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HUI HO'OPULAPULA NĀ WAI O PUNA

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Amended Interim Instream Flow Standards For ) the Surface Water Hydrologic Unit of Wailua ) (2040): Waikoko and North Fork Wailua ) Streams )	Case No.
)	HUI HO'OPULAPULA NĀ WAI O
)	PUNA'S PETITION REQUESTING A
)	CONTESTED CASE HEARING BEFORE
)	THE COMMISSION ON WATER
)	RESOURCE MANAGEMENT
)	

HUI HO'OPULAPULA NĀ WAI O PUNA'S PETITION REQUESTING A CONTESTED  
CASE HEARING BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

1. **Name:** Hui Ho'opulapula Nā Wai O Puna
2. **Address:** 4654 Hauaala Road, Kapa'a, Hawai'i 96746  
**Phone:** (808) 635-8290
3. **Attorney or Contact Person:** Isaac Moriwake (#7174) & Leinaala L. Ley (#9710)
4. **Address:** Earthjustice, Mid-Pacific Office, 850 Richard Street, Suite 400, Honolulu,  
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**Phone:** (808) 599-2436
5. **Subject Matter:** Amended Interim Instream Flow Standards For the Surface Water  
Hydrologic Unit of Wailua (2040): Waikoko and North Fork Wailua Streams ("Proposed  
IIFSs")

6. **Date of Public Hearing/Commission Meeting:** August 21, 2018

7. **What is the legal authority under which the proceeding, hearing or action is to be held or made (cite applicable section of constitution, statutes, or administrative rules):**

Hawai‘i Revised Statutes (“HRS”) § 174C-71, as interpreted by Hawai‘i Supreme Court precedent, is the legal authority for establishing interim instream flow standards (“IIFSs”). Hui Ho‘opulapula Nā Wai O Puna (the “Hui”) is entitled to a contested case hearing (“CCH”) in this IIFS proceeding under the due process clause of the Hawai‘i Constitution, art. I, § 5, in order to protect its members’ rights to exercise traditional and customary Native Hawaiian practices, *see id.* art. XII, § 7, and rights to a clean and healthful environment, *see id.* art. XI, § 9.

Traditional and customary Native Hawaiian practices are constitutionally protected interests that entitle the Hui’s members to a CCH on the amendment of the interim instream flow standards for Wai‘ale‘ale and Waikoko Streams. *See In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 242, 287 P.3d 129, 143 (2012) (“*Nā Wai ‘Ehā*”). The scope of Native Hawaiian rights and practices protected by article XII, section 7, includes spiritual reverence for sacred places such as Wai‘ale‘ale, and related religious and ceremonial practices. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 380, 363 P.3d 224, 228 (2015). Because an IIFS “necessarily” affects the amount of water available for exercise of Native Hawaiian rights, a CCH is constitutionally required on the Proposed IIFSs. *Nā Wai ‘Ehā*, 128 Hawai‘i at 242, 287 P.3d at 143.

The Hui’s members also have rights to a clean and healthful environment under article XI, section 9 of the Constitution, which mandates a CCH whenever the State makes binding decisions under “laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.” *In re Application of Maui Elec. Co., Ltd.* (“*MECO*”), 141 Hawai‘i 249, 264, 408 P.3d 1, 16 (2017) (quoting Haw. Const. art. XI, § 9). The State Water Code, HRS Chapter 174C, is indisputably a law relating to environmental quality and natural resources. *See, e.g.*, HRS § 174C-71(2) (referring to “the maintenance of proper ecological balance and scenic beauty” and “protect[ing] and improv[ing] the quality of waters”); *id.* § 174C-3 (defining beneficial instream uses to include “[m]aintenance of fish and wildlife habitats,” “[m]aintenance of ecosystems,” and “[a]esthetic values.”). Again, because an IIFS necessarily affects the amount of water available for protected instream uses, due process requires a CCH on the Proposed IIFSs, in order for the Hui’s members to protect their environmental rights in Wai‘ale‘ale and Waikoko Streams.

8. **Are you Hawaiian:**

Yes, members of the Hui are Native Hawaiian.

**9. What is the tax map key on which you reside?**

N/A

**10. What is the tax map key of the property considered in this issue?**

(4) 3-9-01:01 & (4) 4-2-01:02

**11. What is the tax map key of the property or properties which you own in the vicinity of the property considered in this issue?**

As indicated in paragraph 12, *infra*, several members of the Hui live within the Wailua hydrologic unit, which is relevant for participation of the Hui as a party to this proceeding. See Haw. Admin. R. (“HAR”) §13-167-54(a)(3).

**12. What, if any, activities have you engaged in on the property considered in this issue?**

Members of the Hui regularly travel to Wai‘ale‘ale and Waikoko streams, including the area of the diversions, to engage in ceremonial practices in and around the stream, to sing, chant and pray within this sacred area, to bathe and swim in the stream waters, to use the water for subsistence purposes including drinking, to gather plants that grow near the stream, and to enjoy and commune with nature, including listening to the sound of running water. Members of the Hui have also looked for native stream life like ‘o‘opu and ‘ōpae for gathering but have observed a decline in such species over the years. Some illustrative but nonexclusive examples of the activities that the Hui’s members undertake in the subject areas are provided below.

Debra Lee Jackson is Native Hawaiian and travels to Wai‘ale‘ale and Waikoko Streams approximately ten times per year to enjoy the stream waters, gather medicinal plants, and exercise traditional ceremonial practices related to the area. She engages in oli, pule and hi‘uwai in and around the stream, among other practices she is not at liberty to share at this time. Her ability to engage in these practices is impaired by the existing stream diversions, which are incompatible with her belief in the sacredness of the area, and also prevent full immersion in the stream waters at many times of the year. The diversion that drains Wai‘ale‘ale of its water and mana is deeply and spiritually offensive.

Sommer Ka‘uakahi was born, raised and continues to reside in Wailua. She is a descendant of area ali‘i and is able to trace her genealogical connection to different sites throughout the ahupua‘a. Growing up in Wailua, she was able to see water flowing in an ‘auwai near her home, which has since dried up. Her father and grandfather would discuss fishing areas in Wailua where there are no longer native fish. She regularly visits Wai‘ale‘ale and Waikoko Streams to enjoy the stream waters, commune with nature, and exercise traditional and customary subsistence practices, including drinking the flowing stream waters. She would like her and her ‘ohana to be able to gather, fish and cultivate

lo‘i using stream water, but the rivers in Wailua no longer support these activities. In addition to preventing her from exercising subsistence and agricultural practices, the water diversions are also a spiritual injury.

Noelani Josselin is a Native Hawaiian cultural practitioner and resident of Wailua who participates in traditional seasonal ceremonies in and around Wai‘ale‘ale Stream with kupuna and kia‘i of the area. Kupuna have taught her that Wai‘ale‘ale is the piko of life, and that the water from this source is spiritually cleansing. She believes that water should not be diverted from this sacred stream.

Bethan Chandler Baptista is Native Hawaiian and travels regularly to Wai‘ale‘ale Stream, in the area of the diversion, to swim in the stream with her family. She enjoys the peace and beauty of Wai‘ale‘ale, far away from crowds, and the sound of running water. She has seen the stream when the water level is extremely low, which interferes with her enjoyment of the area. She would like to be able to fish for ‘o‘opu and ‘ōpae, but there is not enough water in the stream year round to support the native stream life. Her husband fishes for uauoa and ‘aholehole further downstream from the stream diversion, and he has seen the populations of these fish decline over the years, along with the streamflow levels.

Tom Kealii Kanahēle was born on Niihau island in 1969 and is currently a resident of Lihue. As a child, he learned about the sacredness of Wai‘ale‘ale from his kupuna, who learned from their kupuna: Wai‘ale‘ale, and all streams issuing forth from it, are the piko of living energy for the entire island chain. He believes that the pillaging of waters of Wai‘ale‘ale is a spiritual injury which can only be remedied by restoration of stream waters to their stream of origin.

### **13. What is the nature and extent of your interest that may be affected?**

The Hui is an unincorporated association of Native Hawaiian cultural practitioners, taro farmers, educators, and others with an interest in the use, enjoyment, conservation, preservation and restoration of Wai ‘ale ‘ale and Waikoko Steams and includes residents of the Wailua hydrologic unit. The nature and extent of the Hui’s interests that may be affected by the Proposed IIFSs include the following: traditional and customary uses of Wai‘ale‘ale and Waikoko Streams for purposes such as gathering of instream resources such as hīhīwai, ‘ōpae, and ‘o‘opu; gathering of near stream plants and natural resources for hula, medicine, and other art, religious, and subsistence purposes; the use of flowing water within Wai‘ale‘ale and Waikoko Streams for subsistence and ceremonial purposes, including drinking; mālama ‘āina and appreciation of the waters of Wai‘ale‘ale and Waikoko Streams in their natural state; revitalization of native flora and fauna; education; research; aesthetic enjoyment; and other environmental, cultural, and recreational pursuits. *See ¶ 12, supra.*

The interests of the members of the Hui are injured by the existing diversions which negatively impact their ability to engage in traditional and customary Native Hawaiian practices, and to enjoy the streams and surrounding environment in their

natural state. Water diverters have drained one hundred percent of regular, non-storm streamflows from Wai‘ale‘ale and Waikoko Streams for nearly one hundred years. This has severely limited the ability of Hui’s members to utilize the streams for gathering of native stream life and the exercise of other traditional and customary religious, cultural and subsistence practices. *See* ¶ 12. This has also limited Hui’s members to use and enjoy the streams and their surrounding environment for recreational, aesthetic, and other environmental purposes. *Id.* The restoration of water through an IIFS that adequately protects, enhances and restores these instream, and public trust, uses, will remedy the injury to the Hui members’ Native Hawaiian rights and environmental interests.

Because the Hui’s members constitutionally protected interests in Wai‘ale‘ale and Waikoko Streams are injured by water diversions, and because sufficient IIFSs could remedy this injury, the Hui has standing to pursue this CCH. *MECO*, 141 Haw. at 270, 408 P.3d at 22. Further, the Hui is entitled to participate as a party to CCH on the Proposed IIFSs under the express terms of the Commission’s rules, HAR ch. 13-167. First, to the extent that the Hui is the Petitioner in the CCH, the Hui is automatically a party to the proceeding. *See* HAR § 13-167-54(a)(1). Second, the Hui’s members’ constitutionally protected Native Hawaiian rights are “clearly distinguishable” from the general public. *See Pub. Access Shoreline Haw. v. Planning Comm’n*, 79 Haw. 425, 434, 903 P.2d 1246, 1255 (1995). Therefore, to the extent that Kauai Island Utility Cooperative (“KIUC”) or any other member of the public lawfully initiates a CCH as Petitioner, the Hui is entitled to be admitted as a party. *See* HAR § 13-167-54(a)(3). Finally, because members of the Hui reside in Wailua, they have independent standing as affected residents of the hydrologic unit to participate in a proceeding on the Proposed IIFS, and the Hui can participate on their behalf. *Id.*

The Hui would also be able to demonstrate its interests in this case in a hearing on standing, as the Commission deems necessary.

#### **14. What is the disagreement, denial, or grievance which you are contesting?**

The dispute between the Hui and diverter KIUC over the IIFSs for Wai‘ale‘ale and Waikoko Streams arises from the Commission’s August 21, 2018 meeting. Members of the Hui attended the meeting to testify and request that the Commission increase the Proposed IIFSs in the Staff Submittal. Hui members testified concerning the impacts of stream diversions on Native Hawaiian cultural practices, aesthetic and environmental interests, and other public trust values; problems with the methodology used to calculate the Proposed IIFSs; and recommendations to restore more flows. In addition, several Hui members asked the Commission to defer its decision and more carefully consider all the testimony and information.

After public testimony concluded, the Commission began its deliberations, which indicated concerns with the Proposed IIFSs. These included the need for additional time to consider all the comments and testimony, the lack of information on KIUC’s actual needs and practicable mitigation and alternatives, as well as recommendations that the Proposed IIFSs be increased. At that time, KIUC made an oral request for a CCH,

thereby ending the Commission's deliberations. KIUC indicated that it supported the Proposed IIFs in the Staff Submittal and objected to any increase of that proposal. Following KIUC's CCH request, Earthjustice, on behalf of the Hui, also orally requested a CCH, in order to participate in any further proceedings concerning the IIFs for Wai'ale'ale and Waikoko Streams.

The crux of the disagreement, as developed in the August 21st meeting, is with KIUC's opposition, and its legal challenge in its CCH request, against increases to the Proposed IIFs. The Proposed IIFs would have restored less than one-third of median streamflows to Wai'ale'ale and Waikoko Streams, leaving the remaining flows freely available and open to diversion by KIUC. The Hui disagrees with limiting restoration of Wai'ale'ale and Waikoko Streams to the levels in the Proposed IIFs, and with KIUC's opposition to increasing the Proposed IIFs.

#### 15. What are the basic facts and issues?

The basic issue raised in this proceeding is the streamflow level necessary to fulfill the Commission's duty under the constitutional public trust and Code "to protect and promote the entire range of public trust purposes dependent upon instream flows." *In re Water Use Permit Applications*, 94 Haw. 97, 148, 9 P.3d 409, 460 (2000) ("*Waiāhole*"). The basic facts related to this issue to be further considered and developed in this proceeding include, but are not limited to:

- the impacts of diversions of Wai'ale'ale and Waikoko Streams on the exercise of Native Hawaiian rights, and feasible action to mitigate or eliminate these impacts;
- the impacts of diversions on the instream and surrounding ecosystem as well as water quality, and feasible action to mitigate or eliminate these impacts;
- the impacts of diversions on other instream uses including recreational and aesthetic enjoyment, and feasible action to mitigate or eliminate these impacts;
- the actual water needs of KIUC's Waiahi hydro plants, and practicable mitigation and alternatives;
- the amount of electricity generated by KIUC's diversions of Wai'ale'ale and Waikoko Streams, the contributions of the KIUC's Waiahi plants to its system demands and reliability requirements, and the total costs of the electricity, including societal costs and externalities;
- alternative power sources available to KIUC to substitute for the Waiahi hydro plants' hydroelectric generating capacity;
- ditch system losses and mitigation solutions;
- the appropriate methodology to calculate streamflow levels for habitat restoration and other purposes;
- culturally and environmentally appropriate amounts of stream flow diversion, if any.

**16. What is the relief that you seek or that you deem yourself entitled?**


The Hui seeks IIFSs for Wai'ale'ale and Waikoko Streams that fulfill the Commission's fiduciary duties as trustee of public water resources "to maintain the purity and flow of our waters for future generations." *Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441 (citation omitted). The Commission must protect and restore public trust instream uses and values "to the extent practicable," based on the precautionary principle, and with the level of "openness, diligence, and foresight commensurate with the high priority these rights command under the law of our state." *Id.* at 143, 154-55, 9 P.3d at 455, 467-68. Similarly, the Commission is constitutionally mandated to protect Native Hawaiian rights "to the extent feasible." *See Ka Pa 'akai O Ka 'Aina v. Land Use Com 'n*, 94 Hawai'i 31, 46 7 P.3d 1068, 1083 (2000) (citation omitted). IIFSs are the Commission's "primary mechanism" to fulfill its "duty to protect and promote the entire range of public trust purposes dependent upon instream flows." *Waiāhole*, 94 Hawai'i at 148, 9 P.3d at 460.

The Proposed IIFSs falls short of these duties, focusing primarily on protecting KIUC's offstream uses rather than instream public trust uses including Native Hawaiian rights and practices. The Commission's decision on the IIFSs in this proceeding must avoid and remedy this shortfall. The Commission must also hold KIUC accountable to provide the information and transparency on actual water needs and practicable mitigation and alternatives, and determine the IIFSs based on such disclosures or lack thereof, and based on presumptions in favor of public trust uses and the precautionary principle. As the Code expressly provides, the Commission "shall consider physical solutions," to minimize impacts of diversion on instream uses "including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution." HRS § 174C-71(1)(E).

**17. Identify any and all other persons who may or will be affected by the relief which you seek:**

The Hui will identify additional members and witnesses, including for purposes of a standing hearing, in accordance with any future deadlines set by the Commission in the course of the contested case proceeding.

DATED: Honolulu, Hawai'i, August 31, 2018.



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