of my office at 587-3822 should you require clarification or any further assistance.

Enclosure
May 13, 2005

TO: Mr. Anthony Ching, Executive Officer
   Land Use Commission

FROM: Peter T. Young, Chairperson
   Commission on Water Resource Management

SUBJECT: WATER USE PERMIT APPLICATION
   Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1). Specifically, we request that you inform us of the current state land use designation for the TMK parcel, or portion thereof, for the proposed use area(s) and, secondly, whether the current state land use designation is appropriate for the proposed project.

We have attached a TMK map(s) that covers the proposed use area(s). Where water is proposed for use on only a portion of a TMK parcel, or on parcels with multiple zoning, the proposed use area(s) has been clearly delineated on the attached map. Please respond by returning this cover memo along with your review comments by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: Bert Saruwatari

Phone: 587-5822

Signed: Bert Saruwatari

Date: May 25, 2005
June 1, 2005

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Meeting Confirmation
Information on Reasonable and Beneficial Use

Our public meeting to discuss information requested regarding water use permits in the Iao Ground Water Management Area is confirmed for the J. Walter Cameron Center, Room 1, in Kahului on June 8, 2005, from 2:30 to 6:30 p.m.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400 (Maui), extension 70251.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director
May 25, 2005

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Information on Reasonable and Beneficial Use

The hearing officers sent questions to all applicants and additional questions to individual objecting parties, dated August 25, November 15, and November 18, 2004. Without evaluating the adequacy of the responses, we have tabulated the response results (enclosed). Some of the questions have not been addressed at all by various applicants.

The interested public at the public hearing has expressed confidence that we are making progress in receiving better information to address their objections, and we are tentatively scheduling an informal meeting on June 8, 2005 at the Cameron Center in Kahului to offer the public the opportunity to review the latest responses before moving to a final session of the public hearing (public notice to be sent when confirmed).

The accompanying table for the applicants show three columns on the right-hand side that indicate (Yes or No) whether issues have been directly addressed, without evaluating the quality or adequacy of the response. These three issues were raised by the Supreme Court June 21, 2004 remand of the Waiahole case: whether alternatives have been explored, whether amounts per unit of use (“duties”) are prescribed, and whether there are valued cultural, historical, or natural resources that are related to the water source for which you have a water use permit application.

If there are such resources, there are public trust presumptions in favor of maintenance of the water source in its natural state and for the practice of traditional and customary native Hawaiian rights related to those resources. Applicants must identify the extent to which those resources will be affected or impaired by their water uses, and the feasible actions, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist. The hearing officers have opined that it is the responsibility of individuals who claim such rights to provide evidence of their claims.

There is a higher level of scrutiny for private commercial uses in the balancing between public and private purposes. As for municipal uses, at least part of those uses—domestic use—is also a public trust purpose.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

Cc: Garret Hew, Hawaiian Commercial & Sugar Co.
Linnel T. Nishioka, Ishikawa Morihara Lau & Fong LLP
George Tengan, County of Maui, Department of Water Supply
Randy Gentry, County of Maui, Department of Parks and Recreation
Megan Wells, Living Waters Land Foundation, LLC
LINDA LINGLE
GOVERNOR
HAWAII

PETER T. YOUNG
CHAIRPERSON
MEREDITH J. CHING
CLAYTON W. DELA CRUZ
JAMES A. FRAZIER
CHIYOME L. FUKINO, M.D.
LAWRENCE H. MIKE, M.D., J.D.
STEPHANIE A. WHALEN
DEAN A. NAKANO
ACTING DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

May 13, 2005

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1&2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

We acknowledge the receipt of your completed water use permit applications (WUPAs), as captioned, as of March 16, 2004. This late notice is due to a misfiling of your March 16, 2004 letter, which completed your map portion of the water use permit application.

Please note that all these applications are already part of the public hearing, under the Commission’s September 22, 2004 decision.

Enclosed is a copy of the public notice for your water use permit application which will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

WUPA No. 680 was assigned to the Iao Tunnel (Kepaniwai) Well No. 5532-02, for which we have two applications – yours and one filed by Maui Department of Water Supply (MDWS). Both were filed for the existing MDWS use, and yours was filed on behalf of MDWS as the applicant but signed by you, rendering it technically incomplete.

You commented at the April 22, 2005 public hearing that overflow from MDWS’ intake is captured by Wailuku Agribusiness Company, Inc. (WACI) ditches and used by WACI. This new information leads us to suggest we amend your original application for amounts yet to be specified and for uses yet to be specified, to which we are assigning the WUPA No. 738. When we receive sufficient information concerning amounts and uses, as per Table 1 on the returned application (enclosed), we can accept it as complete but must treat it as a new use.

Your original January 2, 2004 application specified MDWS as the end user, in the amount of 1.2 mgd. The initial MDWS WUPA for the same source, transmitted February 19, 2004, lists its end use as 1.418 mgd. Your November 4, 2004 amended application corrected the amount to 1.359 mgd, but again specified only the MDWS as user. Your April 22, 2005 comments included the statement “historical use suggests the actual total is more like 2.5 mgd”. We do not have full documentation of these facts and, as a result, do not really know how much is being used by WACI. Please describe these in writing for your amended application. Diagrams of the intakes will be required for our continued evaluation of your applications.

The public hearing process will be continued in order to receive additional clarifying information to be shared with interested parties, and the hearing will be resumed at a later date.

If you have any questions, please contact Charley Ice at 587-0251.

Sincerely,

DEAN A. NAKANO
Acting Deputy Director

Cl:ss
Enclosures
May 13, 2005

TO: Aquatic Resources
    Forestry and Wildlife/Natural Area Reserve System
    Historic Preservation
    State Parks

FROM: Dean A. Nakano, Acting Deputy Director

SUBJECT: Request for Comments
    Water Use Permit Application
    Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
    Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
    Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
    Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
    Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

CI:ss
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ___________________________ Phone: ___________________________
Signed: ___________________________ Date: ___________________________
May 13, 2005

TO: Harry M. Yada, Acting Administrator  
   Land Division

FROM: Dean A. Nakano, Acting Deputy Director

SUBJECT: Request for Comments  
   Water Use Permit Application  
   Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

*Existing Use*
- Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681  
- Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682  
- Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686  
- Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives specific to your division only. Please respond by returning this cover memo form by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Response:

A water lease/permit is required of this applicant and an application for such will be requested by our division.

A water lease/permit is not required of this applicant.

A water lease/permit has been obtained by the applicant through lease no.

This well project ( ) requires ( ) does not require a CDUP. If a CDUP is required it ( ) has ( ) has not been approved and ( ) is ( ) is not currently active.

Other relevant Land Division rules/regulations, information, or recommendations are attached.

No objections

Other comments:

Contact person: ____________________________ Phone: ________________

Signed: ______________________________________ Date: ________________
May 13, 2005

TO: Mr. Anthony Ching, Executive Officer
   Land Use Commission

FROM: Peter T. Young, Chairperson
       Commission on Water Resource Management

SUBJECT: WATER USE PERMIT APPLICATION
         Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

   Existing Use
   Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
   Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
   Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
   Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e. line item 6 or Table 1). Specifically, we request that you inform us of the current state land use designation for the TMK parcel, or portion thereof, for the proposed use area(s) and, secondly, whether the current state land use designation is appropriate for the proposed project.

We have attached a TMK map(s) that covers the proposed use area(s). Where water is proposed for use on only a portion of a TMK parcel, or on parcels with multiple zoning, the proposed use area(s) has been clearly delineated on the attached map. Please respond by returning this cover memo along with your review comments by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Cl:ss
Attachment(s)

Response:

( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ____________________________  Phone: __________________________

Signed: ____________________________  Date: __________________________
May 13, 2005

TO: Honorable Micah Kane, Director
    Department of Hawaiian Home Lands
Honorable Chiyome L. Fukino, M.D., Director
    Department of Health
Mr. Clyde W. Namuo, Administrator
    Office of Hawaiian Affairs
Attn: Mr. Jonathan Scheuer
Honorable Dain P. Kane, Chairperson
    County Council
    County of Maui
Mr. George Y. Tengan, Director
    Department of Water Supply
    County of Maui
Mr. Michael W. Foley, Director
    Planning Department
    County of Maui

FROM: Peter T. Young, Chairperson

SUBJECT: Water Use Permit Application
    Iao Ground Water Management Area, Maui

Transmitted for your review and comment are copies of water use permit applications:

Existing Use
    Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
    Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
    Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
    Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the proposed use that is described in the attached application (i.e.
line item 6 or Table 1) for any conflicts or inconsistencies with the land use designations, programs, plans,
or objectives specific to your organization or department only. Please respond by returning this cover memo form
by June 6, 2005. If we do not receive your comments by this date, we will assume you have no comments or
objections.

If you have any questions, require additional information, or would like to request an extension of the
review period for this application, please contact Charley Ice at 587-0251.

Cl: ss
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ___________________________ Phone: ___________________________
Signed: ___________________________ Date: ___________________________
In accordance with the Department of Land and Natural Resources Administrative Rules, Section 13-171-17(a), we are transmitting for your review and comment copies of water use permit applications:

**Existing Use**
- Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
- Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
- Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
- Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

In addition, Section 13-171-13(b) of our Administrative Rules states:

"Within sixty days after receipt of notice of a permit application, the county shall inform the commission if the proposed use is inconsistent with the county land use plans and policies."

We have attached copies of the applications for your review and would appreciate receiving your comments, within the next sixty (60) days, on whether this water use is consistent with county plans and policies.

If you have any questions, please call Dean A. Nakano, Acting Deputy Director, at 587-0214 or toll-free at 984-2400, extension 70214.

Sincerely,

Peter T. Young
Chairperson

Enclosures
May 13, 2005

TO: Other Interested Parties

FROM: Dean A. Nakano, Acting Deputy Director
Commission on Water Resource Management

SUBJECT: Request for Comments
Water Use Permit Application
Iao Ground Water Management Area, Maui

In addition to serving you notice as required by 174C-52 (a), Hawaii Revised Statutes, we transmit for your review and comment copies of water use permit applications for Wailuku Agribusiness Company, Inc.:

Existing Use
Waikapu Tunnel 1, Well No. 5132-01, WUPA No. 681
Waikapu Tunnel 2, Well No. 5132-02, WUPA No. 682
Iao Needle Tunnels 1 & 2, Well Nos. 5333-01 & 02, WUPA Nos. 684 & 686
Black Gorge Tunnel, Well No. 5332-01, WUPA No. 685

Public notice of these applications will be published in the Maui News issues of May 13, 2005 and May 20, 2005.

We would appreciate your review of the attached application for any conflicts or inconsistencies with the programs, plans, and objectives of the organization or agency that you represent. Written objections should be made in accordance with Section 13-171-18, Hawaii Administrative Rules and must be filed by the June 6, 2005 deadline. If we do not receive your comments by this date, we will assume you have no comments or objections.

If you have any questions, require additional information, or would like to request an extension of the review period for this application, please contact Charley Ice at 587-0251.

Class
Attachment(s)

Response:
( ) We have no objections or comments
( ) Objections attached
( ) Only comments attached

Contact person: ____________________________ Phone: ____________________________

Signed: ____________________________ Date: ____________________________
PUBLIC NOTICE

Applications for Water Use Permit
Iao Ground Water Management Area, Maui

The following applications for water use permit have been received by the Commission on Water Resource Management, and are hereby made public in accordance with Section 13-171, Hawaii Administrative Rules, "Designation and Regulation of Water Management Areas." These applications are subject to a continuing public hearing, which commenced October 28, 2004 and continued on April 22, 2005. The hearing remains open and will be reconvened at a later date.

1. Wailuku Agribusiness Company, Inc.
   255 East Waiako Road
   Wailuku, HI 96793

The following applications are for Existing Uses as of July 21, 2003 and completed applications submitted by the July 21, 2004 deadline.

<table>
<thead>
<tr>
<th>Application No.</th>
<th>Well Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>WUPA No. 681</td>
<td>Waikapu Tunnel 1, Well No. 5132-01</td>
</tr>
<tr>
<td>WUPA No. 682</td>
<td>Waikapu Tunnel 2, Well No. 5132-02</td>
</tr>
<tr>
<td>WUPA Nos. 684 &amp; 686</td>
<td>Iao Needle Tunnels 1 &amp; 2, Well Nos. 5333-01 &amp; 02</td>
</tr>
<tr>
<td>WUPA No. 685</td>
<td>Black Gorge Tunnel, Well No. 5332-01</td>
</tr>
</tbody>
</table>

Date Application Received/Filed: January 2, 2004
Date Application Acknowledged as Complete: March 16, 2004
Aquifer: Iao System Area, Wailuku Sector, Maui
Quantity Requested: Natural tunnel flow amounts unknown, augmenting Iao and Waikapu Stream flows, from high-level aquifers, not counted against basal sustainable yield.
Existing/New Water Use: Existing
Place of Water Use: Various in Wailuku and Waikapu; WUPAs 684-686 TMKs: 3-3,4,5,6 (contribute to ditch diversions for agriculture)

2. County of Maui
   Department of Parks and Recreation
   700 Halia Nakoa Street, Unit 2
   Wailuku, HI 96793

The following applications are for Existing Uses as of July 21, 2003 and completed applications submitted by the July 21, 2004 deadline.

<table>
<thead>
<tr>
<th>Application No.</th>
<th>Well Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>WUPA No. 709</td>
<td>War Memorial Stadium Well (Well No. 5329-04)</td>
</tr>
<tr>
<td>WUPA No. 710</td>
<td>Baldwin High School Well (Well No. 5329-05)</td>
</tr>
<tr>
<td>WUPA No. 712</td>
<td>Papohaku Park Well (Well No. 5429-02)</td>
</tr>
<tr>
<td>WUPA No. 711</td>
<td>Waiehu Golf Course Well (Well No. 5529-02)</td>
</tr>
</tbody>
</table>

Date Application Received/Filed: July 21, 2004
Date Application Acknowledged as Complete: July 21, 2004
Aquifer: Iao System, Wailuku Sector, Maui
Quantity Requested: Currently uncertain; estimates total 340,000 gpd from caprock, not counted against basal sustainable yield.
Existing/New Water Use: Existing
Place of Water Use: Parks in Wailuku, Kahului, and Waiehu; TMKs: 3-8-7:55, 3-4-30:15, 3-2-13:6

The following applications were received after the one-year filing deadline and are therefore being considered as New Uses.

<table>
<thead>
<tr>
<th>Application No.</th>
<th>Well Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>WUPA No. 713</td>
<td>Maui Stadium Well (Well No. 5329-14)</td>
</tr>
<tr>
<td>WUPA No. 714</td>
<td>Waiehu Golf Course Well 2 (Well No. 5530-04)</td>
</tr>
</tbody>
</table>

Date Application Received/Filed: August 4, 2004
Date Application Acknowledged as Complete: August 4, 2004
Aquifer: Iao System, Wailuku Sector, Maui
Quantity Requested: Currently uncertain; estimates total 78,000 gpd from caprock, not counted against basal sustainable yield.
Existing/New Water Use: New
Place of Water Use: Parks in Kahului and Waiehu; TMKs: 3-8-7:55, 3-2-13:29

Written objections or comments on the above application may be filed by any person who has property interest in any land within the hydrologic unit of the source of water supply, any person who will be directly and immediately affected by the proposed water use, or any other interested person. Written objections shall: (1) state property or other interest in the matter (provide TMK information); (2) set forth questions of procedure, fact, law, or policy, to which objections are taken; and (3) state all grounds for objections to the proposed permit. Written objections must be received by June 6, 2005. Objections must be sent to 1) the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809 and
2) the applicant at the above address. The continuing public hearing for these applications will be duly noticed.

COMMISSION ON WATER RESOURCE MANAGEMENT

DEAN A. NAKANO, Acting Deputy Director for
PETER T. YOUNG, Chairperson

Dated: May 10, 2005

Publish in: Maui News issues of May 13, 2005 and May 20, 2005
PUBLIC HEARING NOTICE

Applications for Water Use Permits
Iao Ground Water Management Area, Maui.

The following applications for water use permits to continue uses existing as of July 21, 2003, and applications for new uses have received objections and are subject to public hearing. The Commission on Water Resource Management, at its regular meeting on September 22, 2004, approved a public hearing originally commenced on October 28, 2004. This public hearing will be the second session and continuation of the original October 28, 2004 hearing and will be held:

April 22, 2005, 5:00-9:00 p.m.
J. Walter Cameron Center
95 Mahalani Street, Wailuku, Hawaii 96793

The Hearing Officers will gather further testimony and information on basal aquifer and caprock wells. Testimony on the high-level dike sources will also be received, but these sources affect stream flow and will be combined with a pending petition to amend the interim instream flow standard of four Wailuku District streams: Waihe'e, Waiehu, Iao, and Waikapū. Testimony should focus on practicable alternatives, water duties, Hawaiian rights, and definitions of public trust uses.

- **Basal Sources:**

<table>
<thead>
<tr>
<th>Name</th>
<th>Well No.</th>
<th>Applicant</th>
<th>WUPA No.</th>
<th>TMK</th>
<th>Amount (mgd)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Existing Uses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mokuhau Well 1</td>
<td>5330-09</td>
<td>MDWS</td>
<td>700</td>
<td>3-3-2:24</td>
<td>1.994</td>
</tr>
<tr>
<td>Mokuhau Well 3</td>
<td>5330-11</td>
<td>MDWS</td>
<td>701</td>
<td>3-3-2:24</td>
<td>2.221</td>
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- **Caprock Sources:**

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  | **New Uses**          |          |           |          |        |              |
  | None                  |          |           |          |        |              |
**High-level Dike Sources** (impacting stream flows, to be later combined with the IFS petition proceedings)

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New Uses arising after July 21, 2003, or applications submitted by or after July 21, 2004

None

Applicants:
- County of Maui, Department of Water Supply (MDWS)
- County of Maui, Department of Parks & Recreation (MP&R)
- Kehalani Mauka, LLC (Kehalani)
- Living Waters Land Foundation (LWLF)
- Hawaiian Commercial and Sugar (HC&S)
- Wailuku Agribusiness Company, Inc., (WACI)

Materials related to the noticed items are available for review at the Kahului Library, 90 School St., Kahului, Maui and at the Commission office located at 1151 Punchbowl St., Rm 227, Honolulu and will also be available at this public hearing.

The Hearing Officers will close the public hearing at the end of this session. Commission staff recommendations on these applications will be forwarded to the Commission at a later date based on the available information.

Any person may testify or present additional information on the public hearing subject matter. If you have a legal interest that may be adversely affected by a proposed application, you have a right to request an administrative contested case hearing (Hawaii Administrative Rules (HAR) §13-167-52(a)). However, you must make the request for such a hearing either orally or in writing by the close of public hearing and file (or mail and postmark) a written petition for a contested case with the Commission within ten (10) days after the close of the public hearing. Petition forms are available from the Commission.

If you do not make a request or fail to file a timely written petition for contested case hearing on a particular application noticed herein with the Commission, the consequence is that you will be precluded from later obtaining a contested case hearing and seeking judicial review of any adverse decision (HAR Chapter 13-167).

Disabled individuals planning to attend the public hearing are asked to contact the Commission at the above address or phone (Kauai) 274-3141 ext. 70214, (Maui) 984-2400 ext. 70214, (Hawaii) 974-4000 ext. 70214, (Molokai or Lanai) 1-800-GOV-INHI ext. 70214 or 587-0214 at least three days in advance of the public hearing to indicate if they have special needs that require accommodation.

COMMISSION ON WATER RESOURCE MANAGEMENT

DEAN A. NAKANO, Acting Deputy Director for
PETER T. YOUNG, Chairperson

Dated: March 28, 2005

Publish in: Maui News issue of April 1, 2005
December 17, 2004

BY U.S. MAIL & FACSIMILE TRANSMITTAL

Fax: (808) 587-0219

Yvonne Y. Izu, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: Burdens Of Proof And Legal Standards Regarding: (1) Traditional And Customary Native Hawaiian Rights And Practices; And (2) Municipal Uses

Dear Deputy Director Izu:

Mahalo for this opportunity to respond to the Commission’s November 15, 2004 letter requesting comments on Commissioner Miike’s questions and analyses on the burdens of proof and legal standards regarding: (1) traditional and customary Native Hawaiian rights and practices; and (2) municipal uses. We have addressed the issues in detail and are hopeful that our comments will assist the Commission in its water use permitting for the "lao aquifer.

I. Traditional & Customary Native Hawaiian Rights & Practices.


Pursuant to Hawai‘i’s constitution, statutes, and case law, this Water Commission is “obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians[,]” Ka Pa‘akai o ka ‘Aina v. Land Use Comm’n, 94 Haw. 31, 45 (2000) (“Ka Pa‘akai”); see also Haw. Const. Art. XII § 7. These rights include, but are not limited to: (1) traditional and customarily exercised rights and practices (e.g. gathering rights for limu, fish, crustaceans, and shellfish in springs, streams, and nearshore marine waters, use of springs and streams for religious and spiritual purposes, water for kalo cultivation); and (2) entitlements to water pursuant to the Hawaiian Homes Commission Act of 1920.¹ See, e.g., Haw. Const. Art. XI § 7; Haw. Rev. Stat. §§ 1-1, 7-1, 174C-63, 174C-101.

¹ Native Hawaiians may also possess appurtenant, riparian, or correlative rights, which may be used for traditional and customary purposes, such as the appurtenant, riparian, or correlative right to water for kalo cultivation on one’s own kuleana. See generally Lawrence H. Miike, M.D., J.D. Water and the Law in Hawai‘i 118 (University of Hawai‘i Press 2004).
Moreover, as trustee of the state’s water resources trust established under the state constitution, this Commission bears the ultimate burden of identifying and protecting Native Hawaiians’ traditionally and customarily exercised rights and practices in the context of water use permit applications for the ‘Iao Aquifer. See generally In re Waiahole Combined Contested Case, 94 Haw. 97, 141 (2000) (“Waiahole I”) (“The state also bears an ‘affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses.”); id. at 137 (“uphold[ing] the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose”).

In addition to the constitutional mandates above, the state Water Code includes independent requirements for this Commission, working in partnership with affected Native Hawaiian practitioners, to identify traditional and customary rights and practices supported by ground water and related surface water in ‘Iao. In fact, the Code contemplated completion of this process many years ago through the declaration of water uses and issuance of certificates for such uses. Haw. Rev. Stat. §§ 174C-26, 27.

The Code required any person using water in any area of the state, including uses of water for traditional and customary practices, to file a declaration of use by April 1989. Id. § 174C-26(a). Once those declarations were filed, the Code required the Commission to scrutinize identified uses to determine if they were reasonable and beneficial. Id. § 174C-27(a). The Code further required this Commission to “act upon a declaration within six months after its filing.” Id. § 174C-26(e). Unfortunately, the Commission never completed this process, and it is our understanding that no certificates of water use were ever issued. This is particularly regrettable because the Code contemplated use of these certificates to “resolv[e] claims related to existing water rights and uses including appurtenant rights, riparian and correlative uses[,]” which is precisely the dilemma faced by this Commission in permitting water uses in the ‘Iao aquifer. Id. § 174C-27(a).

Other sections of the Water Code also mandated this Commission to inventory the scope and existence of traditional and customary Native Hawaiian rights and practices throughout Hawai‘i, including ‘Iao. As part of the Hawai‘i Water Plan, this Commission was charged with developing a water resources protection plan, including: (1) “study[ing] and inventory[ing] the existing water resources of the state and the means and methods of conserving and augmenting such water resources”; and (2) “study[ing] the quantity and quality of water needed for existing and contemplated uses[,]” Id. §174C-31(c) (emphasis added). Other requirements of the Hawai‘i Water Plan mandate the Commission to “describe and inventory: (1) all water resources and systems in each hydrologic unit; (2) all presently exercised uses; (3) the quantity of water not presently used within that hydrologic unit; and (4) potential threats to water
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resources, both current and future.” Id. §174C-31(h) (emphasis added). If the Commission had completed meaningful inventories and established (1) an instream use and protection program and (2) sustainable yields based on numerical or other models lacking the shortcomings of the Robust Analytical Model, the Commission, together with affected practitioners, would have identified many of the traditional and customary rights and practices historically and currently exercised in the areas affected by the `Iao permit applications. Id. § 174C-31(i).

The Hawai`i Supreme Court confirmed the Commission’s planning mandate:

The Code planning provisions mandate the Commission to ‘study and inventory the existing water resources of the state and the means and methods of conserving and augmenting such water resources,’ in formulating a ‘water resources protection and quality plan,’ which must include, among other information, ‘requirements for beneficial instream uses and environmental protection’. The Code also obligates the Commission to ensure that it does not ‘abridge or deny’ traditional and customary rights of Native Hawaiians.

Waiahole I, 94 Haw. at 153 (citations omitted). If these requirements had been implemented, the work necessitated by the Commission’s and the water use permit applicants’ burden would have been significantly reduced. This ongoing failure to comply with the letter and spirit of the Code, however, does not justify improperly shifting this burden to practitioners of Native Hawaiian customs and traditions.

“[A]n 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[.]” In re Wai`ola o Moloka`i, Inc., 103 Haw. 401, 441 (2004) (“Wai`ola”). Wai`ola presented nearly identical issues: this Commission was tasked with considering the impact of a water use permit application for ground water withdrawals for municipal and other purposes on traditional and customary rights and practices. The Hawai`i Supreme Court vacated this Commission’s order because the Commission “failed adequately to discharge its public trust obligation to protect native Hawaiians’ traditional and customary gathering rights[.]” Id. at 443. In so doing, the Court placed “the burden of proving, inter alia, that the proposed water use would not abridge or deny traditional and customary native Hawaiian rights” squarely on the applicant’s and the Commission’s shoulders. Id. at 442. The Court also admonished the Commission for “erroneously placing] the burden on the [practitioners] to establish that the proposed use would abridge or deny their traditional and customary gathering rights.” Id. In no uncertain terms the Court
held that the applicant "was obligated to demonstrate affirmatively that the proposed well would not affect native Hawaiians’ rights; in other words, the absence of evidence that the proposed use would affect native Hawaiians’ rights was insufficient to meet the burden imposed upon [the applicant] by the public trust doctrine, the Hawai‘i Constitution, and the Code." Id. (emphases in original).

In light of the Code’s mandates and Wa‘i‘ola’s clear language, the burden of establishing that traditional and customary Native Hawaiian rights exist in the first instance rests with this Commission as trustee of Hawai‘i’s water resources trust and with any permit applicant who covets public trust resources. "[T]he 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." Waiāhole I, 94 Haw. at 143. Again, the Code devised the Hawai‘i Water Plan (especially the Water Resources Protection Plan) as the framework for managing one of Hawai‘i’s most precious resources. See Miike, supra, at 234-35.

The challenges and burdens that continue to arise from the failure to adequately fund and implement this framework should not and indeed cannot be laid at the feet of practitioners of Native Hawaiian customs and traditions.

B. Assertions Of Traditional & Customary Rights & Practices Are Sufficient.

Hawai‘i case law is unambiguous that even an assertion of traditional and customary rights and practices, without a conclusive showing that specified individuals have such rights, requires private commercial users and this Commission to gather information necessary to analyze potential impacts and ensure that any traditional and customary rights and practices are not abridged or denied. See Ka Pa‘akai, 94 Haw. at 51 n.35 (noting that “neither the boundaries of the Resource Zones . . . nor the specific [traditional and customary] uses in each zone have been established”); id. at 37 (acknowledging general testimony regarding cultural practices including fishing, picking limu, and gathering ‘opihi and other resources); Public Access Shoreline Hawai‘i v. Hawai‘i Cty. Planning Comm’n, 79 Haw. 425, 450 (1995) (“the right of each ahupua‘a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site”).

The Hawai‘i Supreme Court further ruled that state agencies, such as this Commission, “may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” Ka Pa‘akai, 94 Haw. at 46 (emphasis added).

The Court went on to specifically detail an “analytic framework in an effort to effectuate the state’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[].” Id. at 46-47. “Indeed,
the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection.” Id. at 50.

Pursuant to Ka Pa‘akai, given the information already provided to this Commission in objections to water use permit applications for ‘Iao, at the October 28, 2004 public hearing on Maui, and in the petition to restore stream flow in Waihe‘e, North and South Waiehu, ‘Iao and Waikapū streams and their tributaries (“Nā Wai ‘Ehā”) filed by Earthjustice on June 25, 2004, this Commission is tasked with investigating and making specific findings regarding: (1) the identity and scope of cultural, historical and natural resources in the area affected by the permit applications for ‘Iao, including the extent to which traditional and customary rights and practices are exercised in that area; (2) the extent to which those resources, rights, and practices will be affected by the proposed action; and (3) feasible action, if any, to reasonably protect Native Hawaiian rights and practices. 94 Haw. at 52. In particular, we note that the IIFS petition detailed some cultural practices supported by ground and surface water in the Nā Wai ‘Ehā area. If the Commission determines that such rights exist, all water use permit applicants must overcome the presumption in favor of such protected public trust purposes.

Given the limitations of the outdated declarations of water use and Hawai‘i Water Plan, we understand the enormity of the task facing this Commission and the applicants seeking water use permits for ‘Iao. Although the Hawai‘i Supreme Court has made clear that this burden lies with the Commission and permit applicants, not the practitioners, several workable avenues are available to help provide the necessary information. The Commission, in partnership with the permit applicants, could, for example: (1) review declarations of water use for all TMKs and uses within the affected area; (2) request from plantation interests including Wailuku Agribusiness and HC&S, a list of all individuals who receive kuleana water; (3) publish notices in local papers and broadcast on local TV (Akakū) and radio stations requests for information from practitioners from the affected area; (4) locally notice and hold public meetings in Central Maui for practitioners who may be affected by the pending applications; (5) contact Hawaiian agencies with offices or representatives in the affected area, including the Office of Hawaiian Affairs, Queen Lili‘uokalani Children’s Center, and Alu Like for lists of local practitioners or contacts; (6) contact elected representatives at the county, state, and federal levels for recommended contacts; (7) contact cultural consultants or experts from the area, including those listed in state Office of Environmental Quality Control’s list of cultural consultants and others potentially available through the Bailey House for contact information for local practitioners or other resources; (8) contact culturally-based groups from the area including hula hālau, Hawaiian Civic Clubs, ‘Onipa‘a Nā Hui Kalo, Maui Cultural Lands, Maui Cultural Resources Commission and
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the like for information and recommendations; (9) contact state agencies, including the historic preservation division and Island Burial Councils for lists of local practitioners or contacts; and (10) contact schools and organizations of higher learning, including the University of Hawai‘i and Maui Community College for lists of Hawaiian organizations, clubs, local practitioners, and other contacts from the area. These are just a sampling of potential sources of information; many more are available to this Commission and the permit applicants.

C. This Commission Has The Authority And Duty To Recognize And Uphold Traditional & Customary Rights & Practices.

Finally, this Commission has both the authority and the duty to recognize traditional and customary Native Hawaiian rights in the context of water use permitting, contested case hearings, and other matters under its jurisdiction. The Hawai‘i Supreme Court has never imposed any requirement for those asserting such rights to obtain a court ruling before the Commission or any other agency could consider them. Rather, as detailed above, state agencies including this Commission “may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” Ka Pa`akai, 94 Haw. at 46. In Ka Pa`akai, the Hawai‘i Supreme Court specifically detailed an “analytical framework in order to effectuate the state’s obligation to protect native Hawaiian customary and traditional practices[.]” Id. at 46-47. The Court placed this burden squarely on agencies such as this Commission, going on to rule that “[t]he power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated[.]” Id. at 52.

We again note that in Wai‘ola, the Court vacated this Commission’s issuance of water use permits for proposed ground water uses not unlike those at issue in `Iao because the Commission “failed adequately to discharge its public trust obligation to protect native Hawaiians’ traditional and customary gathering rights[,]” 103 Haw. at 443. More specifically, the Court ruled that “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.” Id. at 441-42 (emphasis added).

II. Municipal Uses.

A. “Municipal” Use Is Not A Public Trust Use.

At the October 28, 2004 public hearing, Commissioner Miike stated that “municipal” use was not a “domestic” use recognized under Wai‘ahole as a public
trust purpose, citing the Water Code’s definition of “domestic use” as support. Commissioner Miike later modified this position in correspondence dated November 3 and 15, 2004, opining that Waiahole I suggested domestic uses could extend to municipal uses. We respectfully submit that the Commissioner’s first inclination was correct. In sum, although municipal use may serve the general public interest and partially (but not exclusively) includes many aggregate domestic uses, it constitutes a large-scale, consumptive, and diversionary use that differs, both qualitatively and quantitatively, from the uses that the public trust, both in Hawaii and elsewhere, has traditionally protected. Thus, notwithstanding the “important public benefits” of municipal uses, long-established public trust precedent “stops short” of including such use as a public trust purpose. Waiahole I, 94 Haw. at 138.

“Domestic” and “municipal” are legal terms of art in water law that have carried distinct meanings under the common law for ages. As the plain meaning suggests, “domestic” use denotes individual water use “for household purposes, i.e., for drinking, washing, cooking, and watering domestic animals.” Carter v. Territory, 24 Haw. 47, 66 (1917). Historically, in Hawaii and elsewhere, the priority for domestic use has arisen in connection with riparian principles, such that the use cannot “materially diminish the supply of water or render useless its application by others.” Peck v. Bailey, 8 Haw. 658, 662 (1867). See also id, (recognizing the “sound distinction” under riparian law between “the right to enjoy water in its natural state, and that which is created by artificial means”); Carter, 24 Haw. at 66 (affirming the riparian distinction between “natural” and “artificial” uses and stating, “we have no doubt that such is the law in [Hawaii]”).

“Municipal” use, in contrast, denotes bulk water uses of large population entities. This may include the aggregate domestic uses of the population, but also includes many other kinds of uses, including commercial, agricultural, and industrial purposes. Maui Department of Water Supply’s (“MDWS’s”) applications, for example, concede that single-family use comprises about only 16% of the total use in Central Maui. See, e.g., MDWS’s Water Use Permit Application for Mokuhaau 1. MDWS has also admitted that it transports potable water from Lao to Central and South Maui and Puna for both potable and non-potable needs. MDWS, however, is unable to provide calculations or even estimates of its non-domestic uses, including water for commercial, agricultural, industrial and other purposes. As MDWS’s applications establish, municipal uses, by nature, are large-scale and consumptive, and involve diversions

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2 This Commission determined that while potable water is delivered through the Central Maui system to provide for both potable and non-potable needs, the County was unable to “differentiate between these major categories of use.” State Commission on Water Resource Management, Lao and Waihe’ e Aquifer Systems State Aquifer Codes 60102 and 60103 Ground-Water Management Area Designation Findings of Fact (Nov. 14, 2002) at 66.
away from the water source. Moreover, although municipal use is not “commercial” per se, it does involve the sale of water or water services by a utility (in some places, a private entity), as opposed to a domestic user who takes water for his or her own personal use.

The Code incorporates these common law distinctions between domestic and municipal uses. As Commissioner Miike noted, § 174C-3 assigns separate meanings to each. Domestic use “means any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.” Municipal use “means the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term ‘domestic use.’”

Lumping domestic and municipal together contradicts this well-settled distinction. Courts have consistently declined to make such a leap. Thus, as the eminent treatise on water law (cited repeatedly in Waiahole 1) observes, “[c]ities generally cannot invoke the domestic preference [under riparian law] to acquire land and water rights to supply their inhabitants and to claim an immunity from liability by injured riparians.” A. Dan Tarlock, Law of Water Rights & Resources § 8:59 at 3-97 (2004 rev. ed.) (footnote omitted) (citing cases); see also Union Water Supply Corp. v. Vaughn, 355 F. Supp. 211, 214 (S.D. Tex 1972) (seeing a “clear distinction between general municipal use and domestic and livestock use” and rejecting collective appropriation on behalf of individual domestic users as “domestic” use). Similarly, the seminal treatise on eminent domain explains that “[t]he doctrine that a riparian town

3 The Code underscores the distinction between domestic and municipal uses by exempting only domestic uses from water use permitting requirements. “No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water.” Haw. Rev. Stat. § 174C-48(a) (emphasis added). In areas such as the Lao aquifer where municipal systems comprise the vast majority of existing uses, exempting municipal uses from water use permitting requirements would nullify this Commission’s primary tool for managing water resources. Clearly, domestic and municipal uses were never meant to be one in the same.

4 We note that, although this case involves ground water, similar principles apply, and the Commission should avoid any artificial distinctions between ground and surface water. See Waiahole 1, 94 Haw. at 177 n.90 (analogizing correlative rights to ground water to riparian rights in surface water); id. at 172-73 (rejecting artificial ground-surface distinction). See also id. at 180 n.95 (citing ground water statutes from other states preserving the right of landowners to withdraw water for “domestic” uses, which would not extend to municipal uses).
may take from a private stream all the water it needs for the domestic use of its inhabitants is not generally accepted and is expressly denied in a number of cases.” 2 J. Sackman, Nichols on Eminent Domain § 5.05[2][a][vii], at 5-247 (rev. 3d ed.) (citing cases). “A private riparian proprietor has no right at common law to divert water . . . for purposes of sale, and it would seem that a municipal or a public service corporation should stand in no better position.” Id.

The reason for this differential treatment of domestic and municipal uses is not hard to discern. As the renowned jurist Roscoe Pound explained:

The law does not regard the needs and desires of the person taking the water solely to the exclusion of all riparian proprietors, but looks rather to the natural effect of his use of water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes.


The Commission’s November 15 letter focuses on several points in the Waiahole I decision as potential support for the idea of municipal uses being a public trust purpose. The letter emphasizes Waiahole I’s recognition of the “vital domestic uses of the general public.” Id. at 2 (citing 94 Haw. at 137) (emphasis in letter). This excerpt, however, cannot be removed from its context. The Court used this phrase in the context of extending the trust’s purpose from its “original intent” of preserving Native Hawaiian traditional and customary uses to its “broader sense” of protecting analogous uses of the public at large, i.e., non-Hawaiians and non-traditional users. 94 Haw. at 137. This does not establish that the Court meant to expand domestic uses to include municipal uses. On the contrary, the Court’s actual holding simply states, in unmodified terms: “we recognize domestic water use as a purpose of the state water resources trust.” Id. (emphasis added). We again note that Waiahole involved municipal-type uses, yet the Supreme Court did not treat them as domestic, public trust uses.

The November 15 letter also examines the Court’s citations, but again, these should not be read out of context and proportion. The Court cited this authority for general examples, not definitive rules. See 94 Haw. at 137 (citing the California and Minnesota statutes with “see, e.g.,” for the general proposition of domestic preference,
and using “cf.” (compare) in citing the Clifton case. The imagined implications of these generalized references do not control. More telling, and ultimately concerning, are the Court’s citations to Haw. Rev. Stat. § 7-1, the McBryde case, which the Court described as “comparing [§ 7-1] with authority in other jurisdictions recognizing riparian rights to water for domestic purposes,” and the Carter case, which the Court described as “granting priority to domestic use based on riparian principles and [§ 7-1].” Id. (emphasis added).

Analysis of Waiāhole I must not lose sight of the forest for the trees. A larger view of the public trust purposes recognized in Hawai‘i and other jurisdictions makes clear that these uses all involve maintaining the water source either in its natural state or without substantial impairment. See, e.g., 94 Haw. at 136-37. As explained above, the common definition of domestic use conforms to this unifying principle. Municipal uses, such as those proposed by MDWS for ‘Iao, may include aggregate domestic uses, but are otherwise qualitatively and quantitatively different because of their large-scale, consumptive, and diversionary nature. Inclusion of such uses (which include many other uses besides domestic, including commercial uses, and in most cases would drain a water source dry) as a public trust purpose would constitute an unprecedented, fundamental deviation from long-standing public trust principles.

Moreover, equating domestic and municipal uses would essentially resurrect the argument rejected by the California Supreme Court “Mono Lake” case that the public trust encompassed “all public uses,” including the municipal uses of the City of Los Angeles (termed “domestic” under California statute and in that case). See National Audubon Soc'y v. Superior Ct. of Alpine Cty., 658 P.2d 709, 723-24 (Cal. 1983) (cited in Waiāhole I, 94 Haw. at 138). The National Audubon court declined to adopt such a “broad concept of trust uses,” maintaining that the “public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, and tidelands[.]” Id. The Waiāhole I decision adopted this reasoning without qualification. 94 Haw. at 138. Indeed, Waiāhole I specifically acknowledged that “National Audubon involved diversions for a public purpose, the domestic uses of the City of Los Angeles.” Id. at 140. Yet, these “domestic”/municipal uses in National Audubon did not lead the Court to limit its embrace of that case in any

5 The substance of the Clifton court’s holding was that the state held potable drinking water reserves in trust, 539 A.2d at 765; in other words, the court focused on the “scope” of the trust, and not the “uses” it protects. Cf. Waiāhole I, 94 Haw. 133-35 (analogous section holding that the public trust doctrine applies to “all water resources,” including ground water). Clifton in no way suggested that a state could drain a stream, lake, or aquifer dry to serve municipal purposes.
Letter to Yvonne Izu Re: Burdens Of Proof And Legal Standards Regarding: (1) Traditional & Customary Native Hawaiian Rights & Practices; & (2) Municipal Uses

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way. Notably, the court described these municipal uses as a “public purpose,” not a “public trust purpose.”

In short, Waiahole I came no closer than National Audubon to acknowledging municipal uses as a public trust purpose. Such a ruling would, indeed, eviscerate the public trust doctrine, reducing it to a generalized “public use” doctrine with no more meaning and effect than the clause of the Fifth Amendment of the same name. There is simply “no authority [that] supports this view of the public trust.” Id. at 138 (quoting National Audubon).

The ultimate point of all the foregoing is that, notwithstanding any general “public purpose” served by municipal uses, Waiahole I and other public trust precedent do not support including municipal uses as a “public trust purpose.” The reasoning of the Hawai‘i Supreme Court in Waiahole I applies with equal force here: “while the state water resources trust acknowledges that [public] use for [municipal purposes] may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing [such] use as a protected ‘trust purpose.’” 94 Haw. at 138.

B. Waiahole I States The Standard For Municipal Use Applicants Under The Public Trust And Code.

The November 15 letter also points out that municipal uses are not “private commercial uses” discussed in Waiahole I. Of course, the only uses at issue in Waiahole I were private commercial uses,” so claiming that Waiahole I’s rulings refer only to those kinds of uses says little. Rather, the relevant categories that the Court identified were: (1) public trust uses; and (2) other uses, whether public or private. This dichotomy is fundamental to public trust law. See Waiahole I, 94 Haw. at 139 (“As commonly understood, the trust protects public waters . . . against . . . substantial impairment, whether for private or public purposes.” (citation and internal quotation marks omitted) (emphasis added)). As discussed above, municipal use is a public use, but not a public trust use. “Thus, insofar as the public trust, by nature and definition, establishes use consistent with trust purposes as the norm, or ‘default’ condition,” municipal uses, just as with any other publicly beneficial non-public trust uses like the agricultural uses in Waiahole I, are subject to a “higher level of scrutiny.” Id. at 142 (emphasis added). “In practical terms, this means that the burden lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.” Id.; see also Wa‘i‘ola, 103 Haw. at 441 (“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[].”).
The November 15 letter suggests that, although the Court declined to differentiate among public trust uses, it would differentiate between non-public trust uses, i.e., between private commercial and public uses. Nothing in the Court’s case law supports this notion, and Waiahole I effectively disposes of it. 94 Haw. at 142 (maintaining that “the Commission inevitably must weigh competing public and private water uses on a case-by-case basis”).

This does not mean, of course, that the Commission cannot consider the “definite interest” of the public in uses for municipal, agricultural, or any other publicly beneficial purposes and give such uses their due weight in decisionmaking. Id. at 141-42, 138. It does mean applicants for municipal use such as MDWS must show that their use will not interfere with any public trust purposes, and the Commission must hold such applicants to their burden. Waiole, 103 Haw. at 441.

This understanding, it may be noted, comports with the underlying policies of the public trust doctrine. Scholarship on the doctrine has recognized that the public trust serves to protect uses of the “diffuse public” against the immediate desires of “tightly organized groups with clear and immediate goals.” J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 556 (1970); cf. Waiahole I, 94 Haw. at 190 n.108 (recognizing the Code’s instream flow provisions as a protection of “the inchoate public, including generations unborn”). Municipal users have dedicated agencies to account and advocate for their needs. The efforts of a handful of volunteer community members and public interest groups notwithstanding, the same cannot be said for public trust resources and uses. Holding municipal uses to the same requirements as other non-public trust uses thus makes imminent sense.

Even if municipal uses could be differentiated from other non-public trust uses, or municipal uses could be deemed a public trust use, nothing would effectively change. The Commission would still bear an “affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible.” Waiahole I, 94 Haw. at 141. Even between public trust uses, it “must still ensure that all trust purposes are protected to the extent feasible.” Id. at 142 n.43 (emphasis added). Thus, however municipal uses were categorized, it would have to “consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources.” Id. at 143.

It must be emphasized that the foregoing addresses only the requirements of the constitutional public trust. Apart from these requirements, the Code imposes a burden on applicants for municipal uses such as MDWS. The Code does not grant municipal
uses any allocation priority, but requires municipal users to apply for water use permits like any other user. See also footnote 3, supra. Permit applicants “have the burden of justifying their proposed uses in light of protected public rights in the resource.” Id. at 160. Moreover, the Commission “is duty bound to hold [applicants] to its burden under the Code[.]” Vai’ola, 104 Haw. at 426. The standards for a permit under Haw. Rev. Stat. § 174C-49(a), particularly the requirement of “reasonable-beneficial use,” requires applicants, first, “to prove their own actual water needs.” Waiahole I, 94 Haw. at 161. Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of any practicable mitigating measures, including the use of alternative water sources” -- a requirement that the Court deemed “intrinsic to . . . the definition of ‘reasonable-beneficial use’” and “an essential part of any balancing between competing interests.” Id.; see also In re Waiahole Combined Contested Case, 105 Haw. 1, 16 (2004) (reiterating these standards). These requirements essentially parallel those of the public trust and would likewise apply however “municipal” uses were categorized under the public trust.

Again, mahalo for this opportunity to share our mana`o on these important issues. Please don’t hesitate to contact us if you have any questions or require additional information.

Me ke aloha,

[Signature]

cc: Dr. Jonathan Likeke Scheuer
Office of Hawaiian Affairs
(via U.S. Mail)

Mr. Jim Williamson,
Maui Meadows Homeowners Association
(via U.S. Mail)

Mr. John V. Duey,
Hui o Nā Wai `Ehā
(via U.S. Mail)
December 16, 2004

Yvonne Izu, Deputy Director
Commission on Water Resource Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawai‘i 96809

RE: Questions raised regarding objections to Water Use Permit Applications in the ‘Iao Ground Water Management Area, Maui.

Dear Ms. Izu,

The Office of Hawaiian Affairs appreciates the opportunity to reply to your letter regarding issues raised at the hearing for the above referenced permits. We are also grateful to you for allowing us additional time beyond your requested response date to contemplate and react to your provocative questions. The issues raised are of significance to all the people of Hawai‘i, and to our beneficiaries and the people of Maui in particular. We are encouraged that the Commission wishes to engage in a thoughtful discussion of how each of us should shoulder our particular kuleana to protect the resources on which we all depend.

Applications by:

**Hawaiian Commercial and Sugar Company for:**
- ‘Iao Tunnel (Well No. 5330-02, WUP No. 691, source TMKs 3-4-033:029 and 3-4-34, location of use TMKs 3-8-5,6,7: various);

**Maui County for:**
- Waihe'e Wells 1 & 2 (Well Nos. 5431-02 & 03, WUP Nos. 695 & 696, source TMK 3-3-17:31, location of use TMKs unspecified and multiple);
- Waiehu Heights Wells 1 & 2 (Well Nos. 5430-011 & 002, WUP Nos. 697 & 698, source TMK 3-3-2:28, location of use TMKs unspecified and multiple);
- Kepaniwai Well (Well No. 5332-05, WUP No. 699, source TMK 3-3-3:5, location of use TMKs unspecified and multiple);
- Mokuau Wells 1 & 3 (Well Nos. 5330-09 & 11, WUP Nos. 700 & 701 source TMK 3-3-2:24, location of use TMKs unspecified and multiple);
- ‘Iao Tunnel (Well No. 5332-02, WUP No. 680, source TMK 3-3-3:3, location of use TMKs unspecified and multiple);
- Waihe'e Well 3 (Well No. 5431-04, WUP 703, source TMK No. 3-2-17:018, location of use TMKs unspecified and multiple);

**Kehalani Mauka LLC for:**
- Wailuku Shaft 33 (Well No. 5330-05, WUP 707, source TMK No. 3-5-1-1, location of use TMK Nos. 2-3-04-07, Parcel 2; 2-3-5-01, Parcels 1, 17, 60, 61, 63, and 66.
We have styled our analysis as responses to the assertions made and questions posed. For each issue, we first give the quote we are responding to, and then offer our analyses and answers as applicable.

1. Hawaiian Water Rights

A. "At the public hearing, Commissioner Miike opined that, while such rights are public trust purposes, they accrue to individuals."

We begin our responses by noting that a key underlying assumption of Commissioner Miike's line is correct, but only partially so. We are referring to the idea that traditional and customary rights solely "accrue to individuals." This opinion of Commissioner Miike is key because it supports an implied line of reasoning that an individual holder of these rights must come forward, bear the burden of showing that they have these rights, and only then would a private commercial user and the Commission have the need to (or even be empowered to) consider these rights. The assumption is only partially correct, and therefore the line of reasoning is false in assuming that an individual must demonstrate their rights for the Commission to consider the issue. This is the case for the following reasons.

i. In Hawaiian tradition and custom, individual rights are integral with the rights of larger groups of Hawaiians; individuals do not hold rights solely or separately from the larger group.

We first note that, self-evidently, traditional and customary rights exist in these islands because kanaka maoli developed these traditions and practices prior to the coming of any other group of people in the islands. Thus to meaningfully understand the basis for which later guarantees of traditional and customary rights were made, one must have an understanding of how these rights originated, were held, and were exercised prior to outside influence in the islands.

We do not here have the space or time to offer a full explanation of the background that supports such an understanding. What we will note is the fundamental point that individual and group traditional and customary rights are integral to each other. While it is unarguable that individual Hawaiians in ancient times exercised traditional and customary rights, most if not all practices, including practices around water such as building and maintaining 'auwai, depended upon exercising the practices as part of a group. Indeed those practices could not be undertaken or the resource effectively managed without group effort. It would be meaningless to consider one individual's right to a practice without examining the rights of that person's extended family and community.

ii. The Hawai'i State Constitution does not guarantee or assign traditional and customary rights solely to individuals. The state constitutional provision that provides a guarantee of these rights implies in its wording that these rights are possessed by a whole group as well as individuals. Namely, the rights are possessed by at least the groups of ahupua'a tenants who are the descendants of native Hawaiians:

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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.

We first note that the wording of this section does not explicitly mention individuals and emphasizes the groups’ status. Compare it, for instance, to the specific heading of Article I, Section ii: “Rights of individuals.” Secondly and more importantly, we point out that these rights could not logically be held solely by individuals for the purposes said rights are exercised. The language acknowledges that the exercise of such rights are not only for subsistence purposes, but for cultural purposes. By definition, cultural purposes are related to the entire group of native Hawaiians.

iii. The Kuleana Act does not guarantee these rights solely to individuals. It is our observation that the most relevant law to our understanding of the guarantee of traditional and customary rights does not state that these rights only accrue solely to individuals. The language from the Kuleana Act of 1850, as it is incorporated into the Hawai‘i Revised Statues (HRS 7-1), is key:

Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

We note that the translation of the Kuleana Act chosen by the legislature for incorporation into the HRS does not say, for instance, “...each individual person on their own land shall not be deprived of the right....” but rather says “the people on each of their lands.” Later in the section the word “individuals” is used in reference to wells and watercourses, where they could have again used the word “the landlords” or “the people” if they meant to discuss wells or watercourses developed by a group. If traditional and customary rights were solely held by individuals, the language in this law would not make sense.

If these rights, however, are best understood as belonging both to individuals and the people, the language in the Kuleana Act makes sense. Individuals may exercise such rights, but the guarantee is in the Act so that the practices and the group of people who perpetuate those practices could continue into the future. Flowing from that intent is the need to guarantee these rights to individuals as part of the larger group.

This view is, of course, consistent with the overall purpose behind the passages of the acts collectively known as the Māhele, which was to benefit the commoner class as a group and the Nation as a whole, as well as give all citizens, including the King, clear title to land.³

Because traditional and customary rights are not solely held by individuals, the Commission or any other administrative agency can not and should not require a showing that any such rights

accrue to individuals. Referring to our discussion above when necessary, we now continue with our response.

B. "He believes it is clear that, when such rights exist, private commercial uses must overcome the presumption in favor of trust purposes. But who has the burden of showing that such rights exist in the first place? And does only an assertion that such rights exist, without a showing that specified individuals have such rights, require private commercial uses to overcome a presumption in favor of such asserted rights?"

i. Traditional and customary rights to water must be assumed to exist throughout ʻĪao and everywhere in the islands as a matter of fact and law. To begin our examination of this section of your letter, we need to highlight the phrase "when such rights exist." Not only do such rights accrue to more than individuals, but such rights as a matter of law and fact, clearly exist throughout the ʻĪao Ground Water Management Area. In the recent petition by Earthjustice on behalf of Hui o Nā Wai ʻEha seeking amendment of the interim instream flow standards for streams including those that fall in this area, information has already been provided to the Commission that details the cultural and historical significance of water in this area, including information on population, heiau, and springs. Beyond that evidence, the fact that thousands of Hawaiians lived in this area for hundreds of years developing and practicing custom and tradition is generally known and does not need citation.

Beyond the specific area considered with these WUPAs, we must note that the proper question when the Commission considers a WUPA is not to ask whether these rights exist. These rights exist across the islands as a matter of tradition and custom. They were later guaranteed by the state constitution (Article XII, Section 7) and law (HRS 1-1, HRS 7-1, and in specific relation to water, in HRS 174C-101). Indeed, because of the obligation placed on state agencies by this constitutional provision and statutes cited, there is a burden on agencies to demonstrate in any area that these rights do not exist if that is the position they desire to pursue.

ii. Not even assertion is necessary. Because traditional and customary rights must be assumed to exist in all areas of the island as a matter of fact and law, the idea that specific rights need to be "asserted" in order to be considered in the water use permitting process is, to us, nonsensical. While we at OHA are compelled by our kuleana to remind the Commission and applicants of their duties, we or any individual or group need not "assert" rights which clearly exist as a matter of law.

iii. An individual showing of rights is not necessary. As noted above, traditional and customary rights do not accrue solely to individuals or exist only in places where proven. Therefore, while showing that "specified individuals have such rights" can be useful understand some interests involved, it is not a required trigger for having the Commission and applicant(s) assume their burden. However, if an individual who also possesses such rights appeared before the Commission on a WUPA, they would have standing to do so.

iv. The Commission and the Applicant have an affirmative duty to determine the extent of these rights. Given the above points, we feel there are other questions which would better guide all of us to understanding our own particular kuleana in protecting rights and the resource during the WUPA process. Some of these questions are: Who has the burden of inventorying the traditional and customary Hawaiian rights in an area? How would having an updated Hawaiʻi Water Plan
aid applicants in undertaking the work they have to meet their burden? What kind of efforts and evidence should the Commission consider as adequate when an applicant submits required information?

In response to these questions, two recent Hawai‘i Supreme Court cases rule.

In Wai‘ola (re Wai‘ola o Moloka‘i, Inc. 103 Haw. 401 (2004)), which addressed an issue quite similar to that in ‘lao, the court bound the Commission and the applicant to actively search for information regarding the impact of the proposed use on traditional and customary rights. The court ruled (442) that "the absence of evidence that its [the applicant's] proposed use would affect native Hawaiians' rights was insufficient to meet the burden imposed by the public trust doctrine, the Hawai‘i Constitution, and the Code."

As to what specific findings would prove sufficient, the Hawai‘i Supreme Court offers binding guidance in Ka Pa‘akai. There they addressed the need of the Land Use Commission (LUC) to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible. The court noted (Ka Pa‘akai o ka ‘Āina et al. v. Land Use Commission et al., 94 Haw, 47-49 (2000) (footnotes omitted)::

Article XII, section 7 of the Hawai‘i Constitution obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians to the extent feasible when granting a petition for reclassification of district boundaries. See PASH, 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43 (emphasis added). In order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable. In order for native Hawaiian rights to be enforceable, an appropriate analytical framework for enforcement is needed. Such an analytical framework must endeavor to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other...

We therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests: In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must -- at a minimum -- make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

We have no reason to conclude that the constitutional burden on CWRM to consider these rights is any less than that held by the LUC, or that the analytical framework offered is inapplicable.

So what might be adequate in this case as a response to the requirements set forth in Ka Pa‘akai and Wai‘ola? Here we note that in Earthjustice's response to these same questions we address here in this letter, they point out that the work of the applicant would be greatly reduced if the Commission had by this point fully completed the duties assigned to them by the Code. They also suggest a number of ways the applicant and the Commission could undertake such a study. We agree with the points they raise and will not restate them here.
C. "Does the Commission have the authority to recognize traditional and customary and Native Hawaiian rights in a water use permit application or in a contested case hearing, or do those asserting such rights have to obtain a ruling from the state courts before the Commission can consider them in the water permitting process?"

Because of all of the reasons we mention above, drawing special attention to the language cited in Ka Pa’akai and Wai’ola, we feel it is clear that the Commission has the authority and duty to examine the extent to which these rights exist and are practiced in the ‘Iao Ground Water Management Area. We hope that the Commission begins to affirmatively do so; it will be of great assistance not only to us but to all WUP Applicants who desire a greater level of certainty in the process.

2. "Domestic Use", "Public Trust"

Commissioner Miike also asked whether uses by the MDWS are public trust purposes? If so, then there is no presumption in favor of other trust purposes. If it is not a public trust purpose (or only partly so; ie., drinking water) it is also not a private commercial use. Then what level of scrutiny should its water use permit applications be subject to?"

While we appreciate that our objections to these permits has raised the general issue of municipal v. domestic use, we believe in general the issue has already been asked and answered in Hawai‘i law. We here again join in the discussions of this issue raised by Earthjustice in their response to these same questions. We also offer the following observations.

i. Maui County’s Department of Water Supply does not and apparently can not separate out domestic and non-domestic uses, but they should be required by the Commission to do so. We are unaware of any means the MDWS currently has to distinguish in detail and amount the kinds of uses encompassed by their municipal applications. Because this is the case, it would be illogical to let their industrial and commercial uses “piggyback” on their provision of domestic supplies when considering their WUP A. Carried to its logical extent, such an argument would allow any private commercial user avoid their evidentiary burdens simply by providing a little domestic water as part of their development.

What would be more appropriate in this case would be to require MDWS to provide some estimate of the different uses in their system. They also would then need to show how, in the case of shortage, they would protect domestic, public trust uses before serving their non-public trust uses. Indeed, in their letters to us and in their WUP A, they seem to indicate they desire to understand better their different system uses. We however must note that over 120 years ago, absent of an ability to separately meter domestic and non-domestic use, the city of Honolulu was able to create a legally acceptable management and regulatory scheme to protect domestic uses in its system while curtailing non-domestic uses and respecting other water claimants in their source area. We consider this example below.

ii. A municipal purveyor has the authority and duty to restrict its non-public trust uses when its supplies are restricted due the competing and superior demands of other uses. We believe Hawaii’s courts have already distinguished between the different kinds of uses in municipal systems, discussed how they weigh against competing demands of others outside the municipal
system, and the affirmed duty and authority of municipal purveyors to manage in this kind of environment. We draw your attention to Riemenschneider v. Wilson 6 Haw. 375 (1882).

In this case the plaintiff, Riemenschneider, was a Honolulu municipal water user. A scarcity of water in Honolulu had led the government to restrict the times when individual households could irrigate landscaping. The plaintiff continued to irrigate in a manner afoof the restrictions, and his service was suspended. Riemenschneider subsequently filed a writ of mandamus to the Hawai‘i Supreme Court to order the city to turn his water on again.

The plaintiff lost, and the court’s ruling and reasoning is particularly applicable to the situation in ‘Īao. The court found the city had a legitimate need and a right to restrict water usage and could restrict the non-domestic uses of the plaintiff (379):

I have indicated that the Government has a right to make reasonable rules and regulations in respect to the water works and the supply of water to the inhabitants. The exercise of this authority is necessary for the public benefit, and in order to enable the Government properly to fulfill [sic] its obligations in distributing the water as fairly as may be possible. In times of water famine all [municipal users] must suffer reduction alike, and the Government then has the right to restrict the use of water by ratepayers, commencing the reduction with the least necessary use of water, i.e. irrigation [of residential landscaping].

Part of the court’s reasoning that justified this decision was that other protected uses outside of the City’s control restricted the City’s municipal water supply. Referring to the lower and upper Nu‘uanu reservoirs that supplied the system and the superintendent (Wilson) who controlled the City’s system, the court noted (378):

Moreover, he [Wilson] could not fill the lower reservoir nights because it interfered with the gas machines run by the water from the upper reservoir, and he had further difficulty in drawing off the water from the upper reservoir, as certain persons having kalo patches and lands between the two reservoirs, which had the privilege of riparian proprietors from the stream which supplies both reservoirs, would become short of water, unless the overflow from the upper reservoir was allowed to pass back into the stream for their benefit.

In other words, the municipal system in this case did not respond to the competing demands for use within its own system and the outside, superior claims to water itself competed with, by claiming it had a protected right and ignoring those with superior claims. Rather (and uncontested by the court), the purveyor properly restricted its own diversion and subsequently restricted the non-domestic, non public trust uses of its ratepayers. Furthermore, the court upheld the enforcement of these restrictions, even when that enforcement resulted in the cutting off of domestic water use by the plaintiff, because the system was not set up to cut off only irrigation.

Today, of course, we understand that kalo would be entitled to water as a traditional and customary use protected by the public trust, in addition to having riparian and appurtenant rights. We see this case as illustrative of what the County needs to do in this instance: understand the protected uses it is affecting and restrict its deliveries if necessary, prioritizing the public trust uses over non-public trust uses. The Commission should order it to do so.
Once again, we appreciate the creation of an open discussion on these issues and thank you for the opportunity to offer these comments. If you have further questions, please contact Dr. Jonathan Scheuer at 594-1946 or email him at jonathans@oha.org.

Sincerely,

[Signature]

Clyde W. Nāmu'o
Administrator

Cc: Kapua Sproat Esq.
Earthjustice
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Dear Ms. Lovell:

Transmission of Water Use Permit Files
Iao Water Management Area, Maui

Thank you for your help in providing the Commission with public access to our files concerning water use permit documentation for existing users in the Iao ground water management area.

The copying of the captioned files has been completed, and is up-to-date as of November 30, 2004. There are 11 folders weighing about 12 pounds, which would be expensive to ship, so we are arranging for a department staff person to convey them to Wailuku Public Library as soon as possible.

Items of the record from December 1, 2004 will be separated in our files, and may be compiled by interested parties, or may be arranged for shipment as may be convenient.

If you have any questions, please call Charley lce of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

YVONNE Y. IZU
Deputy Director

CI:ss
telcon from Clayton Suzuki (WACI) 29 Nov 04, 2:20 pm

(responding to letter dated 18 Nov 04 from CWRM to WACI)

CI comments in blue

Tunnel locations unknown, cannot measure outflow; may comingle with lao tributaries before reaching lao Stream.

lao diversions not measured; at low flow diversion may be 100%; at somewhat higher flow, all may be diverted but cumulative ditch overflow may re-enter stream 100 y downstream; at still higher flows, diversion declines from 100%, streamflow continues.

Need stream gage above diversion? Means to determine base flow?

All measurements are in ditch. Amounts distributed to fields are shunted to fields as necessary without measurement. Consequently, losses also are not measured.

Maybe tunnel flows should be considered part of stream flow, calculated as a portion of base flow to be protected at all times. Limitations go to diversion capacity – can only divert excess of base flow.

Distinguish between sources: If lao is not major contributor to essential ditch flow, reduce total diversion capacity. Apportion essential flow by upstream flow gages; estimate total use amount, based on duties. Permit interim amounts, require reservoir security

Clayton to draft response to this effect
November 23, 2004

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Water Use Reporting

Thank you very much for conscientiously responding to our requests for information. We are still trying to understand these figures. On two occasions you sent a table showing 2003 Land Use, including diversified farming, pineapple, sugarcane, quarry, and golf course, by TMK parcel, with acreages and water use.

The water use is listed in acre-inches per week and million gallons per week. We believe that the figures you have supplied may be net acres, namely, the rates of use are very similar to what would be used on a typical day, per irrigated acre. Typically, not all acres are irrigated every day – some are fallow, some are in roadway, work areas, or other non-crop uses, and each acre of crop itself may not be irrigated every day, but may be part of a rotation among all the acreage. Therefore the gross acreage rates are smaller. Because your figures appear to be net acres, it is imperative to know how many acres are actually being irrigated, or to translate the figures into gross acres. If the figures are a report of actual water delivery to the parcels noted, then the amounts seem high.

The sugarcane figures do not comport with the description of drip irrigation, but are even a little high for furrow irrigation, compared with other producers.

The amounts reported for the quarry and the golf course appear not to be per acre but rather the entirety of the service for those parcels. Is that correct?

Your assistance is much appreciated. If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400 extension 70251.

Sincerely,

Yvonne Y. Izui
Deputy Director

Cl:ky

Attachment
November 4, 2004

To: Attendees of October 28, 2004 Public Hearing on Water Use Permits in the 1ao Ground Water Management Area

Dear Attendee:

Clarification of by Hearing Officer Lawrence Miike Regarding Domestic Use

Attached for your perusal is a memo from the hearing officer to those parties in attendance at the public hearing.

If you have any questions, please do not hesitate to call Roy Hardy at 587-0274 or toll-free at 984-2400, extension 70274.

Sincerely,

YVONNE Y. IZU
Deputy Director

RH:ss
Attachments
November 3, 2004

Roy/Charlie:

Could you send this on to the parties as a correction of what I said about the definition of "domestic use" at the public hearing?

At the public hearing, I made a comment that "domestic use" was personal use, relying on the definition in the Water Code ("any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation").

However, in reviewing the Court's Waiahole I decision, it refers to "the vital domestic uses of the general public (my emphasis)" as a public trust purpose of the use of the state's freshwater resources.

The Code defines "municipal use" as "the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term 'domestic use.'"

So it could be argued that a municipal water system is a public trust purpose, or at the least, that municipal uses include a public trust purpose or that they collectively have higher priority than other uses because they are being provided "through public services available to persons of a county."

As for remedies, in Reppun v Board of Water Supply, the Court concluded that "the public use of water, once that use has clearly attached, should be continued in order to avoid the harsh consequences of interruption." There can be remedies if the water was improperly diverted, but they would not include stopping the diversion (e.g., if the diversion was improper, perhaps monetary damages would be relevant).

Larry Miike

---

1 94 Hawai'i 97, 137; 9 P.3d 409, 449.
2 65 Hawai'i 531, 560; 656 P.2d 57 (1982).
public trust uses of waters in their natural state, courts have recognized the distinct public interest in resource protection. As explained by the California Supreme Court:

[O]ne of the most important public uses of the tidelands -- a use encompassed within the tidelands trust -- is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

National Audubon, 658 P.2d at 719 (quoting Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971)) (emphasis added). Thus, with respect to the lake ecosystem involved in that case, the court held that the public trust protected values described as "recreational and ecological -- the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds." Id.

This court has likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust. See Robinson, 65 Haw. at 674-76, 658 P.2d at 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state). The people of our state have validated resource "protection" by express constitutional decree. See Haw. Const. art. XI, §§ 1 & 7. We thus hold that the maintenance of waters in their natural state constitutes a distinct "use" under the water resources trust. This disposes of any portrayal of retention of waters in their natural state as "waste." See Reppun, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20 (citing article XI, section 1 as an acknowledgment of the public interest in "a free-flowing stream for its own sake").

Whether under riparian or prior appropriation systems, common law or statute, states have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources. See, e.g., Restatement (Second) of Torts § 850A cmt.
c (1979) [hereinafter Restatement (Second)] (preference for domestic, or "natural," uses under riparian law); Cal. Water Code § 1254 (West 1971) ("domestic use is the highest use"); Minn. Stat. Ann. § 103G.261(a)(1) (West 1997) (domestic use given first priority). This jurisdiction presents no exception. In granting individuals fee simple title to land in the Kuleana Act, the kingdom expressly guaranteed: "The people shall . . . have a right to drinking water, and running water . . . ." Enactment of Further Principles of 1850 § 7, Laws of 1850 at 202 (codified at HRS § 7-1 (1993)). See also McBryde, 54 Haw. at 191-98, 504 P.2d at 1341-44 (comparing section 7 of the Kuleana act with authority in other jurisdictions recognizing riparian rights to water for domestic uses); Carter v. Territory, 24 Haw. 47, 66 (1917) (granting priority to domestic use based on riparian principles and section 7 of the Kuleana Act). And although this provision and others, including the reservation of sovereign prerogatives, evidently originated out of concern for the rights of native tenants in particular, we have no doubt that they apply today, in a broader sense, to the vital domestic uses of the general public. Accordingly, we recognize domestic water use as a purpose of the state water resources trust. Cf. Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Super. Ct. Law Div. 1987) (holding that the public trust "applies with equal impact upon the control of drinking water reserves").

In acknowledging the general public's need for water, however, we do not lose sight of the trust's "original intent." As noted above, review of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property. Before the Māhele, the law "Respecting Water for Irrigation" assured native tenants "their equal proportion" of water. See Laws of 1942, in Fundamental Laws of Hawaii 29 (1904). Subsequently, the aforementioned Kuleana Act provision ensured
November 15, 2004

Mr. Clyde Namuo, Administrator
Office of Hawaiian Affairs
711 Kapiolani Boulevard, Ste. 500
Honolulu, HI 96813

Dear Mr. Namuo:

Water Use Permit Applications, Iao Aquifer, Maui
Public Trust Burden

Following adjournment of the still-open public hearing convened on October 28, 2004, the Commissioners appointed to conduct the hearing are requesting additional information from objectors as well as applicants.

Hawaiian Water Rights

Your objections to water use permit applications for ground water from Iao Aquifer on Maui raised the issue of addressing traditional and customary and Native Hawaiian water rights, specifically saying that the applications had failed to provide information sufficient to evaluate the requirements of the Supreme Court’s ruling in Waiahole concerning these matters.

At the public hearing, Commissioner Miike asked the various parties for their opinion on who has the burden of proof as to whether or not traditional and customary and Native Hawaiian rights exist. Commissioner Miike opined that, while such rights are public trust purposes, they accrue to individuals. He believes it is clear that, when such rights exist, private commercial uses must overcome the presumption in favor of trust purposes. But who has the burden of showing that such rights exist in the first place? And does only an assertion that such rights exist, without a showing that specified individuals have such rights, require private commercial uses to overcome a presumption in favor of such asserted rights? Does the Commission have the authority to recognize traditional and customary and Native Hawaiian rights in a water use permit application or in a contested case hearing, or do those asserting such rights have to obtain such a ruling from the state courts before the Commission can consider them in the water permitting process?
"Domestic Use", "Public Trust"

 Commissioner Miike also asked whether uses by the MDWS are public trust purposes? If so, then there is no presumption in favor of other trust purposes. If it is not a public trust purpose (or only partly so; i.e., drinking water), it is also not a private commercial use. Then what level of scrutiny should its water use permit applications be subject to?

The Code defines "municipal use" as "the domestic, industrial, and commercial use of water through public services available to persons of a county for the promotion and protection of their health, comfort, and safety, for the protection of property from fire, and for the purposes listed under the term 'domestic use'."

 At the public hearing, Commissioner Miike commented that "domestic use" was personal use, relying on the definition in the Water Code ("any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation").

 However, in reviewing the Court's Waiāhole I decision, he noted that the Court refers to "the vital domestic uses of the general public (emphasis added)" (94 Haw. 97, ¶37) as a public trust purpose of the use of the state's freshwater resources. The Court cited the California and Minnesota water codes, as well as Clifton v Passaic Valley Water Comm'n, 539 A.2d 760,765 (1987). The California code states that "domestic use is the highest use," while the Minnesota code states that "first priority (is) domestic water supply, excluding industrial and commercial uses of municipal water supply." Neither code defines "domestic use." Clifton states: "Potable water, then, is an essential commodity which every individual requires in order to sustain human existence...residents in urban and suburban areas are dependent upon the agency or institution which supplies potable water...the public trust doctrine applies with equal impact upon the control of our drinking water reserves." The Court in Waiāhole I "prescribes a 'higher level of scrutiny' for private commercial uses (emphasis added)" (94 Haw. 97, 142).

 We look forward to your comments to the above analyses and responses to the questions posed. We would appreciate receiving a response by December 10, 2004.

 If you have any questions, please call Charley Ice of the Commission staff at 587-0251.

 Sincerely,

 YVONNE Y. IZÜ
 Deputy Director

 Cl:ss

 c: Kapua Sproat, Earthjustice
Yvonne Izu, Deputy Director  
Commission on Water Resource Management  
1151 Punchbowl Street, Room 227  
Honolulu, Hawaii  96813  

Re: Water Use Application No. 684-686 for Iao Aquifer, Maui, Hawaii  

Dear Deputy Director Izu,  

On behalf of our client, Hawaiian Commercial & Sugar Company ("HC&S"), this letter is to inform you that HC&S is not the applicant for water use application ("WUPA") numbers 684-686 for the Iao Aquifer, Maui, Hawaii. We request that an announcement be made at the October 28th public hearing correcting the record.  

On October 12, 2004, a newspaper ad was placed by the Commission in the Maui News announcing the October 28th public hearing on all WUPAs for Iao aquifer. As part of that ad, HC&S was erroneously designated as the Applicant for WUPA numbers 684-686. The correct applicants for those WUPAs are:  

<table>
<thead>
<tr>
<th>WUPA No.</th>
<th>Applicant</th>
<th>Land Owner</th>
</tr>
</thead>
<tbody>
<tr>
<td>684</td>
<td>Wailuku Agribusiness Co., Inc. (&quot;WACI&quot;)</td>
<td>WACI</td>
</tr>
<tr>
<td>685</td>
<td>WACI</td>
<td>WACI</td>
</tr>
<tr>
<td>686</td>
<td>Maui DWS</td>
<td>WACI</td>
</tr>
</tbody>
</table>

In discussing this matter with Charley Ice of your staff, he mentioned it may be possible for the Commissioners conducting the public hearing to make an announcement at the start of the hearing correcting the record and identifying the correct applicants for WUPA numbers 684-686. We would sincerely appreciate it if that could be done at the start of the hearing to set the record straight. Our client has received inquiries about these erroneously designated WUPAs and would like to have this matter cleared up as soon as possible. Your consideration of this matter is greatly appreciated. Please contact the undersigned should you have any questions or wish to discuss this matter further.  

Very truly yours,  

Linnel T. Nishioka  

LNjhy
September 20, 2004

Yvonne Izu
Department of Land and Natural Resources
Commission of Water Resource Management
P. O. Box 621
Honolulu, Hawaii 96809

Dear Ms. Izu,

Attached is a copy of the response to your letter to Wailuku Agribusiness on March 8, 2004. Please call me at 244-2208 should there be further questions.

Sincerely,

Clayton Suzuki
Land Manager

CC: Charley Ice, Commission of Water Resource Management w/ attachments
   Avery Chumbley, Wailuku Agribusiness Co., Inc. w/o attachments
March 15, 2004

Ernest Lau
Department of Land and Natural Resources
Commission of Water Resource Management
P. O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Lau,

This letter is in response to your letter dated March 8, 2004. Attached is a table by Tax Map Keys showing the uses, acres and average weekly irrigation needs. The second attachment are two maps showing the parcels. The kuleana water users are colored on the map by orange. The third attachment shows the break down of water use by Wailuku Agribusiness Co. by use in million gallons.

Please call me at 244-2208 should you have questions.

Sincerely,

Clayton Suzuki
Land Manager
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</tr>
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<td>3-5-02-02</td>
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<tr>
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<td>657</td>
<td>Sugarcane</td>
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</tr>
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<td>3-6-04-06</td>
<td>53</td>
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<tr>
<td>3-6-04-07</td>
<td>79</td>
<td>Quarry</td>
<td>0.5MG/week</td>
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<td>3-6-04-08</td>
<td>483</td>
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<tr>
<td>3-6-04-10</td>
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September 7, 2004

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Water Use Permit Applications for Various Tunnels

We notified you by a letter dated March 8, 2004 that applications for various tunnels (Iao Tunnel, No. 5332-02; Black Gorge Tunnel, No. 5332-01; Iao Needle Tunnels, Nos. 5333-01 & 02) were deficient and could not be accepted due to lack of information. What is missing are maps identifying the areas of use and amounts being requested for the several end uses we recognize from your water use reporting.

We anticipate going to public hearing in late October, and if these applications cannot be heard, we would have no choice but to treat their use not as existing use but new uses, to be reviewed some time in the future. Without valid permits, continuing use would be in violation of Water Code requirements and subject to daily fines not to exceed $5000 per day.

If we can be of assistance or if you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

[Signature]

YVONNE Y. IZU
Deputy Director

CI:ss
August 25, 2004

Mr. George Tengan, Director
County of Maui
Department of Water Supply
200 South High Street
Wailuku, HI 96793

Dear Mr. Tengan:

Supreme Court Directions for Water Use Permit Applications

Thank you for completing your applications to the best of your abilities and the directions provided by staff. We have been advised to alert you to directions of the Supreme Court in adjudicating the Waiahole Contested Case on remand, as they pose additional information requirements for water use permit applications, namely discussion of practicable alternatives and the calculation of per-unit amounts of water ("duties").

As we have received objections to the applications submitted to-date for continuing the existing use of ground water from the Iao Aquifer, please be informed that additional information is advised for the hearing on Maui that is being scheduled tentatively for late October.

The Supreme Court's opinion is summarized as follows:

1. Practicable Alternatives

"Under the public trust doctrine and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource" (Waiahole 1, 94 Hawai'i at 160, 9 P.3d at 472). The Water Code requires, inter alia, that the applicant prove that the proposed use of water is a "reasonable-beneficial use" and is consistent with the public interest (HRS § 174C-49(a)(2 & 4). "Reasonable-beneficial use" is defined as "the use of water in such a quantity as is necessary for economic and efficient use (sic) for a purpose and in a manner both reasonable and consistent with state and county plans and the public interest" (HRS § 174C-3, emphasis added).

"Furthermore, besides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is ... an essential part of any balancing between competing interests." (Waiahole 1 94 Hawai'i at 161, 9 P.3d at 473, emphasis added)
2. Calculating per-unit amounts of water ("duties")

The Court found that some calculations done for the Waiahole case were not clearly erroneous while others were erroneous. It is typical for planners to project reasonable ballpark numbers to be used by each household, each business, or each acre of crop, based on experience. The Court has opined that such ballpark numbers are inadequate when public resources are being contested, and that more careful, detailed examination of factors must be specified when projecting need. The court made distinctions between type of crop, location, and other factors, and we surmise the same may be applied to different businesses and households.

We urge you to review the Hawaii Supreme Court’s Waiahole I and Waiahole II decisions in formulating your response to this request for additional information.

If you have any questions, please call Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

[Signature]

YVONNE Y. IZU
Deputy Director

Cl:ss
March 15, 2004

Ernest Lau
Department of Land and Natural Resources
Commission of Water Resource Management
P. O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Lau,

This letter is in response to your letter dated March 8, 2004. Attached is a table by Tax Map Keys showing the uses, acres and average weekly irrigation needs. The second attachment are two maps showing the parcels. The kuleana water users are colored on the map by orange. The third attachment shows the break down of water use by Wailuku Agribusiness Co. by use in million gallons.

Please call me at 244-2208 should you have questions.

Sincerely,

Clayton Suzuki
Land Manager
# Wailuku Agribusiness Co,
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### Water Use Report

**Wailuku Agribusiness Co., Inc**

**FLOWS IN MILLION GALLONS**

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<th>Month/Year</th>
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<th>Mar-03</th>
<th>Apr-03</th>
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<th>Jun-03</th>
<th>Jul-03</th>
<th>Aug-03</th>
<th>Sep-03</th>
<th>Oct-03</th>
<th>Nov-03</th>
<th>Dec-03</th>
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<td>1,685.60</td>
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<th>Jul-03</th>
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**Water Delivery Agreements:**

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<td>1,357.29</td>
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* Meter Reading averaged over 8 months

* Data from County of Maui, Iao-Waikâpu Ditch not received

**Delivered to HC&S:**

1,037.37, 1,170.93, 1,020.00, 1,064.50, 1,045.52, 823.44, 1,066.67, 968.95, 960.42, 890.36, 906.05, 1,357.29, 12,391.50
March 8, 2004

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Water Use Permit Application for Various Tunnels

We have received your water use permit application and filing fee for various tunnels. However, your application is incomplete. Matters which must be addressed before we accept your application as complete are as follows:

1. Areas listed in Table 1 on the reverse side of the application can be identified as Wailuku Agribusiness parcels, but are not identified by end use (Column 1). Your water use reporting, transmitted separately, lists sugar cane, macadamia nut, pineapple, and diversified farming, as well as water delivered to HC&S for undisclosed but presumably agricultural uses. In addition, the water use reports identify kuleana use, Maui Tropical Plantation and Waikapu Mauka Golf Course as users, but these are not indicated in Table 1, Column 1.

2. No required maps were submitted to help sort out these end uses.

Upon receipt of clarifying information, we will accept your application as complete and you can then expect your application to be processed within ninety (90) days.

If you have any questions about your permit application, please contact Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

[Signature]

ERNEST Y.W. LAU
Deputy Director

Cl:ss
Attachments
January 14, 2004

Mr. Clayton Suzuki
Wailuku Agribusiness Company, Inc.
255 East Waiko Road
Wailuku, HI 96793

Dear Mr. Suzuki:

Water Use Permit Application for Various Wells

We have received your water use permit application and filing fee for various tunnels. However, your application is incomplete. Matters which must be addressed before we accept your application as complete are as follows:

1. Table 1 on the reverse side of the application calls for the locations of use, not source. Please provide TMK parcel identification for locations of use. We are returning these applications for additional information.

Upon receipt of the above information, we will accept your application as complete and you can then expect your application to be processed within ninety (90) days.

In addition, we find that five applications are for monitoring wells. By the definition in the Water Code, "use" means withdrawal for consumptive use; monitor wells need not apply. We are returning these applications. The filing fees, unfortunately, are non-refundable.

If you have any questions about your permit application, please contact Charley Ice of the Commission staff at 587-0251 or toll-free at 984-2400, extension 70251.

Sincerely,

[Signature]

ERNEST Y.W. LAU
Deputy Director

Cl:ss
Enclosures
In the FOF we researched the origin of the tunnels in Stearns and Macdonald's Geology of Maui. According to Stearns et al the tunnels were driven near existing high-level springs, which would have contributed to the run-off component in the water budget. Only one of the tunnels was driven into an old alluvium.

Roy Hardy/DLNR/StateHiUS

Part of query cuz they SHOULD be (in my humble opinion). Tunnels need WUPs, impact on SY is the issue here. I guarantee that Jim Williamson will notice if we do not count against SY, and we'd better have a clear cut explanation. Either we count against SY or we might need to review impact on streams(!). Tunnels aren't a freebie. We'll discuss later, but WUPAs need to be submitted.

Lenore Y Nakama/DLNR/StateHiUS

We have always issued WUPs to tunnel sources in designated gw areas, because tunnels are considered a ground-water source. But, whether the withdrawals count against SY is another question. We had spoken w/Mink about this, and he said that water diverted by free-flowing gravity sources, where there are known gw/sw interactions, should not be counted against SY because he includes the water as a runoff component in his model (see the submittal for Waimanalo Tunnel). Roy, our database would flag out tunnels if the source is defined as "Dike", but the queries do not query these out. Therefore, it seems that we've issued more allocations than we really have when we look at the summary reports.

Charley F Ice/DLNR/StateHiUS

We have Water Use Permit applications from Wailuku Ag for five tunnels that augment stream flow (water diverted below). Are these subject to WUPs? Can we include this topic when we chat w/ John Mink -- find out what assumptions were made in his model?
<table>
<thead>
<tr>
<th>F YR APP D</th>
<th>SRC/ OBJ CTR</th>
<th>PROJECT PH ACT</th>
<th>AMOUNT</th>
<th>NAME/DESCRIPTION (Wang Input)</th>
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**TOTAL** $300.00

**REMARKS:**

- LINE (1): Well No. WVA #1 Well
- LINE (2): Iao Aquifer Wells

(Copy)

Please login to our database. Then to change for processing.

Done by W.
December 16, 2003

Peter T. Young
Chairperson
Commission on Water Resource Management
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Dear Mr. Young,

Attached are applications for Wailuku Agribusiness Co. water use permit for the Iao Aquifer, Maui, Hawaii.

Please call Clayton Suzuki, Land Manager at 244-2208 should you have questions.

Sincerely,

Avery B. Chumbley
Wailuku Agribusiness Co. Inc.
APPLICATION FOR WATER USE PERMIT

1. (a) APPLICANT
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waikou Road, Wailuku 96793
   Phone: 808-244-2208
   Fax: 808-242-7068
   E-mail: csuzuki@cbcl1826.com

2. WATER MANAGEMENT AREA: Iao Aquifer
   ISLAND: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Waikapu Tunnel 1
   (If source presently exists, please attach well construction/stream diversion permit or application.)

4. SOURCE TYPE (check one): Stream
   (b) Proposed (NEW) WELL/STREAM DIVERSION NAME:
   (c) LOCATION: Waikapu, Maui

5. METHOD OF TAKING WATER (check one):
   □ Artesian
   □ Well & Pump
   □ Diverted Surface
   □ Other (explain)

6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps)
   (a) PUC-Regulated Private System
   (b) Non-PUC-Regulated Private System
   (a) Tax Map Key: Please complete Table 1 on back of application and shade applicable portion of property tax map.

7. QUANTITY OF WATER REQUESTED: ___________ gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   □ Flowmeter
   □ Orifice
   □ Other (explain)

9. QUALITY OF WATER REQUESTED:
   □ Fresh
   □ Brackish
   □ Potable
   □ Non-Potable

10. PROPOSED USE:
    □ Municipal (including hotels, stores, etc.)
    □ Individual Domestic
    □ Irrigation
    □ Other

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: (daytime hours of operation; example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:
    (a) Can be accommodated with the available water source.
    (b) Is a reasonable-beneficial use.*
    (c) Will not interfere with any existing legal use.
    (d) Is consistent with the public interest.
    (e) Is consistent with state and county general plans and land use designations.
    (f) Is consistent with county land use plans and general policies.
    (g) Will not interfere with the rights of the Department of Hawaiian Home Lands.

   * Section 13-171-2, Hawaii Revised Statutes -
   "Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

13. REMARKS, EXPLANATIONS: Daily - water from inversion tunnel flows into Waikapu Stream and is picked up at the South Waikapu Ditch Intake, Everett Ditch Intake or Waihee Ditch intake.

NOTE: Signing below indicates that the signatories understand and swear that: 1) the information provided on this application is accurate and true to the best of their knowledge; 2) Item 14 is the responsibility of the applicant prior to Commission approval; 3) If necessary, further information may be required before the application is considered complete; 4) If a water use permit is granted by the Commission, this permit is subject to prior existing permitted uses, changes in sustainable yields and instream flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) Upon permit approval, a water shortage plan must be submitted by the applicant should the Commission require one.

Applicant (print) ___________________________
Signature ___________________________
Date ________________

Landowner (print) ___________________________
Signature ___________________________
Date ________________
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<td>CURRENT COUNTY</td>
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<td>1 ac'/wk</td>
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14. TOTAL GDP

(For Oahu only) DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE

Only for verification that: 1) TMKs listed are consistent with zoning and development plans; and 2) projects listed are allowed with respect to zoning and development plans.

DATE

Instructions for completing Table 1: Individual projects and phases must be listed separately and numbered sequentially on Table 1. Copy Table 1 and attach additional sheets if necessary. Please indicate individual projects and phases on TMK maps by clearly delineating project areas and indicating sequential number within delineated areas to coincide with Table 1. Please attach a separate sheet giving the address and a brief description of each project and phase listed above. In addition, if the proposed use is existing, please provide the WUP No. or indicate when the existing use was initiated. Also, the Department of Planning and Permitting (DPP) must sign before application is acceptably complete. Please consult with DPP at 650 South King Street, 7th Floor, Honolulu, HI 96813.
State of Hawai‘i
COMMISSION ON WATER RESOURCE MANAGEMENT
Department of Land and Natural Resources
APPLICATION FOR WATER USE PERMIT

PERMITT INFORMATION
1. (a) APPLICANT
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208 Fax: 808-242-7068
   E-mail: csuzuki@cbc11826.com

(b) LANDOWNER OF SOURCE
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208 Fax: 808-242-7068
   E-mail: csuzuki@cbc11826.com

SOURCE INFORMATION
2. WATER MANAGEMENT AREA: Iao Aquifer
   ISLAND: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Waikapu Tunnel - 2
   (If source doesn't presently exist, please attach well construction/stream diversion permit or application.)
   (b) PROPOSED (NEW) WELL/STREAM DIVERSION NAME:
   (c) LOCATION: Waikapu, Maui
      Tax Map Key: 3 6 03 01
      (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

4. SOURCE TYPE (check one): Stream
   □ Basal □ Dye-confined □ Perched □ Caprock

5. METHOD OF TAKING WATER (check one): □ Artesian □ Well & Pump □ Diverted Surface □ Other (explain)

USE INFORMATION
6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps)
   (a) PUC-Regulated Private System □ Intended Dedication to Dept. /Board of Water Supply □ Non-PUC-Regulated Private System
   (b) Tax Map Key: Please complete Table 1 on back of application and shade applicable portion of property tax map.

7. QUANTITY OF WATER REQUESTED: __________ gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   □ Flowmeter □ Open-pipe □ Weir □ Orifice □ Other (explain)

9. QUALITY OF WATER REQUESTED:
   □ Fresh □ Brackish □ Salt □ Potable □ Non-Potable

10. PROPOSED USE:
    □ Municipal (including hotels, stores, etc.) □ Individual Domestic □ Irrigation
        □ Industrial □ Military □ Other (explain)

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION: (day/night hours of operation; example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:
    (a) Can be accommodated with the available water source.
    (b) Is a reasonable-beneficial use.*
    (c) Will not interfere with any existing legal use.
    (d) Is consistent with the public interest.
    (e) Is consistent with state and county general plans and land use designations.
    (f) Is consistent with county land use plans and general policies.
    (g) Will not interfere with the rights of the Department of Hawaiian Home Lands.

* Section 13-171-2, Hawaii Revised Statutes – “Reasonable-beneficial use” means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

13. REMARKS, EXPLANATIONS: Daily - water from inversion tunnel flows into Waikapu Stream and is picked up at the South Waikapu Ditch intake, Everett Ditch intake or Waihee Ditch intake.

NOTE: Signing below indicates that the signatories understand and swear that: 1) the information provided on this application is accurate and true to the best of their knowledge; 2) Item 14 is the responsibility of the applicant prior to Commission approval; 3) If necessary, further information may be required before the application is considered complete; 4) If a water use permit is granted by the Commission, this permit is subject to prior existing permitted uses, changes in sustainable yields and interstream flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) Upon permit approval, a water shortage plan must be submitted by the applicant should the Commission require one.

Applicant (print): Clayton S. Suzuki
Signature: ____________________________
Date: DEC 29 2003

Landowner (print): Wailuku Agribusiness Co., Inc.
Signature: ____________________________
Date: DEC 29 2003
<table>
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<tr>
<th>PROJECT NAME &amp; PHASES (include address if applicable)</th>
<th>EXISTING or NEW USE (If existing, fill in date of first use)</th>
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TOTAL GPD

(For Oahu only) DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE ______________________ DATE ____________

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PERMIT INFORMATION

1. (a) APPLICANT
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208, Fax: 808-242-7068
   E-mail: csuzuki@cbc11826.com

2. WATER MANAGEMENT AREA: Iao Aquifer
   ISLAND: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER:
    Waikapu Tunnel 1
   (If source doesn’t presently exist, please attach well construction/stream diversion permit or application.)

(b) LANDOWNER
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208, Fax: 808-242-7068
   E-mail: csuzuki@cbc11826.com

SOURC INFORMATION

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   Phone: 808-244-2208, Fax: 808-242-7068
   E-mail: csuzuki@cbc11826.com

SOURC INFORMATION

4. WATER SOURCE LOCATION:
   Waikapu, Maui
   Tax Map Key: 3 5 03 01
   (Attach and show source location on a USGS map, scale 1"=2000', and a property tax map)

5. METHOD OF TAKING WATER
   (check one):
   □ Stream
   □ Groundwater
   □ Surface Water

6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps)
   (a) PUC-Regulated Private System
   (b) NON-PUC-Regulated Private System
   (c) Intended Dedication to Dept. /Board of Water Supply
   (d) Water Supply Region
   (e) Water Use Class
   (f) Water Use District
   (g) Water Use Category
   (h) Water Use Subcategory
   (i) Water Use Subcategory
   (j) Water Use Subcategory

7. QUANTITY OF WATER REQUESTED:
   ____________ gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   □ Flowmeter
   □ Open-pipe
   □ weir
   □ Orifice
   □ Other (explain)

9. QUALITY OF WATER REQUESTED:
   □ Fresh
   □ Brackish
   □ Salt
   □ Potable
   □ Non-Potable
   □ Other
   □ Other

10. PROPOSED USE:
   □ Municipal (including hotels, stores, etc.)
   □ Industrial
   □ Military
   □ Irrigation
   □ Non-Potable
   □ Other
   □ Other

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:
   (daytime hours of operation; example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:
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   * See Section 13-171-2, Hawaii Revised Statutes –
   "Reasonable-beneficial use' means the use of water in such a quantity as is necessary for economic and efficient utilization, for a
   purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the
   public interest.

13. REMARKS, EXPLANATIONS:
   Daily – water from inversion tunnel flows into Waikapu
   Stream and is picked up at the South Waikapu Ditch intake, Everett Ditch intake
   or Waihe Ditch intake.

   S. gravity augmentation of stream

NOTE: Signing below indicates that the signatories understand and swear that: 1) the information provided on this application is accurate and true to
the best of their knowledge; 2) Item 14 is the responsibility of the applicant prior to Commission approval; 3) If necessary, further information may be
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future uses; and 5) Upon permit approval, a water shortage plan must be submitted by the applicant should the Commission require one.

Applicant (print): Clayton S. Suzuki
Signature: ____________________________
Date: DEC 9 2003

Landowner (print): Wailuku Agribusiness Co., Inc.
Signature: ____________________________
Date: DEC 28 2003

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<td>PROJECT NAME &amp; PHASES (include address if applicable)</td>
<td>EXISTING or NEW USE (if existing, fill in date of first use)</td>
<td>POTABLE or NONPOTABLE</td>
<td>TMK</td>
<td>STATE</td>
<td>CURRENT COUNTY ZONING CODE</td>
<td>UNITS or NET ACRES</td>
<td>GPD/UNIT or GPD/ACRE</td>
<td>4-YEAR CUMULATIVE PROJECTED DEMAND (year)</td>
<td>ULTIMATE DEMAND GPD (TO BUILD OUT)</td>
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(For Oahu only) DEPARTMENT OF PLANNING AND PERMITTING SIGNATURE __________________________ DATE ____________

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Commission on Water Resource Management, the Commission may not accept incomplete applications. For assistance, accompany your application by a non-refundable fee of $25.00 payable to the Dept. of Land and Natural Resources. The Commission may not accept incomplete applications. For assistance, call the Water Management Branch at 587-0225. For further information and updates to this application form, visit http://www.hawaii.gov/dlnr/cwrm.

PERMITTE INFORMATION

1. (a) APPLICANT
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208, Fax: 808-242-7068
   E-mail: csuzuki@cbcl1826.com

2. (b) LANDOWNER OF SOURCE
   Firm/Name: Wailuku Agribusiness Co., Inc.
   Contact Person: Clayton S. Suzuki
   Address: 255 E. Waiko Road, Wailuku 96793
   Phone: 808-244-2208, Fax: 808-242-7068
   E-mail: csuzuki@cbcl1826.com

SOURCE INFORMATION

2. WATER MANAGEMENT AREA:
   Island: Maui

3. (a) EXISTING WELL/STREAM DIVERSION NAME AND STATE NUMBER: Waiakapu Tunnel - 2
   (b) PROPOSED USE OF WATER:
   Method of Taking Water: Stream
   Method: Open-pipe
   Type: Artesian
   Water Use: Irrigation

USE INFORMATION

6. LOCATION OF PROPOSED WATER USE: (If possible, show on same maps as source location. Otherwise, attach similar maps)
   (a) PUC-Regulated Private System
   (b) Tax Map Key: Please complete Table 1 on back of application and shade applicable portion of property tax map.

7. QUANTITY OF WATER REQUESTED:
   Gallons per day (averaged over 1 year)

8. METHOD OF MEASUREMENT:
   Flowmeter

9. QUALITY OF WATER REQUESTED:
   Fresh

10. PROPOSED USE:
   Municipal (including hotels, stores, etc.)
   Industrial
   Military

11. PROPOSED TIME OF WATER WITHDRAWAL OR DIVERSION:
    (daytime hours of operation; example, 7 a.m. to 2 p.m.)

12. APPLICANT MUST ESTABLISH THAT THE PROPOSED USE OF WATER:
    (a) Can be accommodated with the available water source.
    (b) Is a reasonable-beneficial use.*
    (c) Will not interfere with any existing legal use.
    (d) Is consistent with the public interest.
    (e) Is consistent with state and county general plans and land use designations.
    (f) Is consistent with county land use plans and general policies.
    (g) Will not interfere with the rights of the Department of Hawaiian Home Lands.

* Section 13-171-2, Hawaii Revised Statutes – "Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest.

REMARKS, EXPLANATIONS:
Daily - water from inversion tunnel flows into Waiakapu Stream and is picked up at the South Waiakapu Ditch intake, Everett Ditch intake or Waihee Ditch intake.

NOTE: Signing below indicates that the signatories understand and swear that: 1) the information provided on this application is accurate and true to the best of their knowledge; 2) item 14 is the responsibility of the applicant prior to Commission approval; 3) if necessary, further information may be required before the application is considered complete; 4) if a water use permit is granted by the Commission, this permit is subject to prior existing permitted uses, changes in sustainable yields and instream flow standards, reserved uses as defined by the Commission, and Hawaiian Home Lands future uses; and 5) upon permit approval, a water shortage plan must be submitted by the applicant should the Commission require one.

Applicant (print): Clayton S. Suzuki
Signature: [Signature]
Date: DEC 29 2003

Landowner (print): Wailuku Agribusiness Co., Inc.
Signature: [Signature]
Date: DEC 8 2003

WUPAFORM (4/20/03)
<table>
<thead>
<tr>
<th>1.</th>
<th>Waikapu Tunnel - 2</th>
<th>Existing</th>
<th>3-6-03-01</th>
<th>Consv.</th>
<th>Consv.</th>
</tr>
</thead>
</table>

**TABLE 1. TMKs TO USE REQUESTED WATER**

| PROJECT NAME & PHASES (Include address if applicable) | EXISTING or NEW USE (If existing, fill in date of first use) | POTABLE or NONPOTABLE | TMK | STATE LUD | CURRENT COUNTY ZONING CODE | UNITS or NET ACRES | GPD/UNIT or GPD/ACRE | 4-YEAR CUMULATIVE PROJECTED DEMAND | ULTIMATE DEMAND GPD (TO BUILD OUT) |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | YEAR 1 | YEAR 2 | YEAR 3 | YEAR 4 | |
| | | | | | | | (year) | (year) | (year) | (year) | |

**TOTAL GPD**

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Only for verification that: 1) TMKs listed are consistent with zoning and development plans; and 2) projects listed are allowed with respect to zoning and development plans.

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