CHAPTER 7

PROTECTING AND PRESERVING NATIVE HAWAIIAN WATER RIGHTS

by Moses Haia

INTRODUCTION

The previous chapters reviewed the various levels of our State government, how they work, and how we, as concerned citizens, may participate in the process. In Chapter 6 we were introduced to the contested case hearing process and were given an example, the Kohanaiki case, where Kanaka Maoli interests were concerned. The Kohanaiki case is an excellent example of how concerned citizens used their right to participate in the decision making process to protect their interests. In this chapter and with Kohanaiki fresh in our minds, we'll discuss the nature and extent of, and protections afforded to, Kanaka Maoli in general. We'll then discuss in greater depth these protections with respect to water. In so doing, we hope to provide some insight into what we can do collectively and individually to ensure that these rights are protected into perpetuity for all Kanaka Maoli to come.

The development and application of strategies designed to gain access to and control over sufficient amounts of Hawaii's water resources is a key ingredient in Kanaka Maoli's pursuit and attainment of a meaningful degree of self-determination. Water is a finite resource and a necessary component of any land base. While Kanaka Maoli move toward a sovereign future, State and county agencies are making and carrying out significant water resource management decisions (including the long-term allocation of presently available water) which are not necessarily sensitive to Kanaka Maoli. Strong efforts to protect Kanaka Maoli rights in general and to water specifically, which must include the actual
practice and exercise of such rights, are necessary to ensure that the vision of a healthy, vibrant sovereign Kanaka Maoli nation becomes a reality and not an illusion. Development of these strategies should begin with a basic understanding of the legal protections specific to Kanaka Maoli.

The Legal Framework Of Native Hawaiian Rights

Kanaka Maoli rights are recognized in and are provided legal protection by the Constitution of the State of Hawai‘i, State statutes and Hawai‘i’s common law.

Hawai‘i Revised Statutes (H.R.S.) § 1-1, Hawai‘i’s very first written statute, adopted the common law of England as the governing law of Hawai‘i with some significant exceptions. Most importantly for our purposes, this statute acknowledges that, in some instances, Hawaiian usage (custom and tradition) may prevail over contrary English common law. H.R.S. § 1-1 states:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution and laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Thus, if a Hawaiian tradition and/or custom conflicts with the English common law with respect to a particular matter, the Hawaiian tradition and custom should prevail over the English common law.

The Hawai‘i Supreme Court decision in Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission, 79 Hawai‘i 425, 903 P.2d 1246 (1995) (Kohanaiki) which was discussed above in Chapter 6, provides us with a textbook example of how H.R.S. § 1-1 may apply. This case concerned an action by the Hawai‘i County Planning Commission under the Coastal Zone Management Act ("CZMA"). The owner of a large tract of shoreline property on the island of Hawai‘i was in the process of obtaining a special management area permit from the Hawai‘i County Planning Commission so that it could develop a resort complex. Kanaka Maoli and others claimed that the gathering of ‘opae (shrimp) from a pond on this land was a traditional and customary Hawaiian practice and the planned development would prevent the practice.
Generally, under the western doctrine of private property, a property owner has "exclusive" rights to his or her property and may legally prevent others from entering upon the property. However, in this instance, the court's examination of the development of private property rights in Hawai'i, led it to conclude that "the western concept of exclusivity is not universally applicable in Hawai'i." The court also noted that Hawaiian tradition and custom concerning land use was preserved during the transition in Hawai'i to a more western system. The court held that Native Hawaiian rights can not be extinguished "merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property.'" Thus, the court instructed the Hawai'i County Planning Commission to determine whether the gathering of 'opae from this pond was a traditional and customary practice. If so then H.R.S. § 1-1 was applicable and the land owner would have to allow its reasonable exercise on the property, even after the development.

Another state statute which recognizes Kanaka Maoli rights is H.R.S. § 7-1. This statute provides protection for a few specifically listed Hawaiian customs and traditions. Section 7-1 states:

**Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, alodial 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 ti leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

The **Kohanaiki** court also considered this statute's protection of Kanaka Maoli rights. This statute confirms that the protection of the above traditional and customary Hawaiian subsistence and gathering practices remained intact after the māhele, and remain protected today. As the **Kohanaiki** court determined, despite the concept of private property in Hawai'i, Kanaka Maoli may, in certain circumstances, enter onto private and public lands to exercise their traditional and customary subsistence, cultural and religious practices.

Article XII, Section 7 of Hawai'i's Constitution affords strong protection to the right of Kanaka Maoli to practice their culture. It is the acknowledgment by this State and its people that all Kanaka Maoli traditions and customs, including those referred to in H.R.S. §
1-1 and §7-1, are rights which are entitled to and must enjoy protection from unreasonable restraint by the State or others. Article XII, Section 7 of the State of Hawai‘i Constitution provides:

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

The Hawai‘i Supreme Court has, in a number of cases including Kohanaiki, addressed the nature of certain Kanaka Maoli traditions and customs and determined the level of protection provided to them by our State law. In Kohanaiki, the court strongly restated the obligation of a State agency to preserve and protect the rights of Kanaka Maoli. The court concluded that Article XII, Section 7 of Hawai‘i’s State Constitution demands that the State take action to protect the reasonable exercise of customary and traditional Kanaka Maoli practices. Thus, the State may not, legislatively or otherwise, unreasonably restrain the rights of Kanaka Maoli to practice their traditions and customs.

The Importance Of Water To Native Hawaiians

Many individuals and communities have been working hard to increase understanding of water-related Kanaka Maoli traditions and customs. Generally, just as water is an integral part of life, so too it is an integral part of most, if not all, Kanaka Maoli traditions and customs. The right to use water has universally been one of the most important rights associated with land. For, without water to nourish the land and people, the land is useless and people cease to exist. Contrary to the law of many western cultures, including the English common law, traditional Kanaka Maoli notions of water and its relationship to land use were not based on concepts of private ownership. Water, according to Kanaka Maoli tradition, belongs to Kāne-i-ka-wai-ola. The ali‘i nui, through whom the akua acted and in whom the akua vested their divine power and authority, did not own water. The ali‘i nui served as a trustee, allocating the resource for the greater common good. Thus, for Kanaka Maoli, "water, like sunlight, a source of life to land and man, was the possession of no man, not even the ali‘i nui or mō‘ī." It should not be at all surprising then, that when use of water is granted under the traditional Kanaka Maoli concept of water, those who want to
own the water feel threatened. State and county legislative and administrative decisions
which address how and when water is allocated in this State have typically followed western
concepts. This has made it difficult, and, in many cases, impossible for Kanaka Maoli
individuals and communities to access water to support, among other uses, traditional and
customary Kanaka Maoli subsistence, cultural and spiritual practices. Clearly then, future
access to water will depend upon Kanaka Maolis' participation pursuing enforcement in both
State and county decision-making processes.

**Hawaii'i's Water Code And Its Obligation To Protect Kanaka Maoli Rights**

The Hawaii'i State Water Code is embodied in H.R.S. Chapter 174C. It was passed to
implement Article XI, Section 7 of the State Constitution which directs the State of Hawaii'
"to protect, control and regulate the use of Hawaii'i's water resources for the benefit of its
people." Article XI, section 7 also required the State to create a water resources agency
responsible for carrying out this important obligation. The Water Code regulates surface and
ground water, but not coastal waters or domestic consumption by individual water users.

Because traditional and customary Kanaka Maoli subsistence, agricultural, cultural, and
religious practices and, to a large extent, the development of Hawaiian homelands
depend upon ready accessibility of sufficient supplies of water, the protection of Kanaka
Maoli rights and the welfare of the Kanaka Maoli people are greatly impacted by the
decisions of the Water Commission.

The State's obligation to protect Kanaka Maoli rights runs throughout the Water
Code. The fundamental purpose of the Water Code is the protection and management of
water resources in the "public interest." H.R.S. § 174C-2(c) declares that "the protection of
traditional and customary Hawaiian rights [is] ... in the public interest." Thus, the protection
and preservation of Kanaka Maoli traditions and customs (in some instances this may
include the re-establishment of traditions and customs lost for any number of reasons) and,
therefore, the interests of Kanaka Maoli, are integral to the Water Code.

The Water Code requires that any applicant seeking a water use permit show that
his or her proposed use of water is in the public interest. Since the protection of traditional
and customary Kanaka Maoli rights is declared to be in the public interest, the applicant must
establish that the proposed use will not diminish or deny and, in effect, damage the present or
future reasonable exercise of traditional and customary Kanaka Maoli rights. Similarly, the
Water Code requires that the Water Commission provide enough water for, among other important public interests, the protection of traditional and customary Kanaka Maoli rights. These important public interests must inform every water resource allocation decision of the Water Commission.

The Water Code also requires that permits for the use of Hawai'i's water resources be granted primarily and, in some circumstances only, when the use is determined to be a "reasonable-beneficial use." Under the Water Code, a use is "reasonable-beneficial" when it is economic, not wasteful, reasonable and consistent with the State and county land use plans and the public interest.³

The Water Code also contains a specific section, Part IX, which deals exclusively with the protection of Kanaka Maoli rights. This and other parts of the Water Code are intended to ensure that the Water Commission affirmatively protects traditional and customary Kanaka Maoli rights. It does this by prohibiting the Water Commission from taking actions that would damage the rights of Kanaka Maoli and requires the Water Commission to act affirmatively to protect the rights of Kanaka Maoli. For example, it protects all traditional and customary Kanaka Maoli practices associated with water, specifically including the gathering of certain items and the cultivation of taro.

The Water Code also requires that the Water Commission establish an instream use protection program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water. This includes setting instream flow standards for individual streams or parts thereof. An instream flow standard designates the quantity, flow or depth of water which must be present at a specific location in a stream system at certain specified times of the year to protect beneficial instream uses. The Water Code classifies the protection of traditional and customary Kanaka Maoli rights as a beneficial instream use of stream water.⁴ Therefore, the Water Commission must take into account and protect not only active practices but also traditional and customary practices that can be practicably reestablished by the establishment of adequate instream flows. Furthermore, a stream which hosts traditional and customary practices must be protected from diversions or other actions which would diminish or prevent these practices from being pursued.

Thus, gathering within a stream constitutes a beneficial instream use of stream water. The Water Code specifically lists the gathering of hīhiwai, 'opae, 'o'opu, and limu as protected practices. In order to protect the home of these beings, without which the
constitutional right to gather is meaningless, the Water Commission must establish instream flow standards that ensure an adequate flow to support an environment which supports such life. These aquatic animals and plants are found in streams and estuaries and require a healthy stream environment for their nourishment and growth. The Water Code requirement that the Water Commission preserve and protect traditional and customary Kanaka Maoli practices should, at a minimum, severely restrict the Water Commission’s authority to issue water use permits that potentially have a negative effect on these habitats.

Another type of right to water that is associated with Kanaka Maoli rights is commonly known as appurtenant rights. In general terms, an appurtenant water right in Hawai‘i is the right to use that amount of water from a water source (usually a stream) which was used at the time of the mähele on kuleana and taro lands for the cultivation of taro and other traditional crops and for domestic uses on that same land.

Article XI, Section 7 of the State Constitution required the Water Commission to protect appurtenant rights. This right is tied to the land and not to the legal owner of the land. As a result, under state law the right may be extinguished if there is or has been any attempt to separate the right to use such water from the land upon which it was used. While this water right stems from certain traditional and customary Kanaka Maoli practices, today the water tied to this right need not be used to support such practices. Thus, today, it is argued, an appurtenant water right may be used on the same land for other purposes.

The Water Code provides that appurtenant water rights of kuleana and taro lands can not be lost or otherwise affected by a failure to apply for or to receive a water use permit from the Water Commission. In other words, as long as there has been no attempt to separate the right from the land, the right still exists whether the Commission has issued a permit for use of the water and whether the water is presently being used or hasn’t been used since the mähele.

Water Availability For Current And Foreseeable Development And Use Of Hawaiian Homes Land

Water availability is also of great importance to beneficiaries of the Hawaiian Homes Commission Act (HHCA). Since the passage of the HHCA in 1921, Kanaka Maoli beneficiaries of the HHCA have been unable to move onto Hawaiian homesteads for various reasons. One of the major factors is the shortage of available water. Generally, users in
competition for water that could be used on homelands have been able to stake their claims to water well before the Department of Hawaiian Home Lands (DHHL). The reasons for this are many and have been more than adequately documented elsewhere. Clearly, if the HHCA is to meet its intended purpose of settling eligible Kanaka Maoli on Hawaiian homesteads, significant changes are required in the way in which water resources are allocated. Ideally, the Water Code, the HHCA and other State law should work together to provide adequate water for activities on Hawaiian Home lands. The Water Code attempts to address some of the problems which have prevented sufficient water resources from being available for homestead use. The Water Code requires that planning decisions of the Water Commission ensure that sufficient water remain available for current and foreseeable development and use of Hawaiian Home lands. All applicants for water use permits must prove that their proposed water uses will not interfere with the rights of DHHL to sufficient amounts of water for current and foreseeable development and use of Hawaiian Home lands. All permits issued by the Commission currently contain a condition that the permitted use of water is subject to the rights of DHHL. The Water Code also requires the Water Commission to develop a Hawai‘i Water Plan, which must include in its projections current and foreseeable development and use needs of DHHL. Similarly, in 1991, the HHCA was revised by Act 325 to require that sufficient water be reserved for the future use of Hawaiian homesteaders.

The State's minerals and water rights law also addresses this concern. The Department of Land and Natural Resources (DLNR) and the DHHL are now required to talk with and listen to "affected beneficiaries" in order to develop a reservation of water rights to adequately support current and future homestead needs before the State enters into any new lease of water rights or renews an existing lease of water rights.

The DHHL may also take any action it feels is necessary to assist homestead lessees in obtaining the maximum use of their leased lands. This includes the DHHL taking any steps necessary to develop these lands for their highest and best use as long as such use is consistent with the purposes of the HHCA. DHHL also may demand the right to use, free of all charge, any water necessary for livestock, agriculture, aquaculture or domestic needs from:

1. water covered by water licenses issued by the Bureau of Land & Natural Resources;
2. all government-owned water not covered by license; and
3. all government-owned water covered by licenses issued prior to the enactment of the HHCA on July 9, 1921 which contain a reservation in favor of the public.

To acquire government-owned water that is covered by a license issued before the passage of the HHCA which does not include a reservation of rights for the benefit of the public or to acquire privately-owned surplus water, the DHHL may exercise the right of eminent domain. Section 221 of the HHCA also gives DHHL the right to use ("develop, use, contract for, or acquire") any ditch or pipeline constructed for the distribution and control of water that is needed for use by the DHHL.

These provisions taken together appear to provide the DHHL, lessees and beneficiaries with the means to acquire the water needed to move beneficiaries successfully onto Hawaiian Home lands. Unfortunately, budget constraints and the inherent conflict between the State's interests in water allocation and its trust responsibilities to Kanaka Maoli have proved to be a major obstacle.

**Enforcement Provisions Of The Water Code**

Generally, Hawai'i's Water Code provides the Water Commission with state-wide jurisdiction to hear disputes over the use, management and disposition of Hawai'i's water resources and to make final decisions on how and when Hawai'i's water resources will be allocated and protected. However, this jurisdiction and the Water Commission's obligation to regulate water use through its permit granting authority apply only in areas of the State that have been designated as water management areas by the Water Commission.

The Water Code provides that the Water Commission may designate an area when water resources in an area are threatened by existing or proposed withdrawals or diversions. The Water Commission's administrative rules state that the Water Commission may designate an area when water withdrawals from a given "hydrologic unit" reach 90% of the "sustainable yield." In practical terms, this means that the Water Commission has not asserted jurisdiction over water resources in a specific hydrologic unit until withdrawals in that hydrologic unit reach 90% of its "sustainable yield." Until an area is designated a water management area, the Water Commission does not have the authority to manage water resources in the area through its water use permitting process but it has exercised relatively
broad management perogatives through the addition of special conditions to other required permits such as well construction and pump installation permits.

H.R.S. § 174C-13, Citizen complaints, is a Water Code provision that allows "any person [to] file[,] a complaint with the commission that any other person is wasting or polluting water or is making a diversion, withdrawal, impoundment, consumptive use of water or any other activity occurring within or outside a water management area, not expressly exempted under this code, without a permit where one is required. . ." This provision arguably confirms the limitations placed on the Water Commission's jurisdiction. It suggests that unless the complaint concerns a non-domestic use of water in a designated water management area or concerns pollution or a wasting of water, the Water Commission is not obligated to act and may lack jurisdiction if it chooses to act. If the Water Commission chooses to act upon a citizen complaint in a circumstance where it may lack jurisdiction, its action or decision may be unenforceable. To the extent that this attempts to grant the State, through the Water Commission, the authority to breach its constitutional duty to protect Hawai'i's water resources for the benefit of its people, it may be unconstitutional. Nonetheless, H.R.S. § 174C-13 can be a powerful tool for Kanaka Maoli in protecting their collective and individual rights of access to and control over Hawai'i's water resources. Citizen complaint forms may be obtained from the Water Commission.

In instances where the Water Commission may not have jurisdiction over a water dispute, an "interested person" may request that the Water Commission issue a declaratory order to determine the applicability of the Water Code or any Water Commission rule or order. Take for example, the following scenario.

Alani owns kuleana lands upon which, at the time of the māhele, taro was grown. Since then, however, the water which was used to irrigate that taro has been diverted elsewhere. Wanting to regain the use of that water for his kuleana lands, Alani decides to assert his lands' appurtenant rights. However, Alani lives in an area in the State which has not been designated a water management area. Short of filing suit in State court for the return of this water, is there anything that Alani can do to get this water flowing to his land once again? Well, maybe and maybe not.

The Administrative Rules of the Water Code allow the Water Commission to issue a declaratory ruling determining the extent to which the Water Code or specific provisions of the Water Code may apply to situations in non-designated areas. According to this rule,
Alani would file a petition for a declaratory ruling. Alani would request that the Water Commission first determine whether H.R.S. § 174-63 and § 101(d), the appurtenant rights provisions of the Water Code, apply to his situation. The Water Commission could order a hearing on Alani's petition. If it does, it would then provide public notice of the hearing in a newspaper of general circulation in Hawai‘i and in each county affected. Any person who can demonstrate a "legally protected interest" would be allowed to participate as a party in the hearing. All parties would be given the opportunity to present witness testimony and supporting evidence and to cross-examine other parties' witnesses and introduce contrary evidence. In this instance, the party diverting the water which used to flow to Alani's property would likely fight Alani's attempt to return this water to his property.

If, after all evidence is received, the Water Commission deliberates and determines that one or both of the above provisions apply and that Alani successfully proved an appurtenant right, it would issue a favorable ruling. Notwithstanding this, however, Alani may still be required to bring an action in State court to enforce the Water Commission's declaratory ruling.

In water management areas, Water Commission permission in the form of a water use permit is required before people or companies make any withdrawal, diversion, impoundment, or consumptive use of water from the area. The water use permit applicant must satisfy the following criteria in order to obtain the permit:

Can the proposed use of water be accommodated with the available water source?

Is the proposed use a reasonable-beneficial use?

Will the proposed use interfere with any existing legal use of water?

Is the proposed use consistent with the public interest?

Is the proposed use consistent with State and county general plans and land use designations?
Is the proposed use consistent with county land use policies?

Will the proposed use interfere with the rights of the Department of Hawaiian Homes Land under section 221 of the Hawaiian Homes Commission Act?

As part of the permitting process, the Water Commission must print notices of the permit application to allow public input in the form of general comments or specific objections to the proposed use as outlined in the permit application. Absent specific objections from a party, a proposed water use which meets the above criteria will likely be approved. On the other hand, a party who timely files written opposition to proposed approval of a permit may request a contested case hearing on the application. The party must orally or in writing request the contested case hearing before the close of the Water Commission meeting or public hearing at which the permit application is scheduled for consideration and/or action. The party requesting a contested case hearing must, if he or she does not do so at the meeting or public hearing, also file a written petition for a contested case hearing within ten (10) days of the close of the Water Commission meeting or public hearing. Failure to request a contested case hearing prior to the close of the meeting or public hearing or to file a written petition for a contested case hearing within ten (10) days of the close of the Water Commission meeting or public hearing extinguishes a party's right to a contested case hearing.

If a contested case hearing is granted, the parties will be allowed to file motions and supporting briefs, present oral argument, testimony and evidence and cross examine the other parties' witnesses. It is a quasi-judicial proceeding which is presided over by the Water Commission Chairperson or a hearing officer appointed by the Water Commission Chairperson. Once all parties have presented their case, the Water Commission has ninety (90) days to render its decision and order. Any party to the contested case may request that the Water Commission reconsider its decision and order not later than five business days after the date of the decision. A party requesting reconsideration must show that there is new information not previously available which affects the Water Commission's decision or that a substantial injustice would occur if the decision and order is enforced. Alternatively, any party may appeal the Water Commission's decision and order directly to the Hawai'i Supreme Court. The Hawai'i Supreme Court may reverse or modify the Water
Commission's decision and order only if it finds that the Water Commission's decision and order is contrary to the clear preponderance of the evidence which was submitted by the parties to the contested case hearing.

At any time before the Water Commission makes a decision, the parties to the proceeding may, where practicable, agree to mediate the matter. The mediator may recommend settlement options but can not impose any option upon the parties. Mediation is a private process. Information (oral and written statements, records, reports, other documents) disclosed to the mediator in the course of the mediation is private and confidential. The mediator is prohibited from informing anyone, including the other parties to the mediation, of this information. At the conclusion of the mediation, the mediator must submit a written report which contains the mediator's recommendations to the Water Commission. These recommendations must be based upon the mediation agreement, if any, reached between the parties. The Water Commission will consider the recommendations of the mediator in making its final decision in the proceeding.

Mediation is called an alternative dispute resolution process because it is conducted by someone other than a judge, hearing officer or State commission. It attempts to foster the cooperation of the parties to reach mutual agreement as opposed to the adversarial nature of the American judicial or administrative system where one party prevails. Mediation, while not identical, is somewhat similar to the Hawaiian dispute resolution process known as ho'oponopono. It can be a very helpful process if the parties are willing to work cooperatively toward an agreeable solution to their dispute.

CONCLUSION

Hawai‘i law provides significant protection for Kanaka Maoli rights. Unfortunately, these "legal" protections have until recently done little if anything for the welfare of the Kanaka Maoli people and their culture. Recently however, Hawai‘i's State and county agencies have been instructed by the State's highest court that they can no longer ignore Kanaka Maoli rights when such rights are endangered by an agency's proposed action.

The Supreme Court's Kohanaiki decision and others concerning Kanaka Maoli rights and entitlements have moved Kanaka Maoli interests and rights to the political and economic forefront of this State. Kanaka Maoli rights and entitlements are now, as such, viewed as a serious threat to Hawai‘i's economy because they may "negatively" impact
development. This concern has spawned and will continue to feed serious attempts to diminish and ultimately extinguish these rights. The recent, albeit unsuccessful, legislative attempt to regulate Kanaka Maoli rights out of existence is an excellent example. The assault has likely only begun. The success of Kanaka Maoli responses to such efforts will be of critical importance in the development of the nature and extent of Kanaka Maoli self-determination and the welfare of the Kanaka Maoli people and their culture into perpetuity.

Contamination of Hawai‘i’s water resources is discussed in the following chapter. Water pollution is a serious problem as it poses a real threat to the availability of good quality water resources. Degradation of water quality may also adversely impact certain Native Hawaiian cultural practices related to water as well as the quality of water available for recreation, fishing, farming, and drinking water.

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1Reppun v. Board of Water Supply, 65 Hawai‘i 531 n. 16 (1982).

2Coastal Waters are currently under the jurisdiction of Department of Business, Economic Development and Tourism. (H.R.S. Chapter 205A).

3H.R.S. § 174C-3

4Id.

5Native Hawaiians attempting to assert appurtenant rights on their property are required by the Water Commission to provide responses to several questions in order to have their claim to appurtenant rights considered for permitting. The Water Commission submitted a list of questions to Aimoku Pali of Honokōhau Valley, Maui, for his response upon his request for a stream diversion works permit to restore his `auwai and lo‘i. (See Appendix I). Until this day those `auwai and lo‘i have not been restored. Charles Herring of Waipahu, Oahu was required to provide similar information when he opposed the ‘Ewa Plains Water Development Corporation’s water use permit application that would impact access to the water on his taro land.

6A hydrologic unit is a surface drainage area or a ground water basin or a combination of the two. There are six (6) hydrologic units which comprise the island of O‘ahu. They are the North, Wai‘anae, central, Pearl Harbor, Honolulu and Windward hydrologic units. Each unit has been given a specific sustainable yield. For instance, Pearl Harbor’s sustainable yield is 184 million gallons of water per day (mgd).

7The term “sustainable yield” refers to the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the Water Commission. Anyone can petition the Water Commission to designate an area a water management area.
Generally, an “interested person” must have some sort of property interest that is or will be affected by some act upon a water resource.

Hawai‘i Administrative Rules § 13-167-81(a) provides authority for the Water Commission to issue a declaratory ruling. You will recall that like other administrative rules, this rule allows the agency, in this case the Water Commission, to carry out the day-to-day implementation and enforcement of the Water Code.

See Hawai‘i Administrative Rules § 13-167-54. Generally, one who owns property in the affected area or possesses some concrete interest in the affected area that will be directly and immediately affected by the Water Commission action is a person with a “legally protected interest.”

Written objections to proposed approval of the permit application must be filed on or before the date noted by the Water Commission in its notice of the specific permit application. Failure to timely file written objections may be fatal to one’s right to be heard.

“Party” is defined as the petitioner, all government agencies whose jurisdiction includes the land or water in question, all persons within a hydrologic unit who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public, other persons who can show a substantial interest in the matter and whose participation will substantially assist the Water Commission in its decision making.