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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In re Petitions to Amend Interim Instream Flow Standards for Honopou, Huelo (Puolua), Hanehoi, Waikamoi, Alo, Wahinepe'e, Puohokamoa, Haipua'ena, Punalau/Kōlea, Honomanu, Nu'ailua, Pi`ina`au, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani, Wailuanui, West Wailuaiki, East Wailuaiki, Kopili'ula, Puaka`a, Waiohue, Pa`akea, Waiaka`a, Kapa`ula, Hanawī and Makapipi streams.	Case No. CCH-MA13-01 OPENING STATEMENT AND BRIEF OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS, AS AMENDED AND CORRECTED; CERTIFICATE OF SERVICE

mt/openingstatementamcorr

OPENING STATEMENT AND BRIEF OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS, AS AMENDED AND CORRECTED

Maui Tomorrow Foundation, Inc., on behalf of itself and its supporters, through counsel, hereby files this Opening Statement, pursuant to Minute Order 12.

I. INTRODUCTION

Haleakala reached its highest elevation about a million years ago, creating the geological conditions on the Koolau side for the trapping of clouds, the abundant rainfall, the many large streams continuously flowing to the ocean, the pools, waterfalls, stream environments and native rain forests. In a comparative instant, a period of forty years, between 1878 and 1923, diversion

works and ditches were constructed dewatering these streams at up to six (6) locations per stream, taking the water to the dry Central Maui isthmus to irrigate sugar cane. In this short period of time, the Koolau ecology was destroyed or seriously degraded. Environmental justice demands the reversal of these actions, the restoration of flow and the re-establishment of life in these streams from each of their mauka beginnings to each of their makai discharges into the ocean.

Upon the adoption of the Reciprocity Treaty in 1876, it became clear that water would be made available to sugar planters "in whatever quantities were needed, to be transported [out of the watershed] wherever needed." [1] In East Maui, the first ditch, the (Old) Hamakua Ditch was constructed in 1878 by Baldwin and Alexander. The "Agreement Between Hamakua Ditch Company and the Hawaiian Government, dated September 13, 1876, contains the views of the sugar planters regarding water.[2] The sugar planters state that they are:

> ..... desirous of using for irrigation and otherwise the water of certain streams hereinafter named [Nailiilinaili, Kailua, Huelo, Holaua and Honopou] by conveying the same by means of a ditch canal pipe aqueduct or other watercourse by them to be constructed [over certain government lands].

and that they therefore seek the rights to:

> ....take, draw off and use said water of said streams for their own use for purposes of irrigation and otherwise ....to enter into government lands and dig and construct therein a watercourse whereby to conduct over them the water of said streams .....

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[1] *Sugar Water* by Carol Wilcox (1996), p. 16; Exhibit E-92; Note: All Exhibits are presented in a separate Exhibit Folder.

[2] Agreement Between Hamakua Ditch Company and the Hawaiian Government, dated September 13, 1876, HC&S-MTREQUEST-01-0001–0005; Exhibit E-93.

Alexander and Baldwin are willing to construct this ditch because:

> .... the Hawaiian Government is not now ready or willing to incur the expense and undertake the labor of constructing such water course.

In justification, the Agreement continues:

> .... **the water of the said streams has from time immemorial flowed into the sea and thereby become useless for irrigation or other purposes** and it would promote the general welfare of the Kingdom and its agriculture if the same were used as aforesaid. (Emphasis).

This was preceded by the Opinion of then Attorney General William R. Castle, dated September 7, 1976, interpreting the laws in effect, that it would be legal and appropriate to lease water rights to the sugar plantations, including Alexander and Baldwin, as well as Castle & Cooke, because there is "at best a very sparse population in that region" and "**the waters from time immemorial run waste into the sea** ...." [3] (Emphasis added). He continues, ignoring his obvious conflict of interest:

> The Reciprocity Treaty having passed and a brighter future opening for the country, it becomes the duty of the Government to aid and foster in every possible way the agricultural interests of the country upon which our prosperity depends.[4]

There are no acknowledgments that there were many Hawaiians living below these diversions who had made use of these waters for centuries. Hawaiians were forced to abandon lo'i kalo through the "inability to get a sufficient quantity of water to cultivate them profitably." *Horner v. Kumuliilii,* 10 Haw. 174, 176 (1895). One of the members of the Water Commissions established in

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[3] Castle 1876 Attorney General Opinion; Exhibit E-94.
[4] Id.

each region by King Kamemeha IV, Water Commissioner Daniels, stated in 1866 of another area on Maui:

> There is going to be much trouble in Wailuku respecting Water as the plantations are taking all the water from the natives and I am sorry to say the natives will, if it continues, become very short of Kalo for food.[5]

There may have been a better written record of protests to the diversion of these streams were it not for the difficulty in obtaining redress, there are no written records of the Water Commissions and the Hawaiian population had been decimated by disease. As the author of *Sugar Water* states:

> A degree of despair, fatalism, and chaos must have characterized these times. By the time of sugar's ascendancy, when the large projects were diverting water away from the valleys and their villages, these villages did not have the population, organization, or will to protest. [6]

The sugar plantations positions on water were welcomed by the Hawaii Supreme Court from 1900 to 1959 since the Court was "composed of lawyers drawn from prominent business interests whose commercial philosophy they upheld." [7]

It was not until *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982) and *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982) that any real balance was restored to water rights in Hawaii, based upon an analysis of traditional uses of water and the public trust doctrine. The sugar companies

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[5] Letter from Daniels to Hutchinson dated 23 April 1866, quoted in *Sugar Water*, p. 31; Exhibit E-92.
[6] *Sugar Water*, p. 31; Exhibit E-92.
[7] *Id.* at p. 33 and 34 and George Cooper, "*A Political and Legal History of Water Rights in Hawaii's Streams*"; Exhibit E-92.

argued that their established water rights had been taken by the *McBryde* decision; however this claim was rebuffed.

A Hawaii Constitutional amendment, resulting from the 1978 Constitutional Convention, added to our Constitution the holdings in *McBryde* and also required the adoption of a Water Code and a Water Commission.

The Hawaii Supreme Court has since issued **eight** decisions providing guidance to the Water Commission on the proper application of water law in Hawaii: *Ko'olau Agric. Co., Ltd. v. Commission on Water Res. Mgmt.,* 83 Hawai'i 484, 927 P.2d 1367 (1996); *In re Waiahole Ditch Combined Contested Case Hr'g,* 94 Hawai'i 97, 9 P.3d 409 (2000); *In re Waiola O Moloka'i, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004), *In re Waiahole Ditch Combined Contested Case Hr'g,* 105 Hawai'i 1, 93 P.3d 643 (2004), *In re Waiahole Ditch Combined Contested Case Hr'g,* 113 Hawai'i 52, 147 P.3d 836 (2006), *In re Kukui (Molokai),*116 H. 481, 174 P.3d 320 (2007), *In Re 'Iao Groundwater Management High-Level Source Water Use Permit Application ("Na Wai Eha"),* 128 Hawai'i 228, 287 P.3d 129 (2012) and *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 133 Hawaii 141, 324 P.3d 951 (2014).

The sugar plantations still manage their diversions as they always have. They divert as much water as they can out of the watersheds for use on their plantations, dewatering streams for as long as they are not prevented from doing so, regarding un-diverted water that is allowed to flow downstream of their diversion works to the ocean as water that is wasted.

This case is a major case to restore stream flow to the dewatered streams of East Maui that has been pending, in one form or another, for decades. It is finally time to assure that public trust principles are applied to the management of these streams and that water is allowed to flow in them again.

It makes the most elemental sense that the sugar planters who diverted all of the water in East Maui Streams from 1878 until at least 1978, on the premise that the rights of those downstream could be ignored because water not diverted for irrigation purposes was "wasted" water, must make some adjustments both allowing more water to flow below the ditches and adjustments to their plantation operations – once the Hawaii Constitution, laws and Courts required that these "downstream" rights must be accommodated (further ruling that this did not effect a "taking" of the water rights of the sugar planters).

II. STANDARDS TO BE APPLIED IN IIFS PROCEEDING

Maui Tomorrow intends to advocate both appurtenant and riparian rights in streams that are the subject matter of the Petitions. Appurtenant water rights are protected in HRS §174C-63.[8] Riparian water rights are protected or "assured" by the Hawaii Constitution in Article XI, Section 7.[9]

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[8] HRS §174C-63 provides: "Appurtenant rights. Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62."

[9] Article XI, Section 7 of the Hawaii Constitution provides, in pertinent part: "The legislature shall provide for a water resources agency which ... shall ... establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses ...."

While appurtenant and riparian water uses are construed by some as "non-instream uses," Maui Tomorrow also advocates the protection of the following uses recognized in HAR §13-169-2 as "Instream use[s]." HAR §13-169-2 defines "Instream use" as:

> .... beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream. Instream uses include, but are not limited to:
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> (1) Maintenance of aquatic life and wildlife habitats;
> (2) Outdoor recreational activities;
> (3) Maintenance of ecosystems and estuaries, wetlands, and stream vegetation;
> (4) Aesthetic values such as waterfalls and scenic waterways; ....
> (7) Maintenance of water quality; ....[and]
> (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion.[10]

HRS §174C-71, entitled "Protection of instream uses," in subsection (1) (E), states that:

> In formulating the proposed 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. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution.

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[10] Maui Tomorrow and its supporters advocate the above listed "Instream uses" but do not advocate those that have not been listed, namely: "(5) Navigation and (6) Instream hydropower generation; Na Moku is most appropriately and fully advocating "(9) The protection of traditional and customary Hawaiian rights."

HRS §174C-71(1)(C) requires that:

> Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. **Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses** in the stream in light of existing and potential water developments including the economic impact of restriction of such use. (Emphasis added.)

This is also a quotation from the "Declaration of Policy" for the State Water Code. See HRS §174C-2(c).[11]

> The Hawaii Constitution, in Article XI, Section 7, provides that:
>
> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The declared policy of the State Water Code in HRS §174C-2(a) recognizes 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.

Maui Tomorrow therefore possesses Constitutional and statutory rights to have the uses described above protected.

III. EXISTING USES BY HC&S ARE NOT GRANDFATHERED

The Hawaii Supreme Court, reinforcing *In re Water Use Permit Applications* ("Waiahole I"), 94 Hawai'i 97, 9 P.3d 409, (2000), recently held in *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),*

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[11] HRS §174C-2(c), in pertinent part, requires that: ".... 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 ...."

133 Hawaii 141, 324 P.3d 951 (2014) that:

> A fundamental principle of the public trust doctrine precludes assertion of prior uses or vested rights to use water to the detriment of public trust purposes.

The clear implication of HRS §174C-71 is that the Commission may reclaim instream values to the inevitable displacement of existing offstream uses. See *Waiahole I.*

IV. EAST MAUI DIVERSION WORKS

A. The EMI Stream Diversion System Generally

EMI currently has four parallel ditches running from east to west across the East Maui mountains. From mauka to makai, they are the Wailoa, New Hamakua, Lowrie and New Haiku ditches. The Lowrie runs at a considerably lower elevation than the Wailoa, taking advantage of groundwater development between the two. Wailoa and Lowrie run all the time.[12] The total average daily water delivery under median weather conditions of this system is alleged by EMI to be 160 mgd, although this ranges from 10 to 445 mgd.[13]

B. The (Old) Hamakua Ditch

The (Old) Hamakua Ditch was constructed in 1878 by Baldwin and Alexander of the Haiku Ditch Company. This ditch had an estimated average flow of 4 mgd. The Hamakua Ditch was 17 miles long. It cost $80,000 to construct. It intercepted Kailua, Hoalua, Huelo, Hoolawa and Honopou streams.[14]

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[12] *Sugar Water*, p. 121; Exhibit E-92.
[13] *Id* at p.120; Exhibit E-92.
[14] *Id* at pp. 61, 66; Exhibit E-92.

C. The (Old) Haiku (Spreckels) Ditch

Claus Spreckels constructed the (Old) Haiku Ditch in 1879. The Old Haiku Ditch was abandoned between 1912 and 1929.[15]

D. The Lowrie Ditch

The Lowrie Ditch was constructed in 1900. The Lowrie Ditch starts in the rain forest in Kailua. The first source was a reservoir at Papaaea. The second source was the Kailua Stream where it intercepted the older Old Haiku Ditch and ran parallel to it. The original cost of this Ditch was $271,141. The average flow in this Ditch is alleged by EMI to be 37 mgd. This Ditch has the capacity to carry 60 mgd. This Ditch is capable of irrigating 6,000 acres of sugar lands. The Lowrie Ditch was 22 miles long.[16]

E. The New Hamakua Ditch

The New Hamakua Ditch was constructed in 1904. The average flow in this Ditch is alleged by EMI to be 84 mgd.[17]

F. The Koolau Ditch

The Koolau Ditch extended the water collection system another 10 miles towards Hana. It cost $511,330 to construct. Originally it fed into the New Hamakua Ditch at Alo but it was connected to the Wailoa Ditch upon its

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[15] *Id* at pp. 66,114; Exhibit E-92.
[16] *Id* at pp. 66,114, 115; Exhibit E-92.
[17] *Id* at p. 66; Exhibit E-92.

completion in 1923. Construction started on the Koolau Ditch in 1905. EMI alleges that the Koolau Ditch has an average flow of 116 mgd.[18]

G. The New Haiku Ditch

The New Haiku Ditch was constructed in 1914 by HC&S and EMI. EMI alleges that the New Haiku Ditch has an average flow of 25 mgd. EMI alleges that this Ditch has the capacity to carry 100 mgd.[19]

H. The Kauhikoa Ditch

The Kauhikoa Ditch was constructed in 1914. EMI alleges that the Kauhikoa Ditch has an average flow of 22 mgd and that this Ditch has the capacity to carry 110 mgd.[20]

I. The Wailoa Ditch

The Wailoa Ditch was constructed in 1923 by EMI. EMI alleges that the Wailoa Ditch has an average flow of 170 mgd and that this Ditch has the capacity to transmit between 160 and 195 mgd. [21]

J. The Maui DWS Waikamoi Upper Flume

The Upper Kula system is situated at the highest elevation (about 4,200 feet). It begins as a flume (also known as the Waikamoi Upper Flume), capturing surface water from Haipuaena Stream, middle and west branch of Puohokamoa Stream, and Waikamoi Stream. The flume is connected to a 36-inch transmission line at Waikamoi and then captures additional water from Kailua Stream. The transmission line passes through the Waikamoi Reservoirs

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[18] *Id* at p. 66, 116, Exhibit E-92.
[19] *Id* at pp. 66, 117; Exhibit E-92.
[20] *Id* at p. 66; Exhibit E-92.
[21] *Id* at p. 66, 117; Exhibit E-92.

(two 15 million gallons reservoirs) and the Kahakapao Reservoirs (two 50 million gallons reservoirs) before reaching the Olinda WTF. [22]

K. The Maui DWS Lower Kula System

The Lower Kula system (also known as the Waikamoi Lower Pipeline) is situated at the 2,900 feet altitude and captures surface water primarily from Honomanu Stream, Haipuaena Stream, all branches of Puohokamoa Stream, and the east and west branch of Waikamoi Stream. Water from this system is treated at the Piiholo WTF and provides for domestic and agricultural uses in the Lower Kula region. Other than the 50 million gallon reservoir at the WTF, there are no other major reservoirs along the Lower Kula System. [23]

The State Water Code allows for the consolidated regulation of a single diversion works such as is present here. *In re Waiahole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 9 P.3d 409 (2000); 94 H. 97, 9 P.3d 409.

V. AUTHORIZATION FROM THE STATE TO DIVERT STATE-OWNED WATERS

The first license to take water from East Maui streams was issued in 1876. By 1915, water licenses had been granted to the Hamakua Ditch Company.[24] Licenses for Huelo, Honomanu, Keanae and Nahiku were later issued for water arising on state land in East Maui.[25] The last of the four licenses expired in 1986.

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[22] IIFS Assessment for Honomanu Stream, pp. 138-139; Exhibit E-63.
[23] *Id.* at p. 139; Exhibit E-63.
[24] *Sugar Water*, p. 121; Exhibit E-92.
[25] *Id* at p. 118; Exhibit E-92.

After 1986, revocable permits, that could not last longer than a year, were issued interchangeably between A&B and its subsidiary, EMI, under the fiction that they were independent legal entities. Once a contested case was requested on the proposed thirty year consolidated Lease, EMI was told by the State that it possessed a "holdover" permit, although this form of disposition is not found in HRS 171. The waters of East Maui continue to be diverted to the HC&S plantation, even though no permit or approval recognized by the law supports these diversions.

The value of the water was originally based upon its accessibility and its distance from fields and the price was tied to the price of sugar. EMI now pays fixed monthly rates to the state.[26] Instead of valuing the lease of lands from which EMI collects water, BLNR has been charging a nominal amount for the 33,000 acre consolidated License Areas, or approximately $160,000 per year for the use of an average of 164 MGD. At that level of revenue, A&B pays only 0.26 of a cent per 1,000 gallons of water or .0026 cents per gallon of water diverted from over 100 streams and tributaries in East Maui. In contrast, Maui County charges an agricultural water rate of 15 cents per 1,000 gallons to its farmer customers. If the BLNR charged A&B/EMI the same water rate for the diverted water from its Crown Lands, it could generate and additional $8.954 million per year. Doing that math, over the past 13 years, the State BLNR has subsidized A&B/EMI to the tune of $116.4 million during that period. The State provides a cheap source of water to HC&S in violation of its trust

[26] *Id* at p. 121; Exhibit E-92.

responsibilities to Native Hawaiians and the public.[27]

VI. EAST MAUI SURFACE WATER RESOURCES HAVE NOT BEEN MANAGED IN CONFORMITY WITH PUBLIC TRUST PRINCIPLES

A. Introduction/ Lack of Reliable Data on (Undiverted) Flows in Each of the 27 Streams

There is a lack of reliable data on the undiverted flows in each of the 27 East Maui Streams that are the subject of these proceedings.

B. The State and HC&S Have No Reliable Data on the Amounts of Surface Water Arising on State Owned Lands and the Amounts of Water Arising on Lands Purportedly "Owned" by EMI

In their Agreements, the State and EMI (and the County) have drawn a distinction between stream flow in East Maui that arises on lands owned by the State (which the State claims it has the power lease) and stream flow that arises on private lands owned by EMI (that EMI claims as its own). The 1938 Agreement between EMI and the Territory recites that the ditch system "is partly on government land and partly on Company [EMI] land." [28] EMI must pay the State:

> .... an annual rental which shall be equal to the product of **the quantity of water** actually or constructively **diverted during each license year from the Licensed Area** ... times the price per million gallons [set forth elsewhere].[29] (Emphasis added.)

EMI and the State agreed that EMI had no obligation to pay the State for water diverted in the ditch system from EMI's own private lands. At the time, the total amounts of water diverted from the State License Areas and EMI's private lands

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[27] See Written Testimony of Richard "Dick" Mayor submitted concurrently.
[28] Indenture between Territory of Hawaii and EMI, dated March 18, 1938, p. 1; Exhibit E-95.
[29] Huelo License, General Lease No. 3578, 1960, p. 7; Exhibit E-96.

were calculated for each of the four License Areas.[30] This total amount was then divided by a percentage for the water arising on State land and a percentage of the water arising on land EMI claimed to own. Payment was only required for water attributed to the License Area.[31]

EMI and the State had no accurate manner for determining what these percentages should be. The State's share was determined by the percentage of rain falling on government land, according to *Sugar Water*, although this is not the language used in the Licenses.[32] Six studies were undertaken by DLNR and EMI in 1949 and 1985 to figure out what the proper percentage was between State and EMI lands. The results yielded a high for the State of 73.742% and a low of 69.460% and a high for EMI of 30.540% and a low of 25.650%. The document has a handwritten note upon it representing that Manabu Tagamori for DAR agreed on 12/2/87 to 70% government and 30% private.[33] See, also, the percentages listed for each License Area on EMI's East Maui Ditch System Map dated February 28, 2004.[34] It is clear that there is no reliable calculation for the amount of water that arises within the License Areas. As a result, it cannot be concluded that the State has been paid for the amount of water EMI has diverted from the License Areas.

By 1982, the Hawaii Supreme Court ruled finally that stream water and groundwater were both owned by the State of Hawaii. See *McBryde Sugar Co.,*

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[30] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04–0009; Exhibit E-97.
[31] Id.; Exhibit E-97.
[32] *Sugar Water*, p. 118; Exhibit E-92.
[33] Comparison of Private and State Water Ownership; HC&S-MTREQUEST-10-0001-0006; Exhibit E-98.
[34] East Maui Ditch System Map dated February 28, 2004, HC&S-MTREQUEST-10-0007; Exhibit E-99.

Ltd. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982). After that date even the water arising on the lands allegedly owned by EMI belonged to the State of Hawaii. EMI has not paid the State anything for the waters arising on these lands. EMI has been receiving these state waters **for free** in violation of the public and ceded lands trusts. [35]

C. The State and HC&S Kept Data on Amount of Water Diverted from Each License Area – only when the Licenses were in Effect

The State and EMI kept data on the amounts of water diverted from each License Area, but only while the Licenses were in effect.[36]

D. The State and HC&S Have Only Kept Data on Amount of Water Diverted at Honopou and Not Further West

After the expiration the Four Licenses, the State and EMI only kept data at one place – Honopou Stream.[37] Through 2010 the Monthly Surface Water Reports for the Wailoa, New Hamakua, Lowrie and Haiku Ditches were only calculated at Honopou.[38]

E. Only in 2011 Were Amounts of Water Diverted Calculated West of Honopou

Only beginning in 2011 did EMI also begin to report to the State amounts of water being diverted from streams west of Honopou all the way to

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[35] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0009; Exhibit E-97.
[36] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0009, for ex.; Exhibit E-97.
[37] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0005 -0009 thr. EMI Monthly Water Use Report to State, 1/12/11, HC&S-MTREQUEST-04-0064–0087; Exhibit E-100.
[38] Id.; Exhibit E-100.

Maliko.[39] These Reports indicate that significant additional amounts were being diverted from these streams. For example, the Haiku Ditch carried 133.05 mg at Honopou, however with the addition of streams west of Honopou, the Haiku Ditch carried 369.05 mg at Maliko in March 2011.[40] The Wailoa Ditch carried 3,256.35 mg at Honopou, however with the addition of streams west of Honopou, the Wailoa Ditch carried 3,659.99 mg at Opana in November 2011. [41] Similar substantial additional amounts are documented in all of these Reports.

The streams being diverted by EMI west of Honopou Stream are not within any License area, are not subject to any permission to divert with the State of Hawaii or any agreement for compensation to the State of Hawaii. To the west of Honopou, there is first a large parcel of land allegedly owned by EMI. [42] To the west of that parcel, all the way to Maliko Gulch (and the alleged beginning of the Plantation) are mostly parcels owned by private parties other than EMI, over which the EMI ditches cross, diverting even more water.[43]

By 1982, the Hawaii Supreme Court ruled finally that stream water and groundwater were both owned by the State of Hawaii. See *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *Robinson v. Ariyoshi*, 65

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[39] EMI Monthly Water Use Report to State, 2/3/12, HC&S-MTREQUEST-04-0100 – 0111 through EMI Monthly Water Use Report to State, 2/18/14, HC&S-MTREQUEST-04-0125 – 0132; Exhibit E-101 – E-102.
[40] EMI Monthly Water Use Report to State, 3/14/11, HC&S-MTREQUEST-04-0088 – 0099, p. 0090; Exhibit E-103.
[41] EMI Monthly Water Use Report to State, 3/14/11, HC&S-MTREQUEST-04-0088 – 0099, p. 0098; Exhibit E-103.
[42] East Maui Ditch System Map dated February 28, 2004, HC&S-MTREQUEST-10-0007; Exhibit E-99.
[43] Id.; Exhibit E-99.

Haw. 641, 658 P.2d 287 (1982). After that date even the water arising on the lands allegedly owned by EMI and other private owners belonged to the State of Hawaii. EMI has not paid the State anything for the waters arising on these lands. EMI has also been receiving these state waters **for free** in violation of the public and ceded lands trusts.

F. The County and HC&S Kept Data on the Amount of Water Delivered to the County

The County and EMI have maintained records on East Maui waters supplied to the County BWS. [44]

G. There is Minimal Data, regarding Each of the 27 Streams, on (1) amounts of water in the stream immediately upstream of each diversion works, (2) the amounts diverted from each stream by each diversion works and (3) the amounts left in the stream downstream of each diversion works

Data has only been assembled in a half-hearted attempt to figure out what HC&S should pay for the water delivered to it for plantation use. This data is of no help in determining whether constitutionally protected water rights are being violated or whether stream habitats are being jeopardized.

Data absolutely essential to these IIFS proceedings for 27 Streams is not available. There is no data on:

(1) the amounts of water in the stream immediately upstream of each diversion works for each of the 27 streams,

(2) the amounts diverted from each stream by each diversion works for each of the 27 streams, and

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[44] County BWS Water Consumption, 2/1/14 – 2/28/14, for example; Exhibit E-104.

(3) the amounts left in the stream downstream of each diversion works for each of the 27 streams.

EMI has not seen fit to collect this data. Agencies with jurisdiction over these Streams have not seen fit to collect this data.

VII. HC&S PLANTATION WATER NEEDS

Plantation requirements range as high as 200 mgd (as of approximately 1996).[45] The minimum water need of the HC&S plantation from the Wailoa Ditch , as of 2000, was 8.2 mgd, with another 1.2 mgd with fire flow added. [46] As of 1931, HC&S was able to pump 144 mgd to meet these needs. [47]

VIII. PRESENT AND POTENTIAL INSTREAM VALUES TO BE DEMONSTRATED BY MAUI TOMMORROW

A. Hanehoi/Puolua Stream

The persons listed below will testify regarding the Hanehoi watershed and riparian, appurtenant and domestic water rights and needs. Written Testimony is being served concurrently with the filing of this document so that their testimony is not repeated here.

1. Ernest Shupp
2. TARO, Inc.
3. Neola Caveny
4. Solomon Lee
5. Michael D'Addario
6. Christa Morf or Donald Halley
7. Lucienne De Naie

B. Outdoor Recreational Activities

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[45] *Sugar Water*, pp. 120-121, published in 1996; Exhibit E-92.
[46] Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B dated April 13, 2000, §§ 1(c) and (d), p.1; Exhibit E-105.
[47] *Sugar Water*, p. 121; Exhibit E-92.

The persons listed below will testify regarding Outdoor Recreational Activities. Written Testimony is being served concurrently with the filing of this document so that their testimony is not repeated here.

8. Lucienne De Naie of Sierra Club
9. Miranda Camp of Sierra Club

C. Aesthetic Values Such as Waterfalls and Scenic Waterways

The persons listed below will testify regarding Aesthetic Values Such as Waterfalls and Scenic Waterways. Written Testimony is being served concurrently with the filing of this document so that their testimony is not repeated here.

8. Lucienne De Naie of Sierra Club
9. Miranda Camp of Sierra Club

D. Maintenance of Aquatic Life and Wildlife Habitats

The persons listed below will testify regarding Maintenance of Aquatic Life and Wildlife Habitats. Written Testimony is being served concurrently with the filing of this document for the first two persons so that their testimony is not repeated here. Skippy Hau, Dan Polhemus and Cynthia King may be requested to testify through subpoenas.

8. Lucienne De Naie of Sierra Club
9. Miranda Camp of Sierra Club
10. Skippy Hau, Dan Polhemus, Cynthia King

E. Maintenance of Ecosystems and Estuaries, Wetlands, and Stream Vegetation

The persons listed below will testify regarding Maintenance of Ecosystems and Estuaries,Wetlands, and Stream Vegetation. Written

Testimony is being served concurrently with the filing of this document so that their testimony is not repeated here.

8. Lucienne De Naie of Sierra Club
9. Miranda Camp of Sierra Club

F. Maintenance of Water Quality

The person listed below is expected to testify regarding Maintenance of Water Quality. Dr. Pang may be requested to testify through a subpoena.

11. Dr. Lorrin Pang, MD

G. Some Actual Minimum Stream Flow

All witnesses are expected to testify about the necessity for connectivity, an actual minimum stream flow from the upper most reaches of the streams to their discharge points in the ocean.

IX. REASONS WHY THE BALANCE TIPS DECIDELY IN FAVOR OF RESTORING STREAM FLOW FOR PRESENT AND POTENTIAL INSTREAM VALUES AFTER TAKING INTO CONSIDERATION THE PRESENT AND POTENTIAL USES OF WATER FROM THE STREAM FOR NONINSTREAM PURPOSES, INCLUDING THE ECONOMIC IMPACT OF RESTRICTION OF SUCH USES

HC&S

A. Plantation Acreage is Smaller Than Represented by HC&S

As of 2007, sugar was cultivated on roughly 35,000 acres.[48] In the County's 1990 Water Use and Development Plan, A&B Inc. described a total acreage of 35,800 in cultivation.[49] HC&S's water demands have been based on this amount of acreage in cultivation. This is not an accurate figure to use for

[48] IIFS Assessment for Honomanu Stream, dated September 2008, p. 132; Exhibit E-63.
[49] County 1990 Water Use and Development Plan, p. R-2; Exhibit E-83.

noninstream purposes when public trust assets are involved, as here, for the reasons provided below.

1. Important Agricultural Lands

HC&S has designated only 27,133 of the 35,000 acres in its plantation as Important Agricultural Lands ("IAL"). One definition of "Important Agricultural Lands" is land for which water is available. This being the case, HC&S's water demand should only be based upon these 27,133 acres for which it believes that water is available. [50]

2. Former Plantation Lands Planned for Non-Agricultural Uses

These 35,000 acres have steadily diminished in number, as portions of the plantation have been put by A&B to more lucrative non-agricultural uses. As of 2014, significantly less than 35,000 acres are in actual cultivation by HC&S. A&B has proposed 13 new development projects on a total of more than 4,000 acres of lands it designates as plantation lands on its maps.[51]

3. Monsanto

HC&S has leased large tracts of former plantation land to Monsanto. HC&S does not provide water to these tracts. Monsanto has to locate its own water for these parcels.[52]

B. HC&S Wastes Valuable Stream Water

1. Ditches

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[50] See Written Testimony of Richard "Dick" Mayor submitted concurrently.
[51] Id.
[52] Monsanto Parcels; Exhibit E-106.

EMI's own estimates show that its collection system loses 16.6 to 25 mgd through seepage and evaporation. EMI admits that there is a **ten percent (10%) loss** of water (through leakage or otherwise) that occurs during transport in its ditch system. This ten percent (10%) loss is built into the "License and Water Transmission Agreement" by and among EMI, A&B and Maui Pineapple Company ("ML&P"), originally dated May 22, 1991.[53] ML&P is given the right to withdraw .9 gallon of water for each gallon that ML&P puts into the ditch system.[54] According to ML&P's description of this Agreement:

> Under the MLP/EMI Agreement, MLP pays EMI a fee for water transport and MLP is permitted to withdraw 90% of the amount of water it contributes to the EMI System; **the 10% reduction accounts for potential transport losses**.[55]

EMI and A&B, as signatories to this contract, agreed that transport losses in the East Maui Ditch System were potentially ten percent (10%).

2. Reservoirs

HC&S is experiencing significant losses of water because of its old, unmaintained reservoirs that require lining. HC&S loses between 23-41 mgd from its irrigation delivery system, mainly from evaporation and leakages from its 36 reservoirs on the plantation, 31 of which are unlined. The CWRM discussed this matter on May 25, 2010. Chair Thielen stated:

> *Chair Thielen said that one of the things in the staff submittal is that HC&S will need to take a look at updating the loss study on the reservoir system. HC&S could spend millions of dollars lining their reservoirs, or they could*

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[53] License and Water Transmission Agreement by and among EMI, A&B and Maui Pineapple Company ("ML&P"), originally dated May 22, 1991; Exhibit E-107.
[54] Id at p.7; Exhibit E-107.
[55] Direct Testimony of Wesley M. Nohara; p. 7, § 18, DLNR File No. 01-05-MA; Exhibit E-108.

spend millions of dollars combined with a County effort to bring water from a wastewater plant and put it onto the fields.[56]

The reservoirs on the HC&S plantation are in such a state of disrepair that it would take millions of dollars to prevent the waste of water that is now occurring.

C. HC&S Has Groundwater Available that it Does Not Use to Irrigate its Sugar Cane

Plantation requirements range as high as 200 mgd, as of 1996.[57] HC&S operates 15 groundwater wells on its plantation.[58] As of 1931, HC&S was able to pump 144 mgd of groundwater to irrigate its plantation. [59]

Pumping groundwater supplied up to 45% of the irrigation water for the HC&S plantation, according to *Sugar Water*, written in 1996.[60] In the County's 1990 Water Use and Development Plan, A&B Inc. described a total acreage of 35,800 in cultivation, with a water need of approximately 130 billion gallons a year (approximately 356.2 mgd). These irrigation needs were met "55% by surface water and 45% by ground water." [61] In 1996, 55% of HC&S's water needs were met by the Wailoa Ditch System and 45% of these water needs were met by its groundwater wells.[62]

It requires electricity to pump the groundwater up from the wells. This electricity was and is produced by burning bagasse at the Puunene Mill. HC&S

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[56] CWRM Minutes May 25, 2010, p. 38; Exhibit E-60.
[57] Sugar Water, pp. 120-121; Exhibit E-92.
[58] HC&S Field Water Sources Map, HCS-NHLCREQUEST-16-0001; Exhibit E-109.
[59] *Sugar Water* at p. 121; Exhibit E-92.
[60] Id at p. 121; Exhibit E-92.
[61] County 1990 Water Use and Development Plan, p. R-2; Exhibit E-83.
[62] Third Amendment to Memorandum of Understanding between EMI, BWS, and others, dated January 3, 1996, p.1, HC&S-MTREQUEST-15-0011–0016; Exhibit E-110.

entered Power Purchase Agreements ("PPA") with Maui Electric ("MECO") to sell electricity generated from burning bagasse at the Puunene Mill to MECO. HC&S has found it more profitable to sell electricity to MECO than to devote this electricity to pumping groundwater to irrigate its plantation fields.

As a consequence of this economic decision, HC&S pumps groundwater much less. The IIFS Reports in 2009 state:

> From 2002 to 2004, HC&S received **71 percent** of its water supply from EMI (surface water), while the remaining **29 percent** was supplemental ground water. [63]

This diminished reliance on available but unused groundwater has affected the employees of HC&S. It led to a temporary layoff of 88% of its employees to balance costs against reduced production due to lack of water. The head of the Maui Division of the ILWU Local 142, Willie Kennison, noted that HC&S was not properly pumping its wells (which once provided 45% of their irrigation water) to relieve the irrigation water deficit brought on by drought, and thereby failed to avoid employee layoffs. He is quoted as saying:

> **Instead of utilizing their pumps to properly irrigate their fields, they are selling too much electricity to Maui Electric.**[64] (Emphasis added)

HC&S may not even be continuing its PPA with MECO because the State of Hawaii is now approving PPAs with third parties that use a fixed price, rather than an avoided cost formula. Such a change could adversely affect power revenue for the company. Alexander & Baldwin's 2013 Annual Report states that the PPA could be replaced or renegotiated on less favorable terms and

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[63] IIFS Assessment for Honomanu Stream, dated September 2008, p. 132; Exhibit E-63.
[64] Newspaper Article in Star Bulletin dated December 13, 2008; Exhibit E-111.

further states that A&B may consider "decreasing or **eliminating**" power sales on Maui in the future and instead using the power for field irrigation.[65] (Emphasis added.)

If A&B decreases or eliminates its PPAs, more ground water can be pumped to provide additional waters for irrigation and relieve growing pressures on the severely dewatered East Maui streams that are the subject of this contested case.

D. With the Closure of ML&P More Water is Available

In 2005, ML&P was a party to hearings on whether Water Licenses should be issued to EMI for surface waters arising on state lands in East Maui.[66] ML&P submitted testimony and exhibits about its use of East Maui water and the agricultural lands to which it was applied. ML&P identified 2,800 acres of land in East Maui in proximity to the EMI system used to cultivate pineapple. ML&P claimed that it needed 4.5 mgd from the EMI ditch system for these 2,800 acres for pineapple cultivation.[67]

ML&P has or had a pump, the Nahiku Pump, that diverted water from Hanawi Stream. The pump has a maximum capacity of 0.5 mgd. In addition, ML&P operates or operated Kuhiwa Well nearby Makapipi Stream. It has a maximum pump capacity of 1.0 mgd. These withdrawals were to be monitored.

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[65] A&B 2013 Annual Report; Exhibit E-112.
[66] See DLNR File No. 01-05-MA.
[67] License and Water Transmission Agreement by and among EMI, A&B and Maui Pineapple Company ("ML&P"), originally dated May 22, 1991 and Direct Testimony of Wesley M. Nohara, DLNR File No. 01-05-MA; Exhibits E-107 and E-108.

These waters were pumped into the EMI ditches. ML&P withdrew these amounts – minus 10% for potential transport losses – where its pineapple fields were located.[68]

ML&P has discontinued these pineapple operations. In 2009, MLP estimated its water requirements from the EMI System at 4.5 million gallons per day from 2004 through 2009, and a reduction to approximately 3.1 million gallons per day from 2009 to 2016.[69] According to EMI Reports, ML&P stopped pumping water from Hanawi Stream into the ditch beginning in 2007.[70] ML&P is not currently engaged in agricultural activities and its successor, Hailiimaile Pineapple Co., is farming a much reduced area, approximately 400 acres in size. This should result in an almost full reduction of the 4.5 mgd and 3.1 mgd estimation by ML&P of its water needs from East Maui streams. These amounts are also available to restore East Maui Streams below the EMI diversion works.

E. Wastewater is Reasonably Available to Irrigate Sugar Cane

Recycled wastewater, amounting to approximately 4.5 mgd, is reasonably available and constitutes a viable alternative for the irrigation of HC&S sugar cane.

Central Maui currently injects 4 mgd of treated wastewater via injection wells into Kahului Bay, contributing to algae blooms and the degradation of our near shore waters, according to the County's 2010 Central Maui Recycled

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[68] Id; Exhibit E-107.
[69] IIFS Assessment Report for Honomanu Stream, p. 134; Exhibit E-63.
[70] EMI Monthly Water Use Report to State, 1/21/08, HC&S-MTREQUEST-04-0012–0015, and thereafter; Exhibit E-113.

Water Verification Study.[71] There are also health concerns regarding an increase in staph and MRSA infections in ocean recreation users at Kahului Bay.[72] This Study states that wastewater flows to the Kahului Wastewater Reclamation Facility will increase over time as more development takes place in Central Maui.[73]

During the May 25, 2010 meeting of the Commission on Water Resource Management (CWRM), Chair Thielen and County Water Director Eng discussed recycling Central Maui's wastewater as an alternative to the amount of stream flow diverted by HC&S for irrigation.[74] Chair Thielen stated on p. 38:

> *There was some testimony about injection wells and instead using reclaimed water for agricultural purposes. Since Maui DWS gets a percentage out of the EMI ditch system, would the County be interested in working with HC&S on coordinating some alternative water being used for irrigation in exchange for increase in the percentage of stream water that goes to the County vs. for irrigation purposes in the fields? Are these things something the County would be interested in pursuing and if so, how can the Commission assist that with some guidance.*

Water Director Eng and Mayor Tavares both agreed.[75] This discussion took place over four years ago and no effort has been made by the County and HC&S to work together to use this valuable resource - wastewater from the Central Maui treatment plant.

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[71] County of Maui's December 2010 Central Maui Recycled Water Verification Study prepared by the County's Department of Environmental Management and Department of Water Supply for the Maui County Council; Exhibit E-88.
[72] Id.; Exhibit E-88.
[73] Id.; Exhibit E-88.
[74] CWRM Minutes May 25, 2010; Exhibit E-60.
[75] Id. at pp. 38-39; Exhibit E-60.

The CWRM addressed the use of wastewater for sugar cane irrigation in its own 2013 Update of the Hawaii Water Reuse Survey and Report.[76] This Report supports increased use of wastewater in Central Maui.

The Central Maui Recycled Water Verification Study also finds that wastewater would be suitable for sugar cane irrigation.[77] Funds in the County budget have been set aside for an R-1 upgrade and transmission lines at the Kahului plant. What remains to be decided is where these lines would be placed.

Option 2 of the Central Maui Recycled Water Verification Study proposes a distribution system from the Kahului WWRF to Kanaha Beach Park and Kahului Airport that could be extended to HC&S fields north of the airport. Funding could come jointly from Hawaii Department of Transportation, Airports Division, HC&S and others.

Option 3A is entitled "Develop a Dedicated Distribution System to HC&S." This option would need only enough R-1 pipe line along Kaahumanu Avenue to reach existing ML&P pipe lines. R-1 water would be pumped from the Kahului WWRF directly to the HC&S reservoir and once the reservoir was full, the pumps would shut down. Recycled water from this line could be used to irrigate seed cane in HC&S fields near Maui Lani.

Developing these recycled water use options would help to serve HC&S's agricultural irrigation needs while requiring less water to be taken from Maui's

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[76] 2013 Update of the Hawaii Water Reuse Survey and Report prepared for DLNR/CWRM; Exhibit E-89.
[77] Central Maui Recycled Water Verification Study; Exhibit E-88.

streams. It would also prevent the current 4 mgd of treated wastewater from entering Kahului Bay and the future 6 mgd, after the upgrade to the plant's capacity. The addition of a third ultra violet channel could increase the R-1 capacity to 7.9 mgd. Maui County wastewater will increase as the island's population grows. This wastewater can be a resource for agricultural irrigation rather than "wasted" water which causes harm to our marine environment.

Plants, wildlife, and fish depend on sufficient water flows to their habitats to live and reproduce. The lack of adequate flow in Maui's streams, as a result of diversions for agricultural purposes, has caused deterioration of Maui's stream and aquifer water quality and ecosystem health. Recycled R-1 water can supplement agricultural demands by providing a reliable source of irrigation water that is less dependent on seasonal weather variations than stream water. Over time, investment in R-1 water delivery systems could allow considerable amounts of stream water to remain in our watersheds, supporting increased stream flows and vital ecosystem functions like East Maui aquifer recharge.

F. HC&S Could Decrease its Dependence on East Maui Water Through Green Harvesting of HC&S Fields

An important new development in cane growing is the replacement of pre-harvest burning by the adoption of green cane harvesting and trash blanketing. Trash blanketing is the spreading of leaves and other plant residue in a thick layer of mulch over the ground.

This practice has worked well on a large scale in growing sugar cane in Australia. It does not reduce productivity or efficiency. The volume of cane harvested green has increased by over 200% in the past 10 years.

HC&S currently green harvests between 4 to 6% of their fields; they have publicly stated they could increase that amount to possibly 20%. Increase in green harvesting, especially near residential areas such as Paia and North Kihei, would not only improve field irrigation efficiencies and lower overall water demand, but it would also lead to better air quality from less field burning and a decrease in fugitive dust due to increased soil moisture from trash blanketing.

Because trash blankets helps to prevent evaporation of water from the soil surface and allow better water infiltration, the practice reduces irrigation requirements and produces higher cane yields in drier areas. This practice could reduce the plantation's overall water demands or needs. [78]

G. HC&S is Not Investing in a Sugar Plantation Future

EMI, HC&S and A&B are not investing in a sugar plantation future. They are not maintaining the ditches and reservoirs in a responsible fashion, given the public trust principles that apply. They do not want to spend money lining the ditches or the reservoirs to prevent waste. They are not willing to invest in new infrastructure or new methodologies that could responsibly bring their plantation into alignment with practices long ago determined to be viable in today's environment.

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[78] canegrowers.com.au; Exhibit E-91.

Instead, all appearances are that, instead, EMI, HC&S and A&B simply want to utilize whatever they now have for as long as possible. They have had the benefit of a very cheap supply of water from East Maui. Because they feel entitled to this water, instead of using their electricity to pump groundwater, they over-rely on the cheap water and sell their electricity to MECO.

The rock bottom amounts BLNR requires to be paid by EMI for East Maui water distorts optimal allocation of resources by making water so cheap, A&B, EMI and HC&S have no financial incentive, and suffer no monetary penalties, for wasting water. Its own estimates show that EMI's collection system loses 16.6 to 25 mgd through seepage and evaporation. In addition, HC&S loses between 23-41 mgd from its irrigation delivery system, mainly from evaporation and leakages from its 36 reservoirs on the plantation, 31 of which are unlined. If EMI and HC&S were paying market rates for the water it diverts and uses for storage on the plantation, it would have a huge incentive (60 times more) to stop its wasting of this public trust asset. [79]

EMI, HC&S and A&B may not be planning to operate a sugar cane plantation for much longer into the future. They have not taken the actions one would expect from a companies that calculated that sugar cane was in their future. Unfortunately, these actions are also to the detriment of those with riparian and appurtenant water rights and the life of our streams.

County of Maui, BWS

A. The County BWS Has Alternative Sources of Water Available

[79] See Written Testimony of Richard "Dick" Mayor submitted concurrently.

1. Waikamoi Flume Improvements

The Waikamoi Upper Flume was originally constructed in 1930s.[80] The Waikamoi Flume is located within an easement that was granted to the County by EMI in 1945. Lands underlying the access road to the Flume are owned by the State and A&B. [81]

The Waikamoi Flume is "extremely leaky." [82] The County BWS and EMI agreed in 1996 that:

> ....the Flume is now in a state of major disrepair and there is a concern that it may fail.[83]

Since at least 1996, the County BWS has been contractually bound to repair the Waikamoi Upper Flume.[84] The CDUA Application for these repairs states:

> ....DWS estimates that "during peak flows, **approximately 40 percent of the water conveyed by the flume is lost** through various cracks and holes along its length. [85] (Emphasis added).

The County BWS budgeted $60,000 for the necessary maintenance and repair of the Flume for fiscal year 1996-1997.[86] The County BWS did nothing to prevent this continuing waste of public trust resources.

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[80] CDUA Application for Waikamoi Flume Replacement Project dated June 2012, p.8, HC&S-MTREQUEST-41-0001 – 0063; Exhibit E-114.
[81] CDUA Application for Waikamoi Flume Replacement Project dated June 2012, pp. 4 and 8, HC&S-MTREQUEST-41-0001 – 0063; Exhibit E-114.
[82] CWRM Staff Submittal dated May 25, 2010, p.25; Exhibit E-50.
[83] Fourth Amendment to Memorandum of Understanding between EMI, BWS, and other, dated December 30, 1996, p.1, HC&S-MTREQUEST-15-0017 – 0026; Exhibit E-115.
[84] Agreement Re 1973 Memorandum of Understanding, Repairs to Waikamoi Water System, Construction of Reservoir at Kamole Weir dated March 21, 1996, pp.2-3; Exhibit E-116.
[85] CDUA Application for Waikamoi Flume Replacement Project dated June 2012, p. 8, HC&S-MTREQUEST-41-0001 – 0063; Exhibit E-114.
[86] Fifth Amendment to Memorandum of Understanding between EMI, BWS, and other, dated January 20, 1998, p.1, HC&S-MTREQUEST-15-0027 –0033; Exhibit E-117.

In the Memorandum of Understanding between the BWS and A&B in 2000, the BWS again contractually agreed to improve the Waikamoi flume. Section 1.(I) the 2000 MOU provides:

> BWS to initiate and implement a long-term plan for **permanent improvements to the Waikamoi flume system**. (Emphasis added). [87]

The CWRM, on May 25, 2010, directed the County DWS to replace the Waikamoi Flume Structure in order to reduce waste and system loss, as follows:

> Maui DWS initiate rehabilitation and construction on the Waikamoi Flume within three (3) years. The reconstruction of the extremely leaky Waikamoi Flume is the least expensive alternative water source for Maui DWS Upcountry customers. Maui County is required to reduce waste and system loss. If action is not taken to initiate construction in this time period, then the Commission shall be obligated by law to reduce Maui DWS' diversions due to waste.[88]

During the contested case proceedings, Maui Tomorrow will present documentation from public records of the amounts that have been diverted from East Maui Streams that are the subject of these proceedings into the Waikamoi Upper Flume, the amounts that have been wasted through leakage and the substantially diminished amounts that have been delivered to the Olinda WTF on an annual and cumulative basis.

Any perceived loss to the County BWS due to stream restoration can be compensated for by the gain by the County BWS of the forty percent of the

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[87] Memorandum of Understanding Concerning Settlement of Water and Related Issues" between the Maui County Board of Water Supply and Alexander & Baldwin, Inc. dated April 13, 2000; Exhibit E-105.

[88] CWRM Staff Submittal dated May 25, 2010, p. 25; Exhibit E-50.

water it has been losing for over twenty (20) years, without taking responsible action to protect this public trust resource.

2. Construction of Reservoir at Kamole Weir

Since at least 1996, the County BWS has been contractually bound to construct a reservoir at Kamole Weir.[89] The County BWS has never constructed this reservoir. The County BWS could make up any losses of water required for stream restoration by constructing the reservoir at Kamole Weir.

3. The Percentage of Agricultural Use of Water By The County is Small

The County BWS has argued that the needs of Kula farmers must be protected. The County BWS over-states its case here, however. Of the meters issued in this area (Makawao) as of June 30, 2013, only 433 5/8th inch meters have been issued for "agricultural service" and 8,686 5/8th inch meters have been issued for "regular service." [90]

X. NEITHER HC&S NOR THE COUNTY BWS MAY CLAIM ANY HARM

A. HC&S/EMI

Any entitlements of EMI and HC&S to use surface waters arising on state lands in East Maui have been conditional. HRS 171-58(d) reserves the right in the State to require the lessee of state water rights to make this water available for certain purposes determined by the Board. The Huelo License,

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[89] Agreement Re 1973 Memorandum of Understanding, Repairs to Waikamoi Water System, Construction of Reservoir at Kamole Weir dated March 21, 1996, pp. 3; Exhibit E-116.
[90] County BWS Number of Services by Meter Size for Fiscal Year ended June 30, 2013; Exhibit E-118.

General Lease 3578, excepted from EMI's right to divert:

> .... such water as is used for domestic purposes (including the watering of livestock), under the provisions hereinafter contained, and for domestic purposes and the irrigation of kuleanas entitled to the same.

The State proposed the issuance of a lease to EMI of a consolidation of the Four Licenses. The Staff Submittal dated August 23, 1985 stated that this lease was:

> Subject to the right of the State under certain limitations to withdraw at any time for domestic purposes including the watering of livestock, the government-owned surface and ground waters. [91]

The State acknowledged in its May 26, 2000 Staff Submittal that the proposed thirty (30) year license had been pending due to the concern over the settlement of the *McBryde* case. The State stated that this lease would be conditioned upon the State's right to withdraw water under the lease for:

> Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under Section 221 of the Hawaiian Homes Commission Act, as well as other statutory or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of Section 171-58(d), Hawaii Revised Statutes. [92]

A similar condition was included in the BLNR Board Submittal for May 25, 2001.[93] Any permits or approvals issued thereafter to EMI or HC&S have contained the same conditions.

EMI and HC&S are not harmed, and cannot claim to be harmed, if East Maui waters are now reserved for "constitutionally protected water rights" or

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[91] BLNR Staff Submittal dated August 23, 1985, p. 4; Exhibit E-119.
[92] BLNR Staff Submittal dated May 26, 2000, pp. 4-5; Exhibit E-120.
[93] BLNR Board Submittal for May 25, 2001; Exhibit E-121.

"instream flow standards." They both have been on notice for years that any amount of water they receive may be diminished to satisfy "constitutionally protected water rights" or "instream flow standards."

B. BWS

1. Agreed to Stream Restoration

The Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B binds HC&S and the County to support stream restoration. [94] Section 1.(l.) of this document states:

> **As long term agricultural water needs are reduced, a stream restoration program will be studied, developed and initiated by BWS.** (Emphasis added).

Long term agricultural needs have been reduced on Maui sufficiently to trigger the County's legal obligation to initiate a stream restoration program. See §§ VIII. A. and D. above. Since the County BWS has an obligation to study, develop and initiate stream restoration, the County BWS cannot claim harm through the stream restoration that takes place through these proceedings.

2. Claim Derivative/Subject to Limitations on EMI

The minimum water need of the County, BWS from the Wailoa Ditch, as of 2000, was 8.2 mgd.[95] The claim of the County of Maui derives from and is dependent upon a promise by EMI to supply the County of Maui with a very

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[94] Memorandum of Understanding Concerning Settlement of Water and Related Issues between the BWS, County of Maui and A&B dated April 13, 2000, § 1(k); Exhibit E-122.
[95] Id. at §§ 1(c) and (d), p.1; Exhibit E-122.

small percentage of the water it diverts from East Maui streams. [96] All of the conditions applicable to EMI are also applicable to the County of Maui. See Section IX. A. above.

3. Claim Subject to Constitutional Rights

To the extent that the County BWS claims water from the Upper and Lower Flumes may not derive from EMI, the diversions of these streams are, by law, subject to constitutionally protected water rights, instream flow standards and reservations needed to meet the Department of Hawaiian Home Lands rights under Section 221 of the Hawaiian Homes Commission Act, as matters of law. If stream restoration is required for any of these purposes, the County cannot claim harm.

XI. CONCLUSION/ RELIEF REQUESTED APPLICATION OF BALANCING TEST

There is a methodological tendency to begin with the current diversions, taking them as a given, and to place the burden on those advocating riparian and appurtenant rights and instream values to demonstrate what water source alternatives are available to the diverters so that these diverters are able to retain the same amounts that they have always diverted. This methodology is incorrect as a matter of law. It effectively allows the diverters to "grandfather" their existing uses when the law provides that there shall be no such "grandfathering." This improper methodology tends to exclude consideration of

[96] Memorandum of Understanding between BWS, EMI and HC&S, dated December 31, 1973; Exhibit E-122.

other alternatives that may not leave the diverter with the same total amount of water it is currently diverting.

Instead the starting point must be undiverted East Maui Streams. Then present or potential instream values must be evaluated and quantified along with riparian and appurtenant rights. HRS §174C-71(E). HRS §174C-71(C) provides, in pertinent part:

> Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. **Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses**.... (Emphasis added)

First, an amount of stream flow necessary to protect instream values and Native Hawaiian traditional and customary rights must be evaluated and quantified for each stream, from its uppermost reaches to its discharge point into the ocean. Second, an additional amount of stream flow necessary to protect appurtenant, riparian and domestic rights and needs must be evaluated and quantified for each stream, from its uppermost reaches to its discharge point into the ocean.

The CWRM must also consider present or potential uses of water from the stream for noninstream purposes. HRS §174C-71(E). The CWRM may also consider the economic impact of restriction of nonintream uses. HRS §174C-71(E).

The CWRM must then weigh the importance of instream values with the importance of noninstream purposes. HRS §174C-71(E). While the economic impact of restricting noninstream uses is to be considered, this consideration

cannot "grandfather" noninstream uses. *In re Water Use Permit Applications* ("Waiahole I"), 94 Hawai'i 97, 9 P.3d 409, (2000).

The CWRM may reclaim instream values to the inevitable displacement of existing offstream uses. See *Waiahole I.* The CWRM may do so by considering "physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution." HRS §174C-71(1)(C).

A proper application of the law requires consideration of options that leave the diverters with a total amount of water that is less than they currently divert, even if some adverse economic consequences may result to the diverters. HC&S may simply need to consider a plantation that relies less upon East Maui Stream water than it has in the past and also make whatever operational adjustments are necessary to accomplish this.

EMI has diverted water for over one hundred (100) years without leaving enough flow in the streams to support stream life or to allow the continued practice of traditional and customary Native Hawaiian rights. EMI has diverted water for over one hundred (100) years without accommodating riparian, appurtenant and domestic needs and rights. HC&S has only been able to develop its plantation based upon its dewatering of East Maui streams and monopolization of the surface waters arising in East Maui, paying only minimal amounts to the State for these waters that offend the ceded and public lands trusts. If this dewatering and monopolization at a cheap price is no longer

permitted, as a matter of law, it could not be plainer that HC&S will need to make some adjustments in the way it operates its plantation in order to finally comply with what is now long-established, modern Hawaii water law.

DATED: Wailuku, Maui, Hawaii 1.15.15

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties listed below by email originally on December 30, 2014 and, as Amended and Corrected, on January 15, 2015.

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