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

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

mt/rebdecs

REBUTTAL DECLARATIONS OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS FOR RE-OPENED HEARING

DATED: Wailuku, Maui, Hawaii 1.20.17

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the parties listed below by on January 20, 2017.

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

Camille K. Kalama, Esq.
(via email: camille.kalama@nhlchi.org)
Summer L.H. Sylva, Esq.
(via email: summer.sylva@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)
Caleb Rowe, Esq.
(via email: Caleb.Rowe@co.maui.hi.us)
Kristin Tarnstrom, Esq.
(via email: Kristin.Tarnstrom@co.maui.hi.us)
Department of the Corporation Counsel
County of Maui,
200 S. High Street
Wailuku, HI 96793
Attorneys for County Dept 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: jeffreypaisner@mac.com)
121 North 5th Street, Apt. RH
Brooklyn, New York 11249
Pro Se

DATED: Wailuku, Maui, Hawaii 1-20-17

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

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In re Petitions to Amend Interim Instream Flow Standards for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe'e, Puohokamoa, Haipua'ena, Punalau/Kōlea, Honomanu, Nu'ailua, Pi`ina`au, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopili'ula, Puaka`a, Waiohue, Pa`akea, Waiaka`a, Kapa`ula, Hanawī and Makapipi streams.	Case No. CCH-MA13-01 REBUTTAL DECLARATION OF LUCIENNE DE NAIE

REBUTTAL DECLARATION OF LUCIENNE DE NAIE

1. My name is Lucienne de Naie. I am a resident of Huelo, Maui County in the State of Hawaii. I am a supporter and board member of Maui Tomorrow Foundation ("MTF".)
2. This Declaration is based upon my personal knowledge, except where otherwise stated.
3. I submitted a Declaration for the earlier phase of this contested case in 2015, and for the reopened contested case, in 2016, and also a Responsive Declaration on January 6, 2017. I incorporate my earlier testimony from those Declarations.
4. I wish to address from my knowledge, the accuracy or completeness of statements found in the January 6, 2017 Responsive Brief of HC&S and the Responsive Brief of the County of Maui.

Responsive Brief of Hawaiian Commercial and Sugar Company ("HC&S")

Standards Used for IIFS Decisions

5. On p. 3 of their Responsive Brief HC&S makes the following statement:

" The purpose of this proceeding is not to allocate specific quantities of water to any particular user. However, this IIFS proceeding will determine the overall amount of water available for offstream uses."

These statements overlook the fact that the Commission on Water Resources Management ("CWRM") IIFS process over the years has asked East Maui's rural communities to delineate or "prove" the amount of water they will need to have in the streams in order to demonstrate that their riparian or appurtennant rights will be "harmed" if instream flows are not sufficient.

6. This has resulted in IIFS set to supposedly meet these de facto "allotments" of water available to these instream users based upon those use analyses. For example, in the January 2016 Conclusions of Law, hearing officer Miike gives a detailed analyses (p. 97 to 101) of the particular amounts of land that are justified to receive adequate instream flows for kalo cultivation. CWRM has regularly discussed and determined specific amounts of water needed for various offstream users such as HC&S, Maui Land and Pine, Upcountry farmers, DHHL and DWS Upcountry system in its IIFS process. These amounts have been based upon acres in cultivation, service hookups and other factual information.

7. If Instream users have been the subject of this level of analyses, offstream users such as the transitional HC&S lands should have a similar analyses done to determine their actual agricultural use and the timing of future uses. This is the standard that has been applied to instream users. For example, in the 2015 East Maui Streams IIFS Contested Case, MTF plaintiff TARO requested consideration for future use of Puolua stream water to serve several acres of publicly and privately owned kalo land situated along Puolua stream mauka of the New Haiku Ditch diversion and makai of Lowrie ditch diversion. TARO stated that it intended to lease and farm this land if sufficient flows in Puolua stream were restored below Lowrie ditch. (See TARO at ¶9-13) This land had riparian and appurtennant rights, but because it had no specific proof that it would be leased and farmed in the near term, it was not included in the hearing officer's FOF/ COL analyses computations of instream flows needed to serve East Maui kalo lands.
8. CWRM should apply the same standards to HC&S lands. Their present and future water needs should be based upon factual demonstration of future use in order to demonstrate "reasonable and beneficial use" to justify offstream diversions. The hearing officer's January, 2016 Draft COL states

on p. 95. "There is no right to divert water by non-riparian landowners, but such diversions are permissable if they are reasonable and beneficial." (COL number 28)

9. Such factual demonstrations of reasonable and beneficial use could include but not be limited to:

1) Leases or memorandum agreements for HC&S Maui lands with other agricultural users.
2) Contracts or commitments to install fencing or other infrastructure for proposed irrigated grazing areas on HC&S Maui lands
3) Land sale contracts with other agricultural users for HC&S Maui lands
4) Field logs on test crop areas defining size and length of the agricultural trials and potential crop expansion areas for HC&S Maui lands
5) Agreements with DWS to transport specific amounts of stream water to the DWS's Upcountry public water system

If factual basis of intended agricultural use is not presented sometime during the 2017 IIFS process, the Commission should conclude that there is unlikely to be water needed for agricultural uses on the lands in 2017-2018, and the IIFS, which are adjustable, should be set to retain the majority of water formerly diverted by HC&S in the petition streams.

No Timeline For Offstream Use is Provided

10. On p. 3 of their Responsive Brief HC&S makes the broad statement:

"If retention of the former plantation lands in agricultural production is to remain a viable option, the IIFS must make adequate provisions for potential offstream uses, including future agricultural uses."

HC&S offers no timeline for the requested "adequate provisions for potential offstream uses:" Are these potential uses over the next two years? Five years? Next decade? Should the needs and constitutionally protected rights of traditional stream users, rural communities and native stream life be put on hold, while everyone waits to see what HC&S does to transition its lands to new crops and perhaps even new owners? HC&S has been publicly discussing this transition for at least six years. (Exhibit E-174)

MTF asks the Commission to consider the practical implications of HC&S's statement. Is the Commission being asked to set an IIFS based upon speculative needs of offstream user HC&S with an open-ended timeframe? Does this mean the IIFS should be set that allows millions of gallons of stream water every day to be diverted, even when there is no farming for it to go to? For how long should this unwarranted diversion

be allowed until there is a conclusion that lands it was intended for are or are not likely to be farmed in the near future? Should there be an "adaptive management" re-evaluation of the offstream diversions allowed every year based upon actual agricultural use? Should the IIFS be set to allow the majority of water to flow naturally in the steams and allow the POTENTIAL to divert when water is actually needed for HC&S crops? The HC&S brief leaves these important questions unanswered.

HC&S Diverts Numerous Streams Not Subject to the IIFS Petition

11. The HC&S Responsive Brief on p. 3 also incorrectly suggests that:

"Setting the IIFS at levels so high that little to no water would be available for future offstream uses would impede HC&S and any other user from investing in and developing business plans for new agricultural ventures on the former plantation lands."

MTF and its supporters ask the Commission to recognize that the stream flow levels that HC&S refers to as "too high" may actually be the natural state of the streams. HC&S offers no proof of what setting standards "too high" would be.
HC&S also offers no proof that setting the undefined "too high" IIFS for the 23 petition streams (based upon corrections provided in the Proposed FOF at 57 and 58) streams out of the over 100 East Maui streams and tributaries they are allowed to unconditionally divert would result in "little to no water" to offer future "investors" in agricultural operations on HC&S lands. The HC&S statement obscures the reality that HC&S currently has the unrestricted ability to divert the entire flow of dozens of robust streams in East Maui and Haiku that are not covered by the IIFS Petition.

12. A list of these streams currently diverted by HC&S and not subject to the current East Maui CC IIFS petition was included in the proposed FOF on pages 10-12, at FOF 59. HC&S should specify how many acres can be served by the stream diversions not subject to this petition, before representing to the Commission that unspecified "high IIFS levels" will harm their ability to attract future farming enterprises to their lands.

The Commission has Regulatory to Set IIFS for Individual Stream Reaches

13. On p. 5 of their Responsive Brief HC&S argues that :

"Pursuant to CWRM's administrative rules, CWRM has discretion but not the obligation to set IIFS for individual stream reaches"

Once again, HC&S is ignoring the reality of the failures of past attempts to have a fair and just IIFS process and viable outcomes for East Maui streams and communities. CWRM has used its regulatory authority in the past to set IIFS standards for individual reaches of particular streams in East Maui, often limiting the reaches proposed for IIFS restoration to satisfy the diversion needs of HC&S

14. For example, IIFS for Puolua stream in the 2010 CWRM decision was set for a point immediately below the new Haiku Ditch diversion. Since the majority of base flow was intercepted at the Lowrie ditch diversion, there was only a limited amount of water that even reached the lower Haiku diversion. This made the implementation of the adopted IIFS level a moot point, since it was never achieved except during storm flows.

15. The analysis of individual reaches is allowed and is warranted, especially in regard to providing adequate habitat for native streamlife. MTF's goal is to insist that the Commission use all the tools at its disposal, including setting IIFS for individual reaches of streams, to actually succeed in implementing the legally required protection of public trust resources at adequate levels. For too long there have been inadequate restoration levels proposed and very inconsistent compliance with even those levels.

Key Issues Must be Discussed to Determine Reasonable and Beneficial Use

16. HC&S suggests that the Re-Opened Evidentiary Hearing Should Not Be "Mired in Irrelevant Issues"

HC&S urges the Commission to ignore such important issues as "Speed at which Taro streams should be restored," whether A&B/EMI can assign East Maui "water rights" to a third party and adoption of temporary or interim measures to restore flows at taro streams.

17. HC&S is asking for the Commission to adopt IIFS for 23 East Maui petition streams that will be specifically set to to allow up to 116 mgd of stream water to be diverted for speculative offstream agricultural uses, regardless of whether any farming is actually taking place on the lands for many years. Ironically, in spite of the enormity of this request, HC&S begrudges the Commission even considering the speed at which a handful of taro streams should be restored or adoption of any temporary or interim measures to restore flows at these streams. In short, HC&S asks for real water to be available immediately for its lands, but wants the Commission to accept the theoretical "restoration" of water to the taro streams, regardless of how long communities need to wait for the water to actually return. HC&S does not want the Commission to review whether the implementation of full flows is proceeding efficiently or to adopt any accountability measures or

interim solutions to ensure speedy implementation of actual full flows that East Maui communities have requested for 15 years.

18. This proposed view of the Re-Opened Evidentiary Hearing does not "balance" uses as required by the Water Code. Instead, it assures that offstream users, who have access to diverted stream water from dozens of other streams not subject to this petition, as well as their private well system, continue the status quo and also have access to the majority of the base flow of the 23 petition streams. Meanwhile instream users, who depend solely upon the rain and the 23 streams, need to wait for years to see natural flows implemented in the handful of streams promised full and complete restoration.

19. The Commission has exercised its ability to adopt interim restoration measures for East Maui streams in the past. Since the original 2015 contested case did not address the concept of full and complete restoration of the seven "taro streams" and what interim measures need to be in place while more elaborate solutions are permitted and worked out, this re-opened portion of the case should do so. This information is absolutely essential and will not "mire" the proceedings.

20. It is also vital during the Re-Opened Contested Case proceedings that the Commission considers the possibility of HC&S assigning its lease rights to another party. The former phase of the East Maui Streams IIFS Contested Case (2015-16) focused on the existing operations of HC&S. Extensive information was supplied to the hearings officer and the Commission regarding the company's past, present and future agricultural operations. This included the assurance that the company was viable far into the immediate future. Today we see the company selling off its equipment and letting its employees go. The Commission was not informed of this scenario in 2015, although parties to the Contested Case, including MTF, suggested that it was a very real possibility.
21. Now the Commission has re-opened the Contested Case to consider this changed circumstance. It can not rely on the past information regarding HC&S activities to fulfill its responsibilities to "balance" competing uses of public trust resources and determine if there is "reasonable and beneficial use" being proposed by the potential offstream users. The Commission, and the contested case parties, must be presented information, or be able to request information as to who will be the end user of the millions of gallons of public trust water resources being discussed in the Contested Case. This information is absolutely essential and will not "mire" the proceedings.

22. On p.7 of the HC&S Responsive Brief "IIFS Implementation and Restoration Issues" are discussed. A reference is made to MTF's request to the Commission to adopt temporary or interim measures to restore stream flow more quickly that do not require major permits. The HC&S erroneously concludes that this is unnecessary since "streamflow has already been largely restored on interim basis..." MTF would not be making this request on behalf of its supporters if stream flow was restored on an interim basis on Hanehoi, Huelo and Puolua streams. HC&S is not informing the Commission that interim restoration consists of two small gates open on the New Haiku Ditch that allow water from one reach of Hanehoi and one reach of Puolua stream to return to the stream bed. Because of recent high rainfall, the streams currently do have flow through these gates. Above the open gates, both streams and their tributaries are completely and severely diverted. This precludes any use of the streams by native stream species and also creates stagnant pools that breed mosquitos.

23. On Hanehoi stream, for example, while one small gate is open at the lowest diversion Haiku Ditch (H-3) at around 400 ft elevation, the grates and dams at the three other levels of diversions continue to siphon away the majority of any flow before it can even reach that lower gate. This includes three diversions of Hanehoi and its tributaries on Lowrie Ditch-around 800 ft elevation: Huelo stream intake (L-7), Hanehoi Intake (L-5) and West Hanehoi (L-6). All of these have concrete dams that block flows and send all the water into a grate and to the ditch. At 1000 ft elevation the New Hamakua Ditch intake grate (NH-17) absorbs the waters of the Hanehoi stream during higher flows, and a few hundred feet above that, the Wailoa Ditch intake grate (W-18) takes virtually the entire stream flow and leaves a stagnant pool below the diversion. In short, opening one gate at the 400 ft elevation and not considering any temporary bypass of other intakes will not result in Hanehoi flows as dryer weather comes. Permits need to be expedited or interim solutions implemented.

24. HC&S's Responsive brief on p.7 also concludes that the scope of the Re-Opened Contested Case focusing on managing interim restorations only pertains to "operational integrity" of the EMI system in light of reductions in diversions."

    The State water code deals with balancing the needs of diverse users of public trust water resources. The Department of Agriculture deals with related issues such as the operational integrity of water diversion systems. The Hearing officer's Order mentions the "operational integrity" of the EMI system in light of reductions in diversions" as a specific topic in its own right. Separate information is needed on managing interim restorations. It would be counterproductive to limit the entire scope of the discussion on managing of interim restorations to the scanty information we are being

provided about the modification and removal of HC&S's EMI's diversion structures. The discussion has to include specific plans to restore the actual flows and the restoration of the integrity of the stream ecosystems so they are viable for native streamlife. This information is missing from the HC&S materials.

County of Maui Responsive Brief

MDWS Actual Water Needs Should be Clarified: Amounts Are Not Consistent

25. MDWS Opening Brief states in Section III- "MT'S RE-OPENING BRIEF MISCITES THE EVIDENTIARY RECORD"

> The Proposed FOF/COL/D&O for CCH-MA-01 concluded that MDWS Upcountry system currently uses an average of 7.1 mgd of East Maui stream water. MDWS' current unmet demand up to 2030 is 3.75 mgd (Upcountry meter list) plus 1.65 mgd for Upcountry system population increase. (COL 115). This is a total of 5.4 mgd needed by 2030. Elsewhere in the proposed FOF it is states that MDWS
>
> would need between "4.2 mgd to 7.95 mgd of water for 2030 growth demand." (FOF 474).

26. In its June 9, 2016 Memorandum in Support of its Motion on the Scope of the Re-opened Contested Case Hearing, and its October, 2016 Opening Brief MDWS stated in Section B. that it "anticipates a need of an additional 9.15 mgd to be able to meet future demands through 2030."

27. MDWS offered no explanation why they now assume that every one of the 1,852 applicants on the Upcountry meter list will now be demanding water by 2030. All past Contested Case documents and testimony (as reflected in proposed COL 115) offered the opinion that no more than half the meters would ever be issued, creating a realistic unmet water demand of 3.75 mgd. MDWS does not inform us whether any of those meter reservations have been given out during the past year and if the MDWS has a goal of reducing the list by any particular amount each year, utilizing existing Upcountry water sources. This data would affect the ultimate numbers that should be used to calculate actual future demand for the Upcountry system.

28. The MDWS has also offered statements in their staff Declarations giving a 2030 water demand range of 4.2 mgd to 7.95 mgd. (FOF 474). The figure of 9.15 mgd demand was not mentioned anywhere until the most recent brief. It does not appear to be realistic.

29. As noted in our earlier Responsive Declaration (at ¶39 and ¶40 and Exhibit E-171), the MDWS is working with a different 2030 demand for the Upcountry meter list in its Draft Water Use and Development Plan (WUDP). The WUDP states that 2030 Water Meter List demand is between 3.6 and 7.3 mgd because "historically about 50 percent of the requests are withdrawn or denied." The anticipated water needed to accommodate additional new growth in the Upcountry area is estimated in the WUDP to be .7 mgd, not 1.65 mgd as stated in the MDWS Contested Case brief. (Exh E-171.) The WUDP figures would result in a total MDWS demand between 4.3 mgd and 8 mgd, compared to the County's brief which places the demand at a flat 9.15 mgd.

30. MTF would conclude that the MDWS stated unmet demand for 2030 is either 5.4 mgd or somewhere between 4.2 and 7.95 mgd. The MDWS stated during the 2015 East Maui IIFS Contested Case Hearing that it has no intention of meeting any of that future demand with "new wells," yet the MDWS on November 8, 2016 submitted an Environmental Assessment (EA) for a new back-up well: Pookela "B" Exploratory Backup well. The county has also been supportive of the state's plans to drill a well in the Upcountry area to serve the future needs of Hawaiian Homelands residents in Keokea and Waiohuli Homesteads, thus relieving potential future growth pressures on the MDWS system which currently supplies at least .5 mgd to the Hawaiian Homelands in Keokea and Waiohuli.

31. MDWS Director, David Taylor has stated publicly that "there is a huge difference in demand" for the entire Upcountry MDWS system and that "it's not easily predictable." Taylor noted that system demand Upcountry could be as low as 3.2 mgd during rainy weather and as high as 7.2 mgd-all in the same month. (Exhibit E-177)

32. The MTF Opening Brief at p.9 states: "MTF supports the current recommended allocation of water by the Hearings Officer to the MDWS." This statement would not preclude MDWS receiving a reasonable additional amount of stream water to meet future demands.

33. While MDWS has stated a proposed need for additional water to meet system demands up to 2030, many important facts have either not been discussed, or vital information has not been provided:

a) What the exact amount of that increased demand will be? 4.2 mgd? 5.4 mgd? 7.9 mgd? or even less?
b) How much future demand is practical to meet with East Maui Stream water, since ditch levels can vary, and how much would be better served through existing wells?

c) How much of the projected Upcountry population growth is connected with DHHL lands, and what are the implications of DHHL providing their own water supply for that additional growth?
d) How much future demand could be met with existing unused upcountry well capacity if an economical renewable energy source was utilized for pumping?
e) Since even existing demand varies widely with the weather, what affect would construction of the Kamole Reservoir have on meeting peak demand and when would it be completed? (Director Taylor emphasized in his declarations that a site has not yet been chosen- FOF 484)
f) How much water from the Awalau and Opana Stream intakes would be available to supplement the MDWS Upcountry system and meet 2030 water demands if, in the future, the MDWS would, as stated in the Nov 2016 DEA for the Pookela backup well: "either construct a new WTF to treat water from the intakes and transmit it to the existing Maluhia Tank, or construct a new booster pump station and pump the raw water for treatment at the existing Pi'iholo WTF." (See Exhibit E-183)
g) If increased Upcountry MDWS system demand is entirely dependent on surface water sources from East Maui, will the Upcountry well capacity also need to be increased, in order to have a reliable system? How long will that take and how much will it cost?
h) What portion of projected Upcountry demand will be met through increased water efficiency and conservation among existing Upcountry water customers?
i) Will increased reliance on surface water overwhelm the capacity of any of the Upcountry treatment plants and cause water quality challenges as occurred in the past? How much will upgrades cost?
j) How much of the demand attributed to the Upcountry Meter List will be met in the next several years through existing MDWS Upcountry water sources?

Once this information is provided, it will become clearer how much additional surface water the MDWS would reasonably need, over what time period, and what other infrastructure would need to be in place to treat, store and distribute the increased supply.

34. The MDWS Upcountry System is far different from the County's other water systems, since water demands can vary widely in rainy or sunny weather and water supplies- 85% to 90 % dependent upon stream water-can also vary greatly. The existing MDWS well system, although invaluable during times of low rainfall, is rarely used at even half its full capacity most years due to pumping expenses.(See Exhibit E-178 thru E-180) More economical pumping methodologies could allow the existing MDWS Upcountry well system to meet increased regional water demand in the near future. The wells at peak use of 1.5 mgd pumping (from 3 wells) in drier years are still using less than half of their combined 3.4 mgd capacity.

35. For example, the MDWS' Po'okela Well, with a permitted capacity of 1.3 mgd , was only pumped an average of around 67,000 gallons per day in all of 2016--about 5% of its permitted capacity. In the drier times of 2013-14 the same well was pumped ten times that amount, or an average of .66 mgd. (Exhibit E-183) What this illustrates is that the existing Upcountry wells have an important role to play in meeting future Upcountry water system reliability demands that is part of the IIFS discussion. This is not acknowledged in the current MDWS presentations to the Commission, which seem to focus only on the need to solve all Upcountry water needs with East Maui stream water because it is inexpensive. The larger picture of clearly defining the reasonable future demand for the MDWS Upcountry system and evaluating the various potential water sources, is part of the IIFS evaluation of "reasonable and beneficial use."

Consistency With Water Allotments in Na Wai Eha Settlement

36. The MDWS Opening Brief at Section IV inferred that MTF's position on the Upcountry MDWS system lacking the infrastructure needed to treat significantly larger amounts of surface water as being "circular." MDWS also suggested that such a position was inconsistent with the Na Wai Eha Contested Case settlement of April 2014. MDWS pointed out that MTF was a party to the settlement which:

"recognized an allocation of an additional 1.5 MGD of surface water to MDWS as useful and beneficial, despite the fact that, at that time, the Iao Treatment Plant could not process or deliver the additional water."

37. First, the 9.5 mgd of additional requested by MDWS would more than double the amount of stream water currently processed by MDWS Upcountry system. Since the request is for the current year, It is prudent for all concerned to question whether there is or will be shortly, the infrastructure needed to utilize the additional water, or for that matter, the immediate demand for the water from the Upcountry meter list.

It is clear from the discussion in the previous section of this Declaration that MDWS does not appear to exactly know how much water it needs for future Upcountry system demands, or when additional infrastructure, such as the proposed Kamole reservoir, will be in place to make such allocations practical to utilize.

38. As for the Na Wai Eha settlement terms, settlement discussions and agreements often involve joint decisions among the parties that would not always emerge from the more factual process of a contested case proceeding. Comparing an action from a settlement agreement to a

position that should be taken during a Contested Case, in general, is not logical. They are very different processes.

39. As a representative for MTF during those settlement discussions, my recollection is that the additional 1.5 mgd of Wailuku River ('Iao stream) water requested by MDWS was entirely consistent with the expansion of the 'Iao Water Treatment Facility that had first been planned in 2004, ten years earlier. In fact, the 2004 FEA for the 'Iao Water Treatment Facility Expansion project clearly states that the County's intention was to increase the capacity of the existing treatment facility from 1.7 mgd to 3.2 mgd in order to process an additional 1.5 mgd of stream water the County was securing from Wailuku Agribusiness/Wailuku Water Co. (See Exihibit E-181)
40. In conclusion, MTF and the other parties agreed to support MDWS having the modest amount of stream water needed to follow through on a ten year old infrastructure improvement project, first planned in 2004. In return, by mutual agreement of all parties, Wailuku river was allowed to flow again to the sea for the first time in over one hundred years.

41. MDWS can contend that they were only able to follow through on plans for the brand new expanded 'Iao Water Treatment Facility described in a 2015 FEA after the Na Wai 'Eha settlement was concluded, but the FEA environmental disclosure document indicates that early consultation on the project with agencies like the Army Corps of Engineers had taken place in October 2013, six months before any Na Wai 'Eha settlement talks were even begun. (see Exhibit E-182) Since the MDWS already had a potential project site for the Army Corps to evaluate, it is likely that MDWS had been working on agreements to acquire the land for the new facility and had expended funds to prepare the March 2015 Draft EA long before the April 2014 Na Wai Eha Contested case settlement was finalized.

42. In fact, the 2015 Iao Water Treatment Facility Expansion FEA acknowledges on p. 34 in the "Water" Section, that the MDWS did not yet have an approved Surface Water Use Permit Application (SWUPA) from the State Water Commission at the time of the Final EA, yet it appears start-up funds were invested in the project. It would appear, that the County can and does move forward on water infrastructure projects without complete assurance that all needed water resources will be available. The prudent evaluation by the Commission of the County's request for a substantial increase in the stream water it wants to divert should be evaluated within a framework of commitment to needed infrastructure and a review of alternative water sources already or likely to be available.

Executed this 20 day of JANUARY, 2017.

Name

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In re Petitions to Amend Interim Instream Flow Standards for Honopou, Hanehoi/Puolua (Huelo), Waikamoi, Alo, Wahinepe`e, Puohokamoa, Haipu`ena, Punalau/Kōlea, Honomanu, Nua`ailua, Pi`ina`au, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani (Hamau), Wailuanui, Waikani, West Wailuaiki, East Wailuaiki, Kopili`ula, Puaka`a, Waiohue, Pa`akea, Waiaka`a, Kapa`ula, Hanawī and Makapipi streams.	Case No. CCH-MA13-01 REBUTTAL DECLARATION OF ALBERT PEREZ FOR RE-OPENED HEARING

REBUTTAL DECLARATION OF ALBERT PEREZ FOR RE-OPENED HEARING

1. My name is Albert Perez; I am a resident of the County of Maui, State of Hawaii.

2. This Rebuttal Statement is based upon my personal knowledge, except where otherwise stated.

3. I submitted a previous Declaration for this reopened contested case on October 17, 2016, and a Responsive Statement on January 6, 2017; I incorporate my testimony from those documents.

4. I am the Executive Director of the Maui Tomorrow Foundation (MTF). My background and qualifications were set forth in a previous exhibit.

5. I wish to address from my knowledge the accuracy and/or completeness of statements found in HC&S' January 6, 2017 Responsive Brief.

6. CWRM needs to restore as much water to instream uses as possible. The statements of HC&S regarding future water use are speculative, vague and incomplete; they have not shown how

these statements are based on either a) industry standard crop water use requirements or b) on data that has been gathered based on experience growing these particular prospective crops in the widely varying climactic conditions found in each of their fields. CWRM should hold this commercial user to a higher standard, and should require, at a minimum, that HC&S show calculations for each crop in each field where it is proposed to be grown, using a realistic timeline to assess how much land will be under actual cultivation, and thus, how much water will be required in any given year.

7. Based on the business model described in A&B's Investor's Day presentation of November 2, 2016 (see Exhibit E-173), it is clear that A&B's business strategy considers agriculture to be merely a temporary holding strategy along the path to profit from sale or development of the land. This strategy includes Long Range Planning & Entitlement, and Infrastructure Planning & Development. It also includes the preservation of Water Rights and Water Delivery in order to keep the value of their real estate high while they try to sell or urbanize it. IIFS should be set at a high level that protects public rights in these public trust resources as being superior to the proposed private commercial use until A&B has proven with data-based projections, a credible business plan, and a reliable timeline that they will actually pursue agriculture. A high level of scrutiny must therefore be employed when considering this proposal for private commercial use. MTF would support some allowance for A&B to actually farm the land, on the condition that any change in use (title, lease, permit, easement, licenses or entitlement to those lands), or any cessation of agricultural use, would automatically cause the reversion of such water back to the streams in the petition area. In addition, CWRM should require meters, monitoring, and access by parties other than A&B to ensure compliance.

8. As part of its duty to protect public trust instream uses as much as possible, CWRM should frown on agricultural practices that are wasteful of water. Just as CWRM staff considers different irrigation methods in its evaluation of crop water use requirements, the agency should also consider whether the implementation of agricultural practices such as those outlined in the Mālama ʻĀina report (Exhibit E-160) would enable A&B to use less water than they are claiming they will need, and would thus allow more water to remain in the streams.

9. HC&S in Section II, "DISCUSSION" (page 2) cites the Mālama `Āina report's support for allowing some streamflow to be diverted for agricultural use, but then ignores the clear findings of the same report that water use can be reduced by 10 to 50 percent through the use of regenerative agricultural methods which:

- rebuild the soil and increase its water holding capacity, thus increasing effective precipitation
- reduce water use by selection of crops that are adapted to the local climate and need less water
- reduce evapotranspiration and harvest atmospheric moisture by planting multi-function windbreaks
- adjust the shape and orientation of fields and grade the site to maximize rainwater harvesting, promote soil infiltration, increase groundwater recharge, and allow storage of storm-water runoff
- recharge groundwater and restore hydrological cycles on the land
- allow some of the previously wasted water to be returned to the streams
- reduce the need for pumped irrigation water, thus making agricultural operations more viable without requiring stream diversion

These regenerative agricultural methods can and should be implemented on former sugar lands in order to protect public trust instream resources and allow more water to remain in the streams.

10. HC&S also claims on page 2 that the Mālama `Āina report does not propose any particular agricultural uses for HC&S' lands." On the contrary, pages 28 – 33 of Mālama `Āina detail a list of agricultural uses which would require less water, including ten different categories of crops, the creation of value-added products from locally grown crops, agritourism, and regenerative agricultural education. This approach would increase the likelihood of profitability of long-term agriculture while using less water, thus helping to protect public trust instream resources and allow more water to remain in the streams.

11. A&B's request for water for agricultural use is inconsistent with actions that they have recently taken to auction off items that could be used in agriculture at any scale. Examples

include Ford and Toyota 4X4 pickup trucks, all-terrain vehicles, excavators, tractors, forklifts, welders, generators, grinders, and pressure washers. As reported in The Maui News on January 19, 2017, "It was standing room only for the more than 250 people at the Maui Beach Hotel on Wednesday who crammed into a hotel ballroom to try and fetch a good deal on Hawaiian Commercial & Sugar Co.'s red pickup trucks, **small farming equipment** (Emphasis added), machine shop items and even microscopes and scales." CWRM should carefully weigh whether A&B is serious about long-term agriculture, or whether it is just a means to hold land and claim water until they are ready to urbanize valuable farmland.

I declare under penalty of law that the foregoing is true and correct.

Executed this 20th day of January, 2017.

Albert Perez