NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
Telephone: (808) 521-2302

SUMMER L. H. SYLVA 9649
CAMILLE K. KALAMA 8420
Attorneys for Petitioners
Nā Moku Aupuni O Ko`olau Hui
Lurlyn Scott and Sanford Kekahuna

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

PETITION TO AMEND INTERIM INSTREAM FLOW STANDARDS FOR HONOPOU, HUELO (PUOLUA), HANEHOI, WAIKAMOI, ALO, WAHINEPEE, PUOHOKAMOA, HAIPUAENA, PUNALAU/KOLEA, HONOMANU, NUAAILUA, PIINAAU, PALAUHULU, 'ŌHI'A (WAIANU), WAIOKAMILO, KUALANI, WAILUANUI, WEST WAILUAIKI, EAST WAILUAIKI, KOPILIULA, PUAKAA, WAIOHUE, PAAKEA, WAIAAKA, KAPAULA, HANAWI and MAKAPIPI STREAMS	CASE NO. CCH-MA13-01 NĀ MOKU AUPUNI O KO`OLAU HUI, LURLYN SCOTT, AND SANFORD KEKAHUNA'S EXCEPTIONS TO THE HEARINGS OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER DATED AUGUST 2, 2017; CERTIFICATE OF SERVICE

NĀ MOKU AUPUNI O KO`OLAU HUI, LURLYN SCOTT, AND SANFORD KEKAHUNA'S EXCEPTIONS TO THE HEARINGS OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER FILED AUGUST 2, 2017

Petitioners Na Moku Aupuni o Ko'olau Hui, Lurlynn Scott, and Sanford Kekahuna (collectively, "Petitioners"), respectfully submit their written exceptions to the Amended Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") (collectively, "Proposed Decision") dated August 2, 2017.

It has been more than 16 years since Petitioners filed their IIFS petitions. The commission has had as many years to fulfill its duty towards the public interest by establishing minimum instream flows. While their IIFS petitions were pending, Petitioners participated in

three contested case hearings, before two separate agencies,[1] to prevent and recover from the harms that the EMI Ditch system has inflicted on the streams they have stewarded for generations to protect stream life and to perpetuate the traditional and customary practices dependent on their steady flows. After all that waiting, the Proposed Decision essentially orders that "EMI may continue to leave the streams undiverted . . . until EMI Ditch diversions increase to the point that their flows are required to meet HC&S's expanding irrigation requirements on their East Maui fields." *Id.* at 163 (citing COL #260). In speaking directly to Petitioners – fifth and sixth generation East Maui taro farmers, fishers, and gatherers, all of whom were robbed of natural stream flows for over 140 years – the Proposed Decision orders them "to develop a system of reasonable sharing" among themselves and "for [the] resuscitation of stream life" with leftover flow amounts **not** required to meet HC&S's expanding irrigation requirements.

Any decision that would sanction the idea of East Maui streams serving as a convenient reservoir for offstream private use, at some undetermined time, and under indeterminate circumstances, offends the public trust and the spirit of the instream use protection scheme. The Hawaii Supreme Court has repeatedly invalidated decisions like the one proposed because the wholesale delegation of public trust duties to private entities like EMI, HC&S, and A&B perverts the law, indeed the constitution, to the harm of state waters and native Hawaiian rights. *See Ka Pa 'akai o Ka 'Aina v. Land Use Comm'n,* 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000); *In Re Water Use Permit Applications,* 94 Haw. 97; 9 P.3d 409 (2000)(*Waiāhole I*); *Hui Alaloa v. Planning Comm'n of Maui County*, 68 Haw. 135, 705 P.2d 1042 (1985).

In recommending that the commission sanction allocating 88 to 96 mgd of East Maui stream flows, arising from 33,000 acres of Crown lands now leased by the State of Hawai'i, to satisfy the bulk of HC&S's *estimated* 115.43 mgd gross irrigation requirement, (COL #222), the Proposed Decision ignores well-settled law and case precedent on a record completely devoid of the requisite evidentiary basis, at a time when the actual need and demand for East Maui surface water by private, commercial diverters in Central Maui are at an all-time low. The Hearings

[1] The instant contested case which held hearings in 2015 and 2017, and Petitioners' contested case currently pending before the Board of Land and Natural Resources (BLNR).

Officer convened these hearings in earnest to address Interim Instream Flow Standards (IIFS) for twenty-seven (27) East Maui streams impacted by offstream, commercial diversions in an integrative approach and in recognition of the Commission's inability otherwise to "evaluate the cumulative impact of existing and proposed diversions on trust purposes." FOF #28. As the Hearings Officer himself admits, it is nearly impossible to meet the objective of the IIFS under natural conditions: a stream flows natural variability may cause it to dip below the IIFS due to periods of rainfall, even before competing offstream uses are factored into amending an IIFS. FOF #276. That is precisely why reasonable "margins of safety" are incorporated into minimum standard determinations: to account for these naturally-occurring events and to achieve instream use protection to the extent practicable for streams that take first and for instream trust purposes that depend on a sufficient water allocation.

Instead of doing what the law and evidentiary record require, the Proposed Decision elects to bestow private, commercial diverters with the unfettered right to drain streams above designated minimum flows that provide the **least** protective or precautionary allocation **practicable** under the circumstances. As *Waiāhole I* teaches, such a decision "establishes a working presumption **against** public instream use" and, as a result, stands the constitution and code on their heads. *Id.* at 156

I. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION'S FAILURE TO COMPLY WITH THE PUBLIC TRUST DOCTRINE AND OTHER RELEVANT LAWS AND STATUTES

The Proposed Decision inexplicably eliminates the section of the 1/15/16 Proposed Decision[2] titled, "The Public Trust Doctrine," in its entirety, along with the nine conclusions of law recognizing the doctrine's bedrock principles and mandates. The spirit of the doctrine is noticeably absent from the decision as well. Petitioners take strong exception to the above omissions, and restate each of those important guiding principles below, without which the

[2] The 1/15/16 Proposed Decision was the Hearings Officer's Proposed FOF, COL, and D&O to the commission and the parties following 15 days of hearings held between March 2, 2015 and April 2, 2015 to address all 27 petitions filed by Petitioners on May 24, 2001. COL #33, 36.

commission cannot be expected to fulfill its duty towards the public interest in minimum instream flows:

The Public Trust Doctrine

9. Under Articles XI, sections 1 and 7 of the Hawaii State Constitution, the public trust doctrine applies to all waters of the State without exception or distinction. (*In re Water Use Permit Applications* ["*Waiahole I*"], 94 Haw. 97, 133; 9 P.3d 409, 445 [2000].)

10. The state water resources trust embodies a dual mandate of protection and maximum reasonable and beneficial use. The object is not maximum consumptive use but the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes use. (*Waiahole I*, 94 Haw. at 139-140; 9 P.3d at 451-452.)

11. The purposes of the water resources trust are: 1) maintenance of waters in their natural state; 2) domestic water uses of the general public, particularly drinking; 3) native Hawaiian and traditional and customary rights, including appurtenant rights; and 4) reservations of water, particularly for Hawaiian home lands. (Waiahole I, 94 Haw. at 136-138; 9 P.3d at 448-450. *In re Wai'ola o Moloka'i, Inc.*("*Wai'ola*"), 103 Haw. 401, 429, 431; 83 P.3d 664, 692, 694 [2004].)

12. There are no absolute priorities among trust purposes, and resource protection is not a "categorical imperative." The Commission must weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law. (*Waiahole 1*, 94 Haw. at 142; 9 P.3d. at 454.)

13. Any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment. Use consistent with trust purposes is the norm or "default" condition, which effectively prescribes a higher level of scrutiny for private commercial uses. (*Waiahole I*, 94 Haw. at 142; 9 P.3d at 454.)

14. Reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values. (*Waiahole I*, 94 Haw. at 141; 9 P.3d at 453.)

15. When scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are part of the public trust, it is prudent to adopt "precautionary principles" in protecting the resource. Lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. (*Waiahole I*, 94 Haw. 154-155, 159; 9 P.3d 466-467, 471.)

16. Uncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection. Although interim standards are merely stopgap measures, they must still protect instream values to the extent practicable. The Commission may still act when public benefits and risks are not capable of exact quantification. (*Waiahole I*, 94 Haw. at 159; 9 P.3d at 471.)

17. "In requiring the Commission to establish instream flow standards at an early planning stage, the Code contemplates the designation of the standards based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments." (*Waiahole I*, 94 Haw. at 155; 9 P.3d at 467.)

18. "(I)n the interest of precaution, the Commission should consider providing reasonable 'margins of safety' for instream trust purposes when establishing instream flow standards." (*Waiahole I*, 94 Haw. at 156; 9 P.3d at 468.)

1/15/16 Proposed Decision at pages 93-94.

As a starting point, the state water resources trust or public trust doctrine mandates both protection and maximum reasonable-beneficial use. *Waiahole I*, 94 Haw. at 139, 9 P.3d at 451 (emphases added). The public trust doctrine, which is enshrined in the constitution, "applies to all waters of the State without exception or distinction." *Id.* at 133; 9 P.3d at 445. Importantly, the public trust doctrine's "dual mandate of protection and maximum reasonable and beneficial use" prescribes "the most equitable, reasonable, and beneficial allocation of state water resources [to uses], with full recognition that resource protection also constitutes use." *Id.* at 139-40, 9 P.3d at 451-52. "Any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment" which "effectively prescribes a higher level of scrutiny for private commercial uses." *Id.* at 142, 9 P.3d at 453. Even though "the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values," any such accommodation must still reflect "the most equitable, reasonable, and beneficial allocation of state water resources." *Id.* at 141, 9 P.3d at 453. Moreover, there can be no vested rights in the use of public water. *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i,* 133 Hawai'i 141, 172; 324 P.3d 951, 982 (2014)(*Kaua'i Springs*).

As the Proposed Decision recognizes, the East Maui watershed from which the EMI Ditch System diverts water is not a designated surface water management area under HRS §§ 174C-45 and 174C-46, (COL #33), and as such, is governed by the common law. COL #34. Importantly, "[t]here is no right to divert water by non-riparian landowners [such as EMI, HC&S, and A&B], but such diversions are permissible if they are reasonable and beneficial." COL #42. "The continuing use of stream waters by non-riparian landowners [like EMI, HC&S, and A&B] is permissible if the use is reasonable and beneficial and will not harm the established rights of appurtenant and riparian landowners [like Petitioners]." COL #51. And in these reopened hearings, the Hearings Officer found that "[p]arties with appurtenant and riparian rights [like Petitioners] were harmed by the EMI Ditch diversions." COL #53.

II. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION'S RECOMMENDATION *AGAINST* MAXIMUM RESOURCE PROTECTION IN THE ABSENCE OF FINDING REASONABLE AND BENEFICIAL USE

Unlike the 1/15/16 Proposed Decision, which specifically and expressly determined the value of "HC&S's reasonable and beneficial irrigation requirement" (*Id.* at 251, COL1 #251, FOF1 #346), its "reasonable and beneficial use of EMI ditch system surface waters" (COL #255), and its "total reasonable and beneficial use" (COL #256) for sugarcane, the Proposed Decision for these reopened hearings fails to make any "reasonable and beneficial" findings, conclusions, or other determinations with respect to the present and/or forecasted water requirements associated with the acreage HC&S estimates will be in diversified agriculture (COL #223). The Proposed Decision stops short of that by conspicuously limit[ing] its findings and conclusions to HC&S's "aggregate irrigation requirement" (COL #218), "gross irrigation requirement" (COL# 219), and "estimated gross irrigation requirement . . . contributed by the streams in the [East Maui] lease lands" (COL #222). Because under both the Public Trust Doctrine and the common law, diversions and the continuing use of stream waters by non-riparian landowners like HC&S "are permissible [only] if they are reasonable and beneficial,"(COL #42), the Proposed Decision's failure to declare HC&S's noninstream uses to be "reasonable and beneficial" renders the company's gross irrigation requirement irrelevant in the weighing and balancing of interests in the use of stream water, and, at a minimum, weighs in

favor of maximum stream protection. The Proposed Decision likewise fails to find or conclude that EMI and HC&S's continuing use and diversion of East Maui stream waters "will not harm the established rights of appurtenant and riparian landowners" like Petitioners. COL #51. To the contrary, the Proposed Decision concludes that "[p]arties with appurtenant and riparian rights [like Petitioners] were harmed by the EMI Ditch diversions." COL #53. In so doing, the Proposed Decision provides yet another basis for maximum stream and public trust protections.

To be clear, the Proposed Decision's failure to make any "reasonable and beneficial" use findings or conclusions with respect to HC&S's present and/or forecasted diversified agricultural uses on its former sugarcane lands necessarily prohibits this commission from compromising stream protection and the public trust uses of the water in favor of EMI's continuing or future noninstream use to satisfy any water requirements associated with HC&S's former sugarcane acres. Absent a permissible, competing offstream use for East Maui stream water, which by law must be "reasonable and beneficial," those "use[s] consistent with trust purposes is the norm or 'default' condition" and "the presumption in favor of public use, access, and enjoyment" control. *Waiahole I*, 94 Haw. at 142; 9 P.3d at 454. That also means that the commission has no "basis for postponing effective measures to prevent environmental degradation" and must establish IIFS adequate to "protect instream values to the extent practicable." *Waiahole I*, 94 Haw. at 154-55, 159; 9 P.3d at 466-67, 471.

III. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION'S FAILURE TO PRESCRIBE A HIGHER LEVEL OF SCRUTINY TO HC&S'S PRIVATE, COMMERCIAL OFFSTREAM USE

Even if the commission determines that the Proposed Decision's lack of any specific finding or conclusion of law determining EMI and HC&S's noninstream use to be "reasonable and beneficial" is not fatal to their continuing use and diversion of East Maui streams, there is no evidence in the record upon which to base any specific finding or conclusion that EMI and HC&S's present and forecasted diversified agricultural uses constitute "reasonable and beneficial" noninstream use.

Petitioners take exception to the Proposed Decision's erroneous conclusion that the wholly speculative or non-existent evidence proffered (or not) by HC&S during these

reconvened hearings is "the best information currently available" in satisfaction of the *Waiahole II* standard. COL #107. The Proposed Decision cites to *Waiahole I* and *Na Wai Eha* in support for the proposition that the Code contemplates the commission "establish[ing] instream flow standards . . . based not only on scientifically proven facts, but also on future predictions, generalized assumptions, and policy judgments," COL #18, 107, and "need only reasonably estimate instream and offstream demands." COL #17. Applying the latter reasoning to the earlier conclusion, however, misses the point and betrays a fundamental public trust principle conveniently deleted from this decision: that "**[a]ny balancing** between public and private purposes **must begin with a presumption in favor of public use, access, and enjoyment ...and prescribes a higher level of scrutiny for private commercial uses.**" *Waiahole I*, 94 Haw. at 142; 9 P.3d at 454 (emphases added). Highlighting that the burden of proof for an IIFS petition rests with the Commission and not HC&S, COL #13, or that the IIFS burden is less than the one applicable to water-use permits, (COL #107, 110), does not absolve the commission of its duty to prescribe a higher level of scrutiny to HC&S' proof, as a private commercial user, in "establish[ing] IIFS that 'protect instream values to the extent practicable' and 'protect the public interest." COL #13. The commission does not have the luxury of cherry-picking or compromising constitutional mandates in the manner put forward in the Proposed Decision.

In these reopened hearings, HC&S failed to prove their claimed uses and economic impacts, or to justify them in light of the purposes protected by the public trust. They alone should bear the burden and consequences of those deficiencies in proof; not the commission, not the Petitioners, and not the public trust.

A little over a year ago, the Hearings Officer proposed allocating **105.58 mgd** to be provided from EMI surface water deliveries to satisfy a reasonable and beneficial offstream use totaling **188.9 mgd**, including HC&S's reasonable and beneficial irrigation requirement of **140.19 mgd** for its **28,941 acres then-actively cultivated in sugar**. 1/15/16 Proposed Decision at 13. He further determined that HC&S's brackish groundwater wells could supply **83.32 mgd** to irrigate sustainably **17,200 acres** with well access. 1/15/16 Proposed Decision at 135. He based that allocation on: (i) the number of lands in actual cultivation; (ii) multiple decade's

worth of reports on surface water and pumped groundwater deliveries and irrigation water requirements; (iii) computerized water balance model data; (iv) commission staff reports; (v) agribusiness profit reports; (vi) yields per acre and acreage harvested reports; (vii) financial reports (i.e., market prices, fixed and variable costs, annual reports, profits); (viii) economic impact analyses of reduced water for its sugar operations; and (ix) alternate sources analyses.

In this Proposed Decision, the Hearings Officer allocates a range of **88** to **96 mgd** to be provided from EMI surface water deliveries to satisfy HC&S's "*estimated* gross irrigation requirement" of **115.43 mgd** for its **26,996 acres** estimated to need irrigation at full build-out at some indeterminate future date. COL #218-223. Admittedly, however, "requirements for actual irrigated fields are bound to change," (Proposed Decision at 162), "forecasted water requirements will continue to evolve" (COL #223), and "the acreage estimated to need irrigation - 26, 996 acres - is bound to shrink in the future" (COL #233). Indeed, the speculative nature of A&B's diversified agricultural future is underscored by its own evidence [limited to colored maps, charts, and self-serving declarations of company representative, none of who are qualified experts in diversified agricultural uses and/or business models] and/or lack thereof in the record:

- Forecasted water requirements "will not become final 'until every acre has been planted back in another agricultural use" although even that is "subject to change" because HC&S's yet to be identified "potential partners and lessees are expected to rotate multiple [yet unknown] crops that could potentially have different crop coefficients" correlating to reduced or increased irrigation requirements. FOF #344;

- "[T]he precise tolerance levels and the impacts of prolonged uses of brackish water on these crops [conceptually planned for fields that can access A&B's private groundwater wells for irrigation] are presently unknown. FOF #394. Moreover, "HC&S has not commissioned any expert to ascertain the brackish water tolerance or the impact of prolonged use of brackish water for any of its proposed uses." FOF #396;

- "[I]t is unknown whether every single one of these diversified agricultural uses will come to fruition because so many basic questions about [HC&S's] potential agricultural operations remain unanswered." FOF #344;

- As of the hearing date, "HC&S state[d] that no farmers have been willing to commit to cultivation." FOF #72;

- Rick Volner of HC&S stated "that they do not have any formal steps to implement the [diversified agricultural] plan," they "have no timelines other than the ones they are actively managing," and while they have "internal financing models on how they will execute their own plans" - none of which was submitted as evidence - financing models of future, unknown operators and tenants are likewise unknown. FOF#360.

The speculative and superficial quality of the above evidence, by any objective measure, fails to satisfy the "higher level of scrutiny" that the law explicitly prescribes "for private commercial uses." *Waiahole I*, 94 Haw. at 142; 9 P.3d at 454.

At the time of the hearing, the only fairly known, concrete evidence was that **680 acres** were *actually in cultivation* (FOF #356), most if not all of which were dedicated to test crops, and HC&S projected only **4,450 more acres** *to be in cultivation by the close of 2017* (FOF #355-58). The Petitioners take exception to the fact that the Hearings Officer never bothered to ascertain or to constrain his recommended findings or conclusions of law pertaining to HC&S's gross irrigation requirements to these acres and their associated present and potential noninstream uses for a private commercial purpose. Rather, he only contemplated the amount estimated to be required for *full build out* of the plantation, with no estimated time frame for if and when full build out would occur.

Petitioners also take exception to the Hearings Officer's determination that HC&S's brackish groundwater wells could supply **23.09 mgd** to irrigate sustainably **17,853** of its full build-out acres with well access. As previously noted, HC&S admitted that "the precise tolerance levels and the impacts of prolonged uses of brackish water " on the crops "conceptually planned" for fields with access to A&B's private groundwater wells for irrigation are presently unknown, FOF #394, and "HC&S has not commissioned any expert to ascertain the brackish water tolerance or the impact of prolonged use of brackish water for any of its proposed uses" (FOF #396). Additionally, "[i]t is unclear what the direct relationship is of recharge from surface water importation to the underlying groundwater aquifer." FOF#2 393. Because HC&S submitted no new evidence concerning its underlying groundwater aquifer, except for the above speculative and self-serving testimony from a company representative, the "best information currently

available" is the evidence submitted and in the record at the time HC&S was engaged in sugarcane cultivation.

In the 1/15/16 Proposed Decision, the Hearings Officer had then-determined that HC&S's brackish groundwater wells had a "usable capacity [of] **115 to 120 mgd**" and "could provide a **maximum of 83.32 mgd**" to irrigate 17,200 acres of the approximately 30,000 acres otherwise serviced by the EMI Ditch system. 1/15/16 Proposed Decision at COL1 #253-54, 257; FOF1 #400, 408-09. Indeed, from 1986 to 2013, HC&S's ground water contributions had "remained constant at or near **70 mgd.**" *Id.* at FOF1 #404-05. And at the time, the Hearings Officer inferred from the evidentiary record that "HC&S ha[d] not increased groundwater for irrigation" up to its usable capacity (another 45 to 50 mgd) because the revenue HC&S generated using its power to sell electricity exceeded revenues from operating groundwater pumps to increase sugar production. *Id.* at FOF1 #405-08.

Petitioners take exception to the fact that the Hearings Officer's Proposed Decision reduces HC&S's brackish groundwater well supply from 83.32 mgd to 23.09 mgd in light of the "best currently available information" and evidence in the record from the 2015 hearings and the 1/15/16 Proposed Decision. The speculative and superficial quality of the self-serving testimony provided in these reopened proceedings by one HC&S employee, whose personal "beliefs" that "a sustainable level of groundwater use will more likely be within the range of 0 to 20 percent" for diversified agriculture, without offering any corroborative proof (FOF #396), utterly fails to satisfy the "higher level of scrutiny" that the law explicitly prescribes "for private commercial uses." *Waiahole I*, 94 Haw. at 142; 9 P.3d at 454. While there may be merit in finding that "[t]he transition to diversified agriculture . . . will impact the utility and reliability of brackish groundwater resources in the future," (FOF #395), relying on conjecture alone to quantify that impact in a manner that compromises the resource and public trust uses by 50 to 60 mgd (FOF #397), when HC&S's groundwater contributions remained at 70 mgd for decades despite the company's capacity to pump from 83 mgd to 120 mgd, is wholly unsupported by the evidence and contrary to law.

For similar reasons, Petitioners take exception to an economic loss analysis of HC&S's present and forecasted diversified agricultural uses that essentially recycles the same evidence and testimony concerning brackish well water contributions (FOF #420-48), none of which help to clarify the noninstream values that the commission must weigh in establishing IIFS for the petitioned streams. As the Proposed Decision acknowledged, "[i]n considering [Petitioners'] petition to adopt an interim instream flow standard [for 27 East Maui streams], the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses." *Id.* at 162; COL #20, 32, 99, 107; FOF #28(c).

The only "economic" data offered in the Proposed Decision's "economic impact" analysis is limited to FOF# 449, which estimates what current pumping costs would be to pump different volumes of groundwater to meet HC&S's daily irrigation requirements on the 17,200 acres with access to its private wells. Since HC&S offered no new evidence to dispute evidence from the 2015 hearings that since at least 1986, HC&S's groundwater contributions had "remained constant at or near 70 mgd," (1/15/16 Proposed Decision at FOF1 #404-05), it is reasonable to infer that the economic impact of pumping that amount or the substantially reduced amount of 23.09 mgd recommended by the Hearings Officer is nil or inconsequential.

Failing to provide sufficient data demonstrating the economic impacts of specific reductions in surface water availability compromises the commission's ability to set minimum instream flow standard that fulfill their public trust duty. Back in 2008, commission staff found deficient a consultant's paper titled "Importance of the Hawaiian Commercial & Sugar Company to the Hawaii Economy and Conditions for Its Survival," submitted by HC&S, for "failing to provide . . . any data that demonstrates the [economic] impacts of specific reductions in water availability" despite recognizing that "HC&S plays an important role in Maui's economy." (COL1 #16; COL #15). In these 2017 reopened hearings, the Hearings Officer, received not one paper, not one iota of data that "demonstrat[ed] the [economic] impacts of specific reductions in water availability" for the company's diversified agricultural uses. HC&S's present and forecasted diversified agricultural uses and the economic impact of restricting those uses, based

on the above-cited evidence or lack thereof, plainly weighs in favor of present or potential instream values and maximum stream protection.

IV. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION'S DETERMINATION OF 16 MGD FOR MDWS

The Proposed Decision at page 162 states that the determination of maximum requirements for MDWS is 16 mgd, referring to FOF #448 and 461. These findings appear to have been referenced in error. FOF #488, on the other hand, merely states that MDWS "can receive 12 mgd with an option for an additional 4 mgd, for a total of 16 mgd." The 16 mgd appears to be a statement as to MDWS' capacity rather than a determination of need or even maximum need. By contrast, the 1/25/16 Proposed Decision determined MDWS' **actual** need in terms of its average daily use of Wailoa ditch as 7.1 mgd and there is no basis to change that conclusion at this time to account for projected use through 2030 (1/25/16 Order at COL 265).

V. PETITIONERS TAKE EXCEPTION TO THE PRIORITY THE PROPOSED DECISION AFFORDS THE STATUS QUO DIVERTED STATE OVER THE PROTECTION OF PUBLIC TRUST RESOURCES

The Hearings Officer improperly uses the status quo diverted state of the streams to conclude that restoration of flows -- either full base flows or even minimum habitat flows -- to all petitioned streams is simply not feasible. The record does not support such a finding or conclusion. Rather, the record demonstrates that substantial difficulties arise in the monitoring and enforcement of amended IIFS levels. The commission lacks sufficient staffing and finances to provide downstream users with reliable, timely information regarding IIFS levels, thereby making it difficult for them to determine whether shortfalls are simply due to lack of streamflows or because diversions are occurring when stream flows are insufficient to meet the required IIFS. The Proposed Decision's recommendation to leave 12 of the 23 petitioned streams at their status quo flows as designated on October 8, 1988 adversely impacts the following streams: Piinaau, Kualani (also referred to as "Hamau"), Kapaula, Waiaaka, Paakea, Nuaailua, Honomanu, Punalau/Kolea, Haipuaena, Puohokamoa , and Wahinepee Streams. COL #266-268. Petitioners

further object to the Hearings Officer's conclusion that "[s]torm waters may be diverted into the EMI Ditch system" which is baseless[3] and that no party ever requested. COL #266.

A. Total Flows Should be Fully Restored to All Historically Taro-Feeding Streams

For those areas in which East Maui taro farmers are entirely dependent on East Maui streamflows, the Commission should consider requiring Alexander & Baldwin, Inc. (A&B) to physically remove any diversions "to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values." HRS 174C-71(1)(E). Those streams include Makapipi, Wailuanui, Waiokamilo, Palauhulu, Hanehoi/Puolua, Honopou, Piinaau and Kualani (also referred to as "East Waiokamilo"). COL #200 (citing FOF #184). An IIFS that requires **all** water to be left in **all** taro-feeding streams, including prohibiting any offstream, out-of-watershed, diversions from those hydrologic units, is supported by the evidence and best ensures that East Maui farmers, and the resources on which they depend for public trust purposes, can be properly managed and subject to enforcement.

Of the 8 historically taro-feeding streams, the Hearings Officer concluded that Pi'ina'au was to be "included in the streams from which future noninstream uses may be drawn." COL #203(b). *Waiāhole I* is well known for establishing that "the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible" and that "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." *Id.* at 155. Pi'ina'au, which has historically been diverted by the Ko'olau Ditch, "is dry immediately downstream of the Ko'olau Ditch." FOF #171. According to the Proposed Decision, actual stream flow measurements and data for Piinaau are not available due to the stream's geographic inaccessibility and a major landslide in 2001. FOF #171(a), 172. Although there is "large uncertainty in the hydrological data" for this stream, certain of Piinaau's accessible stretches reportedly "exhibit rich native species diversity, offer[] a variety of

[3] It is the obligation and responsibility of the Hearings Officer to cite a clearly articulated finding to support its conclusions that the administrative record contained sufficient evidence warranting same. *In Re Waiola O Molokai,* 103 Haw. at 442, 83 P.3d at 705.

recreational and aesthetic opportunities, and the two registered diversions (other than EMI's) had not indicated a lack of water availability." COL #203(b); FOF #172. Notwithstanding, A&B "committed to permanently ceasing diversions on Pi'ina'au Stream" (COL #203(b)), thereby making instream use protection entirely feasible on this stream. Under these circumstances, both scientific uncertainty and feasibility weigh in favor of, not against, instream use protection for Piinaau.

Depriving all streams, particularly these eight taro-feeding streams, of their naturally occurring storm waters is a conclusion unsupported by the evidence. COL #266. It is not coincidence that this conclusion of law fails to cite to a finding of fact or any evidence in the record. That is because none exists. First, there is no evidence in the record or cited of any risk of flooding in downstream communities that needs to be mitigated, or that the best way to mitigate that risk is to allow all storm waters – which the Proposed Decision never defines or attempts to distinguish from freshet (rainfall) water[4] – to be diverted into the EMI Ditch system. Second, there is no evidence in the record or cited to support the conclusion that storm water diversions will encourage HC&S's development of "reservoirs for storage" given the litany of excuses HC&S provided against additional reservoirs serving as alternatives or mitigation measures. COL #398-408.[5] Third, recognition that storm water diversions can be used to "recharge the underlying aquifer" in Central Maui, ignores the fact that East Maui aquifers are deprived of the same recharge opportunity when storm waters are diverted out of their watershed. The Proposed Decision never even explains how this approach would be implemented or enforced.

For taro farmers who possess appurtenant water rights protected by Article XI Section 7 of the Hawai'i Constitution, or who exercise Native Hawaiian practices that descend from the traditional and customary uses of water prior to 1892 along these taro-feeding feeding streams, there is more acreage than water available from those streams' full restoration. Accordingly, the Commission is more than justified under the precautionary principle to order full restoration

[4] "For the streams whose base flows will be fully restored . . . freshet (rainfall) water is included in total flows." COL2 #263.

[5] MDWS already allocated $1.5M to acquire land for a possible reservoir. COL2 #480.

(inclusive of base flow, rainfall, and storm water) to satisfy, to the extent feasible, the irrigation requirements for as much of that acreage as possible. These taro fields and acreage need all the water they can get from these streams. They have no alternatives: wells, reservoirs, or otherwise. Compelling EMI to remove all diversions from those eight taro-feeding streams is the only prudent solution for irrigating these fields with a reliable source of water, of sufficient quality and quantity, to ensure a healthy taro crop and to support the continued exercise and expansion of Petitioners' traditional and customary practices. Full restoration also ensures that the water needs of Petitioners who rely or intend to rely on those streams for traditional and customary practices and domestic uses are likewise satisfied.

B. Petitioners Take Exception to The Proposed Decision's "Geographic Approach" to Stream Restoration As it Is Contrary to Law and Unsupported by the Record

The Geographic Approach to stream restoration recommended by this Hearings Officer revisits the errant approach adopted by the 2010 Commission. This Commission should resist endorsing an unreasoned, partial selection of streams for restoration that is at variance with the Regional Approach provided for in HRS § 174C-71(2)(F) of the State Water Code (the "Code").

The public trust doctrine, which protects public trust resources as well as the Native Hawaiian traditional and customary practices reliant on them, prescribes a higher level of scrutiny for private commercial uses and imposes on those whose uses impact public trust resources the burden to justify those uses in light of the protected trust purposes. *See Waiāhole I*, 94 Hawai`i at 142, 160, 9 P.3d at 454, 472; *In re Water Use Permit Application Filed by Kukui*, 116 Hawai`i 481, 508, 174 P.3d 320, 347 (2007); *In Re Wai`ola O Moloka`i Inc.*, 103 Hawai`i 401, 429, 83 P.3d 664, 692 (2004). Employing a geographic approach in this instance, without first calculating the amount of total flows diverted from them or without determining if complete restoration is practicable, leaves a number of petitioned streams without the minimum flow standards necessary to protect the stream resource, COL #268. Simply stated, the Proposed Decision's Geographical Approach is inconsistent with the State Constitution and the public trust doctrine enshrined therein and applicable to all waters of the State without exception or distinction. *Waiahole I*, 94 Haw. at 142, 156; 9 P.3d at 454, 468; Haw. Rev. Stat. § 174C-71(4).

The Code's Regional Approach allows the Commission to set "a general instream flow standard applicable to *all* streams within a specific area."[6] For example, in 1988 the State applied the Code's Regional Approach when it set *all* streams at their existing status quo levels. By contrast, the Proposed Decision's Geographical Approach (FOF #259; COL #80, 157-58) applies an arbitrary "greatest bang for the buck" standard not to *all* streams within East Maui, but a select few of them. That approach satisfies neither the stream-by-stream analysis nor prevailing Regional Approach espoused by the Code. Moreover, it contradicts the constitutional and statutory authorities which presumptively prioritize instream use protection and expressly condition offstream diversions upon maximum reasonable-beneficial use. Having refused to restore certain petitioned streams without first calculating the amount of total flows diverted from them, (COL #28), or without determining if complete restoration is practicable, the Proposed Decision yields a recommendation inconsistent with mandates embodied in the State Constitution, public trust doctrine, and Code. *Waiahole I*, 94 Haw. at 142, 156; 9 P.3d at 454, 468; Haw. Rev. Stat. § 174C-71(4).

Throughout the IIFS proceedings, beginning in 2001 and up through the 2010 Commission decision, the Commission, the Division of Aquatic Resources ("DAR"), and HC&S presumed that restoration of the 27 petitioned streams to even their *minimum* habitat levels (H90) would impact *offstream* users to an extent too great to warrant even an inquiry into the specific water requirements. The Code simply does not contemplate a regional approach for that purpose. Even if it did, the Commission is at minimum required to know how much water is necessary to restore *all* subject streams to their *minimum* flows *prior to* adopting a regional approach to stream restoration. The Commission must follow the science supporting the protection and restoration of the public trust resource, and must not elevate private commercial and financial reasons above this priority.

HRS §174C-71(2)(F) provides that "[i]nterim instream flow standards *may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to* <u>*all*</u> *streams within a specified area.*" (Emphasis added). There is no Geographic Approach in the

[6] HRS 174C-71(2)(F)(emphasis added).

Code. The CWRM's adoption of a rule setting all IIFS levels at their status quo as of October 8, 1988 is an example of a *general* instream flow standard. In this instance, a general standard could be to set the IIFS levels for all streams at minimum habitat levels (Hmin) or 64 percent of base flows and 90 percent habitat restoration as proposed in 2010. *See* Nā Moku Opening Brief 12/30/2014 at 16, n. 19. The Hearing Officer's Geographic Approach is not at all a "general instream flow standard applicable to all streams"; it is simply the handpicking of select streams for restoration to minimize impacts on the *diverter* -- an approach not provided for by the Code nor permitted under the public trust doctrine.

Even assuming the Code authorized the practice of cherry picking streams for restoration, the agency scientists concede that maximum restoration, *i.e.*, the return of all water to East Maui streams, would be the best situation for stream species. In 2009, DAR admitted that the return of 100% of the diverted water "would be the most desirable IIFS for protection and management of native stream animals." Letter from D. Polhemus to CWRM (12/15/09) at 1. Glenn Higashi of DAR reiterated this point in his current testimony, stating "[i]f streamflow could be fully restored the maximum benefit would be realized." Testimony of Glenn Robert Higashi ¶14. Higashi also reiterates the agency's position as to the *minimum* flows necessary, stating that "DAR is very adamant about the Hmin flow rates, which should be 64-percent of natural median base flow and is necessary to provide enough water in the stream for the animals." Higashi Testimony ¶24.

The Proposed Decision ignores that the Geographic Approach implemented by DAR and the Commission was based on the "biggest bang for the buck" theory. This theory assumed that restoration of all streams to sufficient levels was impossible and assumed that the management goal for the Commission was to restore a few streams to sufficient levels in order to provide the maximum amount of water for offstream uses. Higashi Tr. 3/16/15 at p. 186 (pdf. p. 165), l. 24 to p. 187 (pdf. p. 166) l. 12. The Hearings Officer's basis for not restoring flow to the remaining 9 streams (COL #268) buys into the "biggest bang for the buck theory." The Hearings Officer leaves at status quo levels nearly all of the same streams the 2010 Commission did, and offers no reasoned justification for doing so.

The Hearings Officer errs in concluding that each stream will be "addressed on a stream-by-stream basis" (COL #80b), since it is clear from the record that he failed to adequately evaluate each of the streams left at status quo. The Hearings Officer concludes without sufficient basis that "[a] geographic approach is the most feasible method of restoring streams that are collectively diverted by EMI's ditch system." COL #81. The Hearings Officer provides no justification to support COL #81. HC&S submitted no evidence or testimony that restoration of any of the 9 streams left at status quo would be too burdensome to restore. Concluding that feasibility requires fewer streams be restored improperly favors the diverter, whose diversion work project on all the major streams and many of their tributaries created the feasibility problem in the first instance. The Geographic Approach favors the status quo diverted status and fails to properly implement the Code's requirement to assess the streams on an individual basis.

C. The Failure to Restore at Least Minimum Flows (H90) to All Streams is Contrary to Law

1. Honomanu Stream: The "1988 Status Quo" IIFS Fails to Protect Minimum Instream Habitat

The Proposed Decision's failure to amend the IIFS for Honomanu ignores the ample, uncontroverted evidence of Honomanu's importance to East Maui for multiple instream values: "significant outdoor recreational activities" (FOF #301), "aesthetic values" (FOF #303); "maintenance of water quality" (FOF #304). In 2009, DAR initially named Honomanu as its top choice of eight streams then-recommended for restoration, crediting it with a sizeable estuary and the most potential for restored habitat units (11.9 kilometers of Habitat Units) when 64 percent of natural median base flow was restored. FOF #121-127. DAR changed its recommendation due to its untested "concerns" that the recommended flow releases may not overcome the stream's "losing reaches." FOF #133(c), 134. *See also* Testimony of Glenn Higashi, Tr. 3/5/15 at 11 (15-25) to 12 (1-20). Nevertheless, the Commission staff Dean Uyeno conceded that removal of diversions could very well restore connectivity from the sea to the headwaters of Honomanu stream. Uyeno, Tr. 3/5/15, p. 13, ll. 1-23.

In addition, the parties provided evidence and testimony that Honomanu Stream

traditionally supported a large population and continues to be an important stream for traditional gathering practices, recreation, and scenic views. Tengan WT at ¶ 27; McGregor WT (12/23/14), at ¶¶ 10-11 and Exh. A at 6; Exhibits E-65 and E-65-A (maps depicting kalo cultivation in 1909); De Naie WT; Exhibit E-58, p. 265, Chart in the CWRM/NPS, 1990. Moreover, Honomanu was one of five model streams USGS selected and studied intensively for its stream flow characteristics, the results of which were published in 2005. Gingerich Tr. 3/3/15, p. 57, 1.21 to p. 58, l.7; Gingerich WT at 2. Therefore, measurements of stream flow for Honomanu were not extrapolated estimates, but were based on actual observations by USGS. The study results estimated that, under natural conditions, base flows would reach an *estimated 9 cfs* (cubic feet per second). Gingerich WT (10/31/14) at 7 (see Chart p. 2). Without controlled releases for a sufficient period of time, the scientists could not predict whether connectivity for Honomanu could be restored. Honomanu stream is diverted 5 times by EMI's Spreckles and Ko'olau ditches and once by the County Department of Water Supply's Lower Kula Pipeline. Exh. E-63, p. 148, Fig. 13-19 of the December 2009 Honomanu IFSAR. Honomanu's tributaries and nearby springs are also captured by diversion works into EMI's Spreckles ditch. Exh. E-63, p. 111, Fig. 13-2 of the 2009 Honomanu IFSAR. Higashi agreed that, in light of USGS' opinion that the restoration of water to Homanu stream could potentially restore the losing reach, DAR would consider revisiting its position on Honomanu Stream (currently not recommended for restoration). Tr. 3/16/15 p. 164, l. 9 to 25.

Honomanu's connectivity capacity was recently confirmed under undiverted conditions. A. Strauch Tr. 2/6/17, 32:20-33:22, 35:2-8. The Proposed Decision, however, completely ignores this fact, which weighs in favor of stream protection and public trust uses dependent on sufficient flows. The Hearings Officer makes no mention of Dr. Strauch's testimony regarding Honomanu, nor does he explain why Honomanu should not be restored to at least 64% base flows. Na Moku urges the commission to adopt its proposed FOF #17:

> FOF #17: During Dr. Strauch's fifteen (15) monitoring visits to Honomanu Stream in 2016, no dry stretches were observed along the stream course. Dr. Strauch personally observed the lower reaches of Honomanu Stream running continuously, from mauka-to-makai. Tr. 2/6/17, 32:20-33:22, 35:2-8.

The BLNR's December 9, 2016 decision to issue a "temporary, one-year holdover over A&B/EMI's East Maui water licenses" subject to, among other things, "EMI ceasing all diversions of Honomanu for the duration of the one-year holdover period (through December 2017)" (FOF #43; COL #7) was a lawful and sound exercise of its authority. "The public trust doctrine **at all times** forms the outer boundaries of permissible government action with respect to public trust resources." *Kaua'i Springs,* 133 Haw. at 172, 324 P.3d at 982. In ordering EMI to cease its Honomanu diversions, the BLNR held EMI, A&B and HC&S to their burden, as private users of water for economic gain, to justify their private commercial uses. As the agency charged with leasing the land and waters arising therefrom pursuant to HRS §171-3, the BLNR prescribed a higher level of scrutiny for these private commercial uses. *Kaua'i Springs*, 133 Haw. at 108, 324 P.3d at 986. Moreover, at the time the BLNR prohibited the diversion of Honomanu during the one-year holdover authorization, counsel for A&B asserted that he knew EMI was not diverting Honomanu Stream, and, therefore, the prohibition had no economic impact on the company. Minutes of the December 9, 2016 Meeting of the BLNR at 10. The BLNR was not implementing or administering the state water code, over which the Commission has exclusive jurisdiction and final authority, (COL #4), nor was it acting in a manner inconsistent with the code. Rather, the BLNR was acting pursuant to Chapter 171, Hawaii Revised Statutes regarding leases of land which can include water -- over which it alone exercises exclusive jurisdiction and final authority -- and in permitting a one-year holdover of A&B/EMI's authority to divert water from East Maui streams, prohibited A&B from taking **any** water from Honomanu. BLNR Minutes at 12.

The BLNR's authority to act in the manner that it did was addressed years ago, in in the Honorable Eden E. Hifo's October 10, 2003 ruling, in *Maui Tomorrow v. BLNR,* Civ. No. 03-1-0292-02, that:

> In the process of determining whether there is any surplus water which would be in the best interest of the state to lease for 30 years, the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards, whether as a result of Appellant Na Moku Aupuni O Ko`olau's filing of 27 petitions to amend interim instream flow standards, or any other request, or pursuant to CWRM's exercise of its statutory obligations to protect riparian rights, native Hawaiian rights,

> or in the discharge of any of its other obligations. However, if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM. If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.
>
> In any case, **given the provisions of the Hawai`i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM**. Rather, **the BLNR is obligated to make a truly independent investigation as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams**.

The Proposed Decision goes too far in attempting to prevent the BLNR from independently determining "whether it's in the state's best interest to authorize the diversion of water from East Maui streams." *Id.* The commission is charged with establishing minimum flows below which no diversion is authorized, but the BLNR is charged with deciding whether the diversion can proceed at all.

2. Status Quo IIFS Levels for Puohokamoa Stream Does Not Meet Minimum Habitat Standards

Even in applying its "biggest bang for the buck" theory, DAR recommended restoration of Puohokamoa Stream to at least minimum habitat levels. FOF# 134. COL #268 leaves Puohokamoa at 0.26 mgd status quo diverted flow, a mere fraction of the minimum H90 level of 4.33 mgd, which would require restoration of 3.49 mgd. Commission staff had eliminated Puohokamoa Stream from consideration due, it said, to its use for "conveyance". FOF 241. EMI's Garrett Hew, however, agreed that there are no particular conveyance streams or any particular streams designated for "conveyance." FOF #261. In DAR's first recommendation, Puohokamoa was ranked second of the top 8 streams to restore. In its revised recommendation, Puohokamoa was ranked third, above Kopiliula Stream, a stream also rejected as a "conveyance" stream that the Hearing Officer recommends to restore in his decision. Given that the concern regarding "conveyance" is not particular to any individual stream, there is no justification for the Hearings Office to recommend restoration of

Kopiliula Stream, (COL #209, 246), and not Puohokamoa Stream to at least its *minimum* H90 level.

3. The IIFS for Haipuaena Stream Fails to Satisfy Minimum Requirements

Haipuaena stream was also listed as a priority for restoration, ranking 6th in DAR's revised recommendations. Nevertheless, the Hearings Officer recommended status quo levels without justification. COL #268 recommends leaving Haipuaena at its status quo level of 0.06 mgd, less than a third of the 2.13 mgd required to meet H90 levels. FOF #134. 1.62 mgd is the amount required to restore Haipuaena to minimum habitat levels. FOF #135.

D. Na Moku Takes Exception To The Ambiguity Over When EMI May Divert The Six Streams Restored For Habitat Only

The Proposed Decision's creates three classes of streams. The second category of streams, six of which are "restored only for increased habitat," include Hanawi, Waiohue, Kopiliula,/Puakaa, East Wailuaiki, West Wailuaiki, and Waikamoi streams. COL #260. Although in principle Na Moku agrees with the approach of restoring fish and wildlife by reducing stream flows from their status quo undiverted state, i.e., Na Moku objects to the ambiguity as to when and how much water EMI would be permitted to divert. As discussed in detail *supra*, HC&S failed to prove that its uses are reasonable and beneficial. Accordingly, there is no basis to authorize the reduction of streamflows when "EMI Ditch diversions increase to the point that [the six streams' flows] are required to meet HC&S's expanding irrigation requirements on their East Maui fields," COL #260, reducing stream flows "to H90 or whichever flows turn out to be the threshold at which recruitment, retention, and reproduction of stream animals are negatively affected." *Id.* The conclusion must be clear that no diversion of these six streams should be permitted without a showing of reasonable-beneficial need by HC&S.

VI. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION'S ERRONEOUS CALCULATION OF THE WATER REQUIREMENTS FOR WETLAND TARO CULTIVATION TO THE DETRIMENT OF PUBLIC TRUST USES

Rather than rely on taro expert Paul Reppun's undisputed testimony establishing that the reasonable water budget for taro should be 100,000 to 300,000 gad, (*See* FOF #210), the

Hearings Officer reaffirms the unreasoned water budget of 130,000 to 150,000 gad adopted in Na Wai Ehā, (*See* FOF #210-211; COL #69) - a contested case proceeding which developed an evidentiary record distinct from the instant one, and which adopted a water budget Mr. Reppun refutes here for its "backwards" logic and deficient water provisions. Reppun Tr. 3/4/15, p. 40, l. 3 to p. 42, l. 11; p. 44, ll. 18-21; p. 101, ll. 6-17.

The gad range Mr. Reppun endorses in the instant proceeding reflects the rate at which water must flow through the lo`i and exit at 77 degrees or less. 77 degrees is the temperature at which rot begins to accelerate. It is therefore critical for temperatures not to exceed this amount, particularly when factoring in other variables that can affect taro farming *(e.g.,* "percolation rates, weather, season, location on the stream relative to other diversions, initial water temperature, and rate of dilution of used water"). Reppun WT (12/2014), Exh. A at 5-6. (*See* FOF #230-232; COL #61).

The Hearings Officer acknowledges that Mr. Reppun's 100,000 to 300,000 gad water requirement "is predicated on when the taro needs the most water, **not** an average over the course of the entire crop cycle." (FOF #215) (emphasis added). Simply stated, taro's viability depends on its ability to readily access that amount when required, otherwise, crop health is compromised. Neverthelesss, the Hearings Officer adopted an unworkable average to --- set his proposed IIFS amendment for all taro-feeding streams, having determined it sufficient to provide the taro crop with only half of its water needs for an extended period of time. Consequently, the recommended IIFS deprives the taro crop of the water it needs during the most critical times in its crop cycle. That calculation is not only "backwards" but clearly erroneous in view of the reliable, probative, and substantial evidence on the record of these proceedings.

Mr. Reppun repeatedly stressed that the most "important thing" about the amount of water taro needs is that "when [taro] does need the most water, it can be severely damaged--the crop can be severely damaged if it doesn't get that." (FOF #215). The significance of that statement is underscored in FOF #236, wherein the Hearings Officer finds that "[Mr.] Reppun's principal point is that when lo`i waters are most susceptible to reach temperatures that accelerate rot, sufficient inflow waters need to be available to keep water temperatures below the threshold

for rot."[7] In further recognition that the 100,000 to 300,000 gad is not meant to reflect taro's "daily averages during a crop cycle," the Hearings Officer expounds in the same finding that "100,000 to 300,000 gad . . . [is] but an *approximation* of the amount required when maximum inflow is required to prevent rot," and is not, itself, "the *maximum* of the amount so required."[8](FOF #236) (emphases added). In other words, to prevent rot during the wetland taro's crop cycle – which requires progressively raised water levels up to an approximate maximum level of 100,000 to 300,000 gad – the crop must have access to inflow waters sufficient to reach those maximum levels when its growth cycle requires. That is to say, any reasonable water duty for wetland taro **must** accommodate **maximum** water needs that are vital to the crop's health and survival.

The Proposed Decision's water budget of 130,000 to 150,000 gad inexplicably betrays this fundamental principle. The "average" adopted by the Hearings Officer amounts to only half of taro's maximum water need, and provides taro with no more than 43% to 50% of the water it needs when it needs the maximum 300,000 gad. (*See* COL #69.) The recommended budget also deprives taro of adequate inflow at any time or duration the crop cycle demands water levels in excess of the 150,000 gad average. *(See id.)* The Hearings Officer's decision to disregard the wetland taro crop's actual water duty for a 130,000 to 150,000 gad average taken from Nā Wai 'Ehā, (FOF #211-212), is therefore arbitrary and capricious and an inexplicable abuse of the Hearings Officer's discretion.

Mr. Reppun endeavored to explain the fatal defect of the Nā Wai ''Ehā water duty, which is calculated from the taro crop's average water requirement. The misunderstanding appears to stem from the Hearings Officer's reliance on the notion that for "half of the crop cycle [ ] no

---

[7] In other words, a wetland taro farmer "needs to have access to adequate water or he dries his fields up and grows dryland [taro.]" Reppun Tr. 3/4/15, p. 102, l. 16 to p. 103, l. 4. (noting that summertime is especially critical because "[t]hat's when you're least likely to have the soil and water be cold, so you need more. That's when having the right quantity of water is **most important**.")

[8] Mr. Reppun confirms same in testifying that the maximum gad "could be higher" than 150,000 to 300,000 gad, but **not** lower because "there is always going to be that time of year when water temperatures are going to go up" and the crop requires the maximum irrigation flow. Reppun Tr. 3/4/15, p. 45, l. 13 to p. 46, l. 2.

water is needed to flow into the lo`i," (FOF #212; COL #69) -- a wholly unsubstantiated conclusion and assumption to which Petitioners take exception. The Hearings Officer also **misconstrues** Mr. Reppun's uncontroverted testimony that the "higher [water duty] figure" of 300,000 accounts for "a complex of lo`i"[9] within which only "40 to 50 percent of the lo'i complex needs the *maximum* amount of water" (Reppun Tr. 3/4/15, p. 43, ll. 4-10) (emphasis added) **to mean that**: (1) for "50 percent of [the] time [ ] no water is needed to flow into the lo'i." (FOF #212; COL #69); or (2) for "approximately half of the crop cycle [ ] no water is needed to flow into the lo`i" (COL #69). First, no party or witness in the instant proceeding offered up either statement.[10] Second, neither statement equates to Mr. Reppun's testimony that only "40 to 50 percent of the lo`i complex needs the *maximum* amount of water." Reppun Tr. 3/4/15, p. 43, ll. 4-10. (emphasis added).

To avoid confusion, Mr. Reppun endeavored to make plain "that 300,000 is for the entire complex" and that his range "already tak[es] into account the 40 to 50 percent reduction." *Id.* at ll. 11-13; Reppun Tr. 3/4/15, p.84, l. 21 to p. 85, l. 3. Having witnessed firsthand the inadequacy of the proposed 150,000 gad water duty for kalo lo`i in Waihe`e Valley, Maui, Mr. Reppun exhorts that the 300,000 **not** "be reduced by 40 to 50 percent, because that would take them back down to 150,000, which was clearly too low." *Id.* at p. 43, l. 14 to p. 44, l. 1. Only if your lo`i is "located in the coldest part of the stream where the source is the coldest, or you're most mauka, or you're the first guy I think you can get away with as little as 100,000 [gad]." *Id.* at p. 88, l. 21 to p. 89, l. 8 (explaining that the water duty rate will increase even for those lo`i during "the

---

[9] Mr. Reppun distinguishes between water requirements for a taro patch versus for a taro complex, which is comprised of multiple patches requiring greater inflows. Reppun Tr. 3/4/15, p.31, l. 22 to p. 32, l. 11.

[10] To the contrary, Mr. Reppun testified that a two-year crop cycle "means about a six-month fallow" or 16-25% of the crop cycle; **not** 50%. Reppun Tr. 3/4/15, p.85, ll. 4-16. Additionally, when the Hearings Officer asserted, "you don't really run water through [the lo`i] until the plants start growing," Mr. Reppun responded, "You do run water through it." *Id.* at p. 85, l.17 to p. 86, l. 5. Likewise, when the Hearings Officer asked Mr. Reppun to confirm that "as you get ready to harvest, sort of like sugar cane you just don't water it toward the end," Mr. Reppun refuted, "You do [water it] . . .because that's when [the taro] is most vulnerable to rot." *Id.* at p. 86, l. 24 to p. 87, l. 12.

hottest part of the year.") But even then, the water source for the 100,000 to 300,000 water duty is presumed to be "new water, cold water, unused water"[11]. *Id.* By essentially slashing Mr. Reppun's recommended irrigation range in half, the Hearings Officer exacts an oppressive water duty that promotes, rather than prevents, conditions ripe for "severely damaging" the taro crop.

Petitioners urge the Commission to adopt Mr. Reppun's water budget of 100,000 to 300,000 gad, which is predicated on when taro needs the most water to survive and to avert severe damage throughout its crop cycle. In comparison to the Proposed Decision, Mr. Reppun's recommended water duty provides the most equitable, reasonable, and beneficial allocation of state water resources for wetland kalo cultivation. The water duty range not only accounts for the quality and quantity of streamflow necessary to support the diversity of wetland kalo cultivation throughout East Maui by individuals, families, and community groups alike, it incorporates reasonable margins of safety to protect instream trust purposes. In sum, Mr. Reppun's water duty most effectively protects and conserves, all year round, the beneficial instream use of wetland kalo cultivation - an exercise in which Petitioners engage for significant purposes and in recognition of its appurtenant and riparian water rights as well as its traditional and customary Hawaiian rights.

A. THE OMISSION OF 'ILI AND MO'O PARCELS AS TARO ACREAGE IS IN ERROR

The Hearing Officer improperly excludes from the taro acreage those parcels awarded without specificity of use including "ili" and "mo'o" parcels. (FOF #321). The terms "'ili" and "mo'o" were land division terms used to describe parcels of land that did not necessarily indicate the crop that was grown on that parcel. Petitioners' witness Teresa Gomes explained that the terms by themselves did not indicate that a parcel was in taro production or not at the time of the Māhele. Gomes, Tr. 4/2/15 at 31 to 32. Rather, the award itself indicated that the land was occupied, maintained and cultivated that the time of the Māhele, *Id.* In preparing Exhibit A-173,

[11] Mr. Reppun defines "new water" to mean a general streamwater temperature "in the low '70s." (Reppun Tr. 3/4/15, p. 100, l. 19 to p. 101, l. 2.). *See* Decl. of Paul Reppun, Exhibit A6 at 5-6, 11 (explaining that the gad range presumes "new" water or "water that has not been warmed up by previous use").

Petitioners identified as taro lots only those lots for which Ms. Gomes was able to use information from surrounding parcels and tax maps that indicated the parcel was used for taro. Accordingly, the wholesale exclusion of any acreage identified merely as ʻili or moʻo improperly reduces the acreage calculated for appurtenant rights in taro.

FOF #296 indicates that the Hearings Officer did not consider the following parcels identified as moʻo or ʻili as taro acreage:

Ahupuaʻa	Parcel Type	Acreage	Water Allocation Required
Keʻanae	5 ʻili	5.49 acres	5.49 acres * 100,000 -300,000 gad = 0.549 mgd - 1.647 mgd
Wailua	1 ʻili 4 moʻo	0.42 acres 7.43 acres (6.68 acres identified as taro by Petitioners)	7.1 acres (0.42 + 6.68) * 100,000 - 300,000 gad = 0.71 mgd - 2.13 mgd
Wailua	5 moʻo	12.03 acres (10.59 identified as taro by Petitioners)	10.59 acres * 100,000-300,000 gad = 1.059 mgd - 3.177 mgd
Wailua	1 ʻili 4 moʻo	1.32 acres 4.98 acres	6.3 acres * 100,000-300,000 gad = 0.63 mgd - 1.89 mgd
Total		31.67 acres (**29.48** Petitioners)	**Keʻanae: 0.549 mgd - 1.647** **Wailua: 2.399 - 7.197 mgd**

For Keʻanae, the total acreage for taro should be adjusted upwards by 5.49 acres and the water allocation adjusted accordingly. For Wailua Valley, Waiokamilo and Wailuanui waters are commingled and, therefore, determining precisely which parcels are watered with one stream or another is difficult. Waiokamilo is currently undiverted, but while natural undiverted flow is estimated at 2.52 mgd (See HO-1), with 1.62 mgd required to maintain instream habitat, leaving only 0.9 mgd available for irrigation. Given the total needs for the valley including the acreage

excluded by the Hearing Officer in the irrigation allocation, total flows from Waiokamilo and Wailuanui streams should be restored.

VII. PETITIONERS TAKE EXCEPTION TO THE PROPOSED DECISION FAILURE TO PROPERLY PROTECT TRADITIONAL AND CUSTOMARY PRACTICES

A. *Pratt* is not the Proper Standard for Traditional and Customary Practices in a Civil Context

The Hearing Officer mistakenly relies on *State v. Pratt*, 127 Haw. 206, 277 P.3d 300 (2012) (COL #92). *Pratt*, however, is the proper test in the criminal context. In *Pratt*, the Supreme Court explicitly distinguished between traditional and customary rights in the civil and criminal contexts, making it clear that it was picking up "where Hanapi left off," in the criminal context. *Pratt*, 127 Haw. at 207, 277 P.3d 300 at 301. In the civil context, the standards are found in *Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n* (PASH), 79 Hawaii 425, 903 P.2d 1246 (1995) as refined by *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992). Furthermore, the Water Code explicitly protects the Native Hawaiian traditional and customary rights petitioners engage in here, i.e. taro cultivation, gathering of hihiwai, ʻōpae, oʻōpū, limu, thatch, tī leaf, etc. HRS § 174C-101(c). The *Kalipi* Court held that the usage provision of HRS § 1-1 represented an attempt to permit the continuance of native understandings and practices that did not unreasonably interfere with the spirit of the common law. It did not, however, require that the person prove that his specific ancestors engaged in the custom in the particular area. *Kalipi*, 66 Haw. at 10, 656 P.2d at 751.

The Hearing Officer considered the testimonies of Edward Wendt, Terrance Akuna, Norman "Bush Martin", Jerome Kekiwi, and Joseph Young, concluding in COL #88 that,

> [t]he record is not clear whether any person holds traditional and customary Hawaiian rights in the East Maui area, whether for gathering rights or for farming in traditional and customary ways. There was testimony that at least some Na Moku members gathered for subsistence and cultural purposes in the East Maui area, and wetland taro was being grown or attempted to be grown with traditional and customary practices, sometimes by members who have lived in the area for generations.

In doing so, he referenced only the farmer's individual testimonies and effectively rejected and/or disregarded the uncontroverted testimony of Davianna McGregor and Ty Kawika Tengan regarding the history of taro farming and gathering practices, including identifying the area between Makapipi Stream and Honomanu Stream as a "traditional customary practices region" in which residents from Ke'anae and Wailuanui engaged in subsistence gathering. McGregor WT (12/23/15) at ¶¶10-11. Kalo farming and gathering in East Maui Streams is clearly a practice that has taken place since before November 25, 1892 and goes back prior to the Mahele. At this stage of proceedings where the Commission is obligated to make reasonable estimates as to the practices in the area, the Hearing Officer unfairly attempts to shift the Commission's affirmative duty to make those findings onto the farmers and practitioners.

B. The Proposed Decision's *Ka Pa'akai* Analysis is Flawed

The Proposed Decision's *Ka Pa'akai* analysis improperly starts from the diverted state rather than a consideration of free flowing streams. The Hearing Officer in **COL #98** states that, "[t]he proposed actions will not impair these resources but instead they will be improved by increasing stream flows." This conclusion turns the analysis required under the *Ka Pa'akai* framework on its head. 94 Hawaii at 47, 7 P.3d at 1084. In a parallel case on Maui, the Hawaii Supreme Court determined that the Commission's duty in applying the *Ka Pa'akai* framework is to make findings or conclusions articulating the effect of the amended IIFS on the native Hawaiian practices and the feasibility of protecting those practices. *In Re 'Iao*, 128 Hawaii at 248-49, 287 P.3d at 149-50. The Hearing Officer's analysis fails to adequately address the impact of his decision on traditional and customary practices by taking the perspective of the diverted status quo. The IIFS should be considering first the undiverted state, i.e., natural streamflows and analyze the amended IIFS from there.

Although the Hearings Officer is critical of Commission staff for previously "operat[ing] on the premise that complaints of taro farmers. . . not getting enough water was not material to whether or not they would have recommended higher releases into the streams" subsequent to the 2008 Commission Order, (FOF #271, 289, 300), his Proposed Decision commits essentially the same offense in 2017 with respect to gathering streams: by failing to amend IIFSs upwards

and recommend higher releases, particularly for Honomanu, (COL #268), notwithstanding evidence of its priority to both Petitioners and to DAR. FOF #301-304. Designated minimum instream flows are plainly inadequate to meet this protected instream use. Likewise, the shortcomings of the 2010 Commission Order, which "focused only on native stream animals" for a very limited number of streams "and did not balance instream versus noninstream uses," (FOF #292), are revisited in this Proposed Decision with respect to the status quo streams. COL #268.

Here, the Hearing Officer concludes generally that, because the Proposed Decision restores some flow to some streams, it must benefit the resource and the practices. The findings do not, however, explain the impact of leaving streams at status quo levels insufficient to support even minimum habitat needs. Nor does the Hearing Officer make specific findings about why minimum flows cannot be restored to all streams or the potential impact to offstream users if he did so. For example, restoration of flows to Honomanu, Puohokamoa, Haipuaena, Kapaula, and Palauhulu would require restoration of less than 10 mgd in order for flows to meet minimum habitat levels (H90 flows). The Proposed Decision fails to analyze how the effect of the restoration of flows to meet these minimum needs would affect offstream users, nor does it explain other than using sweeping conclusory statements, why it is not feasible to restore the above streams to these minimum levels.

VIII. PETITIONERS TAKE EXECPTION TO THE PROPOSED DECISION'S FAILURE TO STRIKE THE PROPER BALANCE MANDATED BY THE WATER CODE BY IMPROPERLY PRIORITIZING HC&S' PRIVATE COMMERCIAL USE AND DIVERSIONS

Reasonable-beneficial use is mandated by the Hawaii Constitution. *Waiahole I*, 94 Haw. at 139, 9 P.3d at 451). The public trust doctrine enshrined therein "applies to all waters of the State without exception or distinction." *Id.* Importantly, the public trust doctrine's "dual mandate of protection and maximum reasonable and beneficial use" prescribes "the most equitable, reasonable, and beneficial allocation of state water resources, *with full recognition that resource protection also constitutes use*." *Waiahole I*, 94 Haw. at 139-40, 9 P.3d at 451-52 (emphasis added). "Any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment" which "effectively prescribes a higher level of

scrutiny for private commercial uses." *Waiahole I*, 94 Haw. at 142, 9 P.3d at 453. And even though "the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values," the mandate of reasonable and beneficial use nevertheless dictates that the accommodation reflect "the most equitable, reasonable, and beneficial allocation of state water resources." *Waiahole I*, 94 Haw. at 141, 9 P.3d at 453.

In considering Petitioners' petition to adopt an IIFS for 27 East Maui streams, "the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses." (COL #20, 32, 99, 107). The Proposed Decision failed to strike that balance because its recommended IIFS amendments do not reflect a proper weighing of the present and potential instream values against the present and potential noninstream purposes. Here, prior uses and diversions have been given greater weight to the detriment of public trust purposes.

The most glaring example of the Proposed Decision's inequities is reflected in its disparate assignment of water duties and allocations between instream and offstream uses. The recommended IIFS amendments restore about 26.49 mgd diverted from 23 of 27 petitioned streams. Proposed Decision at 162. The 26.49 mgd purportedly provides the streamflow necessary to maintain fish and wildlife habitats and to address appurtenant/riparian and domestic uses. In reality, however, the amended IIFS would leave streams with as little as **5%** and at most **64%** of their natural base flows to support *minimum* habitat requirements. The Proposed Decision is similarly parsimonious with Petitioners' allocation, which makes only **130,000 gad to 150,000 gad** available to satisfy Petitioners' **150,000 gad to 300,000 gad**[12] for wetland taro cultivation. As a result, the amended IIFS would satisfy **43% to 50%** of Petitioners' *actual* water need throughout the taro crop's two-year crop cycle. COL #69. This, despite the fact that Petitioners' has **no alternative water source** available to irrigate its wetland taro patches or to

[12] As discussed *supra* at pages 12-15, Mr. Reppun's water budget is predicated on when taro needs the most water to survive and to avert severe damage throughout its crop cycle.

address its present or potential appurtenant, riparian, traditional & customary, and domestic uses.

By comparison, the amended IIFS makes **88 mgd to 96 mgd** available to satisfy HC&S's **99.75 mgd** reasonable and beneficial use of EMI ditch system surface waters for its sugarcane cultivation. As a result, the amended IIFS would satisfy the vast majority of HC&S's future projected *maximum required* water need, resulting in "not more than a 3.4 mgd to 11.74 mgd short of the estimated surface water that would be available and well within what might reasonably expected to be actually required in the future." Proposed Decision at 163. Stated differently, HC&S and MDWS should always have available as much surface water as they need from East Maui Streams.

Considering that these streamflows are the only available source of water for these 27 East Maui streams and Petitioners' present or potential appurtenant, riparian, traditional & customary, and domestic uses, an IIFS amendment that fails to ensure protection for all *petitioned* streams, which comprise less than all diverted streams, all while satisfying HC&S's maximum reasonable and beneficial use, does not properly balance instream values with offstream uses. This application is inconsistent with the public trust doctrine and flies in the face of presumptions in favor of public use, access, and enjoyment.

IX. JOINDER IN THE EXCEPTIONS OF MAUI TOMORROW FOUNDATION, INC. AND ITS SUPPORTERS

Petitioners hereby joins in the Exceptions of Maui Tomorrow Foundation, Inc. and its Supporters to the Hearings Officer's Proposed Findings of Fact, Conclusions, of Law & Decision and Order submitted on September 1, 2017.

X. GENERAL OBJECTIONS

A. Petitioners object to the proposed rejection or partial rejection of all findings of fact and conclusions of law proposed by it (and those joined with Maui Tomorrow) that were not clearly accepted, on the grounds that each finding of fact proposed by Petitioners is material to the issues in the case and is supported by the portion of the record cited in each proposed finding, and by the record as a whole, and each conclusion of law proposed by Petitioners is an accurate statement of the relevant law.

B. Petitioners object to the proposed conclusions of law in the Proposed Decision to the extent that they are inconsistent with, or do not include, each of the proposed conclusions of law submitted by it (and those joined with Maui Tomorrow) on the ground that each of Petitioners' proposed conclusions of law is an accurate statement of the relevant law.

DATED: Honolulu, Hawai'i, September 1, 2017.

SUMMER L. SYLVA
CAMILLE K. KALAMA
Attorneys for Petitioners
Nā Moku Aupuni O Ko`olau Hui
Lurlyn Scott and Sanford Kekahuna

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Original and three (3) copies of NĀ MOKU AUPUNI O KO`OLAU HUI, LURLYN SCOTT, AND SANFORD KEKAHUNA'S EXCEPTIONS TO THE HEARINGS OFFICER'S AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DECISION AND ORDER DATED AUGUST 2, 2017 was duly served on the following by hand delivery and Email on September 1, 2017.

Commission on Water
Resource Management
c/o Kathy Yoda
Kalanimoku Building,
1151 Punchbowl Street, Room 227
Honolulu, HI 96813
Email: lhmiike@hawaii.rr.com
Email: kathy.s.yoda@hawaii.gov

The undersigned further certifies that a copy of the foregoing document was duly served on the following by Email on September 1, 2017:

David Schulmeister, Esq.
Elijah Yip, Esq.
Cades Schutte
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
Attorneys for Hawaiian Commercial & Sugar Company
Email: dschulmeister@cades.com
Email: eyip@cades.com

Patrick K. Wong
Caleb P. Rowe
Kristin Tarnstrom
Department of the
Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793
Email: pat.wong@co.maui.hi.us
Email: caleb.rowe@co.maui.hi.us
Email: kristin.tarnstrom@co.maui.hi.us
Attorneys for County of Maui, Department of Water Supply

Robert H. Thomas, Esq.
Damon Key Leong Kupchak Hastert
1003 Bishop Street
Pauahi Tower, Suite 1600
Honolulu, Hawaii 96813
Email: rht@hawaiilawyer.com
Attorneys for Hawai'i Farm Bureau Federation

Isaac Hall, Esq.
2087 Wells Street
Wailuku, Maui, Hawaii 96793
Email: idhall@maui.net
Attorney for Maui Tomorrow

William J. Wynhoff, Esq.
Linda L. Chow, Esq.
Deputy Attorney General
465 S. King Street, Room 300
Honolulu, Hawaii 96813
Email: bill.j.wynhoff@hawaii.gov
Email: linda.l.chow@hawaii.gov
Attorney for CWRM

Jeffrey C. Paisner
121 North 5th Street - Apt. RH
Brooklyn, New York 11249
jeffreypaisner@mac.com

Copies as necessary:
John Blumer-Buell
P.O. Box 787
Hana, Hawai'i 96713
Email: blubu@hawaii.rr.com

Nikhilananda
P.O. Box 1704
Makawao, Hawai'i 96768-1704
Email: nikhilananda@hawaiiantel.net

DATED: Honolulu, Hawai'i, September 1, 2017.

SUMMER L. H. SYLVA
CAMILLE K. KALAMA
Attorneys for Petitioners
Nā Moku Aupuni O Ko`olau Hui
Lurlyn Scott and Sanford Kekahuna