DISSENTING OPINION BY RAMIL, J.

Because the majority resorts to the nebulous common law public trust doctrine as a distinct and separate authority to assign "superior claims" status to "public instream uses" and "native Hawaiian and traditional and customary rights," thereby trumping Hawai‘i Revised Statutes (HRS) chapter 174C (1993 & Supp. 1999) (the Code), I dissent. The public trust doctrine, as expressed in the Hawai‘i Constitution and as subsequently incorporated into the Code, does not mandate preference for instream uses or native Hawaiian rights. Rather, a review of the history of the 1978 Constitutional Convention reveals that the framers viewed the public trust simply as a fiduciary duty on the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Haw. Const. art. XI, section 7. Therefore, I would hold that the Commission on Water Resource Management (the Commission) exceeded its statutory authority when it cited to the common law public trust doctrine as a distinct and separate authority for justifying priority for particular uses of water.

Additionally, because more definitive instream flow standards designed to restore and sustain instream uses have yet to be established, I believe that the majority imposes an impossible burden of proof on offstream users to "justify[] their proposed uses in light of protected public rights in the

resource." Majority at 103.

Most troubling, perhaps, is that the majority, in the process of reaching their desired result, breaches a number of fundamental principles of law which we have recognized and adhered to in the past, thus, creating confusion and uncertainty in an area of law that desperately requires clarity. Because the majority essentially rewrites the Code through this opinion today, I suspect that this opinion will generate litigation by applicants arguing that their particular use of water is a public trust use or value.

I. The State's Public Trust Duty, as Enshrined in the Hawai'i Constitution, Requires a Balancing Process Between Competing Public Interest Users.

The majority, in its effort to define the purposes of the public trust, relies on vague, common law notions from foreign jurisdictions. I start with our Constitution.

Because constitutions derive their authority from the people who draft and adopt them, we have long held that the Hawai'i Constitution must be construed in accordance with the intent of the framers and the people adopting it, and that the "fundamental principle in interpreting a constitutional provision is to give effect to that intent." State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998) (quoting Convention Center Authority v. Anzai, 78 Hawai'i 157, 167, 890 P.2d 1197, 1207 (1995) (internal quotation marks and citations omitted)).

Accordingly, I turn to the history of the public trust doctrine as expressed in the Hawai‘i Constitution in order to discern the framers' intent.

Pursuant to the 1978 Constitutional Convention, the people of this State adopted the following constitutional provisions which define the State's trust responsibilities in managing its water resources:

> ARTICLE XI
> CONSERVATION, CONTROL AND DEVELOPMENT OF RESOURCES
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> Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
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> All public resources are held in trust by the State for the benefit of the people.
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> . . .
>
> WATER RESOURCES
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> Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
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> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environment; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

Haw. Const. art. XI, §§ 1 and 7 (1978) (Emphases added).

A plain reading of the above constitutional provisions

does not reveal an intent to accord superior claims to certain uses. To the contrary, Article XI, Section 1 generally obligates the State to "promote the development and utilization" of our water resources (1) "in a manner consistent with their conservation" and (2) "in furtherance of the self-sufficiency of the State." Furthermore, contrary to the majority's expansive use of the public trust doctrine, Article XI, Section 7 makes it plain, that "the legislature shall provide for a water resources agency which, as provided by law, shall . . . establish criteria for water use priorities . . . ." (Emphasis added.) In other words, the "how" or the public policy making function was properly reserved for the legislature. Accordingly, these constitutional provisions did not adopt the common law public trust doctrine as a device to determine how water is to be used or prioritized.

Turning now to the constitutional history of these provisions, I find nothing to equate the State's public trust obligation to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" with according superior claims to certain uses. Rather, the framers used the term "public trust" to "describe the nature of the relationship between the State and its people and the duty of the State to actively and affirmatively protect, control and regulate water

resources, including the development, use and allocation of water." Comm. Whole Rep. No. 18, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 1026 (1980) [hereinafter Proceedings]. Indeed, the framers were keenly aware that such a fiduciary duty to "protect, control and regulate" water necessarily involved a balancing of competing social and economic interests. Id. ("When considering use and development of our natural resources, economic and social benefits are major concerns. However, the broad definition of economics, that of 'careful and thrifty' use of resources, rather than the narrow sense of immediate financial return, should be adopted."). In establishing the State's duty to "protect, control and regulate" water for the benefit of all its people, the framers presumably meant exactly what they said -- nothing more, nothing less.

Specifically, article XI, section 1 imposes a two-fold obligation on the State to (1) conserve and protect Hawai'i's natural resources, and (2) develop the resources "in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." The framers further defined "conservation" as "the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits." Stand. Comm. Rep. No. 77, in 1 Proceedings, at 686 (emphasis added). In fashioning the State's

duty to conserve and develop its natural resources, the framers, while cognizant of the need to balance the competing interests in preserving and using the resource, did not mandate that such balancing be skewed to favor particular uses.

Furthermore, article XI, section 7 imposes upon the State a fiduciary "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." The constitutional history behind this provision fails to support any suggestion that the adoption of the "public trust," as expressed in the Hawai'i Constitution, was intended to grant superior claims to particular types of water use. Rather, the "public trust," as defined by the framers,[1] formally imposed

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[1] The framers were keenly aware of the nebulous aspects of the public trust doctrine. The initial proposal submitted by the Committee on Environment, Agriculture, Conservation and Land read in relevant part, "All waters shall be held by the State as a public trust for the people of Hawaii." Stand. Comm. Rep. No. 77, in 1 Proceedings, at 688 (emphasis added). The term "public trust," however, was deleted and the proposal was subsequently amended to read, "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026. According to the Committee on the Whole, it amended the proposal in order to

> clarify the intent behind the use of the term "public trust." Some confusion has been generated by the term because "trust" implies ownership. However, it was never intended to that the proposal confront the question of ownership of water resources because that is more appropriately a matter for the courts. The question of ownership of the freshwater resources is irrelevant to the ability of the State to exercise its police powers with regard to water because the State has long possessed the power to protect, control and regulate Hawaii's freshwater resources for the health and welfare of Hawaii's people. . . . Therefore, "public trust" was used to describe the nature of the

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a fiduciary duty on the State to "actively and affirmatively protect, control and regulate" the water resource as opposed to the mere authority to do so. Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026; see Comm. of the Whole Debates, September 14, 1978 [hereinafter Debates], in 2 Proceedings, at 863 ("What the [amendment] attempts to do is to, first of all, create a fiduciary duty on the part of the State to regulate and control the water. The second thing that it does is establish a coordinating agency to regulate all water.") (Statement by Delegate Waihee); Id. at 865 ("The intent [of the amendment] was to make it clear that the State had the duty and the responsibility to care for Hawaii's water resources, rather than

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> relationship between the State and its people and the duty of the State to actively and affirmatively protect, control and regulate water resources, including development, use and allocation of water.
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> The public trust theory holds that the public has certain important rights in water resources, including land underlying navigable water and fisheries. These resources are to be held in trust for the use and enjoyment of people. The Hawaii supreme court has already imposed the public trust on navigable waters and the lands under them in the case of Bishop v. Mahiko, 35 Haw. 608 (1940). However, to avoid confusion and possible litigation, your Committee has substituted language which your Committee believes fully conveys the theory of "public trust."

Id. (emphases added). Simply put, "what the amendment attempts to do . . . is to define what 'public trust' means." Comm. of the Whole Debates, September 14, 1978 [hereinafter Debates], in 2 Proceedings, at 859 (statement by Delegate Waihee).

Furthermore, this court itself has recognized that "[t]he extent of the state's trust obligation over all waters of course would not be identical to that which applies to navigable waters." Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d 287, 310 (1982), reconsideration denied, 66 Haw. 528, 726 P.2d 1133 (1983).

simply the power to do so.") (Statement by Delegate Fukunaga); Id. at 867 ("Exercise of the police power is purely discretionary, and for discretionary results; "trust" language imposes an obligation to act for the benefit of all the people.") (Statement by Delegate Hornick). Once again, while the framers were mindful of the need to balance various competing interests in regulating water use, see Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026 ("Because of the evergrowing population, the need to maintain present agricultural uses and develop some new ones and the diminishing freshwater supply, it is extremely important that the State act with a sense of fiduciary responsibility with regard to the use of water"); Debates, in 2 Proceedings, at 870 ("I think the one thing we wanted was to protect the small taro farmer as well as the agricultural users of water, unless it conflicts with some overall emergency situation or use priority") (statement by Delegate Waihee), article XI, section 7 reserved the task of prioritizing uses for the legislature. Haw. Const. art. XI, § 7; Debates, in 2 Proceedings, at 870 ("[W]hat we've done is set out a policy to be considered in establishing criteria. . . . [J]ust to make it clear, its not only this agency that will be setting the criteria or policy; this would be done, in the overall sense by the state legislature, and the agency itself would be implementing the

details. What we wanted was an agency whose policies would have as broad a public input as possible. So the overall scheme for this . . . would be set up 'in accordance with law' or by the legislature, and the agency would then set the implementation and the finer points of this.") (Statement by Delegate Waihee)); Id. at 869 ("As the amended proposal states, it will allow the legislature to set water use priorities, 'set overall water conservation' and so forth.") (Statement by Delegate Chong)).

In sum, a review of the constitutional history reveals that the framers viewed the "public trust" as a fiduciary duty of the State to protect, control, and regulate the use of water for all its people. The framers made it clear that their view of the public trust obligation also embraced offstream economic uses of water, such as agriculture, by the beneficiaries of the trust. See Comm. Whole Rep. No. 18, in 1 Proceedings, at 1026; Debates, in 2 Proceedings, at 870. It is equally apparent that by engrafting this obligation into the Hawai'i Constitution, the framers did not intend to prioritize uses; they reserved that matter for the legislature.[2] Indeed, to avoid confusion, the framers deleted the term "public trust," recognizing that the

[2] In Robinson, this court observed that the parameters of the State's authority and interests in water resources "should be developed on a case by case basis or by the legislature as the particular interests of the public are raised and defined." 65 Haw. at 677, 658 P.2d at 312. In 1987, the legislature did just that as it raised and defined the competing public interests in water resources in the Code.

vague, common law public trust doctrine could be, and has been, used to justify anything, i.e., ownership. See, e.g., Payne v. Kassab, 361 A.2d 263 (Pa. 1976) (rejecting appellants claim that the state violated the public trust by implementing a street widening project that would negatively impact "the historical, scenic, recreational and environmental values" of a tract of land). The majority's expansive use of the public trust doctrine in this case, in my view, will create confusion and uncertainty. The public trust doctrine merely imposes an obligation on the State to affirmatively protect and regulate our water resources. The doctrine does not provide guidance as to "how" to protect those waters. "That guidance, which is crucial to the decision we reach today, is found only in the Water Code." Rettkowski v. Department of Ecology, 858 P.2d 232, 240 (Wash. 1993) (en banc). Given that (1) the framers called on the legislature to create the Commission and to set forth the Commission's authority "as provided by law," i.e., the Code, and (2) statutes trump common law, Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973), it would be inconsistent to conclude that the framers intended to adopt the common law public trust doctrine when they urged the legislature to enact the Code. Accordingly, I strongly disagree with the majority's holding that article XI, sections 1 and 7 adopt wholesale the common law public trust doctrine as a

fundamental principle of our constitutional law. Majority at 44-46.

II. The Code is a Comprehensive Regulatory Statute That Trumps Common Law.

After many years of exhaustive hearings, the legislature finally struck an acceptable balance between competing public interest users that enabled it to pass the Code in 1987. Through the Code, the legislature not only affirmed the State's constitutional obligation to "protect, control and regulate water for the benefit of all its people," it established "a program of comprehensive water resources planning," HRS 174C-2(b) (1993 & Supp. 1999), that set forth how the State would go about satisfying this duty. Haw. Const. art. XI, § 7 ("The legislature shall provide for a water resources agency which, as provided by law, shall . . . establish criteria for water use priorities . . . ."") (Emphasis added.) In its declaration of policy, the Code embraces the public trust as set forth in the Hawai'i Constitution by providing that, "the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use." HRS § 174C-2(a) (1993).[3] The Code then identifies various competing

[3] Contrastingly, in an analogous provision, the Model Water Code (continued...)

interests that the Commission must balance in administering the State's charge to "protect, control and regulate" water:

> The [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 the 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.

HRS § 174C-2(c) (1993) (emphases added). In my view, HRS §174C-2(c) falls well short of constituting a directive that bestows superior claims to any particular classification of uses. Rather, HRS § 174C-2(c) reflects the legislature's intent that the Commission engage in comprehensive water resources management by balancing the need to protect with the need to use water without placing any fixed priority, presumptive or otherwise, on any classification of uses. For example, even in the process of setting interim and permanent instream flow standards, the

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provides:

> (1) Recognizing that the waters of the state are the property of the state and are held in public trust for the benefit of its citizens, it is declared that the people of the state as beneficiaries of this trust have the right to have the waters protected for their use.

A Model Water Code § 1.02, at 81 (Frank E. Maloney et. al. 1972) (emphases added). Apparently following the framers lead in article XI, section 7 of the Hawai'i Constitution, the legislature did not use the term "public trust" in HRS § 174C-2(a).

Commission must assess the economic ramifications of such standards on offstream uses. HRS § 174C-71(1)(E) (1993) ("In formulating the proposed [instream flow] standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses"); HRS § 174C-71(2)(D) (1993) ("In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses"). Moreover, the Code specifies that its provisions shall be liberally interpreted to obtain maximum beneficial use of water for "irrigation and other agricultural uses"; yet, it also mandates that "adequate provision" shall be made for uses including "preservation and enhancement of waters for . . . agriculture. . . ." HRS § 174C-2(c). Agricultural uses, by definition, are offstream uses, and thus, contrary to the majority's reading, the Code does not establish priority for instream uses.

Given that water is absolutely essential to the continued existence of this island state, had the legislature

intended to prioritize the use of water, it would have done so in no uncertain terms. Indeed, the legislature's failure to adopt a 1995 proposal to amend the Code by establishing water use priorities illustrates my point. In 1987, the legislature established a review commission on the Code to comprehensively review and develop recommendations for improving the Code. 1987 Haw. Sess. L. Act 45, § 5, at 101. On December 28, 1994, about seven years after its creation, the review commission submitted its final report to the legislature. Review Commission of the State Water Code, Final Report to the Hawai'i State Legislature at 1 (December 28, 1994). Among other things, the review commission recommended that the Code be amended to establish a hierarchy of water uses. Id. at 23-26, app. B at 49-56. To date, the legislature has yet to adopt the proposal to prioritize water uses.

Accordingly, the State's public trust obligation, as enshrined in the Hawai'i Constitution and as incorporated into the Code, does not mandate that instream uses or native Hawaiian rights be accorded "superior claims." I would therefore hold that the Commission exceeded its statutory authority under HRS chapter 91 when it relied on the common law notion of the public trust doctrine that is neither grounded in the Hawai'i Constitution nor in the Code to justify imposing "a heightened

level of scrutiny" for offstream uses. HRS § 91-14 (g)(2) (1993) (providing that a court may affirm, reverse, or modify an agency decision if such decision is "[i]n excess of the statutory authority or jurisdiction of the agency"); Rettkowski 858 P.2d at 236 (holding that it is a fundamental rule of law that "an agency may only do that which it is authorized to do by the Legislature"); Tri County Tel. Ass'n, Inc. v. Wyoming Public Service Comm'n, 910 P.2d 1359, 1361 (Wyo. 1996) (holding that, "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do"); cf. Stop H-3 Association v. State, 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (observing that, "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred"); HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (maintaining that an agency "generally lacks the power to pass upon the constitutionality of a statute. The law has long been clear that agencies may not nullify statutes.") (Quoting 4 K. Davis, Administrative Law Treatise § 26:6, at 434 (2d ed. 1983)).

It is the State that owes a fiduciary duty to its people to "protect, control and regulate the use of Hawaii's

water resources for the benefit of its people." Haw. Const. art. XI, § 7. Thus, it is the legislature, as the body charged with the responsibility of making laws, that determines public policy, and it is the legislature who should set water use priorities "as provided by law." See id. Water is the lifeblood of this island state, and a decision to prioritize competing uses of water is a public policy determination that will undoubtably shape the course of our future. Such a determination should rest in the hands of the people of this State instead of the discretion of six persons, or in this case, the four persons who composed the Commission. Cf. Konno v. County of Hawai'i, 85 Hawai'i 61, 79, 937 P.2d 397, 415 (1997) ("The determination of what the law could be or should be is one that is properly left to the people, [who are sovereign,] through their elected legislative representatives."). To conclude otherwise, as the majority does, would impermissibly transgress the separation of powers doctrine by allowing an executive agency to transcend its statutory authority and usurp the legislature's lawmaking function under the guise of enforcing the agency's interpretation of what the "public trust" demands. See R.D. Merrill Co. v. State, 969 P.2d 458, 467 (Wash. 1999) ("[T]he [public trust duty] devolves upon the State, not any particular agency. The [agency's] enabling statute does not grant it authority to assume the public trust

duties of the state. . . . [R]esort to the public trust doctrine as an additional canon of construction is not necessary in light of the specific provisions at issue and the water law policies expressed in the state water codes."); Community College of Delaware v. Fox, 342 A.2d 468, 483 (Pa. Commw. Ct. 1975) (Bowman, P.J., concurring) ("Simply by invoking [the constitutional provision identifying the state as the trustee of 'public natural resources,'] neither [the agency] nor a third party can enlarge its 'trustee' role beyond the parameters of its statutory power and authority."). Simply put, the Code trumps common law, not the other way around. Fujioka, 55 Haw. at 10, 514 P.2d at 570.

III. The Majority's Expansive View of the Public Trust Doctrine will Inject Substantial Uncertainty into the Code-Based Water Allocation Process.

In my view, the majority employs the public trust doctrine as a device to (1) recognize certain uses, such as instream uses and native Hawaiian rights, as public trust values and (2) launch its analysis from the proposition that these public trust values have superior claims to other uses. The majority goes on to "eschew" any view of the trust that embraces private commercial use as a public trust purpose. Majority at 59. With such an approach, I cannot agree. As previously discussed, I believe that the public trust, as established in the Hawai‘i Constitution and as adopted in the Code, is simply a

fiduciary duty to protect, control, and regulate the use of our water resources for the benefit of all the people of Hawai‘i. Such an obligation demands that the State actively manage its natural resources by diligently balancing competing interests, both economic and social, in order to arrive at a policy determination of what is ultimately in the public's best interest; it does not mandate priority for particular uses. The State's constitutional obligations to "promote diversified agriculture" and "increase agricultural self-sufficiency" warrant no less consideration because they involve offstream uses that result in economic gain for private individuals. Haw. Const. art. XI, § 3 (1978). Indeed, the public interest advanced by the trust amounts to no more than the sum of competing social and economic interests of the individuals that compose the public. See James L. Huffman, A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 Envtl. L. 527, 549 (1989) ("Public rights are exercised by the public, which in a democracy is the people.").

The majority's view of the public trust invites this court to essentially rewrite the Code to prioritize particular uses, thereby imposing a higher level of scrutiny on "non-public trust uses," where the legislature imposed none. Because accepting such an invitation would devalue the Code as drafted,

circumvent the democratic process, and inject substantial uncertainty into the Code-based water allocation process upon which this State depends, I am compelled to dissent.

IV. Offstream Users Face an Impossible Burden of Proof.

The majority holds that "[u]nder the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource." Majority at 103. The majority arrives at this determination by taking the following steps. The majority reasons that the public trust, as defined by the common law and as incorporated into the constitution, "begin[s] with a presumption in favor of public use, access, and enjoyment." Id. at 67. Turning to the Code, the majority equates the following interests listed in HRS § 174C-2(c) as "public trust purposes dependent upon instream flows": "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." Majority 72-75, 77. Instream flow standards, as the majority observes, serve as the "primary mechanism" to fulfill the State's duty to uphold these instream trust purposes. Id. at 77. Indeed, the majority

declares that such "public instream uses are among the 'superior claims' to which, upon consideration of all relevant factors, existing uses may have to yield." Id. at 80 n.52. Therefore, because the public trust carries an inherent presumption favoring "public use," applicants bear the burden of justify[ing their uses] in light of the purposes protected by the trust." Id. at 67.

Even accepting the majority's articulation of the public trust as true, given that (1) the scientific knowledge necessary to establish more definitive instream flow standards -- the primary mechanism to safeguard instream uses -- is admittedly "years away," majority at 11, and (2) the full scope of public instream uses consequently remain undefined, I believe that it is impossible for applicants to demonstrate that their offstream uses will not impair public instream uses. The majority acknowledges that "the uncertainty created by the lack of instream flow standards modifies the nature of the Commission's analysis . . . ." Id. at 105. In light of this uncertainty, the majority holds that the applicants for offstream uses, "[a]t a very minimum," must demonstrate (1) their actual needs, and (2) "within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs," i.e., absence of practicable mitigation measures. Id. at 106

(emphases added). Despite this floor set by the majority, due to the lack of more conclusive instream flow standards, the onus apparently remains on the applicant to justify its proposed offstream use by (1) identifying instream and potential instream uses, (2) assessing how much water those instream uses require, and (3) justifying their proposed uses in light of existing or potential instream values. Without addressing these three issues, it appears that applicants requesting water for offstream uses may meet the floor established by the majority only to fall short of satisfying their ultimate burden to justify their proposed use in light of instream values. See Majority at 104 ("We thus confirm and emphasize that the 'reasonable beneficial use' standard and the related criterion of 'consistent with the public interest' demand examination of the proposed use not only standing alone, but also in relation to other public and private uses and the particular water source in question."). By granting "superior claims" status to instream uses, the majority renders this already difficult task impossible.

CONCLUSION

I wholeheartedly join the majority's call for the Commission to establish more definitive instream flow standards for the windward streams with "utmost haste and purpose." Id. at 95. I fear, however, that in the period necessary to achieve

these more conclusive standards, offstream uses, which, in substantial part, drive the economy and promote the self-sufficiency of this State, may run dry.