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

STAFF SUBMITTAL

for the meeting of the  
COMMISSION ON WATER RESOURCE MANAGEMENT

October 18, 2010  
Honolulu, Hawaii

Action on the Request for a Contested Case Hearing  
Before the Commission on Water Resource Management  
By Native Hawaiian Legal Corporation,  
On Behalf of Na Moku Aupuni O Koolau Hui,  
And the County of Maui, Department of Water Supply

PETITIONERS:

Na Moku Aupuni O Koolau Hui  
c/o Native Hawaiian Legal Corp.  
1164 Bishop Street  
Honolulu, HI 96813

County of Maui  
Department of Water Supply  
200 South High Street  
Wailuku, HI 96793

SUMMARY:

This submittal seeks action by the Commission on Water Resource Management (Commission) on the petitions for a contested case hearing by Native Hawaiian Legal Corporation (NHLC) on behalf of Na Moku Aupuni O Koolau Hui (Na Moku), and the County of Maui, Department of Water Supply (Maui DWS), in the matter of interim instream flow standards (interim IFS) that were amended for 19 east Maui streams (16 surface water hydrologic units) at its meeting on May 25, 2010. Though the Commission's original action pertained to 19 streams, the NHLC petition specifically refers to the following 13 streams (12 hydrologic units): Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, and Hanawi.

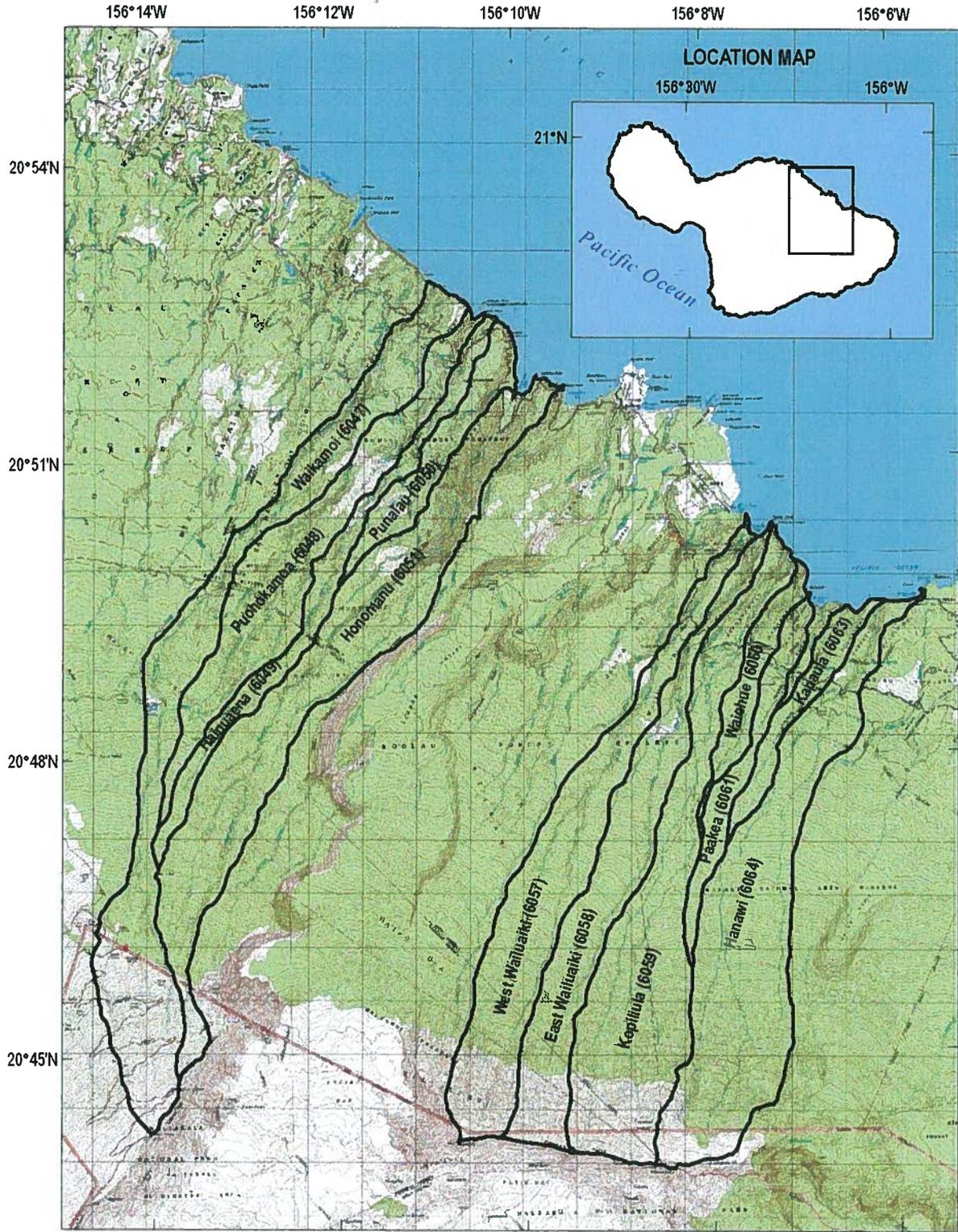
LOCATION: See Figure 1.

BACKGROUND:

On May 24, 2001, NHLC, on behalf of Na Moku, Beatrice Kepani Kekahuna, Marjorie Wallett, and Elizabeth Lehua Lapenia, filed 27 Petitions to Amend the Interim Instream Flow Standards (Interim IFS) for 27 East Maui streams.

On July 23, 2001, NHLC met with Commission staff to discuss the handling of the 27 petitions. Agreement was reached that efforts would focus on Honopou, Hanehoi, Waiokamilo, Kualani, Piinaau, Palauhulu, and Wailuanui Streams. Subsequent efforts by the Commission to adopt surface

Figure 1: Location map of Waikamoi, Puohokamoa, Haipuaena, Punalau, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Waiohue, Paakea, Kapaula, and Hanawi Surface Water Hydrologic Units, Maui.



Prepared by the Department of Land and Natural Resources,  
Commission on Water Resource Management.  
Transverse Mercator projection, zone 4, North American Datum 1983



water hydrologic units for the purpose of improving surface water resource management resulted in the grouping of streams into the five subject hydrologic units.

On April 10, 2008, following preparation of a draft instream flow standard assessment report (IFSAR) the Commission staff held a public fact gathering meeting to inform the public of existing information that the staff had assembled and to seek updated and/or supplemental information in areas which lacked information. Commission staff also sought agency review and comments to improve the information. The public fact gathering meeting was not required by any statute or rule, but was implemented to assist the staff in gathering information regarding stream usage and resources. Based on this best available information, Commission staff prepared a recommendation for amendment of the interim IFS for presentation to the Commission.

On September 25, 2008, the Commission approved amendments to the interim IFS for the first five hydrologic units (8 streams). Subsequently, the Commission staff continued to work on the remaining streams while implementing the interim IFS for the first five units. The Commission staff completed 16 more IFSARs, sought the assistance of the Hawaii Division of Aquatic Resources (DAR), and held another public fact gathering meeting on October 15, 2009.

On December 16, 2009, the Commission was asked to amend the interim IFS for the remaining 16 hydrologic units encompassing the remaining 19 streams. During a two-day meeting, the Commission heard testimony from a variety of people. The Commission voted to defer action and requested that Commission staff work with the parties to collect additional information regarding short-term, mid-term, and long-term issues.

On May 25, 2010, the Commission again took up the issue of amending the interim IFS for the remaining 16 hydrologic units. In summary, the Commission approved the following: 1) A conditional interim IFS of 0.93 cubic feet per second (cfs), equivalent to 0.6 million gallons per day (mgd) for Makapipi Stream; 2) An annual interim IFS of 0.1 cfs (0.06 mgd) for Hanawi Stream immediately below the diversion to provide connectivity for stream biota; 3) Seasonal interim IFS for Waikamoi (includes Alo), West Wailuaiki, East Wailuaiki, and Waiohue Streams; and 4) Establishing measurable interim IFS of status quo conditions for the remaining streams (See Table 1). Following the Commission's decision and prior to the close of the Commission meeting, Mr. Alan Murakami of NHLHC requested, on behalf of his clients, to protect their right for a contested case hearing. No other parties made a request for a contested case hearing.

On June 3, 2010, the Maui DWS filed an application to be a party in a contested case hearing before the Commission. The interest asserted by Maui DWS is as the County's purveyor of water to the public, including homes, farms, schools, churches, and businesses in Upcountry Maui. See Exhibit 1.

On June 4, 2010, NHLHC, on behalf of Na Moku, filed a petition for a contested case hearing before the Commission. The interest asserted by Na Moku is the right to sufficient stream flow to support the exercise of their traditional and customary native Hawaiian rights to grow kalo and gather in, among, and around east Maui streams and estuaries and the exercise of other rights for religious, cultural, and subsistence purposes. See Exhibit 2.

#### DISCUSSION:

The analysis of whether a petitioner is entitled to participate in a contested case hearing is primarily a two step process. First, the Commission must determine if there is a right to a contested case, as defined in Hawaii Revised Statutes ("HRS") §91-1. Next, the Commission must determine if the particular petitioner has standing to participate in the contested case hearing. In the current case, there is no requirement for the Commission to hold a contested case hearing from its decision to amend the interim IFS for the 19 hydrologic units. Accordingly, the Commission does not have to

**Table 1. Summary of the interim instream flow standards (Interim IFS) for 19 east Maui streams approved by the Commission at its May 25, 2010 meeting.**

	Interim IFS Amounts				Restoration Amounts			Notes on Interim IFS Location (All interim IFS locations are located below all EMI diversions)	
	Wet Season cfs	Dry Season mgd	Wet Season cfs	Dry Season mgd	Wet Season cfs	Dry Season mgd	Altitude feet		
1 Waikamoi	2.80	1.81	0	0	2.60	1.68	0	0	Just above Hana Highway.
2 Alo	--	--	--	--	--	--	--	--	One measurable interim IFS established for Waikamoi Stream below the confluence with Alo Stream.
3 Wahinepee	0.50	0.32	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
4 Puohokamoa	0.40	0.26	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
5 Haipuaena	0.10	0.06	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
6 Punalau/Kolea	0.20	0.13	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
7 Honomanu	0	0	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
8 Nuaiilua	3.10	2.00	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
9 Ohia (Waianu)	4.60	2.97	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
10 West Wailuaiki	3.80	2.46	0.40	0.26	3.80	2.46	0.40	0.26	Just above Hana Highway.
11 East Wailuaiki	3.70	2.39	0.20	0.13	3.70	2.39	0.20	0.13	Just above Hana Highway.
12 Kopiliula	0.50	0.32	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
13 Puakaa	0.60	0.39	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
14 Waiohue	3.20	2.07	0.10	0.06	3.2	2.07	0.10	0.06	Just above Hana Highway.
15 Paakea	1.50	0.97	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
16 Waiaaka	0	0	(Annual)	(Annual)	--	--	--	--	At Hana Highway, as designated on October 8, 1988.
17 Kapaula	0.20	0.13	(Annual)	(Annual)	--	--	--	--	Just above Hana Highway, as designated on October 8, 1988.
18 Hanawi	0.10	0.06	(Annual)	(Annual)	0.10	0.06	(Annual)	(Annual)	Below EMI's main Hanawi diversion (Intake K-3).
19 Makapipi	0.93	0.60	(Annual)	(Annual)	0.93	0.60	(Annual)	(Annual)	Just above Hana Highway.

reach the question of whether the petitioners, the Maui DWS and Na Moku, have standing to participate in the contested case hearing.

Hawaii's courts have interpreted the definitions of contested case contained in HRS chap. 91 to mean that "[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *E&J Lounge Operating Co. Inc. v. Liquor Comm'n of the City and County of Honolulu*, 118 Haw. 320, 330, 189 P.3d 432, 442 (2008).

There is no requirement for the Commission to hold a contested case hearing as the requirements for a contested case hearing have not been met. The first prong, that a hearing be required by law, has not been met. Neither the statutes nor the rules require the Commission to hold a hearing prior to deciding on whether to amend an interim IFS. HRS §174C-71(2), HAR §13-169-40. Due process considerations also do not require a hearing prior to decision making by the Commission as the determination made by the Commission is what is the public interest in stream flows. Neither petitioner has a property interest in the determination of the public's interest in stream flows.

The second prong, that the decision of the agency determines the rights, duties, or privileges of specific parties, is also not met in this case. The amendment of the interim IFS for the subject streams was couched in terms of flows required at a particular point in the stream. The Commission's decision did not give any party any rights or privileges in the stream flows. There was no individualized findings with respect to specific parties that was required to be made as part of the Commission's decision. HRS §174C-71.

As it is clear that there was no requirement for the Commission to hold a contested case hearing prior to making a decision on the amendment of interim IFS for the 16 hydrologic units in east Maui, the Commission may deny the petitioners' requests for a contested case hearing.

**RECOMMENDATION:**

That the Commission deny the petitions for a contested case hearing filed by the Maui DWS and NHLC, on behalf of Na Moku, as it is clear there was no requirement for the Commission to hold a contested case hearing prior to making a decision on the amendment of interim IFS for the 16 hydrologic units in east Maui.

Respectfully submitted,



LENORE N. OHYE  
Acting Deputy Director

- Exhibit (s): 1 Application to be a Party in a Contested Case Hearing before the Commission on Water Resource Management, filed by County of Maui, Department of Water Supply.
- 2 Petition for a Contested Case Hearing before the Commission on Water Resource Management, filed by Native Hawaiian Legal Corporation on behalf of Na Moku Aupuni O Koolau Hui.

**APPROVED FOR SUBMITTAL:**



LAURA H. THIELEN  
Chairperson

**APPLICATION TO BE A PARTY IN A CONTESTED CASE HEARING BEFORE THE  
COMMISSION ON WATER RESOURCE MANAGEMENT**

NOTE: THIS APPLICATION IS TO BE FILED IN PERSON OR MAILED AND POSTMARKED NOT LATER THAN THE DATE ESTABLISHED BY THE COMMISSION IN THE PUBLISHED NOTICE.

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RESOURCE MANAGEMENT  
2008 JUN -3 AM 11:17

**(Please submit an original and 3 copies, pursuant to HAR 13-167-25(c)).**

REFERENCE: Administrative Rules Chapter 13-167-54 Parties

IF MAILED, SEND TO: Commission on Water Resource Management  
P.O. Box 621  
Honolulu, Hawaii 96809  
Phone: (808) 587-0225 Fax: (808) 587-0219

IF DELIVERED: Commission on Water Resource Management  
1151 Punchbowl St., Rm. 227, Kalanimoku Bldg.  
Honolulu, HI 96813

Please provide the following information:  
(If there is not sufficient space to fully answer any of the items noted below, please use additional sheets of paper)

GENERAL INFORMATION

1. NAME: COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY
2. ADDRESS: 200 S. HIGH STREET  
WAILUKU, HI 96793  
PHONE: 808-270-7816 FAX: 808-270-7951
3. ATTORNEY OR CONTACT PERSON: JANE E. LOVELL
4. ADDRESS: DEPT. OF THE CORPORATION COUNSEL  
200 S. HIGH STREET, WAILUKU, HI 96793  
PHONE: 808-270-7741 FAX: 808-270-7152
5. SUBJECT MATTER: Petition to Amend IIFS for E. Maui Streams
6. DATE OF PUBLIC HEARING: TBA

SPECIFIC INFORMATION

1. The nature of applicant's statutory or other right.

The County of Maui's Department of Water Supply (MDWS) is a "government agenc[y] whose jurisdiction includes the land or water in question." Therefore, MDWS has the right to be admitted to this contested case as a party under HAR Rule 13-167-54(a)(2).

APPLICATION TO BE A PARTY IN A CONTESTED CASE HEARING BEFORE  
THE COMMISSION ON WATER RESOURCE MANAGEMENT

Reference: Administrative Rules Chapter 13-167-54 Parties

2. The tax map key number of the applicant's property as well as the petitioner's property. The nature and extent of applicant's interest.

TMKs: 225004080 (Kamole WTF, County of Maui, owner); 224016002 (Piipolo WTF, State of Hawaii, owner); 223006006 (Olinda WTF, State of Hawaii, owner). The petitioners' TMKs are on file with CWRM. MDWS is the supplier of water to homes, farms, schools, hospitals, churches, and businesses in Upcountry Maui. Upcountry Maui relies heavily on surface water. The IIFS adopted by CWRM at its meeting held May 25, 2010 will directly impact MDWS's ability to serve the public.

3. The effect of any decision in the proceeding on applicant's interest.

Any decision will directly affect MDWS's ability to provide water to homes, farms, schools, hospitals, churches, and businesses in Upcountry Maui, as MDWS's Upcountry System relies heavily on surface water.

4. The difference in the effect of the proposed action on the applicant's interest and the effects of the proposed action on the general public.

MDWS is the public water supplier for the County. MDWS is in the best position to represent the public's interest in continued use of these sources for the Upcountry Maui public water supply.

If relevant, the application shall also address:

1. Other means available whereby applicant's interest may be protected.

None.

2. The extent the applicant's interest may be represented by existing parties.

MDWS's position as the purveyor of water to the public is unique; therefore, MDWS's interests cannot be adequately represented by existing parties.

3. The extent the applicant's interest in the proceedings differs from that of the other parties.

MDWS is the County's purveyor of water to the public, including homes, farms, schools, churches, and businesses in Upcountry Maui.

4. The extent the applicant's participation can assist in development of a complete record.

MDWS has participated actively in previous proceedings and will do so here.



**PETITION FOR A CONTESTED CASE HEARING  
BEFORE THE COMMISSION ON WATER RESOURCES MANAGEMENT**

**NOTE:** THIS PETITION IS TO BE FILED IN PERSON OR MAILED AND POSTMARKED WITHIN 10 DAYS OF THE PUBLIC HEARING OR COMMISSION MEETING AT WHICH THE REQUEST FOR CONTESTED CASE HEARING WAS MADE

**(Please submit an original and 3 copies, pursuant to HAR 13-167-25(c)).**

**IF MAILED, SEND TO:** Commission on Water Resource Management  
P.O. Box 621  
Honolulu, Hawai'i 96809  
Phone: (808) 587-0225 Fax: (808) 587-0219

**IF DELIVERED:** Commission on Water Resource Management  
1151 Punchbowl St., Rm. 227, Kalanimoku Bldg.  
Honolulu, Hawaii 96813

Please provide the following information:

(If there is not sufficient space to fully answer any of the items noted below, please use additional sheets of paper)

- 1. NAME:** Nā Moku `Aupuni O Ko`olau Hui ("Nā Moku")  
Please see attached documentation of Native Hawaiian Legal Corporation's authority to represent Nā Moku.

(If you are representing an organization, please attach the resolution, meeting minutes, or other evidence that provides your authority.)

- 2. ADDRESS:** c/o Native Hawaiian Legal Corporation  
1164 Bishop Street, Suite 1205  
Honolulu, Hawai'i 96813

- 3. ATTORNEY OR CONTACT PERSON:**  
Native Hawaiian Legal Corporation  
Alan T. Murakami  
Moses K. N. Haia III  
Camille K. Kalama

- 4. ADDRESS:** Native Hawaiian Legal Corporation  
1164 Bishop Street, Suite 1205  
Honolulu, Hawai'i 96813  
**PHONE:** (808) 521-2302  
**FAX:** (808) 537-4268

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RESOURCE MANAGEMENT  
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5. **SUBJECT MATTER:** The subject matter for this contested case is the protection of adequate stream flows in East Maui streams to support and promote public trust purposes. Specifically, this matter relates to the Interim Instream Flow Standards for the following streams: Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi.

6. **DATE OF PUBLIC HEARING/COMMISSION MEETING:** May 25, 2010.

7. **WHAT IS THE LEGAL AUTHORITY UNDER WHICH THE PROCEEDING, HEARING OR ACTION IS TO BE HELD OR MADE (CITE APPLICABLE SECTION OF CONSTITUTION, STATUTES, OR ADMINISTRATIVE RULES):**

HRS § 91-9 (Contested cases; notice; hearings; records.), HRS Chapter 174C (Water Code), HAR Title 13 (Department Of Land And Natural Resources) Subtitle 7 (Water Resources), Chapter 167 (Rules Of Practice And Procedure for the Commission on Water Resource Management) Subchapter 4 (Contested Case Proceedings), Hawai'i Const. Art. XI, §§ 1 & 7, Art. XII, §7, the Hawaiian Homes Commission Act secs. 213(i) and 221, HRS § 10-13.5, Section 5(f) of the Hawaii Admission Act, 42USC § 1983, and the public trust doctrine.

8. **ARE YOU HAWAIIAN?**

Members of Nā Moku are Native Hawaiian.

9. **WHAT IS THE TAX MAP KEY OF THE PROPERTY ON WHICH YOU RESIDE?**

Members of Na Moku Aupuni O Ko`olau Hui reside, own, farm, and gather on various properties in and around the subject streams, including, but not limited to the following parcels: 1-1-01:44; 1-1-02: Portion 02; 1-1-04:28; 1-1-04:30; 1-1-05:16; 1-1-05:20; 1-1-05:22; 1-1-05:52; 1-1-06:8; 1-1-06:39; 1-1-06:46; 1-2-02:09; 1-2-04:05; 1-2-04:07.

10. **WHAT IS THE TAX MAP KEY OF THE PROPERTY CONSIDERED IN THIS ISSUE?**

The properties considered in this issue are identified by hydrologic units assigned by the Commission, including the following units and the surrounding properties:

WAIKAMOI (6047): Waikamoi Stream, Alo Stream, and Wahinepee Stream

PUOHOKAMOA (6048): Puohokamoa Stream

HAIPUAENA (6049): Haipuaena Stream

PUNALAU (6050): Punalau Stream and Kolea Stream

HONOMANU (6051): Honomanu Stream

WEST WAILUAIKI (6057): West Wailuaiki Stream

EAST WAILUAIKI (6058): East Wailuaiki Stream

KOPILIULA (6059): Kopiliula Stream and Puakaa Stream

WAIOHUE (6060): Waiohue Stream  
PAAKEA (6061): Paakea Stream  
KAPAUOLA (6063): Kapaula Stream  
HANAWI (6064): Hanawi Stream

**11. WHAT IS THE TAX MAP KEY OF THE PROPERTY OR PROPERTIES WHICH YOU OWN IN THE VICINITY OF THE PROPERTY CONSIDERED IN THIS ISSUE?**

Members of Na Moku Aupuni O Ko`olau Hui own various parcels in the vicinity of the hydrologic units in the Ko`olau watershed, including the following parcels: 1-1-01:44; 1-1-02: Portion 02; 1-1-04:28; 1-1-04:30; 1-1-05:16; 1-1-05:20; 1-1-05:22; 1-1-05:52; 1-1-06:8; 1-1-06:39; 1-1-06:46; 1-2-02:09; 1-2-04:05; 1-2-04:07. They also have the right to engage in constitutionally protected activities in and around each of the petitioned streams.

**12. WHAT, IF ANY, ACTIVITIES HAVE YOU ENGAGED IN ON THE PROPERTY CONSIDERED IN THIS ISSUE?**

The activities that members of Nā Moku have engaged in on the properties impacted by this contested case are detailed in item 13, below. Nā Moku previously provided information to the CWRM included as part of its petitions to amend the Interim Instream Flow Standards (IIFS) for the subject streams.

**13. WHAT IS THE NATURE AND EXTENT OF YOUR INTEREST THAT MAY BE AFFECTED?**

Rights protected under HRS § 1-1, HRS § 7-1, Hawaii Const. Art. XI, secs. 1& 7, Art. XII, sec. 7, HRS §§ 174C-63, 71, & 101, Hawaiian Homes Commission Act secs. 213(i) and 221, HRS § 10-13.5, Section 5(f) of the Hawaii Admission Act, 42USC § 1983 and the public trust doctrine.

More specifically, Petitioners' right to sufficient stream flow to support the exercise of their traditional and customary native Hawaiian rights to growing kalo and gathering in, among, and around East Maui streams and estuaries and the exercise of other rights for religious, cultural, and subsistence purposes. Specifically, the rights of members to engage in such practices in, on, and near Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi streams from HRS § 1-1 and HRS § 7-1 and protected under HRS §174-101.

Sections 1 and 7 of Article XI of the Hawaii Constitution also recognize the application of the public trust doctrine to all water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawai'i, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property. Article XII, section 7 of the Hawaii

Constitution places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights including appurtenant rights (appurtenant rights also receive protection in the Water Code at HRS § 174C-63), and confers upon the State and its agencies the power to protect these rights and prevent any interference with the exercise of these rights. In effect, the exercise of such rights is a public trust purpose. The exercise of these rights by Petitioners is threatened by the interim instream flow standards set by the Commission on Water Resources Management on May 25, 2010.

Petitioners are also beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act. The proposed disposition of public lands subject to the trust provisions of Section 5(f) for the development, diversion, and use of water implicate Petitioners rights as beneficiaries of said trust.

**14. WHAT IS THE DISAGREEMENT, DENIAL, OR GRIEVANCE WHICH YOU ARE CONTESTING?**

Nā Moku disagrees with the May 25, 2010 interim instream flow standards set by the Commission which fail to restore sufficient water to the subject streams to adequately protect and promote instream public trust uses of the streams, including Native Hawaiian traditional and customary rights and practices. Nā Moku has detailed its concerns, objections, and other disagreement with the Interim Instream Flow Standards referenced in item 5, via numerous objections and oral and written testimony provided to the Commission between May 24, 2001, the filing of the original petitions to amend Interim Instream Flow Standards for the subject streams, and the latest decision on May 25, 2010. Nā Moku will not repeat all of its arguments except to state that the IIFSs set for the 19 streams at issue fail to satisfy the requirements of the law (including Haw. Rev. Stat. §§ 174-71(1), 101, & 174C-63, and this Commission has failed to hold the diverter to its burden.

In *In Re Water Use Permit Applications*, 94 Haw. 97, at 160 (“*Waiahole I*”), the Hawai’i Supreme Court noted that:

[T]he Commission has an affirmative duty under the public trust to protect and promote instream trust uses. In accordance with this duty, 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.’ HRS 174C-71(1)...The Code also obligates the Commission to ensure that it does not ‘abridge or deny’ traditional and customary rights of native Hawaiians. *See* HRS 174C-101(c)(1993); *see also* HRS 174C-63 (1993) (preserving appurtenant rights)[.]

*Id.* at 153-154.

In carrying out its obligations under the public trust, the Commission is duty-bound to require Hawaiian Commercial & Sugar and East Maui Irrigation to affirmatively prove: (1) their actual need, (2) that there are no feasible alternative sources of water to

accommodate that need, and (3) the amount of water diverted to accommodate such need does not, in fact, harm a public trust purpose, or “any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial.” *In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai) Inc.*, 116 Haw. 481, 499 (2008).

If the diverter fails or refuses to provide any one of the above, the Commission must end its inquiry as it cannot determine whether such use is a reasonable-beneficial use. *See Waiahole II*, 105 Haw. at 16 (“The Water Commission’s analysis should have ceased when [the applicant] failed to meet its burden of establishing that no practicable alternative water sources existed.”)

Finally, prior to making any decisions, the Commission must also make specific findings and conclusions as to: (1) the identity and scope of “valued cultural, historical, or natural resources” in the ... area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources --including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken . . . to reasonably protect native Hawaiian rights if they are found to exist. *Ka Pa`akai o Ka `Aina v. Land Use Commission*, 94 Haw. 31, 53 (2000).

The Commission has failed to hold A&B to its burden of proof and failed to make the required findings and conclusions regarding native Hawaiian traditional and customary practices prior to setting the IIFSs for the subject streams.

East Maui is not a designated water management area. Therefore, and with respect to these out of watershed diversions, the applicable common law applies and the burden of demonstrating that any transfer of water is not injurious to the rights of others rests wholly upon A&B/HC&S. *Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 694 (1904). Thus, in order to obtain any ultimate judicial sanction to a transfer of water away from the lands of ancient application, A&B/HC&S must 1) have defined all the potentially affected interests in a watercourse, and 2) have demonstrated that no aspect of these rights would be detrimentally affected. A&B/HC&S have clearly not met its burden.

## **15. WHAT ARE THE BASIC FACTS AND ISSUES?**

The members of Petitioner Nā Moku Aupuni O Ko`olau Hui reside and exercise, have exercised, or desire to exercise their traditional and customary native Hawaiian rights to grow kalo and gather plants and stream species in and along East Maui streams. Specifically, the members seek sufficient water to be restored to the following streams to support such practices: Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula and Puakaa, Waiohue, Paakea, Kapaula, Hanawi streams. Members of Petitioner Na Moku Aupuni O Ko`olau Hui and other Petitioners own kuleana land and enjoy constitutionally protected traditional and customary native Hawaiian rights. The established Interim Instream Flow Standards for the above streams set by the Commission on May 25, 2010 fail to protect the statutory

and constitutionally protected instream values violates their rights as Native Hawaiians and as beneficiaries of the public trust.

More detail regarding the basic facts and issues are detailed in Nā Moku's various communications to the Commission and are incorporated by reference, including:

May 24, 2001, Petitions to Amend IIFS for the subject streams  
September 24, 2008 oral and written testimony  
December 16, 2009 oral and written testimony  
May 25, 2010 oral testimony

Nā Moku can provide further information regarding the basic facts or issues upon request.

**16. WHAT IS THE RELIEF THAT YOU SEEK OR THAT YOU DEEM YOURSELF ENTITLED?**

Nā Moku seeks the restoration of the subject streams to levels adequate and sufficient to protect and promote public trust purposes. Nā Moku has detailed its requested relief regarding the IIFSs referenced in item 5, via numerous written and oral correspondence already on file with this Commission. The relief requested will not be repeated here except to state that Nā Moku, as beneficiaries of the public trust, are entitled to have their rights and interests protected by this Commission in adhering to its duties to ensure adequate protection of the subject streams and instream values and uses as well as in holding all diverters to their burden of establishing that their water use satisfy the requirements of the State Constitution and Water Code and ratified by the Hawai'i Supreme Court. Specifically for this contested case petition, Nā Moku seeks the restoration of an amount of stream flow in each diverted and dewatered stream within the Waikamoi, Puohokamoa, Haipuaena, Punalau, Honomanu, West and East Wailuaiki, Kopiliula, Waiohue, Waiaaka, Kapaula, and Hanawi hydrologic units that will ensure the protection and preservation of instream public trust purposes, including Petitioners' traditional and customary native Hawaiian rights.

Nā Moku also seeks the following monitoring and enforcement measures:

- (1) A systematic study and monitoring of the impacts of any allowed diversion on stream and estuarine habitats.
- (2) Specific deadlines and requirements for all diverters to report to the Commission the amounts of system losses and measures to reduce or eliminate such losses.
- (3) Specific deadlines and requirements for all diverters to implement measures to reduce and/or eliminate the use of streams for conveyance and to reduce or eliminate commingling of stream waters.

(4) Any and all other relief deemed necessary to ensure adequate protection of Nā Moku members' rights.

Nā Moku hereby incorporates earlier communications by reference, including:

May 24, 2001, Petitions to Amend IIFS for the subject streams  
September 24, 2008 oral and written testimony  
December 16, 2009 oral and written testimony  
May 25, 2010 oral testimony

Nā Moku can provide further information regarding the relief that they seek upon request.

**17. IDENTIFY ANY AND ALL OTHER PERSONS WHO MAY OR WILL BE AFFECTED BY THE RELIEF WHICH YOU SEEK:**

The relief sought herein will impact all beneficiaries of the water resources trust, especially the people of Maui, individuals who live within or near the subject hydrologic units, Alexander & Baldwin and its subsidiaries, Hawaiian Commercial & Sugar and East Maui Irrigation, and Maui County Department of Water Supply and its subscribers.

**The above-named person hereby requests and petitions the Commission on Water Resources Management for a Contested Case Hearing in the matter described above.**

DATED: Honolulu, Hawaii, June 4, 2010

CAMILLE K. KALAMA  
Name (Print)

  
Signature

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, a courtesy copy of the foregoing document was served upon the following parties by U.S. Mail, postage prepaid, to their last known address:

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DATED: Honolulu, Hawai'i, June 4, 2010.



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