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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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Surface Water Use Permit Applications,)	Case No. CCH-MA 15-01
Integration of Appurtenant Rights and)	
Amendments to the Interim Instream Flow)	OPENING BRIEF OF WAILUKU
Standards, Na Wai Eha Surface Water)	COUNTRY ESTATES IRRIGATION
Management Areas of Waihee, Waiehu, Iao,)	COMPANY AND WAILUKU COUNTRY
and Waikapu Streams, Maui.)	ESTATES COMMUNITY ASSOCIATION
)	and CERTIFICATE OF SERVICE
)	
)	Hearing Officer: Lawrence Miike
)	
)	Hearing: June 6, 2016

**OPENING BRIEF OF WAILUKU COUNTRY ESTATES IRRIGATION
COMPANY AND WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION**

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I. INTRODUCTION

COMES NOW Applicant WAILUKU COUNTRY ESTATES IRRIGATION COMPANY (“WCEIC” or “Irrigation Company”) and WAILUKU COUNTRY ESTATES COMMUNITY ASSOCIATION (“WCECA” or “Wailuku Country Estates” or “Association”), by and through its attorneys, and hereby respectfully submits its Opening Brief in accordance with Minute Order No. 3 issued by the Hearings Officer, Lawrence H. Miike, on January 15, 2016. WCEIC supplies non-potable irrigation water to the agricultural lots and common areas of Wailuku Country Estates, a residential agricultural subdivision located near the foothills of the West Maui Mountains within the Wailuku ahupua’a of Wailuku district. This agricultural subdivision is comprised of 184 lots each between 2 to 3.9 acres in size for a total of approximately 420 acres, plus roadway lots of approximately 16.8 acres, a 2.125 acre exclusion lot, a 2.5 acre public community park, 20 acres of common roadway irrigation area, and 10 acres of in-lot drainage swales and retention basins.

The Wailuku Country Estates agricultural subdivision is rooted in agriculture – over the past 120 years its lands were used to cultivate sugar cane, and more recently, macadamia nut. Today, the Wailuku Country Estates homeowners steward a growing abundance of diverse agriculture such as banana, breadfruit, cucurbit, eggplant, green onion, lettuce, lilikoi, mango, macadamia nut, okra, papaya, sour sap, string beans, taro, and tomatoes; livestock, such as goats and horses; and ornamental and medicinal flowers and foliage, such as kukui nut trees, kava, pahole fern, plumeria, ti-leaf, red ginger torch, orchids and palm trees. Many homeowners have plans to further expand their agricultural uses, making the farm-to-table concept a sustainable reality for their families and community. As a result, Wailuku Country Estates has a need for

water to serve these agricultural and livestock uses, including the growing, processing, and treating of crops, livestock, aquatic plants and animals, and ornamental flowers and similar foliage.

In addition, the Wailuku Country Estates' common areas, which include approximately 32.5 acres of property, require irrigation for the public community park, roadside setbacks, drainage swales, and retention basins. In particular, the rural system of grassed drainage swales which utilizes few pipes and concrete linings relies upon healthy vegetation to prevent erosion and remain stable under storm flow conditions. Without continued irrigation, the storm drainage plan approved by the County of Maui could degrade, cease to operate properly, and lead to flooding within the agricultural subdivision and the surrounding community.

As explained more fully herein, the foregoing uses of water meet the reasonable-beneficial use standard which allows the use of water in such quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest. The lack of reasonable alternative water sources highlights the tremendous need for the water use permits. Without the continued water resource from the Na Wai Eha Surface Water Management Area, homeowners within the subdivision will be deprived of valuable irrigation water for their agricultural crops that sustain their families and livelihoods.

II. STATEMENT OF FACTS

A. Wailuku Country Estates Agricultural Subdivision

On December 27, 2002, the County of Maui granted final subdivision approval for the Wailuku Country Estates agricultural subdivision, containing 184 lots in Wailuku, Maui. See

December 27, 2002 letter from the County of Maui (Exhibits 225-226); Declaration of Joseph Blackburn (Exhibit 476). The agricultural subdivision is located within an agricultural district under the state land use laws and the zoning ordinances of the County of Maui, and is also designated as agricultural land in the Wailuku Community Plan. See id. Lands within the agricultural subdivision have been classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Classes B, C and E. See id.

The agricultural subdivision is subject to a Subdivision Agreement (Agricultural Use) dated July 26, 2002, requiring compliance with land use laws, including Hawaii Revised Statutes ("HRS") §205-4.5. See Subdivision Agreement (Agricultural Use) (Exhibit 230); Declaration of Joseph Blackburn (Exhibit 476). The agricultural subdivision is also subject to a Farm Dwelling Agreement dated December 5, 1988, requiring that any residence constructed on the property be a "farm dwelling" occupied by "family" as those terms are defined in HRS Chapter 205 and land use regulations. See Farm Dwelling Agreement (Exhibit 224); Declaration of Joseph Blackburn (Exhibit 476).

The agricultural subdivision is subject to a Declaration of Covenants, Conditions, and Restrictions for Wailuku Country Estates (the "CC&Rs"). Article XVI of the CCRs provides that each lot within the subdivision is designated for, and restricted to, agricultural use as defined in the zoning laws, and that agricultural use shall be conducted on the lots to provide economic benefit to the lot owners in a manner consistent with the zoning laws. See CCRs (Exhibit 234); Declaration of Joseph Blackburn (Exhibit 476).

Article XX of the CC&Rs requires that two water systems provide water to the Wailuku Country Estates agricultural subdivision: a potable water system and a non-potable

system designed to provide non-potable water for agricultural use within the subdivision. See CCRs (Exhibit 234). The Irrigation Company manages the irrigation system that provides non-potable water for irrigation and agricultural purposes to every lot owner of Wailuku Country Estates and for the common areas managed by the Association. See Joseph Blackburn Declaration (Exhibit 476).

The Irrigation Company receives its water exclusively from Wailuku Water Company, LLC (fka Wailuku Agribusiness Co., Inc.) (“Wailuku Water Company”) pursuant to a Water Delivery Agreement between Wailuku Agribusiness Co., Inc. and the Irrigation Company dated August 30, 2002 (the “Water Delivery Agreement”). See Water Delivery Agreement (Exhibit 232); Joseph Blackburn Declaration. Pursuant to the Water Delivery Agreement, all water received from Wailuku Water Company (up to a maximum average of one million gallons per day) must be used exclusively for irrigation of landscaping and agricultural activities at the Wailuku Country Estates agricultural subdivision and only within the subdivision. See id.

Wailuku Water Company charges the Irrigation Company a Minimum Charge (defined as a minimum delivery of 500,000 gallons per day at the County Rate). See id. The County Rate is defined as the rate charged by the Maui Department of Water Supply for the delivery of water for agricultural uses (which is currently \$1.90 per one thousand gallons from 0-5,000 gallons, \$3.60 per one thousand gallons for the next 5,001-15,000 gallons, and \$1.00 per one thousand gallons for anything over 15,000 gallons); however, the rate charged by Wailuku Water Company is currently set by the Public Utilities Commission at \$.90 per one thousand gallons. See id. In addition to the Minimum Charge, the Irrigation Company pays to Wailuku Water Company an additional amount by which the Delivery Charge for each quarter exceeds the

Minimum Charge. See id. The Delivery Charge is defined as the County Rate times the gallons delivered each month plus general excise tax. See id.

Delivery of the non-potable water to each of the 184 agricultural lots at Wailuku Country Estates is governed by the Agreement Regarding Irrigation Water (Individual Lots) executed by the Irrigation Company and each lot owner upon closing (“Individual Lot Irrigation Agreement”). See Agreement Regarding Irrigation Water (Individual Lots) (Exhibit 227); Joseph Blackburn Declaration (Exhibit 476). The Individual Lot Irrigation Agreement requires each lot owner to use the non-potable water delivered by the Irrigation Company only for irrigation and agricultural activities and only on the owner’s own lot. See id.

Each of the agricultural lots at Wailuku Country Estates has a water meter to measure the amount of non-potable water delivered by the Irrigation Company to each lot. See Declaration of Joseph Blackburn (Exhibit 476). The Irrigation Company charges each lot owner \$100.00 per month for 2,666 gallons per day or 80,000 gallons per month. See id. Any water used in excess of these amounts is charged at \$2.00 per thousand gallons. See id. For reference, the \$2.00 per thousand gallons rate is higher than the County of Maui Department of Water Supply’s agricultural rate of \$1.00 per one thousand gallons, and is imposed to encourage water conservation throughout the development. See id. The Association also regularly encourages its members to conserve water resources through its newsletters and recommendations concerning irrigation methods. See id.

B. Agricultural Use

As of April 30, 2008, approximately 120 lots within Wailuku Country Estates were conducting agricultural activities. See Declaration of Joseph Blackburn. As of April 30,

2008, there were approximately 98.75 acres within the Wailuku Country Estates producing agricultural products and utilizing non-potable water. See id. At an average of 210,890 gallons per day, this equates to an average of approximately 2,135 gallons per day per acre for agricultural activity. See id.

When many of the homeowners purchased their lots at Wailuku Country Estates, a major factor in their purchase was the ability to conduct agricultural activities. See e.g. Declaration of Malcolm Wong (Exhibit 468); Declaration of Dain Kane (Exhibit 469); Declaration of Ann Emmsley (Exhibit 473); Declaration of Kent Carlson (Exhibit 470); Declaration of Joseph Blackburn (Exhibit 476); Declaration of Romeo Yanos (Exhibit 471). Many wanted the ability to grow food for their families and have small farming operations. See id. They understood that water would be available at an acceptable cost. See id. Relying upon this, many have cultivated and harvested the various agricultural crops on their properties for over a decade. See id.

The types of agricultural activity within the Wailuku Country Estates agricultural subdivision non-exclusively include taro, banana, avocado, mango, ulu, papaya, macadamia nut, and various vegetables and native plants. See id. Most of the agricultural activity takes place year-round, with the exception of certain seasonal crops. See id. Many of the homeowners implement some kind of conservation measures for their crops, including drip irrigation and rotor spray heads. See id. Many of them sell their produce at farmers markets or to local businesses and restaurants. See id. While many of the homeowners have full time jobs and utilize their agricultural activities to supplement their incomes, there are a number of homeowners who rely upon the agricultural activities as their sole or majority income for their families. See id.

The Pahia family has owned and operated Hawaii Taro Farms for over 10 years. See Declaration of Robert Pahia (Exhibit 475). All of the Pahia family members are either employed by Hawaii Taro Farms or somehow assist with the farming operations. See id. Since 2010, the Pahia family has farmed on 3 lots within Wailuku Country Estates. See id. They regularly sell produce to local business and rely solely on their income from Hawaii Taro Farms for their livelihood. See id. Without water from the Na Wai Eha Surface Water Management Area, the family's crops would not be viable and they would be forced to shut down agricultural activities in Wailuku Country Estates. See id.

C. Common Areas

In addition to homeowner use, the Association uses water to irrigate the common areas of the agricultural subdivision, which include approximately 32.5 acres of property. See Declaration of Joseph Blackburn (Exhibit 476); Declaration of Dain Kane (Exhibit 469). This includes a community park (which is open to the public) of 2.26 acres; 20 acres of roadside setbacks along six miles of roads (the setbacks consist of a 24 foot setback on the mauka side of the roadways and a 9.5 foot setback on the makai side of roadways); nine acres of lot drainage swales; and one acre of retention basins. See id. The common areas are irrigated through sprinklers using timers, and other portions are irrigated manually as needed. See id.

The design of the storm drainage system approved by the County of Maui for Wailuku Country Estates, including grassed drainage swales, requires the continued maintenance of vegetation to hold down the swale matting. See Declaration of Joseph Blackburn (Exhibit 476); Declaration of Darren Unemori (Exhibit 260). This requires irrigation of the vegetation on a regular basis in order to prevent excessive erosion which may lead to the subsequent failure of

the drainage system and flooding of the roadways. See id. This rural-type drainage system, which utilizes few pipes and concrete linings, relies upon healthy vegetation to remain stable under storm flow conditions and prevent significant impacts to surrounding communities. See id.

The community park located within Wailuku Country Estates, which is open to the public, also requires continued irrigation. See Declaration of Joseph Blackburn (Exhibit 476). The park is designated in the CC&Rs as an extension of Puuohala Park, which is an existing public park owned by the County of Maui. See id. The CC&Rs provides for an easement for public access to the community park, and the Association has no authority to restrict or change the public’s right to access the park. See id. Residents from the surrounding developments and communities regularly use and enjoy the park. See id. Although the CC&Rs provide that the community park will be dedicated to the County of Maui at some point, the dedication has not taken place and the CC&Rs provide that the Association is therefore responsible for the maintenance of the entire park, including irrigation of the park. See id.

III. LEGAL STANDARDS

A. Appurtenant Rights

Appurtenant water rights are “rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land.” Reppun v. Board of Water Supply, 65 Haw. 531, 554, 656 P.2d 57, 72 (1982) (“Reppun”); Territory v. Gay, 31 Haw. 376, 383 (1930) aff’d sub nom. Territory v. Gay, 52 F.2d 356 (9th Cir. 1931) (“a mere reference to the land in the award or in the records of the land commission as ‘taro land’ (‘aina kalo’ or ‘loi kalo’) or as ‘cultivated land’ (‘aina mahi’) has sufficed to lead to and to support an adjudication that that

land was entitled to use water for agricultural purposes.”). Such rights are “incidents of land ownership,” and constitute “an easement in favor of the [property with an appurtenant right] as the dominant estate.” Reppun, 65 Haw. at 551, 656 P.2d at 71-72 (quoting Peck v. Bailey, 8 Haw. 658 (1867) (brackets in original)).

Appurtenant rights are afforded the highest degree of protection under Hawai‘i law. Indeed, through the 1978 Hawai‘i Constitutional Convention, the people of Hawai‘i identified the State’s “obligation to protect, control and regulate the use of Hawai‘i’s water resources for the benefit of its people.” Haw. Const. art. XI, § 7. To that end, the Hawai‘i Constitution directed the legislature to create the State Commission on Water Resource Management (the “Commission”) which shall, among other things, “set overall water conservation, quality and use policies . . . while assuring appurtenant rights[.]” Id.

The exercise of appurtenant rights is also a public trust purpose. In re Waiāhole Ditch Combined Contested Case Hr’g, 94 Haw. 97, 137 & n.34, 9 P.3d 409, 449 & n.34 (2000) (“Waiāhole I”) (“The trust’s protection of traditional and customary rights recognized in Peck.”). Under Chapter 174C of the Hawai‘i Revised Statutes (“HRS”), Hawai‘i’s Water Code, “appurtenant rights are preserved” and nothing in the Code “shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time.” Haw. Rev. Stat. § 174C-63. Consequently, not only is the exercise of an appurtenant right preserved, but the exercise of that right has priority over other uses in the issuance of a water permit.

A permit for water based on such appurtenant rights “shall be issued upon application,” provided such use is “reasonable-beneficial.” Haw. Rev. Stat. § 174C-63. Under the Water Code, a “reasonable-beneficial use” means the use of water in such a quantity “as is

necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest.” Haw. Rev. Stat. § 174C-3; Haw. Admin. Rules § 13-171-2. Upon application for a permit, the Commission shall “determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of [the Code].” Haw. Rev. Stat. §174C-5(15). The quantity of water associated with an appurtenant right is the amount of water that was being used on the parcel at the time of the Māhele. Gay, 31 Haw. at 383 (“Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, that land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named.”); Peck v. Bailey, 8 Haw. 658, 661 (1867) (recognizing “appurtenant rights” as “all the water rights which the lands had by prescription at the date of title.”).

With regard to the burden of proof as to the quantity of water associated with an appurtenant right, the Hawaii Supreme Court has emphasized that “while the proper measure of those [appurtenant] rights is indeed the quantum of water utilized at the Mahele, requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights.” Reppun, 65 Haw. at 554, 656 P.2d at 72. To that end, when “the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to give rise to a presumption that the amount of water diverted for such cultivation sufficiently approximates the quantity of the appurtenant water rights to which that land is entitled.” Id.

Importantly, once appurtenant rights have been established, future uses are not limited to the cultivation of traditional products approximating those utilized at the time of the Māhele. Peck established the right to use the water for other purposes. “[O]riginally the water was wanted mainly for the cultivation of kalo and more recently for cane. If land has a water right, it will not be contended that the water shall be forever for the same crop, be it kalo or cane. It may be used for any purpose which the owner may deem for his interest, always taking care that any change does not affect injuriously the rights of others.” Peck, 8 Haw. at 665.

B. Existing Uses

Applications for existing-use permits must be filed within one (1) year from the effective date of designation. Haw. Rev. Stat. § 174C-50(c). Under the public trust doctrine and the Code, permit applicants must establish that their existing use of water is a “reasonable-beneficial” use and is “consistent with public interest.” Haw. Rev. Stat. § 174C-50(b). As a result, permit applicants “must prove their own actual water needs[,]” Waiāhole I, 94 Haw. at 161, 9 P.3d at 473, and a permit to continue an existing use shall be for a quantity of water not exceeding that quantity being consumed under the existing use. Haw. Rev. Stat. § 174C-50(f); Haw. Rev. Stat. § 174C-51. The quantity being consumed “shall be determined and verified by the best available means not unduly burdensome on the applicant, as determined by the commission.” Id. To establish each use, the applicant must provide details on “acres to be used, the crops to be planted, and the water needed as to each group.” Waiāhole II, 105 Haw. at 25, 93 P.3d at 667. Absent such basic information, an applicant cannot meet its burden.

In addition to “advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures,

including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of ‘reasonable-beneficial’ use, and is an essential part of any balancing between competing interests.” Waiāhole I, 94 Haw. at 161, 9 P.3d at 473.

C. New Uses

An application for new uses may be filed at any time and will be considered after the appurtenant and existing use determinations are made. Haw. Rev. Stat. §§174C-49 and 174C-51. An applicant for a new water use permit must establish that the proposed use is “reasonable-beneficial” and affirmatively demonstrate that its proposed use satisfies all criteria set forth in Haw. Rev. Stat. § 174C-49(a). Waiāhole I, 94 Haw. at 160-61, 9 P.3d at 472-73; In re Waiāhole Ditch Combined Contested Case Hr’g, 105 Haw. 1, 15-16, 93 P.3d 643, 657-58 (2004) (“Waiāhole II”). To obtain a permit, the applicant shall establish that the use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a “reasonable-beneficial use”;
- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands.

Haw. Rev. Stat. § 174C-49(a).

In addition, an applicant for a new water use permit must “demonstrate the absence of practicable mitigating measures, including the use of alternative water sources. Such a requirement is intrinsic to the public trust, the statutory instream use protection scheme, and the definition of ‘reasonable-beneficial’ use, and is an essential part of any balancing between competing interests.” Waiāhole I, 94 Haw. at 161, 9 P.3d at 473. Moreover, “applicants must

still demonstrate their actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” Id. at 162, 9 P.3d at 474.

IV. DISCUSSION

A. Specified lot owners within the Wailuku Country Estates agricultural subdivision have appurtenant rights which are preserved under the Water Code and cannot be extinguished.

1. Specified lot owners have appurtenant rights.

When parcels of land allotted by the Māhele were confirmed to the awardee by the Land Commission and/or when a Royal Patent was issued based on such award, the conveyance of these parcels carried with them an appurtenant right to water. McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 190, 504 P.2d 1330, 1340 (1973) (“[A]ppurtenant right[s] to taro land attached to the land when title was confirmed by the Land Commission Award and title conveyed by the issuance of Royal Patent.”). To confirm appurtenant water rights, “a mere reference to the land in the award or in the records of the land commission as ‘taro land’ (‘aina kalo’ or ‘loi kalo’) or as ‘cultivated land’ (‘aina mahi’) has sufficed to lead to and to support an adjudication that that land was entitled to use water for agricultural purposes.” Gay, 31 Haw. at 383 .

There are approximately 93 lots within the Wailuku Country Estates agricultural subdivision that have appurtenant water rights. See Wailuku Country Estates Summary of Appurtenant Rights Claims and Applications (Exhibit 262); Wailuku Country Estates Subdivision Lots Affecting Land Commission Awards (Exhibit 243-A); Hearing Officer’s Provisional Order (Exhibit 244).

In this case, the appurtenant water rights within the Wailuku Country Estates agricultural subdivision are evidenced by their respective LCAs, which clearly and

unambiguously reference taro (kalo), taro patches (loi), dry taro patches (loi maloo), taro land (aina kalo or loi kalo), and/or ali'i taro patches (poalima), and in some instances, also reference a stream (kahawai) or auwai (ditch). These LCAs are marked as Exhibits 193-218 in this proceeding. The LCAs were translated by Puakea Nogelmeier and Doris Moana Rowland. Ms. Rowland is an expert in the Hawaiian language and translation. See Declaration of Doris Moana Rowland (Exhibit 185).

The Provisional Order on Claims that Particular Parcels have Appurtenant Rights, issued in this proceeding on December 31, 2014 (“Provisional Order”), acknowledges the references to water in the various LCAs that make-up a portion of the Wailuku Country Estates. Exhibit 7 on page 72 of the Provisional Order cites various LCA references to water. The following is a chart showing the references to water in the various LCAs that make up a portion of Wailuku Country Estates:

<u>Water Term</u>	<u>LCA (RP)</u>
Kalo (<i>taro</i>)	1. LCA 2436 Ap 1, 2, 3 (RP 2009); 2. LCA 2502 Ap 1, 3 (RP 5973); 3. LCA 2503 Ap 2 (RP 3652); 4. LCA 3292; 5. LCA 3294B Ap 1 M1, Ap 1 M2, and Ap 2 (RP 6102); 6. LCA 3330 (RP 4424 & 4622); 7. LCA 3335 (RP 7774); 8. LCA 3388 (RP 6101); and 9. LCA 4461 Ap 1, 2 (RP 6630).
Loi (<i>taro patches</i>)	1. LCA 453 Ap 1, 2 (RP 997) (apana 2 is the site of loi); and 2. LCA 3387 (RP 6065) (identifying 9 loi);
Loi maloo (<i>dry taro patches</i>)	1. LCA 406 Ap 1 (RP 5376).
Aina kalo	1. LCA 2533 Ap 1 (RP 6529 & 6437)

<i>(taro land)</i>	
Poalima <i>(ali`i taro patches)</i>	<ol style="list-style-type: none"> 1. LCA 453 Ap 1, 2 (RP 997) (apana 1 is bounded by a poalima); 2. LCA 2434 (RP 6397); 3. LCA 2495 Ap 1, 2, 3, 4; 4. LCA 2503 Ap 2 (3652); 5. LCA 2533 Ap 1 (RP 6529 & 6437); 6. LCA 3225 (RP 6298); 7. LCA 3237 Ap 3 (RP 6888); 8. LCA 3275E (RP 5154); and 9. LCA 3292.
Kahawai <i>(stream)</i>	<ol style="list-style-type: none"> 1. LCA 3225 (RP 6298); and 2. LCA 3275E (RP 5154).
Auwai <i>(ditch)</i>	<ol style="list-style-type: none"> 1. LCA 2436 Ap 1, 2, 3 (RP 2009) (apana 2 cites an auwai); 2. LCA 2502 Ap 1, 3 (RP 5973) (an auwai runs through apana 3); 3. LCA 3225 (RP 6298); 4. LCA 3237 Ap 3 (RP 6888); 5. LCA 3292; 6. LCA 3294B Ap 1 M1, Ap 1 M2, and Ap 2 (RP 6102); 7. LCA 3330 (RP 4424 & 4622); 8. LCA 3335 (RP 7774); and 9. LCA 3388 (RP 6101).
House lot	<ol style="list-style-type: none"> 1. LCA 2503 Ap (RP 3652)

As set forth above and in the exhibits to this proceeding, the LCAs clearly and ambiguously establish that the majority of lots within the Wailuku Country Estates agricultural subdivision have appurtenant rights. Indeed, in purchasing their lots specifically for the ability to farm, many of the lot owners relied upon the appurtenant rights and the availability of water to irrigate their crops at an acceptable cost. See Declaration of Malcolm Wong (Exhibit 468); Declaration of Dain Kane (Exhibit 469); Declaration of Ann Emmsley (Exhibit 473); Declaration

of Kent Carlson (Exhibit 470); Declaration of Joseph Blackburn (Exhibit 476); Declaration of Romeo Yanos (Exhibit 471). These appurtenant rights, which are afforded the utmost protection under Hawaii law, enable the lot owners to irrigate their agricultural crops, including taro, for their own sustenance and livelihood. See id.

2. The appurtenant rights are preserved and cannot be extinguished.

In Hawaii, appurtenant rights of the lot owners are expressly preserved and cannot be extinguished. The protection of appurtenant rights is reflected in the Water Code, HRS § 174C-63, which states:

Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application. Such permit shall be subject to sections 174C-26 and 174C-27 and 174C-58 to 174C-62.

The holding in Reppun that a reservation upon conveyance of a parcel extinguishes appurtenant water rights is inapplicable. Any reliance on Reppun for this proposition is misplaced as explained below.

In 1982, the Hawaii Supreme Court in Reppun determined that because riparian rights in Hawaii arose by statute, HRS § 7-1, the right attached to the land and was transferred with the title to the land. Reppun, 65 Haw. at 551, 656 P.2d at 70. Such riparian rights could not be severed. Id. In contrast, appurtenant rights arose from common law, not statute. See Peck v. Bailey, 8 Haw. 658 (1867) (recognizing appurtenant rights). Treating appurtenant rights as an incident of land ownership that parties could mutually agree to modify, the Hawaii Supreme Court concluded that an attempted reservation could extinguish that right. Reppun, 65 Haw. at 552, 656 P.2d at 71.

Importantly, the trial court proceeding on appeal in Reppun occurred in 1975-1976, *i.e.*, two years before the 1978 Hawai‘i Constitutional Convention through which the Hawai‘i Constitution was amended expressly to preserve all appurtenant rights, not just appurtenant use, and eleven years before the 1987 Water Code was enacted, which expressly preserves such appurtenant rights. Reppun, 65 Haw. at 563, 656 P.2d at 78. On appeal, the Hawaii Supreme Court in Reppun applied the law in place at the time of trial rather than applying the 1978 constitutional amendment retroactively to the trial court’s 1976 decision. Id.

This case is easily distinguished from Reppun on the basis that Reppun is a pre-1978 Constitutional amendment and pre-1987 Water Code decision. The Wailuku Country Estates agricultural subdivision was not in existence prior to 2002. Consequently, the 1978 constitutional amendment and 1987 Water Code are controlling. The lots owners’ appurtenant water rights are expressly preserved thereunder and are not (and cannot) be extinguished. Extinguishing appurtenant water rights under the reasoning in Reppun would not only run afoul of the clear dictates of the 1978 constitutional amendment and the 1987 Water Code provisions placing the highest priority on appurtenant rights, but would also have the unintended and unfair consequence of depriving local farmers of irrigation for crops that they have been cultivating for more than a decade.

B. Existing uses of water are reasonable-beneficial and in the public interest.

Wailuku Country Estates timely filed its Application for existing-use permits within one (1) year from the effective date of designation as required under HRS § 174C-50(c). As set forth in the Application, the existing uses are “reasonable-beneficial” and “consistent with public interest.” Haw. Rev. Stat. § 174C-50(b). Under the Water Code, a “reasonable-beneficial

use” means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest. Haw. Rev. Stat. § 174C-3.

1. **The homeowners use the water for irrigation of agricultural crops.**

As set forth above, as of April 30, 2008, approximately 120 lots within Wailuku Country Estates were conducting agricultural activities and approximately 98.75 acres within Wailuku Country Estates were producing agricultural products utilizing non-potable water. See Declaration of Joseph Blackburn. This is consistent with the state and county agricultural land use designations, and the governing documents of Wailuku Country Estates, which require that each lot within the subdivision be designated for agricultural use. See CCRs, Article XVI (Exhibit 234). Indeed, in purchasing their lots, many of the homeowners specifically relied upon their ability to grow food for their families and have small farming operations on their properties, believing that water would be available at an acceptable cost. See Declaration of Malcolm Wong (Exhibit 468); Declaration of Dain Kane (Exhibit 469); Declaration of Ann Emmsley (Exhibit 473); Declaration of Kent Carlson (Exhibit 470); Declaration of Joseph Blackburn (Exhibit 476); Declaration of Romeo Yanos (Exhibit 471). Relying upon this, many have cultivated and harvested the various agricultural crops on their properties for over a decade. See id.

Over the last decade, these homeowners have cultivated and harvested numerous types of agricultural crops on a year-round basis within the Wailuku Country Estates agricultural subdivision, including, without limitation, taro, banana, avocado, mango, ulu, papaya, macadamia nut, and various vegetables and native plants. See id. Many of the homeowners utilize the produce for their families’ own sustenance, and many of the homeowners sell their

produce at farmers markets or to local businesses and restaurants. See id. In addition to the economic benefit that this provides the homeowners (some of whom rely upon this income for their livelihood), this provides a significant public benefit. The homeowners are contributing to the supply of local products for local families, including ti leaves that are utilized by many of the hula halau on the island. See id. Many of the homeowners also regularly donate their produce to charities and the local food bank. See id.

The homeowners are careful to implement water conservation measures for their crops, including drip irrigation and rotor spray heads. See id. Many of them diligently monitor their water meters to ensure that they do not exceed their maximum water use allotments. See id. The Association and Irrigation Company are also very careful about water conservation, charging homeowners a premium for water usage above a certain amount and regularly encouraging conservation methods. See Declaration of Joseph Blackburn. The use of water for the foregoing agricultural purposes is reasonable-beneficial and in the public interest.

2. The Association uses the water to irrigate common areas.

The Association uses water to irrigate the common areas, including a community park (which is open to the public) of 2.26 acres; 20 acres of roadside setbacks along six miles of roads (the setbacks consist of a 24 foot setback on the mauka side of the roadways and a 9.5 foot setback on the makai side of roadways); nine acres of lot drainage swales; and one acre of retention basins. See Declaration of Joseph Blackburn (Exhibit 476); Declaration of Dain Kane (Exhibit 469).

The irrigation of the grassed swales in the storm drainage system, which was approved by the County of Maui, is a reasonable-beneficial use. This is a rural-type drainage

system, which utilizes few pipes and concrete linings, is in the public interest, and is appropriate for the community it serves; however, it relies upon healthy vegetation to remain stable under storm flow conditions and prevent significant impacts to surrounding communities. See id. It is in the public interest to ensure that the drainage system remains intact and does not cause flooding or otherwise adversely affect surrounding communities.

The irrigation of the community park is also reasonable-beneficial and in the public interest. The park is open for public use and is an extension of the County-owned Puuohala Park. See id. Indeed, residents from surrounding communities regularly use and enjoy the park. See id. Even if it wanted to (which it does not), the Association has no authority to restrict or change the public's right to access the park. See id. The Association is obligated to irrigate the community park until the County of Maui accepts dedication of the park. See id. It is in the public interest to ensure continued irrigation of the community park until such a time as the County of Maui accepts dedication and maintenance of the park.

3. Actual water needs/use are established through water meters.

Through its submissions in this proceeding, Wailuku Country Estates has established its actual water needs, including details on “acres to be used, the crops to be planted, and the water needed as to each group,” and that the amount of water requested for such existing use does not exceed the actual water being consumed under such existing use. See Waiāhole I, 94 Haw. at 161, 9 P.3d at 473; see also Haw. Rev. Stat. § 174C-50(f); Haw. Rev. Stat. § 174C-51.

As set forth above, the Irrigation Company manages the irrigation system that provides non-potable water for irrigation and agricultural purposes to every lot owner of Wailuku

Country Estates and for the common areas managed by the Association. See Declaration of Joseph Blackburn (Exhibit 476). Each of the agricultural lots at Wailuku Country Estates has a water meter to measure the amount of non-potable water delivered by the Irrigation Company to each lot. See id. Set forth in Exhibit 265 is a listing of each lot within the Wailuku Country Estates agricultural subdivision providing a summary of the acreage of each crop and daily water usage. Attached as Exhibit 264 is a listing of each lot, the water meter readings, and any overages (which homeowners are charged a premium for), from the months of January through August 2008.

The average daily use of the non-potable water from May, 2007 through April, 2008 for all of the approximately 120 lots with agricultural activity as of April 30, 2008 was 210,890 gallons per day. See Breakdown for Daily Use, Common Areas and Existing Use (Exhibit 266); Declaration of Joseph Blackburn (Exhibit 476). The average daily use of 210,890 gallons per day for the 120 lots with agricultural activity as of April 30, 2008 equates to an average of 1,757 gallons per day for each of the 120 lots. See id. There were approximately 98.75 acres with agricultural activity in the development using non-potable water as of April 30, 2008. See id. At an average of 210,890 gallons per day, this equates to an average of approximately 2,135 gallons per day per acre for agricultural activity. See id.

The Irrigation Company requested an allocation of the following quantities of non-potable water for the following existing uses and acreages: crops and processing (125,328 gpd / 50.25 acres); ornamental and nursery plants (20,449 gpd / 7.75 acres); livestock, processing and pasture (1,640 gpd / 2.0 acres); and irrigation for landscaping / water features (63,473 gpd / 38.75 acres). See Declaration of Joseph Blackburn (Exhibit 476). The Irrigation Company's

total request for existing use is 210,895 gpd, which represents agricultural activity on approximately 98.75 acres. See id.

For the Association's common areas, water is not separately metered by common area; however, the total amount of water provided by Wailuku Water Company to the Irrigation Company is metered. See id. The calculated average daily use for the common areas is 158,768 gpd for the 32.5 acres of common areas within the agricultural subdivision. See Breakdown for Daily Use Common Areas, Existing Use (Exhibit 266); Declaration of Joseph Blackburn (Exhibit 476). The foregoing, and the record herein, establish in detail the actual water need and actual water usage for the individual lots and the common areas.

C. **After the accommodation of appurtenant rights and existing uses, Wailuku Country Estates should receive a Water Use Permit for new uses.**

After appurtenant and existing use determinations are made, the Wailuku Country Estates agricultural subdivision should receive a water use permit for new uses in accordance with HRS §§ 174C-49 and 174C-51. The new uses satisfy all of the criteria set forth in Haw. Rev. Stat. § 174C-49(a), including that the use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a "reasonable-beneficial use";
- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands.

Haw. Rev. Stat. § 174C-49(a).

For purposes of this proceeding, the existing use period was from May 2007 to April 2008. Since then, agricultural activity has increased within the subdivision, which is consistent with the agricultural nature of the subdivision and the CCRs and governing documents

requiring agricultural productivity. Approximately 120 homeowners are covered by the Application for existing uses, but many of these homeowners intend to increase agricultural production on their properties. See April 22, 2009 Letter (Exhibit 5); New Use SWUPA (Exhibit 6); Declaration of Joseph Blackburn (Exhibit 476); Declaration of Dain Kane (Exhibit 469); Declaration of Kent Carlson (Exhibit 470); Declaration of Romeo Yanos (Exhibit 471); Declaration of Ann Emmsley (Exhibit 473). Another 64 homeowners would receive water to irrigate their agricultural crops under the Application for new use. See New Use Spreadsheet (Exhibit 267); April 22, 2009 Letter (Exhibit 5). New use is expected to increase the amount of land under agricultural production by 220.50 acres for a total of 319.25 acres of agricultural activity within the subdivision. See id. Accordingly, the total request for new use is 511,700 gpd, which represents agricultural activity on 220.5 acres. See id.

As set forth above, utilizing water for agricultural use is a reasonable-beneficial use, is consistent with the public interest, and is consistent with the state and county plans and land use designations. Growing agricultural products that can be used for family sustenance and delivered to local consumers at farmers markets and across the island to local businesses and restaurants is in the public interest. Cultivating and harvesting bananas, mango, ti leaves and other produce is consistent with the state and county agricultural land use designations and county plans for this area. Indeed, the state land use laws require agricultural activity on agricultural lands, as do the CCRs and governing documents for this agricultural subdivision which was approved by the County of Maui in 2002.

Once the appurtenant rights and existing uses have been determined in this proceeding, any new uses that are granted will not interfere with such rights. Additionally, there

are no known rights being asserted by the Department of Hawaiian Home Lands in this proceeding, and the Department of Hawaiian Home Lands does not appear to be utilizing any water from the same hydrologic unit such that any of its rights would be affected. Without any rights being affected, and consistent with the public interest and the various state and county land use plans, the proposed new uses (i.e. beyond April 2008) are reasonable-beneficial and should be granted.

D. There is no reasonable, practicable alternative water source.

The Wailuku Country Estates has no reasonable, practicable alternative water source. Haw. Rev. Stat. § 174C-71(1)(E); Haw. Admin. Rules § 13-169(20)(5). An alternative is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiāhole II, 105 Haw. at 19, 93 P.3d at 661. In this case, the Wailuku Country Estates agricultural subdivision demonstrates “the absence of practicable mitigating measures, including the use of alternative water sources.” Waiāhole I, 94 Haw. at 161, 9 P.3d at 473. There are no practical potable or non-potable alternatives to using water from the Na Wai Eha Surface Water Management Area for the Wailuku Country Estates agricultural subdivision.

As set forth in the Assessment for Alternative Sources of Irrigation Supply for Wailuku Country Estates (“Alternatives Assessment”), prepared by Tom Nance, the following are not possible alternative water sources:

- The Waihee and Spreckels Ditches, which the Irrigation Company has no legal right to withdraw water from and is expressly prohibited from doing so by the terms of the Water Delivery Agreement;

- A water use permit for a new well within the Iao Aquifer System Water Management Area, which would not and should not be issued by the Commission due to the system's fully allocated sustainable yield;
- Groundwater from the Waikapu Aquifer System, which is already at or exceeding its sustainable yield with existing and proposed projects and for which installation of a transmission pipeline would be prohibitive;
- Groundwater from the Kahului Aquifer System, which is in a state of flux following the closure of HC&S and for which installation of a transmission pipeline would be prohibitive;
- Potable water from the Maui Department of Water Supply, which does not have adequate sources; and
- Reclaimed water, which cannot be reasonably obtained from the nearest wastewater treatment plant in Kahului, and which is not suitable (R-2) for reuse at Wailuku Country Estates given the setback requirements and other use limitations.

See Alternatives Assessment (Exhibit 270); Declaration of Tom Nance (Exhibit 271). The foregoing are simply not viable alternative water sources.

The Alternatives Assessment also evaluated two alternatives that are cost prohibitive, and consequently that are impracticable water sources. These include well development on the north side of the Waihee Aquifer System and desalinization.

The Waihee Aquifer System on the north side of the Iao Aquifer is not a groundwater management area, which makes obtaining a permit for development and construction of a new well potentially doable. See id. However, the estimated cost for building such a system is approximately \$9,080,000 (\$9.08 million dollars), and this amount does not include the cost of land and/or easements necessary for the construction of the system. See id. Further, it is unknown whether such land or easements could actually be acquired. See id. It is not anticipated that any landowner or developer within the aquifer system would grant land rights

or easements that may potentially impact his/her ability to develop groundwater resources. See id. Under these circumstances, this alternative is not practicable.

Desalinization of onsite saline groundwater from beneath the basal lens which comprises the Iao Aquifer was also identified as a potential water source. See id. However, such a system would be costly to construct at approximately \$10,200,000 (\$10.2 million dollars), and the operation of such a system would also be quite high at about \$12.05 per thousand gallons (kgal). See id. This is about 9 times greater than the rate of \$1.40 per kgal currently paid to Wailuku Water Company. See id. This would be cost prohibitive for Wailuku Country Estates. See Declaration of Joseph Blackburn (Exhibit 476). Under these circumstances, this alternative is also impracticable.

V. **CONCLUSION**

For the foregoing reasons and authorities and the entire records and files herein, the Association and the Irrigation Company, and all of the lot owners within the Wailuku Country Estates agricultural subdivision respectfully request that water use permits be issued consistent with their Applications and the evidence and testimony herein.

DATED: Honolulu, Hawai'i, February 5, 2016.



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