

THE LOSING RECORD ON APPEAL OF COMMISSION ON WATER RESOURCE MANAGEMENT (CWRM) DECISIONS, 1987 - 2023

In 1987 the Legislature created the Hawaiʻi Water Code and the CWRM. The seven members have made nine major decisions that have been appealed to the Intermediate Court of Appeals (ICA) or the Hawaiʻi Supreme Court (HSC). Seven of nine times CWRM has been overruled for failing to protect public trust interests in water. CWRM’s two wins were when they ruled with Maoli, local, mālama ʻāina advocates in upholding Public Trust purposes.

	CASE	ISSUE	CWRM DECISION	COURT DECISION
1	Koʻolau Ag , 83 Hawaiʻi 484, 927 P.2d 1367 (1996)	The Sierra Club petitioned for water management areas (WMAs) on Oʻahu.	At their May 5, 1992 hearing, CWRM voted to designate the five aquifers as WMAs. Koʻolau Ag., a commercial water user, appealed.	HSC upheld CWRM; “a WMA designation is not judicially reviewable,” but a decision to <i>not</i> designate may be.
2	Waiāhole I , 94 Hawaiʻi, 97, 9 P.3d 409 (2000)	Windward groups petitioned to return water to windward streams that had been diverted to leeward Oʻahu for nearly a century.	In December 1997 after a long contested case hearing (CCH), CWRM permitted over half the water for ditches and released the “surplus” to two of three windward streams under increased interim instream flow standards (IIFS).	HSC reversed because: (1) The new IIFS were not shown to be sufficient for instream uses; (2) “Public Trust” uses are supposed to have priority over private commercial water use; (3) the “precautionary principle” requires protection when science is uncertain.
3	Waiāhole II , 105 Hawaiʻi 1, 93 P.3d 643 (2004)	The Agricultural Development Corp. (ADC) and other commercial users sought water use permits (WUPs) for agricultural uses and ditch system losses.	CWRM ruled: (1) IIFS could be half their natural flow because anciently ditches could not divert more than half of streams; (2) Economic impacts on leeward users made groundwater use impracticable; (3) ADC was granted a WUP for system losses.	HSC reversed because: (1) CWRM did not show restoring half of stream flow would protect instream uses; (2) economic viability of diversions was not adequate grounds for its decision in light of public trust purposes; (3) ADC’s 1.5 mgd losses did not comply with WUP conditions.
4	Waiʻola , 103 Hawaiʻi 401, 83 P.3d 664 (2004)	Waiʻola, a Molokaʻi Ranch (MR) subsidiary, sought a WUP for development.	Practitioners, the Department of Hawaiian Home Lands (DHHL) and others opposed the WUP. After holding a CCH, CWRM issued Waiʻola an “interim” WUP.	HSC vacated the WUP because: (1) CWRM did not protect DHHL’s and traditional/ customary rights; (2) Waiʻola had the burden of showing how it would not affect these rights.
5	Kukui , 116 Hawaiʻi 481, 174 P.3d 320 (2007).	Kukui Molokaʻi Inc. (KMI), a different MR subsidiary, applied for a WUP in a different aquifer than in Waiʻola .	In a CCH, DHHL argued water for homesteaders was a public trust use and pumping nearby could affect their reservations. Hawaiian practitioners argued groundwater removal would impact near shore traditional and customary practices. CWRM granted a WUP.	HSC reversed CWRM’s decision because: (1) DHHL’s water reservation was a public trust purpose; (2) KMI had not been burdened with showing an absence of alternatives; (3) CWRM impermissibly placed the burden on DHHL to show how Kukui would impair water quality.
6	Waiāhole III , 130 Hawaiʻi 346, 310 P.3d 1047 (App. 2010) (mem.)	Central / leeward users including Puʻu Makakilo, Inc. (PMI) sought WUPs.	Jul. 2006: CWRM granted water to central / leeward users. Windward community groups appealed to the ICA.	ICA vacated PMI’s WUP because CWRM refused to consider evidence that PMI did not need all water applied for in its WUP.
7	Nā Wai ʻEhā , 128 Hawaiʻi 228, 287 P.3d 129 (2012)	Maui community groups petitioned to amend the IIFS for the streams of Nā Wai ʻEhā for instream uses and kalo cultivation.	From 2007-08, a CCH was held on Hui o Nā Wai ʻEhā’s IIFS petition, resulting in a proposed restoration of 34.5 mgd by a hearings officer. CWRM instead chose to limit restoration to only two of the four streams.	HSC overturned CWRM’s decision for: (1) failing to consider impacts on and protections for practices; (2) incompletely analyzing instream uses; (3) miscalculating alternative water sources, user company’s acreage and reasonable system losses.
8	Nā Moku Aupuni o Koʻolau Hui , 128 Hawaiʻi 497, 291 P.3d 395 (Haw. App. 2012) (mem.)	A community group petitioned CWRM to amend the IIFS for 27 East Maui streams diverted for Central Maui agriculture.	CWRM amended IIFSs for 8 streams. Oct. 2010: CWRM denied Nā Moku’s petition for a CCH on its IIFS petition on the basis that Nā Moku had no “legal” right to a CCH. Nā Moku appealed to the ICA.	ICA reversed CWRM’s CCH denial. Nā Moku members exercised legally protected traditional and customary practices, including kalo cultivation. CWRM’s IIFS decisions on Nā Moku’s members’ rights merited a CCH.
9	Kukui II , No. SCOT-17-0000184 (2018)	Remand of the Kukui case	CWRM dismissed the Kukui remand, at the urging of DHHL and OHA; MR appealed.	HSC upheld CWRM: The Commission did not err in finding MR had made a clear and unambiguous waiver.