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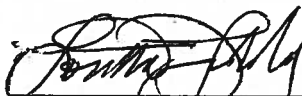
STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
**COMMISSION ON WATER RESOURCE MANAGEMENT**  
P.O. BOX 621  
HONOLULU, HAWAII 96809

JAN 23 2013

Dear Parties:

Attached is the Commission's Findings of Fact, Conclusions of Law, and Decision and Order in the matter of the Complaint/Dispute Resolution CDR 2769.8 and Application for After-the-Fact Stream Channel Alteration Permit Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8) for Leslie Aina Weight/Robert Scott Henderson and Dr. David Jung/Mrs. Dora Okazaki Ainako Branch Stream and Ainako Stream, Hilo, Hawaii Contested Case Hearing (CCH-HA11-1).

  
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WILLIAM J. AILA, JR., Chairperson

  
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LORETTA J. FUDDY, A.C.S.W., M.P.H., Commissioner

  
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NEAL S. FUJIWARA, Commissioner

  
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JONATHAN STARR, Commissioner

  
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TED YAMAMURA, Commissioner

COMMISSION ON WATER RESOURCE MANAGEMENT  
STATE OF HAWAII

COMPLAINT/DISPUTE RESOLUTION CDR 2769.8 AND	}	Case No. CCH-HA11-1
APPLICATION FOR AFTER-THE-FACT	}	
STREAM CHANNEL ALTERATION PERMIT	}	FINDINGS OF FACT,
STREAM DIVERSION WORKS PERMIT	}	CONCLUSIONS OF LAW,
AND PETITION TO AMEND INSTREAM	}	AND DECISION AND ORDER
FLOW STANDARD (SCAP.2898.8) FOR	}	
LESLIE AINA WEIGHT/ROBERT SCOTT HENDERSON	}	
AND DR. DAVID JUNG/MRS. DORA OKAZAKI	}	
AINAKO BRANCH STREAM AND	}	
<u>AINAKO STREAM, HILO, HAWAII</u>	}	

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER**

I hereby certify that the foregoing  
is a true and correct photocopy of the  
original document on file in the office of the  
Commission on Water Resource Management.

Dated JAN 23 2013

By

W. Roy Hardy  
W. ROY HARDY Hydrologic Program Manager

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1  
2  
3  
4 **I. INTRODUCTION**

5 The hearings officer makes the following Findings of Fact (hereinafter, “FOF”),  
6 Conclusions of Law (hereinafter, “COL”), and Decision and Order (hereinafter, “D&O”), based  
7 on the records maintained by the Commission on Water Resource Management (hereinafter,  
8 “Commission”) and the witness testimonies and exhibits presented and accepted into evidence.

9 If any statement denominated a COL is more properly considered a FOF, then it should  
10 be treated as a FOF; and conversely, if any statement denominated a FOF is more properly  
11 considered a COL, then it should be treated as a COL.

12 FOF not incorporated in this D&O have been excluded because they may be duplicative,  
13 not relevant, not material, taken out of context, contrary (in whole or in part) to the found facts,  
14 an opinion (in whole or in part), contradicted by other evidence, or contrary to law. Proposed  
15 FOF that have been incorporated may have modifications or corrections that do not substantially  
16 alter the meaning of the original findings.

17 **II. FINDINGS OF FACT**

18  
19 **A. Procedural Background**

20  
21 1. Between April 2010 and July 2010, applicants Leslie Aina Weight (“Weight”) and  
22 Robert Scott Henderson (“Applicant Henderson”) (hereinafter collectively referred to as  
23 “Applicants”): 1) submitted a late Registration of Stream Diversion Works and Declaration of  
24 Water Use (REG.2680.8) for a dam diversion and sluice/flood control gate on Ainako Stream on  
25 behalf of Applicant Weight; 2) amended REG.2680.8; 3) filed a second and separate late  
26 Registration of Stream Diversion Works and Declaration of Water Use for ornamental ponds A  
27 and B on Ainako Branch Stream, REG.2649.8; 4) filed a Stream Channel Alteration Permit  
28 (SCAP) application for Ornamental Pond C on Ainako Branch Stream (the application was not  
29 accepted pending further verification that Ainako Branch Stream was a stream or man-made  
30 ditch); and 5) requested that the registration result in the issuance of certificates of use. (Staff

1 Submittal E1, Commission in Water Resource Management (“Commission”) meeting of  
2 September 27, 2011.)

3 2. In July 2010, Commission staff determined that: 1) ornamental pond A for Applicant  
4 Weight on TMK: (3) 2-5-025:014 was constructed before 1956 and is considered a late  
5 Declaration of Existing Water Use; 2) ornamental pond B for Applicant Weight on TMK: (3) 2-  
6 5-025:005 and ornamental pond C, shared between Applicant Weight on TMK: (3) 2-5-025:005  
7 and Applicant Henderson on TMK: (3) 2-5-025:006, were constructed within the last two years  
8 and cannot be considered Declarations of Existing Water Use for registration purposes.  
9 Commission staff did not request a SCAP application at that time because it was still unverified  
10 whether Ainako Branch was a stream or man-made ditch. (Staff Submittal E1, Commission  
11 meeting of September 27, 2011.)

12 3. In July 2010 Commission staff also determined: 1) that the rock dam diversion and flood  
13 control gate on Ainako Stream were developed and in use before 1987 when the State Water  
14 Code was enacted into law, were registered as existing Stream Diversion Works, and did not  
15 require a Stream Diversion Works Permit (SDWP); and 2) the Ainako Branch Stream diversion  
16 and instream flow were considered a late Declaration of Existing Stream Diversion Works and  
17 Declaration of Water Use. (Staff Submittal E1, Commission meeting of September 27, 2011.)

18 4. In July 2010, unknown to Commission staff at the time, Complainants David and  
19 Malinee Jung (hereinafter “Jung”), Ronald and Dora Okazaki (hereinafter “Okazaki”), Tamae  
20 Shindo (“Shindo”), and Norman Purves and Maren Hauschildt-Purves (hereinafter “Purves”)  
21 (hereinafter collectively referred to as “Complainants”), filed an action in the Third Circuit Court  
22 against Applicant Weight related to an ongoing dispute between Applicant Weight and  
23 Complainants Jung, Okazaki, Shindo, and Purves regarding the flood control gate and the  
24 amount of water that was being diverted from Ainako Stream to Branch Stream 1b (as shown on  
25 Submittal E.1, Commission meeting of September 27, 2011). In September 2010, Complainants  
26 filed a Motion for Summary Judgment with the Third Circuit Court. In October 2010,  
27 Complainants reported to Commission staff that Applicant Weight’s sluice/flood control gate  
28 was restricting the amount of water in Ainako Branch Stream and inquired about a Commission  
29 hearing. In November 2010, the Third Circuit Court issued an Order Denying the Plaintiffs’  
30 Motion for Summary Judgment and referred the matter to the Commission.

1 5. In December 2010, Complainants filed a Complaint/Dispute Resolution, CDR.2769.8,  
2 with the Commission against Applicant Weight, seeking to: 1) revoke the registration for the  
3 diversion gate at the mouth of the Branch Stream on Ainako Stream; 2) remove the diversion  
4 gate and restore the alleged original mouth of the Branch Stream; 3) restore an alleged second  
5 branch (*hereinafter*, “Branch Stream 2/Drainage Channel”) which Complainants claimed was  
6 blocked by the actions of Dr. Henderson (deceased) and Robert Scott Henderson during the  
7 approximate period 1985-1990; and 4) restore free surface water flow to the Branch Stream 1  
8 (including Branch Stream 1a and 1b) and Branch Stream 2/Drainage Channel.

9 6. Between January and September 2011: 1) Complainants amended CDR.2769.8, which  
10 was sent to and commented on by the Applicants; 2) Commission staff met with the Applicants  
11 and Complainants, conducted a field investigation and distributed its report to the parties; 3)  
12 Commission staff issued its final report FI2011031001, which Complainants alleged contained  
13 misrepresentations and inaccuracies; and 4) Applicants submitted an application for an after-the-  
14 fact SCAP, SDWP, and Petition to Amend Instream Flow Standard (PAIFS) (SCAP.2898.8) for  
15 Ainako Branch Stream 1 for two ponds, one concrete-lined 3,000 gallon pond that receives  
16 Branch Stream water via a buried pipe and returns water to the Branch Stream over a spillway,  
17 and a pond created by placement of a six-foot wide by one and one-half foot stacked rock dam  
18 across the Branch Stream. (Staff Submittal E1, Commission meeting of September 27, 2011.)

19 7. In August 2011, Waimea Water Services, Inc. submitted an application for a Stream  
20 Channel Alteration Permit (SCAP.3232.8) on behalf of Complainant David Jung, for the  
21 installation for a weir at TMK: (3) 2-5-024:029 to measure and record stream flow in Branch  
22 Stream 1 through his property. (Staff Submittal E1, Commission meeting of September 27,  
23 2011.)

24 8. At its September 27, 2011 meeting, the Commission staff recommended that the  
25 Commission: 1) order mediation or binding arbitration for Complaint/Dispute Resolution  
26 (CDR.2769.8) if agreeable to both parties; 2) find Applicants Weight and Henderson in violation  
27 of H.R.S. §174C-71(3)(A) for a) patching four leaks in Branch Stream 1 in 2007 and 2008; b)  
28 constructing 450 linear feet of rock retaining wall in 2008 including the lower reach of branch  
29 stream 1; and c) constructing two ornamental ponds of 3,000 and 4,900 gallons in Branch Stream  
30 1 without obtaining a SCAP and SDWP from the Commission; 3) fine the Applicants \$700 for  
31 the violations; 4) require the Applicants to install a means to measure the amount of water that is

1 diverted by the flood control gate on a monthly basis and submit a water-use report on an annual  
2 basis to the Commission; 5) issue a written warning to the Applicants indicating that any future  
3 violations involving the alteration of stream channels or stream diversions without the necessary  
4 SCAP or SDWP and petition to amend the instream flow standard may be considered repeat  
5 violations with fines up to \$5,000 for each day of violation; and 6) either a) defer action on the  
6 after-the-fact application for a SCAP, SDWP and Petition to Amend Instream Flow Standard  
7 pending the final report for the mediation or binding arbitration of CDR.2769.8 or b) approve the  
8 after-the-fact SCAP, SDWP and PAIFS (SCAP.2898.8), Ainako Branch Stream in Hilo, Hawaii  
9 at TMKs: (3) 2-5-025:005, 014 and 006, subject to the standard conditions (except conditions 4  
10 and 8) and the following special condition: Issuance of the permit is subject to payment of the  
11 fines, and failure to pay within 30 days of Commission action may result in further fines and  
12 violations. (Minutes of the September 27, 2011 Commission meeting.)

13 9. After going into Executive Session to consult with legal counsel, the Chairperson asked  
14 for and received a motion to enter into a contested case hearing, which motion was unanimously  
15 approved. The Commission, by unanimous vote, also authorized the Chairperson to appoint a  
16 hearing officer for the contested case hearing. (Minutes of the September 27, 2011 Commission  
17 meeting.)

18 10. The Commission then unanimously voted in favor of a motion to approve the SCAP  
19 (SCAP.3232.8), Installation of a Weir in Ainako Branch Stream, in Hilo, Hawaii at TMK: (3) 2-  
20 5-024:029 (see FOF 6, *supra*), subject to the standard conditions. (Minutes of the September 27,  
21 2011 Commission meeting.)

22 11. On November 1, 2011, Commissioner Lawrence Miike was appointed hearings officer.  
23 (Letter from William J. Aila, Chairperson, to Commissioner Lawrence Miike dated November 1,  
24 2011.)

25 12. On December 16, 2011, a standing hearing was held in Hilo, Hawaii, and the following  
26 persons were admitted as parties: Leslie Aina Weight and Robert Scott Henderson, Applicants;  
27 Ronald and Dora Okazaki, Dr. David and Malinee Jung, Norman Purves and Dr. Maren  
28 Hauschildt-Purves, and Tamae Shindo, Complainants; Gary Meltzer (“Meltzer”); Fred and  
29 Carolyn Koehnen (collectively “Koehnen”); Margaret Oda; Bret Marsh (“Marsh”); and Martin  
30 and Cheri Eisgruber. (Minute Order #2, December 21, 2011.)



1 13. After the December 16, 2011 standing hearing, a scheduling conference was held, at  
2 which time the contested case was scheduled for February 29, 2012 and March 1, 2012 in Hilo,  
3 and the date for any prehearing motions to be heard was scheduled for February 21, 2012 in  
4 Honolulu in the Commission's conference room. (Minute Order #2, December 21, 2011.)

5 14. Prior to the contested case hearing on February 29 and March 1, 2012, Margaret Oda and  
6 Martin & Cheri Eisgruber withdrew as parties by letters dated January 12, 2012, to the Hearings  
7 Officer, and Bret Marsh withdrew as a party by oral communication but testified at the hearing  
8 as a witness for Applicant Weight.

9 15. The contested case hearing was held on February 29 and March 1, 2012 in Hilo, Hawaii.  
10 Appearing on behalf of Applicant Weight were attorneys Thomas Bush and Mei-Fei Kuo, and  
11 Applicant Robert Scott Henderson appeared pro se. Appearing on behalf of Complainants were  
12 attorneys John Carroll and Christopher Dias. Fred and Carolyn Koehnen appeared pro se.

13 16. Hearing officer Miike issued his Proposed Findings of Fact, Conclusions of Law and  
14 Decision and Order to the Commission on June 5, 2012. (Minute Order #5, June 5, 2012.)

15 17. On September 19, 2012, at the Department of Land and Natural Resources Conference  
16 Room in Honolulu, Hawaii, the Commission heard oral argument from Thomas E. Bush, Esq.,  
17 attorney for Applicant Weight, and John S. Carroll, Esq., attorney for Complainants, on their  
18 written exceptions to the Proposed Findings of Fact, Conclusions of Law and Decision and Order.  
19 During the course of oral argument, Mr. Carroll stated that the case should be reheard by the  
20 Commission. (Tr. 9/19/12, p.15, l. 23 to p. 16, l. 2.)

21  
22 B. **The Ainako Subdivision**

23  
24 1. **The 1947 Ainako Subdivision Map**

25  
26 18. "File Plan 427," dated June 1947, is the original 1947 Ainako subdivision map on file  
27 with the Hawaii County Real Property Tax and Planning Office, and the features on the file plan  
28 are what were surveyed as of 1947. (Exh. A-52; Cross, Tr. 2/29/12, p. 117, l. 1 to p. 118, l. 7.)  
29 [Weight FOF 81.]

30 19. File Plan 427 was: 1) certified by the surveyor of the Territory of Hawaii on July 9, 1947,  
31 with the notation that "the description of survey and map hereon have been examined and

1 checked as to form and mathematical correctness, but not on the ground”; and 2) received and  
2 filed on July 10, 1947, at the Bureau of Conveyances. (Exh. A-52.)

3 20. The purpose of the subdivision was to create new boundaries and sell lots or develop lots  
4 of appropriate size and to sell them to individuals. (Christensen, Tr. 2/29/12, p. 147, ll. 13-22;  
5 Cross, Tr. 2/29/12, p. 117, ll. 15-18.)

6 21. In the field of land surveying, recognized purposes of creating subdivision (and TMK)  
7 maps are to mark geological features which serve as property boundaries and to mark natural  
8 features of the properties being surveyed so as not to create a lot that is divided into two parts,  
9 one part that’s inaccessible from the other part of the lot. However, geological features are not  
10 necessarily depicted unless they serve as property boundaries (Christensen, Tr. 2/29/12, p. 148, ll.  
11 13-22, p. 140, ll. 12-17.) [Complainants FOF 11-12.]

12 22. In accordance with established survey practices, stream routes are depicted as solid lines  
13 only if those stream routes were also used as property boundaries, and, therefore, side tributaries  
14 or stream segments that were not used as property boundaries were commonly shown as dashed  
15 lines. (Exh. A-49: Christensen Suppl. Declaration, ¶ 11; Christensen, Tr. 2/29/12, p. 153, l. 12 to  
16 p. 154, l. 15.) [Weight FOF 84-86.]

17 23. Whether or not a stream is flowing or manmade versus natural cannot be inferred by its  
18 identification on subdivision or TMK maps. (Christensen, Tr. 2/29/12, p. 138, ll. 16-21.)

19 24. The Planning Director for the County of Hawaii stated that current law requires that all  
20 subdivision maps recorded in the Hawaii County Department of Planning depict all watercourses,  
21 but she did not know what the law was in 1954. Liethead-Todd, Tr. 2/29/12, p. 70, ll. 7-13.)  
22 [Complainants FOF 18.]

23 25. A subdivision map dated July 1, 1954 shows a different connection of Branch Stream 1  
24 to Ainako Stream (see FOF 5, *supra*) and the Branch Stream 2/Drainage Channel (Exh. B-1)  
25 [Complainants FOF 13]; but the map is an enlarged copy of a portion of File Plan 427 filed by  
26 Hilo Sugar Company in 1947. (Exhs. B-2 and A-52; Christensen, Suppl. Declaration, ¶ 7-8.)  
27 [Koehnen FOF 9.]

28  
29 2. **The 1954 TMK Map**

1 26. The 1954 TMK Map Plat for Zone 2, Section 5, Plat 25 is based on the 1947 File Plan  
2 427. (Exh. B-2; Santiago, Tr. 2/29/12, p. 23, l. 19 to p. 24, l. 10; Christensen, Tr. 2/29/12, p. 146,  
3 ll. 8-17.) [Weight FOF 87, 95, 96.]

4 27. The 1954 TMK Map represents what was surveyed and recorded back in 1947 and not in  
5 1954. (Exh. A-49: Christensen, Suppl. Declaration, ¶ 8; Exh. A-51: Cross, Suppl. Declaration, ¶  
6 13.) [Weight FOF 97.]

7

8 3. **Parties and Witnesses**

9

10 28. Applicant Weight's parents purchased the property at 1000 Ainako Avenue in 1954, built  
11 a new home, and moved onto the property in the summer of 1956. After going to college in 1962,  
12 applicant Weight returned to Hilo in 1970 and has continuously lived on the property since 1995.  
13 (Exh. A-1: Declaration of Leslie Aina Weight, p. 1, ¶ 3; Weight, Tr. 2/29/12, p. 173, l. 5 to p.  
14 177, l. 10; Exh. A-58: Warranty Deed.) [Weight FOF 14-15; Complainants FOF 19-20; 29.]

15 29. Applicant Henderson has lived with his wife, Judy, at 107 Kokea Street since 2004. Mrs.  
16 Henderson and her family resided at this property since 1965, and when her mother passed away  
17 in 2004, she and her husband moved onto the property. Applicant Henderson and his family,  
18 including his brother Richard, resided at 51 Kokea Street from 1958 to 1976, when his parents  
19 sold the property. This property is currently owned by Applicant's witness Marsh. (Applicant  
20 Henderson, Tr. 2/29/12, p. 39, ll. 11-15, p. 40, ll. 15-19; Richard Henderson, Tr. 3/1/12, p. 303, ll.  
21 5-14; Judy Henderson, Tr. 3/1/12, p. 296, ll. 3-12; p. 299, l. 23 to p. 300, l. 6.) [Weight FOF 16-  
22 18; Complainants FOF 30.]

23 30. Applicants' witness Richard Henderson lived at 51 Kokea Street from 1958-1964 and  
24 visited the property intermittently from 1967-1972. (Exh. A-4: Declaration of Richard A.  
25 Henderson, ¶ 3.)

26 31. Intervenor Marsh's parents purchased the property at 51 Kokea Street in 1978, and he has  
27 lived there continuously from 1982 to the present. (Exh. A-6: Declaration of Bret Marsh, ¶ 3.)

28 32. Intervenors Koehnen purchased the property at 111 Kapaa Street in 1948 and completed  
29 their house in 1957, in which they have continuously resided to the present time. (Koehnen, Tr.  
30 2/29/12, p. 156, l. 7 to p. 157, l. 2; Exh. A-8: Testimony of Fred Koehnen, ¶ 3.) [Weight FOF  
31 22.]

1 33. Applicants' witnesses Robert and Susan Irvine previously resided at 974 Ainako Avenue  
2 from 1973 to 2005. (A-5: Declaration of Robert and Susan Irvine, ¶ 1; R. Irvine, Tr. 3/1/12, p.  
3 269, l. 20 to p. 270, l. 2.) [Weight FOF 20.]

4 34. Complainants Okazaki purchased the property at 80 Kokea Street in 1960 and have  
5 resided there continuously since 1963. (Dora Okazaki, Tr. 3/1/12, p. 382, ll. 1-7; Ron Okazaki,  
6 Tr. 3/1/12, p. 414, ll. 22-25.) [Complainant FOF 51; Weight FOF 25.]

7 35. Complainant Shindo resides at 145 Koula Street. (Submittal E1, Commission meeting of  
8 September 27, 2011, Honolulu, Hawaii, Exh. 1: "Request for Dispute Resolution Memorandum,"  
9 p. 1.) [Weight FOF 28.]<sup>1</sup>

10 36. Complainants Jung own and have resided at 118 Koula Street since 1997. (Jung, Tr.  
11 3/1/12, p. 322, ll. 4-12.) [Complainant FOF 61, Weight FOF 24.]

12 37. Complainants Purves reside at 60 Kokea Street. (Staff Submittal E1, "Mediation or  
13 Binding Arbitration for Complaint/Dispute Resolution (CDR.2769.8); Application for After-the-  
14 Fact Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend  
15 Instream Flow Standard (SCAP.2898.8) Ainako Branch Stream, Hilo, Hawaii; TMKs: (3) 2-5-  
16 025:005, 014 and 006, 2-5-024:028, 029 and 045", Commission meeting of September 27, 2011,  
17 Honolulu, Hawaii; Exh. 1: "Request for Dispute Resolution Memorandum," p. 1) [Weight FOF  
18 27.]<sup>2</sup>

19 38. Intervenor Meltzer resides at 46 Kokea Street. (Meltzer, "Application to be a Party in a  
20 Contested Case Hearing before the Commission on Water Resource Management," dated  
21 11/24/11, filed with the Commission on 11/28/11 and assigned document ID no. 8455.)<sup>3</sup>

22 39. Exhibit 1c to Submittal E.1, Commission meeting of September 27, 2011, is the 1954  
23 TMK map, derived from the 1947 subdivision file plan (see FOF 26-27, *supra*), with the lots  
24 currently owned by Applicants Weight and Henderson and Complainants Okazaki and Jung  
25 identified by Commission staff for its presentation at the September 27, 2011 Commission  
26 meeting. The lots owned by Complainant Shindo, Intervenor Koehnen, and Applicants'  
27 witnesses Robert and Susan Irvine are identified on the original map. The lot currently owned by  
28 Complainant Purves is on the opposite side of Branch Stream 2/Drainage Channel from

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<sup>1</sup> Complainant Shindo did not testify at the hearing, and her prepared testimony, which identified how long she had resided at her property, was not introduced into evidence.

<sup>2</sup> Complainant Purves neither submitted written testimony nor testified at the hearing.

<sup>3</sup> Complainant Meltzer neither submitted written testimony nor testified at the hearing.

1 Complainant Okazaki and identified as belonging to “Donald R. Lavalley” with the number “5”  
2 encircled. The lot currently owned by Meltzer is between the Purves’ lot and Ainako Stream and  
3 identified as belonging to “Donald R. La Valley” with the number “4” encircled. (Exh. A-61:  
4 Exhibit 1c to Staff Submittal E1, “Mediation or Binding Arbitration for Complaint/Dispute  
5 Resolution (CDR.2769.8); Application for After-the-Fact Stream Channel Alteration Permit,  
6 Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8)  
7 Ainako Branch Stream, Hilo, Hawaii; TMKs: (3) 2-5-025:005, 014 and 006, 2-5-024:028, 029  
8 and 045”, Commission meeting of September 27, 2011, Honolulu, Hawaii.)

9 40. The parties and witnesses who have property along Ainako Stream are Applicant Weight,  
10 Applicant’s witness Marsh, Intervenor Meltzer, and Intervenor Koehnen. Witnesses Robert and  
11 Sue Irvine previously owned property on Ainako Stream. (Attachment 1; FOF 39, *supra.*)

12 41. The parties who have property along the Branch Stream are Applicants Weight and  
13 Robert Scott Henderson, and Complainants Okazaki, Shindo, and Jung. (Attachment 1; FOF 39,  
14 *supra.*)

15 42. The parties and witness who have property along Branch 2/Drainage Channel are  
16 Applicant Weight, Applicant’s witness Marsh, and Complainants Okazaki and Purves.  
17 (Attachment 1; FOF 40, *supra.*)

18 43. The parties have not alleged, nor is there any evidence of, any traditional cultural,  
19 historical or natural resources or traditional and customary native Hawaiian practices occurring  
20 in or around Ainako Stream, the Branch Stream (including Branch Stream 1a and 1b), or Branch  
21 Stream 2/Drainage Channel.

22

23 C. **Ainako Stream, the Branch Stream, and Branch 2/Drainage Channel**

24

25 1. **Ainako Stream**

26

27 44. Ainako Stream emerges from springs above Hilo and flows between several residential  
28 lots in the Ainako subdivision, where it passes under four streets and then terminates in a boggy  
29 area about 1.3 miles from its origin. (Exh. A-12: 1947 TMK map; Exhs. A-13 and A-14:  
30 annotated 1947 TMK Maps; Exh. A-30: March 2010 Report on Ainako Stream and Branch  
31 Stream by Scott Henderson, p. 1) [Weight FOF 37].

1 45. Ainako Stream typically flows year-round; however, the quantity of flows varies from  
2 month to month and year to year. (Exh. A-30, at pp. 1 and 7-8; Exhs. A-32 to A-38) [Weight  
3 FOF 38].

4 46. Between 1957 and the present, Koehnen experienced complete dry-ups of Ainako Stream  
5 six to eight times. (Koehnen, Tr. 2/29/12, p. 157, ll. 10-25.) [Complainants FOF 44.]

6 47. The Akolea Ditch was constructed in the 1980s, and before its construction, there was  
7 more surface runoff and Ainako streamflow, with a considerable flood threat throughout the  
8 Ainako subdivision. Prior to the construction of the Akolea Ditch, areas of Ainako subdivision  
9 along the stream were subject to several major flood events. (Koehnen, Tr. 2/29/12, p. 158, l. 13  
10 to p.159, l. 21; Exh. A-30, p. 3; Bowles, Tr. 3/1/12, p. 369, ll. 14-21.)

11 48. Koehnen has observed that there have not been sustained periods of very heavy rainfall  
12 that compare to 1964 and 1967, and that there has been a gradual change of weather that has  
13 decreased rainfall in general. (Exh. A-8: Testimony of Fred J. Koehnen, ¶ 6.)

14 49. Applicant/expert witness Henderson is of the opinion that there has been a pattern of  
15 decreasing rainfall since the early 1980s. (Exh. A-2: Declaration of Robert S. Henderson, ¶ 16.)

16 50. Complainants' expert witness Bowles was of the opinion that there is a downward trend  
17 in rainfall in the past ten years, but it is not totally significant. (Bowles, Tr. 3/1/12, p. 378, l. 20  
18 to p. 379, l. 1.)

19 51. Koehnen constructed his hydro-electric plant in 1982 and commenced operation in 1983,  
20 and is greatly concerned about any attempt to decrease the flow of Ainako Stream above his  
21 property. His plant was constructed for the flow that existed at that time. He will accept whatever  
22 the stream flow was in 1983, including whatever diversion existed upstream at that time, has not  
23 had complaints or issues related to Applicant Weight's prior or current use of stream flow, but  
24 does not want more diversions. (Exh. A-8, at ¶ 7; Koehnen, Tr. 2/29/12, p. 161, l. 20 to p. 162, l.  
25 24.)

26 52. Applicant's witness Marsh lives just downstream of Weight along Ainako Stream and  
27 opposes changes to the flows of Ainako Stream and Branch Stream and modifications to the  
28 historic configuration of the flood control levees along the east boundary of his property, as they  
29 will cause extreme flooding and erosion to his property. (Exh. A-6: Declaration of Bret Marsh, ¶  
30 4.)

1 53. Complainant Meltzer lives just downstream of Marsh on the other side of Kokea Street,  
2 but his application to be a party in this contested case states similar objectives as the other  
3 complainants: to “[r]estore free water flow to branch stream 1b and fully restore free flow of  
4 surface flow to branch stream 1 and branch stream 2,” alleging “irreparable diminution of  
5 property value, loss of use, other incidental damages and loss of appurtenant rights.” He was  
6 granted standing because of his ownership of property along Ainako Stream but owns no  
7 property along either the Branch Stream or Branch Stream 2/Drainage Channel, so the hearings  
8 officer stated at the December 16, 2011 standing hearing that “if his testimony is irrelevant to  
9 what his interests are in the stream, I’ll just strike that testimony. But we do have to open up that,  
10 he does have property on Ainako Stream, we just have to see what he’s going to testify about if  
11 at all at a later time.” (Meltzer, “Application to be a Party in a Contested Case Hearing before the  
12 Commission on Water Resource Management,” dated 11/24/11, filed with the Commission on  
13 11/28/11 and assigned document ID no. 8455; Transcript of Hearing on Standing, 12/16/11, p. 19,  
14 l. 7 to p. 22, l. 2.)

15  
16 2. **The Branch Stream**

17  
18 54. The Branch Stream extends about one-half mile from the flood control gate on Ainako  
19 Stream on the Weight property through culverts at Kokea Street, Koula Street, and Kapaa Street  
20 and into the same boggy area in a valley below Kapaa Street that Ainako Stream flows into. (Exh.  
21 A-30, p. 7-8.)

22  
23 a. **Origin at 1b**

24  
25 55. Applicant Weight has a diversion on Ainako Stream along the east side of her property  
26 near Ainako Avenue, through which water flows through a flood control gate and an  
27 underground culvert into the Branch Stream, designated as Branch 1b for the purposes of this  
28 hearing. (Exh. A-1: Declaration of Leslie Aina Weight, ¶ 3; Exh. A-61.) [Weight FOF 39, 103.]

29 56. The gate was installed in the 1950s or possibly earlier, and appears to be integral with the  
30 three-foot high retaining wall that runs along the entire Ainako Stream boundary of the Weight  
31 property. (Exh. A-30, p. 4.)

1 57. Since the 1960s, a steel plate of 14-inch width and 36-inch height that used to slide  
2 vertically within grooves in the sides of the gate structure had been jammed in a position that  
3 was about three and one-half inches above the bottom of the gate. It was replaced in 2009 with a  
4 gate of plastic wood by Applicant Robert Scott Henderson and set at five inches to approximate  
5 the opening of the old gate in its fixed position of three and one-half inches with a jagged bottom.  
6 (Exh. A-30, p. 5; Weight, Tr. 2/29/12, p. 189, l. 9 to p. 190, l. 2; Henderson, Tr. 2/29/12, p. 82, l.  
7 25 to p., 83, l. 10.) [Weight FOF 113-118; Complainants FOF 26.]

8 58. The flood control gate cannot and never has completely closed off the water passageway  
9 into the Branch Stream, because there is still a three-quarter square foot of area which is still  
10 open when the gate is at its lowest point. (Exh. C-14; Henderson, Tr. 2/29/12, p. 80, l. 9 to p. 82,  
11 l. 12.) [Weight FOF 104.]

12 59. The concrete culvert is placed onto an unaltered pahoehoe lava surface in a natural low  
13 spot through which water would have flowed. (Exh. A-30, p. 4.)

14 60. A diversion dam made of loose-stacked rock and topped by a length of railroad track had  
15 been built across half the width of Ainako Stream. It is not known who first built the dam. Over  
16 the years, Applicant Weight's father periodically repaired storm flow damage to the dam by  
17 recovering loose rocks in the stream and placing them back on the dam face. Applicants' expert  
18 witness Henderson estimated that the typical water level on Ainako Stream is about eight and  
19 one-half inches, or about 2000 gallons per minute. Without the diversion dam, the flow in  
20 Ainako Stream would be about 2,570 gallons per minute, and no water would flow into the  
21 culvert that feeds the Branch Stream. (Exh. A-30, pp. 6-7; Exhs. C-19A and C-19B; Henderson,  
22 Tr. 2/29/12, p. 75, l. 17 to p. 78, l. 3.) [Weight FOF 100-102.]

23 61. Applicant Weight's diversion is at the location of a temporary sugar cane flume that is  
24 shown on a 1924 Hilo Sugar Company field map. The flume was installed to transport the cane  
25 down to the mill, and the flume was at this location instead of about 100 feet downstream  
26 because of the contours—they needed to get the water and sugar cane to flow downhill, not  
27 uphill. (Exh. A-11; Cross, Tr. 2/29/12, p. 112, l. 15 to p. 114, l. 14) [Weight FOF 108-109.]

28 62. Applicant Weight testified that the location of the flood control gate has remained the  
29 same and has been the only gate since she and her family moved onto their property in 1956.  
30 (Weight, Tr. 2/29/12, p. 177, l. 23 to p. 178, l. 9.) [Weight FOF 110.]



1 63. An August 1954 architectural drawing of the Weight house and property shows Ainako  
2 Stream, the culvert and the Branch Stream. No other connection to Ainako Stream is shown.  
3 (Exhs. A-18 and A-19; Exh. A-1: Declaration of Leslie Aina Weight, ¶ 12; Weight, Tr. 2/29/12,  
4 p. 173, l. 12 to p. 175, l. 15.)

5 64. Based on their personal observations, other witnesses stated that the flood control  
6 gate/culvert was the only connection to Ainako Stream:

7 a. Applicant Henderson’s recollections go back to 1978;

8 b. former neighbors Irvine’s recollections go back to 1973;

9 c. neighbor Marsh’s recollections go back to 1978;

10 d. the recollections of Awong, former yardman to the Weights, go back to the mid-  
11 1970s;

12 e. Richard Henderson’s recollections go back to 1978; and

13 f. John Cross’s recollections go back to 1968. (Exh. A-2: Declaration of Robert S.  
14 Henderson, ¶ 7-10; Exh. A-5: Letter from Robert and Susan Irvine, p. 1; Exh. A-6: Declaration  
15 of Bret Marsh, ¶ 7; Exh. A-7: Declaration of Abel Awong, ¶ 8-9; Awong, Tr. 2/29/12, p. 218, l.  
16 24 to p. 220, l.24; Richard Henderson, Tr. 3/1/12, p. 304, l. 23 to p. 306, l. 18; Cross, Tr. 2/29/12,  
17 p. 116, ll. 9-11.) [Weight FOF 114.]

18

19 b. **Origin at 1a**

20

21 65. The 1954 TMK Map, which is based on the 1947 subdivision File Plan 427, depicts the  
22 Branch Stream as starting at 1a, not at 1b, with a “side channel” running down from the 1b  
23 location to the 1a location. The Branch Stream was used as a boundary to divide lot 13 into 13-A  
24 and 13-B and bears the legend “boundary follows along the centerline of stream.” (Exhs. B-1 and  
25 B-2; Santiago, Tr. 2/29/12, p. 32, ll. 2-11.) [Complainants FOF 13.]

26 66. In accordance with established survey practices, stream routes are depicted as solid lines  
27 only if those stream routes were also used as property boundaries, and, therefore, side tributaries  
28 or stream segments that were not used as property boundaries were commonly shown as dashed  
29 lines. Whether or not a stream is flowing or manmade versus natural cannot be inferred by its  
30 identification on subdivision or TMK maps. (see FOF 22-23, *supra*.)

1 67. An August 1954 architectural drawing of the Weight house and property shows Ainako  
2 Stream, the culvert and the Branch Stream. No other connection to Ainako Stream is shown. (see  
3 FOF 63, *supra*.)

4 68. An aerial photograph taken in 1956 shows the connection of Ainako Stream and the  
5 Branch Stream at where the gate is located and no other connection between the two streams.  
6 (Exh. A-68 and A-69; Cross, Tr. 2/29/12, p. 114, l. 15 to p. 116, l. 11.)

7 69. Based on their personal observations, Weight and other witnesses stated that the flood  
8 control gate/culvert was the only connection to Ainako Stream from at least 1956. (see FOF 62,  
9 64, *supra*.)

10 70. The rock walls that are in the area where the 1a connection between Ainako Stream and  
11 the Branch Stream would have been, have existed at least since 1958. (Exh. A-2: Declaration of  
12 Robert S. Henderson, ¶ 7.)

13 71. When Applicant Weight's family bought their property in 1954, the area where branch 1a  
14 might have been was grassy lawn and marked by a slight depression in the ground. (Exh. A-1:  
15 Declaration of Leslie Aina Weight, ¶ 11.)

16 72. The location of branch 1a is solid bedrock, and water would have had to run literally  
17 uphill to get over those obstructions, and there are no visible breaks in the wall. At least from the  
18 1950s the area was a uniform expanse of grassy lawn with no lateral channels or waterways  
19 existing between Ainako Stream and the Branch Stream. (Exh. A-29; Exh. A-2: Declaration of  
20 Robert S. Henderson, ¶ 10; Henderson, Tr. 2/29/12, p. 58, l. 13 to p. 59, l. 11; Tr. 3/1/12, p. 317,  
21 ll. 1-23.)

22 73. Sue Irvine, who lived across Ainako Stream from the Weights (see FOF 33, *supra*),  
23 stated that "Ainako Stream is four feet below the edge of the wall...if you went from Ainako  
24 Stream down there straight across on the line they call 1a, you might be going uphill." (S. Irvine,  
25 Tr. 3/1/12, p. 287, ll. 15-22.)

26 74. Dora Okazaki stated in her written testimony that branch 1a was wide enough in 1963  
27 that she couldn't jump across it even though she was a young woman at the time. About 1992 or  
28 1993, the water suddenly stopped and her husband walked upstream to see why and told her that  
29 something was blocking the mouth of the branch stream. A few years later, she saw a lot of  
30 trucks and a lot of work being done on the Weight property. When she went up, the mouth of the

1 branch stream was covered up and landscaped and didn't exist anymore. (Exh. B-14: Testimony  
2 of Dora Okazaki, pp. 2-3.)

3 75. However, in her oral testimony, Dora Okazaki stated that when she couldn't find the  
4 mouth (1a) because of the major overhaul of Weight's yard, it was in the 1970s (not in the 1990s  
5 as she stated in her written testimony—see FOF 74, *supra*). (D. Okazaki, Tr. 3/1/12, p. 395, l. 15  
6 to p. 396, l. 13.)

7 76. Further, in her oral testimony, Dora Okazaki first stated that between 1985 and 1995, she  
8 walked up the main stream (Ainako Stream) and saw bars embedded into its floor at the  
9 boundary between the Marsh and Weight properties. The next time she went up with her husband,  
10 there was a sheet intertwined between the bars. She later was unsure whether the time was in the  
11 1960s, 1970s, or in the 1990s. (D. Okazaki, Tr. 3/1/12, p. 388, l. 9 to p. 391, l. 10; p. 406, l. 5 to  
12 p. 407, l. 19; p. 409, l. 22 to p. 410, l. 16.)

13 77. In his written testimony, Ron Okazaki first indicated that in 1963 the mouth of the  
14 Branch Stream was at 1a, was pretty wide and had two vertical metal poles sticking out of the  
15 ground. Later, in his written testimony, he indicated that in 1992 or 1993, a piece of sheet metal  
16 had been placed between the two metal poles, and when he revisited again a few years later, the  
17 piece of sheet metal was not there anymore, but instead there was an egg-shaped adjustable grate  
18 covering the mouth that could be opened or closed. (Exh. B-15: Testimony of Ron Okazaki, p. 2,  
19 l. 14 to p. 3, l. 17.)

20 78. However, in his oral testimony, R. Okazaki stated that it was true that the change he  
21 noticed is not that the mouth of the stream had changed but that there was now a gate to control  
22 the Branch Stream flow where the metal poles had been. (R. Okazaki, Tr. 3/1/12, p. 422, l. 18 to  
23 p. 424, l. 4.)

24 79. Steve Bowles, Complainants' expert witness, stated in his written testimony that "(t)he  
25 origin of Branch Stream 1 used to be downstream of its current origin. The former, natural origin  
26 has been closed off. (Exh. B-11: Testimony of Stephen P. Bowles, p. 2, ll. 24-26.)

27 80. However, in his oral testimony, Bowles stated that he couldn't recall saying that there  
28 was a different beginning of the Branch Stream and didn't know if he could say that there was a  
29 different beginning. From the map that was shown to him and from his visual inspection, the  
30 only thing he could say was that the gate's location correlates with where it is now. (Bowles, Tr.  
31 3/1/12, p. 379, ll. 2-21.)

1  
2 c. The Branch Stream's Users  
3

4 81. Applicant Weight's use of the gate is for flood control, and her use of the Branch Stream  
5 is for aesthetic and ecological purposes. (Exh. A-1: Declaration of Leslie Aina Weight, ¶ 8; Exh.  
6 A-2: Declaration of Robert S. Henderson, ¶ 13; Exh. A-6: Declaration of Bret Marsh, ¶ 10;  
7 Weight, Tr. 2/29/12, p. 191, l. 12 to p. 192, l. 4.) [Weight FOF 112.] (See also FOF 1-2, *supra*,  
8 regarding ornamental ponds A and B.)

9 82. Applicant Henderson's use of the Branch Stream is for aesthetic and ecological purposes.  
10 See FOF 1-2, *supra*, regarding ornamental pond C.)

11 83. Both Weight and Henderson agree to the diversion amount corresponding to the historical  
12 amount, with the new gate set at five inches to approximate the opening of the old gate in its  
13 fixed position of three and one-half inches with a jagged bottom. (Exh. A-1: Declaration of  
14 Leslie Aina Weight, ¶ 8; Declaration of Robert S. Henderson, ¶ 12; See FOF 1 and 57, *supra*)

15 84. Complainants Okazaki's use of the Branch Stream was for koi ponds, the aesthetics of a  
16 flowing stream, and recreation for their children. (D. Okazaki, Tr. 3/1/12, p. 386, l. 19 to p. 383, l.  
17 4; p. 393, ll. 1-15; R. Okazaki, Tr. 3/1/12, p. 415, l. 5 to p. 417, l. 25.)

18 85. From 1963, when the Okazakis first lived on their property, the Branch Stream was fast-  
19 running. But in the 1980s, his koi ponds went out of existence because of a lack of water. (R.  
20 Okazaki, Tr. 3/1/12, p. 416, l. 1 to p. 417, l. 25; p. 424, l. 24 to p. 425, l. 18.)

21 86. The Okazakis want the flood control gate removed and will take whatever water comes  
22 through. (R. Okazaki, Tr. 3/1/12, p. 420, l. 19 to p. 421, l. 22.)

23 87. Complainants Jung's use of the Branch Stream is for the aesthetics of a year-round  
24 stream, including the surge that comes with a hard rain. (Jung, Tr. 3/1/12, p. 323, ll.2-5; p. 345, l.  
25 25 to p. 346, l.3.)

26 88. When Jung first lived at their property starting in 1997, the Branch Stream flow was  
27 intermittent. Six months of the year it was completely dry and sometimes there would be a flow.  
28 When it rained heavily, there was a nice flush. Around 2005, he started seeing a bit more flow.  
29 Flow stopped in 2009 and about two or three days before the field visit by Commission staff in  
30 March 2011, water flowed continuously and is now a year-round stream again. (Jung, Tr. 3/1/12,  
31 p. 323, l. 6 to p. 327, l. 11.)

1 89. Complainants Jung want the alleged 1a mouth of the Branch Stream opened, or the flood  
2 control gate at 1b taken down. Mr. Jung would like from 50 to 100 percent more flow than there  
3 is today. He bases this estimate on conversations with Complainants Okazaki, and that they are  
4 saying that the natural flow was 50 to 100 more than it currently is (Jung, Tr. 3/1/12, p. 342, l. 24  
5 to p.345, l. 25;p. 349, ll. 3-25.) (But see FOF 86, *supra.*)

6  
7 3. **Branch 2/Drainage Channel**

8  
9 90. Branch Stream 2/Drainage Channel forms part of the boundary between the Weight and  
10 Marsh properties, passes through a culvert under Kokea Street, and terminates after forming the  
11 boundary between the Okazaki and Purves properties. (Exhibit 1c to Staff Submittal E1,  
12 Commission meeting of September 27, 2011) [Weight FOF 56.] (See also FOF 37 and 39,  
13 *supra.*)

14 91. The 1947 subdivision File Plan Map and the 1954 TMK Map, which is derived from the  
15 1947 subdivision map, show that Branch Stream 2/Drainage Channel's upgradient beginning is  
16 on land, with a survey chord connecting it to Ainako Stream to complete the boundary between  
17 the Weight and Marsh properties. (Exhibit 1c to Staff Submittal E1, Commission meeting of  
18 September 27, 2011) [Weight FOF 61-62] (See FOF 18, 22, 25-27, *supra.*)

19 92. Branch Stream 2/Drainage Channel is depicted as a solid, wavy/squiggly line, with the  
20 legend "boundary follows along centerline of stream," while the survey chord is depicted as a  
21 solid, straight line, with the legend "19° 44"←84.82" on Exh. B-1, and "19° 44→84.82" on Exh.  
22 52A.

23 93. Complainants misinterpret a survey chord on the 1947 TMK Map as being a stream. The  
24 straight line is clearly a survey chord, which marked the property boundary between lots 12 and  
25 13on the original subdivision. (Exh. A-51: Supplemental Declaration of John Cross, ¶ 9; Cross,  
26 Tr. 2/29/12, p. 130, l. 4 to p. 131, l. 9.)

27 94. An August 1954 architectural drawing of the Weight house and property shows Ainako  
28 Stream, the culvert and the Branch Stream. No other connection to Ainako Stream is shown. (See  
29 FOF 63, *supra.*)

30 95. Based on their personal observations, other witnesses stated that the flood control  
31 gate/culvert was the only connection to Ainako Stream:

- 1 a. Applicant Henderson’s recollections go back to 1978;
- 2 b. former neighbors Irvine’s recollections go back to 1973;
- 3 c. neighbor Marsh’s recollections go back to 1978;
- 4 d. the recollections of Awong, former yardman to the Weights, go back to the mid-  
5 1970s;
- 6 e. Richard Henderson’s recollections go back to 1978; and
- 7 f. John Cross’s recollections go back to 1968. (See FOF 64, *supra*.)

8 96. Branch Stream 2/Drainage Channel only has water flow during very high sustained  
9 rainfall and high surface runoff. Applicant Henderson and Richard Henderson both recall this  
10 feature as a drainage ditch that was nearly always dry. (Exh. A-2: Declaration of Robert S.  
11 Henderson, ¶ 6.)

12 97. Branch Stream 2/Drainage Channel never had a connection to Ainako Stream, at least  
13 since 1958. It was (and is) a drainage feature that has always looked just as it does today. (Exh.  
14 A-4: Declaration of Richard A. Henderson, ¶ 5.)

15 98. Branch Stream 2/Drainage Channel is typically dry and has water flow only during heavy  
16 or prolonged rains. This channel was never fed by a gate with water from Ainako Stream. The  
17 existing concrete Flood Control Levees, which run nearly the length of Ainako Stream on the  
18 south side of the Marsh property, and the dry-stack lava rock wall, which continues along the  
19 Ainako Stream and the Weight property, have been in their present location and of the same  
20 condition at least since Marsh’s parents purchased the property in 1978. (Exh. A-6: Declaration  
21 of Bret Marsh, ¶ 9.)

22 99. In his written testimony, Complainants’ expert witness Bowles stated that Branch Stream  
23 2/Drainage Channel once existed, was a natural branch stream of Ainako Stream, and had been  
24 artificially eliminated and its channels filled in. (Exh. B-11: Testimony of Stephen P. Bowles, p.  
25 2, l. 27 to p. 3, l. 2; Exh. B-12: Responsive Testimony of Stephen P. Bowles, p. 2, ll. 8-10.)

26 100. However, in his subsequent oral testimony, Bowles stated that he didn’t say Branch  
27 Stream 2/Drainage Channel was running, only that it was a defined channel, and a defined  
28 channel could be a ditch or a dry bed. (Bowles, Tr. 3/1/12, p. 379, l. 22 to p. 380, l. 15.)

29 101. Vince Kimura, who grew up on lot 32 on Koula Street, played in the Branch Stream and  
30 branch 2/drainage channel from 1970-1977. Contacted by Commission staff on the suggestion of  
31 Complainant Jung, Mr. Kimura stated that “[b]ranch #2 only acted up during heavy rain and

1 actually bordered the Okazaki property ending in lot 34 on Koula Street. So Branch #2 is  
2 normally dry.” (Agenda Item E1, Exhibit 8: Email from Vince M. Kimura to Robert Chong,  
3 Commission staff, April 11, 2011, Commission meeting of September 27, 2011.)

4 102. When the Okazakis purchased their property in 1960, they remembered that the Branch  
5 Stream was “fast running” and Branch Stream 2/Drainage Channel was “slow running.” (D.  
6 Okazaki, Tr. 3/1/12, p. 382, l. 16 to p. 383, l. 8; p. 415, l. 21 top. 416, l. 2) [Complainants FOF  
7 52, 59.]

8 103. The Okazakis remember that the flow of water in the segment of Branch Stream  
9 2/Drainage Channel adjacent to the Okazakis stopped in the 1970s. (D. Okazaki, Tr. 3/1/12,  
10 p.387, ll. 7-10.) [Complainants FOF 54.]

11

12

### III. CONCLUSIONS OF LAW

13

#### A. Branch Stream 2/Drainage Channel

14

15  
16 1. There is no evidence that Branch Stream 2/Drainage Channel was ever a branch of  
17 Ainako Stream. It is a drainage channel with its origin on land. (FOF 91-101.)

18 2. Complainants misinterpret a straight survey chord running from Ainako Stream to the top  
19 of the drainage channel, depicted as a wavy/squiggly line, as included in the legend, “boundary  
20 follows along centerline of stream;” but the survey chord is separately marked with survey  
21 coordinates. (FOF 92-93.)

22 3. The only testimony that Branch Stream 2/Drainage Channel was a running stream was  
23 from Complainants Okazaki, who described it as “slow running” when they bought their  
24 property in 1960. (FOF 102.)

25 4. However, there was no physical connection to Ainako Stream before, during and after the  
26 Okazakis bought their property in 1960. (FOF 91-94, 97.)

27 5. The Okazakis’ description of Branch Stream 2/Drainage Channel as “slow running” is  
28 consistent with the observations of others that Branch Stream 2/Drainage Channel only flowed  
29 during periods of prolonged or heavy rain. (FOF 96, 98, 101.)

30 6. A “stream” is defined in the State Water Code as “any river, creek, slough, or natural  
31 watercourse in which water usually flows in a defined bed or channel. It is not essential that the

1 flowing be uniform or uninterrupted. The fact that some parts of the bed or channel have been  
2 dredged or improved does not prevent the watercourse from being a stream.” A “watercourse”  
3 “means a stream and any canal, ditch, or other artificial watercourse in which water usually  
4 flows in a defined bed or channel. It is not essential that the flowing be uniform or  
5 uninterrupted.” HRS Section 174C-3.

6 7. Branch Stream 2/Drainage Channel’s origin is on land, COL 1, *supra*, and water does not  
7 usually flow but only flows during periods of rain, when runoff enters it.

8 8. Weight, Marsh, Okazaki and Purves, who have property alongside Branch Stream  
9 2/Drainage Channel, have no riparian rights to that channel, because it is not a stream.

10 9. Even if Branch Stream 2/Drainage Channel meets the Water Code’s definition of a  
11 stream, COL 6, *supra*, Weight, Marsh, the Okazakis and the Purves still would not have riparian  
12 rights, because the only flow would be runoff in times of rain and such runoff are not subject to  
13 riparian rights. Riparian rights apply to “the natural flow of the stream...in the shape and size  
14 given it by nature.” **McBryde v Robinson**, 54 Haw. 178, at 198; 504 P.2d 1330, at 1344 (1973).  
15 *appeal dismissed for want of jurisdiction and cert. denied*, 417 U.S. 962 (1974). FOF 60. COL  
16 12, 14-17, *supra*. In **Carter v Hawaii**, 24 Haw. 47 (1917), the Hawaii Supreme Court ruled that  
17 the doctrine of riparian rights was applicable to “storm and freshet” water, but in **McBryde v**  
18 **Robinson**, the Court overruled **Carter** and ruled that such waters were the property of the State.  
19 54 Haw. 178, at 199-200; 504 P.2d 1330, at 1345.

20

21 B. **Origin 1a for the Branch Stream**

22

23 10. The only evidence that the origin of the Branch Stream was further downstream at 1a  
24 from its current location at 1b is the 1947 subdivision File Plan 427. (FOF 65.)

25 11. File Plan 427 was certified by the surveyor of the Territory of Hawaii on July 9, 1947,  
26 with the notation that “the description of survey and map hereon have been examined and  
27 checked as to form and mathematical correctness, but not on the ground;” i.e., physical features  
28 on the map were not confirmed. (FOF 19.)

29 12. All other evidence, starting from 1954, does not support, and is contrary to, the depiction  
30 on the 1947 subdivision plan. (FOF 67-80.)



1 13. In accordance with established survey practices, stream routes are depicted as solid lines  
2 only if those stream routes were also used as property boundaries, and, therefore, side tributaries  
3 or stream segments that were not used as property boundaries were commonly shown as dashed  
4 lines. Whether or not a stream is flowing or manmade versus natural cannot be inferred by its  
5 identification on subdivision or TMK maps. (FOF 22, 23, and 66.)

6 14. The legend, “boundary follows along centerline of stream,” is used for any watercourse,  
7 natural or manmade, flowing or not, if the watercourse is used as a property boundary. (FOF 66.)

8 15. The legend, “boundary follows along centerline of stream,” was used to depict the  
9 drainage channel that formed part of the property boundary between the Weight and Marsh  
10 properties. (FOF 92. See COL 2, *supra*.) The same legend was applied to the Branch Stream  
11 when it was used in July 1954 (using the 1947 File Plan 427 as its source) as a boundary to  
12 divide lot 13 into 13-A and 13-B at 1a and bears the legend “boundary follows along the  
13 centerline of stream.” (FOF 65.) Therefore, the 1a location of the Branch Stream was not  
14 necessarily a flowing stream or even a periodic stream, but could also have been a drainage  
15 channel.

16 16. The same map dividing lot 13 into 13-A and 13-b depicts a “side channel” with dotted  
17 lines, starting at the 1b location (the site of the current flood control gate) and ending at the  
18 location of the alleged branch stream 1a origin. (FOF 65.)

19 17. Under the survey practices described above (see COL 11, *supra*), the side channel and the  
20 1a beginning of the Branch Stream could have been part of a single watercourse that originated  
21 at the present location at 1b; i.e., a drainage channel that originates at 1b runs downstream close  
22 to and parallel to Ainako Stream to the 1a location, which then diverges away from Ainako  
23 Stream to form its present course. This is a reasonable supposition, because: 1) without the rock  
24 dam in Ainako Stream, there would be no flow in the Branch Stream under average conditions,  
25 even with the artificially deepened channel carved into the rock base of the flood control gate,  
26 FOF 60; 2) 1b is further upstream than 1a; 3) the culvert at 1b is placed onto an unaltered  
27 pahoehoe lava surface in a natural low spot through which water would have flowed (FOF 59);  
28 4) the location of 1a is solid bedrock, and water would have had to run literally uphill to get over  
29 those obstructions (FOF 72); and 5) Ainako Stream is four feet below the edge of the wall at the  
30 1a location (FOF 73).

1 18. Thus, rather than beginning at 1a, a more reasonable historical course for the Branch  
2 Stream would have been as described in COL 17, *supra*. Under these conditions, the Branch  
3 Stream would have been a drainage channel similar to branch2/drainage channel, but it would  
4 also have received flows directly from Ainako Stream under high flow conditions. Such high  
5 flow conditions would have been more frequent than is presently the case, because much of the  
6 runoff from rain is now diverted by the Akolea Ditch, and there has been a trend toward less  
7 rainfall in the past few decades. (FOF 47-50.)

8 19. Regardless of whether or not Branch Stream 1a existed in the past, no evidence was  
9 presented as to its stream flow. Even if Complainants had provided sufficient evidence that such  
10 a connection existed with Ainako Stream at 1a, the quantity of the flow that they would have  
11 requested, and the evidentiary basis for their request, would have been required. Complainant  
12 Jung's request for 50 to 100 percent more flow than there is today, based on conversations with  
13 the Okazakis (and inconsistent with their request) (FOF 86, 89), falls far short of Complainants'  
14 evidentiary burden.

15 20. Therefore, there was no connection to Ainako Stream from the Branch Stream at location  
16 1a, and even if there had been such a connection, there is no evidence of its flow pattern (i.e.,  
17 perennial, intermittent, or drainage in very high flows in Ainako Stream) nor of the amount of  
18 flow.

19  
20 C. Ainako Stream

21  
22 1.  Holders of Riparian Rights to Ainako Stream

23  
24 21. The parties and witnesses who have property along Ainako Stream are Applicant Weight,  
25 Applicant's witness Marsh, Intervenor Meltzer, and Intervenor Koehnen. (FOF 40.) They  
26 therefore have the right to use Ainako Stream waters on their respective riparian lands, provided  
27 that: 1) the use is reasonable, and 2) the exercise of their rights cannot actually harm the  
28 reasonable use of those waters by other riparian landowners. **Reppun v Board of Water Supply**,  
29 65 Haw. 531, at 553; 656 P.2d 57, at 72 (1982).

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31 2.  Current Uses by Riparian Landowners

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22. Applicant Weight uses Ainako Stream for three flow-through ornamental ponds on the Branch Stream for aesthetic and ecological purposes. The flood control gate at the diversion is for flood control. (FOF 1, 2, and 81.)

23. Intervenor Koehnen constructed his hydro-electric plant in 1982 and commenced operation in 1983. His plant was constructed for the flow that existed at that time. He will accept whatever the stream flow was in 1983, including whatever diversion existed upstream at the time, and has not had complaints or issues related to Weight’s prior or current use of stream flow. He is greatly concerned about any attempt to decrease the flow of Ainako Stream above his property and does not want more diversions. (FOF 51.)

24. Applicant’s witness Marsh lives just downstream of Weight along Ainako Stream and has no diversions, but opposes changes to the flows of Ainako Stream and Branch Stream and modifications to the historic configuration of the flood control levees along the east boundary of his property, as they will cause extreme flooding and erosion to his property. (FOF 52.)

25. Intervenor Meltzer lives just downstream of Marsh on the other side of Kokea Street, but his application to be a party in this contested case states similar objectives as the other complainants: to “(r)estore free water flow to branch stream 1b and fully restore free flow of surface flow to branch stream 1 and branch stream 2,” alleging “irreparable diminution of property value, loss of use, other incidental damages and loss of appurtenant rights.” (FOF 53.) Intervenor Meltzer did not participate in the contested case hearing. Based on his objectives in his standing application, he would have supported transport of additional Ainako Stream waters to non-riparian lands, which is not within the rights of a riparian landowner. As for appurtenant rights, no evidence was presented at the hearing that the lands of Complainants Okazaki, Shindo or Jung had such uses at the time of the Great Mahele, as Okazaki’s uses were for a flowing stream and koi ponds, and Jung’s, for a flowing stream. (FOF 84, 87.) “[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion to fee simple land.” **Reppun v. Board of Water Supply**, 65 Haw. 531, at 551; 656 P.2d 57, at 71.

3. **Complainants’ Request for Additional Waters from Ainako Stream**

1 26. The current flows in the Branch Stream are not “the natural flow of the stream...in the  
2 shape and size given it by nature.” 54 Haw. 178, at 194; 504 P.2d 1330, at 1344. FOF 60. COL  
3 15, 17-20, *supra*.

4 27. Aside from Applicant Weight, none of the landowners along the Branch Stream has land  
5 adjacent to Ainako Stream. FOF 41-42. Thus, the request by complainants’ Okazaki, Shindo, and  
6 Jung (who are landowners along the Branch Stream) for additional waters from Ainako Stream is  
7 a request to appropriate Ainako Stream waters for non-riparian purposes. There is no right for  
8 such appropriators to benefit from such a diversion, but such diversions will be restrained only  
9 after a careful assessment of the interests and circumstances involved indicates a need for  
10 restraint. **Robinson v. Ariyoshi**, 65 Haw. 641, at 648-650; 658 P.2d 287, at 294-295. Riparian  
11 owners must demonstrate actual harm to her/his own reasonable use of those waters. **Reppun v.**  
12 **Board of Water Supply**, 65 Haw. 531, at 553; 656 P.2d 57, at 72.

13 28. Riparian landowner Koehnen’s use is for a hydroelectric plant sized to 1983, when it was  
14 constructed. He has no complaints or issues with Weight’s past and current diversion, but states  
15 that his riparian use will be harmed if the flow of Ainako Stream is decreased further than what it  
16 is now. (COL 23, *supra*.) Weight’s use is for aesthetic and ecological purposes. Complainants  
17 Okazaki’s request is for a free-flowing stream and possible re-use of their koi ponds. They also  
18 want the flood control gate removed. (FOF 86.) Complainant Jung wants a year-round stream,  
19 including the surges that come with a hard rain. (FOF 87.) Both the Okazaki and Jung requests  
20 would expose Weight’s property to flood damage. (COL 22, *supra*.) In addition to the impact on  
21 Koehnen’s hydroelectric plant, Complainants’ request would also have a negative effect on  
22 riparian rightsholder, Marsh, with an increase of the Branch Stream flow coming at the expense  
23 of reduced Ainako Stream flow past the Marsh property.

24 29. Assessment of the interests and circumstances involved lead to the conclusion that the  
25 request to divert up to 50 to 100 percent more water from Ainako Stream than is currently being  
26 diverted should be denied. The uses and interests of riparian rightsholders Weight, Koehnen and  
27 Marsh clearly outweigh the proposed non-riparian uses by the Complainants. In addition, the  
28 proposed non-riparian uses would not have a neutral effect on the current riparian uses but would  
29 cause direct harm to those uses.

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31 D. **The Branch Stream**

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1. **Existing Diversion and Flood Control Gate**

30. Without the diversion dam, no water would flow into the culvert that feeds the Branch Stream when Ainako Stream is at its typical water level. (FOF 60.)

31. Weight’s use of the diversion is reasonable. The historical and current amount of the existing diversion from Ainako Stream into the Branch Stream is the amount with the new gate set at five inches to approximate the opening of the old gate in its fixed position of three and one-half inches with a jagged bottom. (FOF 83.) The use of this diversion is for aesthetic and ecological purposes and is supported by Koehnen and Marsh, who are riparian landowners downstream from Weight. (COL 28, *supra*.)

32. Without the flood control gate, Weight and other property downstream on the Branch Stream are at risk for flooding. (FOF 60; COL 22, 28, *supra*.)

2. **Are Riparian Rights Applicable to the Branch Stream or is it a Diversion?**

33. Without the dam to assist in diverting water into the Branch Stream from Ainako Stream, the Branch Stream would be similar to Branch Stream 2/Drainage Channel and only flow during periods of rain when runoff enters it.(COL 6-9, *supra*.)

34. However, the Branch Stream would have had an additional source of water during periods of rain, because higher than typical flows in Ainako Stream would have spilled over into the Branch Stream. Would these spillover flows from Ainako Stream be part of “the natural flow of the stream...in the shape and size given it by nature”? (COL 9, *supra*.)

35. As explained in the case of Branch Stream 2/Drainage Channel, storm and freshet waters are not part of the natural flow of the stream and not subject to riparian rights. (COL 9, *supra*.)

36. Thus, there are no riparian rights to the waters flowing in the Branch Stream. It carries diverted water, which is not its natural flow, from Ainako Stream and occasionally, spillover from Ainako Stream and runoff from its banks during periods of rain.

37. The Branch Stream meets the Water Code’s definition of a stream because it “usually flows” with the diverted waters from Ainako Stream. (See COL 6, *supra*.) However, none of the waters that flow in it are subject to riparian rights, because at all times, the waters contained in

1 the Branch Stream are not part of its natural flow in the shape and size given it by nature. (COL  
2 9, 34, *supra*.)

3 38. Could landowners along the Branch Stream and other proposed users nevertheless  
4 appropriate a portion of its flows? (See COL 27, *supra*.) Unlike the situation with Ainako Stream,  
5 there are no riparian rights to the Branch Stream, see COL 35-36, *supra*, so there are no riparian  
6 rights to protect. The diverted flow at Weight's property is for use on her property, and the flow  
7 further downstream is incidental to that use. Thus, as long as the proposed uses are reasonable,  
8 there would be no prohibition for such diversions, subject to the Code's regulation of diversions,  
9 as explained at COL 45, *infra*.

10  
11 3. **Does Use of the Branch Stream for Over 50 Years Make it a Natural**  
12 **Tributary of Ainako Stream?**

13  
14 39. Applicant Weight argues that her use of the Branch Stream for the last fifty years was  
15 open and notorious, effectively making it a natural tributary of Ainako Stream, citing cases from  
16 Minnesota (1901), Vermont (1845), and Washington (1901 and 1909).<sup>4</sup> These cases found dams  
17 to be permanent and the diversions in place for such a long time that property owners along the  
18 watercourse had acquired or improved their properties in reliance upon it. **Kray v Muggli**, 86  
19 NW. 882 (Supreme Ct. of Minnesota, 1901); **Woodbury v Short**, 17 Vt. 387 (Vermont, 1845);  
20 **Hollet v Davis**, 54 Wash. 326, 103 P. 423 (Supreme Ct. of Washington, 1909); **Matheson v**  
21 **Ward**, 24 Wash. 407, 64 Pac. 520 (Wash. 1901). [Applicant Weight COL F.43-46]

22 40. These conditions do not apply to the Branch Stream. The diversion dam in Ainako  
23 Stream is not permanent, with loosely stacked rocks on the underlying railroad ties that need to  
24 be restacked after storm flows in Ainako Stream. (FOF 60.) And Okazaki and Jung, landowners  
25 along the Branch Stream, have testified that the flow in the Branch Stream was unreliable.  
26 Although the original metal flood control gate was frozen in place in 1960 and replaced in 2009  
27 (FOF 57), Complainant Ron Okazaki testified that in 1963 there were only two metal poles, that  
28 in 1992 or 1993 a piece of sheet metal had been placed between the poles, and that when he  
29 revisited the site a few years later, the sheet metal had been replaced by an egg-shaped adjustable

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<sup>4</sup> It is curious that the Applicant, and not the Complainants, argues for making the Branch Stream a natural tributary of Ainako Stream, as it would give Complainants along the Branch Stream riparian rights that they do not have now.

1 grate that could be opened or closed. (FOF 77-78.) Complainant Ron Okazaki further testified  
2 that flows in the Branch Stream were “fast-running” in 1963 but decreased in the 1980s and  
3 attribute the decrease to the flood control gate. FOF 85-86. Complainant David Jung saw only  
4 intermittent flows in 1997 when he bought his property, saw a bit more flow in 2005, saw flow  
5 stop in 2009, and since March 2011, when Commission staff conducted their field visit, flow has  
6 been continuous. (FOF 88.)

7 41. To find that the conditions described in COL 40, *supra*, meet the test for legally  
8 recognizing the Branch Stream as a natural tributary of Ainako Stream turns logic on its head. A  
9 non-permanent dam would be made permanent and unreliable flows would be made reliable by  
10 legally designating the Branch Stream from a drainage channel to a natural tributary of Ainako  
11 Stream.

12  
13 4. **Can the Commission Regulate the Branch Stream Even if it is a**  
14 **Diversion and not a Stream?**

15  
16 42. “The Commission shall establish guidelines for processing and considering applications  
17 for stream channel alterations...” H.R.S. 174C-71(3)(C). “‘Stream channel’ means a natural or  
18 artificial watercourse with a definite bed and banks which periodically or continuously contains  
19 flowing water. The channel referred to is that which exists at the present time, regardless of  
20 where the channel may have been located at any time in the past.” H.R.S. 174C-3. (See COL 6,  
21 *supra*, for the definition of a “watercourse.”)

22 43. The Branch Stream meets the definition for a “stream channel” and is therefore subject to  
23 stream channel alteration permits under H.A.R. § 13-169-50 to 55.

24 44. “‘Stream diversion’ means the act of removing water from a stream into a channel,  
25 pipeline, or other conduit.” H.R.S. § 174C-3. Stream diversions are subject to the registration  
26 requirements and permits for construction or alteration. H.R.S. § 174C-91 to 95.

27 45. The Branch Stream is a stream within the meaning of the Water Code, COL 37, *supra*, so  
28 it would be subject to the Water Code’s regulatory requirements for stream diversions. However,  
29 none of the waters are subject to riparian rights of landowners along the Branch Stream. COL 37,  
30 *supra*. However, diversions would still be allowed, see COL 38, *supra*, and would be subject to  
31 regulation under the Code.

1 46. “Instream flow standard” means a quantity or flow of water or depth of water which is  
2 required to be present at a specific location in a stream system at certain specified times of the  
3 year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream  
4 uses.”HRS Section 174C-3.

5 47. The Branch Stream is a stream within the meaning of the Code, COL 37, *supra*, and  
6 therefore instream flow standards apply to it.

7 48. The diversion from Ainako Stream preceded the 1987 State Water Code, and the interim  
8 instream flow standard for all streams on the island of Hawaii is “that amount of water flowing  
9 in each stream on the effective date of this standard (October 8, 1988), and as that flow may  
10 naturally vary throughout the year and from year-to-year without further amounts of water being  
11 diverted offstream through new or expanded diversions, and under the stream conditions existing  
12 on the effect date of the standard.” HAR § 13-169-46.

13 49. Therefore, the interim instream flow standard of the Branch Stream is the amount  
14 diverted from Ainako Stream at that date, which is the amount being diverted today, measured at  
15 the flood control gate. The interim instream flow standard of Ainako Stream just past the  
16 diversion is the amount just above the diversion, minus the amount diverted into the Branch  
17 Stream.

18

19 E. **Stream Channel Alteration and Stream Diversion Works Permits**

20

21 50. Complaint/Dispute Resolution, CDR.2769.8 did not include the patching of four leaks in  
22 branch stream 1 in 2007 and 2008, the construction of 450 linear feet of rock retaining wall in  
23 2008 including the lower reach of Branch Stream 1, or the construction of two ornamental ponds  
24 of 3,000 and 4,900 gallons in Branch Stream 1. Nor did the Complainants provide any testimony  
25 or other evidence on these actions by the Applicants, focusing instead on the issues they  
26 identified in CDR.2769.8; namely, the diversion and its gate, the alleged Branch Stream  
27 2/Drainage Channel, and the alleged 1a origin for the Branch Stream. (FOF 5, 8, *supra*.)

28 51. The Commission therefore accepts the staff recommendations on these items at its  
29 September 27, 2011 meeting, subject to the amendments identified below. (FOF 8.)

30 52. The Commission is not required make findings on the extent to which traditional and  
31 customary native Hawaiian rights will be affected or impaired or what feasible action may be



1 taken to protect traditional and customary native Hawaiian rights because there are no traditional  
2 cultural, historical or natural resources or traditional and customary native Hawaiian practices  
3 found in or around Ainako Stream, the Branch Stream, Branch Stream 1a, Branch Stream 1b, or  
4 Branch Stream 2/Drainage Channel. Furthermore, Article XII, Section 7 of the Hawaii State  
5 Constitution does not protect the exercise of a traditional and customary native Hawaiian  
6 practice on fully developed residential property. See, Public Access Shoreline Hawaii v. Hawaii  
7 County Planning Commission, 79 Hawai'i 425, 250, 903 P.2d 1246, 1271 (1995).

8 53. HAR Section 13-168-7(a) requires an owner or operator of any well or stream diversion  
9 works from which water is used to provide and maintain an approved meter or other appropriate  
10 device or means for measuring and reporting total water usage on a monthly basis. HAR Section  
11 13-168-7(c) gives the Commission discretion to lessen or modify the requirement of monthly  
12 water usage reporting for owners or operators of small individual wells or stream diversion  
13 works or exempt them from the monthly water usage reporting requirement.

14  
15 F. **Complainants' Request for New Contested Case Hearing**

16 54. Complainants are not entitled to a new contested case as a matter of law.

17  
18 IV. **DECISION AND ORDER**

19  
20 1. Complainants' petition to revoke the registration for the diversion gate at the  
21 mouth of the Branch Stream on Ainako Stream is denied.

22 2. Complainants' petition to remove the diversion gate and restore the alleged  
23 original mouth of the Branch Stream is denied.

24 3. Complainants' petition to restore Branch Stream 2/Drainage Channel is denied.

25 4. Complainants' petition to restore free surface water flow to the Branch Stream,  
26 the alleged Branch Stream 1a, and the alleged Branch Stream 2/Drainage Channel is denied.

27 5. Applicants Weight and Henderson are in violation of HRS §174C-71(A) for: 1)  
28 patching four leaks in the Branch Stream in 2007 and 2008; 2) constructing 450 linear feet of  
29 rock retaining wall in 2008 including the lower reach of the Branch Stream; and c) constructing  
30 two ornamental ponds of 3,000 and 4,900 gallons in the Branch Stream without obtaining a  
31 SCAP and SDWP from the Commission.

1           6.     The Applicants are fined \$700 for these violations.

2           7.     The Applicants are required to install a means to measure the amount of water  
3 that is diverted by the flood control gate on a monthly basis and to submit a water-use report on  
4 an annual basis to the Commission.

5           8.     A written warning to the applicants is to be issued, indicating that any future  
6 violations involving the alteration of stream channels or stream diversions without the necessary  
7 SCAP or SDWP and petition to amend the interim instream flow standard may be considered  
8 repeat violations with fines up to \$5,000 for each day of violation.

9           9.     After-the-Fact Stream Channel Alteration Permits (SCAP) and Stream Diversion  
10 Works Permits (SDWP) (SCAP.2898.8), Ainako Branch Stream in Hilo, Hawaii at TMKs: (3) 2-  
11 5-025:005, 014 and 006, are approved, subject to:

12           a.     the standard conditions (except #4 and #8), and the following special  
13 conditions:

14           i.     issuance of the permit is subject to payment of the fines, and  
15 failure to pay within 30 days of Commission action may result in further fines and  
16 violations; and

17           ii.    the adjustable flood control gate at the diversion on Ainako Stream  
18 into the Branch Stream shall be set at five inches, to approximate the opening of the old  
19 gate in its fixed position of three and one-half inches with a jagged bottom.

20           10.    The Applicants were not required to submit the petition to amend the interim  
21 instream flow standard for the Branch Stream (and Ainako Stream), because there have been no  
22 change in the standards since their adoption in October 1988.

23           11.    To the extent that Complainants may have requested a new contested case hearing  
24 during oral argument on exceptions to the Proposed Findings of Fact, Conclusions of Law and  
25 Decision and Order on September 19, 2012, the request is denied.

26           12.    Future alterations and diversions are subject to the permit conditions of the Water  
27 Code. Diversions may also require petitions to amend the interim instream standards, including  
28 the requirement that the use of the diversion is reasonable/beneficial, defined in the Water Code  
29 as “the use of water in such a quantity as is necessary for economic and efficient utilization, for a  
30 purpose, and in a manner which is both reasonable and consistent with the state and county land  
31 use plans and the public interest.” HRS Section 174C-3.

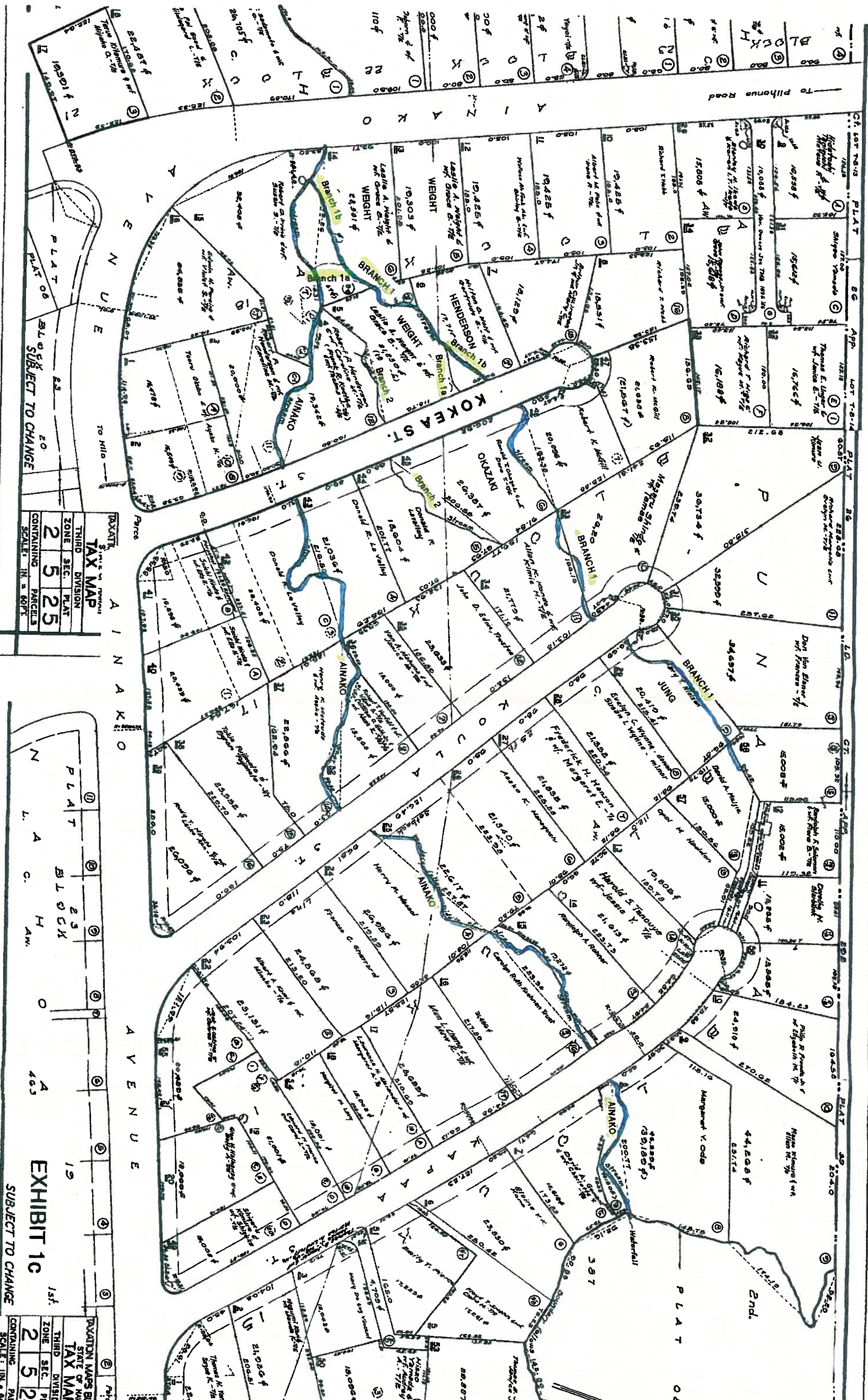
1            13.    Any other relief sought by the Complainants is denied.

ATTACHMENT 1:

TMK MAP

Source: Exh. A-61: Exhibit 1c, Agenda item E1, “Mediation or Binding Arbitration for Complaint/Dispute Resolution (CDR.2769.8); Application for After-the-Fact Stream Channel Alteration Permit, Stream Diversion Works Permit and Petition to Amend Instream Flow Standard (SCAP.2898.8) Ainako Branch Stream, Hilo, Hawaii; TMKs: (3) 2-5-025:005, 014 and 006, 2-5-024:028, 029 and 045”; Commission meeting of September 27, 2011, Honolulu, Hawaii.





TAX MAP	
THIRD DIVISION	25
ZONE SEC. PLAT	5 25
CONTAINING PARCELS	25
SCALE: IN. = 50 FT.	

TAX MAP	
THIRD DIVISION	25
ZONE SEC. PLAT	5 25
CONTAINING PARCELS	25
SCALE: IN. = 50 FT.	

TAXATION MAPS BY STATE OF HAWAII	
THIRD DIVISION	25
ZONE SEC. PLAT	5 25
CONTAINING PARCELS	25
SCALE: IN. = 50 FT.	

TAXATION MAPS BY STATE OF HAWAII	
THIRD DIVISION	25
ZONE SEC. PLAT	5 25
CONTAINING PARCELS	25
SCALE: IN. = 50 FT.	

EXHIBIT 1C  
SUBJECT TO CHANGE



ATTACHMENT 2:

STANDARD STREAM CHANNEL ALTERATION PERMIT CONDITIONS

STANDARD STREAM CHANNEL ALTERATION PERMIT CONDITIONS  
(Revised 9/19/07)

1. The permit application and staff submittal approved by the Commission at its meeting on September 27, 2011, shall be incorporated herein by reference.
2. The applicant shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The applicant, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The applicant shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this stream channel alteration permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the applicant shall submit one set of construction plans and specifications to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. The applicant shall develop site-specific, construction best management practices (BMPs) that are designed, implemented, operated, and maintained by the applicant and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting state waters. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.
7. The applicant shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.

ATTACHMENT 3:

LIST OF ADMITTED EXHIBITS



AINAKO STREAM  
 CONTESTED CASE HEARING  
 CCH-HA11-1  
 2/29/12 to 3/1/12

Revised 4/25/12

<b>Parties:</b>	<b>Indexed Exhibit</b>	<b>Accepted</b>
<b>Weight</b>	<b>A-1</b>	<b>Yes</b>
	<b>A-2</b>	<b>Yes</b>
	<b>A-3</b>	<b>Yes</b>
	<b>A-4</b>	<b>Yes</b>
	<b>A-5</b>	<b>Yes</b>
	<b>A-6</b>	<b>Yes</b>
	<b>A-7</b>	<b>Yes</b>
	<b>A-8</b>	<b>Yes</b>
	A-9	No
	A-10	No
	A-11	<b>Yes</b>
	<b>A-12</b>	<b>Yes</b>
	A-13	<b>Yes</b>
	<b>A-14</b>	<b>Yes</b>
	A-15	No
	<b>A-16</b>	<b>Yes</b>
	<b>A-17</b>	<b>Yes</b>
	A-18	<b>Yes</b>
	<b>A-19</b>	<b>Yes</b>
	<b>A-20</b>	<b>Yes</b>
	<b>A-21</b>	<b>Yes - with error</b>
	<b>A-22</b>	<b>Yes</b>
	<b>A-23</b>	<b>Yes</b>
	<b>A-24</b>	<b>Yes</b>
	<b>A-25</b>	<b>Yes</b>
	<b>A-26</b>	<b>Yes</b>
	<b>A-27</b>	<b>Yes</b>
	<b>A-28</b>	<b>Yes</b>
	<b>A-28A</b>	<b>Yes</b>
	A-28B	No
	<b>A-29 (entirety)</b>	<b>Yes</b>
	<b>A-30</b>	<b>Yes</b>
	A-31	<b>Yes</b>
	A-32	<b>Yes</b>
	A-33	<b>Yes</b>
	A-34	<b>Yes</b>
	A-35	<b>Yes</b>
	A-36	<b>Yes</b>
	A-37	<b>Yes</b>
	A-38	<b>Yes</b>
	A-39	No
	<b>A-40</b>	<b>Yes</b>
	<b>A-41</b>	<b>Yes</b>
	A-42	No
	<b>A-43</b>	<b>Yes</b>
	A-44	No
	A-45	<b>Yes</b>
	A-45A	No
	A-46	No
	A-47	No
	A-48	No
	A-49	<b>Yes</b>
	A-50	<b>Yes</b>
	<b>A-51</b>	<b>Yes</b>

**AINAKO STREAM  
CONTESTED CASE HEARING  
CCH-HA11-1  
2/29/12 to 3/1/12**

Revised 4/25/12

	A-52	Yes
	<b>A-52A (marked)</b>	<b>Yes</b>
	A-53	No
	A-54	No
	A-55	No
	A-56	No
	A-57	No
	<b>A-58</b>	<b>Yes</b>
	<b>A-59</b>	<b>Yes</b>
	<b>A-60</b>	<b>Yes</b>
	A-61	<b>Yes</b>
	A-61A	No
	<b>A-62</b>	<b>Yes</b>
	<b>A-63</b>	<b>Yes</b>
	<b>A-64</b>	<b>Yes</b>
	<b>A-65</b>	<b>Yes</b>
	A-66	No
	A-67	No
	<b>A-68</b>	<b>Yes</b>
	<b>A-69</b>	<b>Yes</b>
	<b>A-69A</b>	<b>Yes</b>
	<b>A-70</b>	<b>Yes</b>
<b>Okazaki/Jung/et al</b>	<b>B-1</b>	<b>Yes</b>
	<b>B-2</b>	<b>Yes</b>
	B-3	No
	B-4	No
	B-5	No
	B-6	No
	B-7	No
	B-8	No
	<b>B-9</b>	<b>Yes</b>
	<b>B-10</b>	<b>Yes</b>
	<b>B-11</b>	<b>Yes</b>
	<b>B-12</b>	<b>Yes</b>
	<b>B-13</b>	<b>Yes</b>
	<b>B-14</b>	<b>Yes</b>
	<b>B-15</b>	<b>Yes</b>
<b>Jung</b>	<b>Video</b>	<b>Yes</b>
<b>S. Henderson</b>	C-1	No
	C-2	No
	C-3	No
	C-4	No
	C-5	No
	<b>C-6</b>	<b>Yes</b>
	C-7	No
	<b>C-8</b>	<b>Yes</b>
	C-9	No
	C-10	No
	C-11A	No
	C-11B	No
	C-11C	No
	C-12	No
	C-13A	No

**AINAKO STREAM  
CONTESTED CASE HEARING**

Revised 4/25/12

**CCH-HA11-1**

2/29/12 to 3/1/12

	C-13B	No
	<b>C-14</b>	<b>Yes</b>
	C-15	No
	C-16	No
	<b>C-17A</b>	<b>Yes</b>
	C-17B	No
	C-18	No
	<b>C-19A</b>	<b>Yes</b>
	<b>C-19B</b>	<b>Yes</b>
	C-20	No
	C-21	No
	C-22	No
<b>Koehnen</b>	<b>D-1</b>	<b>Yes</b>
	<b>D-2</b>	<b>Yes</b>
	<b>D-3</b>	<b>Yes</b>
	<b>D-4</b>	<b>Yes</b>
	<b>D-5</b>	<b>Yes</b>

ATTACHMENT 4:

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE PARTIES

## **RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE PARTIES**

The Commission makes the following rulings on the parties' proposed findings of fact. The findings are placed into two categories.

Category A contains findings that are accepted in their entirety, or accepted with minor modifications or corrections that do not substantially alter the meaning of the original findings.

Category B contains findings that are rejected because they may be: 1) duplicative; 2) not relevant; 3) not material; 4) taken out of context; 5) contrary (in whole or in part) to the found facts; 6) an opinion (in whole or in part); 7) contradicted by other evidence; or 8) contrary to law.

### 1. Applicant Weight

#### A. Accepted

1-6, 9-28, 34-58, 61-63, 75-82, 84-97, 99-105, 107-119, 121, 123-134, 141-142, 144-154, 156-159.

#### B. Rejected

7-8, 29-33, 59-60, 64-74, 83, 98, 106, 120, 122, 135-140, 143, 155, 160-174.

### 2. Applicant Henderson

#### A. Accepted

p. 6, A.1, ¶ 1-2; p. 8, A.2 ¶ 1 and 3; p. 10, A.3, ¶ 2; p. 14, B.1, ¶ 1.

#### B. Rejected

p. 5, A.1, ¶ 1-2; pp. 6-7, A.2; p. 8, A.2, ¶ 2; p. 9, A.2, ¶ 1-2; p. 10, A.3, ¶ 1, 3, 4; p. 11, A.3, ¶ 1; p. 11, B.1, ¶ 1; p. 12, B.1, ¶ 1 to p. 13, ¶ 3; p. 14, B.1, ¶ 2; p. 14, B.2, ¶ 1 to p. 20, B.9, ¶ 1.

3. Complainants

A. Accepted

1-5, 11-14, 17-31, 33, 37, 40-41, 44-47, 50-55, 59-64, 66-71, 73.

B. Rejected

6-10, 15-16, 32, 34-36, 38-39, 42-43, 48-49, 56-58, 65, 72, 74-79.

4. Fred & Carolyn Koehnen

A. Accepted

1-5, 9-10, 15.

B. Rejected

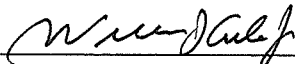
6-8, 11-14.

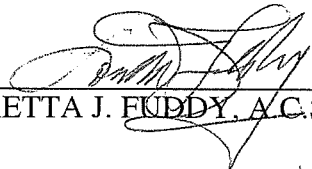
The foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER ARE HEREBY ADOPTED.


IT IS SO ORDERED.

DATED: HONOLULU, HAWAII,     JAN 23 2013    .


COMMISSION ON WATER RESOURCE MANAGEMENT  
STATE OF HAWAII

By:   
WILLIAM J. AILA, JR., Chairperson

  
LORETTA J. FUDDY, A.C.S.W., M.P.H., Commissioner

  
NEAL S. FUJIWARA, Commissioner

  
JONATHAN STARR, Commissioner

  
TED YAMAMURA, Commissioner