



**JULY 22, 2016**

**HILTON WAIKIKI  
BEACH**

**Honolulu, HI**

# Hawaii Water Law

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*“Water – and water law – is critical to land and development in an island state like Hawaii. This program surveys major legal and land use issues relating to water, including regulation of freshwater resources under the Hawaii Water Code, coastal development, the public trust doctrine, the Clean Water Act, and climate change. Being conversant with these important issues will help you gain perspective on the role of water in land ownership, development, and natural resource policymaking in Hawaii.”*

*- Elijah Yip, Program Chair*

## Program Chair:



**Elijah Yip**  
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**9:00 Introduction and Overview**

**Elijah Yip**, *Program Chair*  
*Cades Schutte LLP*

**9:10 Regulation under the State Water Code: Recent Developments**

Recent developments in State Water Code proceedings and significant pending proceedings before the Water Commission

**Douglas A. Codiga**  
*Schlack Ito LLLC*

**10:00 Break****10:15 Survey of Hawaii Supreme Court Law**

Recent Hawaii Supreme Court cases regarding entitlement to a contested case hearing, the Public Trust Doctrine, and rights of action arising under the Hawaii Constitution, especially in the context of water rights, environmental law, and land use

**Elijah Yip**  
*Cades Schutte LLP*

**11:15 Coastal Development and Land Use**

Boundaries; legislative changes; coastal zone management; engineered setback policy; rolling easements; Who owns the beach? What happens when things change?

**Leo R. Asuncion, Jr., AICP**,  
Dir., Ofc. of Planning  
*State of Hawaii*

**Gregory W. Kugle**

*Damon Key Leong Kupchak Hastert*

**Bradley M. Romine**, Extension Faculty  
*University of Hawaii, Sea Grant College Program*

**12:15 Midday Break****1:30 Clean Water Act Jurisdiction: Where Are We Now?**

Supreme Court review of the Clean Water Act; siting issues; aquaculture; jurisdictional issues in the Clean Water Act; Rivers and Harbors Act

**Lisa A. Bail**  
*Goodsill Anderson Quinn & Stifel*

**2:15 Climate Change Adaptation**

Statewide climate change adaptation policy; ongoing initiatives; possible legislative and regulatory approaches, current practices in land use planning; Hawaii's law and policy tools for climate change adaptation in the water resources sector

**Rep. Della Au Belatti**

*Hawaii State Legislature, District 24*

**Emily A. Gardner**, Principal

*Earth Sea & Sky Solutions*

**Richard Wallsgrove**,

Project Specialist, East-West Center

*Pacific RISA Program*

**3:15 Break****3:30 Ethical Considerations**

Ethical considerations when dealing with land use, shoreline, commercial and private shoreline usage, and water management agencies and boards

**James A. Kawachika**  
*Deeley King Pang & Van Etten*

**4:30 Adjourn****Group Rates**

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***Drone Law***

*September 6, 2016 ~ Las Vegas, NV*

***3<sup>rd</sup> Annual Public/Private Finance  
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*September 14, 2016 ~ Los Angeles, CA*



**Elijah Yip**, Program Chair, a litigation partner with Cades Schutte LLP, practices in the areas of commercial and business litigation and arbitration; Internet and information technology law; and media and First Amendment rights. He also advises on environmental and health law issues.

**Leo R. Asuncion, Jr., AICP**, is the Director of the Office of Planning, State of Hawaii, and Manager of the Hawaii Coastal Zone Management Program. He is responsible for the management, budgeting, and oversight of the Office of Planning.



**Lisa A. Bail**, a partner with Goodwill Anderson Quinn & Stifel, concentrates on environmental law, land use and commercial litigation. Her experience includes trials, administrative hearings and appellate work in areas of environmental law, personal injury, contracts, and products liability.

**Douglas A. Codiga**, a member of Schlack Ito LLC, concentrates his practice on energy and environmental law, including regulatory proceedings before the Hawaii Public Utilities Commission, environmental permitting and compliance, and renewable energy project development.



**Representative Della Au Belatti**, a member of the Hawaii State Legislature, represents District 24. From 2007-13, she represented District 25. She is a member of the Health, Consumer Protection and Commerce, Housing, Human Services, and Judiciary Committees.



**Emily A. Gardner**, a biologist, attorney and public policy specialist, is a principal with Earth Sea & Sky Solutions. Her diverse background includes work as a biologist at Hawaii's Bernice P. Bishop Museum and as a researcher at the University of Hawaii Center for Conservation Research.

**James A. Kawachika** is Of Counsel with Deeley King Pang & Van Etten. His practice has emphasized civil and commercial litigation, including business, real estate, trust, personal injury and professional liability litigation, as well as arbitrations and mediations, throughout his legal career.



**Richard Wallsgrove** is a Project Specialist for the East-West Center of the Pacific RISA Program. NOAA's Regional Integrated Sciences and Assessments (RISA) program was created in 1995 to pioneer innovative mechanisms for enhancing the value of climate information.

**Gregory W. Kugle**, a Director with Damon Key Leong Kupchak Hastert, focuses on the areas of commercial disputes and business litigation, construction, land use and real estate, antitrust, product liability and personal injury, aviation, bankruptcy, admiralty and insurance coverage.

**Bradley M. Romine, PhD** is Extension Faculty with the University of Hawaii, Sea Grant College Program, serving as Coastal Lands Program Coordinator at the Hawaii Department of Land and Natural Resources, Office of Conservation and Coastal Lands, through a cost-share agreement.

## Conference Information

### Course Accreditation

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## A BRIEF OVERVIEW OF SELECTED PROCEEDINGS BEFORE THE STATE OF HAWAII COMMISSION ON WATER RESOURCE MANAGEMENT

Douglas A. Codiga, Esq.  
Schlack Ito LLLC  
dcodiga@schlackito.com

The purpose of this article is to provide a brief overview of selected proceedings before the State of Hawaii Commission on Water Resource Management (“Commission” or “CWRM”), with a focus on major proceedings involving important and noteworthy issues of water law and policy. A comprehensive discussion of these often lengthy and complex proceedings is beyond the scope of this article. Instead, selected aspects are surveyed to provide an introductory overview of important legal developments and critical issues shaping the growth and development of water law in Hawaii.

### Nā Wai ‘Ehā

Nā Wai ‘Ehā is the name given to the “Four Great Waters” of Waihe‘e River and Waiehu, Īao (aka Wailuku River) and Waikapū Streams on Maui.<sup>1</sup> The Nā Wai ‘Ehā proceedings focus on Commission designation of water management areas (“WMA”) as well as Commission amendment of interim instream flow standards (“IIFS”).

Under Hawaii law, a WMA is a management unit in which the Commission has established administrative control over the withdrawal of ground and surface water.<sup>2</sup> The purpose of WMA designation is to ensure the reasonable and beneficial use of the water resources in a manner consistent with the public trust doctrine.<sup>3</sup> WMA permits and public hearings may support protection of community and Hawaiian cultural uses of water.<sup>4</sup> Water use permits and public hearings are not required in non-WMA areas.<sup>5</sup>

On July 21, 2003, the Commission designated the Īao Aquifer System as a WMA and on March 13, 2008 the Commission designated Nā Wai ‘Ehā as a surface WMA. Pursuant to the designation, existing users had one year to file surface water use permit applications (“WUPA”).<sup>6</sup> WUPAs were subsequently filed by Alexander & Baldwin’s (“A&B”) subsidiary Hawaiian Commercial & Sugar Co. (“HC&S”) and Wailuku Water Company (“WWC”). HC&S diverted up to 80% of Nā Wai ‘Ehā stream flow diversions or 50 million gallons of water per day

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<sup>1</sup> See Teresa Dawson, *Impending HC&S Closure Raises Questions About Future of East, West Maui Diversions*, available at <http://www.environment-hawaii.org/?p=8698>.

<sup>2</sup> Haw. Rev. Stat. § 174C-10.

<sup>3</sup> See Haw. Rev. Stat. § 174C-41.

<sup>4</sup> See Haw. Rev. Stat. §§174C-42 and 174C-48.

<sup>5</sup> See *id.*

<sup>6</sup> *In Re Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe‘e River and Waiehu, Īao, and Waikapū Streams Contested Case Hearing*, 297 P.3d 129 (Haw. 2012).

("MGD").<sup>7</sup> WWC supplied water formerly available to the Wailuku Sugar Company to private development projects being built on the former plantation lands.<sup>8</sup> WUPAs were also filed by many dozens of other applicants.

On December 31, 2014, the Commission issued its order concerning appurtenant rights, concluding that final determinations of appurtenant rights will be addressed with the WUPAs, with all applicants to participate in a contested case proceeding. The first day of the contested case proceeding was July 11, 2016 and it remains ongoing at this time.

On June 25, 2004, Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation ("MTF"), represented by Earthjustice, filed a petition to amend the IIFS for Na Wai Eha. IIFS are "temporary instream flow standard of immediate applicability."<sup>9</sup> The petition alleged that the existing IIFS, which had been in place since 1998, did not have a sufficient scientific basis and preserved the status quo without adequately addressing the public trust, environmental concerns, native Hawaiian practices, outdoor recreational activities, or aesthetic and scenic values as required by the Water Code.<sup>10</sup>

On June 10, 2010, the Commission issued its Findings of Fact, Conclusions of Law, Decision and Order ("order") in the IIFS proceeding. The order amended the IIFS for the Waihe'e River (to 10 MGD) and the North and South Maiehu Streams (to 1.6 and 0.9 MGD, respectively), generally maintained the existing IIFS for the two remaining streams, and lowered the amount of water HC&S was required to pump from a certain well (Well No. 7) to 9.5 MGD. A dissenting opinion by Hearing Officer Lawrence criticized the majority decision for failing to properly discharge the Commission's public trust duties consistent with his findings of fact and conclusions of law.

Petitioners appealed the Commission's order and on August 15, 2012 the Hawaii Supreme Court issued its decision. The Court found that the Commission failed to adequately protect public and native Hawaiian rights to flowing streams. In particular, the Court concluded that the Commission's order amending IIFS for streams lacked required findings or conclusions explaining the feasibility of protecting native Hawaiian practices; the Commission erred in its decision not to restore stream flow to two streams by focusing only on amphidromous species and disregarding evidence supporting other instream uses; and the Commission erred in its consideration of alternative water sources and in its calculation of diverting parties' acreage and reasonable system losses. Accordingly, the Commission's June 10, 2010 order in the IIFS proceeding was vacated and the case was remanded for further proceedings before the Commission.

On April 17, 2014, the Commission approved and ordered a stipulated settlement agreement which restored partial flow to all four of Nā Wai 'Ehā while accommodating HC&S's

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<sup>7</sup> See Maui Now, *Petition Filed to Increase Water Flow at Nā Wai 'Ehā*, MAUI NOW, (March 9, 2016), available at <http://mauinow.com/2016/03/09/petitionfiledtoincreasewaterflowatnawaieha/>.

<sup>8</sup> *Id.*

<sup>9</sup> Haw. Admin. Rules § 13-169-2

<sup>10</sup> See Haw. Const. art. XI, § 7.

ongoing plantation water uses for almost 5,000 acres in Central Maui. The agreement updated the IIFS and established IIFS of 10 MGD for ʻĪao near Kepaniwai Park, 5.0 MGD for ʻĪao at or near the stream mouth, and 2.9 MGD for Waikapū Stream. It also maintained the previous restorations of 10 MGD for Waiheʻe River, 1.6 MGD for North Waiehu Stream, and 0.9 MGD for the South Waiehu Streams.<sup>11</sup>

On March 9, 2016, Hui o Nā Wai ʻEhā and MTF, represented by Earthjustice, filed a legal petition with the Commission to increase the flows in Nā Wai ʻEhā. This petition was partly in response to A&B’s announcement that HC&S will have its final sugarcane harvest this year and convert its fields into diversified agriculture. The petition argues that HC&S’s closure of sugar operations presents new circumstances that the Commission must address in fulfilling its ongoing public trust duties to restore stream flows to Nā Wai ʻEhā. This change in circumstances, according to the petition, requires leaving more flows in the rivers and streams to restore native ecosystems, revitalize local communities and Native Hawaiian culture, and recharge public drinking water aquifers.<sup>12</sup> The Commission has consolidated these claims with its determination of appurtenant rights.

### East Maui

In 1876, the Kingdom of Hawaii allowed A&B to divert water for sugar production and since 1978 Board of Land and Natural Resources (“BLNR”) has authorized diversions by HC&S and East Maui Irrigation Co. (“EMI”) (also an A&B subsidiary). These diversions of approximately 165 MGD from East Maui to Central Maui were facilitated by issuance of annually renewed revocable permits.<sup>13</sup> In 2001, private citizens and Na Moku ʻAupuni O Koʻolau Hui (“Na Moku”) requested a contested case hearing with the BLNR after HC&S and EMI requested a thirty-year lease which would allow the continued diversions.<sup>14</sup> MTF also contested A&B’s lease request. BLNR rejected Na Moku’s challenge to the proposed thirty-year lease, and First Circuit Court Judge Eden Hifo subsequently ruled that BLNR could not proceed with the lease based on the assumption that the Water Commission, through IIFS, would protect water uses. Judge Hifo also ruled that an environmental assessment or possibly an environmental impact statement was required prior to BLNR’s grant of water rights.

MTF and Native Hawaii Legal Corporation (“NHLC”), on behalf of Na Moku, subsequently petitioned the Commission to amend the IIFS for 27 streams in East Maui on the basis that the EMI System did not comport with the public trust doctrine as to taro cultivation and traditional and customary native Hawaiian practices. Note that insofar as East Maui is not a WMA the Commission does not allocate water to users via Water Use Permits, and instead relies on IIFS to determine flows left in the stream.

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<sup>11</sup> Wendy Osher, *Water, Tears Flow After Decade Long Battle at ʻĪao*, MAUI NOW (October 14, 2014), available at <http://mauinow.com/2014/10/13/watertearsflowafterdecadelongbattleat%CA%BBiao/>.

<sup>12</sup> *Id.*

<sup>13</sup> Kapuaʻala Sproat, *From Wai to Kānāwai: Water Law in Hawaii*, Native Hawaiian Law, p. 567, (2015).

<sup>14</sup> *Id.* See also Teresa Dawson, *Water Commission Amends Flows for Six of 19 East Maui Streams*, Environment Hawaii, Vol. 21, No. 1 (July 1, 2010), available at <http://www.environmenthawaii.org/?p=1009>.

The EMI System supplies water to HC&S's 30,000 acres of sugarcane in central Maui and serves more than 9,000 Upcountry residents and farmers. Petitioners argued it also leaves dry many of the 110 East Maui streams that it diverts, thereby degrading streams and limiting downstream farming opportunities. In 2007, BLNR ordered an interim release of 6 MGD into one of the 27 streams (Waiokamilo) but postponed further action until the Commission reached its decision on the IIFS petitions.

In 2005 and 2006, the U.S. Geological Survey issued scientific reports to support Commission determination of IIFS. On May 25, 2010, the Commission issued its IIFS which restored 0.45 MGD to East Wailuaiki, West Wailuaiki, and Waiohue streams in dry times, 8.7 MGD to those streams plus Waikamoi during the wet season, and 0.66 MGD to Makapipi and Hanawi. The 13 remaining East Maui streams were kept at current usage levels.

On March 10, 2016, the Commission reopened the contested case hearing<sup>15</sup> and on April 20, 2016 A&B announced that it will "fully and permanently" restore water to eight priority taro streams in East Maui. NHLC has disputed this claim. On June 24, 2016, BLNR heard arguments concerning Na Moku's requests that BLNR require A&B to install water meters, halt its diversions except for those necessary to provide up to 8.4 MGD needed by the Maui Department of Water Supply, and that BLNR deny A&B's lease application because it lacks an EIS and order A&B to identify by June 30, 2016 its current and future water needs and alternative water resources.

A&B has opposed altering the irrigation system based on time and cost considerations. A&B has also asserted that requiring diversions to cease would be inconsistent with the March 18, 1938 agreement between the Territory of Hawaii and A&B, which gives the company the right to access and operate diversions on state land. NHLC disputes A&B's arguments noting that the Circuit Court's decision invalidated the company's permits and that A&B has the ability to pump approximately 70 MGD of ground water from its brackish well. NHLC has also challenged the 1938 easement agreement and the claims that A&B is incapable of limiting the ditch flow to meet the county's needs, citing to Hawaii Supreme Court precedent requiring water use applicants to demonstrate actual needs and the absence of practicable alternative sources.

Related to the foregoing IIFS proceedings, during the period of 2001 to 2014 the state continued to extend revocable permits on a "holdover" annual basis to A&B.<sup>16</sup> On January 8, 2016, the First Circuit Court ruled that the four permits governing A&B's water diversions were invalid because the BLNR's practice of extending such permits violated state law and were inconsistent with the legislative intent of short-term permits.<sup>17</sup> The Hawaii Legislature

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<sup>15</sup> Teresa Dawson, *Water Commission Chair Reopens Case on Interim Stream Flows in East Maui*, Environment Hawaii, Vol. 26, No. 10 (April 1, 2016), available at <http://www.environmenthawaii.org/?p=8830>.

<sup>16</sup> See Melissa Tanji, *A&B: Water to be restored permanently to 8 streams*, MAUINEWS.COM (April 21, 2016), available at <http://www.mauinews.com/page/content.detail/id/609277/ABWatertoberestoredpermanentlyto8streams.html?nav=5161>.

<sup>17</sup> *Id.*

subsequently passed House Bill 2501 for the stated purpose of continuing the water flowing in A&B's ditches while HC&S completes its final sugarcane harvest and prepares to transition its fields into diversified agriculture.<sup>18</sup> Notwithstanding the Circuit Court's decision, the bill allows A&B to obtain a "holdover" of its diversions until a final decision is made on its lease application provided that BLNR determines A&B's continued diversions is consistent with the public trust doctrine.<sup>19</sup>

### **Keauhou Aquifer System**

On September 13, 2013, National Park Service ("NPS") petitioned the Commission to designate the Keauhou aquifer system of North Kona, County of Hawaii, as a WMA.<sup>20</sup> Kaloko-Honokōhau National Historical Park ("Park") was founded in 1978 with its stated purpose to preserve, interpret, and perpetuate traditional native Hawaiian activities, values and culture and to demonstrate historic land use patterns. The anchialine pools, fishponds, tide pools, and the near shore environment provide habitat for limu (seaweed), `ama`ama (mullet), `opae`ula (shrimp) and other species used by Native Hawaiians. The Park also provides habitat for endangered waterbirds and candidate species. NPS views the health of these biological resources as dependent upon the continued flow of groundwater from upland areas within the Keauhou aquifer system. Accordingly, NPS has sought Commission designation of fresh groundwater resources as a WMA to prevent alleged diminishment due to nearby development and to preserve a level that would sustain Park ecosystems and cultural practices.

The County has opposed the petition for designation of the Keauhou aquifer as a WMA, asserting that state control would stifle development under excessive bureaucracy. It also points out that the aquifer is only being pumped at half of its sustainable yield, in contrast to the Īao aquifer on Maui, which was pumping at 90 percent of sustainable yield when it was designated for state oversight. The West Hawaii business community and certain local, state and federal lawmakers have also opposed the designation on the basis that it is premature and would expose the water permitting process to unnecessary lawsuits.

In December 2014, the Commission mandated that NPS and the County of Hawaii Department of Water Supply ("County") enter into formal mediation of NPS's claims. In conjunction with mediation, the Commission has ordered the County to revise its Water Use and Development Plan ("Plan") for its assessments of future water withdrawals in Waimea and Keauhou.<sup>21</sup> The update was to proceed in phases involving demand projections, authorized use, and strategies for developing water sources and improving infrastructure including strategies to meet agricultural and other non-potable demands, assessment of potential impacts of source

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<sup>18</sup> Teresa Dawson, *Land Board Set to Hear Arguments in Dispute Over A&B's Water Lease*, Environment Hawaii (June 2016) available at <http://www.environmenthawaii.org/?p=8994>.

<sup>19</sup> *Id.*

<sup>20</sup> Press Release, U.S. National Park Service, *Water Management Area Kaloko-Honokōhau National Historical Park* (September 13, 2013), available at <https://www.nps.gov/kaho/learn/news/water-management-area.htm>.

<sup>21</sup> Teresa Dawson, *Water Commission Stresses Importance of Early Assessment of Cultural Impacts*, Environment Hawaii, (February 28, 2015), available at <http://www.environmenthawaii.org/?p=7683>.

development on environmental resources and cultural practices, and identification of mitigation measures.

On February 18, 2015, the Commission requested the County to focus its assessment of the impact such designation would have on the cultural practices and environment. The County's report on its preliminary findings was due by May 30, 2015. In March 2015, however NPS petitioned the Commission to consider designating an area smaller than the entire Keauhou aquifer system as a WMA on the basis that the Water Code does not define "area" for purposes of WMA designations.<sup>22</sup> The Commission has designated multiple aquifers as WMAs but has not designated a portion of an aquifer as a WMA.<sup>23</sup>

In August 2015, the Commission rejected NPS's request to create a smaller WMA within the larger aquifer, noting that designation of partial WMAs may adversely impact Commission data gathering. The Commission also expressed concern over the lack of a sufficient hydrogeological basis for such designations.

On May 19, 2016, the Commission held a meeting during which NPS presented on native Hawaiian traditional and customary uses of water at the Park and why water is needed at existing flow levels to sustain natural resources in and around the Park. The County also presented its Development Plan Update for the Keauhou Aquifer System Area.<sup>24</sup>

### **West Kaua'i**

On July 24, 2013, Earthjustice, on behalf of Po'ai Wai Ola (West Kaua'i Watershed Alliance), filed with the Commission a combined petition to amend the IIFS for the Waimea River a complaint and petition for declaratory order against waste.<sup>25</sup> Petitioners alleged waste with regard to the state Agribusiness Development Corporation's ("ADC") and its tenants' use of water diverted into Kekaha ditch irrigation system from the Waimea River and into the Koke'e ditch irrigation system. ADC's tenants include the Kekaha Agriculture Association ("KAA"), an agricultural cooperative.<sup>26</sup> Other interested parties include the Department of Hawaiian Home Lands ("DHHL"), which owns 15,061 acres of homestead lands in the area and the Kauai Island Utility Cooperative ("KIUC"), which has proposed pumped storage hydropower project would draw water from the Koke'e Ditch.<sup>27</sup>

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<sup>22</sup> Patricia Tummons, *Water Commission Rebuffs NPS Effort to Shrink Proposed Designation Area*, Environment Hawaii, (August 31, 2015), available at <http://www.environmenthawaii.org/?p=8325>.

<sup>23</sup> See *id.*

<sup>24</sup> State of Hawaii, Department of Land and Natural Resources, Commission on Water Resource Management, Agenda for the Meeting of the Commission on Water Resource Management (May 19, 2016), available at <http://files.hawaii.gov/dlnr/cwrm/agenda/2016/ag20160519.pdf>.

<sup>25</sup> Commission on Water Resource Management, Minutes for the Meeting of the Commission on Water Resource Management (February 16, 2016), available at <http://files.hawaii.gov/dlnr/cwrm/minute/2016/mn20160216.pdf>.

<sup>26</sup> *Id.*

<sup>27</sup> *Kaua'i Pumped Storage Project Wins Preliminary Approval of Land Lease*, Environment Hawaii (December 2014), available at <http://www.environmenthawaii.org/?p=6109>.

In response to the petition, the Commission retained a consultant to assess the Koke`e and Kekaha system diversions of the Waimea River's headwaters.<sup>28</sup> At the Commission's meeting on February 18, 2015, the consultant presented its initial findings, which noted that water flows in the Kekaha ditch serve hydroelectric power production purposes in addition to providing irrigation water for agriculture. The hydropower facilities provide power to pumps which drain water to maintain a low water table to allow agriculture on the Mana plain and to protect the U.S. Pacific Missile Range Facility and residential areas in Kekaha town from flooding.

Petitioners have alleged waste or dumping of water occurs with regard to operations of the Kekaha and Koke`e systems, and have objected to the hydropower facilities generating electricity that is sold to KIUC and not used for agricultural infrastructure purposes. In addition to electricity generation to power drainage pumps, ADC and KAA have asserted that sufficient flow is necessary to maintain the systems by keeping tunnels from drying, cracking, and possibly collapsing, and also suppressing vegetation growth and debris accumulation.<sup>29</sup> KAA has also noted that the 22.7 MGD currently diverted is significantly less than the amount of 31.1 MGD diverted by its predecessor the Kekaha irrigation system between 1980 and 1999.<sup>30</sup>

On August 11, 2015, the Commission ordered Petitioners, ADC and KAA (and also interested parties DHHL and KIUC) to enter into formal mediation. In conjunction with mediation, on September 30, 2015, the Commission requested ADC and KAA to provide additional information concerning water use data, water demand of ADC's tenants, and hydroelectric power production and revenues. On December 16, 2015, the Commission approved the Delegation of Authority to the Chairperson to Hire a Mediator for the Complaint and Petition.<sup>31</sup> On February 16, 2016, the Commission approved the Terms of Reference as Proposed by the Mediator to Initiate the Mediation Process to Address the Complaint and Petition. The mediation is ongoing.

Related to the petition, on November 17, 2015 DHHL filed a petition for reservation of surface water of 33.145 MGD from the Waimea River watershed. The Commission has not taken any formal action on the petition. In August 2015, the Commission approved a similar DHHL water reservation with regard to the Keahou aquifer in Kailua Kona in an area that, like West Kauai, is not a designated WMA. In the 1990s, the Commission approved three DHHL water reservations in WMAs on Oahu and Molokai.

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<sup>28</sup> Teresa Dawson, *Mediation Over West Kaua'i Stream Diversions May Hinge on Response to Information Request*, Environment Hawaii (July 1, 2015), available at <http://www.environmenthawaii.org/?p=8219>.

<sup>29</sup> Teresa Dawson, *Agricultural Tenants in Kekaha Object To Basic Questions About Water Use*, Environment Hawaii (August 31, 2015), available at <http://www.environmenthawaii.org/?p=8334>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

# Brief Overview of Selected Hawaii Water Commission Proceedings

Hawaii Water Law Seminar

July 22, 2016

Douglas A. Codiga, Esq.

Schlack Ito LLC



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# Summary of Key Points

- \* Water law and policy are key drivers of economic development and environmental protection in Hawaii
- \* Proceedings exhibit high degree of factual and legal complexity
  - \* West Kauai (IIFS), Hawaii (GWMA), Maui (IIFS, SWMA)
- \* Evolving interplay between administrative and judicial legal proceedings
- \* Proceedings show potential for advances in multi-party environmental dispute resolution

# IIFS and Waste Petition (Kauai)

# Legal and Factual Background

- \* Kekaha Sugar Company ceased operations in 2001
- \* Kekaha Agriculture Association formed in 2003
  - \* HRS ch. 421 agricultural cooperative
  - \* Purpose is to “promote effective and compatible agriculture/aquaculture business uses” of the ADC lands
- \* ADC/KAA to manage, operate, maintain and repair agriculture infrastructure (irrigation, drainage, electricity, roads) under E.O. 4007 and E.O. 4287

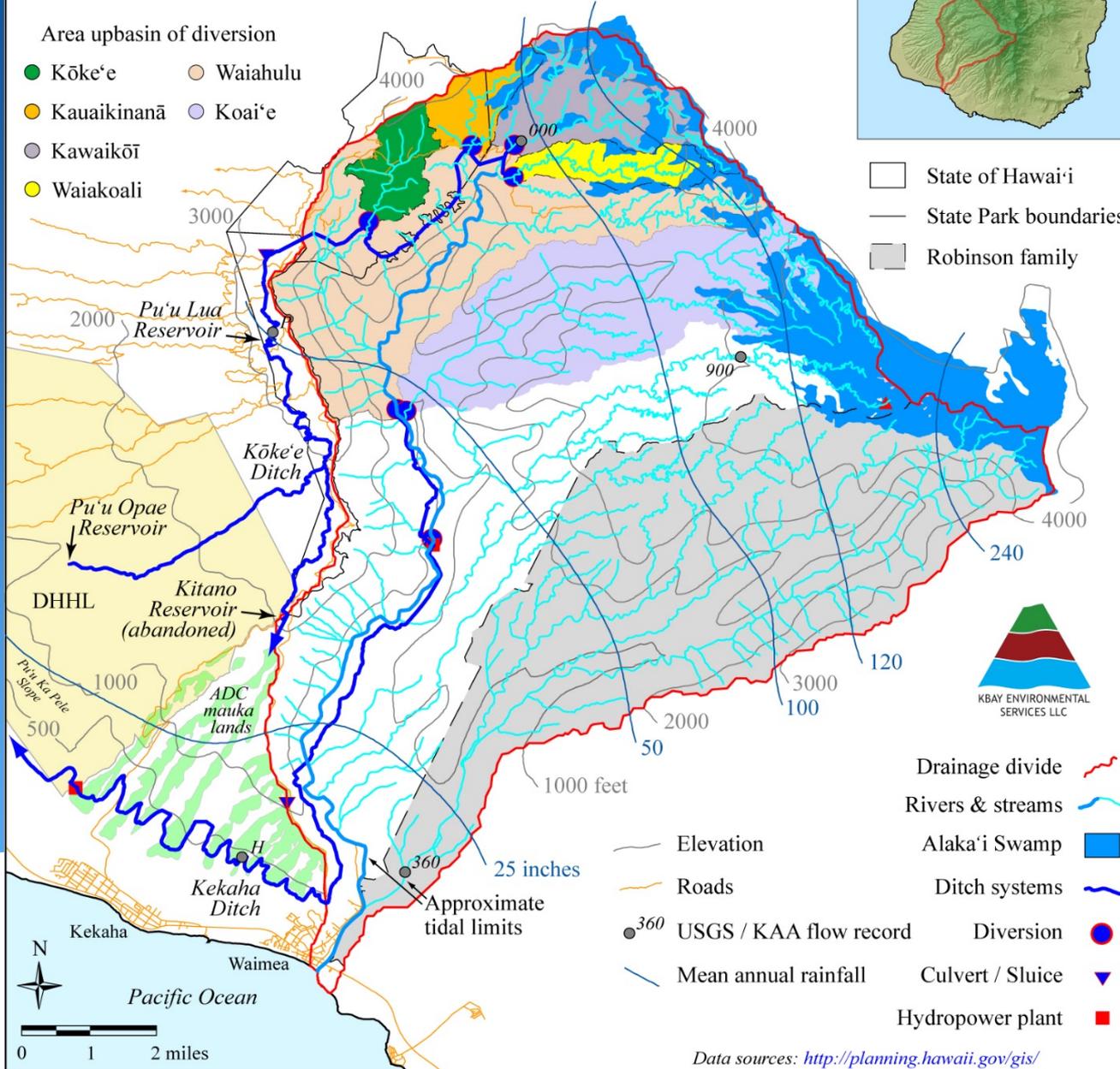
# WAIMEA RIVER WATERSHED



Area upbasin of diversion

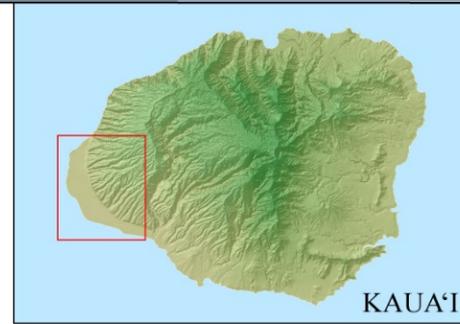
- Kōke'e
- Kauaikinanā
- Koai'e
- Kawaikōi
- Waiakoali
- Waiahulu

- State of Hawai'i
- State Park boundaries
- Robinson family



Data sources: <http://planning.hawaii.gov/gis/>

# Kekaha – Mānā Coastal Plain



KAUAI



- PMRF
- 200 ft elevation
- State highway
- Secondary or unpaved roads
- Ephemeral streams
- Kekaha Ditch
- Water use record
- Field reservoir
- Hydropower plant
- Drainage ditch

Pacific Ocean



0 5,000 10,000 feet

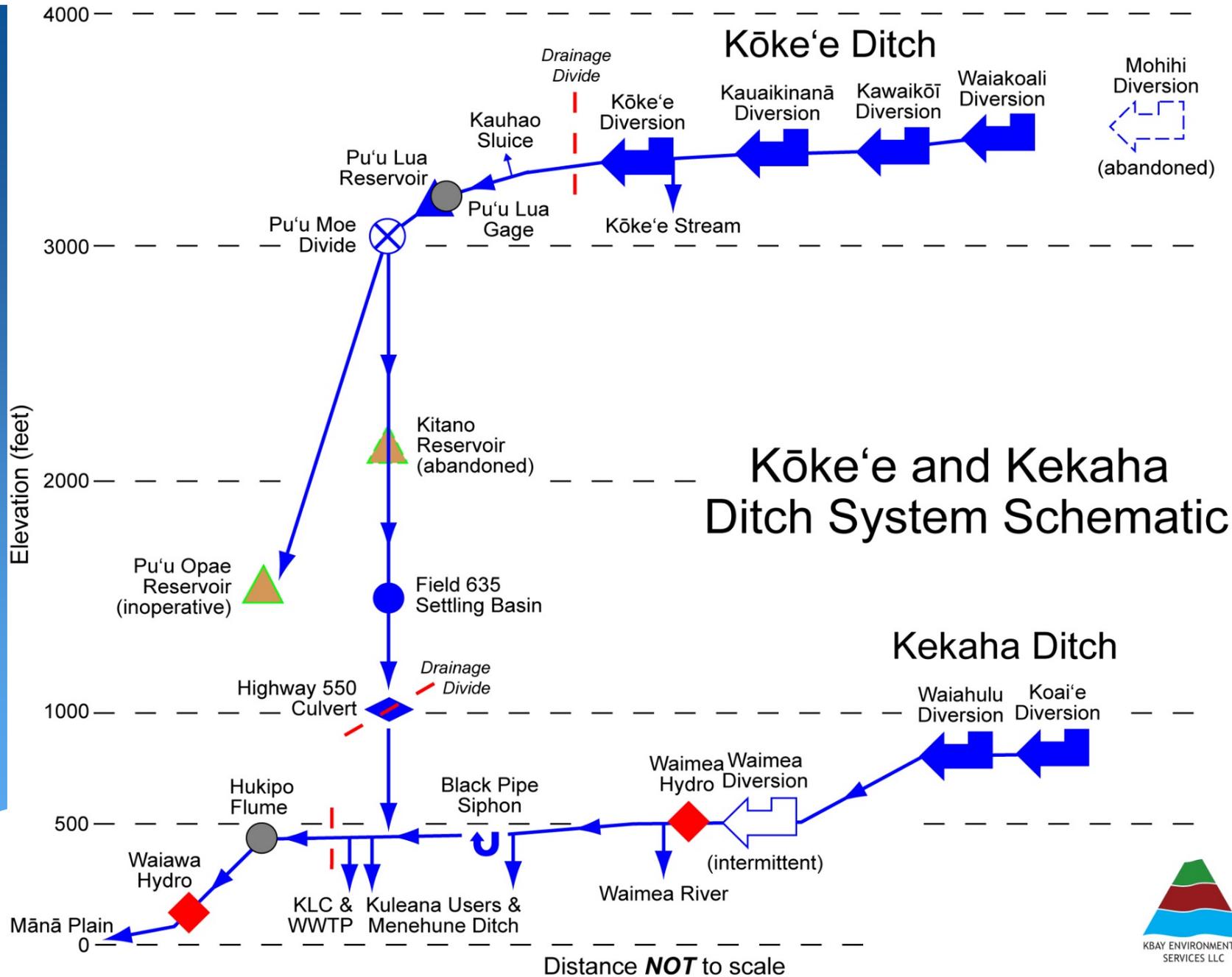
Kekaha

Waimea

Data sources: USGS Kekaha and Kekaha OE S 7.5 minute series quadrangles,  
and State of Hawai'i Agribusiness Development Corporation

# Irrigation Infrastructure

- \* Extensive irrigation system for water delivery and storage
  - \* Surface water, ditches, reservoirs (Puu Lua, Kitano, Puu Opae)
  - \* Groundwater, pumps, filters
- \* Kekaha system (1907)
  - \* Three diversions (Waiahulu, Koaie, Waimea)
  - \* 27 miles of ditches, tunnels, flumes and syphon
- \* Kokee system (1926)
  - \* Four diversions (Kauaikinana, Kawaikoi, Waiakoali, Kokee)
  - \* 21 miles of ditches, tunnels, flumes and syphon
- \* Two systems are physically connected and in same watershed





# Drainage Infrastructure

- \* 40 miles of canals and ditches serving Kekaha region
  - \* Pumping stations (Kawaiele, Nohili, Kekaha)
  - \* Ravines, canals, drainage channels
  - \* Electric and mechanical equipment
- \* Pumps lower groundwater table for farming
- \* Drainage system prevents flooding of PMRF and local communities
- \* Pumps move irrigation water for farming
- \* Pumps run on power generated by KAA hydros
- \* Drainage system water released to Pacific Ocean



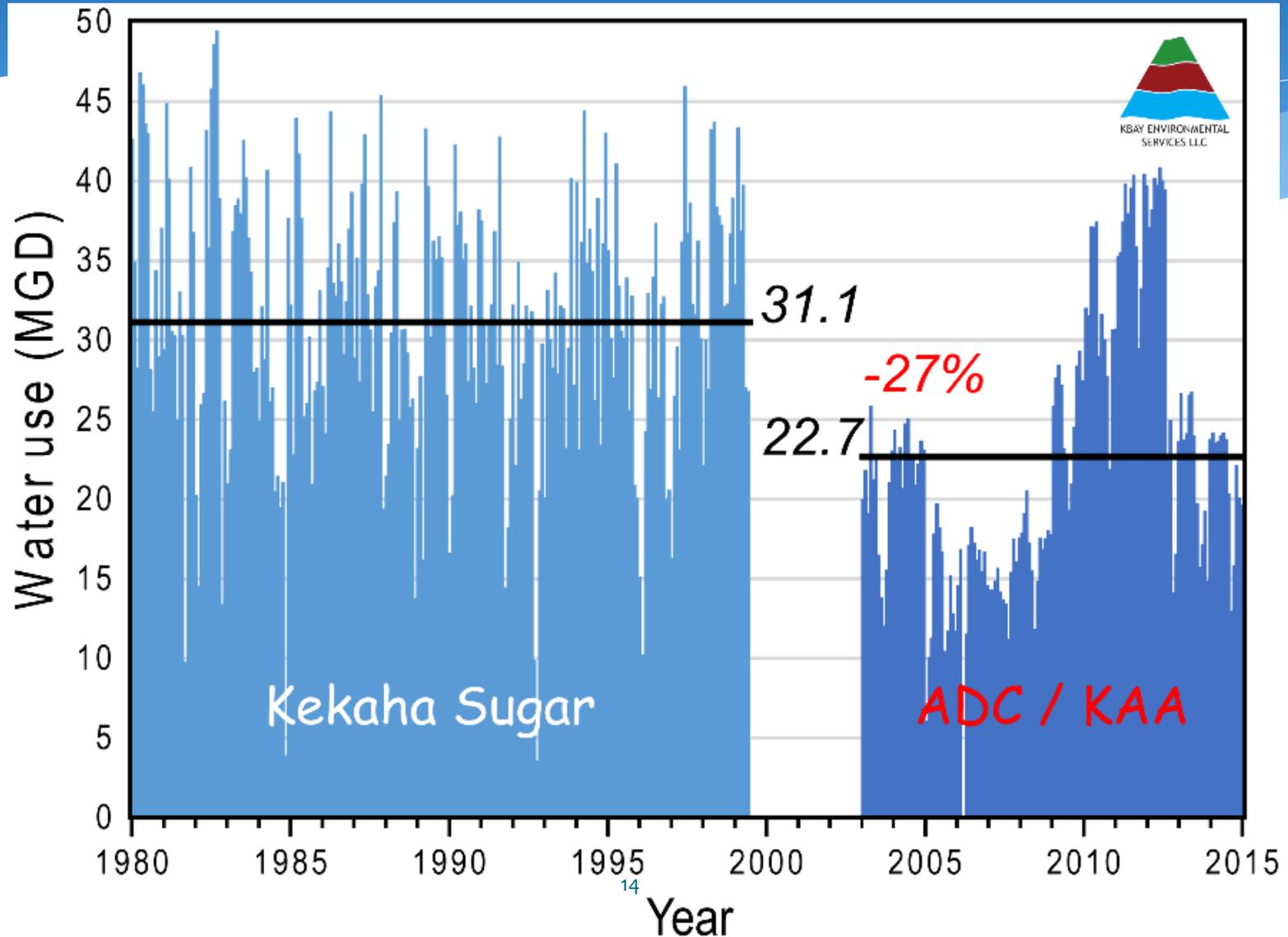
# Electrical Infrastructure

- \* KAA hydros make electricity to power pumps for essential functions
  - \* Pumps lower groundwater table for farming
  - \* Drainage system prevents flooding of PMRF and local communities
  - \* Pumps move irrigation water for farming
- \* Mauka hydro (1911, 1959, 2002)
  - \* Upper Kekaha ditch system in Waimea Canyon
  - \* 1.2 MW capacity
- \* Waiawa hydro (1908)
  - \* Lower Kekaha ditch system on Mana Plain
  - \* 500 kW capacity
- \* KAA maintains 29 miles of electrical distribution lines
- \* The two KAA hydros supply 10% of KIUC's renewable energy

# Major Reductions in Water Diversion and Use Since Plantation Era

- \* Kekaha ditch system
  - \* KAA monitors flow at Hukipo flume
  - \* KAA reports readings to CWRM
  - \* Waiawa hydro uses 21 MGD for essential functions
    - \* Pumps lower groundwater table for farming
    - \* Drainage system prevents flooding of PMRF and local communities
    - \* Pumps move irrigation water for farming
- \* Major reduction in water diversion and use
  - \* Plantation era monthly average of 31.1 MGD
  - \* KAA monthly average is 22.7 MGD (Jan. 2003 to Dec. 2014)
  - \* This is a 27% reduction in water diversion and use

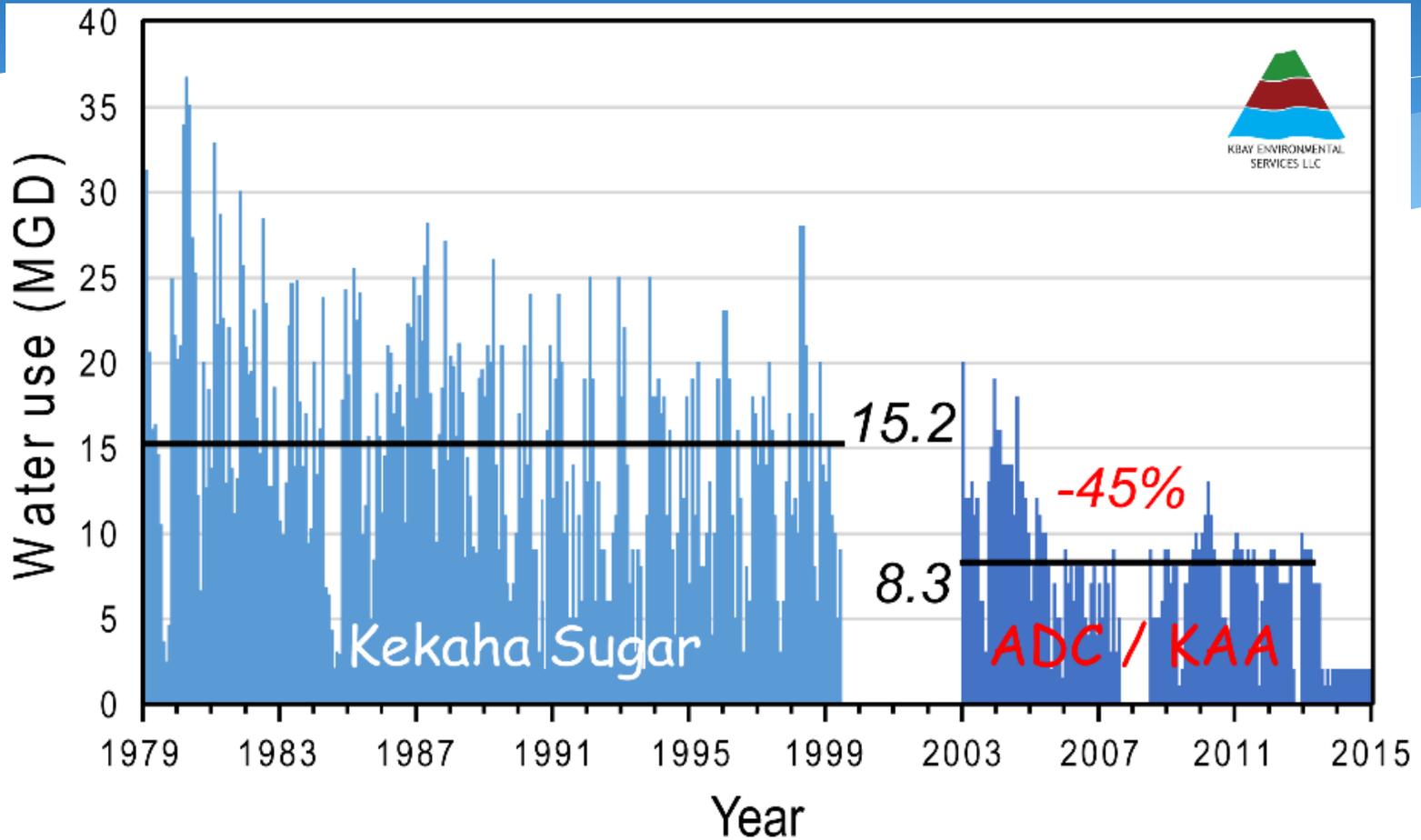
# Kekaha – 27% Reduction



# Similar Major Reduction for Kokee Ditch System

- \* Kokee ditch system
  - \* KAA monitors flow at Puu Lua Reservoir
  - \* KAA reports readings to CWRM
- \* Major reduction in water diversion and use
  - \* Plantation era monthly average of 15.2 MGD
  - \* KAA monthly average is 8.3 MGD (Jan. 2003 to Dec. 2014)
  - \* This is a 45% reduction in water diversion and use

# Kokee – 45% Reduction



# Petition for Amended IIFS

- \* Combined petition filed by Po'ai Wai Ola (West Kauai Watershed Alliance)
- \* Petition for amended Interim Instream Flow Standards (Haw. Rev. Stat. 174C-71)
- \* CWRM established IIFS in 1988
- \* CWRM development of amended IIFS in process
- \* IIFS included in scope of CWRM-mandated mediation

# Complaint and Petition for Declaratory Order Against Waste

- \* In addition to IIFS, combined petition includes complaint and petition for declaratory order against waste (Haw. Rev. Stat. 174C-13)
- \* Waste allegations focus on release of water from Kekaha and Kokee systems
- \* Waste included in scope of mediation

# KIUC and DHHL Involvement

- \* Kauai Island Utility Cooperative project
  - \* Hawaii clean energy law and policy mandates
  - \* Kekaha and Kokee systems hydro and pumped storage potential
  - \* BLNR approval in principle
- \* Department of Hawaiian Home Lands reservation
  - \* Petition filed Nov. 17, 2015
  - \* CWRM granted DHHL reservation for Keahou aquifer outside of Water Management Area

# NPS Petition for GWMA (Hawaii Island)

# Legal and Factual Background

- \* Petition filed by National Park Service
  - \* Kaloko-Honokōhau National Historical Park
  - \* Anchialine pools, fishponds, tide pools
  - \* Limu (seaweed), `ama`ama (mullet), `opae `ula (shrimp)
  - \* NPS seeks to protect groundwater resources from increased use from land development
- \* Water Management Area (Haw. Rev. Stat. 174C-44)
  - \* Use regulated through Water Use Permit Application process

# Response to NPS Petition

- \* County of Hawaii and business community oppose Keahou aquifer WMA designation
  - \* Aquifer not fully utilized (cf. 'Īao at 90% of MSY)
  - \* Existing protections are sufficient to protect aquifer
  - \* Exposure to unnecessary litigation over permits
- \* CWRM required updated demand projections
- \* Parties mandated to enter formal mediation

# Nā Wai 'Ehā IIFS and SWMA (Maui)

# Legal and Factual Background

- \* Nā Wai ‘Ehā or “Four Great Waters”
  - \* Waihe‘e River and Waiehu, ‘Īao, and Waikapū Streams
- \* Water Management Area (Haw. Rev. Stat. 174C-44,45)
  - \* Ground water and surface water
  - \* CWRM control over withdrawals and use
  - \* Reasonable-beneficial use consistent with public trust

# GWMA and SWMA

- \* 'Īao aquifer designated as Ground WMA
- \* Nā Wai 'Ehā designated as Surface WMA
- \* Water Use Permit Applications (WUPA) process
  - \* Hawaiian Commercial & Sugar Co.
  - \* Wailuku Water Company
  - \* Individual users claiming appurtenant rights
- \* SWUPA and appurtenant rights ongoing contested case hearing

# IIFS Petition

- \* June 2004 petition for amended IIFS filed
  - \* Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation
  - \* Existing IIFS deficient scientific basis and public trust
- \* June 2010 CWRM order establishing IIFS
- \* August 2012 Hawaii Supreme Court decision
  - \* Remand to CWRM
- \* April 2014 CWRM order approving settlement
- \* March 2016 petition to increase flows
  - \* HC&S closure similar to Waiahole

# East Maui IIFS petition (Maui)

# Revocable permit legal challenges

- \* East Maui Irrigation diversions authorized by BLNR
  - \* Revocable permits and 30-year water lease
  - \* Na Moku challenged 30-year water lease
- \* First Circuit Court upheld challenge
  - \* BLNR cannot rely on CWRM IIFS determinations
  - \* Environmental review required
- \* Holdover revocable permits 2001-14
  - \* Jan. 2016 First Circuit Court invalidated holdover RPs
  - \* House Bill 2501 allows holdover pending CWRM decision on water lease

# Petition to Amend IIFS

- \* Na Moku petition for amended IIFS
  - \* Native Hawaiian traditional and customary practices
  - \* Public trust doctrine obligations
- \* CWRM arranged for 2005-06 USGS scientific reports
  - \* Technical basis for IIFS
- \* May 2010 CWRM order amending IIFS
- \* March 2016 contested case reopened

# Conclusion

- \* Water law is key economic and environmental driver
- \* Factual and legal complexity of proceedings
  - \* West Kauai (IIFS)
  - \* Hawaii (GWMA)
  - \* Maui (IIFS, SWMA)
- \* Administrative and judicial interplay
- \* Mediation and environmental dispute resolution

# Mahalo

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