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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, 'ŌHI'A (WAIANU), WAIOKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILIULA, PUAKAA, WAIOHUE, PAAKEA, WAIAAKA, KAPAULA, HANAWI and MAKAPIPI STREAMS	CASE NO. CCH-MA13-01 PETITIONERS' REBUTTAL BRIEF; CERTIFICATE OF SERVICE

PETITIONERS' REBUTTAL BRIEF

A. The Public Trust Demands "Special Consideration" of Resource Protection

HC&S and the County attempt to minimize the significance of the public trust doctrine and distort the legal framework that guides the Commission in this proceeding. The overriding language in the constitutional provision setting forth the public trust doctrine is conservation-

minded. Article XI, §1 of the Hawai`i Constitution provides that the State "shall conserve and protect Hawaii's natural beauty and all natural resources, including. . . water" and "shall promote the development and utilization of these resources in a manner consistent with their conservation." To effect the constitutional doctrine's dual mandate of protection and maximum reasonable and beneficial use, the Hawai`i Supreme Court has directed that: (1) the State has a "duty to ensure the continued availability and existence of its water resources for present and future generations," and (2) the Water Code "shall be liberally interpreted to obtain maximum beneficial use of the waters of the State," *In Re Water Use Permit Applications,* 94 Hawai`i 97, 139, 146, 9 P.3d 409, 451, 458 (2000) ("*Waiāhole I*"). Maximum beneficial use "is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" *Id.* at 140, 9 P.3d at 452.

Although the public trust may have to accommodate offstream diversions, *see id.* at 141, 9 P.3d at 453; *see also* HC&S' Responsive Brief ("HC&S Resp.") at 5, as even HC&S recognizes, the Court "read[s] HRS §174C-2(c) to describe a statutory public trust essentially identical to the previously outlined dual mandate of protection and conservation-minded use, under which resource protection, maintenance, and preservation and enhancement receive special consideration or scrutiny[.]" *Id.* at 146, 9 P.3d at 458 (internal quotations omitted); HC&S Resp. at 6.[1] Common sense therefore dictates that the Court would not have prescribed this special consideration or higher level of scrutiny for commercial uses if they shared equal priority with the use of resource protection.

Likewise, the Court has repeatedly lauded the virtue of establishing instream flow standards **before** assessing private interests in offstream use. *See In re Water Use Permit Application Filed by Kukui (Molokai), Inc.* ("*In re Kukui*"), 116 Hawai`i 481, 493, 174 P.3d 320, 332 (2007) (citing *Waiāhole I*, 94 Hawai`i at 148-49, 9 P.3d at 460-61). There is broad consensus that "[e]arly designation of instream flow standards furthers several important

[1] *See also Waiāhole I*, 94 Hawai`i at 142, 9 P.3d at 454 (affirming that a "higher level of scrutiny" was required for private commercial uses and "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust"); *id.* at 141, 9 P.3d at 453 (recognizing that article XI, §1 "condition[s] use and development on resource 'conservation'"); *cf. In re `Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawai`i 228, 259, 287 P.3d 129, 150 (2012) ("*Nā Wai Ehā*") ("Allowing a water user to divert water from the public trust res when that user has exclusive access to an alternative water source that is currently un- or under-used would not effect the Legislature's policy as expressed in the water code.").

objectives" -- among them "ensuring that instream uses do not suffer inadvertent and needless impairment" and "preserv[ing] the integrity of the Commission's comprehensive planning function." *Id.* By quantifying the public interest in instream flows **prior to** accommodating offstream uses, the CWRM avoids having to bend to the "immediate" and "highly particularized" demands of private interests when discharging its dual mandate.[2] Indeed, a "certain and manageable [instream flow] quantity" eliminates the uncertainty of what is in fact "reasonable and consistent with ... the public interest" -- the standard to which the CWRM as well as existing and potential offstream users are bound. *Id.* Thus, there are obvious pragmatic reasons to quantify instream flow requirements at the outset, before addressing private interests in offstream use. Indeed, "if the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time." *Waiāhole I,* 94 Hawai`i at 138, 9 P.3d at 450.

HC&S disingenuously argues that the inevitable harm its offstream diversions inflict on public trust uses -- including native Hawaiian rights -- is the type of "unavoidable impairment" the Hawai'i Supreme Court condoned in *In re Kukui* and to which the public trust, with its mandate of protection, must acquiesce. HC&S' Resp. at 5-6. In that case, however, the Court evaluated the scenarios that arise when "inconclusive allegations raise a specter of harm that cannot be dispatched by readily available evidence" and which consequently burden the applicant with "demonstrat[ing] that there is, in fact, **no harm**, or that **any potential harm** does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial." *In re Kukui*, 116 Hawai`i at 499, 174 P.3d at 338 (emphases added). In the instant case, the harms are real and irrefutable, corroborated by objective science and witness testimony. The native Hawaiian practices at stake here concern more than a mere reservation of water resources; they concern constitutionally-protected rights and practices that predate the century-old diversions on which HC&S and the County rely and that persist, even today, despite the unprecedented dewatering of East Maui streams.

While HC&S and the County may display a blithe disregard for the express and unambiguous preference and priority afforded **existing, legal** uses under the Code, the CWRM is

[2] The Commission's mandate of protection include its "affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights," *Ka Pa`akai O Ka `Āina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000), a protected public trust purpose.

duty bound to vigilantly uphold both the letter and the spirit of the laws that govern water resources. *Id.* at 494, 174 P.3d at 333 ("[T]he applicant shall establish that the proposed use of water . . . *will not interfere with any existing use of water.*") (citing HRS §174C-49(a)(3)) (emphasis in original). The native Hawaiian traditional and customary practices in which Nā Moku engages and seeks to perpetuate in the same manner and place as their ancestors requires a mere fraction of the water traditionally available. These practices are exactly the kinds of existing legal uses to which the CWRM must give priority. To impede or impair instream uses as firmly rooted in the law and culture as these in favor of private offstream uses that divert petitioners' **sole** source of water, despite practicable alternatives, is to inflict harm "ris[ing] to a level that would preclude a finding that the requested use is . . . reasonable-beneficial." *Id.* at 499, 174 P.3d at 338.

HC&S simultaneously attempts to render a well-established legal principle mere dicta. HC&S Resp. at 6-8.[3] Contrary to HC&S' dismissive treatment of the law, the precautionary principle is not simply an "aspirational" concept that provides the CWRM with unfettered discretion to further some nebulous interest; rather, it is an authoritative restatement of the CWRM's express legal duties. *See Waiāhole I*, 94 Hawai`i at 155, 9 P.3d at 467 ("[T]he precautionary principle . . . restates the Commission's duties under the constitution and Code."). Any "deference" espoused in the principle is not constrained to the Commission's decision-making authority but extends to "reasonable precautionary presumptions or allowances"

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[3] In downplaying the precautionary principle, HC&S asserts that all it does is simply "afford[] deference to the CWRM's decisions under judicial review." HC&S Resp. at 7 (citing *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976)(en banc)). Although the *Waiāhole I* Court indeed referred to *Ethyl* as a "lodestar opinion" in a footnote, it does not rely on the D.C. Circuit case for the proposition HC&S asserts. Rather, the Court cited *Ethyl* for the following **substantive** propositions: (1) "[a]waiting for certainty will often allow for only reactive, not preventive, regulatory action," *Waiāhole I*, 94 Hawai`i at 154, 9 P.3d at 466; and (2) in the absence of sufficient scientific evidence, the CWRM "must rely as much on policy considerations as on hard scientific 'facts.' *Id.* at 159, P.3d at 471 (citing *Ethyl*, 541 F.2d at 29 ("[The Commission] must act, in part on factual issues, but largely on choices of policy, on an assessment of risks, and on predictions dealing with matters on the frontiers of scientific knowledge. . . .") (brackets in original)). The Court also quoted the following from the *Ethyl Corp.* opinion:

> Regulators such as the [Commission] must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist.
>
> Questions involving the environment are particularly prone to uncertainty. . . . Yet the statutes--and common sense--demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.

Id. at 154 n.59, 9 P.3d at 466 n.59 (citing *Ethyl*, 541 F.2d at 24-25) (brackets in original).

specifically designed to protect the public interest in minimum instream flows. *Id.* at 155, 159-60, 9 P.3d at 467, 471-72; *In re Kukui*, 116 Hawai'i at 500, 174 P.3d at 339.

Regarding the CWRM's obligations under the law, the Hawai`i Supreme Court made abundantly clear that, "[w]here scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt 'precautionary principles' in protecting the resource." *Id.* at 154, 9 P.3d at 466. The Court went on to say:

> Indeed, the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible. Nor does present inability to fulfill the instream use protection framework render the statute's directives any less mandatory. In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments. **Neither the constitution nor Code, therefore, constrains the Commission to wait for full scientific certainty in fulfilling its duty towards the public interest in minimum instream flows.**

Id. at 155, 9 P.3d at 467 (footnote omitted).

Indeed, if the resource is not protected then no one -- not even the would-be diverter -- would have access to water for *any* purpose. For Nā Moku, East Maui stream water is the only water source that exists to support their traditional and subsistence lifestyle. For Nā Moku, there is no debating practicable alternatives because there are none. Thus, the "prudent" thing to do here, given the CWRM's duties pursuant to the public trust described *supra*, the documented harm to Nā Moku and others, and HC&S' and the County's professed need for East Maui water, is to ensure the streams and their resources are fully protected first. Only then is the CWRM equipped to affirmatively preserve and protect appurtenant rights or traditional and customary native Hawaiian rights and their existing, legal correlative uses, and only thereafter prioritize among proposed, competing offstream uses the allocation of surplus streamflow quantities.

B. HC&S' Attack on the Eight Prioritized Petitions Is Baseless

1. Nā Moku's Reasonably Calculated Water Needs is Based on Well-Settled Law, Historical Records, and Native Testimony.

HC&S irrationally complains about the basis of Nā Moku's kalo-growing water needs despite the petitioners' judicious approach toward assessing the same. Its TMK selections were well-reasoned and based on corroborating information -- via historical documents and/or

testimony -- that the specific parcels were used for taro growing at any time since the Māhele and through the present.

As a matter of law, parcels of lands that were cultivated (usually in kalo) at the time of the Māhele retain the right to the amount of water necessary to sustain cultivation. *See Nā Wai Ehā,* 128 Hawai`i at 270, 287 P.3d at 171 (2012);[4] *Reppun v. Board of Water Supply*, 65 Haw. 531, 551, 656 P.2d 57, 71 (1982) ("[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land."). Indeed, "lands possessing appurtenant water rights . . . are therefore entitled to the quantity and flow of water which was utilized to irrigate crops **prior to** the diminution of the stream[.]" *Id.* at 564, 656 P.2d at 78 (emphasis added).

Although this proceeding is not intended to result in a per se appurtenant rights determination, this is the general approach by which to quantify the public interest, specifically native Hawaiian traditional and customary practices, in instream flows. Such analysis necessarily includes -- at minimum -- establishing that the lands irrigated by the streams (*i.e.*, Honopou, Pi'ina'au, Waiokamilo, and Wailuanui) and/or the auwai connected to those streams have a legal right to continued flow in volumes sufficient to sustain cultivation in the same manner as was done at the time of the Māhele. *See Nā Wai Ehā,* 128 Hawai`i at 242, 287 P.3d at 143.

HC&S attempts to pull a fast one by urging the CWRM to burden taro farmers with proving and quantifying their current use, under diverted conditions and irrespective of their appurtenant rights as kuleana users, and showing cause why that amount (and no more) should be released from the EMI Ditch System. This is complete nonsense. The Hawai`i Supreme Court

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[4] The Court explained:

> HRS chapter 174C statutorily protects kuleana users' appurtenant rights to water. HRS §174C-101(c) provides that "traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians . . . shall not be abridged or denied by this chapter. Such . . . rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana. . . ." Additionally, HRS §174C-101(d) states that "[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter." Further, HRS § 174C-63 states that "[a]ppurtenant 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." HRS §174C-63 (emphasis added). Thus, by virtue of HRS §174C-101, appurtenant water rights to kuleana users are legally protected. The right to grow taro, then, shall not be abridged or denied. Appurtenant rights for such purposes may not be diminished or extinguished by the failure to obtain a permit. Such appurtenant rights may be exercised at any time. HRS §174C-63.

Nā Wai Ehā, 128 Hawai`i at 270, 287 P.3d at 171; *see also id.* at 242, 287 P.3d at 143..

explicitly rejected the same unprincipled argument in *Nā Wai Ehā*. In that case, in response to HC&S' contention that "downstream kalo farmers cannot assert property interests to more water than they currently use[,]" the Court concluded that: (1) "the fact that HC&S . . . ha[s] historically deprived downstream users of water does not negate those downstream users' interest in the water"; (2) "neither [HRS §174C-101 or HRS §174C-63] provides for abandonment of appurtenant rights; in fact, the text specifically protects against abandonment"; and (3) "as the court explained in *Waiāhole I*, 'The constitution and Code do not differentiate among protecting, enhancing, and restoring public instream values like native Hawaiian rights, or between preventing and undoing harm thereto.'" *Nā Wai Ehā*, 128 Hawai'i at 242, 287 P.3d at 143 (brackets and internal quotations omitted).

HC&S is acutely aware that **actual current use** of traditional taro land is **not** the relevant inquiry. As long as a taro farmer demonstrates that he/she is cultivating traditional crops on historic taro land in the same manner undertaken at the time of the Māhele, then that parcel is entitled to the quantity and flow of water historically utilized for such cultivation. *See Reppun,* 65 Haw. at 554, 656 P.2d at 72 ("[W]hen ... the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Māhele, there is sufficient evidence to give rise to a presumption that the amount of water diverted for such cultivation sufficiently approximates the quantity of the appurtenant water rights to which that land is entitled.").

It is precisely the quantity and flow of water used at the time of the Land Commission award and long before diversions all but eliminated cultivable lo'i existing at that time -- **not** present-day irrigation requirements for those limited areas that have managed to survive century-old diversions -- that constitutes the amount of water under an appurtenant right. *See* HC&S Resp. at 8-9, 11-15; *Reppun*, 65 Haw. at 564, 656 P.2d at 78*; see also* Instream Flow Standard Assessment Report ("IIFSAR"), Island of Maui, Hydrologic Unit 6034, Honopou (March 2008) at 57 (citing to *Waiāhole I* and the Commission's 2007 *Water Resource Protection Plan - Public Review Draft*). To be clear, the measure of water is established by cultivation methods that approximate those utilized at the time of the Māhele. *Id.* Thus, appurtenant rights are attached to the lands that Nā Moku has identified in Honopou, Ke'anae, and Wailuanui for historic, present, or potential kalo growing in the same manner as their ancestors. Nā Moku has met its burden to lay this important foundation through historical documents, testimony of East Maui farmers (past

and present), as well as the testimony of experts in traditional practices associated with these streams. No further specificity is required. HC&S' objections to Nā Moku's acreage sums are meritless and an unnecessary distraction from the applicable appurtenant rights legal standard to which Nā Moku's calculated irrigation needs adhere.

In identifying the parcels on which it based its water needs, Nā Moku was very conservative, adopting a reasonable approach to identify and carefully select parcels for the CWRM's consideration in setting the IIFS. First, Nā Moku's title expert researched 162 parcels in Honopou, Ke'anae, and Wailuanui valleys. Rebuttal Decl. of Teresa "Teri" Gomes ¶6 ("Gomes Rebuttal Decl."). Of those parcels, only 135 parcels with historical lo`i designations based on testimony (past and/or current) were originally selected for the CWRM's consideration in these proceedings.[5] *See id.*; *see also* Exhs. A-140-143; Decl. of Isaac Kanoa ("Kanoa Decl.") ¶¶20-24; Supp. Decl. of Edward Wendt ¶¶4-8. In fact, Nā Moku has omitted at least 25 parcels entitled to appurtenant rights precisely because no testimony *specifically* confirmed the prior existence of lo`i or expressed a present or future intention to farm taro there. *See* Exh. A-166. Nā Moku did not, as HC&S suggests, "simply add[] the total acreage of TMK parcels listed on the Nā Moku Spreadsheet" in the various plats. HC&S Resp. at 14, 12, 9; Gomes Rebuttal Decl. ¶6.

Second, Nā Moku's estimate, which was corroborated by historical documents and/or native testimony, was conservative even compared to CWRM's records, which are based on original registration documents of declared water use for taro cultivation:

Table 1: Comparison of CWRM and Nā Moku's Acreage Estimates of Cultivable Lo`i

	Honopou	**Ke'anae**	**Wailuanui**	**TOTAL**
CWRM	34.55	105.85	353.32	**493.72**
Nā Moku	26.06	29.695	90.992	**146.747**

See Nā Moku's Opening Brief at 10, *Table No. 1.* Considering that Nā Moku seeks to exercise a mere fraction of the appurtenant rights to which it is entitled and which have not been extinguished, it is simply inaccurate to characterize its values as "greatly overstated."

HC&S' preoccupation with tying each lo`i parcel to a present-day farmer is similarly specious because it ignores the obvious: **more kalo farmers would be farming more lo`i and exercising their appurtenant rights thereto if water had not been diverted for over a**

[5] *See* Gomes Rebuttal Decl. ¶¶17, 19 (identifying two additional parcels with historic and/or present lo`i).

century already, and if today there was more water, enough water, to sustain this traditional and customary practice. *See*, e.g., Kanoa Decl. ¶17; Decl. of Aja Akuna ¶16; Decl. of Jonah Kuponoikeauea Hueu ¶12; Decl. of Norman "Bush" Martin ¶21; Decl. of Solomon Ka`auamo ¶19; Decl. of Edward Wendt ("Wendt Decl.") ¶16; Decl. of Lezley Jacintho ¶22; Decl. of Ty Kāwika Tengan ¶37 ("The return of streamflows will support the regeneration of the land and people."); *see also* Nā Moku Opening Brief at 26-27.

Moreover, the hearing officer in this proceeding specifically instructed Nā Moku to provide *any* evidence suggesting that the land irrigated by the 27 petitioned streams was historically used for taro growing. Nā Moku has propounded overwhelming evidence supporting the historical capacity of the taro-growing areas of Honopou, Ke'anae, and Wailuanui and the reasonableness of its water requirements. Where the sum total of taro acreage as reported by CWRM (493.72) approximates the figures espoused by expert historians (496.00), *see* Nā Moku Opening Brief at 3 -- both of which far exceed Nā Moku's estimation (146.747) -- HC&S utterly fails to demonstrate how Nā Moku's present calculations are unreasonable.

2. Diverted Conditions and Current IIFSs Have Reduced the Amount of Cultivable Lo`i Acreage.

The CWRM should not be distracted from the relevant inquiry that HC&S attempts to obscure by quibbling over irrelevant concerns, including Nā Moku's current use of historic taro lands.

HC&S correctly observes that Nā Moku wants 1.472 mgd (64% of 2.3 mgd) to be left in Honopou stream before calculating the amount to be restored to satisfy its taro needs. HC&S Resp. at 9. That is exactly what the State's "duty to ensure the continued availability and existence of its water resources for present and future generations" requires. *Waiāhole I,* 94 Hawai`i at 139, 9 P.3d at 451. HC&S also correctly extrapolates that observing this precautionary principle -- which is simply a restatement of the CWRM's express legal duties -- leaves only 0.828 mgd of average baseflow to meet Nā Moku's minimum irrigation requirement of 2.61 mgd. As aptly pointed out by HC&S, even that minimum "far exceeds what can be 'restored' to Honopou since it is much greater than the average base flow in its natural undiverted condition." HC&S Resp. at 9. In other words, not only is current streamflow inadequate, but full restoration of Honopou may merely mitigate, not completely resolve, Nā Moku's water requirements. On this point, HC&S and Nā Moku are in complete agreement,

which is why Nā Moku is baffled that HC&S continues to deny the obvious inadequacy of the current IIFS of 1.29 mgd. *See id; see also* Decl. of Lurlyn Scott ("Scott Decl.") ¶¶54-55, 63-66.

In addition, although HC&S and Nā Moku agree that taro cultivation in Honopou is ***currently*** about one acre, HC&S ignores the obvious, *i.e.*, that the current acreage in cultivation is artificially suppressed precisely because of EMI's diversions, making the current IIFSs insufficient to support more cultivation. *See* HC&S Resp. at 9. For example, over a hundred years ago, before EMI diversions decimated Honopou's vast cultivable taro acreage, the Kekahuna ohana's one kuleana (LCA 5595:E) alone supported 4.79 acres in wetland taro.[6] The responsive testimony of Garret Hew, which is limited to his observations from the last decade, *see* Resp. Decl. of Garret Hew ("Hew Resp. Decl.") ¶¶2-9, says nothing about what was historically possible on that one kuleana "prior to the diminution of [Honopou] stream" -- the only legally relevant consideration. *See Reppun,* 65 Haw. at 564, 656 P.2d at 78.

Importantly, neither HC&S nor Mr. Hew disputes that the Scott, Kekahuna, and Jacintho ohana are presently utilizing lands awarded during the Māhele to grow taro by means approximating those utilized at the time of the Māhele, *e.g.*, traditional `auwai and lo`i systems. The law demands that those lands be entitled to the quantity and flow of water historically utilized for such cultivation. *See Reppun,* 65 Haw. at 553-54, 656 P.2d at 72. Moreover, because Honopou's diverted conditions naturally deprived these instream users of water, the law allows these Honopou taro farmers to assert property interests to more water than they currently use. *See Nā Wai Ehā*, 128 Hawai`i at 242, 287 P.3d at 143. Bottom line, the kuleana's historic capacity of 4.79 acres entitles its kuleana users to at least three times more than their current use. *See id.* This is a far cry from HC&S' misguided position that the CWRM should limit the Scott, Kekahuna, and Jacintho ohana to only the amount of water HC&S deems sufficient (*or* is willing to release from its ditch system) to support their current one acre of taro.

HC&S recycles the same defective argument -- that kuleana users' irrigation supply should be limited to their current use under diverted conditions and irrespective of their appurtenant rights -- for Pi`ina`au and Palauhulu (Hydrologic Unit 6053) which serve Ke`anae, and Waiokamilo (Hydrologic Unit 6055) and Wailuanui (Hydrologic Unit 6056) which serve

[6] The CWRM has already recognized the *historic* land uses for the Honopou parcel TMK 2-9-1-14, of which LCA 5595-E is a part. Title history records and native testimony reflect the presence of ***27 lo`i over 22 acres*** for the same land area on which Scott, Kekahuna, and Jacintho ohana now farm just one acre. *See* IIFSAR, Island of Maui, Hydrologic Unit 6034, Honopou (March 2008) at 60.

Wailuanui. The appurtenant rights legal standard, however, does not burden Ke`anae kuleana users "to quantify what percentage of each of [their kuleana] parcels actually contain loi," *see* HC&S Resp. at 12, nor does it burden Wailua farmers "to identify the specific acreages actually cultivated and provide a "breakdown of the [Wailuanui] parcels by stream source." *Id.* at 14.

Similarly, any observation concerning current actual use **except for** whether those uses utilize "means approximating those utilized at the time of the Mahele" is irrelevant to CWRM's affirmative duty to protect and advance the rights of those cultivating taro on historic taro lands. *Reppun,* 65 Haw. at 554, 656 P.2d at 72. Importantly, HC&S does not dispute Nā Moku's claim that Ke`anae **historically** supported at least 29.695 acres of wetland taro irrigated by Pi'ina'au or Paluahulu, or that Wailuanui **historically** supported at least 90.992 acres of wetland taro irrigated by Waiokamilo, Wailuanui, Waikani Falls, or their tributaries. HC&S also appears to concede that these taro farmers farm "by means approximating those utilized at the time of the Māhele." *Id.* Thus, as a matter of law, those parcels are also entitled to the quantity and flow of water historically utilized for such cultivation. *See id.* And the kuleana users growing taro on those parcels are entitled to exercise their appurtenant rights at any time and without fear that their rights may be diminished or extinguished. *See Nā Wai Ehā,* 128 Hawai`i at 270, 287 P.3d at 171.

As the *Nā Wai Ehā* Court made crystal clear, "neither [HRS §174C-101 or HRS §174C-63] provides for abandonment of appurtenant rights [and] in fact . . . specifically protects against abandonment." *Id.* at 242, 287 P.3d at 143. Thus, it does not matter that ten years ago, in a non-IIFS proceeding before a completely different agency "no users came forward to claim that they were not receiving adequate water [from Palauhulu] for cultivating taro in Ke'anae" or that "Nā Moku did not seek interim relief with regard to Pi'ina'au Stream."[7] *See* HC&S Resp. at 12-13. Nor does it matter that one year later, wetland kalo in cultivation "in the

[7] HC&S apparently argues that no restoration of Pi`ina`au Stream is warranted since no one has submitted evidence of current use. HC&S Resp. at 13. However, HC&S ignores the possibility of future use of traditional taro lands, such as the lo`i it admits exists in the Ke`anae arboretum, which could be leased by the State in the future. Accordingly, the CWRM should not be so dismissive as HC&S urges about restoring this stream for future lo`i cultivation.

Moreover, Nā Moku submitted with its opening brief the declaration of Isaac Kanoa indicating his desire to work the taro lands that could be irrigated by Pi`ina`au Stream, as well as his current gathering, fishing, and recreational uses and aesthetic appreciation of that stream. *See* Kanoa Decl. ¶¶13-15, 17-18. HC&S ignores this information. Accordingly, the CWRM should include the possibility of restoring Pi`ina`au to accommodate the restoration of these traditional stream uses.

entire Ke'anae complex was 10.53 acres," which is the same amount it has been for the past 30 years. *Id.* at 12. Likewise, it is of no consequence that the total lo`i "being cultivated in Wailuanui [as of October 25, 2005] was 19.484 of which 2.505 [acres] were irrigated solely from Wailuanui Stream," or that 2.80 acres comprised the "Wailua (Waikani) complex" irrigated solely by Wailuanui Stream as of the summer of 2006 and may be even less today. *Id.* at 15. What matters is that "[a]ppurtenant rights are preserved" and nothing, least of all HC&S, shall "deny the exercise of any appurtenant right by the holder thereof at any time." *Nā Wai Ehā,* 128 Hawai`i at 270, 287 P.3d at 171
(citing HRS §174C-63).

In short, kuleana users are not bound by the limited acreage on which their taro growing has been constrained for the last thirty years but by the vast historic lo`i that fed their ancestors and which is theirs to emulate at any time, at all times. *See Reppun,* 65 Haw. at 553-54, 656 P.2d at 72; *Nā Wai Ehā* COL 333 (recognizing that potential future uses on historic taro land requires irrigation water). Indeed, it is their constitutionally-protected right to insist that present diverters release the quantity and flow of water in keeping with that tradition, even if it means expanding current use and water requirements to mirror those practices. Otherwise, not only are these crops in jeopardy, but so too are the traditions and practices that the kupuna of today hope to pass on to future generations to perpetuate the Hawaiian culture. *See* Wendt Decl. ¶14; Decl. of Joseph Kimo Day ¶¶17-19; Kanoa Decl. ¶¶14, 18-19; Scott Decl., ¶¶25, 71.

3. HC&S' Attack on Reppun's Taro Needs Estimates is a Plain Misreading of CWRM's COL 219.

HC&S attempts to reduce the upper limit of Paul Reppun's range of estimated taro irrigation requirement of 300,000 gad in half to 150,000 gad in responding to Nā Moku's estimated taro needs for Honopou, Ke'anae, and Wailuanui. *See* HC&S Resp. at 9, 12, 15. In doing so, HC&S relies on an erroneous interpretation of the CWRM's determination of the reasonable irrigation requirement for taro in the *Nā Wai 'Ehā* case.

COL 219 states in part that, "[f]or kalo lo'i on kuleana lands, 130,000 gad to 150,000 gad, **or about 260,000 to 300,000 gad when adjusted for the 50 percent of the time that no water is needed to flow into the lo'i**, is sufficient for proper kalo cultivation. COL 56[.]" HC&S Exh. C-120 at 168 ln.24 (emphasis added). COL 56 provides:

> The Commission estimates that current kuleana lands receive more than 130,000 to 150,000 gad for their kalo lo'i, FOF 332-333, translating to about 260,000 to

> 300,000 gad when adjusted for the 50% of time that no water is needed to flow into the lo'i, FOF 330. **These amounts would be sufficient for proper kalo cultivation and even meet Reppun's estimate of sufficient flow**, FOF 328.

Id. at 120 ln.14 (emphasis added). Reppun's estimate of sufficient flow in that case is identical to his estimates here, as confirmed in FOF 328:

> From these findings and Reppun's observation that the outflow water temperature often exceeded the threshold for root fungus (27°), **he concluded that 300,000 gad must be consistently available to satisfy current demand for water to grow healthy kalo.**

Id. at 51 ln.9 (emphasis added). This is consistent with his testimony provided in Exhibit A to his declaration in support of Nā Moku's Opening Brief, wherein he explains "there are times when the farmer **must use the maximum amount** and that needs to be taken into account when determining how much water is required." Reppun Decl., Exh. A at 5-6 (emphasis added).

These statements confirm that the 50% adjustment is upwards, not downwards, resulting in figures that more than double Reppun's lower limit from 100,000 gad to 260,000 gad minimum per day to a maximum of 300,000 gad, consistent with his testimony in 2005 upon which Nā Moku's estimated water needs are based. HC&S' simply got it backwards when it interpreted the CWRM's determination of reasonable water needs for taro.

Even assuming *arguendo* that CWRM adopted HC&S' erroneous reading of *Nā Wai Ehā's* taro irrigation requirement, and like HC&S, erroneously concluded that Lyn Scott's one acre lo`i in Honopou receives more water than needed, Nā Moku has provided ample evidence proving that this "glut" of quantity and flow is nonetheless inadequate. For example, even after the CWRM's 2008 Decision compelled EMI to maintain an IIFS of 1.29 mgd below the Haiku Ditch, temperature readings for irrigation water exiting the one acre lo`i parcel exceeded 77°F/25°C -- the temperature at which "pythium rot begins to accelerate unacceptably." Reppun Decl. ¶5; Nā Moku Resp. at 26, n.26. The low flow available during this time severely restricted Honopou taro cultivation, as farmers were left unable to keep their lo`i cool enough to avoid root rot.[8] *See* Scott Decl., ¶¶54-55 (attesting that low flows *after* the 2008 Decision precluded her from growing taro on all the lo`i on her kuleana parcel).

[8] *Compare,* temperature readings of water entering and exiting Honopou lo`i complex in the following two graphs previously submitted:

Given the harm plainly attributed to inadequate stream flow and quantity, it is indefensible to maintain that the current IIFS of 1.29 mgd is enough to "support cultivation by Scott's family of the entire one acre lo`i system," HC&S Resp. at 9, let alone enough to support the historical acreage to which their kuleana use and appurtenant rights entitle them. The decades of reduced streamflow to Honopou and the other petitioned streams have impacted multiple generations' ability to grow taro and exercise their traditional and customary practices. *See* CWRM Staff Submittal (9/24/08) at 10; Exh. A-152 at 3-4; Exh. A-147; Decl. of Sanford Kekahuna ¶¶17-20; *see also* Nā Moku Resp. at 26. For example, HC&S similarly attempts to deprive Ke`anae of its water needs for taro cultivation from Palauhulu Stream by using the same erroneous calculus for water and taro acreage.[9] *See* HC&S Resp. at 12. The assurances of Mr. Hew notwithstanding, EMI simply failed to release enough water to meet the needs of these taro farmers.

4. HC&S' Unsupported Hydrological Claims Should Be Disregarded.

HC&S makes unsubstantiated claims about the hydrology of Palauhulu and Waiokomilo Streams on which the CWRM should not rely.

First, as to Palauhulu, it offers the lay observation that all of the streamflow releases from the Ko`olau Ditch are "lost in the leaky sections of the streambed between the release point [i.e., the ditch] and the origin of Store Spring" further downstream. HC&S Resp. at 12 (citing Hew Resp. Decl. ¶28). According to Mr. Hew's lay testimony, none of the current low flow releases reach Store Spring, which is purportedly "the source of the water in Palauhulu Stream that supplies the Keanae (sic) lo`i complex." *Id.* Based on Mr. Hew's lone opinion, HC&S appears to conclude that "there is nothing further that can be done to increase the availability of water in Palauhulu Stream during periods of low flows." *Id.* at 13. That conclusion, however,

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(1) Exhibit A-155 (Graph of temperature readings between May 2009 through July 2010 at the metering station located at "USGS 205548156143901 Diversion Ditch at outlet, nr Honopou, Maui, HI" at the top of the current Scott-Kekahuna Honopou lo`i complex); and

(2) Exhibit A-157 (Graph of temperature readings between July 2009 through September 2010 at the metering station located at "USGS 205548156143901 Diversion 2, lo`i outlet, Honopou Stream, Maui, HI" at the bottom of the current Scott-Kekahuna Honopou lo`i complex).

For locations of the relevant temperature metering station, see, Exhibit A-158 Aerial Photograph No. 1 of a portion of Honopou, Maui. While the USGS station number is not depicted, the appropriate description of each metering station is noted on the aerial photograph.

[9] To support its argument, HC&S relies on currently cultivated acreage limited to 10.53 acres, multiplied by its improperly adjusted water needs estimate of 130,000 to 150,000 gad. *See* HC&S Resp. at 12. Applying the proper estimate of up to 300,000 gad, the estimated need for Ke`anae would be close to the current IIFS even for the currently cultivated acreage and would greatly exceed the IIFS of 3.56 mgd for the 29.65 acres entitled to appurtenant rights.

operates on the assumption that Store Spring: (1) has no hydrologic connection to any part of the flows in the upper sections of Palauhulu Stream; and (2) draws from a water source independent from flows in Palauhulu's upper reaches. The consequence of this unsubstantiated belief is HC&S' refusal to consider that increased releases from the Ko`olau Ditch could in fact reach the Ke`anae lo`i complex. However, there is simply no hydrologic basis for ruling out this possibility. Water flowing in the upper stretches of Palauhulu (and perhaps other adjacent streams) could supply the water source that emerges from Store Spring. For this reason, the CWRM should reject HC&S' invitation to categorically disregard increasing releases from the Ko`olau Ditch, and should, at minimum, verify the release from Ko'olau Ditch and evaluate whether additional releases are required.

Second, HC&S similarly misinterprets the water requirements for Waiokamilo Stream, urging the CWRM to disregard Nā Moku's water claims there. Its basic stance regarding Waiokamilo is that it has released all of the water previously diverted from this stream, so "[t]here is nothing more that can be done to further 'restore' [it]."[10] *Id.* at 14; Hew Resp. Decl. ¶35. However, the CWRM's 2008 decision did not amend the IIFS for Kualani Stream -- a major tributary of Waiokamilo Stream. *See* Exh. A-144 (depicting Kualani Stream feeding Waiokamilo Stream); CWRM Minutes (9/25/08) at 30-31; CWRM Staff Submittal (9/24/08) at 45; *see also* CWRM Staff Submittal (12/16/09) at 4, Table 1. In other words, because the CWRM left Kualani Stream in its "status quo," EMI was not required to release any diversions from that stream. However, if Kualani is in fact diverted, such diversions could also affect the flow of Waiokamilo Stream, which feeds the lo`i located downstream in Wailuanui Valley. *See* CWRM Staff Submittal (9/24/08) at 43 (describing the "confluence of Waiokamilo and Kualani (Hamau) Streams"). Thus, it would be prudent for the CWRM to verify whether Waiokamilo and the Kualani Stream tributary are both currently undiverted to ensure that all necessary steps have been taken to restore Waiokamilo Stream consistent with the legitimate irrigation water needs of downstream taro farmers.

[10] EMI claims that it could only attain a 6 MGD level of flow in Waiokamilo under the BLNR's 2007 interim order if it closed all of its diversions of that stream. HC&S Resp. at 14-15.

5. HC&S and EMI's Excuses for Their Noncompliance with Current IIFSs are Inexcusable.

HC&S and EMI do not deny their failure to comply with the CWRM's 2008 IIFS amendments. Instead, they attempt to distract attention from their documented noncompliance by focusing on the ways in which they have cooperated with the CWRM Staff to modify and operate their diversions and ditch system. *See* HC&S Resp. at 10-11. However, mere attempts to cooperate are not equivalent to actual compliance, as the CWRM data makes clear. *See* Scott Decl. ¶53; Exhibit A-145, Slide 20.

HC&S' actual excuse for why it has not complied with the CWRM's 2008 IIFS Decision is nonsensical and completely at odds with its insistence that the 2008 Decision "represented a reasonable balancing of instream values and noninstream uses based on ample data." HC&S Opening at 43. Regarding its unilateral noncompliance with the Honopou IIFS, HC&S alleges:

> The evident intent and rationale of the IIFS ... was to set the IIFS at an amount that would be satisfied on average due to the ground water arising between the Wailoa Ditch and the Haiku Ditch plus any additional gain below the Haiku Ditch. This does not mean that there would not be days during dry periods where the flow could be less than the IIFS.

HC&S Resp. at 10. HC&S cites no authority to support this lame and unfounded "law of averages" argument. In fact, there never was an intention to resort to average flows over any period of time, and HC&S itself concedes this point in purporting that EMI closed all of its Waiokomilo diversions precisely because "EMI knew that the natural undiverted flows would not sustain [the IIFS minimum] except during rainy conditions." *See id.* at 14-15. The IIFS established a minimum streamflow, not averaged over a year, but for each and every day of the year. *See* CWRM Minutes (9/24/08-9/25/08) at 31 (recounting Chair Thielen's explanation of the IIFS, *i.e.*, that **"[t]he minimal amount of water needs to stay in the stream first**; anything above that minimum amount would be allowed to be diverted into the EMI system. It is a substantial change in how that water is being transported now.") (emphasis added).

If the CWRM was to accept HC&S' self-serving rationale, HC&S could dismiss the CWRM's decision-making authority with impunity and deprive East Maui streams, particularly during Central Maui's dry season, of the connectivity vital to stream biota and the health and reproductive cycle (*i.e.,* patterns of migration) of native stream animals year round. *See* Higashi Decl. ¶23 (reporting that, "in streams that lack connectivity flow or with low flows, the animals would be unable to reproduce, to feed, or be healthy"). Thus, if a deluge of rain artificially boosts

the average flow for that year, EMI could elect to dewater East Maui streams without regard to resulting impacts on the resource, native stream species, and their habitat. An IIFS designed to protect the resource should not be employed to inflict injury upon it.

HC&S' reign over East Maui streamflows could inflict similar injuries upon the taro growth cycle by depriving traditional lo`i of the quantity and flow of water the crop requires throughout the year. As HC&S has already proven, the water needs and timing of taro farmers, let alone native stream animals, take a back seat to their profit-driven bottom line. The IIFS should not be employed to elevate the diverters' economic viability, which is legally subordinate to native Hawaiian taro farmers, gatherers, and fishers, above those who enjoy constitutionally-protected water rights. *See In Re Kukui*, 116 Hawai`i at 493, 174 P.3d at 332; *Waiāhole I*, 94 Hawai`i at 148-49, 9 P.3d at 460-61; *Kauai Springs*, 133 Hawai`i at 172, 324 P.3d at 982. To do so would stand the public trust doctrine on its head.

C. HC&S' Attack on the Remaining 19 Streams Ignores Accepted Science

Curiously, HC&S' aforementioned criticisms of Nā Moku's treatment of the eight streams only addressed kalo. It failed to consider, let alone concede, any entitlements for biota or the other myriad traditional and customary practices discussed, which were not limited only to the 19 streams. This was precisely the purpose of expanding the scope of the instant proceedings to include all 27 petitioned streams. Thus, the analysis *infra* is equally applicable to **all** streams covered by Nā Moku's petitions.

1. Diverted Conditions Hamper Agencies' Ability to Properly Evaluate the Effect of Streamflows on Habitat and Animal Populations.

HC&S attempts to use scientific uncertainty regarding the relationship between streamflow levels, habitat, and biota to argue that no further restoration is warranted for any of the 19 streams. HC&S Resp. at 16-20. The CWRM, however, cannot ignore that the century of dewatering of East Maui streams is the cause of at least some of this uncertainty today because it is no longer possible to get a true baseline of stream and biota health under undiverted conditions -- turning the evaluation of the impacts of diverting these streams on its head. Accordingly, the CWRM must not take lightly the factors that the Division of Aquatic Resources ("DAR") notes has led to inconsistent results in its study and the difficulty in establishing concrete correlations in streamflows and their impacts on habitat restoration and animal populations.

While HC&S correctly cites to Higashi's testimony that the DAR's monitoring study was not conclusive, it ignores the authors' statement that, although the study results were not "definitive" they do "suggest some general conclusions." Appendix E to Testimony of Glenn Robert Higashi ("Monitoring Study") at 1. For every statement HC&S uses to suggest that no additional water should be restored to the streams, it leaves out a statement in the study that suggests the opposite. For instance, HC&S states that the Monitoring Study shows that "the streams appear to be generally healthy," HC&S Resp. at 16, citing in part to a statement in the Monitoring Study that, "[i]n the lower stations for all streams, the stream animal assemblages appear healthy and diverse[.]" *Id.* at 17 (citing Monitoring Study at 2). However, the Monitoring Study also states that, "[i]n the upper stations of all streams, stream animal assemblages **did not show the healthy characteristics**." Monitoring Study at 1. Higashi's testimony stating that "The correlation between return flows, habitat, and biota was weak," is qualified by the Monitoring Study, which notes that the weak correlation

> may be due to a number of factors, including: changing environmental conditions (e.g. rainfall, drought, flash flooding), short monitoring period (< 4 years), **and/or that summer flows were detrimental to gains in habitat and biota from the winter flows. A longer monitoring period with more stations distributed more thoroughly throughout the stream may improve results, but this was not possible due to time and funding constraints.**

Id. at 2 (emphasis added). HC&S attempts to justify its position that no further restoration is warranted for the 19 streams on the basis that DAR's Monitoring Study was inconclusive as to whether the flow restorations thus far have had a positive effect on habitat and target species populations. HC&S Resp. at 16-20. Once again, it is important to put this study in context and understand that the streams are in a diverted state and have been for nearly a century. The Monitoring Study took place over a relatively short period of time (less than four years), a factor that DAR acknowledges may have contributed to the weakness in correlating return flows, habitat and biota. Monitoring Study at 70. The surveys began before flow was restored and continued for only two years after flow was restored. *Id.* at 7. In fact, the survey only covered *two* winter water releases and *one* summer release. *Id.* at 51-65. The Monitoring Study noted that, "[a] longer monitoring period with more stations distributed more thoroughly throughout the stream may improve results, but this was not possible due to time and funding constraints." *Id.* at 70. What this suggests is not that further restoration is unwarranted; to the contrary, it is symptomatic of the backwards nature of the current process. What should be studied is the effect

of *diversion* on streamflow, habitat, and species populations -- in other words, **the evaluation should begin from an undiverted state**.

Importantly, USGS pointed out a number of factors affecting the presence of native aquatic species that were *not* addressed by its own 2005 studies, including the question, "[a]t what rate and at what locations will native species population return to natural levels if diversions were removed?" Written Testimony of Stephen B. Gingerich at 4. We cannot know the impact, or what the baseline should be, unless all diversions are removed and all flows restored. DAR states unequivocally that, "[w]hen considering instream flow quantities to support stream animals, **it is axiomatic that 100% flow restoration to natural undiverted flow would be best for native stream animals**." Monitoring Study at 67. Surely, HC&S would argue against the need for long term studies where streams are fully restored. Therefore, where results are inconclusive and time and funding a factor in the ability to adequately study the health of these streams, uncertainty must weigh in *favor* of further restoration and certainly not against it.

2. The Monitoring Study's Variable Results Demand *More*, Not Less, Restoration.

HC&S' assertion that the impact of flow restoration on habitat was inconsistent, while true, does not support its sweeping conclusion that "the habitat conditions observed during the winter months should have been substantially better than those observed during the summer months." HC&S Resp. at 18. Throughout the study, DAR repeated that rainfall prior to sampling trips may have contributed to the variability in results. Monitoring Study at 19, 25, 37, 50, 67, 70. Given the number of factors that could affect the study results, a survey covering two winter and one summer release is hardly enough to definitively conclude that the flows failed to evidence improved habitat restoration. DAR does conclude, however, that the seasonal flow hypothesis was not supported by the data, which suggests either that "the prescribed flows amounts were insufficient (*i.e.,* needed higher flows in summer) or that a year round minimum flow is more appropriate in East Maui streams." *Id.* at 69. In either case, DAR's conclusion means *additional* restoration is needed at a minimum to raise the summer flows. *See id.*

3. The Absence of a Linear Relationship Between Habitat Availability and Animal Populations Points to Additional Factors that Must Also be Corrected.

HC&S attacks the habitat model implemented by USGS (PHABSIM) based in part on DAR's acknowledgment that the relationship between habitat restoration and the volume of

animals is not linear but fails to offer any alternative model or even its own responsive witness. HC&S Resp. at 19. Given that HC&S has been dewatering the subject streams for over 100 years, the habitat models are beginning from a long-diverted state. HC&S uses DAR's bare statement that the biota response was not evident to attack the PHABSIM model. Yet, it ignores the statement that follows: "[t]he non-response to the winter flow releases could be a result of various factors such as a **slow biotic response to the habitat changes,** migration of animals further upstream to more suitable sites**, or that summer flows were too low and removed gains from the winter releases**." Monitoring Study at 68-69. In other words, the lack of evidence that a positive relationship exists between habitat availability and animal populations could be that (1) the monitoring only observed two years of releases after over 100 years of diversion, which may not have been enough time for the animal populations to bounce back, or (2) animal populations could not recover because the reduced summer flows wiped out any gains they made. Again, both scenarios weigh in favor of additional or prolonged restoration of flows.

In terms of animal populations, DAR also notes the importance of connectivity and that passage and entrainment issues were not addressed by its study, emphasizing that "[p]assage and entrainment at water diversion sites is an important topic and will need to be addressed for more effective stream animal restoration to occur." *Id.* at 69. In any case, the inconsistency in results should lead the CWRM to exercise the precautionary principle and err on the side of restoration to ensure that the lack of funding to sufficiently study the relationship between streamflow and animal populations does not act to support offstream use at the expense of stream health. *See Waiāhole I*, 94 Hawai`i at 155, 9 P.3d at 467.

D. Conclusion

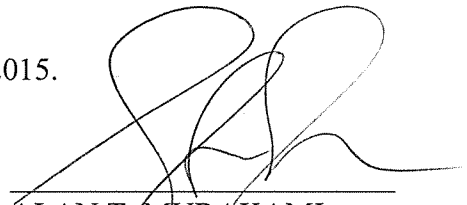
In both HC&S and the County's responses to Nā Moku's Opening Submissions, they resort to erroneous standards to influence the CWRM's IIFS determinations for East Maui streams. Neither the status quo, nor the application of stream protection measures that prioritize commercial interests in surface water diversion, such as seasonal IIFS, can substitute for the clear legal requirements that dictate the CWRM's actions. Accordingly, HC&S and the County's erroneous standards should not distract the CWRM from implementing clear mandates from the Hawai`i Supreme Court.

In contrast, Nā Moku has presented the reasoned and objective evidentiary basis for the CWRM to evaluate the proper levels of stream restoration to support traditional and subsistence

uses of taro land, customary gathering from streams, and fishing along coastlines. Studies and analysis of public agencies are also now available to the CWRM to formulate useful measures of the appropriate restoration needed to adhere to its stream protection duties.

Accordingly, Nā Moku urges the CWRM to conduct a thorough investigation of the water needs of East Maui streams and ensure that the public interest in those streams is protected. In doing so, the CWRM should amend the IIFS for each of the 27 petitioned streams now subject to EMI diversions to restore: (1) a reasonable level of connectivity to these streams to support the reproductive cycle of stream animals and marine life habitats dependent on fresh water outflows to the ocean; and (2) the appropriate surface water volume necessary to promote the cultivation of healthy taro. The CWRM should also incorporate provisions for timely implementation of any amended IIFS to minimize any further injury to the resource. Prevailing law demands no less.

DATED: Honolulu, Hawai`i, February 10, 2015.



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