ISAAC HALL #2238
2087 Wells Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-9017
Attorney for Maui Tomorrow Foundation, Inc.
and its Supporters

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, 'OHI'A (WAIANU), WAIOKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILIULA, PUAKAA, WAIOHUE, PAAKEA, WAIAAKA, KAPAULA, HANAWI and MAKAPIPI STREAMS	)	Case No.: CCH-MA13-01 EXCEPTIONS OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER; CERTIFICATE OF SERVICE

mt/exceptions

EXCEPTIONS OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER

Maui Tomorrow Foundation, Inc., on behalf of itself and its Supporters, through its undersigned counsel, hereby files its Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law & Decision and Order, pursuant to HRS § 91-11 and the Order of the Hearings Officer, as follows:

I. INTRODUCTION

Exceptions are hereby taken to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law & Decision and Order (hereafter the "Report").

The Report, while favorable in some respects, contains appealable errors that prejudice the substantial rights of Maui Tomorrow Foundation, Inc. and its Supporters. Chapter 91 recognizes four types of appealable errors: (1) errors of law ("EL"), (2) mixed errors of laws and

fact ("MELF"), (3) errors of fact ("EF"), and (4) arbitrary or capricious actions or abuses of discretion ("ACAD").[1]

II. EXCEPTIONS

A. The Report Fails to Begin at the Required Starting Point

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"),* 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 on Water Resource Management ("CWRM") may reclaim instream values to the inevitable displacement of existing offstream uses. See *Waiahole I.* The required starting point is, therefore, 27 undiverted, free flowing streams.

The Report leaves "grandfathered" the existing diversion works, the size of the openings for the sluice gates that allow flow below the diversion works and diversions in the higher elevation ditches.

B. The Starting Point: Free Flowing Streams

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-five 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 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.

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[1] HRS §91-14(g) recognizes that decisions are reversible if the administrative findings, conclusions, decisions or orders contain errors of law which are "(1) in violation of constitutional or statutory provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedure; or (4) affected by other error of law." The findings are also reversible if they contain errors of fact such that the findings are, as stated in HRS §91-14(g)(5), "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Findings may be challenged if they are mixed and the factual finding has been affected by an error of law. Arbitrary and capricious actions or abuses of discretion may be challenged through HRS §91-14(g)(6).

C. The Historical Setting When the Ditches and Diversion Works Were Constructed

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." [2] 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.[3] 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 .....

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 added).

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**

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[2] *Sugar Water* by Carol Wilcox (1996), p. 16; Exhibit E-92; Note: All Exhibits are presented in a separate Exhibit Folder.
[3] Agreement Between Hamakua Ditch Company and the Hawaiian Government, dated September 13, 1876, HC&S-MTREQUEST-01-0001-0005; Exhibit E-93.

time immemorial run waste into the sea ...." [4] (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.[5]

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 each region by King Kamehameha 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.[6]

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 *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. [7]

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." [8]

D. Significant Corrections to Water Law Beginning in 1973

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

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[4] Castle 1876 Attorney General Opinion; Exhibit E-94.
[5] Id.
[6] Letter from Daniels to Hutchinson dated 23 April 1866, quoted in *Sugar Water*, p. 31; Exhibit E-92.
[7] *Sugar Water*, p. 31; Exhibit E-92.
[8] *Id.* at p. 33 and 34 and George Cooper, "*A Political and Legal History of Water Rights in Hawaii's Streams*"; Exhibit E-92.

Hawaii, based upon an analysis of traditional uses of water and the public trust doctrine. The sugar companies 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).

E. The Application of Public Trust Principles to Water Law Has Not Changed the Extent of the East Maui Diversions

The sugar plantation still manages its diversions as it always has. EMI diverts as much water as it can out of the watersheds for use on the HC&S plantation, dewatering streams for as long as they are not prevented from doing so, regarding un-diverted water that is allowed to flow downstream of the diversion works to the ocean as water that is wasted.

F. Significant Changes to the Amounts Diverted and to the Diversion Works Themselves Are Now Mandated by Law

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).

G. The Ditches and Diversion Works of East Maui Dewater East Maui Streams, Many on Multiple Occasions

1. The East Maui Stream Diversion System Generally

The County of Maui operates the highest elevation diversions: the Waikamoi Upper Flume and the Waikamoi Lower Flume. These are above and parallel to the EMI ditches and divert twice (Haipuaena, Puohokamoa and Waikamoi) some of the same Streams diverted again at lower elevations by the EMI diversions. In addition to these three Streams, the Waikamoi Lower Flume also diverts Opana and Opaepilau Streams that are also diverted by EMI's lower elevation diversions. C-33.

EMI currently has four major 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.[9] 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.[10]

2. East Maui Diversion Systems – Mauka to Makai

a. 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 (two 15 million gallons reservoirs) and the Kahakapao Reservoirs (two 50 million gallons reservoirs) before reaching the Olinda Water Treatment Facility ("WTF"). [11]

b. The Maui DWS Lower Kula System

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[9] *Sugar Water*, p. 121; Exhibit E-92.
[10] *Id* at p.120; Exhibit E-92.
[11] IIFS Assessment for Honomanu Stream, pp. 138-139; Exhibit E-63.

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. [12]

c. The Koolau, Spreckels and Wailoa Ditches

The Koolau Ditch begins at the East Makapipi Stream in Nahiku and eventually, travelling westward, becomes the Wailoa Ditch. Before Puohokamoa Stream (at the border of the Honomanu and Huelo License Areas) this ditch, alone, carries 200 mgd. In the Heulo License Area, this ditch only carries 160 mgd, a decrease of 40 mgd, when an increase would otherwise be expected. After Honopou Stream, this ditch, alone, carries 195 mgd. The Spreckels Ditch is above the Koolau – Wailoa Ditch diverting Streams from Nuaalua to Alo Streams. C-33.

The reduction from 200 mgd to 160 mgd that occurs in the Wailoa Ditch in the Huelo License Area and westward can be potentially explained by the release of flows from the Wailoa Ditch into Streams from Alo Stream to Lilikoi Stream and permitting these flows to be carried by lower elevation Ditches such as the New Hamakua Ditch, the Old Hamakua Ditch and ultimately the Kauhikoa Ditch. C-33.

EMI testified that it did not transfer water in streams from one ditch to another and that, if anything, stormwaters sometimes overflow from a higher level ditch into the streams and that these waters are then diverted by the next lower elevation ditch. FoF 242.

This ability to move surface water between higher elevation ditches to lower elevation ditches is ignored in the Report. It was a concern of the County of Maui in its 2000 Memorandum of Understanding ("MOU") with EMI. This MOU focuses on the County's rights to water from the Wailoa Ditch. Paragraph 1(e) of the MOU states that:

> "During periods of low flow, HC&S will not divert water to lower elevation ditch systems."

The County wanted to protect its rights to flows in the Wailoa Ditch from being diminished by EMI transferring water from Wailoa Ditch to lower elevation ditches as described above.

[12] *Id.* at p. 139; Exhibit E-63.

i. 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 completion in 1923. Construction started on the Koolau Ditch in 1905. EMI alleges that the Koolau Ditch has an average flow of 116 mgd.[13] Exhibit C-33 indicates that this Ditch carries 140 mgd.

ii. The (Old) Haiku (Spreckels) Ditch

Claus Spreckels constructed the (Old) Haiku Ditch in 1879. The Old Haiku Ditch was abandoned between 1912 and 1929.[14] The Spreckels Ditch is shown as existing on C-33.

iii. 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. [15]

d. The (Old) Hamakua, New Hamakua and Kauhikoa Ditches

The New Hamakua Ditch lies below the Wailoa Ditch and begins at Alo Stream and terminates at Opaepilau Stream. The New Hamakua Ditch carries 150 mgd. C-33.

The Old Hamakua Ditch lies below the New Hamakua Ditch, diverts three (3) Streams and carries 30 mgd.

The Kauikoa Ditch lies at the same basic elevation as and to the west of the Old Hamakua Ditch, to the west of the Huelo License Area. It carries 112 mgd. C-33. Without transfers from the Wailoa Ditch and/or the New Hamakua Ditch, it is doubtful that this amount of stream flow would accumulate between the Wailoa and Kauhikoa Ditches.

i. 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.[16]

ii. The (New) Hamakua Ditch

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[13] *Id* at p. 66, 116, Exhibit E-92.
[14] *Id* at pp. 66,114; Exhibit E-92.
[15] *Id* at p. 66, 117; Exhibit E-92.
[16] *Id* at pp. 61, 66; Exhibit E-92.

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

iii. 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.[18]

e. The Manuel Luis, Center and Lowrie Ditches

The Manuel Luis, Center and Lowrie Ditch systems are located at the next lower elevations beginning at Kolea Stream, to the east, and Maliko Gulch, to the west. C-33. The Manuel Luis Ditch carries 30 and then 60 mgd. The Center Ditch carries 10 and then 42 mgd. Lowrie Ditch carries 50 mgd at Honopou and past Maliko this reduces to 30 mgd. C-33.

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.[19]

f. 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.[20]

The Haiku Ditch is the lowest elevation ditch. It diverts Streams in the Huelo License and also between Honopou and Maliko. C-33. By Maliko, the Haiku Ditch carries 105 mgd. C-33.

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.

H. The Report Does Not Acknowledge that East Maui Surface Water Resources Have Not Been Managed In Conformity With Public Trust Principles

1. Introduction/

[17] *Id* at p. 66; Exhibit E-92.
[18] *Id* at p. 66; Exhibit E-92.
[19] *Id* at pp. 66,114, 115; Exhibit E-92.
[20] *Id* at pp. 66, 117; Exhibit E-92.

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.

2. 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." [21] 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].[22] (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 were calculated for each of the four License Areas.[23] 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.[24]

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. [25] 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

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[21] Indenture between Territory of Hawaii and EMI, dated March 18, 1938, p. 1; Exhibit E-95.
[22] Huelo License, General Lease No. 3578, 1960, p. 7; Exhibit E-96.
[23] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0009; Exhibit E-97.
[24] Id.; Exhibit E-97.
[25] *Sugar Water*, p. 118; Exhibit E-92.

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.[26] See, also, the percentages listed for each License Area on EMI's East Maui Ditch System Map dated February 28, 2004.[27] 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., 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.

3. The State and HC&S Kept Data on the Amounts 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.[28]

4. The State and HC&S Have Only Kept Data on the Amounts 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.[29] Through 2010 the Monthly Surface Water Reports for the Wailoa, New Hamakua, Lowrie and Haiku Ditches were only calculated at Honopou.[30]

5. 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 Maliko.[31] These Reports indicate that

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[26] Comparison of Private and State Water Ownership; HC&S-MTREQUEST-10-0001-0006; Exhibit E-98.

[27] East Maui Ditch System Map dated February 28, 2004, HC&S-MTREQUEST-10-0007; Exhibit E-99.

[28] EMI Water Report to State, 10/24/85, HC&S-MTREQUEST-04-0009, for ex.; Exhibit E-97.

[29] 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.

[30] Id.; Exhibit E-100.

[31] 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.

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.[32] 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. [33] 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. [34] 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.[35]

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 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.**

6. The County and HC&S Kept Data on the Amounts of Water Delivered to the County

The County and EMI have maintained records on East Maui waters supplied to the County BWS. [36]

7. 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

[32] EMI Monthly Water Use Report to State, 3/14/11, HC&S-MTREQUEST-04-0088 - 0099, p. 0090; Exhibit E-103.
[33] EMI Monthly Water Use Report to State, 3/14/11, HC&S-MTREQUEST-04-0088 - 0099, p. 0098; Exhibit E-103.
[34] East Maui Ditch System Map dated February 28, 2004, HC&S-MTREQUEST-10-0007; Exhibit E-99.
[35] Id.; Exhibit E-99.
[36] County BWS Water Consumption, 2/1/14 - 2/28/14, for example; Exhibit E-104.

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

(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. There is no requirement in the Hearings Officer's Report that this data be collected.

I. The Report Does Not Fully Account for the Environmentally Devastating Mechanics of the Multiple Dewaterings Effected by the Ditches and Diversion Works

Seven (7) of the twenty-seven (27) Streams are each diverted between four (4) and (5) times. For example, **Waikamoi Stream is diverted five (5) times.** Beginning at the highest elevation, it is first dewatered by the County Upper Waikamoi Diversion works. Waikamoi Stream must be a gaining stream because enough water accumulates below the County Upper Waikamoi Diversion works to have made it worthwhile to construct the County Lower Waikamoi Diversion works which once again dewaters Waikamoi Stream, diverting the amount of water that has been gained in between the Upper and Lower Waikamoi Diversions. C-33.

Again Waikamoi Stream gains stream flow below the County Lower Waikamoi Diversion works and the amounts gained are diverted at the Wailoa Ditch, dewatering Waikamoi Stream once again. C-33.

This dewatering, gaining in between diversion works and dewatering in the next, lower diversion system is repeated two (2) more times, at the New Hamakua Ditch, then lower down at the Manuel Luis Ditch. C-33.

In like fashion and to like effect:

* **Nuailua Stream** is diverted **twice** (by the Spreckels and Wailoa Ditches),
* **Honomanu Stream** is diverted **five times** (by several Haleakala Ranch diversions the Waikamoi Lower Flume, the Spreckels and Wailoa Ditches),
* **Punalau/Kolea Stream** is diverted **three times** (by the Spreckels, Wailoa and Manuel Luis Ditches),
* **Haipuena Stream** is diverted **five times** (by the Waikamoi Upper Flume, the Waikamoi Lower Flume, the Spreckels, Wailoa and Manuel Luis Ditches),
* **Puohokamoa Stream** is diverted **five times** (by the Waikamoi Upper Flume, the Waikamoi Lower Flume, the Spreckels, Wailoa and Manuel Luis Ditches),
* **Wahinepee Stream** is diverted **twice** (by the Wailoa and Manuel Luis Ditches),
* **Alo Stream** is diverted **four times** (by the Spreckels, Wailoa, New Hamakua and Manuel Luis Ditches),
* **Hanehoi Stream** is diverted **four times** (by the Wailoa, New Hamakua, Lowrie and Haiku Ditches),
* **Huelo (Puoloa) Stream** is diverted **four times** (by the Wailoa, New Hamakua, Lowrie and Haiku Ditches),
* **Honopou Stream** is diverted **five times** (by the Wailoa, New Hamakua, Old Hamakua, Lowrie and Haiku Ditches). C-33.

Below the diversion works that divert the water into the ditches and leave the Stream stretches below the diversion works de-watered, are dry segments of these Streams. The existence of these dry segments (that only exist because of the diversions) has emboldened some to claim that the Streams are not gaining and are, instead, intermittent. This is another way of improperly elevating "prior uses ... to the detriment of public trust purposes. *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 133 Hawaii 141, 324 P.3d 951 (2014); *In re Water Use Permit Applications,* 94 Hawai'i 97, 9 P.3d 409, (2000).

CWRM Staff have approached the same facts in a different manner. CWRM wrote of the Hanehoi Hydrological Unit, a small watershed of one-and-a-half square miles (1.5 sq miles,), that it had been dewatered so much, by so many EMI diversions, for so long, that it has become an "**artificially intermittent stream.**" Exhibit E-5, p. 2. This is a more accurate description of

the 27 East Maui Streams. They have been dewatered so much, by so many diversions, for so long, that they have become **artificially intermittent streams.**

In FoF 46, the Report states:

> With few exceptions, the diversions capture all of the base flow, which represents the ground-water contribution to total stream flow, and an unknown percentage of the total stream flow at each crossing.

The Report defines "total stream flow" as "groundwater, plus freshet ("normal rainfall) and storm waters.

Public trust principles require that the causes of this artificial intermittency – the diversions – be modified to restore the Streams to their original gaining nature. Accepting their artificially intermittent status caused wholly by the "prior uses" constituted by the existing diversions has placed in jeopardy or eliminated uses explicitly mandated for protection as public trust purposes.

J. The Report Fails to Require Continuous Flows – Mauka to Makai – in Streams

The Report significantly errs by failing to require mauka to makai continuous flows in any of the 27 Streams – with the sole exception of Makapipi Stream. See proposed Amended IIFS, p. 143, Footnote 43.

This is particularly a problem with respect to all of those Streams that are diverted more than once. All Streams from, and including, Nuaailua, westward are diverted more than once. There are eleven (11) of these Streams: Nuaailua, Honomanu, Punalau/Kolea, Haipuaena, Puohokamoa, Wahinepee, Alo, Waikamoi, Hanehoi, Huelo (Puoloa) and Honopou Streams.

Of these Streams, the Report only requires a particular flow "below all EMI diversions." See, Waikamoi Stream and Hanehoi/Puolua Streams. For Honopou Stream, the flow required is "Just below the Haiku Ditch" (which is the lowest elevation Ditch).

This means that the Ditches at elevations higher than the lowest elevation Ditch may still dewater the Streams thereby preventing migration of protected stream species anywhere above the lowest level EMI diversions.

Continuous mauka to makai flows have not been explicitly required. For Streams that are diverted more than once, the upwards and downwards migration of protected species is not possible. The Report errs, therefore, in failing to protect fish and wildlife habitats.

K. The Report Fails to Include Required Modification to Diversion Works to Allow Upward and Downward Migration of Stream Species

The Report also significantly errs by failing to require modifications to specific diversion works on specific streams to facilitate the necessary upward and downward migration of protected stream species. The diversion works are constructed in a manner that prevents the migration of native streamlife.

Diversion works must be modified to include "trough style" low flow bypasses that allow migration of native streamlife. Even if continuous flows were required in the Streams, modifications to the diversion works would also be required to allow migration. These modifications, although authorized by law, have not been required in the Report. See HRS §174C-71(1)(E), discussed in the Section below.

L. The Report Fails To Require Modification to the Diversion Works to Permit Sufficient Flows Downstream of the Diversions

The various Ditch systems include diversion works where they cross streams. These Ditch systems and diversion works are designed to capture and divert all of the water that flows into the Ditch and/or diversion works and to transfer that water westward to the HC&S Sugar Plantation.

There are sluice gates constructed within the diversion works. These sluice gates were not designed to assure a minimum stream flow. These sluice gates were designed to release storm and flood waters downstream.

In some instances, pipes, of limited capacities, were placed through the diversion works to provide some water to downstream users.

The Report seriously errs when it states, on several occasions, that one limiting factor in providing a minimum stream flow has been that even when these sluice gates are wide open there was an insufficient amount of water to meet minimum stream flows. See, for examples, FoF 256 -257, CoL 63, 144, 155 and 167.

The error here is that the sluice gates have limited capacities, even when fully opened. These sluice gates were not intended to allow the full flow of the Stream above the diversion works to flow downstream. When the sluice gates are fully open, water is still captured and diverted westward to the HC&S Sugar Plantation.

The open sluice gates do not demonstrate that there is not enough water in the Stream to satisfy minimum stream flows. What is demonstrated is that sluice gate openings need to be enlarged to permit greater amounts of water to flow downstream to satisfy minimum stream flows. HRS §174C-71(1)(E) states:

> **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;**

The CWRM has the statutory authority to adopt "physical solutions" and "modifications of project operations" to preserve, enhance or restore instream values. The CWRM has the full authority to require EMI to increase the sluice gate openings in the diversions to allow more water to flow downstream to satisfy instream standards.

M. The Report Fails to Identify Segments of Streams in Which Greater Flows Are Required for Protected Purposes

Detailed testimony and evidence was submitted during the contested case on "fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses" in the 27 Streams. Testimony and evidence was received on the particular locations in various Streams at which these protected resources existed.

The Report, in a perfunctory manner, acknowledges this testimony and evidence:

* Maintenance of Fish and Wildlife Habitats. FoF 279.

* Outdoor Recreational Activities – twelve (12) Streams are identified for the significant outdoor recreational activities that they afford. FoF 282.

* Maintenance of Ecosystems Such as Estuaries, Wetlands and Stream Vegetation – three (3) Streams have estuaries and palustrine wetlands exist in all but two of the 27 Streams. FoF 283.

* Aesthetic Values Such as Waterfalls and Scenic Waterways – Waterfalls and, to a lesser extent, springs constitute the principal aesthetic values in the East Maui Streams. FoF 284.

* Maintenance of Water Quality. FoF 285.

The Report states, in CoL 99, that the following Streams have one of these values:

* Honopou – palustrine wetlands, aesthetic values and outdoor recreation.

* Hanehoi/Puolua - palustrine wetlands and outdoor recreation.
* Waiokamilo - palustrine wetlands, aesthetic values and outdoor recreation.
* Wailuanui - palustrine wetlands, aesthetic values and outdoor recreation.
* Waikamoi - palustrine wetlands, aesthetic values, outdoor recreation and impaired water quality.
* East Wailuaiki – estuaries, palustrine wetlands, aesthetic values, outdoor recreation and impaired water quality.
* West Wailuaiki – estuaries, palustrine wetlands, outdoor recreation aesthetic values and impaired water quality.
* Waiohue – estuaries, palustrine wetlands, outdoor recreation and aesthetic values.
* Hanawi - palustrine wetlands, aesthetic values and impaired water quality.
* Makapipi - palustrine wetlands, aesthetic values and outdoor recreation. CoL 99.

The Report concludes, however, that the 2008 and 2010 Commission Decisions already substantially represent these other instream uses. CoL 100. As such, the Amended IIFS, in the Decision and Order, makes no specific provision for these significant, protected instream uses.

These particular instream uses were never specifically addressed in the Commission's 2008 or 2010 Decisions.

This is a significant error of fact and law. HRS §174C-71(1)(C) states:

> 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)

HAR §13-169-20, entitled "Principles and guidelines for instream use protection", in subsection (1), provides:

> **The quality of the stream systems statewide shall be protected and enhanced where practicable. Accordingly, where practicable, streams should be maintained with water sufficient to preserve fish, wildlife, scenic, aesthetic, recreational, and other instream uses, and stream systems should be retained substantially in their natural condition.** (Emphasis added)

Defined "reaches" of Streams must be identified within which sufficient flows must be maintained in order to protect and preserve **fish, wildlife, scenic, aesthetic, recreational, and**

other instream uses.

HAR §13-169-33, entitled "Method for development of instream flow standard" in subsection (d) requires:

> Based on the evaluated instream use(s), **requirements for the stream within defined reaches** shall be determined. **These requirements shall be expressed for specified time intervals (such as monthly or seasonal) and reaches in terms of the quantity, depth, quality, or other measurable attributes of stream water, or a combination of these attributes, needed to preserve, enhance, or restore the stream or stream reach's ability to provide for those identified instream uses.** Each instream flow standard shall describe the measurable attributes necessary to protect the public interest in the particular stream. **Instream flow standards shall be expressed in terms of variable flows of water necessary to adequately protect 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.** When quantitative data cannot be developed without undue expenditure of time, financing, and effort, the department may recommend qualitatively derived requirements. (Emphasis added)

HAR §13-169-2 defines a "Stream reach" as:

> ... a segment of a stream channel having a defined upstream and downstream point.

Unrebutted testimony and evidence was received during the contested case of the **location** on many Streams of **fish, wildlife, scenic, aesthetic, recreational, and other instream uses** worthy of protection. The Report agrees that these resources were identified and that they are worthy of protection. The significant error in the Report, however, was in its failure to identify specific stream segments within particular Streams within which particular minimum flows were required to protect these specific resources. A few examples should suffice:

Waikamoi Stream

The Report recommends amending the IIFS to require a flow, estimated as 1.81 mgd, at a location below all EMI diversions for Waikamoi Stream. **Waikamoi Stream is diverted five (5) times.** Requiring a certain flow below the lowest diversion does not prevent the complete diversion of the Stream four times above that lowest diversion. Any of the many **fish, wildlife, scenic, aesthetic, recreational, and other instream uses** worthy of protection identified above the lowest ditch are therefore not protected or preserved.

Many of the identified **fish, wildlife, scenic, aesthetic, recreational, and other instream uses** worthy of protection are located above the lowest ditch.

The following unrebutted statements were included in the written testimony of Miranda Camp on behalf of the Sierra Club:

> The Waikamoi Stream originates in one of Maui's most pristine native forest areas: Waikamoi Preserve, managed by the Nature Conservancy. Thirty percent (30%) of Waikamoi Stream originates and travels through one of Maui's most notable and protected native forests, the Waikamoi Preserve. Almost 85% of the Waikamoi hydrological unit has a high concentration of threatened or endangered species. Exhibit E-48.
>
> The riparian resources of Waikamoi Stream were classified as "substantial" by the Hawaiian Stream Assessment. Exhibit E-58, p. 265. The riparian resources of Waikamoi Stream were classified as "substantial" by the Hawaiian Stream Assessment. Exhibit E-58, p. 265.
>
> The CWRM's Waikamoi Stream assessment report notes that:
>
> > The proportion of a stream course flowing through native forest provides an indication of the potential "naturalness" of the quality of a stream's watershed; the greater the percentage of a stream flowing through native forest most of which is protected in forest reserves **the more significant the resource.**
>
> Exhibit E-48, Waikamoi IFSAR, p. 64,Fig 6-1.
>
> The CWRM Waikamoi Stream assessment also concludes that:
>
> > Based upon the current designations, the Waikamoi hydrologic unit contains critical habitat areas for ten plant species (Table 6-6). While critical plant habitats are more promenint [sic} above the 1,300 feet altitude, the area around 600 feet elevation and along the Wahinepee Trail has a good representation of native endemic plants.

Exhibit E-48, Waikamoi IFSAR, p. 67, Table 6-7.

> On Sierra Club hikes hikers have visited stream, pool and waterfall areas along Waikamoi Stream on state and EMI land at the approximately 900 ft. elevation and the 4,000 ft. elevation, as shown on Exhibits E-61 and E-61-A. Hikers have also observed these areas being accessed by local families and visitors for recreation and aesthetic enjoyment.

Sierra Club hiking groups have visited stream, pool and waterfall areas along Waikamoi Stream for educational and recreational hikes for many years, both before and after the 2010 Commission on Water Resource Management (CWRM) decision to set amended Interim Instream Flow Standards (IIFS). The stream areas often have long dry stretches caused by the lack of sufficient flows making it past the diversions. The lower stretches of the stream between the EMI's Manuel Luis ditch and New Hamakua/Wailoa Ditch are often overgrown by water hungry invasive species of noxious weeds such as pole bamboo, various ficus species, Coix lacryma-jobi (Job's Tears), Clidemia hirta, Hedychium flavescens (yellow ginger), Tibouchina herbacea, and Ardisia elliptica (Inkberry). It does not appear that any maintenance of the stream beds is ongoing by either EMI or the State.

The EMI ditch diversion works on Waikamoi Stream must be modified to allow the more adequate flow level of 4.4 cfs (2.87 mgd) recommended by the DAR in their May, 2010 Report. Exhibit E-72, p. 5.

Waikamoi Stream should be restored to this recommended mauka-makai flow to fully and adequately support the numerous public trust uses that Sierra Club Maui and the public are entitled to enjoy under Hawaii State laws.

Hanehoi, Huelo and Puolua Streams

Maui Tomorrow prepared and presented a map of the traditional ponds in Huelo. Exhibits E-24 and E-24-A.

The DAR Hanehoi Watershed Report (June 2008) commented on the extremely dewatered condition of the stream. These stream experts observed:

> ...diversions resulted in an increased frequency of dry or shallow sites as compared to streams statewide.

And:

> the stream was shallower downstream of diversions then would be expected in a normal stream

and concluded:

> the stream is now nearly permanently intermittent as a result of water diversions....**The intermittent nature of this stream currently reduces habitat and restricts instream migration for the native animals. A more consistent flow would reconnect habitats and allow for upstream migration of native species.** (Emphasis added)

Exhibit E–5, pp. 2-3.

Above the highest diversions on Hanehoi stream, DAR found a completely different stream with a rich variety of native insects, including the endangered *Megalagrion pacificum* damselfly. Exhibit E-6.

The Sierra Club is concerned that the endangered native Hawaiian damselfly Megalagrion Pacificum, which has been found above the diversions on Hanehoi stream, is being deprived of the vitally needed opportunity to expand its habitat range along the other nearby reaches of the stream, due to the extreme dewatering of Hanehoi below the upper diversions. If this rare damselfly had adequate natural habitat areas provided to allow it to survive at lower elevations, it would greatly enhance the opportunities of the Sierra Club for nature study and environmental education.

The Hanehoi, Huelo and Puolua Streams are dewatered Streams. The native species mentioned and some of the recreational resources exist higher in elevation than the IIFS locations in the recommended Amended IIFS. Hanehoi, Huelo and Puolua Streams are diverted four times. The highest elevation location is on Hanehoi Stream just above the Lowrie Ditch. These Stream are diverted and dewatered by the higher elevation New Hamakua and Wailoa Ditches. Any resources located above the Lowrie Ditch are not protected or preserved.

Waiohue Stream

Waiohue Stream has been rated as having "Outstanding" recreational and aquatic stream life characteristics by the Hawaii Stream Assessment ("HSA"). Exhibit E-58, pp. xxv and 265 of the CWRM/NPS, 1990 study.

Waiohue Stream was more recently rated in USGS and Hawaii DAR stream studies as having a high variety of native stream life. The HSA identified opportunities for camping, hiking, fishing, swimming, parks, and scenic views related to Waiohue. Exhibit E-57, p. 52, Table 5-1 of the 2009 CWRM Waiohue IFSAR.

Waiohue Stream passes through the very popular Pua'a Ka'a State Wayside Park along the Hana Highway. There are natural pools and waterfalls on Waiohue Stream in Pua'a Ka'a Park that are easily and safely accessible. The pools are overlooked by the public picnic areas in the park, providing the potential for scenic enjoyment. This is practically the only natural pool that is visible, and easily and legally accessible to the public along the entire forty mile drive from Pa'ia to Hana. Since there are also comfort stations located at Pua'a Ka'a State Park, thousands of residents and visitors stop there every day.

The state expends public funds to promote visitors coming to Maui and seeking places of natural beauty, such as Waiohue Stream, yet the state guardians of the public trust did not allow enough water in the stream for those same visitors to enjoy what they came to find.

At the ocean is Waiohue Bay, where the Waiohue Stream discharges. It is accessible by a narrow fishing trail from Wailuanui, labeled on maps as the "old Government makai road." Two other streams (Puakea and Paakea) discharge into Waiohue Bay and there is a small but productive estuary there for native stream life.

According to the DLNR Division of Aquatic Resources (DAR) studies referred to in the 2009 Waiohue CWRM IFSAR, the dewatering of Waiohue Stream also impacts habitat availability for the large array of native species found in the stream. The Assessment offers an analysis of stream life habitat conditions for Waiohue Stream based upon USGS studies and concluded:

> Overall, less than 50 percent of the natural habitat for all species in Waiohue Stream was maintained below Koolau Ditch under diverted conditions.

Exhibit E-57, p.43 of the December 2009 CWRM Waiohue IFSAR.

> Since Waiohue Stream already has a great diversity of native stream animals under diverted conditions, it has the potential to carry a full compliment of native stream fauna if allowed continous (sic) mauka to makai flow.

Exhibit E-57, p. 46 of the December 2009 CWRM Waiohue IFSAR.

Sierra Club hiking groups have visited stream, pool and waterfall areas along Waiohue Stream for educational and recreational hikes for many years, both before and after the 2010 CWRM decision to set amended IIFS. Sierra Club hiking groups access Waiohue Stream as part of their hikes along the Makapipi Trail in Ko'olau District. The approximate location of these hikes is shown on a USGS map of the area. Exhibit E-56. Virtually all of Waiohue Stream is located on publicly owned land, from the mountains to the sea. Sierra Club hikers value the scenic and recreational attributes of Waiohue Stream.

Sierra Club educational hikes follow the EMI's Ko'olau ditch trail, which crosses both branches of Waiohue Stream. Sierra Club hikers have observed that the stream beds are virtually dewatered below the ditch by two major and five minor diversions that all drain into EMI's Ko'olau ditch. This affects water levels in the Pua'a Ka'a Park ponds and waterfalls as is noted by visitors.

The Report simply requires an annual flow without making any provision for the significant recreational resources requiring protection.

See, also, like unrebutted testimony and evidence submitted with respect to East and West Wailuaiki Streams and Makapipi Stream.

Honomanu Stream

Honomanu Stream flow is diverted five (5) times: by Haleakala Ranch through two small diversions at higher elevations; by the County Department of Water Supply's (DWS) Lower Kula Pipeline (936 m), by EMI's Spreckels Ditch (529 m. elevation) and the Koolau Ditch (400 m. elevation) diversion works. Exhibit E-63, p. 148, Fig. 13-19 of the December 2009, Honomanu IFSAR.

Honomanu Stream has been rated as having "Outstanding" recreational and riparian characteristics by the Hawaii Stream Assessment (HSA). The HSA identified opportunities for "camping, hiking, fishing, hunting, swimming and scenic views related to Honomanu." Exhibit E-58, p. 265, Chart in the CWRM/NPS, 1990.

Honomanu Stream was recently the subject of a 2007 Stream and Estuary study published in the Bishop Museum Bulletin in Cultural and Environmental Studies. The study concluded that the presence of coastal ground water springs and a coastal estuary "results in significantly higher hīhīwai counts and allows recruits to grow to larger sizes (>20 mm)." The same study however, concludes that: "Most hīhīwai will not survive beyond the estuary because of dry stream beds and the lack of consistent stream flow." Exhibit E-62.

Sierra Club hiking groups have visited stream, pool and waterfall areas along Honomanu Stream for educational and recreational hikes for many years, both before and after the 2010 CWRM decision to review the IIFS for this stream. Sierra Club hiking groups access Honomanu Stream as part of their hikes along the Wahinepe'e trail in Ko'olau District, as well as in the coastal portion of the stream. Exhibits E-61 and E-61-A.

Sierra Club hikers value the scenic and recreational attributes of Honomanu Stream and are concerned that these are being limited due to lack of adequate flow in the stream.

The upper areas of Honomanu stream along the Spreckels ditch are of particular interest to Sierra Club for nature study. This region has many varieties of native forest plants that are easy to view from the trail and are used as part of the nature study opportunities offered on Sierra Club hikes. Higher elevations of the stream, above the diversions, also have excellent native

plant density, according to the HSA, and habitat for several endangered species. Severe dewatering of the steam has an overall negative effect on the surrounding native plant habitat

One of the greatest losses resulting from this dewatering are the once magnificent waterfalls that are found near the 500 m. elevation of the stream, below the Spreckels and Ko'olau Ditch diversions. Sierra Club has lead hikes to this area for almost twenty (20) years and it has become increasingly difficult to find any water visible in these waterfalls, since it is all taken by the EMI diversions. These falls, on public land, are now dry except during heavy rain events when access to the area is not safe. This means that the public is denied the opportunity to enjoy the beauty of a public trust resource located on public land. Sierra Club presented photographs of one of the smaller upper water falls. Exhibit 64-A-D.

The restoration potential of Honomanu Stream is high. The HSHEP offered the following analyses of the restoration potential of Honomanu Stream, ranking Honomanu as the highest candidate for restoration out of the twenty-four streams analyzed:

> From a ranking perspective, Honomanü Stream ranked as the second stream for the amount of potential suitable habitat for native species in comparison with the other streams in this analysis. Overall, the results of the HSHEP model predicted approximately 13.5 km of habitat for all species combined in Honomanü Stream with 99.8% of this lost due to the combined effects of the stream diversion. There is the potential to recover over 13.4 km of habitat units in this stream and it ranked first among all streams in this report for its potential for restoration.

Exhibit E-67, pp 71-72 from the November 2009 HSHEP study completed for DAR and Bishop Museum by Parham et al. See Section N. below.

N. The Current De-Watered Status of Some Streams Was Used as a Reason Not to Restore the Stream - To the Detriment of Public Trust Purposes

The Report failed to address the existing, long-term, dewatered state of many of the twenty-seven Streams and the effect of this long-term dewatering on these Streams.

For example, the lower portions of Honomanu Stream, and its estuary, were recognized as having high values for stream species and gathering. It was also recognized that a segment of this lower portions of Honomanu Stream currently lost water or was dry. This was the state of Honomanu after years of dewatering due to upstream diversion.

The Hearing Officer declined to recommend restoration to Honomanu because the losing or dry segment of Honomanu prevented or deterred upward or downward migration of anadromous species.

The witness for USGS testified that if a minimum flow were restored to this segment that, within a reasonable time, it might well transmit or carry flows again and that it would be worthwhile to restore flows to determine whether, in a reasonable, time this restoration allowed this segment to transmit or carry flows again such that Honomanu could achieve its pre-diversion very high value for instream species and gathering.

Test releases have been recommended for Makapipi Stream. See p.143. It is arbitrary and capricious to not also recommend test releases in Honomanu Stream, a stream of higher resource value and a stream for which the USGS witness recommended test releases.

This is an example of the "grandfathering" of the diversions. Honomanu was not recommended for restoration because its current dewatered state was used as the starting and ending point. This is contrary to the holding of the Hawaii Supreme Court, reinforcing *In re Water Use Permit Applications* ("Waiahole I"), 94 Hawai'i 97, 9 P.3d 409, (2000), in *Kauai Springs v. Planning Commission of the County of Hawaii ("Kauai Springs"),* 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.

Here, prior uses and diversions have been given greater weight to the detriment of public trust purposes.

O. Significant Errors Regarding Water Claims in the Hanehoi Watershed

1. The Report Does Not Describe Prior Determinations Accurately

The Report significantly errs in describing prior determinations regarding minimum flows in the Hanehoi Watershed. Three IIFS Sites were established:

Site A 2008 IIFS

The CWRM adopted an amended Interim Instream Flow Standard ("IIFS") for Puolua Stream in September 2008. CWRM adopted a flow standard of .57 mgd or five-hundred and seventy-thousand gallons per day (570,000 gpd) on Puolua stream below the New Haiku Ditch to provide water for Ernest Schupp's kalo cultivation on TMK No. (II) 2-9-08:14 along Puolua stream. Exhibit E-7, p. 26.

Site B 2008 IIFS

The CWRM also adopted a flow standard of .41 mgd or four hundred and ten-thousand gallons per day (410,000 gpd) on Hanehoi stream below the New Haiku Ditch diversion works to

provide water for downstream users, such as Ms. Caveny, and for the stream. Both of these recommended restoration flow levels were adopted by the CWRM. A diagram of the release points described above is shown on Exhibit E-7, p. 26.

Site C 2008 IIFS

The CWRM adopted an amended interim instream flow standard ("IIFS") for Hanehoi stream in September 2008. CWRM adopted a flow standard of .74 mgd seven-hundred and forty-thousand gallons per day (740,000 gpd) on East Hanehoi stream at the pool on Hanehoi Stream above the Lowrie ditch to provide water for the Huelo community water pipe, the stream itself and downstream users.

FoF 61 is incorrect in characterizing .98 mgd allocated for taro and .74 allocated for the Huelo community. Only .57 mgd was allocated for taro.

2. Amounts Allocated Were Not Overstated

The Report alleges that taro water requirements are greatly exceeded, in part, because some will be returned to the stream after use. FoF 143. Just because water is returned to the stream after use does not mean that it was not required to be available to be applied initially to the lo'i in order to grow healthy taro.

There is no evidence to support the conjecture in the Report that the initial IIFS were established based upon low flow values or that even if EMI had supplied the amounts required that these amounts would have been "sufficient and even excessive." FoF 144.

3. The Fiction that There is Insufficient Flow in the Ditches to Satisfy Minimum Stream Flows

One of the most pernicious errors in the Report is the suggestion, repeated on multiple occasions, that:

> Therefore, it is most likely that the amended IIFS were never fully implemented ... [because of] insufficient water in the ditches to restore the streams to the levels intended.

FoF 144.

The Report seeks to buttress this speculation with another unfounded suggestion that:

> ... **if the sluice gates on the ditches are opened, there still may not be enough flow to meet the amended IIFS.** (Emphasis added)

See, FoF 119 – then FoF 256 -257, CoL 63, 144, 155 and 167.

The truth here is that there are no reliable facts that support these suppositions in the Report and/or the great weight of the reliable evidence is to the contrary. With respect to the Hanehoi Watershed, it was firmly established that sluice gates were not designed to facilitate minimum stream flows; flows were still being diverted even when the sluice gates were wide open and sluice gates could be modified to allow increased amounts to flow downstream.

Even if the sluice gates allowed all of the water to be released and this amount was insufficient, increased amounts of water could be required to be released from higher elevation diversions. During the contested case, Commission Staff member, Dean Ueno, admitted that if insufficient amounts were available at the Haiku Ditch elevation, more water could be required to be released at the Ditch at the next higher elevation, the Lowrie Ditch, in order to satisfy minimum stream flow requirements. This is consistent with the statutory mandate in HRS §174C-71(1)(E) which states:

> **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;**

The CWRM has the statutory authority to adopt "physical solutions" and "modifications of project operations" to preserve, enhance or restore instream values. The CWRM has the full authority to require EMI to increase the sluice gate openings or to require water to be released from higher level Ditches to allow more water to flow downstream to satisfy instream standards. It is plain error in the Report to ignore these mandates.

4. Amounts Allocated Were Never Delivered and There Was No Enforcement Requiring Compliance

The record actually demonstrates that the IIFS were established based upon an assessment of the water needs of the taro growers in order to grow healthy taro.

The record also establishes that EMI never supplied .57 mgd to Site A, never supplied .41 mgd to Site B and never supplied .74 mgd to Site C. Those who were intended to benefit from these flows complained to CWRM and demanded enforcement action. CWRM took no enforcement actions.

The record demonstrates that knowing that EMI was in violation of the IIFS established for the Hanehoi Watershed that Commission Staff instead agreed to allow EMI to divert **more** water via the New Haiku Ditch. CWRM permitted EMI to close the sluice gate even further.

In result, no water was available to Ernest Schupp to grow healthy taro. In result, no water was available to Ms. Caveny for her reasonable riparian uses.

5. The Report Ignores the Valid Water Claims Presented By Those Within the Hanehoi Watershed

a. Claims Based Upon Appurtenant Water Rights Were Unlawfully Rejected

The Report repeats, in several places, a wholly unsupported finding that:

> Na Moku identified no acreage [in taro] for Hanehoi and Puolua Streams, but contended that insufficient water and lands that have either appurtenant or riparian rights require that both Hanehoi and Puolua Streams be returned to their natural base flows ... FoF 150.

The Report does acknowledge that specific additional amounts of water were requested at each of the IIFS locations. FoF 150. This statement, by itself, is a gross simplification and misstatement of the appurtenant and riparian water rights claims relating to the Hanehoi Watershed presented during the contested case.

The Report continues that HC&S identified:

> ... an estimated cultivable area of 2.3 acres, and identified **two parties who are or would like to cultivate taro on four acres**, as well as one person who has a parcel adjacent to Hanehoi Stream and would like to exercise her riparian rights. (Emphasis added) FoF 150

The Report relies upon the FoF of HC&S that identifies these parties vaguely as Ernest Schupp, Neola Caveny and Solomon Lee. FoF 151. It is odd that the Report does not identify Ernest Schupp personally (or his specific claims), or Solomon Lee personally (or his specific claims) or Neola Caveny personally (or her specific claims). Ernest Schupp and Solomon Lee were vaguely referred to as "...two parties who would like to cultivate taro on four acres ..." Ms Caveny is obliquely referenced, as she was by HC&S, as "...one person who has a parcel adjacent to Hanehoi Stream and would like to exercise her riparian rights." For examples, see FoF 151, 219, 309. Why the Report elects this path is difficult to decipher.

Ernest Schupp, Neola Caveny and Solomon Lee all appeared before the Hearings Officer and presented lengthy testimony and detailed evidence. There was no need to rely upon the proposed FoF of HC&S. In fact, in relying upon the proposed FoF of HC&S, the Report has failed to include the testimony and evidence presented by Ernest Schupp, Neola Caveny and Solomon Lee, much of which was unrebutted.

Ernest Schupp and Solomon Lee presented sufficient competent evidence for the purposes of this IIFS proceeding to have their particular claims identified and evaluated and to have specific amounts of water allocated for each of their claims. Even HC&S admitted that **two parties** (Ernest Schupp and Solomon Lee) are or would like to **"cultivate taro on four acres"** – not 2.3 acres. FoF 150.

i. The Claim of Ernest Schupp

The CWRM adopted in September 2008 a flow standard of .57 mgd or five-hundred and seventy-thousand gallons per day (570,000 gpd) on Puolua stream below the New Haiku Ditch ("Site A") to provide water for Ernest Schupp's kalo cultivation on TMK No. (II) 2-9-08:14 along Puolua stream. Exhibit E-7, p. 26. This water was never released by EMI and the CWRM never required EMI to deliver this amount of water to Site A.

Ernest Schupp has testified on every available occasion about his efforts to grow healthy taro and how these efforts have been undermined by the refusal to require a sufficient amount of water to be delivered to his lo'i. Documents demonstrating the use of his parcel for taro growth at the time of the Mahele were received into evidence. The taro lot is one acre in size. Documents demonstrating the size and location of the kuleana, a Land Commission Award, were received into evidence. Mr. Schupp provided photographs of his kalo lo'i. Exhibit E-12, A-H; Exhibit E-12-(f) and (g). He testified that there were 14 kalo lo'i on his kuleana. Mr. Schupp's testimony indicated that he was using his parcel to grow taro in approximately the same manner in which taro was grown on it at the time of the Mahele. Mr. Schupp testified that:

> To grow healthy kalo on one acre of land, Mr. Schupp must have 300,000 gallons per day of water available on a regular basis to be diverted into his auwai and into his taro lo'i, as well as at least an equivalent amount to return to the stream unused, through his auwai. The release of 570,000 gpd at the New Haiku Ditch, if indeed that has occurred, does not provide for that required volume of water to reach his kalo lo'i through his auwai and also maintain the Puolua stream.

ii. The Claim of Solomon Lee

Solomon Lee presented similar testimony and evidence. Documents demonstrating the use of his parcel for taro growth at the time of the Mahele were received into evidence. Documents demonstrating the size and location of the kuleana, a Land Commission Award, were received into evidence. Solomon Lee Jr. is the owner of family lands, TMK No. (2) 2-9-008:034; TMK No. (2) 2-9-008:035 and TMK No. (2) 2-9-008:007 in Huelo. (collectively "kuleana lands"). Exhibits E-26, E-31 and E-31-A. Two of the three family kuleana parcels were granted to Solomon Lee Jr.'s kupuna as Land Commission Awards during the Mahele. Parcel -035 (.31 ac) is LCA 5459-A:1 and parcel -007 (1.04 ac.) is LCA 5459-A:2. LCA 5459-A was awarded to Naaeae (AKA "Kaaeae") during the Mahele. The Original LCA is Exhibit E-149. The Foreign Testimony supporting the Award is Exhibit E-150; The Royal Patent issued is Exhibit E-151; Exhibit E-28, p.115; Exhibit E-28-A.Hanehoi Stream flows through each of Mr. Lee's three parcels. Exhibit E-27. Both LCA were described as having kalo and kula lands in Mahele era native testimony. Exhibit E-3, p. 236 of Wai o ke Ola – He Wahi Mo'olelo no Maui Hikina, Kumu Pono Associates, 2001. Mr. Lee's testimony indicated that his kuleana had been used and would be used in the future to grow taro in approximately the same manner in which taro was grown on it at the time of the Mahele. The properties are taro lots. Mr. Lee testified that all of his lo'i together comprised approximately three (3) acres in size.

Mr. Lee's father read an announcement in the paper that requested users of ground or stream waters across the state to send in the form. He noted on the form that the land had both riparian and appurtenant rights, the stream water had been used for these parcels since the 1850's and that the main crop had been kalo. Declaration of Solomon Lee, Jr.

The Supplemental Declaration attached to the form 8810-2 notes the problems in securing adequate stream flow being encountered by the Lees:

> During the years 1928 to 1940 plus we used water for the taro patches. There was some problem with East Maui Irrigation Co. where my mother's water was not fully received...she claims she had 3" of water rights.

Exhibit E -34, A-C.

Mr. Lee requested that:

> The Lowrie Ditch diversion works and the New Haiku ditch diversion works on Hanehoi Stream must be modified to allow the full flow of Hanehoi Stream through the Lee's kuleana and **to allow the amount of water to flow to our kuleana lands that is necessary to grow healthy taro on three acres of land.** (Emphasis added).

This was sufficient evidence in these IIFS proceedings to qualify Solomon Lee to a particular evaluation of his claim and an entitlement of a reasonable amount of water for his taro lo'i. It was error to ignore his particular claim.

iii. The Combined Analysis in the Report of the Appurtenant Water Rights Claims of Ernest Schupp and Solomon Lee is Wholly Erroneous

The Report erroneously states that the acreage for taro is 2.3 acres and, after applying the Report's formula, determines that .30 - .35 mgd is required. CoL 58. The Report provides that the IIFS at Site A, for Mr. Schupp, will be increased from .57 mgd to .69 mgd. CoL 206.

The CWRM in September 2008 adopted a flow standard of .41 mgd or four hundred and ten-thousand gallons per day (410,000 gpd) on Hanehoi stream below the New Haiku Ditch diversion works ("Site B") for Ms. Caveny and the Stream. The Report provides that the IIFS at Site B will be increased from .41 mgd to 1.87 mgd to meet all taro requirements. CoL 206. The Report changes the purpose of Site B and provides that this water is for taro growth so that it logically follows that it is allocated to Solomon Lee, however the Report does not so state.

These allocations must be corrected because they are based upon the erroneous 2.3 acre figure. CoL 206. Just considering the appurtenant water rights claims of Ernest Schupp and Solomon Lee, together, they possess taro lots four (4) acres in size (Schupp, 1 acre, and Lee, 3 acres), not the 2.3 acres provided, in self-serving fashion, by HC&S. FoF 150, 151, 219 and 292 and CoL 44 are clearly erroneous. The mathematics in CoL 58 is therefore erroneous (using 2.3 instead of 4.0) to determine the water budget for taro in Hanehoi/Puolua. Likewise, CoL 206 is also undermined insofar as it determines the taro requirements based on the erroneous 2.3 acre calculation. This also undermines the Amended IIFS for the Hanehoi/Puolua Streams found on p. 141.

In addition, HC&S included the claims of Neola Caveny (for riparian water rights) with the claims of Ernest Schupp and Solomon Lee (for appurtenant water rights) to arrive at its erroneous 2.3 acre figure. If Ms. Caveny's 2.219 acre parcel is added on to the 4 acres the total is 6.219 acres, not 2.3 acres. See below. The Report thus grossly and erroneously understates the amounts of water that must be allocated to claimants within the Hanehoi Watershed.

The Water Code provides that "present and future uses" must be considered. The Report fails to consider reasonable future uses. Solomon Lee was not presently growing taro on his

kuleana but he testified that with the return of water to the kuleana he would grow taro. Neither was Jeffrey Paisner growing taro on his property, however he received an allocation based upon the 4.17 acre size of his parcel. See CoL 58.

iv. The Claim of TARO

Likewise, TARO presented a claim of reasonable future uses. The Report erroneously fails to acknowledge or evaluate this claim.

b. Claims Based Upon Riparian Water Rights Were Unlawfully Ignored

i. The Claim of Neola Caveny

The CWRM in September 2008 adopted a flow standard of .41 mgd or four hundred and ten-thousand gallons per day (410,000 gpd) on Hanehoi stream below the New Haiku Ditch diversion works ("Site B") to provide water for downstream users, such as Ms. Caveny, and for the stream. Site B was not well located. It was far mauka of her riparian property. In the Report Site B is retained – but for a different purpose. See the Section above regarding Solomon Lee.

The Report adds a new IIFS Site appropriately downstream – "Just above the terminal waterfall at the mouth of the Hanehoi Stream." See p. 141. However, the Report now terminates Ms. Caveny as an explicit beneficiary of this water by stating that the purpose of this Amended IIFS is "for native stream animals." CoL 206. There is no recognition that Ms. Caveny can use any of this water based upon her riparian rights.

Ms. Caveny's property possesses riparian water rights. Hanehoi Stream passes right through her property. Her property abuts Hanehoi Stream on two sides. See TMK No. (II) 2-9-11. Ms. Caveny's parcel is 2.219 acres in size. Ms. Caveny, through her riparian rights, seeks to use the water in Hanehoi Stream passing by and through her property.

The Report acknowledges that riparian water rights are to be addressed. CoL 21, 25. The Report uses the "Other Agriculture" category for riparian rights. CoL 44. The Report acknowledges two claims for riparian rights: the claim submitted by Ms. Caveny (although she is not named) and a claim submitted by Jeffrey Paisner. CoL 44. Mr. Paisner's claim is allegedly for 4.17 acres of "taro lo'i" and 3.25 acres in "Other Agriculture" based upon a riparian claim. His claim is allegedly supported by FoF 305 and 310. FoF 303 mentions a 4.17 acre agricultural lot running along Haiha Stream. FoF 310 mentions a single exhibit regarding a 4.17 acre lot for agricultural purposes running along Haiha Stream. On these grounds, the Report uses 4.17 as the

number of acres and determines that Mr. Paisner is entitled to between .54 and .63 mgd. CoL 58. The Amended IIFS for Makapipi Stream is thereby proposed to be .60 mgd. See p. 143.

In CoL 44, the Report includes a "?" under "Other Agriculture" (riparian claims) for the Hanehoi Watershed. Ms. Caveny supplied competent testimony and evidence of a great deal more weight and significance than the slim evidence presented by Mr. Paisner that was deemed adequate for a successful riparian claim in the Report.

The Report has failed to include the testimony and evidence presented by Neola Caveny much of which was unrebutted concerning her claim based upon riparian water rights. Like Ernest Schupp, Neola Caveny has testified on every available occasion about her efforts to restore flow to Hanehoi Stream to satisfy her reasonable riparian rights and how these efforts have been undermined by the refusal to require water to be restored to the Stream.

Ms. Caveny's predecessor in title, Stanley E. Rushworth, registered the water rights of her property with the CWRM in 1989. Exhibit E-21. Mr. Rushworth noted the prior use of Ms. Caveny's property for taro cultivation. He sought restoration of 100,000 gallons of water per day delivered in Hanehoi Stream to her property. Exhibit E-21.

Currently, Hanehoi Stream is almost completely dewatered as it passes through Ms. Caveny's property, except during and shortly after large storm events. The streambed is often dusty and devastated as it passes through Ms. Caveny's property.

Ms. Caveny has a commercial tropical flower farm on her property called "Pualana Farms." See Exhibit E-25. Kalo lo'i existed on her property. She would like to partner with other community members to grow kalo on the land in the future. As such, she is entitled to have in Hanehoi Stream at her property, available for her use, the amount of water that it would take to grow healthy taro on one acre of land.

Ms. Caveny has recently begun the cultivation of wauke (*Broussonetia papyrifera*) on her land. This plant is used for making kapa bark cloth. She wishes to expand her cultivation area for this very culturally important and sought after plant, that was traditionally grown alongside streams and kalo lo'i. If she had a sufficient supply of water in Hanehoi Stream, she would grow wetland taro bordered by wauke.

Ms. Caveny also has a large vegetable garden on her property. There is not enough streamflow in Hanehoi Stream to supply water for her farm, in its present form. She cannot

expand her farm along the stream, as she would like to because there is not a sufficient supply of water in Hanehoi Stream to support such an expansion.

Ms. Caveny was entitled to have her riparian water rights claim identified and affirmed. As with Mr. Paisner, she was entitled to have her riparian claim recognized as an "Other Agriculture" claim for 2.219 acres in size.

ii. Solomon Lee and Ernest Schupp Also Possess Riparian Water Rights

The Report fails to acknowledge that the properties of Solomon Lee and Ernest Schupp are also riparian and possess riparian water rights. Mr. Schupp's kuleana abuts Puolua Stream and therefore possesses riparian water rights. Exhibit E-2. Mr. Lee's kuleana abut Hanehoi Stream and therefore possess riparian water rights. Both Solomon Lee and Ernest Schupp were also entitled to have their claims analyzed and affirmed as riparian water rights claims. The Report failed to do this. Mr. Paisner's claim was analyzed as a riparian claim and an appurtenant rights claim. See, FoF 44. Solomon Lee and Ernest Schupp were entitled to the same treatment.

c. Claims Based Upon Domestic Uses Were Unlawfully Ignored

The Report significantly erred in failing to acknowledge, analyze and allocate specific amounts of water for the domestic water claims presented by those within the Hanehoi Watershed.

Domestic uses are protected in water law. The Huelo License, 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.

Exhibit E-96. The September 2008 Instream Flow Standard Assessment Report (IFSAR) for Hanehoi Hydrological Unit ("Hanehoi IFSAR September 2008") states on p. 103:

> The licenses, and also the subsequent revocable permits, included clauses protecting the water rights of the native tenants for domestic use, including cultivation of taro.

The Hanehoi IFSAR September 2008, on p. 5, includes in its "Surface Water Definitions" most commonly referenced "as defined in the Code", the definition of "Domestic use" as follows:

> Any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation.

The Report recognizes that EMI is required to release waters for downstream domestic uses. FoF 56. Having done so, however, the Report fails to acknowledge these claims and allocate water for these purposes.

i. The Community Pipe

The Hanehoi IFSAR September 2008 states that there is:

> ... no public water system in the Huelo area, and Hanehoi and Puolua Streams supply a private community water system that includes about 30 families [and as many as 100 people] and two active churches; this includes water for all domestic use, farming, and livestock.

The Hanehoi IFSAR September 2008 further notes that two agricultural education centers located outside of Hanehoi ... also utilize the stream as a resource for domestic, education, or recreational purposes.

The Hanehoi IFSAR September 2008 states that the pipe draws water from a pool on Hanehoi Stream, later identified as the above-referenced Site C.

The CWRM in September 2008 adopted a flow standard of .74 mgd seven-hundred and forty-thousand gallons per day (740,000 gpd) on East Hanehoi stream at the pool on Hanehoi Stream above the Lowrie ditch ("Site C") to provide water for the Huelo community water pipe, the stream itself and downstream users.

This amount of water was never delivered to Site C.

Unrebutted testimony and evidence was received during the contested case about the need for much more water for Huelo community needs. This testimony and evidence will not be repeated here.

The Report states that the amount of water "for domestic use in the Huelo community would remain unchanged" (CoL 206.a.) such that the Amended IIFS at Site C remains at .74 mgd. There is no evidentiary support for the Report's refusal to allocate the additional water needed for domestic purposes by the Huelo community.

ii. The Domestic Water Claims of Hale Akua

Hale Akua is an agricultural education center that utilizes Hanehoi Stream as a resource for domestic, education, or recreational purposes. Michael D'Addario testified extensively, presented Written Testimony and many exhibits about the farming endeavors of Hale Akua and

the needs of Hale Akua for additional domestic water. This will not be repeated here. He concluded by requesting that:

> The New Hamakua Ditch diversion works and the Wailoa ditch diversion works on Hanehoi Stream must be modified to allow an adequate flow of over one million gallons a day (1 mgd) in Hanehoi Stream to reach the pond above the Lowrie diversion and satisfy the demands of both the stream ecology and the Huelo community through the duly registered Huelo community pipeline.

iii. The Domestic Claim of Christa Morf

Christa Morf testified extensively, presented Written Testimony and many exhibits about her farming endeavors and needs for additional domestic water. Ms. Morf concluded her written testimony as follows:

> As owners of a parcel of land with domestic water rights, Ms. Morf and her husband are entitled to the adequate flows of Hanehoi Stream to serve the Huelo Community pipe, the only practical source for us to access a domestic water supply.

These three requests raised bona fide, cognizable claims for additional amounts of water for domestic purposes from the Hanehoi Watershed.

The Report acknowledges, and the CWRM admits, that any authorization by the State granting to EMI and HC&S the waters arising on state lands within the Huelo License Area, **excepts from that authorization**:

> .... **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.

And this **exception** applies with equal force not only to the now expired Huelo License, but to all subsequent revocable permits (to the extent that they were or are legal to permit diversions by EMI at all).

As such, it was significant error for the Report to fail to address these claims for additional domestic water in the Hanehoi Watershed and to adjudicate them consistent with the purposes of IIFS proceedings.

P. Minimum Allocated to Streams, Amounts Allocated to HC&S and County, However "Surplus" Assumed to Be Allowed to be Diverted to HC&S

The Report establishes minimum flows in some Streams and then determines amounts needed by HC&S and the County of Maui. There is a significant flaw here: when flows **exceed**

the sum of the minimum stream flows and the amounts determined to be necessary for HC&S and the County of Maui, these additional amounts are diverted and delivered to HC&S and the County of Maui. No effort was made to calculate when (on average) these additional amounts occurred in the Streams. More importantly, no effort was made to share these additional amounts for legitimate instream purposes or with riparian and appurtenant users. This is inconsistent with the public trust doctrine.

Q. HC&S, EMI and County Waste

There is no factual or basis for concluding that the extent of the waste of public trust water resources by HC&S, EMI and the County of Maui is reasonable.

R. Lack of Compliance/ Lack of Enforcement

The Report largely ignores the huge problems of the well-documented lack of compliance by EMI and the lack of enforcement by CWRM. What benefits were conferred on downstream users by the 2008 and 2010 CWRM Orders were not experienced by the downstream users because of the lack of compliance by EMI and the lack of enforcement by CWRM. The Amended IIFS recommended in the Report will, once again, be illusory and meaningless without compliance by EMI and enforcement by CWRM.

EMI does not account for its management of the public trust resources in a manner that would allow public trust principles to be applied accurately, instead of with the guestimates utilized in the Report. This is still true after having been given de facto control of these resources for over 100 years.

Na Moku and Maui Tomorrow included measures in their Proposed Findings of Fact, Conclusions of Law & Decision and Order that would have greatly diminished the lack of compliance by EMI and greatly enhanced enforcement by CWRM. The Report fails to include these measures. Without these measures, or measures like them, it is likely that the Amended IIFS will be illusory once again, no matter how often and how much downstream users complain about the continued violation of their protected water rights. It was arbitrary and capricious not to include these measures.

S. Limitations of the Report

HC&S is a subsidiary of A&B, Inc. The primary purpose of HC&S is to grow sugar cane on the HC&S plantation. The Report is based on an analysis of the uses and needs of HC&S in growing sugar cane on the acreage covered by its Plantation. To the extent that HC&S goes out

of business or is dissolved or the acreage covered by the Plantation is used for anything other than the growth of sugar cane, this Report is not applicable to the uses and operations conducted on the acreage formerly covered by the HC&S Plantation or earlier used for sugar cane growth.

EMI is a subsidiary of A&B, Inc. The primary purpose of EMI is to divert and transport East Maui waters to the HC&S Plantation, another subsidiary of A&B, Inc. The authority from the State of Hawaii (to the extent that any lawful authority now exists) to EMI to divert and transport waters is based upon the delivery of these waters to the HC&S Plantation. To the extent that any of these limiting factors change, this Report is not applicable to the uses and operations of EMI or anyone else.

Neither HC&S nor EMI nor A&B, Inc. may lawfully reserve, assign or transfer any of the water arising on state lands or any of the allocations of water deemed reasonable and beneficial in this Report to other parties whose particular uses and needs have not been fully analyzed in the Report.

III. JOINDER IN EXCEPTIONS FILED BY NA MOKU

Maui Tomorrow Foundation, Inc., on behalf of itself and its Supporters, hereby joins in and incorporates by reference the Exceptions of Na Moku Aupuni o Koolau Hui, Lurlyn Scott and Sanford Kekahuna to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law & Decision and Order.

IV. CONCLUSION/ RELIEF REQUESTED

A. Enter Interim Relief

Ernest Schupp and Neola Caveny, as Maui Tomorrow Supporters, have participated in these proceedings for years. Neither the 2008 nor the 2010 CWRM Orders led to the actual delivery of water intended for them. It is now 2016.

Maui Tomorrow requests that the CWRM immediately Order, in an Interim basis, the flows in the Amended IIFS for the Hanehoi/Puolua Streams. See p. 141. The deprivation has been for such a long period of time that this immediate relief is warranted, even though, based upon these Exceptions, those claiming allocations of water within the Hanehoi Watershed were and are entitled to much more water, as detailed above. The CWRM has the authority to grant such interim relief. See HAR §13-169-43.

B. Modify Report or Remand to Hearings Officer to Correct Report

There are appealable errors in the Report that prejudice the substantial rights of Maui Tomorrow and its Supporters. These must be corrected. The CWRM can correct these errors before adopting its final Findings of Fact, Conclusions of Law & Decision and Order or the CWRM can instruct the Hearings Officer to correct these errors before adopting his Report – so long as interim relief is provided as requested in Section IV. A above.

DATED: Wailuku, Maui, Hawaii 2.29.16

Isaac Hall
Attorney for Maui Tomorrow Foundation,
Inc. and its Supporters

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the parties listed below by email, on February 29, 2016.

Commission on Water Resource Management
(via U.S. Mail and email
c/o kathy.s.yoda@hawaii.gov)
c/o Kathy S. Yoda
P.O. Box 621
Honolulu, HI 96809

Lawrence Miike, Hearings Officer
(via email: lhmiike@hawaii.rr.com)
c/o Commission on Water Resource Management
P.O. Box 621, Honolulu, HI 96809

Alan T. Murakami, Esq.
(via email: alan.murakami@nhlchi.org)
Camille K. Kalama, Esq.
(via email: camille.kalama@nhlchi.org)
Ashley K. Obrey, Esq.
(via email: ashley.obrey@nhlchi.org)
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, HI 96813
Attorneys for Na Moku Aupuni O Koolau Hui

Elijah Yip, Esq.
(via email: eyip@cades.com)
David Schulmeister, Esq.
(via email: dschulmeister@cades.com)
Cades Schutte, LLP
1000 Bishop Street, 10th Floor
Honolulu, HI 96813
Attorneys for Alexander & Baldwin, Inc. and East Maui Irrigation Co., Ltd.

Robert H. Thomas, Esq.
(via email: rht@hawaiilawyer.com)
Damon Key Leong Kupchak Hastert
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, HI 96813
Attorneys for Hawaii Farm Bureau Federation

Patrick K. Wong, Esq.
(via email: pat.wong@co.maui.hi.us)
Jennifer M.P. E. Oana, Esq.
(via email: jennifer.oana@co.maui.hi.us)
Department of the Corporation Counsel
County of Maui
200 S. High Street
Wailuku, HI 96793
Attorneys for County of Maui, Department of Water Supply

William J. Wynhoff, Esq.
(via email: bill.j.wynhoff@hawaii.gov)
Linda L.W. Chow, Esq.
(via email: linda.l.chow@hawaii.gov)
Department of the Attorney General
465 South King Street, Room 300
Honolulu, HI 96813

Jeffrey C. Paisner
(via email: jpaisner@ripcony.con)
403 West 49th Street #2
New York, New York 10019
Pro Se

DATED: Wailuku, Maui, Hawaii 2.29.16

Isaac Hall
Attorney for Maui Tomorrow Foundation, Inc. and its Supporters