

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications, ) Case No. CCH-MA15-01  
Integration of Appurtenant Rights and )  
Amendments to the Interim Instream Flow )  
Standards, Nā Wai 'Ehā Surface Water )  
Management Areas of Waihe'e, Waiehu, )  
'Āo, & Waikapū Streams, Maui. )  
\_\_\_\_\_ )

HUI O NĀ WAI 'EHĀ'S, MAUI TOMORROW FOUNDATION, INC.'S,  
AND OFFICE OF HAWAIIAN AFFAIRS'S JOINT OPENING BRIEF

HUI O NĀ WAI 'EHĀ'S, MAUI TOMORROW FOUNDATION, INC.'S WITNESS LIST

TESTIMONY OF LILIKALĀ K. KAME'ELEIHIWA, PH.D.

TESTIMONY OF ZACHARY SMITH

TESTIMONY OF HŌKŪAO PELLEGRINO

HUI O NĀ WAI 'EHĀ'S, MAUI TOMORROW FOUNDATION, INC.'S EXHIBIT LIST

EXHIBITS NĀ WAI-1 TO 17

AND

CERTIFICATE OF SERVICE

ALSTON HUNT FLOYD & ING  
Attorneys at Law  
A Law Corporation

JUDY A. TANAKA #5369  
PAMELA W. BUNN #6460  
1001 Bishop Street, Suite 1800  
Honolulu, HI 96813  
Telephone No.: (808) 524-1800  
Email: Judy.Tanaka@ahfi  
pbunn@ahfi.com

Attorneys for:  
OFFICE OF HAWAIIAN AFFAIRS

ISAAC H. MORIWAKE #7141  
SUMMER KUPAU-ODO #8157  
EARTHJUSTICE  
850 Richards Street, Suite 400  
Honolulu, Hawai'i 96813  
Telephone No.: (808) 599-2436  
Email: imoriwake@earthjustice.org  
skupau@earthjustice.org

Attorneys for:  
HUI O NĀ WAI 'EHĀ and  
MAUI TOMORROW FOUNDATION,  
INC.

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HUI O NĀ WAI 'EHĀ'S, MAUI TOMORROW FOUNDATION, INC.'S,  
AND OFFICE OF HAWAIIAN AFFAIRS'S JOINT OPENING BRIEF

Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (collectively, the "Community Groups") and the Office of Hawaiian Affairs ("OHA") respectfully submit their joint opening brief for the contested case hearing for Surface Water Use Permit Applications ("SWUPAs"), Integration of Appurtenant Rights, and Amendments to the Interim Instream Flow Standards for the Nā Wai 'Ehā Surface Water Management Areas of Waihe'e, Waiehu, 'Īao, and Waikapū Streams. The legal dispute over the waters of Nā Wai 'Ehā has entered a second decade, bringing with it an extensive legal and factual record. With well over 100 SWUPAs to resolve, including those seeking water for protected public trust uses and priority rights and others seeking water for private and municipal uses, as well as the major recent development of the closure of Hawai'i Commercial and Sugar ("HC&S"), this proceeding will be precedent-setting in its size and complexity.

Since the Community Groups initiated legal proceedings over Nā Wai 'Ehā stream flows with their Petition to Amend Interim Instream Flow Standards ("IIFS") on June 25, 2004, the Community Groups and OHA have worked steadfastly to uphold the Commission's public trust mandate, bring the plantation-era diversions of Wailuku Water Company ("WWC") and HC&S under 21st century public trust management, and promote the entire range of public trust uses of community members and OHA beneficiaries. The Community Groups and OHA will continue in this proceeding to

ensure that justice, and the waters of Nā Wai 'Ehā, will flow for present and future generations.

In their opening brief and supporting filings, the Community Groups and OHA establish critical legal and factual foundations for this proceeding:

- First, HC&S and WWC and its customers must bear the full burden of proof in this proceeding to justify their diversions in light of *all* public trust purposes, including higher-priority traditional and customary Native Hawaiian rights to cultivate kalo (“T&C rights”) and appurtenant rights, as well as instream uses that the Commission must continue to protect and promote to the extent feasible, particularly in light of HC&S’s closure. *See* Part I.
- Second, the Commission’s consolidation of SWUPAs for public trust uses in the same proceeding as other SWUPAs will require heightened vigilance to ensure that community members’ priority T&C rights to cultivate kalo and/or appurtenant rights are not prejudiced and unduly burdened. *See* Part II.
- Third, recognized cultural experts provide key presumptions, principles, and water requirements for the quantification of appurtenant and T&C rights. *See* Part III.
- Fourth, the Commission must take early, proactive action, as it did in the *Waiāhole* case, to require the major diverters WWC and HC&S to provide proper monitoring and management plans. *See* Part IV.

These foundations will enable an informed, orderly, and lawful process in this case. The Community Groups and OHA respectfully request the Hearings Officer’s and Commission’s attention to these matters, including the requests for proactive and corrective action.

I. LEGAL FRAMEWORK AND REQUIREMENTS IN THIS PROCEEDING

A. HC&S And WWC And Its Customers Must Bear Their Full Burden Of Proof As Required By Law.

In this water use permitting process, the legal burden of proof unambiguously falls on offstream diverters like HC&S and WWC and its customers to justify any uses. The Community Groups and OHA, nonetheless, are concerned about potential perceptions to the effect that the Commission may now dispense any unallocated water above the current IIFS as it may choose among any and every applicant in this proceeding, including HC&S and WWC and its customers.

Of course, the law establishes the opposite presumption and burden. *See Kauai Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014) ("The agency is to apply a presumption in favor of public use, access, enjoyment, and resource protection."). The Commission bears no trust obligations toward permit applicants -- apart from the applicants with legally protected Native Hawaiian and appurtenant rights, *see infra* Parts I.B, II -- to allocate water for offstream uses. Rather, the Commission is "duty bound to hold [applicants] to [their] burden under the Code and the public trust doctrine." *In re Wai'ola o Moloka'i, Inc.*, 103 Hawai'i 401, 426, 83 P.3d 664, 689 (2004).

This burden of proof includes satisfying the conditions under the Code, particularly the "reasonable-beneficial use" and "consistent with the public interest" requirements. *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 160, 9 P.3d 409, 472 (2000) ("*Waiāhole*"). As the Hawai'i Supreme Court has explained, "[a]t a very minimum, applicants must prove their own actual water needs." *Id.* at 161, 9 P.3d

at 473. “Furthermore, besides advocating for 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.” *Id.* As discussed below, HC&S and WWC and its customers must bear their full burden in this proceeding to justify their uses in light of *all* the purposes protected by the public trust. *Id.* at 142, 9 P.3d 454.

B. SWUPAs Based On T&C And/Or Appurtenant Rights Have Priority Over Other Existing And New Use SWUPAs.

The Community Groups and OHA cannot stress enough that traditional and customary Native Hawaiian rights to cultivate kalo (“T&C rights”) and/or appurtenant rights are *not* “competing uses” at a co-equal level with the existing and new uses of other applicants such as HC&S and WWC and their customers. Rather, they command specific protections under the constitution, the public trust doctrine, and the Code.

Thus, in this proceeding, as in “every stage of the planning and decisionmaking process,” the Commission bears a continuing obligation to protect and promote these applicants’ rights and uses. *Id.* at 143, 9 P.3d at 455. Moreover, offstream users like HC&S and WWC and its customers bear the burden to establish that their uses “*will not interfere with any public trust purposes,*” including the rights of applicants with T&C and/or appurtenant rights. *Wai’ola*, 130 Hawai’i at 442, 83 P.3d at 705 (emphasis added). In sum, SWUPAs based on T&C and appurtenant rights are not “competing” with other SWUPAs – they have priority.

1. 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. Bd. of Water Supply*, 65 Haw. 531, 551, 656 P.2d 57, 71 (1982). Such rights are “incidents of land ownership” and constitute “an easement in favor of the [land with an appurtenant right] as the dominant estate.” *Id.* (quoting *Peck v. Bailey*, 8 Haw. 658 (1867)). “As use of the word ‘appurtenant’ indicates, it is water rights which pertain to or annexed to that particular parcel of land conveyed by the original grant from the King or Hawaiian government.” *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 190-91, 504 P.2d 1330, 1341 (1973).

The constitution specifies the Commission’s responsibility of “assuring appurtenant rights.” Haw. Const. art. XI, § 7 (emphasis added). The Code mandates that “[a] permit for water use based on an existing appurtenant right shall be issued upon application.” Haw. Rev. Stat. (“HRS”) § 174C-63; *see also id.* § 174C-101(d) (appurtenant rights “shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter”). The Hawai’i Supreme Court noted that the public trust’s protection of T&C rights “also extends to the appurtenant rights recognized in *Peck*.” *Waiāhole*, 94 Hawai’i at 137 n.34, 9 P.3d at 449 n.34.

“[T]he use of the water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant[.]” *McBryde*, 54 Haw. at 191, 504 P.2d at 1341. Therefore, a deed which attempts to sever

appurtenant rights from the land by reserving such rights to the grantor has the effect of extinguishing the appurtenant rights. *Reppun*, 65 Haw. at 552, 656 P.2d at 71.

2. T&C rights to cultivate kalo.

As the Hawai'i Supreme Court recognized, the Commission has already found in "very thorough" documentation the "identity and scope of 'valued cultural, historical, or natural resources' in [Nā Wai 'Ehā], including the extent to which [T&C] rights are exercised in Nā Wai 'Ehā." *In re 'Īao Ground Water Mgm't Area*, 128 Hawai'i 228, 247-48, 287 P.3d 129, 148-49 (2012) ("*Nā Wai 'Ehā*"). These established T&C rights in Nā Wai 'Ehā include "kalo cultivation." *Id.* at 245-47, 287 P.3d at 146-48.<sup>1</sup>

T&C rights are comprehensively protected at every level of the law. Article XII, § 7 of the Hawai'i Constitution mandates that Commission "shall protect" all T&C rights. The Hawai'i Supreme Court has repeatedly emphasized that this mandate "places an *affirmative duty* on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights." *Nā Wai 'Ehā*, 128 Hawai'i at 247, 287 P.3d at 148 (quoting *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000)) (emphasis added).

The Code includes a non-exclusive list of protected T&C rights, including "the cultivation or propagation of taro on one's own kuleana," HRS § 174C-101(c), and mandates that "adequate provision shall be made for the protection of [T&C] rights," which "are declared to be in the public interest," *id.* § 174C-2(c). The Code specifically

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<sup>1</sup> (Citing Final Findings of Fact, Conclusions of Law, and Decision and Order, filed on June 10, 2010 (Case No. CCH-MA06-01) ("2010 Decision"), Findings of Fact ("FOFs") 35, 51, 55, 60.)

“obligates the Commission to ensure that it does not ‘abridge or deny’ [T&C] rights.” *Waiāhole*, 94 Hawai‘i at 153, 9 P.3d at 465 (quoting HRS § 174C-101(c)).

Moreover, the exercise of T&C rights is a protected public trust purpose under the constitutional public trust doctrine, which the Commission has an affirmative duty to protect to the extent feasible. *Id.* at 137, 141, 9 P.3d at 449, 453. In so holding, the Hawai‘i Supreme Court reviewed the early law of the Hawaiian Kingdom and recognized the “specific objective of preserving the rights of native tenants during the transition to a western system of private property.” *Id.* at 137, 9 P.3d at 449. The court made clear its intention to uphold this “original intent” of the public trust. *Id.*

The T&C rights of Native Hawaiians to cultivate kalo are distinct from appurtenant rights. The law recognizes and protects each of these rights independently. *See, e.g.*, HRS §§ 174C-101(c), (d); -63. T&C rights belong to “ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778,” whereas appurtenant rights attach to “kuleana and taro lands.” *Id.* § 101(c), (d).

T&C rights to cultivate kalo, indeed, are critically important for community members and OHA beneficiaries who are not successors to one of the unconscionably few Native tenants who received Land Commission Awards during the Māhele process, or who have purchased kuleana land with extinguished appurtenant rights. The Commission has already concluded, as a matter of law, that separate and apart from appurtenant rights, “traditional and customary rights include, but are not limited to, kuleana water for . . . kalo cultivation,” 2010 Decision, Conclusion of Law (“COL”)

19, and that such rights “cannot be abandoned, and are guaranteed even if the practice has not been continually practiced in an area,” *id.*, COL 20. Such conclusions are compelled by Hawai‘i law, and by the Commission’s factual finding that kalo cultivation “is integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians and Hawaiians.” *Id.*, FOF 60.

C. The Commission’s Duty To Protect Instream Uses To The Extent Feasible Still Continues.

The Community Groups and OHA must also address any potential misconceptions that applicants’ burden of proof can be lessened in light of the current IIFS established by the Commission-approved settlement filed on April 17, 2014 (“2014 Stipulation”).<sup>2</sup> Such an argument would contradict both the law and the 2014 Stipulation’s terms. First, the current IIFS is an interim standard, intended to provide interim relief. The Hawai‘i Supreme Court has emphasized that “the establishment of bona fide, ‘permanent’ instream flow standards” is the Commission’s “ultimate objective.” *Waiāhole*, 94 Hawai‘i at 150, 9 P.3d at 462. The Commission “must establish permanent instream flow standards of its own accord ‘whenever necessary to protect the public interest in the waters of the State.’” *Id.* at 153, 9 P.3d at 468 (quoting HRS § 174C-71(1)).<sup>3</sup>

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<sup>2</sup> Commission’s Order Adopting: (1) Hearings Officer’s Recommendation on the Mediated Agreement Between the Parties; and (2) Stipulation re Mediator’s Report of Joint Proposed Findings of Fact, Conclusions of Law, Decision and Order (Case No. CCH-MA06-01), filed on April 17, 2014.

<sup>3</sup> The Commission has a mandatory duty to establish permanent standards where, as here, there is “substantial conflict between instream and offstream interests either presently or in the foreseeable future.” *Id.* at 147 n.49, 9 P.3d at 459 n.49. Indeed,

Thus, the Court in *Waiāhole* made clear that the establishment of an IIFS did not end of the inquiry; rather the Court directed the Commission to continue to “consider[] every offstream use in view of the cumulative potential harm to instream uses and values and the need for meaningful studies of stream flow requirements.” *Id.* at 159; 9 P.3d at 471. In addition to imposing the applicants’ “at-minimum” burden of proof, *see supra* Part I.A, the Court further empowered the Commission to decide in favor of “postponing certain uses, or holding them to a higher standard of proof.” *Id.*<sup>4</sup> In sum, the Commission’s trust duties to protect instream flows in relation to offstream diversions are ongoing and are not “discharged” by the interim standard.

Second, the 2014 Stipulation itself repeatedly provides that findings and conclusions regarding “water use requirements,” “alternative water sources,” or “system losses” are

made without prejudice to the rights of the Parties and the Commission to revisit those issues in connection with any proceeding involving a WUPA for water diverted from any of the Nā Wai ‘Ehā Streams inasmuch as the burden of proof with respect to such issues in a WUPA proceeding will be upon the applicant rather than the Commission.

*Id.* at 18-19, 21-25, FOF 72, COLs 9, 13-18, 22. The 2014 Stipulation thus deferred to this proceeding the resolution of any offstream diversions and the applicants’ burden of justifying those diversions.

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the Commission has in fact already found such “serious disputes” as its basis for designating Nā Wai ‘Ehā as a water management area. HRS § 174C-54.

<sup>4</sup> The Commission recognized such a higher standard for golf courses and other non-agricultural uses in that case. *See id.* at 168, 9 P.3d at 480.

The 2014 Stipulation further recognized that the IIFS was resolved under a settlement to “enable the earlier *interim* protection of instream uses and Native Hawaiian practices without further delays in litigation.” *Id.* at 24, COL 20 (emphasis added). The 2014 Stipulation recognized the public interest supported such voluntary resolution, “*particularly given this Proceeding involves the amendment of interim standards.*” *Id.* at 25, COL 21 (emphasis added). In sum, the 2014 Stipulation and the resulting IIFS did not purport to fulfill the Commission’s trust duty to protect public trust instream uses “to the extent feasible,” but rather expressly recognized the interim nature and purpose of the relief.

Finally, the recently announced closure of HC&S significantly changes the scenario of Nā Wai ‘Ehā diversions and requires the Commission’s proactive engagement. The Commission must not only ensure that HC&S properly amends its SWUPAs and fully justifies any continued diversions, but also must revisit the IIFS at the earliest opportunity to provide further instream use protection in an increased IIFS based on current circumstances.<sup>5</sup>

The significance of this change from HC&S’s closure is undisputable. Based on previous Commission calculations, for example, HC&S’s total water requirements comprised up to 79 percent of total current and future offstream uses.<sup>6</sup> The 2014

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<sup>5</sup> See *Waiāhole*, 94 Hawai‘i at 151, 9 P.3d at 463 (“Interim standards must respond to interim circumstances.”); *id.* at 148, 9 P.3d at 460 (emphasizing that the Commission must designate protective instream flow standards “particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values”).

<sup>6</sup> See 2010 Decision at 221 (Table 18) (calculating HC&S maximum requirements of 29.81 mgd, compared to 37.92 mgd maximum total uses, or 79 percent).

Stipulation and resulting IIFS were also premised on the continuation of HC&S's sugar operations on the fields in question.

In the *Waiāhole* case, the Hawai'i Supreme Court emphasized:

the close of sugar operations in Central O'ahu has provided the Commission a unique and valuable opportunity to restore previously diverted streams while rethinking the future of O'ahu's water uses. The Commission thus should take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.

*Id.* at 149, 9 P.3d at 461.

The exact same directive applies here with the close of sugar operations in Central Maui. Nā Wai 'Ehā stream flows above the current IIFS cannot be considered freely available for renewed offstream diversions. On the contrary, the Commission, as "the primary guardian of public rights under the trust . . . . must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455; *Kauai Springs*, 133 Hawai'i at 173, 324 P.3d at 983. This includes holding HC&S and other offstream users to their mandated burden of proof. It also includes pursuing a further increase in the IIFS based on new circumstances.

## II. THE COMMISSION MUST AMELIORATE ITS PROCESS TO PROTECT THE SUBSTANTIVE AND PROCEDURAL RIGHTS OF PUBLIC TRUST USERS

This proceeding will mark the first time the Commission has attempted to fulfill its statutory duty to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right." HRS § 174C-5(15). Given the size and historic significance of the undertaking, OHA and the Community Groups, along with

legal clinic volunteers from the University of Hawai'i Law School, have done their best to assist the Commission and community members and ensure a workable and just process.

OHA and the Community Groups, however, continue to object to the en masse combination of the quantification of SWUPAs based on T&C rights to cultivate kalo and/or appurtenant rights with the proceedings on other SWUPAs for existing and new uses because: (1) substantively, this threatens to relegate SWUPAs for public trust uses to “competing” with SWUPAs for other existing or new uses, contrary to law; and (2) procedurally, it imposes onerous burdens on holders of appurtenant and T&C rights that threaten to unlawfully infringe those rights. Having nonetheless pursued this path, the Commission must exercise heightened vigilance protecting the substantive and procedural rights of applicants seeking water for public trust purposes. Moreover, the Commission must alleviate the procedural burdens that are infringing on pro-se community member applicants’ rights.

A. SWUPAs Based On T&C And/Or Appurtenant Rights Should Not Be Lumped Together With Other Existing And New Use SWUPAs.

Lumping together applicants for public trust uses with all other applicants, including HC&S and WWC and its customers, exacerbates an already evident inclination to treat SWUPAs based on public trust uses as “competing applications” with other SWUPAs. Preliminary discussions at prehearing conferences have suggested that the first order of business for the contested case hearing would be to determine the amount of water currently flowing in the streams, so the IIFS could be

subtracted from that amount to determine how much water was “available” for existing and new uses. That approach overlooks that, as a matter of law, water for the exercise of T&C rights to cultivate kalo<sup>7</sup> and appurtenant rights *is not available* for offstream use unless it can be proven that the offstream use will not “abridge or deny” T&C and appurtenant rights, and “will not interfere with any public trust purposes.” HRS §§ 174C-101; -63; *Wai’ola*, 130 Hawai’i at 442, 83 P.3d at 705; *supra* Part I.B.

Determining the amount of water available for private offstream use requires knowing first how much is required to satisfy public trust purposes. Until the appurtenant rights and T&C rights to cultivate kalo are quantified, other applicants for existing or new uses cannot meet their burdens of proof, because they will not be able to establish that their uses will not interfere with any public trust purpose. *See also supra* Part I.A, B. Combining the permitting for public trust uses with the permitting for other existing and new uses requires the Hearings Officer and Commission to rigorously apply the burden of proof and vigilantly guard against the tendency to treat all SWUPAs as competing applications, to the prejudice of appurtenant rights and T&C rights to cultivate kalo.

B. The Procedural Burdens Imposed In This Process Infringe on Community Members’ and OHA Beneficiaries’ Substantive Rights.

The Code mandates that any permitting process must *enable*, not undermine, the exercise of T&C and appurtenant rights. HRS § 174C-63 provides that “Appurtenant

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<sup>7</sup> When the Commission attempted to identify the “categories of applications and the SWUPAs under which they fall,” SWUPAs based on the T&C right to cultivate kalo, which right cannot be abridged or denied, did not even make the list. Minute Order No. 1, dated June 25, 2015, at 2.

rights are preserved. Nothing in this part [Part IV – Regulation of Water Use] 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.*” (Emphases added.) Both appurtenant and T&C rights *“shall not be diminished or extinguished* by a failure to apply for or receive a permit under this chapter.” *Id.* § 174C-101(d) (emphasis added).

Dozens to hundreds of community members, including OHA beneficiaries, hold T&C rights to cultivate kalo and/or appurtenant rights, yet they continue to be deprived of the ability to exercise those rights. Many have engaged in good faith in the SWUPA process that has now dragged on for over seven years and has been so burdensome that it has required countless hours of volunteer work, including the repeated assistance of law-school clinics. Appurtenant rights holders have not been issued permits “upon application”; instead, they are being compelled to appear at “Due Process Hearings” for the benefit of major diverters who interposed “blanket” objections to all appurtenant rights SWUPAs. Those objections, even where not sustained, forced the appurtenant rights SWUPAs into an unwieldy contested case hearing, where the due process rights of the appurtenant rights holders are being compromised.

In the latest insult and injury, applicants who seek to exercise their T&C and/or appurtenant rights are being required to engage in a process that has been designed for attorneys and imposes financial and logistical hardships that pro-se community member applicants simply cannot afford and cannot possibly be expected to bear. *See,*

*e.g.*, Minute Order No. 3, dated January 15, 2016. The most outrageous twist yet is the provision in Minute Order No. 3 that applicants must serve paper copies of every filing on a list of over eighty other applicants in this case. *See id.* at 2-3 & attached Certificate of Service. This requirement imposes prohibitive burdens on pro-se community member applicants. *See* Test. of Hokuao Pellegrino, attached hereto. One shudders to think what may happen next when community member applicants foreseeably do not comply with this provision, or simply abandon the process altogether in the face of such oppressive barriers.

The Community Groups, OHA, and others have made substantial efforts to assist community member applicants, but the exercise of rights protected by the constitution and the Code should not require such extensive third-party intervention. The *Commission*, as the primary guardian of the public trust uses of applicants with T&C and/or appurtenant rights, must take the initiative to facilitate this process. The Code not only fails to support, but indeed *prohibits*, imposing such undue burdens on those seeking to exercise their appurtenant or T&C rights.

In sum, despite all the historical lessons about the injustices of the Māhele process in the 19th century, this Commission's process threatens to repeat similar mistakes in the 21st century. The Community Groups and OHA call on the Commission to remedy the procedural flaws above without delay before they cause any further harm to community member applicants and loss of confidence in the Commission and this process.

### III. QUANTIFYING APPURTENANT RIGHTS AND T&C RIGHTS TO CULTIVATE KALO

“[A]ppurtenant 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*, 65 Haw. at 551, 656 P.2d at 71. “[T]he proper measure of [appurtenant] rights is . . . the quantum of water utilized at the time of the Mahele.” *Id.* at 554, 656 P.2d at 72. Thus, in order to establish and quantify appurtenant water rights for a given parcel, the Commission must determine: (1) what the land was being used for at the time of fee-simple conversion, *e.g.*, lo’i kalo (irrigated/flooded taro patch), kula (non-flooded cultivated area), pāhale (house lot), *see* Test. of Kame’eleihiwa, Ph.D., attached hereto, ¶¶ 25, 36; (2) the area devoted to each use; and (3) the amount of water required for that particular use, bearing in mind that

when, as in this case, 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.

*Reppun*, 65 Haw. at 554, 656 P.2d at 72 (emphasis added). The Hawai’i Supreme Court deemed this presumption necessary to avoid rendering a claimant’s burden unattainable, *see id.* (“requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights”), and applied the presumption to T&C lo’i kalo farming practices, *id.* at 537, 554, 656 P.2d at 62, 72.

Due to the passage of time, alterations to cultural landscape and traditional ‘auwai systems, and limitations in the historical record (all of which are beyond the

control of community member applicants), “requiring too great a degree of precision in proof” of land use at the time of fee-simple conversion “would make it all but impossible” for community member applicants to ever establish their appurtenant rights. *Id.* at 554, 656 P.2d at 72.<sup>8</sup> Consistent with the Hawai‘i Supreme Court’s directive in *Reppun* to employ presumptions to avoid imposing insurmountable burdens, the Commission should adopt reasonable presumptions supported by the historical record to determine land uses on particular parcels at the time of the Māhele and the amount of land put to those uses. *See infra* subpart A. Where the appurtenant right is being exercised for kalo cultivation, or the applicant has T&C rights to cultivate kalo, the water needs for kalo range from 100,000 to 300,000 gallons per acre per day. *See infra* subpart B.

A. Key Presumptions And Principles For Quantifying Appurtenant Rights.

Dr. Lilikalā Kame‘eleihiwa, Director and Senior Professor of the University of Hawai‘i at Mānoa’s Kamakakūokalani Center for Hawaiian Studies, Hawai‘inuiākea School of Hawaiian Knowledge, has over 30 years of experience researching and teaching how to research land title records from the Māhele, including, specifically,

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<sup>8</sup> During the “provisional” “due process” phase of this case, the Commission required community member applicants to produce, among other things: “Legible copy of the LCA and number”; “English translation of the LCA”; “Royal Patent (“RP”) and number”; “Kama‘aina testimony and/or other Mahele documents”; “Other title history in support of the claim”; “Map showing sources of water at the time of the Mahele”; “1800s tax records”; “Schematic maps or diagrams showing water flow in, through, and/or out of the parcel.” Minute Order No. 1, dated 6/25/15, at 3-4; Public Notice to Announce Appurtenant Rights Determination in Na Wai Eha Surface Water Management Areas (Waihee, Waiehu, Iao, and Waikapu Streams) By the Commission on Water Resource Management, dated 10/26/11, at 1-2. This exhaustive list of documents is precisely the kind of exacting burden of proof *Reppun* rejects.

records pertaining to kuleana awards: land commission awards (“LCAs”), native registers, and native/foreign testimonies. Kame‘eleihiwa, Ph.D. WT 2/5/16 ¶¶ 2-6, 18, 23. She has reviewed land title records from the Māhele for the Nā Wai ‘Ehā region, including kuleana LCAs, native registers, native/foreign testimonies, as well as other conveyances, such as government grants. *Id.* ¶ 7.

Upon review of these records, Dr. Kame‘eleihiwa observed patterns and nuances for documenting land use activities throughout Nā Wai ‘Ehā. *Id.* ¶ 28. These observations, along with provisions of the 1850 Kuleana Act (“Kuleana Act”), support certain rebuttable presumptions and guiding principles for interpreting Nā Wai ‘Ehā kuleana records. *Id.* ¶¶ 28, 39. According to Dr. Kame‘eleihiwa, applying these rebuttable presumptions and guiding principles leads to reasonably accurate estimates of water use on a particular kuleana at the time of conversion to fee-simple, and they comprise the best available historical and cultural information and understanding, in the absence of more details on a specific parcel due to the limitations in the historical record and the passage of time. *Id.* ¶¶ 2, 39. The presumptions and guiding principles are as follows:

**Presumption No. 1:** If no pāhale is mentioned in a kuleana award, the entire kuleana should be presumed to be in cultivation. This presumption is consistent with the Kuleana Act, which restricted kuleana awards to lands *hoa‘āina* were actually cultivating or living on at the time. *Id.* ¶ 40.

**Presumption No. 2:** If a pāhale is referenced in the kuleana award, but no size of the pāhale is provided, the area for the pāhale should be presumed to be no more than

one quarter of an acre. This presumption is based on the Kuleana Act, which limited kuleana awards for house lots to one quarter of an acre. *Id.* ¶ 41.

**Presumption No. 3:** If the following descriptors<sup>9</sup> are used to describe kuleana or an ‘āpana (parcel) within a kuleana, without referencing any other crop or pāhale, the entire parcel should be presumed to be cultivated in lo‘i kalo:

- a. Kalo
- b. Loi
- c. Loi kalo
- d. Pauku kalo: section of lo‘i.
- e. Pauku loi: section of lo‘i.
- f. Moo kalo: a section of kalo that is smaller than an ‘ili but larger than a paukū.
- g. Poalima: lands cultivated in lo‘i kalo for the ali‘i or konohiki.
- h. Loi aupuni: lo‘i kalo on government lands, cultivated for government servants or employees who did not have time to labor for subsistence.
- i. Loi paahao: lo‘i kalo cultivated for konohiki that required the tenant to pay for use of the land or else face imprisonment.
- j. Aina kalo: kalo land.

*Id.* ¶¶ 25, 29-30, 34, 42. This presumption is based on Dr. Kame‘eleihiwa’s familiarity with common terms used to describe what was being cultivated on a kuleana in records

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<sup>9</sup> The descriptors are spelled in the way in which they are usually recorded in the original records, without modern-day diacritical marks, *i.e.*, kahakō (macron) and ‘okina (glottal stop).

for Hawai‘i in general, as well as her discovery of additional terms specific to Nā Wai ‘Ehā records. *Id.* ¶ 25, 29-31, 34.

**Presumption No. 4:** All pō‘alima should be presumed to be cultivated in lo‘i kalo. *Id.* ¶ 43. This presumption is based on Dr. Kame‘eleihiwa’s observations of the use of the term “poalima” in kuleana records for Nā Wai ‘Ehā, the high presence of pō‘alima across these four ‘ahupua‘a, as well as the region’s reputation for maintaining the largest contiguous area of lo‘i kalo cultivation in Hawai‘i. *Id.* ¶ 30-31.

**Presumption No. 5:** Where Māhele records for a particular kuleana do not specify the crop being farmed on the land or the presence of a house lot, if the kuleana includes, abuts, or is near to a stream, ‘auwai, or other lands for which lo‘i kalo documentation exists, such as a pō‘alima, it should be presumed that wetland kalo was being cultivated on that kuleana. *Id.* ¶ 44. This presumption is based on Dr. Kame‘eleihiwa’s observation that Nā Wai ‘Ehā kuleana records confirm the generally accepted cultural traditions and practices of placing lo‘i kalo alongside or near to streams and ‘auwai, and of grouping lo‘i kalo near to each other, separate from other crops and pāhale. *Id.* ¶ 35.

**Guiding Principle No. 1:** Where Māhele records are ambiguous in describing the land use for an ‘āpana,<sup>10</sup> the land use for neighboring ‘āpana can serve as a guide. *Id.* ¶ 45.

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<sup>10</sup> Ambiguities may arise where the record provides multiple uses within a kuleana or ‘āpana (*e.g.*, “kula and lo‘i”), without providing the location and size for each use within that kuleana or ‘āpana, or where the description in the record covers multiple ‘āpana, without identifying the ‘āpana to which each land use applies. *Id.* ¶ 45a-c. (providing an example of the application of this guiding principle).

**Guiding Principle No. 2:** In some instances, existing cultural land features can help to determine the location and size of the lo'i on a kuleana or 'āpana. For example, remnants of lo'i walls and terraces still exist on some kuleana in Nā Wai 'Ehā.<sup>11</sup> These land features provide evidence of the location and size of lo'i, and, accordingly, an estimate of water use at the time of the Māhele. *Id.* ¶ 46.

**Guiding Principle No. 3:** If the Māhele records for surrounding kuleana and the subject kuleana's current cultural land features are not helpful, there is likely no way to arrive at a reasonably accurate water use quantification for that parcel. In these instances, an equal distribution of land among the noted land uses may be the only justifiable compromise. For example, if the parcel is described as "loi and kula," fifty percent of the land should be attributed to lo'i and the other fifty percent should be attributed to kula. *Id.* ¶ 47.

B. Kalo Water Needs.

Information on kalo water requirements is necessary to quantify both T&C rights to cultivate kalo and appurtenant rights exercised to cultivate kalo, which rights are "sufficiently approximate[d]" by the amount of water currently used for kalo cultivation by traditional methods. In *Reppun*, the Hawai'i Supreme Court explained that the plaintiffs utilized the waters of the Waihe'e Stream on O'ahu to irrigate kalo by

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<sup>11</sup> Even where physical evidence of ancient lo'i systems no longer exist, their former existence on a particular kuleana may be established by a kama'aina witness's recollections of such lo'i. *See State v. Hanapi*, 89 Hawai'i 177, 187, 970 P.2d 485, 495 (1998) ("In this jurisdiction, we have also accepted kama'aina witness testimony as proof of ancient Hawaiian tradition, custom, and usage.").

diverting water from the stream to flood and flow through their lo'i, "which approximates the traditional methods of taro cultivation." *Id.* at 534, 656 P.2d at 60. The court held that plaintiffs' land possessing appurtenant rights that had not been extinguished were "entitled to the quantity and flow of water which was utilized to irrigate crops prior to the diminution [by BWS] of the stream that damaged the crops." *Id.* at 554, 564, 656 P.2d at 72, 78.

As detailed by one of the *Reppun* plaintiffs, long-time kalo farmer, and previously qualified expert Paul Reppun (*see* Ex. OHA-1), an average wetland taro complex requires between 100,000 and 300,000 gallons per acre per day ("gad") of "new" water to support a healthy taro crop. *Id.* ¶ 4. "This water duty includes both the amount needed for actual consumption by the taro, and the amount needed to flow through the lo'i to keep the taro cool and prevent crop failure from rot and pests. Both amounts are necessary to farm taro successfully and to calculate any realistic measure of taro water duty." *Id.*

The water needs of taro vary over its growth cycle, which is typically about 14 to 15 months from planting to harvest. *Id.* ¶ 15. The lo'i are flooded to prepare them for planting, and then for the first month or two after the huli are planted, farmers usually apply a low flow just to keep enough water covering the soil surface to prevent weed growth. *Id.* ¶ 16. After one to two months, farmers increase the flow to the lo'i. *Id.* Thereafter, flow is interrupted only intermittently, for fertilizing, weeding, and harvesting. *Id.* Most farmers fertilize taro once every one to two months, up until the crop is eight months old. *Id.* ¶ 17.

At about eight months, the corm begins to form and the taro becomes more sensitive to temperature as its leaf cover begins to shrink and the corm starts to fill out. *Id.* ¶ 20. As the leaf canopy shrinks, the water temperature increases and, because the corm is starting to fill out and rise up out of the ground, water flow becomes especially critical to protect the taro from rot. *Id.* ¶ 21. Thus, the water requirements for taro are greatest during the last half of its growth cycle. *Id.*

Typically, farmers grow taro in complexes of multiple lo'i in different stages of cultivation, to ensure regular harvest and adequate fallowing. *Id.* ¶ 14. The per acre water use of taro is thus an average over the entire complex, including fallow lo'i and uncultivated areas such as the banks between the lo'i. *Id.* The range of 100,000 to 300,000 gad takes this into account and is an average for a lo'i complex. *Id.*

Mr. Reppun's experience with the water needs of taro is confirmed by the United States Geological Survey's ("USGS") 2007 study entitled *Water Use in Wetland Kalo Cultivation in Hawai'i*, which documented water use and temperatures in taro farming operations across Hawai'i. Ex. OHA-3. The study indicated an average inflow of 250,000 gad for lo'i complexes and 350,000 gad for individual lo'i. The reason for the difference is that lo'i complexes include lo'i in varying stages of cultivation, and may include lo'i that are being fallowed. The data for the USGS study was collected during the dry season, from lo'i with crops close to harvest and thus being continuously flooded. This is the time of peak water needs for taro, and lack of sufficient water at this time could cause loss of the crop.

#### IV. THE COMMISSION MUST TAKE EARLY ACTION TO REQUIRE PROPER MONITORING AND MANAGEMENT BY THE MAJOR DIVERTERS

Finally, the Community Groups and OHA emphasize the need for early action by the Commission in this proceeding to ensure transparency and accountability over WWC's and HC&S's diversions (collectively, the "Companies"). As in the *Waiāhole* case, the Commission must take a more proactive role in requiring the Companies to submit, as soon as possible during the early stages of this proceeding, detailed monitoring and management plans documenting their actions to install or upgrade proper gaging to measure actual diversions and uses, and to implement management measures to eliminate waste and maximize reasonable beneficial use. Such plans are essential for the Companies to fulfill their burden of proof, as well as to provide necessary information for other parties and the Commission in this case.

For years in the Nā Wai 'Ehā proceedings, the Companies have been able to get by with lax, substandard monitoring and management of their offstream diversions, effectively leaving those defending the public trust like the Community Groups and OHA, and ultimately the Commission, to do the work to compensate for the lack of information. Now, the burden falls solely on the Companies to provide the full information necessary to document their uses and prove those uses are reasonable-beneficial. Such full disclosure and scrutiny is all the more critical given the major shift in uses resulting from HC&S's closure.

In the *Waiāhole* case, the Commission took early action to require proper monitoring and management. On August 15, 1995, several months before the contested case hearing began on November 9, 1995, the Commission issued Order No. 8,

identifying interim “existing uses” and also specifically recognizing “*The Need for Management.*” See Ex. Nā Wai-1, attached hereto. The Commission noted both a lack of measuring devices to gauge particular uses, and a lack of information on system losses. *Id.* at 2-3. The Commission emphasized: “Only by accurately quantifying source, usage, and losses of Waiahole Ditch water can there be efficient use and the prevention of waste.” *Id.* at 3. The Commission required the placement of “meters and gauges in appropriate locations to determine particular uses and system losses” and reporting of the information on a monthly basis. *Id.* The Commission also required implementation of management practices “includ[ing], among others, the use of storage facilities, the staggering of new plantings, the scheduling of water use to smooth out the peaks and valleys, in demand, and the repair of the system to reduce losses.” *Id.*

On October 31, 1995, the ditch operator Waiahole Irrigation Company submitted an extensive “Preliminary Monitoring and Management Practices Plan for the Waiahole Irrigation System.” See Ex. Nā Wai-2, attached hereto (“Plan”). The Plan addressed three main tasks. First, it identified the service connections for all major ditch users, the problems in the metering of these users, and efforts to rectify the problems. *Id.* at 2-11. Second, it reviewed the gaging of the ditch system’s sources of supply and the work to evaluate and/or rerate the gauges in order to ensure accuracy. *Id.* at 11-14; Apps. A-C. Third, it provided a preliminary management practices plan including actions by both the ditch operator and major ditch users to monitor and coordinate uses and minimize waste. *Id.* at 14-16; App. D.

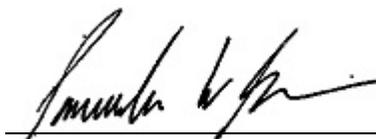
Here, the same principles that the Commission recognized in the *Waiāhole* case apply; and the same types of information are critically lacking and necessary. As the Hawai‘i Supreme Court has already emphasized in this case, “losses in the water system of Nā Wai ‘Ehā are massive.” *Nā Wai ‘Ehā*, 128 Hawai‘i at 257, 287 P.3d at 158. Moreover, the Companies’ records of diversions and uses have been crude and spotty at best. HC&S, for example, was unable to account for the huge difference between reservoir deliveries and irrigation usage, other than to report the water as “missing” and to assume amounts of losses. *See* HC&S Ex. E-5 (Case No. CCH-MA06-01). WWC similarly reported its deliveries to HC&S simply as the bulk amount remaining after subtracting all other users from total ditch flows. *See* 2010 Decision, FOFs 288, 435. WWC also assumed the amount of its system losses based on a decades-old report. *See* 2010 Decision, FOFs 374, 426. WWC did not identify the nature of its water users apart from general labels of “agriculture” and “irrigation,” and the existence and quality of metering seemed to vary. *Id.*, FOFs 240-42. In sum, the lack of transparency and accountability by the Companies falls far short of the practices the Commission required in *Waiāhole* or any modicum of best practices that public trust water resources demand.

The close of HC&S further heightens the need for transparency and accountability. The same situation occurred in the *Waiāhole* case with the close of that plantation. Here, the cessation of the main use of Nā Wai ‘Ehā stream flows requires full disclosure by the Companies and rigorous oversight by the Commission to ensure that diversions are reduced accordingly and stream flows are not diverted needlessly.

V. CONCLUSION

The Commission must take the initiative and opportunity in this proceeding to raise the standard of water resource management in Nā Wai 'Ehā and move once and for all from the Companies' historical plantation-era monopoly to the Commission's full regulatory mandate under the public trust and Code. As discussed above, the Community Groups and OHA respectfully request this Commission to: (1) fulfill its duty to hold WWC and its customers and HC&S to their full burden of proof; (2) guard against threatened prejudice and undue burdens on applicants with T&C rights to cultivate kalo and/or appurtenant rights; (3) adopt constructive presumptions, principles, and water requirements in the quantification of T&C and appurtenant rights; and (4) and require WWC and HC&S to provide proper monitoring and management plans.

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



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JUDY A. TANAKA  
PAMELA W. BUNN  
Attorneys for OFFICE OF HAWAIIAN  
AFFAIRS



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ISAAC H. MORIWAKE  
SUMMER KUPAU-ODO  
Attorneys for HUI O NĀ WAI 'EHĀ and MAUI  
TOMORROW FOUNDATION, INC.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications, ) Case No. CCH-MA15-01  
Integration of Appurtenant Rights and )  
Amendments to the Interim Instream Flow )  
Standards, Nā Wai ‘Ehā Surface Water )  
Management Areas of Waihe‘e, Waiehu, )  
‘Īao, & Waikapū Streams, Maui. )  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

On February 5, 2016, a copy of the foregoing document was served on the following parties by U.S. mail, postage prepaid, or by electronic service, as indicated below:

**SERVICE BY MAIL**

Noelani & Alan Almeida  
Gordon Almeida  
P.O. Box 1005  
Wailuku, HI 96793

Alan Birnie  
175 W. Waiko Road  
Wailuku, HI 96793

Thomas Cerizo  
1740 Kamamalu Place  
Wailuku, HI 96793

Joseph Alueta  
P.O. Box 785  
Wailuku, HI 96793

Gary & Evelyn Brito  
2160A Puuohala Road  
Wailuku, HI 96793

Cordell Chang  
2315 Kahekili Hwy.  
Wailuku, HI 96793

Michael Bailie  
PO Box 1433  
Wailuku, HI 96793

David & Anne Brown  
2525 Kahekili Hwy.  
Wailuku, HI 93793-9233

Joshua Chavez  
P.O. Box 6240  
Kahului, HI 96733

Vernon Bal  
230 Koeli Street  
Wailuku, HI 96793

Douglas Myers  
1299 A Malaihi Road  
Wailuku, HI 96793

Winifred and Gordon Cockett  
1159 Piihana Road  
Wailuku, HI 96793

Dorothy Bell  
1419 Nuna Place  
Waikapu, HI 96793

Regino Cabacungan  
304 Hoomalu Place  
Wailuku, HI 96793

Pauline Kanegai Curry  
P.O. Box 3172  
Wailuku, HI 96793

Dwayne Betsill  
Koolau Cattle Company,  
LLC  
635 Kenolio Road  
Kihei, HI 96753

Dave Gomes  
Hawaiian Cement - Maui  
Concrete and Aggregate  
Division  
P.O. Box 488  
Kahului, HI 96732

Darrell Higa  
918 Kanakea Loop  
Lahaina, HI 96761

Charles Dando, Sr. & Jr.  
85 E. Kanamele Loop  
Wailuku, HI 96793

Russel Gushi  
185 West Waiko Road  
Wailuku, HI 96793

George & Yoneko Higa  
592 S. Papa Avenue  
Kahului, HI 96732

Alfred & Patricia DeMello  
El Ranchitos DeMello  
P.O. Box 1394  
Lockeford, CA 95237

Valentine Haleakala  
2160 Puuohala Road  
Wailuku, HI 96793

Paul and Jennifer Higashino  
P.O. Box 239  
Wailuku, HI 96793

James Dodd  
P.O. Box 351  
Wailuku, HI 96793

Steve Haller  
1060 East Kuiaha Road  
Haiku, HI 96708

Hiolani Ranch LLC  
P.O. Box 34167  
San Diego, CA 92163

Michael Doherty  
41 Waihee Valley Road  
Wailuku, HI 96793

Robert Hanusa  
895 Malaihi Road  
Wailuku, HI 96793

Brian Ige  
RCFC Kehalani, LLC  
2005 Main Street  
Wailuku, HI 96793

Richard Emoto  
2032 B Ulei Lane  
Wailuku, HI 96793

Clifford & Cristal Koki  
P.O. Box 442  
Wailuku, HI 96793

Greg Ibara  
227 Kawaipuna Street  
Wailuku, HI 96793

Patricia Federcell  
88 S Papa Avenue, # 404  
Kahului, HI 96732-3307

Lawrence Koki  
2585 Kahekili Highway  
Wailuku, HI 96793

Nadao Makimoto  
1480 Honoapiilani Highway  
Wailuku, HI 96793-5930

Rudy & Perlita Fernandez  
P.O. Box 330808  
Kahului, HI 96733

Mary Jane Kramer  
Na Mala o Waihee Private  
Water Co. Inc.  
c/o Commercial Properties  
of Maui Management, Inc.  
1962-B Wells Street  
Wailuku, HI 96793

Anthony Manoukian  
Anthony Aram & Downey  
Rugtiv Manoukian Tr.  
P.O. Box 1609  
Waianae, HI 96792

Roderick Fong  
Fong Construction  
Company Inc.  
495 Hukilike Street, Bay 4  
Kahului, HI 96732

Donald Kuemmeler  
RCFC Kehalani, LLC  
555 California Street,  
Suite 3450  
San Francisco, CA 94104

Glenn McLean  
350 West Waiko Road  
Wailuku, HI 96793

Ronald Jacintha  
Pohakulepo Recycling, LLC  
150 Pakana Street  
Wailuku, HI 96790

Jonathon Kurtz  
Living Waters Land  
Foundation, LLC  
P.O. Box 2327  
Wailuku, HI 96793

Kenneth Mendoza  
2160 B Puuohala Road  
Wailuku, HI 96793-0463

Ronald Jacintha  
ROJAC Trucking, Inc.  
150 Pakana Street  
Wailuku, HI 96793

Jane Laimana  
45-520 Alokahi Street  
Kaneohe, HI 96744

Lawrence Miyahira  
Jason Miyahira  
P.O. Box 762  
Wailuku, HI 96793

Amanda Jones  
Spencer Homes Inc.  
P.O. Box 97  
Kihei, HI 96753

Cindy Lee  
Managing Agent  
Waiolani Mauka  
Community Assoc., Inc.  
c/o Scott Nunokawa  
P.O. Box 946  
Wailuku, HI 96793

Elsie Miyamoto  
1455 Miloiki Street  
Honolulu, HI 96825-3229

Kaanapali Kai, Inc.  
2145 Wells Street  
Suite 3301  
Wailuku, HI 96793

David & Katherine  
Lengkeek  
128 River Road  
Wailuku, HI 96793

Jinsei Miyashiro Trust  
P.O. Box 235  
Wailuku, HI 96793

Kauai Kahalekai  
202 Waihee Valley Road  
Wailuku, HI 96793

Isabelle Rivera  
P.O. Box 364  
Wailuku, HI 96793

Glynnis Nakai  
Maui National Wildlife  
Refuge Complex, USFWS  
P.O. Box 1042  
Kihei, HI 96753

Kenneth Kahalekai  
240 Waihee Valley Road  
Wailuku, HI 96793

Katherine Riyu  
P.O. Box 696  
Wailuku, HI 96793

Warren Soong  
245A West Waiko Road  
Wailuku, HI 96793

Alfred Kailiehu Sr.  
Alfred Kailiehu, Jr.  
3660 Kahekili Hwy.  
Wailuku, HI 96793

Waldemar & Darlene  
Rogers  
1421 Nuna Place  
Wailuku, HI 96793

Yoshie Suehiro & Nat  
Hashimoto  
915 Malaihi Road  
Wailuku, HI 96793

Leinaala Kihm  
1415 Honua Place  
Wailuku, HI 96793

Alfred Santiago & Colin  
Kailiponi  
2445C Vineyard St.  
Wailuku, HI 96793

Takitani Agaran & Jorgensen  
Wailuku Executive Center  
24 N Church Street, Ste 409  
Wailuku, HI 96793

Sterling Kim  
Hale Mua Properties, LLC  
250 Alamaha Street, Suite  
N18  
Kahului, HI 96732

Ione Shimizu  
219-K West Waiko Road  
Wailuku, HI 96793

Noel & Katherine Texeira  
P.O. Box 2846  
Wailuku, HI 96793-7846

Lester Nakama  
Aloha Poi Factory, Inc.  
800 Lower Main Street  
Wailuku, HI 96793

Donnalee & David Singer  
P.O. Box 3017  
Wailuku, HI 96793

Thomas & Patricia Texeira &  
Denise Texeira  
205 Waihee Valley Road  
Wailuku, HI 96793

David Niehaus  
1630 Piiholo Road  
Makawao, HI 96768

Kurt & Betsy Sloan  
P.O. Box 310  
Kihei, HI 96753

Waldo Ullerich  
Emmanuel Luthera  
& School  
P.O. Box 331194  
Kahului, HI 96733

David Nobriga  
Nobriga's Ranch Inc  
P.O. Box 1170  
Wailuku, HI 96793

Milla Richardson  
94 Laukahi Street  
Kihei, HI 96753

Melvin Riyu & Judith  
Yamanoue  
P.O. Box 696  
Wailuku, HI 96793

Nelson Okamura  
Kihei Gardens &  
Landscaping Co. LL  
P.O. Box 1058  
Puunene, HI 96784

Kalani & Tera Paleka  
P.O. Box 342  
Wailuku, HI 96793

Robert Pinto  
c/o Claire Pinto  
130 Pilikana Place  
Wailuku, HI 96793

Francis Ornellas  
340 Iao Valley Road  
Wailuku, HI 96793

Ken & Saedene Ota  
2261 Aupuni Street  
Suite 101  
Wailuku, HI 96793

Peter Fritz  
107 Wailuku Valley Rd.  
Wailuku HI 96793

## **ELECTRONIC SERVICE**

<b><u>Name and Address</u></b>	<b><u>Email Address</u></b>
Douglas Bell 1420 Honua Place Waikapu, HI 96793	sandi.doug@hawaiiantel.net
Francisco Cerizo P.O. Box 492 Wailuku, HI 96793	cerizof@gmail.com
Heinz Jung and Cecilia Chang P.O. Box 1211 Wailuku, HI 96793	cici.chang@hawaiiantel.net
Jordanella (Jorrie) Ciotti 484 Kalua Road Wailuku, HI 96793	jorrieciotti@gmail.com
Fred Coffey 1271 Malaihi Road Wailuku, HI 96793	hawaii50peleke@yahoo.com
Kathy De Hart P.O. Box 1574 Wailuku, HI 96793	kdehart17@gmail.com
John V. & Rose Marie H. Duey Houululahui LLC Nani Santos 575 A Iao Valley Rd. Wailuku, HI 96793	jduey@maui.net nanisantos808@gmail.com
Stanley Faustino 384 Waihee Valley Road Wailuku, HI 96793	kanealoha808@gmail.com
William Freitas 2644 Kahekili Highway Wailuku, HI 96793	kapunafarms@gmail.com

<u>Name and Address</u>	<u>Email Address</u>
Diannah Goo 2120 C Kahekili Hwy. Wailuku, HI 96793	ag2517@aol.com
Nicholas Harders Karl & Lee Ann Harders 1422 Nuna Pl. Wailuku, HI 96793	waikapu@me.com
Theodore & Zelig Harders T&Z Harders FAM LTD PTNSHP 1415 Kilohi St. Wailuku, HI 96793	
Evelyn Kamasaki Cynthia Ann McCarthy Claire S. Kamasaki 1550 Nukuna Place Wailuku, HI 96793	cmcmaui@live.com
Charlene E. and Jacob H. Kana, Sr. P.O. Box 292 Wailuku, HI 96793	char1151@hawaii.rr.com
Kimberly Lozano P.O. Box 2082 Wailuku, HI 96793	pauahi808@aol.com
Renee Molina P.O. Box 1746 Wailuku, HI 96793	myoheo@yahoo.com
Lorrin Pang 166 River Road Wailuku, HI 96793	pangk005@hawaii.rr.com
Victor and Walette Pellegrino 1420 Kilohi Street Wailuku, HI 96793	hokuao44@msn.com

<u>Name and Address</u>	<u>Email Address</u>
L. Ishikawa Piko Ao, LLC 2839 Kalialani Circle Pukalani, HI 96768	lorilei@hawaii.edu
Michael Rodrigues 2518 W. Main Street Wailuku, HI 96793	mikerodmaui@yahoo.com
Burt Sakata 107 Waihee Valley Rd. Wailuku, HI 96793	waihee89@yahoo.com
Bryan Sarasin, Sr. c/o Bryan Sarasin, Jr. P.O. Box 218 Wailuku, HI 96793	mauifishfarm@hawaiiantel.net
Duke & Jean Sevilla & Christina Smith 702 Kaae Road Wailuku, HI 96793	sevillad001@hawaii.rr.com
Jeff and Ramona Lei Smith P.O. Box 592 Wailuku, HI 96793	ohianui.ohana@gmail.com
Murray and Carol Smith P.O. Box 11255 Lahaina, HI 96761	murray@jps.net
Crystal Smythe John Minamina Bro 727 Wainee Street Lahaina, HI 96761	csuzuki@wailukuwater.com
Clayton Suzuki Linda Kadosaki Reed Suzuki Scott Suzuki P.O. Box 2577 Wailuku, HI 96793	csuzuki@wailukuwater.com

<u>Name and Address</u>	<u>Email Address</u>
John Varel 191 Waihee Valley Road Wailuku, HI 96793	jvarel@fusionstorm.com
Michele and Leslie Vida, Jr. 135 Pilikana Place Wailuku, HI 96793	mikievida@hotmail.com
Leslie Vida, Sr. c/o Donna Vida 115 Pilikana Street Wailuku, HI 96793	dmlavida@yahoo.com
Roger Yamaoka Kevin Yamaoka 1295 Old Waikapu Road Wailuku, HI 96793	rryamaoka@aol.com kty@hawaii.rr.com
Caleb Rowe, Esq. Kristin Tarnstrom, Esq. County of Maui Department of the Corporation Counsel 200 South High Street Wailuku, HI 96793 (County of Maui, Department of Water Supply)	caleb.rowe@co.maui.hi.us kristin.tarnstrom@co.maui.hi.us susan.pacheco@co.maui.hi.us
Colin J. Lau, Esq. Russell Kumabe Holly McEldowney 465 S. King Street, Room 300 Honolulu, HI 96813 (Department of Land and Natural Resources, Division of State Parks)	colin.j.lau@hawaii.gov russell.p.kumabe@hawaii.gov holly.mceldowney@hawaii.gov
Yvonne Izu, Esq. Garret Hew Moriyara Lau & Fong LLP 400 Davies Pacific Center 841 Bishop Street Honolulu, HI 96813 (Hawaiian Commercial & Sugar Co.)	yizu@moriyara.com ghew@hcsugar.com

<u>Name and Address</u>	<u>Email Address</u>
Tina Aiu, Esq. Oahu Island Director Scott Fisher Hawaiian Islands Land Trust, P.O. Box 965 Wailuku, HI 96793	christina@hilt.org scott@hilt.org
Avery & Mary Chumbley 363 West Waiko Road Wailuku, HI 96793 (Makani Olu Partners LLC)	abc@aloha.net
Jodi Yamamoto, Esq. Wil Yamamoto, Esq. Yamamoto Caliboso 1099 Alakea Street, Suite 2100 Honolulu, HI 96813 (MMK Maui, LP, The King Kamehameha Golf Club, Kahili Golf Course)	jyamamoto@ychawaii.com wyamamoto@ychawaii.com
Pamela Bunn, Esq. Alston, Hunt, Floyd & Ing 1001 Bishop Street, Suite 1800 Honolulu, HI 96813 (Office of Hawaiian Affairs)	pbunn@ahfi.com
Craig Nakamura, Esq. Catherine L.M. Hall, Esq. Carlsmith Ball LLP 2200 Main Street, Suite 400 Wailuku, HI 96793 (Wahi Hoomalu Limited Partnership)	cnakamura@carlsmith.com chall@carlsmith.com
Peter A. Horovitz, Esq. Kristine Tsukiyama, Esq. Albert Boyce Merchant Horovitz LLLC 2145 Wells Street, Suite 303 Wailuku, HI 96793 (Waikapu Properties, LLC and MTP Operating Company, LLC)	pah@mhmaui.com kkt@mhmaui.com albertboyce@gmail.com

**Name and Address**

**Email Address**

Brian Kang, Esq.  
Emi L.M. Kaimuloa  
Watanabe Ing, LLP  
First Hawaiian Center  
999 Bishop Street, 23rd Floor  
Honolulu, HI 96813  
(Wailuku Country Estates Irrigation Company)

bkang@wik.com  
ekaimuloa@wik.com

Paul R. Mancini, Esq.  
James W. Geiger, Esq.  
Avery Chumbley  
Mancini, Welch, & Geiger LLP  
RSK Building  
305 Wakea Avenue, Suite 200  
Kahului, HI 96732  
(Wailuku Water Company, LLC)

pmancini@mrwlaw.com  
jgeiger@mrwlaw.com

Lawrence H. Miike  
Hearings Officer  
1151 Punchbowl Street, Room 227  
Honolulu, HI 96813

lhmiike@hawaii.rr.com

Linda L.W. Chow, Esq.  
Deputy Attorney General  
465 S. King Street, Room 300  
Honolulu, HI 96813

linda.l.chow@hawaii.gov

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

  
ISAAC H. MORIWAKE  
SUMMER KUPAU-ODO  
Attorneys for HUI O NĀ WAI ‘EHĀ and MAUI  
TOMORROW FOUNDATION, INC.