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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, 'ŌHI'A (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAIOHUE,
PAAKEA, WAIAAKA, KAPAUULA,
HANAWI and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

NĀ MOKU AUPUNI O KO'OLAU HUI,
LURLYN SCOTT, AND SANFORD
KEKAHUNA'S EXCEPTIONS TO
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION AND ORDER FILED
JANUARY 15, 2016; CERTIFICATE OF
SERVICE

**NĀ MOKU AUPUNI O KO'OLAU HUI, LURLYN SCOTT, AND SANFORD
KEKAHUNA'S EXCEPTIONS TO THE RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION & ORDER FILED ON JANUARY 15, 2016**

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Petitioners Na Moku Aupuni o Ko'olau Hui, Lurlynn Scott, and Sanford Kekahuna (collectively, "Petitioners"), respectfully submit their written exceptions to the Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") (collectively, "Proposed Decision") dated January 15, 2016.¹

To address Interim Instream Flow Standards (IIFS) for twenty-seven (27) East Maui streams at once is an immense undertaking. Petitioners appreciate that the Hearing Officer's decision to address the impacts of diversion on all 27 streams 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 #34.) The Proposed Decision is nonetheless flawed because it erroneously assumes that previously diverted streams are a foregone conclusion. That assumption informed the Hearings Officer's effort to accommodate HC&S's water needs as an offstream, out-of-watershed user and to term it "balancing."

In reality, the Proposed Decision fails to adequately consider whether the harm or potential harm resulting from continued diversions rises to a level that precludes a finding that the requested use is reasonable-beneficial, or whether its proposed IIFS amendments strike the proper balance between the Water Code's mandate of protection on the one hand and maximum reasonable and beneficial use on the other. The Proposed Decision also deprives the Commission of a clear and complete understanding of the diversions' impacts on East Maui streams,

¹ The record in this contested case hearing was closed in April 2015. Petitioners are aware that circumstances have changed since the close of the evidentiary portion of this hearing. Nevertheless, Petitioners request that the Commission issue a decision expeditiously on the current record. Petitioners filed their petitions on May 24, 2001. The 15+ year delay in rendering a decision in this contested case has harmed aquatic life as well as Petitioners' ability to engage in their traditional and customary practices. Actions in a related contested case hearing before the Board of Land and Natural Resources likewise have been delayed pending resolution of these IIFS amendments. Restoration of streamflow in any amount and as soon as possible is imperative. The Commission will have the opportunity to address the changed circumstances at a later date, as will all interested parties. Delaying a decision on the current record to address changed circumstances, however, only prolongs the harm to the resource and the prejudice suffered by Petitioners.

including the needs of the streams, the aquatic life and habitats they support, as well as the appurtenant, riparian, and domestic uses which rely on them. While the Proposed Decision ultimately ascertains and concludes that 105.58 mgd of diverted East Maui surface water (when combined with usable ground-water sources) is sufficient to fully satisfy A&B's reasonable and beneficial use requirements, in fulfillment of the Code's maximum reasonable-beneficial use mandate, it never ventures to ascertain flows sufficient to fulfill the Code's protection mandate, including: (1) the amount of total flows diverted from these petitioned streams (**COL #248**); (2) the amount of flows necessary to achieve *minimum* habitat levels of 64% base flows or H90 for all petitioned streams; and (3) the amount of flows necessary to fully satisfy the irrigation requirements for appurtenant rights holders and other public trust uses.

Without considering, let alone understanding, the total water necessary to protect instream public trust values and all uses dependent on instream flows, the Proposed Decision can never achieve the balance that "must begin with a presumption in favor of public use, access, and enjoyment" and that incorporates "reasonable 'margins of safety' for instream trust purposes." (**COL #13, 18**).

I. THE STATUS QUO DIVERTED STATE IS GIVEN PRIORITY OVER PROTECTION OF PUBLIC TRUST RESOURCES

The Hearings Officer improperly uses the status quo diverted state of the streams to conclude that restoration of 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 CWRM 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. Accordingly, for those areas in which East Maui farmers are entirely dependent on East Maui streamflows, the Commission should consider requiring Alexander & Baldwin, Inc. (A&B) to remove any diversions "to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values." HRS 174C-71(1)(E).

For Wailuanui, Ke'anae, Huelo, and Honopou, the Commission should consider and evaluate the effect of an IIFS that requires all water to be left in all taro-feeding streams, i.e.,

prohibiting any diversions from those hydrologic units. This option best ensures that East Maui farmers and the resources on which they depend for public trust purposes can be adequately managed and easily subject to enforcement action. Petitioners object to the Hearings Officer's rejection of their request that the Commission discharge its public trust responsibilities, to set an amended IIFS that fully restores 5 of the 27 petitioned (and the more than 43 diverted) streams which serve as the only water source for wetland taro cultivation in Honopou, Hanehoi, and Keanae-Wailuanui ahapua`a. The streams awaiting full restoration include Wailuanui, Palauhulu, Honopou, and Hanehoi (Huelo). 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 streams, there is more acreage than water available from their full restoration. Accordingly, the Commission is more than justified under the precautionary principle to order full restoration. Compelling EMI to remove all diversions from those four 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 continued exercise of their traditional and customary practices. Full restoration also ensures that the water needs of the gatherers and fishermen who rely or intend to rely on those streams for traditional and customary practices, and that domestic uses by riparian owners are likewise satisfied.

A. The Proposed Decision's "Geographic Approach" to Stream Restoration 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"). 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. (*See COL #9*). The Code's Regional Approach allows the Commission to set "a general instream flow standard applicable to *all* streams within a specific area."² For example, in 1988 the State applied the Code's Regional Approach when it set *all*

² HRS 174C-71(2)(F)(emphasis added).

streams at their existing status quo levels. By contrast, the Proposed Decision’s Geographical Approach 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 #248), 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).

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. (COL #13.) *See Waiahole 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).

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 all*

streams within a specified area.” (Emphasis added). There is no Geographic Approach in the 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 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. This approach restores only the bare minimum to a few streams while maximizing other uses, which is not a balance between instream values and offstream uses.

The Hearings Officer’s basis for not restoring flow to the remaining 9 streams (**FOF #244, COL 73, 76**) buys into the “biggest bang for the buck theory” in rejecting those streams because they would “not result in significant biological return from additional flow.” The prior

Commission staff's recommendation to establish measurable IIFS points in those streams does not address insufficient flow values and once again improperly prioritizes offstream uses over instream values. 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 #74) even as he fails to analyze each of the streams left at status quo. The Proposed Decision merely adopts the Commission's 2010 decision for wet season flows with the exception of Kopiliula/Puakaa streams which were not amended by the Commission due to its staff's conclusion that the stream was used for conveyance and should not be amended.

Contrary to the Hearing Officer's finding that the 2010 decision "focused only on native stream animals and did not balance instream versus noninstream uses," (FOF #273) the 2010 decision affirmatively accommodated offstream diversions to the detriment of habitat restoration and instream uses. Although it is true that the 2010 Commission did not revisit its 2008 decision in weighing instream versus offstream uses, it also decided on a seasonal approach to restoration - which restored 9.45 mgd during the wet season but reduced restoration for 19 streams to 1.11 mgd (FOF #12, 233) in the dry season - for the sole purpose of accommodating offstream use and over the recommendation for annual restoration by the Commission's own staff. CWRM Staff Submittal (5/25/10) at 16-17, ROA Doc. 127 at 5590-91.

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 #75). The Hearings Officer provides no justification to support COL #75. 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.

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

1. Honomanu Stream: The IIFS Fails to Protect Minimum Instream Habitat

The Proposed Decision makes no attempt to analyze whether the amendment of the IIFS for Honomanu in particular, was feasible even though the parties provided ample evidence of Honomanu's importance to East Maui for multiple instream values. DAR's initial recommendations to the Commission named Honomanu as one of its 8 top choices for stream restoration due to its characteristics including a sizeable estuary that changed only because it believed the releases may not overcome the losing reach at the lower level. Testimony of Glenn Higashi, Tr. 3/5/15 at 11 (15-25 to 12 (1-20). Nevertheless, the Commission staff Dean Uyeno could not rule out the possibility that the removal of diversions could restore connectivity from the sea to the headwaters of Honomanu stream. Uyeno, Tr. 3/5/15, p. 13, ll. 1-23.

The parties provided evidence 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, l.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 Honomanu 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. The Proposed Decision fails to assess Honomanu's potential for restoration.

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 114. **COL #237** 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 #242**). 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 #220-224**), 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 #236** 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 #115**). 1.62 mgd is the amount required to restore Haipuaena to minimum habitat levels. (**FOF #116**).

4. The Failure to Provide Sufficient Water for Habitat Needs (H90) in Palauhulu Stream Is Contrary to Law

Petitioners take exception to **COLs #142 and 167** in which the Hearings Officer concludes that irrigation requirements for Palauhulu and Hanehoi/Puolua are excessive. The Hearing Officer's conclusion that the available water in Palauhulu Stream "greatly exceeds the needs" assumes that the taro farmers will take from the stream all water available, leaving minimal to no flow for instream habitat requirements. Even at the Hearings Officer's calculated

need of 1.75-2.02 mgd, the 3.56 mgd amended IIFS for Palauhulu Stream left only 1.56 mgd available for the instream habitat, which is far short of the estimated 4.55 mgd required to satisfy the minimum 64% median base flow.

The Hearings Officer questions whether releases at the Ko‘olau ditch level would reach the IIFS site for Palauhulu Stream due to infiltration losses (**COL #172**) and bases his downward adjustment of Palauhulu’s IIFS on this dry stretch while conceding in **COL #175** that, “[i]f increasing the flow to meet both irrigation and H90 requirements were the objectives, then the IIFS should be an estimated 6.30 mgd to 6.57 mgd, rather than 3.56 mgd.” After concluding that protection of habitat and meeting irrigation needs would require an *additional* 3.0 mgd at the very least, he proceeds to recommend lowering the IIFS by 0.46 mgd. The resulting IIFS does not provide sufficient water to protect instream values and to provide for irrigation needs.

Petitioners take exception to the Hearing Officer’s conclusory statement that the “the Ko‘olau Ditch has only been taking, for the most part, water generated by rainfall, and spring water below the Ditch is what farmers have access to, *supra*, COL 63, 155.” (**COL #176**). It is unclear how the Hearing Officer determines that the Ko‘olau Ditch is only taking water generated by rainfall and spring water below the Ditch. Under undiverted conditions, farmers would have access to water in the stream from rainfall mauka of their lo‘i and flowing down through the stream. Offstream users who collect water from well outside the watershed in which the rain is falling should not take priority over these waters especially after they have become part of a stream within the watershed in which they fall.

Petitioners take exception to **COLs # 177-179** as it sets the IIFS levels for Palauhulu Stream below minimum levels required for an IIFS. In **COL #172**, the Hearings Officer concludes that, due to losses below the Ko‘olau Ditch “it is questionable whether or not releases from the Ko‘olau Ditch would reach the IIFS site.” In other words, whether the restoration of water would restore a losing reach is an unknown. Palauhulu Stream diversions have been ongoing for nearly a century. Therefore, there is insufficient information to conclude that the losing reach would persist after water is returned to the stream for a sufficient period of time. Nevertheless, the Hearing Officer concludes in **COL #177** that because of this loss and because “the gain in habitat would be small,” such that he actually recommends a *downward* adjustment to Palauhulu’s IIFS. The Proposed Decision provides this Commission with all the information

required to determine what the amended IIFS should be for Palauhulu Stream in order to accommodate the *bare minimum* for habitat restoration of 65% median base flow or 4.55 mgd in addition to estimated kalo irrigation requirements. In other words, 3.10 mgd, the IIFS recommended by the Hearing Officer, is well below even the 64% minimum, conceding that, for Palauhulu Stream, the goal of the amended IIFS is not to “meet both irrigation and H90 requirements,” but rather the provision of irrigation water alone. Considering that the flow of Piinaau Stream is unknown and that no IIFS is set for Piinaau, i.e., the diversions can continue for that stream (*See COL #169*), and that the two streams converge, it is incumbent on this Commission to ensure sufficient water for Palauhulu Stream. Even at the Hearing Officer’s estimate of 1.75 to 2.02 mgd for irrigation requirements, the amended IIFS of 3.10 mgd is less than half the total calculated of 6.30 mgd to 6.57 mgd to meet both irrigation and stream habitat needs and should be amended upward. Indeed, the Hearing Officer even reduced the Commission’s prior restoration of 0.46 mgd to raise the level to at least half of the estimated undiverted base flow. This reversion ultimately prioritizes offstream use and does not properly protect instream values and the public trust. The Commission should, at a minimum, restore 64% base flow plus estimated irrigation to 6.57 mgd.

5. The Proposed Restoration to Waikamoi is Insufficient to Meet Minimum Habitat Needs

The Proposed Decision recommends making the 2010 wet-season amendment for Waikamoi Stream an annual IIFS. (**COL #208, COL #211**). The IIFS falls short, however, of meeting minimum H90 levels. COL #242 shows the amended IIFS for Waikamoi Stream at 1.81 mgd, a restoration of 1.68 mgd. However, the Commission Staff’s table in Exhibit HO-1 indicates that H90 flows require 2.71 mgd, nearly 1 mgd more than the IIFS set. **COL #245** incorrectly states that the restored flow would be “sufficient to enable growth, reproduction, and recruitment of native stream animals” for streams including Waikamoi. To meet minimum habitat requirements, which is the stated goal for Waikamoi stream in **COL #245**, an additional 0.9 mgd must be restored and the amended IIFS should be at least 2.71 mgd.

II. THE PROPOSED DECISION ERRONEOUSLY CALCULATES THE WATER REQUIREMENTS FOR WETLAND TARO CULTIVATION TO THE DETRIMENT OF PUBLIC TRUST USES

Contrary to the evidence in the record for these contested case proceedings, the Hearings Officer adopts an IIFS for taro-feeding streams that deprives taro of the water it needs during the most critical time in its crop cycle, which in turn deprives the tenants of the Honopou, Hanehoi, and Keanae-Wailuanui ahapuaa with the opportunity to make productive use of their lands.³ 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 #191*), the Hearings Officer reaffirms the unreasoned water budget of 130,000 to 150,000 gad adopted in Na Wai Eha, (*See FOF #192; COL #46*) - 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 - the temperature at which rot begins to accelerate - notwithstanding other variables affecting 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 #194-98; COL #48*).

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 #196*) (emphasis added). Nevertheless, the Hearings Officer predicates his proposed IIFS amendment for all taro-feeding streams on an unworkable **average** that provides the taro crop with only half the water it needs to survive for an extended period of time. This recommended IIFS consequently 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

³ An absurd result considering the Proposed Decision acknowledges, among other things, that "[t]he exclusive purpose of the statutory imposition of riparian rights in this jurisdiction was to enable tenants of ahapuaa to make productive use of their lands." (*COL #27*).

clearly erroneous in view of the reliable, probative and substantial evidence on the whole record of the instant proceeding.

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 #196). The significance of that statement is underscored in FOF #217, 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.”⁴ 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.”⁵(FOF #217) (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 #57.) The recommended budget also deprives taro of adequate inflow at any time or duration the crop cycle demands water levels in

⁴ 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.**”)

⁵ 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.

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 Na Wai Eha, (FOF #193), 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 Na Wai Eha 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 water is needed to flow into the lo'i," (FOF #194; COL #47) -- 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"⁶ 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 #193; COL #47); or (2) for "approximately half of the crop cycle [] no water is needed to flow into the lo'i" (COL #47). First, no party or witness in the instant proceeding offered up either statement.⁷ 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

⁶ 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.

⁷ 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.

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 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”⁸. *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. (*See COL #2, 6, 40-41*).

III. 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 #299**). The terms “ili” and

⁸ 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”).

“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, 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 ‘ili or mo‘o 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 mo‘o or ‘ili as taro acreage:

Ahupua‘a	Parcel Type	Acreage	Water Allocation Required
Ke‘anae	5 ‘ili	5.49 acres	5.49 acres * 100,000 -300,000 gad = 0.549 mgd - 1.647 mgd
Wailua	1 ‘ili 4 mo‘o	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 mo‘o	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 ‘ili 4 mo‘o	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)	Ke‘anae: 0.549 mgd - 1.647 Wailua: 2.399 - 7.197 mgd

For Ke‘anae, 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.

IV. THE PROPOSED DECISION FAILS 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 #86). *Pratt* sets for 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, ‘ōpae, o‘ōpū, 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 findings on those practices onto the farmer's 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 #92 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.

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 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.

V. THE PROPOSED DECISION FAILS TO STRIKE THE PROPER BALANCE MANDATED BY THE WATER CODE BY IMPROPERLY PRIORITIZING A&B'S PRIOR USE AND DIVERSIONS

As the Proposed Decision recognizes, reasonable-beneficial use is mandated by the Hawaii Constitution. (*See COL #9-10; 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.” (**COL #9**.) 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.*” (**COL #10; 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.” (**COL #13; 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.” (*See COL #10, 13; 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 #3, 239**.) 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 18 to 18.6 mgd diverted from 23 of 27 petitioned streams. (COL #247). The 18.6 mgd purportedly provides the streamflow necessary to maintain fish and wildlife habitats and to address appurtenant/riparian and domestic uses. (COL #240). 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**⁹ 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 #46, 48, 57). This, despite the fact that Petitioners' has **no alternative water source** available to irrigate its wetland taro patches or to address its present or potential appurtenant, riparian, traditional & customary, and domestic uses.

By comparison, the amended IIFS makes **96 mgd to 149 mgd** available to satisfy HC&S's **105.58 mgd** reasonable and beneficial use of EMI ditch system surface waters for its sugarcane cultivation. As a result, the amended IIFS would satisfy **91% to 141%** of HC&S's *actual* water need, resulting in "not more than a 10 mgd or 9 percent shortfall some of the time, and still more surface water than needed most of the time."¹⁰ (COL #253 at p. 136). When combined with HC&S's **83.32 mgd** of water available from its brackish groundwater wells, **100%** of HC&S' **188.9 mgd** reasonable and beneficial use for sugarcane cultivation is satisfied. (COL #253-257 at p. 135).

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 restores only the bare minimum to a few

⁹ 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.

¹⁰ This amount incorporates "the average use by MDWS from the Wailoa Ditch at 7.1 mgd," and therefore "MDWS's use of 7.1 mgd of water from the Wailoa Ditch would seldom compete with the amended IIFS's increased needs for 18 mgd, and if such competition occurs, it would be for only a few days a year." (COL #256 at p. 135, 270 at p. 138)

streams and inadequate flows to taro-feeding sources, 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.

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

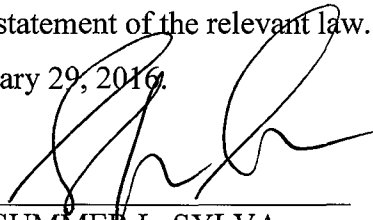
Petitioners hereby joins in the Exceptions of Maui Tomorrow Foundation, Inc. and its Supporters to the Hearings Officer's Proposed Findings of Fact, Conclusions, of Law & Decision and Order submitted on February 29, 2016.

VII. 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 in which Maui Tomorrow joined) 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 in which Maui Tomorrow joined) on the ground that each of Petitioners' proposed conclusions of law is an accurate statement of the relevant law.

DATED: Honolulu, Hawai'i, February 29, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties in the manner indicated at their last known address:

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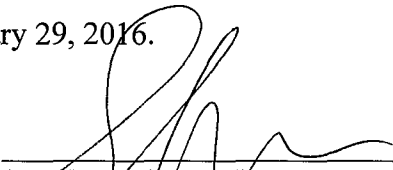
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