

Hawai`i water law overview

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Water law in Hawai`i has evolved over time to reconcile Native Hawaiian and Western conceptions of property law and water rights. Prior to contact with the West, water was viewed as a shared resource central to native culture. Communities were typically organized by watersheds and subsistence agriculture depended on diversions and ditches to irrigate the staple crop of taro (Wilcox, 1996). With Western contact, many water practices began to change, particularly as commodity agriculture took hold on the islands.

The Great Māhele, or division of Hawaiian lands by King Kamehameha III in the mid-1800s, created a fee simple title property system and rudimentary water rights. Statutes and case law during the pre-statehood period (1858-1959) defined these rights further and began a process of water privatization which ran counter to earlier traditions that treated water as a public resource (Miike, 2004). These traditions would inform two landmark Hawai`i Supreme Court decisions in the 1970s and 1980s (*McBryde v. Robinson* and *Reppun v. Board of Water Supply*) that reversed earlier case law by reasoning that the Great Māhele transferred the right to water *use* but not water *ownership*, which belonged to the state. These two rulings had the effect of affirming the existence of three types of water rights in Hawai`i: riparian, appurtenant, and correlative rights to water (discussed below).

Types of Water Rights

Riparian rights are attached to land adjacent to a stream and they allow beneficial use that does not substantially diminish the natural flow. In its decisions, the Hawai`i Supreme Court qualified these rights by stating that use must be reasonable and not lead to actual harm to another riparian land owner's reasonable use of the waters (Miike, 2004). The state allows riparian water transfer to other users or watersheds, though this is not protected as a right and may be enjoined (*McBryde*; State Water Code).

Appurtenant rights are those that accompany a parcel of land, which in the context of Hawaiian history means that the parcel received diverted stream flow at the time of the Māhele (1848). Most commonly, these were taro farms. Appurtenant rights are not restricted to the growing of taro and may be applied to other beneficial uses (Miike, 2004). Appurtenant rights are preserved and not cancellable by the state (Hawaii Administrative Rules §13-171-27)

Correlative rights are analogous to riparian rights but for the groundwater underneath a parcel. All landowners that overly a given aquifer have equal rights to use groundwater. Water may be withdrawn to the extent that it does not produce actual harm to the water rights of other users (either groundwater or interconnected surface water; *Reppun v. Board of Water Supply*). Correlative rights allow the transfer of water to other users, so long as such use does not interfere with the use of other overlying parties.

Also, potentially superseding all of the above rights are **Native Hawaiian water rights**. The state constitution (Chapter XII, Section 7) protects “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes” for descendants of native Hawaiians. Thus, water uses that impact those customs and traditions could be restricted.

Development of State Water Code

Echoing the Supreme Court’s *McBryde* decision, in 1978, a state constitutional convention and election added the following language to Chapter XI, Section 7 of the Hawai`i State Constitution: “The State has an obligation to protect, control and regulate the use of Hawai`i’s water resources for the benefit of its people.” The Constitution also directed the state legislature to create a water resources agency to oversee water regulation in the state. In 1987, the legislature enacted a State Water Code to fulfill this directive and provide a statutory framework for water rights in the state.

The State Water Code declares that “the waters of the State are held for the benefit of the citizens of the State” and that “the people of the State are beneficiaries and have a right to have the waters protected for their use” (Hawaii Revised Statute [HRS], Ch. 174-C). The code seeks to balance maximum beneficial use for commercial and domestic uses with adequate protections for traditional and customary Hawaiian rights, fish and wildlife, scenic beauty, and public uses (HRS §174C-2c). The State Water Code established a Commission on Water Resource Management (CWRM) to oversee the administration of the code and subsequent administrative rules.

The CWRM is tasked with collecting declarations of surface and ground water use; certifying those uses where “reasonable and beneficial;” registering existing wells and stream diversion works; collecting records of current water use; and permitting new wells, pumps, pump repairs, and stream diversion works (HAR, 13-168). Additionally, the CWRM may designate surface and ground water management areas where “water resources may be threatened by existing or proposed withdrawals or diversions of water” (HRS §174C-41a). Water use in water management areas is regulated by a permit system administered by CWRM.

Despite an emphasis on the permit system in water management areas, the CWRM has jurisdiction statewide to hear any disputes regarding water resources, regardless of whether it is covered by a water management area (Hawaii Administrative Rules [HAR] §13-167-23).

Water Management Areas

The CWRM has an online form to petition for the establishment of a water management area. The criteria the CWRM uses for surface and ground water management area are as follows:

Criteria for Surface Water Management Area (HRS §174C-45):

In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;
- (2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or
- (3) Serious disputes respecting the use of surface water resources are occurring.

Criteria for Groundwater Management Area (HRS §174C-44):

In designating an area for water use regulation, the commission shall consider the following:

- (1) Whether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed ground water management area;
- (2) There is an actual or threatened water quality degradation as determined by the department of health;
- (3) Whether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels;
- (4) Whether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water;
- (5) Whether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses;
- (6) Whether excessive preventable waste of ground water is occurring;
- (7) Serious disputes respecting the use of ground water resources are occurring; or
- (8) Whether water development projects that have received any federal, state, or county approval may result, in the opinion of the commission, in one of the above conditions.

Water Use Permitting Process

In a newly designated surface or ground water management area, CWRM notifies landowners to apply for a Water Use Permit and declare their existing or proposed new water uses. Proposed new uses require that the applicant establish that the new use:

1. Can be accommodated with the available water source.
2. Is a reasonable-beneficial use.¹

¹ HRS §174C-3 of the State Water Code states: "*Reasonable-beneficial use*" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.

3. Will not interfere with any existing legal use of water.
4. Is consistent with the public interest.²
5. Is consistent with state and county general plans and land use designations.
6. Is consistent with county land use plans and policies.
7. Will not interfere with the rights of the Department of Hawaiian Home Lands as provided in Section 221 of the Hawaiian Homes Commission Act.

CWRM then publishes a record of received applications, during which time other water users may file objections. Applicants are allowed to respond to the objections and CWRM serves as arbiter for the dispute. Water Use Permits are not required for domestic use, nor are they required for catchment systems harvesting rainwater.

The CWRM may issue an interim or a permanent permit. An interim permit is issued only for existing un-metered water uses where quantification verification is the only issue; there is a maximum 5-yr. review period to verify amount. A permanent water use permit may be issued for metered and verified existing uses. Permits are subject to review every 20 years to determine if permit conditions are being complied with.

Permits may be modified to reflect new uses, new places of use, or intention to use greater quantities of water. These permit modifications are treated as new permit applications with the same review and public notice requirements as the initial permit application.

Forfeiture

Water use permits are subject to revocation for partial or total non-use during a continuous four-year period, unless for reasons of conservation or documented hardship beyond the user's control. If partial non-use, the amount of water not used will be forfeit. Periods of non-use caused by an official declaration of water shortage are not counted as part of the four-year period of forfeiture (HAR §13-171-24).

Definition

There is no legal definition of Irrigation in the Water Resource Management's rules nor the Hawaii Department of Agriculture rules.

² HRS §174C-2(c) of the State Water Code states that: *(t)he state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such objectives are declared to be in the public interest.*