IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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IN RE ʻĪAO GROUND WATER MANAGEMENT AREA HIGH-LEVEL SOURCE WATER USE PERMIT APPLICATIONS AND PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS OF WAIHEʻE RIVER AND WAIEHU, ʻĪAO, AND WAIKAPŪ STREAMS CONTESTED CASE HEARING

NO. SCAP-30603

APPEAL FROM THE COMMISSION ON WATER RESOURCE MANAGEMENT
(CASE NO. CCH-MA06-01)

August 15, 2012

CONCURRING OPINION BY ACOBA, J.

I concur in remanding this case to the Commission on Water Resource Management (the Commission), but write separately to address two issues. First, in connection with subject matter jurisdiction, I would hold that: (1) jurisdiction over the claims of Petitioners-Appellants[1] Hui O Nā Wai ʻEhā (Hui) and Maui

[1] Hui/MTF are separate organizations that filed joint briefs. In a Petition to the Commission to Amend Interim Instream Flow Standards dated June 25, 2004, the Community Groups described themselves in part as follows:

> Hui O Nā Wai ʻEhā is a community-based organization established to promote the conservation and appropriate management of Hawaii's natural and cultural resources . . .

(continued...)

Tomorrow Foundation, Inc. (MTF), and the Office of Hawaiian Affairs (OHA) (collectively, Petitioners) does not arise under Koʻolau Agricultural Co. v. Commission on Water Resource Management, 83 Hawaiʻi 484, 927 P.2d 1367 (1996), because Petitioners seek to vindicate rights as to the setting of an interim instream flow standard (IIFS)[2] but "[i]t is only at the permitting stage that property interests of applicants are

[1](...continued)

> and related traditional and customary [n]ative Hawaiian practices, educational opportunities, and scientific activities. Hui supporters live, work, and play in the areas surrounding Nā Wai ʻEhā and rely on, routinely use, or hope to use Nā Wai ʻEhā and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary [n]ative Hawaiian practices, and other recreational, scientific, cultural, educational, and religious activities.
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> [MTF], a community based-organization[,] is dedicated to protecting Maui's precious natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the opportunity for rural lifestyles[.] [MTF] . . . conduct[s] community forums and workshops, provide[s] input and testimony, . . . and carr[ies] out litigation as necessary[.] [MTF]'s supporters rely on, routinely use, or hope to use Nā Wai ʻEhā and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary [n]ative Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

[2] The State Water Code defines an "instream flow standard" as "a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses." HRS § 174(c)(3). An "[i]nterim instream flow standard" means "a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard." Id. See In re Water Use Permit Applications, 94 Hawaiʻi 97, 148 n.48, 9 P.3d 409, 460 n.48 (2000) (Waiāhole I).

potentially affected," and a due process hearing is mandated, id. at 496, 927 P.2d 1367; (2) jurisdiction over the claims of Petitioners who are native Hawaiians arises independently under the State Water Code, Hawai'i Revised Statutes (HRS) chapter 174C, and also under article XII, section 7 of the Hawai'i Constitution[3] in light of specific provisions therein protecting native Hawaiian rights; (3) jurisdiction could have been invoked under Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 881 P.2d 1201 (1994), had Petitioners claimed under HRS chapter 174C and article XI, section 1 of the Hawai'i Constitution[4] that their constitutional rights were adversely affected by the permit applications (WUPAs) of Hawaiian Commercial and Sugar Company (HC&S), Wailuku Water Company (WWC), and the Maui Department of Water Supply (MDWS) in the combined

[3] Article XII, section 7 of the Hawai'i Constitution states:

> 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 those rights.

[4] Article XI, section 1 of the Hawai'i Constitution states:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the People.

contested case hearing[5] held by the Commission; and (4)(a) jurisdiction arises under the public trust doctrine embodied in Article XI, sections 1 and 7 of the Hawai'i Constitution as implemented through provisions of HRS chapter 174C affording judicial review under HRS chapter 91; however, (b) standing to sue to enforce the public trust doctrine is uncertain under the reference to "individual instream and offstream rights, duties, and privileges" in In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000) (Waiāhole I) (emphasis added); (c) but absent consideration of the effect the IIFS may have on protected instream uses, the Commission's setting of the IIFS may violate the principles of preserving the right to water for "the common good," McBryde Sugar Co. v. Robinson, 54 Haw. 174, 186, 504 P.2d 1330, 1342 (1973), and of preventing "private water rights" from injuriously affecting [] the rights of others," Robinson v. Ariyoshi, 65 Haw. 641, 649, n.8, 658 P.2d 287, 295 n.8 (1982); (d) consistent with such principles, a public trust claim raised by members of the public who are affected by potential harm to the public trust should be cognizable; (e) Petitioners, as members of the public who are affected by the setting of an IIFS, were entitled to a contested case hearing in order to protect the public trust.

[5] A "'contested case' is a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing." HRS § 91-1(5).

Second, with respect to the Commission's decision, I would hold that (1) the Commission failed to adhere to the balancing formula set out in Waiāhole I because it did not actually apply a "presumption in favor of public use, access, and enjoyment[,]" 94 Hawai'i at 142, 9 P.3d at 454; (2) the Commission failed to hold HC&S's proposed private commercial use to a "higher level of scrutiny[,]" id.; (3) the Commission "compromise[d] public rights in the resource . . . [without] a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state[,]" id. at 143, 9 P.3d at 455, when it failed to justify its decision not to restore any water to 'Īao and Waikapū Streams, even though all parties agreed that some water should be restored to 'Īao, and all parties except HC&S agreed that some water should be restored to Waikapū; and (4) the Commission failed to address the effect of the amended IIFS on native Hawaiian practices and to protect the rights of those additional kuleana users who did not testify at the contested case hearing but who nevertheless are afforded protection under HRS § 174C-101 and article XI, section 7 of the Hawai'i Constitution.

I.

This case involves appellate review of the June 10, 2010 Findings of Fact (findings), Conclusions of Law

(conclusions), and Decision and Order (D&O) of the Commission resulting from its December 2, 2007 to March 4, 2008 combined contested case hearing. In its D&O, the Commission considered WUPAs for ground water use[6] and IIFS for the Nā Wai ʻEhā ("the four great waters of Maui") comprised of the Waiheʻe River and the Waiehu, ʻĪao, and Waikapū streams. The Commission's D&O amended the IIFS for the Waiheʻe River and the Waiehu stream, but retained the existing IIFS for the ʻĪao and Waikapū streams as measured before off-stream diversions.[7]

II.

Before reaching the issues raised by the parties, this court must first resolve whether it has subject matter jurisdiction. Kernan v. Tanaka, 75 Hawaiʻi 1, 15, 856 P.2d 1207, 1215 (1993) ("Appellate courts have an obligation to insure they have jurisdiction to hear and determine each case"). Jurisdiction is, inter alia, "to have power over the subject matter given by the laws of the sovereignty in which the tribunal

[6] HRS § 174C-3 defines "ground water" as "any water found beneath the surface of earth, whether in perched supply, dike-confined, flowing, or percolating in underground channels or streams, under artesian pressure or not, or otherwise."

[7] It should be noted that despite the temporality suggested in the term "interim," the IIFS in this case has not been modified into a permanent IFS in almost twenty-five years, since 1988. Thus, under the circumstances, the IIFS practicably operates as a permanent instream flow standard.

exists." The King v. Lee Fook, 7 Haw. 249 (1888).[8] See Puna Geothermal, 77 Hawai'i at 67, 881 P.2d at 1213 ("subject matter jurisdiction is concerned with whether the court has the power to hear a case"); see also Alaka'i Na Keiki, Inc. v. Matayoshi, 127 Hawai'i 233, 277 P.3d 327 (2012) (stating that "the courts have subject matter jurisdiction over 'civil actions and proceedings,' and it is presumed that the courts have jurisdiction, unless the legislature 'expressly' provides otherwise by statute" (citing Sherman v. Sawyer, 63 Haw. 55, 58, 621 P.2d 346, 349 (1980))). The existence of subject matter jurisdiction is a question of law that is reviewable de novo under the right/wrong standard. Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 131, 139 P.3d 712, 719 (2006). "If a court lacks jurisdiction over the subject matter of a proceeding, any judgment rendered in that proceeding is invalid. Therefore, such a question is valid at any stage of the case." Id. at 132, 139 P.3d at 720.

III.

Petitioners contend that the Commission's IIFS determination is subject to appellate review because of the "rights, duties, and privileges at stake." Waiāhole I, 94

[8] On the other hand, standing is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his or her invocation of the court's remedial powers on his or her behalf." Hanabusa v. Lingle, 119 Hawai'i 341, 347, 198 P.3d 604, 610 (2008) (citing In re Application of Matson Navigation Co. v. Fed. Deposit Ins. Corp., 81 Hawai'i 270, 275, 916 P.2d 680, 685 (1996)).

Hawai‘i at 119 n.15, 9 P.3d at 431 n.15. They rely largely on Waiāhole I to establish that the court has jurisdiction over appeals of IIFS determinations. In so doing, Hui/MTF maintain that "water use involves rights and interests distinct from the 'property' interests in land." (Quoting Robinson, 65 Haw. at 667 658 P.2d at 305-06 ("[A] simple private ownership model of property is conceptually incompatible with the actualities of natural water courses.")). Regarding the meaning of due process in relation to water resources, Hui/MTF assert that "[p]rotectable due process interests . . . stem from an independent source . . . that secure certain benefits and that support claims of entitlement to those benefits." (Citing Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Puna Geothermal, 77 Hawai‘i at 68, 881 P.2d at 1214).

Hui/MTF assert claims of entitlement to Nā Wai ʻEhā stream water flows, including native Hawaiian traditional and customary rights, appurtenant rights, and public trust rights. Therefore, because "due process requires a hearing to resolve . . . conflicting claims for Nā Wai ʻEhā water" and because the parties "sought to have the legal rights, duties, or privileges [in water] in which [they] held an interest declared over the objections of other landowners and residents" a hearing was required. (Quoting Puna Geothermal, 77 Hawai‘i at 68, 881 P.2d at 1214).

OHA supports Hui/MTF's claim that "[n]ative Hawaiian traditional and customary rights and kuleana rights, among others," were impaired by diversion of Nā Wai ʻEhā waters by WWC and HC&S and asserts that "[c]onstitutional due process mandates a hearing whenever the claimant seeks to protect a 'property interest,' which does not mean a vested property right, but rather is a 'benefit to which the claimant is legally entitled.'" (Citing Puna Geothermal 77 Hawaiʻi at 68, 881 P.2d at 1214). According to OHA, inasmuch as "the contested case hearing on the IIFS petition was required by constitutional due process because of the individual rights, duties, and privileges at stake, and because the contested case hearing was required by law, this court has appellate jurisdiction to review the majority's decision pursuant to HRS § 91-14."

On the other hand, the Commission, WWC, and HC&S (collectively, Respondents) argue that the IIFS determination is not subject to appellate review because it has no impact on property rights, and an IIFS is an agency determination that does not afford Hui/MTF and OHA a right of appeal. The Commission focuses on the first four requirements needed to appeal a contested case hearing under HRS § 91-14 as laid out in Public

Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Commission, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("PASH").[9] According to the Commission, there is no statutory requirement to hold a contested case hearing. Additionally, there was no constitutional due process requirement to hold a hearing. Citing Puna Geothermal, the Commission agreed that if the issuance of a permit affects a person's property rights, and the person has standing, then there is a right to a contested case hearing.[10] However, the Commission asserts that, in this case, the ground water permits "should not be used to piggyback jurisdiction when they are not before this court."

The Commission further argues that specific rights, duties, or privileges were not determined because "the purpose of the IIFS [under HRS § 174C-71(2)] was to 'protect the public interest pending the establishment of a permanent instream flow

[9] The four requirements from PASH that the Commission sets out in its brief are: (1) that the unfavorable agency action is a contested case hearing that was required by law and determined the 'rights, duties, and privileges' of specific parties; (2) the action represents a final decision and order or a preliminary ruling such that deferral of review would deprive claimant of adequate relief; (3) the claimant followed the applicable agency rules and, therefore, was involved in the contested case; and (4) the claimant's legal interests were injured such that the claimant has standing to appeal the agency decision. PASH, 79 Hawai'i at 431, 903 P.2d at 1252.

[10] In Puna Geothermal, this court determined that when the issuance of a permit implicates constitutional rights of other interested parties who have followed the agency's rules governing participation in contested cases and thereby have standing, then such interested parties have a right to a contested case hearing. A jurisdictional analysis under Puna Geothermal follows in section VI, infra.

standard.'" In amending the IIFS, the Commission states that it "did not determine how much water Hui/MTF and OHA, the County, kuleana users, or any other person was entitled to take from the streams." Instead, it set the IIFS at a particular location and at a specific rate for each waterway. Thus, the Commission argues that this appeal should be dismissed for lack of jurisdiction.

HC&S and WWC also recite that the hearing was not required by law, and that no rights, duties, or privileges were at stake. HC&S asserts that Hui/MTF do not have a sufficiently vested property interest in the IIFS determination. According to HC&S, aside from cultivating taro, native Hawaiian practices are not considered "property interests" under the Hawai'i Constitution, and Hui/MTF are attempting to expand practices currently within the purview of the due process clause beyond existing precedent.

WWC additionally maintains that Hui/MTF have no private cause of action under the state constitution to enforce environmental laws such as the protection or enhancement of natural resources. Like the Commission, WWC also references Puna Geothermal and asserts that no property rights are involved because no permits are at issue. Additionally, WWC analogizes the setting of an IIFS to the designation of a water management

area (WMA) in Koʻolau, where a contested case hearing was not required.[11]

Elaborating on footnote 15 of Waiāhole I, 94 Hawaiʻi at 119 n.15, 9 P.3d at 431 n.15, the majority states that this court has jurisdiction based on constitutional due process because the IIFS, independent of any WUPA, affects property interests of Hui/MTF's members. (Majority at 28.) The majority also holds that traditional and customary native Hawaiian rights constitute a "property interest" for purposes of due process hearing analysis. (Majority at 30-33.) According to the majority, setting an IIFS requires a hearing because it involves the same analysis in Koʻolau for WUPAs which require hearings. (Majority at 34-39.) The majority concludes that "an erroneous IIFS . . . is simply too important to deprive parties of due process and judicial review." (Majority at 37.) Arguably, several grounds may support this court's jurisdiction.

IV.

A.

In determining whether a party's claim of deprivation of property without due process is entitled to a hearing, this court must first resolve whether the party's asserted interest is "'property' within the meaning of the due process clause of the

[11] The application of Koʻolau to this case is further discussed in section IV, infra.

federal and state constitutions." Sandy Beach Def. Fund v. City and Cnty of Honolulu, 70 Haw. 361, 376, 776 P.2d 250, 260 (1960).[12] Under the Hawai'i Constitution, procedural due process rights are violated when "(1) a particular interest which a claimant seeks to protect is 'property' within the meaning of the due process clauses of the federal or state constitutions, and (2) those property interest[s] are not adequately protected by specific procedures." Troyer v. Adams, 102 Hawai'i 399, 435, 77 P.3d 83, 120 (2003) (Acoba, J., dissenting) (citing Sandy Beach, 70 Haw. at 376, 773 P.2d at 260). Additionally,

> Once it is determined that a valid property interest is at stake, it must be determined whether proper procedural due process was afforded the claimant. The basic elements of procedural due process require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of property interest.

Id. Hence, "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Puna Geothermal, 77 Hawai'i at 66, 881 P.2d at 1212.

Under the federal constitution, "[t]he Fourteenth Amendment's procedural [due process] protection of property is a safeguard of the security of interests that a person has already

[12] The Hawai'i Constitution states, "[n]o person shall be deprived of life, liberty or property without due process of law . . . ." Haw. Const. art. I, § 5. The United States Constitution states, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. 5.

acquired in specific benefits. These interests-property interests-may take many forms." In re Int'l Brotherhood of Painters and Allied Trades v. Befitel, 104 Hawai‘i 275, 283, 88 P.3d 647, 655 (2004) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576 (1972)). Thus, as recounted by Hui/MTF, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

However, the "range of property interests protected by due process is not infinite." Id. "To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Sandy Beach, 70 Haw. at 377, 776 P.2d at 260. "A person's interest in a benefit constitutes a 'legitimate claim of entitlement' if it is supported by contractual or statutory language that might be invoked in a hearing." Alejado v. City and Cnty. of Honolulu, 89 Hawai‘i 221, 227, 971 P.2d 310, 316 (1998).

In Ko‘olau, this court held that "[i]t is only at the permitting stage that property interests of applicants are

potentially affected, and, thus, the contested case hearing procedures of HRS chapter 91 [pertaining to administrative agencies] are required to satisfy due process." 83 Hawai'i at 496, 927 P.2d at 1379 (emphasis added). There, Ko'olau Ag requested judicial review of the Commission's designation of several Oahu aquifers as water management areas. Id. at 486, 927 P.2d at 1370. A water management area means a geographic area that has been designated pursuant to HRS § 174C-41[13] as requiring management of the ground or surface water resource or both. HRS § 174C-3.

In Ko'olau, the Sierra Club Legal Defense Fund submitted a petition pursuant to HRS § 174C-41(b) to the Commission to designate five Windward Oahu aquifers[14] as WMAs under the State Water Code.[15] Ko'olau, 83 Hawai'i at 487, 927 P.2d at 1370. The Commission voted to designate all five aquifer systems as WMAs. Id. Ko'olau Ag challenged the Commission's decision, alleging, inter alia, that the Commission violated its

[13] HRS § 174C-41 states in relevant part that "[w]hen it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest."

[14] An aquifer is a "water-bearing stratum of permeable rock, sand, or gravel." Merriam-Webster Dictionary 58 (10th ed. 1993).

[15] HRS § 174C-41(b) states in relevant part that "[t]he designation of a water management area by the commission may be initiated by the chairperson or by written petition."

due process rights because it failed to conduct the designation process in accordance with HRS chapter 91 governing contested cases.[16] Id. This court held that Koʻolau Ag did not have a property interest in whether or not the aquifers received the WMA designation, and therefore it was not entitled to a contested case hearing under chapter 91. Id.

Koʻolau held WUPA decisions do require contested case hearings, while WMA designations do not require hearings:

> The difference between procedures governing WMA designations, on the one hand, and permit applications, on the other, is eminently logical given the difference between the issues presented for decision. At the permitting stage, the Commission is required to determine the respective rights of water users; because recognized property interests could be affected, applicants' due process rights are implicated and contested case hearings pursuant to HRS chapter 91 are required. . . Designation of a WMA, unlike water use permitting neither affects any property interest of existing or potential water users nor requires the determination of any individualized facts. Designation requires a determination, "after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water[.]" HRS § 174C-41(a). . . It is only at the permitting stage that property interests of applicants are potentially affected, and, thus, the contested case hearing procedures of HRS chapter 91 are required to satisfy due process.

Id. at 496, 927 P.2d at 1367 (emphases added). Although WUPAs

[16] The majority uses Koʻolau to suggest that the factors for establishing a WUPA in Koʻolau "counsel in favor of judicial review in this case." (Majority at 36.) The Koʻolau court held that, in deciding a WUPA, the Commission must consider several factors, including whether the water is a "reasonable-beneficial use as defined in [the State Water Code]"; whether the use is "consistent with the public interest"; and whether it is consistent with governmental land use plans. Koʻolau 83 Hawaiʻi at 492, 927 P.2d at 1375. The majority likens the analysis for a WUPA to the IIFS in this case, stating, "[u]nlike establishing a WMA, the analysis supporting the determination of an IIFS requires more than a yes/no decision." (Majority at 36.) According to the majority, "the ramifications of an erroneous IIFS could offend the public trust, and is simply too important to deprive parties of due process and judicial review." (Majority at 37.) However, an IIFS determination is more akin to a WMA designation than a WUPA decision because, as with a WMA designation, the legislature did not intend for an IIFS to be the subject of a contested case hearing under chapter 91. This is further discussed in section B, infra.

were not at issue in that case, the Koʻolau court made the distinction between WUPAs and WMAs because WUPAs were the next step in the process. This court explained that "[o]nce an area is designated as a WMA, '[n]o person shall make any withdrawal, diversion, impoundment, or consumptive use of water . . . without first obtaining a permit from the Commission." Id. at 492, 927 P.2d at 1375 (quoting HRS § 174C-48). Permit applications, and not WMAs, triggered the contested case hearing provisions of HRS chapter 91 because "the Commission is required to determine the respective rights of water users [and] . . . recognized property interests could be affected." Therefore "applicants' due process rights are implicated and contested case hearings pursuant to HRS chapter 91 are required." Id. Correlatively, then, contested case hearings were not required for WMA designations under Koʻolau.

B.

Koʻolau determined that the legislature did not intend that a WMA designation proceeding be conducted as a chapter 91 contested case hearing because "the statutory designation procedure [for a WMA] conflicts with the contested case hearing procedures outlined in chapter 91." Koʻolau, 83 Hawaiʻi at 495-96, 927 P.2d at 1378-79.[17] Similarly here, it does not appear

[17] The statutory designation procedure is described in HRS § 174C-41. The following section, HRS § 174C-42, indicates that notice and a public

(continued...)

that the legislature intended that setting an IIFS be conducted as a chapter 91 contested case hearing. The State Water Code in HRS chapter 174C defines an interim instream flow standard as "a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard." HRS § 174(c)(3) (emphasis added).

Analogous to a WMA designation, the statutory definition of an IIFS indicates that the legislature did not require a hearing in the setting of an IIFS. Under Koʻolau then, Petitioners in this case would be required to claim a permit granting specific rights to water in order to invoke a contested case hearing under HRS chapter 91. Petitioners do not make such a claim. Therefore applying Koʻolau, they do not have a sufficient property interest for purposes of a due process claim, and are not entitled to a hearing under HRS chapter 91 on that

(...continued)
hearing are required, and states that "[w]hen a recommendation for designation of a water management area has been accepted, the commission shall hold a public hearing at a location in the vicinity of the area proposed for designation and give public notice of he hearing[.]" While a public hearing is required in a WMA, Koʻolau established that this is not the equivalent of a contested case hearing. Koʻolau stated:

> As we interpret the Code, the legislature did not intend that a WMA designation proceeding be conducted as a Chapter 91 contested case hearing. The legislature, instead, designated a statutory process that is specific to the designation of WMAs and mandated that "chapter 91 shall apply except where it conflicts with this chapter."

Koʻolau, 83 Hawaiʻi at 495-496, 927 P.2d at 1378-79 (emphasis added). Therefore, under Koʻolau, the HRS § 174C-41 statutory procedure must be followed when designating a WMA.

ground. Like Sierra Club Legal Defense Fund, Hui/MTF and OHA are not applying for permits in the instant case. Accordingly, Koʻolau would countenance that Petitioners' property interests are not affected.

Although we have recognized that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands," Koʻolau, 83 Hawaiʻi at 496, 927 P.2d at 1379 (citation omitted), both HRS § 174C(3) (indicating that the definition of an IIFS does not require a public hearing) and Koʻolau instruct that a contested case hearing does not apply in setting an IIFS. Koʻolau is clear that it is "only at the permitting stage that property interests are potentially affected." Koʻolau, 83 Hawaiʻi at 496, 927 P.2d at 1379. Pursuant to Koʻolau, as with a WMA designation, establishing an IIFS does not constitute a sufficient property interest for purposes of traditional due process analysis, and does not trigger the requirement of a contested case hearing under HRS chapter 91.

V.

However, both HRS chapter 174 and article XI, section 7 of the Hawaiʻi Constitution constitute independent bases for this court's jurisdiction over native Hawaiian claims. In its D&O, the Commission found that "[c]ultural experts and community witnesses provided uncontroverted testimony regarding limitations on native Hawaiians' ability to exercise traditional and

customary rights and practices due to lack of freshwater flowing from streams."[18] Approximately fifty witnesses came forward with proof of their appurtenant water rights, native Hawaiian traditional and customary rights, and/or riparian rights to Nā Wai ʻEhā waters for, among other things, the cultivation of taro and other crops. Among them were OHA beneficiaries[19] with unchallenged evidence that their kuleana parcels on ʻĪao and Waikapū streams were planted in taro at the time of the Mahele.[20] Id.

[18] The majority refers to specific individuals who cultivate taro and otherwise use the land and water surrounding Nā Wai ʻEhā for native Hawaiian traditional and customary uses.

[19] Although no specific definition of "OHA beneficiary" exists, OHA serves "all Hawaiians regardless of blood quantum." Office of Hawaiian Affairs, http://www.oha.org/about/early-days-oha-oha-beginning (last visited July 5, 2012). The 1978 Constitutional Convention incorporated the establishment of OHA as a public trust into the state constitution with the mandate to better the conditions of both native Hawaiians and the Hawaiian community in general. OHA is funded with a pro rata share of revenues from state lands designated as "ceded." Office of Hawaiian Affairs, http://www.oha.org/about/history (last visited July 5, 2012).

[20] The Great Mahele of 1848 divided the lands between the chiefs and the King. Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (1982). "Two years later, . . . commoners were permitted to obtain fee simple title to the lands which they had cultivated[,]" under HRS § 7-1. Kalipi, 66 Haw. at 7, 656 P.2d at 749. HRS § 7-1 (2009 Repl.) states:

> 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 article 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.

(Emphasis added.)

A.

Independent of a due process entitlement claim, HRS chapter 174C statutorily protects kuleana[21] users' appurtenant rights to water. HRS § 174-101(c) provides that "traditional and customary rights of ahapua'a tenants who are descendants of native Hawaiians . . . shall not be abridged or denied by this chapter. Such . . . rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana. . . ." Additionally, HRS § 174C-101(d) states that "[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter." Further, HRS § 174C-63 states that "[a]ppurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." HRS § 174C-63 (emphasis added). Thus, by virtue of HRS § 174C-101, appurtenant water rights to kuleana users are legally protected. The right to grow taro, then, shall not be abridged or denied.

[21] "Kuleana" is a term used by the parties to describe the property of users who were not charged for water delivery; whether they have riparian or appurtenant rights was not determined at the hearing. OHA asserts that "kuleana rights are property rights, akin to appurtenant rights" and that "kuleana rights are exercised by individual right holders, compared to other public trust rights which are available to the larger community." OHA also maintains that "appurtenant rights are a kind of customary right based on water use since 'time immemorial' which attaches to land that was receiving water during the Mahele in the mid-1800s." (Citing Peck v. Bailey, 8 Haw. 658, 661 (1867)).

Appurtenant rights for such purposes may not be diminished or extinguished by the failure to obtain a permit. Such appurtenant rights may be exercised at any time. HRS § 174C-63.

The broad reference to "any time" denotes that any Commission decision setting an IIFS would be subject to the provisions of HRS § 174C-63 and HRS §§ 174C-101(c)-(d).[22] It follows that kuleana owners may, at any time, assert that these rights have been infringed. Hui/MTF (to the extent its members qualify as native Hawaiians) and OHA thus have a legitimate right under HRS § 174C to bring a claim that kuleana and appurtenant water rights protected by HRS § 174C-63 and HRS §§ 174C-101(c)-(d) have been abridged by a decision of the Commission.

HRS § 174C-12 further instructs that "[j]udicial review of rules and orders of the commission under this chapter shall be governed by chapter 91." Under chapter 91, "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter." HRS § 91-14(a).[23] HRS § 91-14(g)(1) specifically provides for judicial review of an agency decision if it is, inter alia, "[i]n

[22] HRS § 174C-71(2)(D) confirms this, directing the Commission, when setting the IIFS, to weigh "present or potential instream values." Among the instream uses defined in the Water Code is "[t]he protection of traditional and customary Hawaiian rights." HRS § 174C-3(9).

[23] HRS § 91-14(a) states, "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter."

violation of constitutional or statutory provisions." Because Hui/MTF and OHA claim the Commission's decision violates HRS § 174C-63 and HRS §§ 174C-101(c)-(d), they are entitled to judicial review under HRS § 91-14(a).[24] Consequently, jurisdiction over the Commission's decision with respect to rights asserted under HRS § 174C-101(c)-(d) is available pursuant to HRS § 91-14.

Moreover, as noted, HRS § 174C-101(d) specifically protects the water rights of kuleana owners, regardless of a "failure to apply for or to receive a permit." This creates a statutory exception to the Koʻolau requirement that a contested case hearing is available only "at the permitting stage [where] property interests are affected." Koʻolau, 83 Hawaiʻi at 496, 927, P.2d at 1379. Accordingly, Petitioners, as kuleana water users, do not need to obtain a permit in order to obtain judicial

[24] HRS § 91-14(g), which establishes judicial review of agency rules and orders, states:

> Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary and capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

review under HRS chapter 91 because their rights "shall not be diminished or extinguished by a failure to apply for or to receive a permit" under HRS § 174C-101(d). By virtue of statute alone, Petitioners who are native Hawaiian are entitled to a contested case hearing under HRS § 91-14, without the need to establish a due process property claim.

B.

Independent of HRS chapter 174C, article XII, section 7 of the Hawai'i Constitution provides specific protection for native Hawaiian traditional and customary rights. It states that "[t]he 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." Haw. Const. art. XII § 7 (emphasis added). These "[t]raditional and customary rights shall include, but are not limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limo, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes." HRS § 174C-101(c) (emphases added).

In the past, we have exercised jurisdiction over claims brought by native Hawaiians asserting that their constitutionally

protected rights have been infringed. In Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982), the plaintiff, who was a native Hawaiian, brought suit claiming the right to enter upon the defendants' undeveloped lands to gather natural products necessary for certain traditional native Hawaiian practices. Id. at 3-4, 656 P.2d at 747. This court considered the plaintiff's claim on the merits, implicitly assuming that the plaintiff would have a right to sue to enforce his native Hawaiian rights, and thus that this court would have jurisdiction over that claim. In doing so, this "court's obligation to preserve and enforce such traditional rights [as] . . . a part of our Hawai'i State Constitution," article XII, section 7 was affirmed. Kalipi, 66 Haw. at 4-5, 656 P.2d at 748. While Kalipi relied in part on HRS § 7-1 pertaining to gathering rights, it recognized that "the balance" between "traditional rights" and the "modern system of land tenure" was "struck, consistent with . . . [the] constitutional mandate" and the statute. 66 Haw. at 4-8, 656 P.2d at 748-49.

Here, likewise, where native Hawaiian Petitioners claim that their native Hawaiian rights are adversely affected by the Commission's decision to restore a limited amount of water to the Waihe'e River and North and South Waiheu Streams, and no water to the 'Īao and Waikapū Streams, they may sue to enforce their

rights under article XII, section 7 of the Hawai'i Constitution. Cf. Kaleikini v. Thielen, 124 Hawai'i 1, 31, 237 P.3d 1067, 1097 (2010) (Acoba, J., concurring) ("native Hawaiians . . . have equal rights to a contested case hearing where these [traditional and customary] practices are adversely affected."). Petitioners' ability to exercise traditional and customary rights such as the cultivation of taro is necessarily dependent on how much water is available in the Nā Wai 'Ehā water system. The Commission's decision concerning the setting of the IIFS pursuant to HRS § 174C-3 (listing the protection of traditional and customary Hawaiian rights as an "instream use") and HRS § 174C-71 therefore affect native Hawaiian Petitioners in the exercise of their rights. Because such Petitioners can allege the Commission's decision under these statutes adversely affected their constitutional rights under article XII, section 7, they have a legitimate claim of entitlement under the Constitution and would be entitled to a due process hearing on their claim.[25] Cf. Alejado, 89 Hawai'i at 226-227, 971 P.2d at 315-316 (contractual or statutory claim of entitlement is a basis for due process hearing).

[25] Native Hawaiians are "[t]hose persons who are 'descendants of native Hawaiians' who inhabited the islands prior to 1778' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 [and who] are entitled to protection regardless of their blood quantum." PASH, 79 Hawai'i at 449, 903 P.2d at 1270 (citing Haw. Const., art. XII, § 7) (emphasis in original).

Inasmuch as a contested case hearing, pursuant to HRS chapter 91, was convened by the Commission, the article XII, section 7 claim may be afforded review through that process. See Kaleikini, 124 Hawai'i at 43, 237 P.3d at 1109 (Acoba, J., concurring) ("[A]s a [n]ative Hawaiian practicing the native and customary traditions . . . Petitioner was already entitled to a contested case hearing because it was 'required by law' under constitutional due process.").[26] Accordingly, this court would have subject matter jurisdiction pursuant to HRS § 174C-3, HRS § 174C-71 and article XII, section 7 of the Hawai'i Constitution. Cf. Kalipi, 66 Haw. 1, 656 P.2d 745.

VI.

A.

In Puna Geothermal, this court stated that, "as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who

[26] "[A]n appellate court or judge is empowered to review constitutional questions if justice requires it, even if the issue is not raised by the parties." Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973); see State v. Pratt, ___ P.3d ___, 2012 WL 1936321, at *28 (Haw. May 11, 2012) (Acoba, J., concurring and dissenting, joined by McKenna, J.) ("It was proper for Judge Leonard to consider whether Petitioner's activities were traditional and native Hawaiian practices, if she chose to, because that issue was germane to the application of article XII, section 7. . . she was not required to accept what she deemed to be an erroneous proposition of law that was . . . central to the question [of] . . . whether [Petitioner's] conduct was constitutionally protected.").

have followed the agency's rules governing participation in contested cases." 77 Hawai'i at 68, 881 P.2d at 1214.[27] In that case, Puna Geothermal Venture (PGV) applied for Department of Health (DOH) Authority to Construct (ATC) permits to build a well field and power plant. Id. at 66, 881 P.2d at 1210. In its "discretionary authority," (emphasis in original), the DOH held two "public informational hearings," in which various individuals testified after requesting contested case hearings. Id. at 66, 881 P.2d at 1272. The DOH denied the contested case hearing requests after the Attorney General's office decided there was "no legal mandate to grant a contested case hearing." Id.

The DOH ultimately granted PGV's permit applications. Id. Pele Defense Fund (PDF), a Hawai'i nonprofit organization formed to defend native Hawaiian rights and other named parties (collectively, Appellees) requested judicial review of the DOH

[27] The Commission, WWC, and HC&S assert that Puna Geothermal indicates that there is no jurisdiction in this case. These groups argue that Puna Geothermal is distinguishable in that it involved an appeal of Puna Geothermal Venture's permits, whereas in the instant case the permits of MDWS, WWC, and HC&S were not appealed. According to the Respondents, there are no grounds for jurisdiction because it is the IIFS, and not the WUPAs, that are at issue in this case.

In response, Hui/MTF and OHA cite Waiāhole I. The Waiāhole I court cited Puna Geothermal when it held that, "with respect to petitions to amend interim instream flow standards[,] . . . constitutional due process mandates a hearing . . . because of the individual instream and offstream 'rights, duties, and privileges' at stake.'" 94 Hawai'i at 143 n.15, 9 P.3d at 455 n.15 (citing Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214). Therefore, according to Hui/MTF, irrespective of a permit requirement in Puna Geothermal, in Waiāhole I, this court "made clear that it had independent jurisdiction over IIFS petitions."

decision pursuant to HRS § 91-14, HRS § 603-21.8[28] and Hawai'i Rules of Civil Procedure (HRCP) Rule 72.[29] Id.

Before the circuit court, Appellees "alleged that allowing PGV's activities to proceed under the authority of the ATC permits would expose [Appellees] to 'potential harm including diminished property values, deterioration of air quality, odor nuisance, and possible physical injury resulting from the permitted operations.'" Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216. PGV moved to dismiss, urging that there were no grounds for circuit court jurisdiction. Id. at 66, 881 P.2d at 1212. The circuit court denied PVG's motion to dismiss, stayed the permits, and granted an interlocutory appeal as to the matter of jurisdiction. Id. at 67, 881 P.2d at 1213.

On appeal, this court noted that a discretionary hearing "[could] not be a 'contested case' [under HRS chapter 91] because it fails to meet the 'required by law' test," and the public hearings were not required by statute or rule. Id. at 68, 881 P.2d at 1214. Consequently, "the remaining question [in the case was] whether the hearings were required by constitutional due process." Id. This court said that "[c]onstitutional due

[28] HRS § 603-21.8 provides that "[t]he several circuit courts shall have jurisdiction of all causes that may properly come before them on any appeal allowed by law from any other court or agency."

[29] HRCP Rule 72 provides that "[w]here a right of determination or review in a circuit court is allowed by statute, any person adversely affected by the decision, order or action of a governmental official or body other than a court, may appeal from such a decision, order or action by filing a notice of appeal in the circuit court having jurisdiction of the matter."

process protections mandate[d] a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Id. (citing Aquiar v. Hawai'i Housing Auth., 55 Haw. 478, 495, 522 P.2d 1255, 1267 (1974); Sandy Beach, 70 Haw. at 361, 773 P.2d at 260). Thus, the "dispositive issue . . . [was] whether [PGV's] interest [in obtaining an ATC] permit . . . constitute[d] a 'property' interest such that the agency hearing was a 'contested case' pursuant to HRS § 91-14(a)." Id. (citing Bush, 76 Hawai'i 128, 136, 870 P.2d 1272, 1280 (1994)).

Because PGV "sought to have the legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents of Puna,"[30] this

[30] The majority states:

> The Commission, WWC, and HC&S argue that the Waiāhole I court's citation to Puna Geothermal indicates that the court exercised jurisdiction over the appeal of the IIFS only because the parties also appealed the Commission's resolution of permit applications. Hui/MTF reads Waiāhole I as holding that the court has independent jurisdiction to review IIFS. This court concludes that the jurisdictional language from Waiāhole I is susceptible to both interpretations. However, the court's due process cases indicate that the court has jurisdiction to hear Hui/MTF's appeal because the IIFS, independent of any WUPA, affects property interests of Hui/MTF's members.

(Majority at 28.)

The majority does not discuss Puna Geothermal further, and instead moves to a discussion of Sandy Beach for the proposition that Petitioners have a legitimate expectation in water for taro farming, and of Ko'olau and of the public trust doctrine to establish that IIFSs do affect interests protected by the constitution and due process. In contrast to the majority position, Puna Geothermal should be read as permitting jurisdiction over an appeal by persons whose constitutional rights are claimed to be affected by a permit request which is itself the subject of a contested case hearing.

court concluded that the public hearings held by the DOH were contested cases required by constitutional due process. Id. at 68, 881 P.2d at 1214. Therefore, this court held that appellate jurisdiction was proper under HRS § 91-14. Puna Geothermal, 77 Hawai'i at 71, 881 P.2d at 1218. As to Appellees, this court stated in connection with their standing to sue that Appellees must "demonstrate . . . their interests were injured and that they were involved in the administrative proceedings that culminated in the enforceable decision." Id. at 69, 881 P.2d at 1216. Puna Geothermal held that Appellees "clearly demonstrated an 'injury in fact.'" Id. at 70, 881 P.2d at 1216.

Further, to reiterate, this court held that "as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." Id. (emphasis added). Since the DOH's issuance of a permit to PGV required a contested case hearing, the claims of other interested persons, whose constitutionally protected rights were allegedly affected, i.e. Appellees, were also entitled to a contested case hearing. Id. Consequently, due process compelled a contested case hearing to address whether the constitutional rights of Appellees were infringed. Id.

B.

Applying Puna Geothermal to this case, Hui/MTF and OHA would be entitled to a contested case hearing as a matter of due process if they claimed that their constitutional rights were adversely affected by the permit applications of MDWS, WWC, and HC&S.[31] A contested case hearing regarding the WUPAs had been requested by MDWS, WWC, Hui/MTF, and OHA. MDWS and WWC were entitled to a contested case hearing on the WUPAs. Thus, at that point, rights involved in the issuance of permits were at issue. Although the WUPAs are not at issue on certiorari, it appears they were at the time that the contested case hearing was initially requested.

The Commission decided to hold a combined contested case hearing for the WUPAs and the IIFS because the Nā Wai ʻEhā water systems are interconnected. The Hearings Officer explained that considering the WUPAs and IIFS together would allow the Commission to "get a bigger picture and be able to try to reach a more rational and reasonable decision." Because the water systems are interconnected, the Commission believed it would be most appropriate to join consideration of the WUPAs and IIFS in the same proceeding. Inasmuch as the Commission held a combined

[31] The majority does not apply Puna Geothermal. However, it acknowledges that the jurisdictional language in Waiāhole I, which references Puna Geothermal, is unclear. The majority concludes that the IIFS, independent of any WUPA, does in fact affect the property interests of Hui/MTF's members. (Majority at 28.) Additionally, the majority decides that these interests constitute property interests for the purposes of due process analysis. (Majority at 31-34.)

contested case hearing, there was the potential question of whether rights granted by issuance of permits in the WUPA process might adversely affect Petitioners' constitutional rights in the IIFS determination.

Thus, in this case, the Commission held a contested case hearing for WUPAs and IIFS rather than discretionary hearings as had occurred in Puna Geothermal. However, in Puna Geothermal, PGV's ATC permit application implicated a property right, entitling it to a contested case hearing as a matter of constitutional due process. 77 Hawai'i at 70, 881 P.2d at 1216. Here, the ground water permit use applications of MDWS, WWC, and HC&S for diked, high-level well and tunnel sources from the Nā Wai 'Ehā streams are analogous to the permit applications of PGV.[32] In Puna Geothermal, because PGV's ATC permit allegedly "adversely affect[ed] the constitutionally protected rights of other interested parties (i.e. Appellees)," a contested case hearing was also mandated for Appellees as a matter of due process. Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214. Similarly, if the applications for issuance of the ground water use permits of MDWS, WWC, and HC&S were alleged to adversely affect Petitioners' constitutionally protected rights,

[32] The Commission awarded the MDWS ground water use permits for 1.042 million gallons per day (mgd) from the Kepaniwai Well and 1.359 mgd from the Iao Tunnel, subject to the Commission's standard ground water permit conditions. The Commission awarded HC&S a one year ground water use permit for 0.1 mgd from the Iao Tunnel.

Petitioners would be entitled to a contested case hearing as a matter of due process.[33] In that event, applying Puna Geothermal, a contested case hearing as to all Petitioners would be constitutionally mandated, vesting this court with subject matter jurisdiction over the combined contested case hearing.[34]

VII.

Waiāhole I involved the Waiāhole Ditch System, a major irrigation infrastructure which collects fresh surface water and dike-impounded ground water on the island of Oahu. 94 Hawai'i at 110, 9 P.3d at 422. As in this case, the Commission in Waiāhole I decided sua sponte to hold a combined contested case hearing for both WUPAs and the IIFS although it was not "required by

[33] It may be argued that Puna Geothermal differs from this case in that Puna Geothermal involved an appeal of PGV's permits, whereas here the granting of the permits of MDWS, WWC, and HC&S was not appealed. The IIFS and not the WUPAs are at issue on certiorari. However, the Commission consolidated the WUPAs and IIFS proceedings. By joining the WUPAs, the property rights of MDWS, WWC, and HC&S would be involved in the same proceedings as the constitutional rights asserted by Petitioners in connection with the IIFS.

[34] It may appear that the holding in Puna Geothermal conflicts with the subsequent holding in Ko'olau. Puna Geothermal established that a contested case hearing is required by law when the property interests of permit applicant allegedly intersect with the constitutional rights of other interested parties. Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214. But Ko'olau restricts such contested case hearings because it is "only at the permitting stage that property interests are potentially affected." Ko'olau, 83 Hawai'i at 484, 927 P.2d at 1379.

The two holdings can be reconciled. Because the Commission held a combined contested case hearing to consider WUPAs, in essence this case is "at the permitting stage" where property interests are potentially affected as Ko'olau requires. If the permits of MDWS, WWC, and HC&S allegedly affected the constitutionally protected rights of Petitioners, under Puna Geothermal, constitutional due process would mandate a contested case hearing for Petitioners. Consequently, under HRS § 91-14, the claims of all Petitioners as to the IIFS would be afforded judicial review and this court would have subject matter jurisdiction.

law."[35] Also, in both cases, the parties appealed the Commission's decision regarding petitions to amend interim instream flow standards. Id. at 119, 9 P.3d at 431.

Before embarking on a discussion of the issues in Waiāhole I, this court stated in footnote 15 of that opinion that, "[a]s a threshold matter, we . . . have jurisdiction to entertain this appeal." Id. at 119 n.15, 9 P.3d at 431 n.15. It was said that, "[p]ursuant to HRS § 174C-12, HRS chapter 91 governs our review of the Commission's decisions." Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15. HRS § 91-14(a) allows judicial review of a final decision and order in a contested case. "A contested case is an agency hearing that is 1) required by law and 2) determines the rights, duties, or privileges of specific parties." Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15.

To reiterate, Waiāhole I further states that, "while the statutes and rules do not require a hearing with respect to petitions to amend interim instream flow standards, constitutional due process mandates a hearing . . . because of the 'rights, duties, and privileges' at stake. See Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214." Waiāhole I, 94 Hawai'i at 119, n.15, 9 P.3d at 431, n.15 (emphasis added).

[35] At the hearing in Waiāhole I, the Commission considered WUPAs for various leeward offstream purposes, petitions to amend the IIFS for windward streams affected by the ditch, and water reservation petitions for both instream and offstream uses. Waiāhole I, 94 Hawai'i at 110, 9 P.3d at 422.

Without further elaboration on this point, Waiāhole I concludes that rights duties and privileges are involved in an IIFS, and so constitutional due process requires a hearing where an IIFS is involved.[36]

In contrast to Koʻolau, this court in Waiāhole I did not specify what rights, duties, and privileges were at stake in that case; it simply concluded that "individual instream" uses might be affected in setting an IIFS and so mandated that IIFS be subjected to contested case hearings. Waiāhole I, 94 Hawaiʻi at 119 n.15, 9 P.3d at 431 n.15. In the absence of more guidance from this court, Petitioners attempt to show that they have sufficient rights, duties, and privileges that are affected by the IIFS so as to require a hearing for purposes of due process.[37]

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[36] Additionally, HRS § 174C-60 was read to "provide for direct appeal to the supreme court from the . . . combined case hearing in its entirety." Id. HRS § 174C-60 states, "[a]ny other law to the contrary not withstanding, including chapter 91, any contested case hearing under this section shall be appealed upon the record directly to the supreme court for final decision." This would not appear to be a basis for jurisdiction of this case but refers to the procedure to follow, assuming jurisdiction exists in the first place.

[37] The HC&S brief indicates that the Commission could have used "any number of procedural vehicles, including procedures patterned after a contested case hearing." It analogizes the hearing in this case to a "discretionary hearing" which are "not contested case hearings because they are not required by law." Id. (citing Lingle v. HGEA, 107 Hawaiʻi 178, 184, 111 P.3d 587, 593 (2005)). In contrast, OHA contends that there are no other methods of resolution because "[r]ulemaking and contested case adjudication are the only alternatives available to [the Commission] pursuant to the Code."

Related to this issue, at the outset of its answering brief, HC&S references a similar case dealing with the setting of interim instream flow standards for streams in East Maui that is currently pending in the Intermediate Court of Appeals (In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomau, West

(continued...)

Waiāhole I is precedent, and thus we should not depart from it "without some compelling justification." State v. Garcia, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2001)(citing Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991) (emphasis omitted)).[38] However, Waiāhole I's brief treatment of jurisdiction in footnote 15,which created a sui generis[39] basis for jurisdiction, requires additional support. The fact that a contested case hearing was not required by statute or rule, both in this case and in Waiāhole I, weighs against a contested case hearing rather than in favor of one.

[37](...continued)
Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula, and Hanawai Streams, No. CAAP 10-0000161, the "East Maui Appeal"). In that case, the Commission did not utilize a contested case hearing and therefore its decision is not subject to judicial review. Id. OHA attempts to distinguish this case from the East Maui Appeal, and relies on Waiāhole I to suggest that the proper resolution for an IIFS in both cases is via a contested case hearing. OHA contends that in the East Maui Appeal, the Commission in fact created a "legal nonentity" by adopting a process which is "neither rulemaking nor contested case [hearing]." Id. However, that case is not before us and has no bearing on the outcome of the case at hand.

[38] As we have indicated, the benefit of stare decisis is that it "furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . eliminates the need to relitigate every relevant position in every case; and . . . maintains public faith in the judiciary as a source of impersonal and reasoned judgements." State v. Garcia, 96 Hawai'i 200, 205, 29 P.3d 919, 925 (2001) (citing Morgane v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970)). We have also established that "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." Id. (citing Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991)). "When the court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." Id. (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992)).

[39] "Sui generis" means a legal concept that is "of its own kind or class, unique or peculiar." Black's Law Dictionary 1572 (9th ed. 2009).

VIII.

Article XI, section 1 of the Hawai‘i Constitution provides that all public natural resources are held in trust by the State:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

(Emphasis added.)[40] Article XI, section 7 of the Hawai‘i Constitution concerns water resources specifically, and states:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

(Emphasis added.)

Accordingly, Waiāhole I held that "[a]rticle XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i." Waiāhole I, 94 Hawai‘i at 132, 9 P.3d at 444. The

[40] These provisions are repeated here for the convenience of the reader.

public trust doctrine embodied in article XI, sections 1 and 7 of the Hawai'i Constitution is implemented through chapter 174C. In re Contested Case Hearing on Water Use Permit Application, 116 Hawai'i 481, 174 P.3d 320 (2007) ("It is now well established that the public trust doctrine is a fundamental principle of constitutional law in Hawai'i, and that its principles permeate the State Water Code.") (internal citations omitted).[41] As noted, supra, HRS § 174C-12 affords "[j]udicial review of rules and orders of the [Commission]" under chapter 91, and "[a]ny person aggrieved . . . in a contested case . . . is entitled to judicial review . . . ." See Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15 ("Pursuant to HRS § 174C-12, HRS chapter 91 governs our review of the Commission's decision."). HRS § 91-14(g)(1) specifically provides for judicial review of an agency decision if it is, inter alia, "[i]n violation of constitutional or statutory provisions." Consequently, jurisdiction over the Commission's decision with respect to the IIFS is available pursuant to HRS § 91-14.

IX.

The public trust doctrine arose in the regulation of

[41] See also In re Waiola O Molokai, Inc., 103 Hawai'i 401, 429, 83 P.3d 664, 692 (2004) ("[T]his court traced the historical development of the public trust doctrine in Hawai'i and reasoned therefrom that . . . the legislature, pursuant to the constitutional mandate of article XI, section 7, incorporated public trust principles into the [State Water] Code."); Waiāhole I, 94 Hawai'i at 130, 9 P.3d at 442 ("[T]he legislature appears to have engrafted the [public trust doctrine] wholesale in the [State Water] Code.").

navigable waters, as discussed in Waiāhole I.[42] 94 Hawai'i at 127-28, 9 P.3d at 439-40. The modern version of the doctrine originated in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892). In that case, the state legislature conveyed land submerged in Lake Michigan to a railroad. Id. at 442-43. The Court held that the state's title in such lands was held in trust for the people of the state. Id. at 453. It said: "The state can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers[.]" Id.

As Waiāhole I further explained, this court adopted the public trust doctrine in King v. Oahu Railway & Land Co., 11 Haw. 717 (1899). In King, this court agreed that "[t]he people of Hawai'i hold the absolute rights to all its navigable waters and the soils under them for their own common use. The lands under the navigable waters in and around the territory of the Hawaiian Government are held in trust for the public uses of navigation." Waiāhole I, 94 Hawai'i at 128, 9 P.3d at 440 (quoting King, 11 Haw. at 725). It may be inferred from the foregoing that where a public trust exists the state has an inherent obligation to

[42] The majority addresses the public trust briefly in its jurisdictional analysis, stating that "the ramifications of an erroneous IIFS could offend the public trust, and is simply too important to deprive parties of due process and judicial review." (Majority at 37) (emphasis added).

manage public resources to preserve them for the people and to protect the common good.

X.

However, in Waiāhole I, this court said that constitutional due process mandated a hearing with respect to petitions to amend IIFS "because of the individual instream and offstream 'rights, duties, and privileges' at stake." Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 431 n.15 (emphasis added). This proposition necessarily raised the question of who can bring suit to enforce the public trust. Under our precedent, individuals may sue to vindicate the rights of the public if the individual can demonstrate that he or she has suffered an "injury in fact." Akau v. Olohana Corp., 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982). This court has held "that a member of the public has standing to sue to enforce the rights of the public even though [that person's] injury is not different in kind from the public's generally, if he [or she] can show that he [or she] has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action." Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989).

For example, in Akau, 65 Haw. at 384-85, 652 P.2d at 1132, the plaintiffs brought a class action to enforce alleged

rights-of-way along once public trails to the beach that crossed the defendants' property. The plaintiff class was composed of Hawai‘i residents who used or were deterred from using the trails and of all persons who owned land or resided in the area and used or were deterred from using the trails. Id. The defendants alleged that only the State could bring an action against landowners to enforce the public's right of beach access. Id. at 386, 652 P.2d at 1133. This court held that the plaintiffs had standing, explaining that "[c]laims of harm to public trust property is another area where courts are expanding standing," and that "[t]his court has been in step with the trend away from the special injury rule towards the view that a plaintiff, if injured, has standing." Id. at 387-88, 652 P.2d at 1134 (citations omitted). Otherwise, it would be "unjust to deny members of the public the ability to enforce the public's rights when they are injured." Id. at 388, 652 P.2d at 1134. This court held, therefore, that "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact[.]" Id.

For standing purposes, injury in fact requires a showing that the plaintiff has suffered actual or threatened injury as a result of the defendant's conduct, that the injury is

traceable to the alleged action, and that the injury is likely to be remedied by a favorable judicial decision. Id. at 389, 652 P.2d at 1134-35. However, Waiāhole I did not mention the requirement of an injury in fact, rendering the reference to "individual instream and offstream 'rights, duties, and privileges[,]'" see Waiāhole I, 94 Hawai'i at 119 n.15, 9 P.3d at 409 n.15, ambiguous.[43]

Assuming the necessity of applying an injury in fact test to Petitioners, Joseph Alueta (Alueta), a member of Hui, did submit testimony that he and his wife, who is native Hawaiian, live on property that borders Waihe'e Stream. Alueta stated that he and his family seek water from the Waihe'e Stream to grow taro and to generate hydroelectricity for their home. He also testified that additional water from the stream was needed in order for his children "to play [in the stream] and [for his family] simply [to] enjoy the sounds and beauty of the stream flow." However, this is not possible in the stream's "artificially diminished condition." Alueta's testimony may

[43] Waiāhole I cites Puna Geothermal for the proposition that a hearing was required because of the "rights, duties, and privileges" at stake. However, in Puna Geothermal, in contrast to Waiāhole I, there was a specific interest identified and a particular party, i.e. PVG, whose rights were at stake. As noted supra, PGV "sought to have the legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents of Puna," and for that reason a contested case hearing was required. Puna Geothermal, 77 Hawai'i at 70, 881 P.2d at 1216. Waiāhole I used the "rights, duties, and privileges" language, which in Puna Geothermal described the interests of PVG, and ascribed it to the undifferentiated interests of the various community organizations that sought to have the Commission amend the IIFS.

satisfy the three-prong injury-in-fact test.[44] Similarly, there is testimony in the record from several plaintiffs who are native Hawaiian and who claim they need more water from the Nā Wai ʻEhā system in order to grow taro and to exercise their native Hawaiian rights. While independent grounds based in HRS Chapter 174C and article XII, section 7 exist for invoking jurisdiction over such claims, see discussion supra, native Hawaiians are also cloaked with the rights of the public in general in the public trust, see Waiāhole I, 94 Hawaiʻi at 136, 9 P.3d at 448 ("[E]xercise of [n]ative Hawaiian and traditional and customary water rights [is] a public trust purpose").

In environmental cases, and in particular as to standing in those cases, this court has stated that "in applying this three-part test in cases involving environmental concerns and native Hawaiian rights," this court's opinions have moved "from 'legal right' to 'injury in fact' as the . . . standard . . . for judging whether a plaintiff's stake in a dispute is sufficient to invoke judicial intervention[,] from 'economic harm

[44] First, as a nearby landowner, Alueta claims his children have been denied the opportunity to play in the stream and his family has been denied enjoyment of the sounds and beauty of the Nā Wai ʻEhā waters. Accordingly, Alueta and his family could have sufficiently alleged actual injury. See Akau, 65 Haw. at 389, 652 P.2d at 1134-35. Further, the injury alleged by Alueta may be "traceable to the alleged action," in this case, the diversion of the Nā Wai ʻEhā waters and the Commission's alleged failure to protect the instream flow of the Nā Wai ʻEhā. See id. Finally, Alueta's injury is redressable, and likely to be remedied by a favorable judicial decision insofar as requiring the Commission account for the public trust could ostensibly ensure that Nā Wai ʻEhā waters are protected to the greatest extent possible. See id. As such, the testimony of Alueta could be sufficient to establish injury in fact.

... [to inclusion of] '[a]esthetic and environmental well-being' as interests deserving of protection, . . . and to the recognition that 'a member of the public has standing to ... enforce the rights of the public even though his [or her] injury is not different in kind from the public's generally, if he [or she] can show that he [or she] has suffered an injury in fact[.]'" Sierra Club v. Hawai'i Tourism Authority ex rel Bd. of Dirs., 100 Hawai'i 242, 251, 59 P.3d 877, 886 (2002) (plurality opinion) (citations omitted). However, "while the basis for standing has expanded in cases implicating environmental concerns and native Hawaiian rights, plaintiffs must still satisfy the injury-in-fact test."[45] Id.

[45] In Sierra Club, the plurality noted many other cases in which injuries were sufficiently concrete to establish injury in fact. See Sierra Club v. Hawai'i Tourism Authority ex rel Bd. of Dirs., 100 Hawai'i 242, 251, 59 P.3d 877, 886 (2002) (plurality opinion) (citing Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 35-36, 7 P.3d 1068, 1072-73 (2000) (petitioner had standing to challenge land use reclassification to build 530 single family homes, 500 low-rise multi-family units, a 36-hole golf course, an 11-acre commercial center, a 3-acre recreation club, and a golf clubhouse on historic lava flow region associated with native Hawaiian culture and history, linked to King Kamehameha I, Kameeiamoku, and his twin brother); Mahuiki v. Planning Comm'n, 65 Haw. 506, 515, 654 P.2d 874, 880 (1982) (petitioners, adjacent landowners, had standing to invoke judicial review to challenge "decision to permit the construction of multi-family housing units on undeveloped land in the special management area" because injury was considered "personal" or "special"); Akau, 65 Haw. at 384, 390, 652 P.2d at 1132, 1135 (plaintiffs had standing to bring class action to enforce rights-of-way along once public trails to the beach that crossed defendants' property because "difficulty in getting to the beach hampers the use and enjoyment of it and may prevent or discourage use in some instances"); Life of the Land v. Land Use Comm'n, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979) (plaintiff had standing to challenge development project for which variance or modification was sought to include a high density multiple-family dwelling because "urbanization w[ould] destroy beaches and open space now enjoyed by members and decrease agricultural land presently used for the production of needed food supplies," where members resided in "immediate vicinity" of construction area); East Diamond Head Ass'n. v. Zoning Bd. of Appeals, 52 Haw. 518, 521-22, 479 P.2d 796, 798-99 (1971) (appellants had standing to challenge movie operation that interfered (continued...)

XI.

The testimony of the members of Hui/MTF who are not native Hawaiians, other than Alueta, did not establish individual injury in fact claims that represented similar interests in the general public in connection with the various public trust purposes. The State Water Code lists several protected instream uses, which

> include, but are not limited to: (1) Maintenance of fish and wildlife habitats; (2) Outdoor recreational activities; (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) Aesthetic value such as waterfalls and scenic waterways; (5) Navigation; (6) Instream hydropower generation; (7) Maintenance of water quality; (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and (9) The protection of traditional and customary Hawaiian rights.

HRS § 174(c)(3). In particular, the definition of instream flow standard states that it is "a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses." HRS § 174(c)(3) (emphasis added). Likewise, HRS § 174-2 provides:

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[45](...continued)
with the enjoyment of their property because "evidence of an increase in noise, traffic, and congestion . . . inconvenience by electrical and telephone work crews, and a fear that studio's facilities would permanently remain and detract from the aesthetic residential character of the neighborhood" showed that each appellant was a "person aggrieved"); Dalton v. City and Cnty. of Honolulu, 51 Haw. 400, 403, 462 P.2d 199, 202 (1969) (petitioners living across the street from proposed highrise apartment building site had standing because restricted scenic view, limited open space, and increased population in the area created a "concrete interest" in a "legal relation") (internal quotation marks and citation omitted)).

> The [S]tate [W]ater [C]ode shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation.

(Emphasis added.) Here, individuals did not assert denial of the several uses of the waters, such as the protection of fish and wildlife[46] uses, and except for Alueta, perhaps, did not attempt to prove injury in fact as a basis for standing.

In Sierra Club, the plaintiffs claimed that an environmental assessment (EA) should have been conducted by Respondent Hawai'i Tourism Authority (HTA) prior to its letting of a contract for tourism marketing services. Sierra Club, 100 Hawai'i at 242, 59 P.3d at 877 (plurality opinion). The plurality concluded that plaintiff's affidavits concerning "traffic congestion and crowded recreation areas lack sufficient specificity to be accepted as factual allegations of injury," because "[i]nsofar as the affidavits assert that the persons observed in recreational areas were tourists, the affiants fail[ed] to present any facts demonstrating the basis for their conclusions, much less that the presence of such tourists was the

[46] However, Mr. Stanley J. Faustino, a native Hawaiian, testified that additional surface water was necessary in order to protect various fish species that were gathered by native Hawaiians for their traditional practices.

result of the HTA's marketing program." Id. at 251, 59 P.3d at 886. Here, it does not appear that Petitioners focused on establishing injury in fact with respect to the instream protected uses of water listed in the State Water Code. It would seem, that, as in Sierra Club, that Petitioners' allegations may be insufficient to establish injury in fact.

XII.

However, the legal nature of water is that it is not subject to private ownership but rather that its dominant purpose is use for the common good. In McBryde this court observed that the right to water, being one of the most important usufruct[47] of lands, was said to be "specifically and definitely reserved for the people of Hawai'i for their common good in all of the land grants." 54 Haw. at 186, 504 P.2d at 1338. McBryde held that "right to water was not intended to be, could not be, and was not transferred . . . and the ownership of water in natural watercourses and streams and rivers remained in the people of Hawai'i for their common good." Id. at 186-87, 504 P.2d at 1339. Consequently, "[n]o one may acquire property to running water in a natural watercourse; [] flowing water was publici juris; and [] it was common property to be used by all who had a right of

[47] "Usufruct" is defined as "a right for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it, but allowing for any natural deterioration in the property over time." Black's Law Dictionary 164.

access to it, as usufruct of the watercourse." Id. at 187, 504 P.2d at 1339. Therefore, water, by its nature, is inherently intended for public use, and not subject to ownership by private interests to the exclusion of the public.

In Robinson, this court elaborated on this concept. "[A] change in any aspect of the utilization of a private water right has always been understood as dependent upon such a change not injuriously affecting the rights of others." Robinson, 65 Haw. at 650 n.8, 658 P.2d at 295 n.8. Robinson concluded that because water is intended for public use, "[t]he rights of others which were to be respected were not limited to a specified quantity of water." Id. "Instead, the scope and nature of such rights also included interests in the means of any diversion and the purposes to which the water was applied." Id. "These private usufructory interests were not so broad as to include any inherent enforceable right to transmit water beyond the lands to which such private interests appertained." Id. at 648, 658 P.2d at 295.

XIII.

The consequence of setting an IIFS without regard to the public trust uses of the waters affected is that it may be too late to protect the public interest during the permitting process. The Commission argues that the IIFS does not affect individual rights because the IIFS only establishes the flow of

water in streams and not how much water individuals may divert from the streams. But the quantity of water that must be left in a stream pursuant to the IIFS determination will necessarily affect the amount of water that will be diverted for off stream uses and the amount that is left for instream uses. Absent consideration of the effect the IIFS may have on protected instream uses, the Commission's setting of the IIFS may violate the principles stated in McBryde and Robinson of preserving the right to water for the "common good," McBryde, 54 Haw. at 186, 504 P.2d at 1338, and of preventing "private water rights" from "injuriously affecting [] the rights of others," Robinson, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8.

The injury in fact test relates essentially to individual harm and therefore emphasizes the private interest in water. See Akau, 65 Haw. at 389, 652 P.2d at 1134-35 (individual harm must be shown to establish injury in fact). Such a formulation would appear ill-suited as a basis for determining standing to sue to vindicate the public trust doctrine. With respect to the public trust, the common good is at stake, and this court is duty-bound to protect the public interest. See Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455 ("Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the

public trust. . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.") (quoting Arizona Cent. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991)).

The rationale in two California cases, National Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983), and Marks v. Whitney, 491 P.2d 374 (Cal. 1971), the first of which is cited approvingly by Waiāhole I, as "the leading decision applying the public trust to water resources[,]" 94 Hawai'i at 140, 9 P.3d at 452, best conforms to the principles embodied in McBryde and Robinson. In Audubon, the plaintiffs, an organization of bird watchers, filed suit to enjoin the Water and Power Department of the City of Los Angeles (the Department) from diverting four of five streams flowing into a lake. See Audubon, 658 P.2d at 712. This caused the level of the lake to drop and compromised the scenic beauty and ecological value of the lake. Id. The California Supreme Court entertained the suit and held that the state had to "bear in mind its duty as trustee to consider the effect of the taking on the public trust, and to preserve, so far as consistent with the public interest, the uses protected by the trust." Id. (internal citation omitted). In a footnote, that court noted that the Department had argued that plaintiffs lacked standing, but it rejected the Department's argument:

> Judicial decisions . . . have greatly expanded the right of a member of the public to sue as a taxpayer or private attorney general. (See Van Atta v. Scott (1980) 27 Cal.3d 424, 447-450, 166 Cal.Rptr. 149, 613 P.2d 210, and cases there cited.) Consistently with these decisions, Marks v. Whitney, supra, 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374, expressly held that any member of the general public (p. 261, 98 Cal.Rptr. 790, 491 P.2d 374) has standing to raise a claim of harm to the public trust. (Pp. 261-262, 98 Cal.Rptr. 790, 491 P.2d 374; see also Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183, 161 Cal.Rptr. 466, 605 P.2d 1, in which we permitted a public interest organization to sue to enjoin allegedly unreasonable uses of water.) We conclude that plaintiffs have standing to sue to protect the public trust.

Id. at 717 n.11. (emphases added). That court ultimately held that the state must reconsider the allocation of the waters in the streams and the lake, taking into account the impact on the lake's environment. Id. at 729.

In Marks, cited in Audubon, the California Supreme Court held that members of the public had standing to enforce the public trust. Marks, 491 P.2d at 381. In that case, the plaintiff brought a quiet title action to settle a boundary line dispute. Id. at 377. Defendant objected on the ground that his rights as a littoral owner[48] and as a member of the public in the adjacent tidelands and navigable waters covering them would be injured. Id. The trial court concluded that the defendant did not have standing, as a member of the public, to raise the public trust issue. Id. The California Supreme Court reversed, stating that members of the public had been permitted to bring actions

[48] "Littoral" is defined as "of or relating to the coast or shore of an ocean, sea, or lake." Black's Law Dictionary 1018.

"to enforce a public right to use a beach access route"; to quiet title to private and public easements in a public beach; and to restrain improper filling of a bay and to secure a general declaration of the rights of the people to the waterways and wildlife areas of the bay. Id. at 381 (internal citations omitted). Members of the public had also been allowed to assert "the public trust easement for hunting, fishing and navigation . . . and to navigate on shallow navigable waters in small boats[.]" Id. at 381 (internal citations omitted).

Pursuant to the rationale in these cases, a public trust claim can be raised by members of the public who are affected by potential harm to the public trust. Waiāhole I's express approval of Audubon, see 94 Hawai'i at 140, 9 P.3d at 452, a case holding that "any member of the general public has standing to raise a claim of harm to the public trust[,]" 658 P.2d at 717 n.11 (citation omitted)), furnishes a basis for Waiāhole I's view of jurisdiction in this case. Audubon and Waiāhole I, by implication, do not require a showing that plaintiffs have suffered injury in fact. Instead, "any member of the general public" had standing to raise a claim of harm to the public trust. Id.

When Petitioners asked the Commission to set the IIFS claiming that the current level of surface water in the Nā Wai 'Ehā system was injurious to interests protected by the public

trust, they, as "member[s] of the general public," asserted "a claim of harm to the public trust." Id. Cf. Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982) ("Where the interests at stake are in the realm of environmental concerns we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.") (internal citation and quotation marks omitted). Petitioners, thus, as members of the public who are affected by the setting of an IIFS, were entitled to a contested case hearing of their claim that amending the IIFS was necessary in order to protect the public trust. Accordingly, this court has subject matter jurisdiction, see discussion supra, and Petitioners have standing to sue.

XIV.

With respect to evaluating the merits of the Commission's D&O, the Commission must (1) "begin with a presumption in favor of public use, access, and enjoyment[,]" Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454; (2) hold private commercial uses to a "higher level of scrutiny[,]" id.; and (3) make its decision "with a level of openness, diligence, and foresight commensurate with the high priority [public rights in a resource] command under the laws of our state[,]" id. at 143, 9 P.3d at 455. In my view, the Commission did not adequately adhere to this formula when coming to its conclusions, and failed

to demonstrate the basis for its rulings on several important issues.

XV.

An administrative agency's findings and conclusions must be (1) reasonably clear to enable the parties and the reviewing court to ascertain the basis of the agency's decision, see In re Water Use Permit Applications, 105 Hawai'i 1, 27, 93 P.3d 643, 669 (2004) (Acoba, J., concurring) (Waiāhole II) ("'Findings and conclusions by an administrative agency must be reasonably clear to enable the parties and the court to ascertain the basis of the agency's decision.'") (quoting Igawa v. Koa House Rest., 97 Hawai'i 402, 412, 38 P.3d 570, 580 (2001) (Acoba, J., concurring)); (2) sufficient to enable the reviewing court to track the steps by which the agency reached its decision, id. at 27, 93 P.3d at 669 (Acoba, J., concurring) ("'An agency's findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.'") (quoting Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 230, 751 P.2d 1031, 1034 (1988)); and (3) expressly set out to assure reasoned decision making by the agency took place, see Nakamura v. State, 98 Hawai'i 263, 276, 47 P.3d 730, 743 (2002) (Acoba, J., concurring and dissenting) ("[T]he purpose behind requiring agencies to expressly set out their findings is 'to assure reasoned decision making by the agency and enable

judicial review of agency decisions.'") (quoting In re Application of Hawaii Elec. Light Co., 60 Haw. 625, 642, 594 P.2d 612, 623 (1979)).

Furthermore, "[c]larity in an agency's decision is all the more essential where the agency acts as a public trustee and 'is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.'" Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653 (quoting Save Ourselves v. Louisiana Env't Control Comm'n, 452 So.2d 1152, 1159-60 (La. 1984)). In the instant case, respectfully, the Commission does not appear to have applied the precepts set forth in Waiāhole I. Therefore, it cannot be concluded with confidence that the Commission gave adequate and proper consideration to several important issues.

XVI.

A.

The balancing process that weighs public against private purposes must "begin with a presumption in favor of public use, access, and enjoyment." Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454 (citing State v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) ("The State as trustee has the duty to protect and maintain the trust [resource] and regulate its use. Presumptively, this duty is to be implemented by devoting the [resource] to actual public uses, e.g., recreation.")).

Furthermore, where uncertainty about present or potential threats of serious damage or environmental degradation exists, "a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource."[49] Id. at 154, 9 P.3d at 466 (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1152-56 (D.C. Cir. 1976) (relying on the statutory "margin of safety" requirement in rejecting the argument that the agency could only authorize standards designed to protect "clearly harmful health effects")).

However, here the Commission merely recited the law, stating that "there is also a presumption in favor of the streams, whose maintenance in their natural states is a public trust purpose[.]" This recitation, without further explanation of how that presumption affected the Commission's decision with respect to restoring stream flows for public use, access, and enjoyment, does not amount to an actual application of the required standard. The Commission had a duty to expressly set forth findings and conclusions from which this court can

[49] In Waiāhole I, this court adopted the view that the "lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible. . . . Uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." 94 Hawai'i at 157, 9 P.3d at 467.

This court therefore concluded that "where uncertainty exists, a trustee's duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource." Id. at 154, 9 P.3d at 466 (citing Lead Indus. Ass'n v. EPA, 647 F.2d 1130, 1152-1156 (D.C. Cir. 1980)).

ascertain the presumption was applied in favor of the public by the Commission and track the steps the Commission followed in balancing that with private interests. See Waiāhole II, 105 Hawai'i at 27, 93 P.3d at 669 (Acoba, J., concurring); see also Nakamura, 98 Hawai'i at 276, 47 P.3d at 743 (Acoba, J., concurring and dissenting). The Commission's role as a public trustee for the Nā Wai 'Ehā waters also rendered it "duty-bound to demonstrate that it ha[d] properly exercised the discretion vested in it by the constitution and the statute." Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653 (internal quotations omitted).

B.

In Waiāhole I, this court established that the public trust "effectively prescribes a 'higher level of scrutiny' for private commercial uses." Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454. Accordingly, while the Commission carries the burden of justifying its IIFS, "[i]n practical terms, . . . the burden [of justifying private commercial uses] ultimately lies with those seeking to justify them in light of the purposes protected by the trust." Id. at 142, 9 P.3d at 454. Justification of a proposed offstream use requires permit applicants to "demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs." Id. at 162, 9 P.3d at 474. This process entails

"(1) identifying instream and potential instream uses, (2) assessing how much water those instream uses require, and (3) justifying their proposed uses in light of existing or potential instream values." Id. at 197, 9 P.3d at 509 (Ramil, J., dissenting).

Nonetheless, the Commission's ultimate decisions, particularly its treatment of HC&S, do not reflect the actual application of a higher level of scrutiny or the enforcement of the requirement that the permit applicants "demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs." Id. at 162, 9 P.3d at 474. The Commission mentioned the required "higher level of scrutiny" for private commercial users in the introduction section of the D&O. It also acknowledged that "private commercial [users] bear the burden of justifying their uses in light of the purposes protected by the trust," and criticized WWC's Proposed IIFS as "revers[ing] this . . . burden of proof" and failing to provide a "'reason and necessity'" for accommodating WWC's diversions. However, the Commission did not require HC&S to explain the "reason and necessity" for diverting stream water when available and practicable "[a]lternative sources for HC&S include[d] Well No. 7 and recycled wastewater."

Despite HC&S's long history of pumping from Well No. 7,[50] the Commission's D&O would permit HC&S to pump only 9.5 mgd from Well No. 7. This was a significant decrease from the 14 mgd proposed by Commissioner Miike, who recommended requiring that HC&S mitigate its stream diversion by reasonably maximizing the use of this alternative source. Miike stated in his dissent that he and the Commission "agreed that Well No. 7 should be used only during dry-weather conditions, when available stream flows are insufficient to meet offstream requirements . . . [but] the majority arbitrarily reduce[d] Well No. 7's capacity [by] half."

During the hearings, HC&S offered four explanations for its position that pumping heavily from Well No. 7 would be impracticable: (1) HC&S would incur an estimated $1 million in capital costs to install new pipelines and pumps; (2) HC&S did not have adequate electrical power to run the pumps on a consistent and sustained basis, and upgrading its equipment to enable additional pumping would result in substantial costs and jeopardize $1.8 million in annual revenues from its contract with Maui Electric Company; (3) increased pumping would reduce the recharge from the imported surface water that sustains the Kahului aquifer; and (4) increased pumping would increase the

[50] For the past 25 years, HC&S has minimized the use of Well No. 7, but it has used the well heavily on two recent occasions: for six months from June through November of 1996 HC&S pumped an average of 25 mgd, and for six months from May through October 2000 HC&S pumped an average of 18.9 mgd.

salinity of the water. The Commission only addressed the first three of HC&S's proposed reasons in its D&O, and then concluded that "the practical alternative from Well No. 7 is [a lower amount] than historic rates."

In response to the Commission's treatment of HC&S's first two reasons, which were both cost-related, Miike stated that the Commission "without any credible foundation chose 9.5 mgd as the practical alternative from Well No. 7 to protect HC&S's interests, to the detriment of stream resources." The Commission's decision seems to have been driven primarily by the threat of costs and lost revenue to HC&S rather than by a "heightened level of scrutiny" for HC&S's proposed private commercial use of the water. In its findings, the Commission stated that "[a]n applicant's inability to afford an alternative source of water, standing alone, does not render that alternative impracticable." (Quoting Waiāhole II, 105 Hawai'i at 19, 93 P.3d at 661.) The Commission further noted that it was "not obliged to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake." (Quoting Waiāhole I, 94 Hawai'i at 165, 9 P.3d at 477.) Additionally, the Commission concluded that

> HC&S's estimate of electrical costs of pumping Well No. 7, without any information about the costs or benefits of the other options, might be a factor in an economic analysis, but does not substitute for the analysis. HC&S has not

> analyzed the economic impact of increased water costs on its business and has done no financial analysis of the impact of having to pay for water at the agricultural rate that other farmers pay.

However, the Commission ultimately decided that 9.5 mgd was a reasonable minimum amount, citing its "decision to place the full burden of remedying [system] losses immediately upon HC&S" as a reason for this lenience and clarifying that the Commission would not require HC&S to incur capital costs, only the costs of additional energy for pumping.

Even if the costs necessary for HC&S to utilize alternative sources would be as great as HC&S contends, this court has adopted the view that if a proposed use would damage a water resource through excessive diversion, the use "should not be permitted, no matter how useful the application of that water might be to a given enterprise . . . [and] no further balancing occurs at that extreme level of harm."[51] Waiāhole I, 94 Hawai'i at 146 n.46, 9 P.3d at 458 n.46. This court has also "rejected the idea of public streams serving as convenient reservoirs for offstream private use." Waiāhole I, 94 Hawai'i at 156, 9 P.3d at 468 (quoting Robinson, 65 Haw. at 676, 658 P.2d at 311 (maintaining that private parties do not have the unfettered right "to drain rivers dry for whatever purposes they see fit")).

[51] The court cited to Douglas W. MacDougal, Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawaii's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 46-47 n.222 (1996).

The Commission failed to resolve these considerations with the required "higher level of scrutiny" for private commercial uses.

The Commission's findings of fact and several of its conclusions of law as to HC&S's third purported reason are merely restatements of HC&S's testimony.[52] Most notably, the Commission simply adopted as fact HC&S's testimony that increased pumping would diminish Kahului aquifer,[53] and failed to mention any of the evidence in the record to the contrary, such as OHA's Exhibit C-90, a letter from HC&S's Senior Vice President to the Commission stating that its sixteen wells in the Kahului and Paia areas "all have been in place and operated for many decades without any long term deterioration in water quality."

The Commission was silent regarding HC&S's fourth argument that increased pumping could increase the salinity of the Kahului aquifer's water stores, which HC&S presented in its Answering Brief and again in its Proposed D&O and its Exceptions

[52] The majority agreed that the Commission's findings were "plainly descriptions of testimony" and that "the Commission restated several of these 'findings,' indicating that the Commission adopted the testimony as fact." (Majority at 82.)

[53] The Commission listed HC&S's claims regarding the impracticability of pumping Well No. 7, and then concluded: "[t]he combined facts that the current sustainable yield of the aquifer is already being exceeded; that increased pumping from Well No. 7 may exacerbate that strain; and that the historically higher levels of pumping occurred during a period where furrow irrigation methods were affecting recharge rates for the aquifer, [suggest that] the practical alternative from Well No. 7 is lower than historic rates. Considering these uncertainties in combination with the Commission's decision to place the full burden of remedying [system] losses immediately upon HC&S, discussed intra, the practical alternative from Well No. 7 is deemed 9.5 mgd. This alternative will not require capital costs, only the costs of pumping." (Emphasis added.)

to the Hearings Officer's Proposed D&O. Petitioners took issue with this argument, pointing out that HC&S failed to introduce evidence which was admittedly within its possession that would either confirm or deny this argument (the salinity data for Well No. 7 from 1996 and 2000 when HC&S pumped Well No. 7 heavily). Also, Petitioners argued that "[t]he fact that HC&S chose not to introduce that evidence gives rise to the inference" that the evidence would not support HC&S's argument.[54] The Commission did not address either HC&S's salinity argument or Petitioners' objection to that argument, and ultimately chose not to address this issue in its analysis.

The Commission's treatment of HC&S's third argument and silence on HC&S's fourth argument suggest that the Commission based its decision largely on HC&S's first and second cost-related reasons, and failed to expressly set out findings and conclusions from which this court can track the Commission's reasoning. By arriving at a decision that was inconsistent with its findings regarding practicable alternatives, simply reiterating HC&S's position that increased pumping might damage the Kahului aquifer as "fact" without mentioning conflicting evidence, and neglecting to question the veracity of HC&S's claim

[54] According to Hui/MTF, "[a]s OHA pointed out in its Opening Brief, the Well No. 7 salinity data from 1996 and 2000, when HC&S pumped Well No. 7 heavily for sustained periods, would either confirm HC&S's salinity argument or it would not. The fact that HC&S chose not to introduce that evidence gives rise to the inference that it would not."

that increased pumping might cause the salinity of the aquifer to rise, the Commission failed to hold HC&S's intended private commercial use to the required "higher level of scrutiny." Waiāhole I, 94 Hawai'i at 142, 9 P.3d at 454. Therefore, we cannot be assured that the Commission has engaged in "reasoned decision-making." Nakamura, 98 Hawai'i at 276, 47 P.3d at 743 (Acoba, J., concurring and dissenting).

C.

In Waiāhole I, this court held that "the [S]tate may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455 (emphases added). The State "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 whenever feasible." Waiāhole I, 94 Hawai'i at 141, 9 P.3d at 453 (internal quotations and citations omitted).

In this regard, for example, the Commission failed to justify its decision not to restore any water to 'Īao and Waikapū Streams. All parties agreed that some water should be restored to 'Īao Stream, and all parties except for HC&S agreed that some water should be restored to Waikapū Stream. It is puzzling, then, that the Commission arrived at a decision that not only

conflicts with the recommendations of all or all but one of the parties, but also undeniably compromises public rights in water resources.

In discussing the basis of its decision, the Commission placed a singular emphasis on the "limited reproductive potential" these two streams offer for amphidromous species without an explanation as to why this particular instream use deserved such emphasis. Although the parties were in disagreement about whether a continuous flow from mauka to makai was actually necessary to sustain the amphidromous species,[55] the Commission decided that Waikapū Stream was not a good candidate for stream flow restoration because, as HC&S's expert testified, "Waikapū Stream may not have flowed continuously mauka to makai prior to the diversions[.]"

Because it is unknown whether Waikapū Stream would flow from mauka to makai if water were restored to it, all parties, as well as the Commission, acknowledged that, "ultimately, restoration of flow would [assess] whether [Waikapū] flows mauka to makai." Despite this consensus, the Commission decided without any apparent justification that "such an assessment [could] be deferred until some future time when the balancing of

[55] Hui/MTF's expert witness maintained that "the amphidromous life cycle requires continuous flow to link biologically the mountains (mauka) to the ocean (makai)." HC&S's expert witness disagreed, stating that "[i]t has not been definitively established that the life cycle of native Hawaiian amphidromous species absolutely depends on continuous mauka to makai flow."

instream values and offstream uses might be more favorable to such a controlled restoration." The Commission offered no explanation as to why a test flow could or should be postponed, or when "some future time" might be, demonstrating a lack of the "openness, diligence, and foresight" required when compromising public rights in a resource. The Commission also failed to discuss or analyze the ability of these streams to support other instream uses, see HRS § 174C-3, as required by HRS § 174C-71(2)(D).[56]

The Commission's unexplained focus on amphidromous species and its failure to adequately weigh other instream uses without expressly setting out findings and conclusions which would enable the court to ascertain the basis of its decision violate its duty as a public trustee for the Nā Wai ʻEhā waters to "demonstrate that it properly exercised the discretion vested in it by the constitution and [HRS §§ 174C-3 and 174C-71]" See Waiāhole II, 105 Hawaiʻi at 11, 93 P.3d at 653.

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[56] HRS § 174C-71(2)(D) provides:

> The commission shall establish and administer a statewide instream use protection program . . . [and] shall:
>
> (2) Establish interim instream flow standards;
>
> (D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses[.]"

(Emphasis added.)

XVII.

Article XI, sections 1 and 7 of the Hawai‘i Constitution mandate that the State conserve and protect water resources as a trustee for the public and protect traditional and customary native Hawaiian rights. Additionally, as mentioned, supra, the State Water Code, HRS § 174C-101 (c)-(d), provides protection for native Hawaiian rights to water.[57]

In his Proposed D&O, Commissioner Miike noted that, "[i]n addition to the users identified . . . who did not testify about their uses, there is evidence in the record that there are other existing kuleana users who did not testify." Miike estimated that "kuleana users who did not testify about their uses have a combined total of at least 109.39 acres." To address the needs of these unidentified kuleana users, Miike argued that "the estimated 6.84 mgd reportedly being provided to kuleana

[57] To reiterate, HRS § 174C-101(c) and (d) provide:

> (c) Traditional and customary rights of ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o‘opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.
>
> (d) The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.

(Emphases added.)

users currently is reasonable and sufficient . . . to satisfy the current and planned needs of the kuleana users who came forward and testified regarding their uses . . . [but] does not include any amount to satisfy the needs of existing kuleana users who did not testify, and does not take into account new users who may seek to exercise their appurtenant and/or traditional and customary rights in the future." (Emphasis added.) Accordingly, Miike concluded that if "the Commission intends to make a 'collective assessment' of the reasonable needs of all Nā Wai ʻEhā kuleana users, as opposed to just those who testified, the assessment would obviously have to be increased substantially."

Indeed, the Commission failed to adequately weigh, among other instream uses, the feasibility of preserving the traditional and customary native Hawaiian rights of those kuleana users who did not testify at the contested case hearing but who are afforded the protections enumerated in the Constitution and the State Water Code. See HRS § 174C-101(c)-(d) ("Traditional and customary rights of ahupuaʻa tenants who are descendants of native Hawaiians . . . shall not be abridged or denied by this chapter. . . ."). The Commission stated that "[e]ven without recognized appurtenant rights, current users of Nā Wai ʻEhā waters qualify as existing uses if their WUPAs are filed with and accepted by the Commission by April 30, 2009 . . . and kuleana landowners who successfully petition for recognition of their

claimed appurtenant rights may subsequently submit WUPAs for the amounts of water recognized as accompanying those rights." However, as noted before, HRS § 174C-101(d) expressly protects even those kuleana users who did not come forward to testify at the contested case hearing or apply for Water Use Permits. HRS § 174C-101(d) ("The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter") (emphasis added). Again, by not addressing the rights of these unidentified kuleana users, the Commission neglected "to demonstrate that it ha[d] properly exercised the discretion vested in it by the constitution and the statute.'" Waiāhole II, 105 Hawai'i at 11, 93 P.3d at 653 (quoting Save Ourselves, 452 So.2d at 1159-60).

The Commission merely stated that the "number of future 'kuleana' users beyond those identified at the [contested case hearing] is unknown." Petitioners suggested that the testifying kuleana users' claims that there was inadequate water evidenced the existence of numerous other unidentified kuleana users who also shared the water.[58] The Commission instead concluded that

[58] Petitioners asserted that the testifying kuleana users' claims that there was inadequate water was due to the "undisputed existence of other existing kuleana users other than those who testified in this proceeding. Many of the community witnesses identified other kuleana users on their 'auwai." Petitioners also pointed out that "WWC's own list of kuleana users . (continued...)

the lack of adequate water was due to substantial system losses,[59] and omitted any mention or projection of how many unidentified kuleana right-holders might be affected.

This court has held that "the Commission must not relegate itself to the role of a mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." Waiāhole I, 94 Hawai'i at 143, 9 P.3d at 455 (emphasis added) (quoting Save Ourselves, 452 So.2d at 1157). The public trust also "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 . . . [and] requires planning and decisionmaking from a global, long-term perspective." Id. at 143, 9 P.3d at 455 (emphasis added). The Commission neglected to adequately assess the feasibility of protecting traditional and

[58](...continued)
. . includes many more landowners and parcels beyond those covered by the testifying witnesses, and the Proposed Decision incorporates this information in its own tables[.]"

[59] The Commission estimated that current kuleana lands receive more than 130,000 to 150,000 gallons a day (gad) for their plots, or about 260,000 to 300,000 gad when adjusted for the 50 percent of time that no water is needed to flow into the plot. According to the Commission, this amount should be sufficient for taro cultivation, yet the kuleana users who testified at the contested case hearing indicated that water deliveries were inadequate. Therefore, the Commission concluded that "much of the water reported by WWC as being delivered to the kuleana lands is being lost between the kuleana lands and WWC's ditches and reservoirs from which the kuleana ditches/pipes emanate."

customary rights of all kuleana users, and therefore violated its affirmative duty to protect public trust uses whenever feasible. Id. at 139, 9 P.3d at 451. Under the circumstances, this court cannot be assured that the Commission has engaged in "reasoned decision-making." Nakamura, 98 Hawai'i at 276, 47 P.3d at 743 (Acoba, J., concurring and dissenting).

XVIII.

The Commission erred in failing to adhere to the balancing formula set out in Waiāhole I, which requires that the Commission (1) "begin with a presumption in favor of public use, access, and enjoyment[,]" 94 Hawai'i at 142, 9 P.3d at 454; (2) hold private commercial uses to a "higher level of scrutiny[,]" id.; and (3) make its decision "with a level of openness, diligence, and foresight commensurate with the high priority [public rights in a resource] command under the laws of our state[,]" id. at 143, 9 P.3d at 455. Consequently and respectfully, in my view, the Commission did not discharge its "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." Id. at 139, 9 P.3d at 451 (internal quotations and citations omitted).

/s/ Simeon R. Acoba, Jr.