

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

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

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF 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, KAPAULA,
HANAWI and MAKAPIPI STREAMS

CASE NO. CCH-MA13-01

PETITIONERS NĀ MOKU AUPUNI O
KO'OLAU HUI, LURLYN SCOTT AND
SANFORD KEKAHUNA'S REBUTTAL
BRIEF REGARDING RE-OPENED
HEARING; CERTIFICATE OF SERVICE

PETITIONERS NĀ MOKU AUPUNI O KO'OLAU HUI, LURLYN SCOTT AND
SANFORD KEKAHUNA'S REBUTTAL BRIEF REGARDING RE-OPENED HEARING

Pursuant to the Order Regarding the Scope of the Re-Opened Hearing to Address the Cessation of Sugar Operations by HC&S, so ordered by Chairperson Suzanne Case on August 18, 2016 (the "Order") and Minute Order No. 22, Petitioners Nā Moku Aupuni O Ko'olau Hui, Lurlyn Scott and Sanford Kekahuna (hereinafter, collectively, "Nā Moku"), hereby submit in this re-opened hearing their rebuttal brief in response to: (1) the County of Maui, Department of Water Supply's Responsive Brief filed January 6, 2017, and (2) the Hawaiian

Commercial and Sugar Company's Responsive Brief filed January 6, 2017.

I. THE COMMISSION RE-OPENED THESE HEARING TO RECEIVE ADDITIONAL EVIDENCE TO ADDRESS SIGNIFICANT CHANGES IN OFFSTREAM WATER USE

Minute Order No. 18's directive from the Commission to the Hearings Officer to limitedly re-open the evidentiary hearing to address significant changes in water use by Alexander & Baldwin "A&B" and its subsidiaries anticipated that:

such additional evidence should lead to: 1) revision of the Hearings Officer's findings of fact on offstream uses; 2) rebalancing of instream versus noninstream uses; and 3) reassessment of the Hearings Officer's current proposed amendments to the interim instream flow standards.

Minute Order No. 18 at 1. The Commission further directed that any new available information regarding streamflows in East Maui streams where diversions have been ceased, be incorporated into the rehearing. Order Regarding the Scope of the Re-Opened Hearing to Address the Cessation of Sugar Operations by HC&S at 2. Minute Order No. 21 expressly requested that Commission staff present updated data on diverted and undiverted stream flows; stream life after the 2008, 2010, and 2016 restorations; and H_{90} flows near the terminus for each of the 27 petitioned streams. Minute Order No. 21 at 2. Notably, the "planned staff presentation" was to address Nā Moku's concern that amended IIFS reflect "new information regarding streams flows gathered after releases in April or May, 2016" for all the reasons stated in Nā Moku's Motion to Expand Scope filed on June 9, 2016.

Both A&B and Maui County, however have failed to present evidence of "projected water needs that are real and supported by evidence as required by the Hawai'i Supreme Court," *In re Water Use Permit Applications*, 105 Hawaii 1, 22, 93 P.3d 643, 665 (2004) ("*Waiahole II*"). Commission staff have likewise failed to address concerns that impact the Commission's ability to establish IIFS' protective of instream values to the extent practicable and to give effect to the IIFS determination. As a result, the balance between public and private commercial purposes, actual existing needs and hypothetical future projections, and constitutionally-protected riparian, appurtenant instream uses and statutorily-recognized, presently non-existent, offstream ambitions tips squarely in favor of the constitutional requirements of protection and conservation. When examined under a reasonable and beneficial use standard, the propriety of draining the vast majority of water from these petitioned public streams to satisfy A&B and

Maui County's offstream uses holds no water.

II. THE BEST INFORMATION AVAILABLE FAVORS SETTING AMENDED IIFS AT LEVELS THAT PROVIDE MAXIMUM PROTECTION FOR INSTREAM VALUES

The IIFS determinations that ultimately emerge from these contested case proceedings will determine, for the interim, how much East Maui surface water will be made available for present and potential offstream uses. "Although interim stream standards are merely stopgap measures, they must still protect instream values to the extent practicable." *Waiahole II*, 105 Haw. at 123, 9 P.3d at 653 (citing *Waiāhole I*). Moreover, "the constitutional requirements of 'protection' and 'conservation,' the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the 'zero-sum' game between competing water uses demand that any balancing between public and private uses begin with a presumption in favor of public use, access, and enjoyment." *Id.* at 142, 9 P.3d at 454. Given the current situation where offstream uses are projected, conceptual, and unsupported by the record, the Commission should first consider maximum protection of the public trust resource and determine the feasibility of that level of protection in balancing offstream potential uses with present instream purposes.

Historically, the EMI Ditch System has diverted an average total stream flow of 114 mgd to 167 mgd from at least 43 streams. COL 248 - 249. Of the 43 diverted streams, only 23 are the subject of this contested case. COL 247 - 248. In other words, the 23 streams at issue do not alone account for the total flows diverted by EMI for use by HC&S and other end users, including Maui County. COL 248.

As previously addressed in Nā Moku's Responsive Brief at pages 6 through 8, HC&S' Diversified Agriculture Plan identifies "conceptual uses" for the 26,600 acres it intends to irrigate at some unspecified future date. Volner Declaration at ¶ 15; Exhibit C-155. Its corresponding irrigation requirements listed in Exhibit C-156, if taken at face value, calculates an average crop requirement of 3,369 gpad for 26,600 acres. Aside from these spoonfed values, nothing in HC&S' table or (non)supporting documentation demonstrates its need to plant crops exceeding or nearly doubling the 2,500 gad the Hawaii Supreme Court in *Waiahole II* determined sufficient per cultivated acre in diversified agriculture. 105 Hawaii at 63, 93 P.3d at 664. Considering the current available information, which Nā Moku contends is less than best,

and the lack of information vital to stream-by-stream IIFS determinations, the record does not support accepting HC&S' prospective water demands at face value. See Nā Moku Responsive Brief at 6-8. Maui County's similar failure to provide additional evidentiary support for its anticipated need of an additional 9.15 mgd, dictate that the Commission err on the side of instream use protection in setting the IIFS. See Nā Moku Responsive Brief at 3-6.

III. THE BALANCING OF INSTREAM VALUES WITH OFFSTREAM USES FAVORS AMENDED IIFS THAT PROVIDE MAXIMUM STREAM PROTECTION

The *Waiahole II* court recognized “the Water Commission’s daunting task to synthesize the evidence and reach a conclusion while balancing various interests and accounting for the public trust.” 105 Hawaii at 22, 93 P.3d at 664. As the Hearing Officer acknowledged in his Proposed Findings of Fact, Conclusions of Law, & Decision and Order Filed January 15, 2016 (“HO Proposed Decision”), in considering a petition to adopt an interim instream flow standard in particular, “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. (HRS §174C-71(2)(D)).” *Id.* at 132. COL 239. Likewise, “[a]ny balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment” with “[u]se consistent with trust purposes [a]s the norm or ‘default’ condition, which effectively prescribes a higher level of scrutiny for private commercial uses.” COL 13 (citing *Waiahole I*, 94 Haw. 97, 142, 9 P.3d 409, 454). “Although interim instream standards are merely stopgap measures, they must still protect instream values to the extent practicable.” *Id.* at 155, 9 P.3d at 467. See also HRS §174C-71(2)A (calling for petitions to “adopt instream flow standard for streams in order to protect the public interest”). As reiterated by the Hawaii Supreme Court in *Waiahole II*, “[n]otwithstanding their temporary effect, therefore, interim standards must still provide meaningful protection of instream uses.” 105 Haw. at 11, 93 P.3d at 653 (quoting *Waiahole I*, 94 Haw. at 151, 9 P.3d at 463).

The Hearing Officer’s January 2016 Recommendation to restore the 18 mgd that EMI had previously diverted from the 23 petitioned streams upon a balancing of various interests and the public trust, COL 247, expressly contemplated restrictions on HC&S’ use notwithstanding

the risk of incurring some adverse economic impacts.¹ EMI's-then diversion average of 114 mgd to 167 mgd was slated to be reduced by 11 to 16 percent, representing a 13 percent reduction in the winter and a 7 percent reduction in the summer, COL 249, and resulting in a 96 mgd to 149 mgd annual average. COL 253. The Hearing Officer supported his conclusion to restrict HC&S' offstream use after finding its reasonable and beneficial irrigation requirement to be 4,844 gad (or 140.19 mgd) for 28,941 acres then in sugar cultivation, and a total reasonable and beneficial use requirement of 188.9 mgd, inclusive of MDWS' average use of 7.1 mgd. COL 251-256. The proposed amended IIFS also concluded, based on the evidence in the record to the extent supplied by HC&S, that brackish well water could satisfy a maximum of 83.32 mgd of its total reasonable and beneficial use requirement. COL 257. While that value may be reduced over the long-term, it is the best and only available information on HC&S' groundwater supplies. The resulting shortfall of no more than 10 mgd *some of the time* for HC&S was deemed necessary, consistent with *Waiahole I* and *II*, to protect competing instream values to the extent practicable for interim purposes and in furtherance of the public interest. COL 253.

In assessing Nā Moku's competing beneficial instream uses, the Hearing Officer concluded that appurtenant/riparian uses on acreage limited to wetland taro *and* supported, through historic record evidence and sworn testimony, "as suffering **actual** harm to their owners' reasonable use" (HO Proposed D&O at 140), were satisfactorily addressed by the stream-by-stream IIFS amendments. COL 240. The maintenance of fish and wildlife habitats, another beneficial instream use, was determined to have been addressed by the "geographic approach," deemed the most feasible method of restoring select EMI-diverted streams that would result in the most biological return from additional flow. COL 73-76, 240. In other words, the Hearing Officer concluded that the evidentiary standards used to establish his recommended stream-by-stream IIFS amendments protected those beneficial instream uses to the extent **then** practicable. *Id. See also Waiahole I*, 94 Haw. at 155, 9 P.3d at 467.

Given the reduction in HC&S' projected water needs from 188.9 mgd to 116 mgd (or 123.1 mgd if inclusive of MDWS' average use of 7.1 mgd) as a result of significant changes in HC&S' offstream use, the Commission can now afford to expand upon practicable protections

¹ As the Hearing Officer concluded in COL 251, an inconsistent relationship existed between tons of sugar produced and amount of irrigation water available, providing no clear correlation to economic impacts.

for instream values while maintaining a balance for reasonable beneficial offstream uses. Recall that parties asserting protections for historic, present, and potential instream uses were required to satisfy exacting evidentiary standards despite the acknowledgement that, at least in the IIFS-setting context, the Commission “need only reasonably estimate instream and offstream demands” COL 35 (citing *Na Wai Eha*, 128 Haw. 228, 258; 287 P.3d 129, 159 (2012)). For the Commission to now employ a more flexible, less searching evidentiary standard for presently non-existent, non-substantiated, future, offstream uses serving a private, commercial purpose would turn on its head the prescribed “balancing between public and private purposes [which] must begin with a presumption in favor of public use, access, and enjoyment” and “which effectively prescribes a higher level of scrutiny for private commercial uses.” COL 13 (citing *Waiāhole I*, 94 Haw. at 142, 9 P.3d at 454). Contrary to HC&S’ and MDWS’ protestations, the “best information currently available” need not be an evidentiary standard too exacting to satisfy. *Waiāhole II*, 105 Haw. at 63, 93 P.3d at 664. HC&S Responsive Brief at 3; MDWS Responsive Brief at 2. HC&S’ plan for diversified agriculture is no doubt subject to uncertainty and speculation, but those considerations bear on the weight afforded their evidence (or lack thereof) in balancing instream versus offstream uses for purposes of setting the amended IIFS. It does not give the Commission license to reach conclusions or make assumptions unsupported by the record, particularly when uncertainty and speculation were a basis for reducing Nā Moku and Maui Tomorrow’s claimed water needs for their instream uses.

HC&S erroneously assumes that maximum instream use protections would result in “little to no water” available for future offstream uses or otherwise “impede HC&S and any other user from investing in and developing business plans for new agricultural ventures on the former plantation lands.” HC&S Responsive Brief at 3. Maui County’s similarly alarmist concern that no additional water will be available once IIFS are set to reflect maximum instream use protection is also meritless. Maui County Responsive Brief at 2-4. Recall that the 23 petitioned streams constitute approximately half of the streams diverted by the EMI Ditch System. FOF 59; COL 247-248. Only eight of the 23 petitioned streams are slated for full and permanent restoration. Clearly then, setting IIFS at levels that provide maximum instream use protections for only the petitioned streams will not result in the doomsday scenario of “little to no water” being peddled by HC&S and Maui County. Unlike in prior situations, this is no longer a “zero-

sum” game.

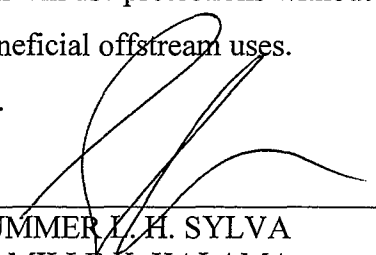
IV. JOINDER IN MAUI TOMORROW’S POSITIONS ON RE-OPENING

Nā Moku hereby joins in the positions of Maui Tomorrow and its Supporters in the re-opened proceedings as presented in its Responsive Statement and Brief filed January 6, 2017.

V. CONCLUSION

The Hearings Officer and Commission are obligated to collect the best information available to plan for future uses of Maui’s precious water resources. Given the admittedly speculative nature of future planned uses for that water, the amended IIFS for all petitioned streams can and should be set to provide maximum instream use protections without unduly limiting streamflows available for future reasonably beneficial offstream uses.

DATED: Honolulu, Hawai‘i, January 20, 2017.



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

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CASE NO. CCH-MA13-01

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that the Original and seven (7) copies of Petitioner Nā Moku Aupuni O Ko'olau Hui, Lurlyn Scott and Sanford Kekahuna's Rebuttal Brief Regarding Re-Opened Hearing, Dated January 20, 2017 was duly served on the following by hand delivery and Email on January 20, 2017.

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

The undersigned further certifies that a copy of the foregoing document was duly served on the following by U.S. mail postage pre-paid and Email on January 20, 2017:

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

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

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

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


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

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

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

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

DATED: Honolulu, Hawai'i, January 20, 2017.



SUMMER L. H. SYLVA
CAMILLE K. KALAMA
Attorneys for Petitioners
Nā Moku Aupuni O Ko`olau Hui