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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI`I

`Īao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe`e, Waiehu, `Īao, & Waikapū Streams Contested Case Hearing	Case No. CCH-MA06-01 HUI O NĀ WAI `EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

HUI O NĀ WAI `EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

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HUI O NĀ WAI `EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Petitioners Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"), respectfully submit their written exceptions to the Proposed Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") (collectively, "Proposed Decision") dated April 9, 2009. This Proposed Decision is the latest step in this case now approaching its sixth year, and the culmination of extensive briefings and hearings extending over a year and tremendous time and resources expended by the parties and the Commission. The Community Groups appreciate the time and hard work of the Hearings Officer and Commission staff in receiving, digesting, and synthesizing all this material in producing the Proposed Decision.

The importance of the decision before this Commission cannot be understated. Maui is at a crossroads, and the waters and communities of Nā Wai 'Ehā are right at the axis point. This decision will chart their future for years, perhaps generations, to come and will determine whether the waters of Nā Wai 'Ehā will be a footnote in history, or will endure as living legacies for present and future generations to appreciate what makes these communities, the island of Maui, and all of Hawai'i, truly special. This decision will also define this Commission, "the primary guardian of public rights under the trust" over Hawai'i water resources, and determine whether the Commission will realize its mission to protect and manage water resources for the sake of all the people of Hawai'i, including generations yet unborn.

It is with these understandings and in this spirit that the Community Groups submit the following:

I. THE COMMISSION SHOULD APPLY THE CONSTITUTIONALLY MANDATED REASONABLE-BENEFICIAL STANDARD AND AVOID NEEDLESS REPETITION AND INEFFICIENCY

The Community Groups are concerned, and seek clarification, regarding the suggestions in the Proposed Decision that offstream users will be granted another opportunity in subsequent proceedings to re-litigate issues regarding their uses, despite already having had not only the opportunity, but the obligation, to prove their uses in this proceeding. The parties engaged in extensive litigation in this case regarding offstream uses, particularly the existing diversions of Wailuku Water Company ("WWC") and Hawaiian Commercial & Sugar ("HC&S") (together, the "Companies"). The Proposed Decision analyzes all of this evidence and makes determinations of "reasonable use," which does not include "water that is being used inefficiently, losses that could be prevented through practical actions, or water that have practical alternatives." COL 42, 218. The Community Groups agree with these conclusions and observe that they essentially describe the mandate of "reasonable-beneficial" use under the Hawai'i Constitution.

The Proposed Decision, however, further states that: its determinations of "reasonable" use serve "to determine what might be the economic impact of such uses, and [are] not determinative of the 'reasonable-beneficial' requirement for WUPAs under the surface water management area designation of Nā Wai Ehā"; and the Commission "does not make the WUPA-specific assessment with the burden of providing information on the parties seeking water use permits." COL 218 (emphasis added). These statements would apparently grant offstream users a second chance to re-litigate issues regarding their uses in subsequent proceedings and relieve them of their legally mandated burden of proof. Such a result would be contrary to law and unfairly prejudice opposing parties, including the Community Groups, and would also needlessly waste the limited resources of the parties and the Commission and undermine judicial efficiency and the "just, speedy, and inexpensive determination of each proceeding," Haw. Admin. R. § 1-167-1.

A. Brief Background: The Community Groups Requested Determinations of Reasonable-Beneficial Use Of The Offstream Diverters, and the Hearings Officer Indicated That Standard Applied In This Proceeding.

As the Commission is well aware, this case has extended for many years. From the very outset, the Community Groups have requested the Commission to determine the offstream diverters' reasonable-beneficial use in restoring flow to Nā Wai 'Ehā streams to the extent practicable. Five years ago, on June 25, 2004, the Community Groups requested in their Petition to Amend Interim Instream Flow Standards ("IIFS Petition") the "immediate return of all water that is not in actual and reasonable-beneficial use by [then-]Wailuku Agribusiness or other users." Id. at 15 (citing In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Haw. at 118, 156, 9 P.3d at 430, 468 (hereinafter, "Waiahole I")); see also id. at 2, 29. Later that year, on October 19, 2004, the Community Groups followed up with a Complaint against Wailuku Agribusiness Co. ("WACI") and HC&S ("Waste Complaint") requesting the Commission to order the offstream diverters to "leave all water not being put to actual, reasonable and beneficial use in their streams of origin." Id. at 1.

The Commission has also waited for a long time to determine the offstream diverters' reasonable-beneficial use. In response to the Community Groups' filings, the Commission repeatedly but unsuccessfully pressed the Companies for information on their uses to "determin[e] whether or not all the water diverted by the ditch systems named in the Complaint and Petition is being put to reasonable-beneficial use, and not being wasted." See Exh. A-140, pp. 22-23; Exh. A-141, pp. 36-37 (correspondence to WACI and Alexander and Baldwin ("A&B")). In February 2006, the Commission initiated contested cases on the Waste Complaint and IIFS Petition. Before the hearing on the Waste Complaint, which proceeded first at the Community Groups' request, the Hearings Officer indicated that, apart from the standards applied to waste, the reasonable-beneficial use standard would apply in the IIFS contested case. See Minute Order No. 7 (December 21, 2006) at 6-7 (referring to the "requirements of 'reasonable-beneficial uses' for purposes of any water use permit and/or in the balancing act between instream and offstream uses in amending the IIFS" and indicating that the

"reasonable-beneficial use" standard would apply "when surface water diversions are addressed in the second CCH"). See also Letter from Community Groups to Commission (May 10, 2007) at 4 (voluntarily withdrawing the Waste Complaint since "as the Hearings Officer has made clear, the IIFS CCH would follow closely after the Waste CCH and would apply the standard of reasonable-beneficial use").

Before the extensive hearings in this IIFS proceeding, the Hearings Officer reiterated that "the burden of proof and the types of proof to show reasonable and beneficial use and no practical alternatives would be the same as basically if we were applying for water use permit." (Tr. 6/14/07, p. 6.) The Hearings Officer noted the petition to designate Nā Wai 'Ehā as a water management area, but concluded "it's [not] going to affect in any substantive way the conduct of the CCH, in the sense that the IIFS process can go separate from a designation." (Id.)

B. The Proposed Decision Effectively Applies The Legally Mandated Reasonable-Beneficial Standard To Current Uses, But The Failure To Use That Term Causes Needless Difficulties.

The Community Groups agree with these initial rulings that, whether in IIFS or water use permitting proceedings, the same legal standard of reasonable-beneficial use applies to offstream uses. As the Proposed Decision recognizes, reasonable-beneficial use is mandated by the Hawai'i Constitution. COL 11; Waiāhole I, 94 Haw. at 139, 9 P.3d at 451 (comparing this law with those in other states mandating the maximum beneficial or highest and best use of water resources). Moreover, the constitutional public trust doctrine imposes on offstream users such as WWC and HC&S the burden to justify their own uses, including demonstrating the absence of practicable mitigation and alternatives. COL 12, 15-16; Waiāhole I, 94 Haw. at 143, 161, 9 P.3d at 454, 473. Any water not actually put to reasonable-beneficial use must remain in the stream. COL 18; Waiāhole I, 94 Haw. at 118, 156, 9 P.3d at 430, 468.

Indeed, in recognizing that "water that is being used inefficiently, losses that could be prevented through practical actions, or water that have practical alternatives" is not "reasonable," COL 218, the Proposed Decision essentially describes the reasonable-beneficial standard. As a legal and practical matter, no other standard could

apply, since offstream diverters by law cannot divert any water not proven reasonable-beneficial, and particularly since the Companies' diversions currently drain the streams dry, and therefore, any instream flow restoration must balance restored instream uses with their current offstream diversions.

WWC and HC&S have attempted for years to avoid proving their reasonable-beneficial uses, not only providing incomplete and inadequate information, but also arguing that their diversions should be evaluated under some lesser standard. Offstream users are not entitled to any lesser standard than what the constitutional public trust doctrine mandates, and the Proposed Decision does not appear to apply a lesser standard here. The Proposed Decision, however, calls the standard by another, similar term of "reasonable," and adds that determinations in this case are "not determinative of the reasonable-beneficial requirement for WUPAs under the surface water management area designation of Nā Wai Ehā," and that the Commission "does not make the WUPA-specific assessment with the burden of providing information on the parties seeking water use permits." COL 218.

Of course, determinations on the entire list of statutory permitting criteria, in relation to all competing existing and new use applications, must wait until subsequent water use permitting proceedings; nonetheless, this does not relieve the Commission of its duty to apply the reasonable-beneficial standard to the maximum extent -- particularly to present offstream diverters already draining the streams dry.[1] From the outset, the Hearings Officer put the Companies on clear notice that they must prove reasonable-beneficial use. See Tr. 6/14/07 at 6-8 (establishing the standards for the proceeding and emphasizing that "I'm just . . . letting you know that what you should try to do is provide as much information as you can"). The Companies' current diversions were litigated extensively in this proceeding, and the Companies argued that

[1] The Proposed Decision refers to making "general, collective" determinations of offstream use. COLs 41, 218. While such collective determinations may be appropriate for uses such as the many identified kuleana users that did not testify in this case, see infra Part IV.C., there is no legal or practical basis for making "collective," non-specific determinations with respect to specific users seeking to justify their uses in this case such as HC&S, WWC and its testifying customers, and the testifying kuleana users.

their uses met the reasonable-beneficial standard. See, e.g., HC&S's Opening Br., pp. 11-12; WWC's Opening Br., p. 23. All the deficiencies in the legally mandated proof are the sole responsibility of the Companies.

While calling reasonable-beneficial by another name of "reasonable" has no apparent substantive effect on the Proposed Decision's analysis, it threatens substantial negative consequences by effectively opening the door for the Companies to have a "second bite of the apple," i.e., another chance to reopen issues regarding their uses in the subsequent WUPA proceedings. Granting such repeated chances to offstream users contravenes the law and prejudices opposing parties, including the Community Groups. Moreover, if the Proposed Decision relieves the Companies of their constitutionally mandated burden of proof (it is unclear whether the Proposed Decision is simply describing the burden during the WUPA process, or making a broader, erroneous statement that offstream diverters have no burden of proof apart from the WUPA process), it is also contrary to law and prejudicial to opposing parties.

The avoidance of the term "reasonable-beneficial" also needlessly undermines the Proposed Decision by basing the Commission's restrictions on offstream uses on a different legal standard than Hawai'i's Constitution establishes. Likewise, the ambiguous language regarding the burden of proof appears to lend credence to the offstream users' attempt to shift their burden of proving their own uses onto the Commission, which would enable offstream users to fault the Commission for their own failures to prove their claimed uses and economic impacts despite the efforts and specific requests and instructions by the Commission staff and Hearings Officer over many years.

Finally, allowing the Companies a second chance to re-litigate their reasonable-beneficial use needlessly expends the limited resources of the parties and this Commission. The Commission is well aware of the time and resources consumed in this proceeding. Allowing a "do over" on issues of reasonable-beneficial use that all the parties understood would apply and proceeded to fully litigate does not serve fundamental principles of finality and judicial efficiency. Particularly where the Proposed Decision for all intents and purposes applies the reasonable-beneficial

standard, calling it something else imposes unnecessary further costs for no beneficial purpose.

In sum, there is no legal or practical basis for not resolving, after all these years and extensive litigation, the issue of the offstream diverters' reasonable-beneficial use, including actual needs and practicable mitigation and alternatives. This issue should not be further deferred and left open to be rehashed in subsequent proceedings. It may be that such is not the intent of the Proposed Decision, but this would still require clarification. To address the ambiguities and concerns outlined above, the Community Groups respectfully request that the second and third sentences of COL 218 be removed, and that the references to "reasonable" be changed to "reasonable-beneficial."

C. The Proposed Decision Goes Further To Undermine Its Own Footing In This Proceeding.

For similar reasons, the Community Groups object to the following statements in the Proposed Decision that appear not only to increase the burden in later proceedings, but further act to undermine the foundation for the decision in this proceeding:

- COLs 230 and 282 state that the Commission is making "assumptions" about the practicability of mitigating system losses and using alternative sources and makes the IIFS "subject to the assumptions . . . being confirmed." These statements raise the same concerns about prejudice and inefficiency described above. Even further, these statements unduly diminish the Commission's decision in this case. The Commission is not making "assumptions," but rather its best determinations on the lack of practicable mitigation and alternatives, which the offstream users bear the burden of proving.

- Similarly, on page 190, the Proposed Decision states that "the subsequent WUPA process should begin to identify the issues concerning the impacts on offstream uses." This statement could be misconstrued as an admission that this Proposed Decision has not identified, let alone weighed, the impacts on offstream uses -- which is certainly not the case. Again, the burden of any deficiencies in proof of such impacts should be borne by the offstream users, and not the Commission or the public trust.

These statements serve to contradict and negate unnecessarily the Commission's decision in this case. The Community Groups thus respectfully request the

Commission to revise COLs 230 and 282 and page 190 and remove the language discussed above.

II. THE COMMISSION SHOULD REFRAIN FROM OPINING ON PAST, OBSOLETE WATER CASES.

The Community Groups are concerned that the Proposed Decision's several discussions of past views of water as "private property" during the plantation era grant more attention and recognition to such views than is necessary and appropriate in this case. COLs 202-04, 207. Ultimately, any past laws advancing those views bear no relevance to these proceedings, given that the Constitution of the State of Hawai'i, the comprehensive State Water Code, and the modern rulings of the Hawai'i Supreme Court are now the governing authorities regarding water in this jurisdiction. As an agency established under this presently governing law, the Commission is defined entirely by this law and is in no position to entertain other, past law.

The Proposed Decision's discussions of past Hawai'i water law are, at most, a sidebar of historical interest, but they are not germane to the Commission's legal function and can be omitted entirely without affecting the Commission's decision. Particularly troubling, however, are infelicitous statements such as: "[s]tarting with the very first water case addressed by the Hawaii Supreme Court and continuing until 1973, surface waters in Hawai'i could be treated as private property, and those with such 'prescriptive' rights had superior rights to the common law 'riparian' rights"; and the Commission's duty under present law "<u>fundamentally turns on its head</u>" the prior law. COL 204 (emphasis added). This does not accurately represent the State of Hawai'i's position on the history of Hawai'i water law, as set forth in detail in the modern Hawai'i Supreme Court opinions. <u>See</u>, <u>e.g.</u>, <u>Reppun v. Board of Water Supply</u>, 65 Haw. 531, 539-48, 656 P.2d 57, 63-69 (1982); <u>Robinson v. Ariyoshi</u>, 65 Haw. 641, 667-676, 658 P.2d 287, 305-312 (1982). As an arm of the state and a creation of present state law, the Commission should not and cannot diverge from this established precedent.

Similarly, the Proposed Decision interprets <u>Territory v. Gay</u>, 31 Haw. 376 (1930), as having "completed the privatization of surface waters in Hawaii," and states that the

Hawai'i Supreme Court later "reversed course." COL 203. The Hawai'i Supreme Court has rendered the state's definitive interpretation of Gay and other contemporaneous cases. See Robinson, 65 Haw. at 667-73, 658 P.2d at 305-310 (maintaining that the concept of "surplus" water in the territorial cases remained contingent on "every other interest in a watercourse" and that "far from being settled, the law governing surplus water was in a state of flux").

As the Commission is well aware, the history of Hawai'i water law has been an intensely contested ground, with much of the dispute turning on the very way this history is described. This debate may reemerge in this case, where HC&S has already "advise[d] the Commission and parties" of its perceived claims of a "taking" of its "private property." See HC&S's 11/16/07 Rebuttal Brief at 5 n.3. While such posturing should not affect in any way the Commission's decision under the governing laws of the state, it nonetheless does highlight why the Commission should not interject itself into the debate over the history of water law, much less in a way that may serve to undermine the state's position, and ultimately the basis of this Commission's authority and existence. In sum, the Community Groups respectfully submit that the Proposed Decision's discussions of past laws regarding "private property" be omitted entirely, or at the very least, carefully worded to ensure consistency with the governing law of the State of Hawai'i as established by the Hawai'i Constitution, Water Code, and modern precedent of the Hawai'i Supreme Court.

III. HC&S'S REASONABLE USE AND ECONOMIC IMPACTS

A. The 25 Percent Increase Of Dr. Fares's Calculations Greatly Overstates HC&S's Actual Need.

At the request of the Community Groups, OHA, and the County of Maui, Ali Fares, Ph.D. provided calculations of HC&S's "optimal irrigation requirements" in this case, based on the "well-accepted" methodology used by this Commission and others worldwide to calculate agricultural water duties. (Fares, Ph.D. WT 10/26/07, ¶ 2; Tr. 2/15/08, p. 30, ll. 11-13; p. 133, ll. 12-17; Tr. 2/20/08 (Dr. Ogoshi), p. 176, l. 23 to p. 177, l. 1; p. 193, ll. 5-13.) The Proposed Decision uses Dr. Fares's calculations as the

foundation for determining HC&S's actual need. COLs 90-93. As explained below, however, the Proposed Decision makes a math error in increasing Dr. Fares's calculations by 25 percent, which results in greatly overstating HC&S's actual water needs.

Initially, the Community Groups agree that Dr. Fares's calculations "should be the starting point for determining actual irrigation requirements," and that the "burden is on HC&S to avoid the model as the default requirement." COL 82. The Proposed Decision concludes that while HC&S "has met that burden in part, . . . there are still uncertainties remaining on what are reasonable irrigation requirements for HC&S's Waihe'e-Hopoi and 'Īao-Waikapū fields." Id. Of course, the burden for any "uncertainties remaining" must fall solely on HC&S, as it alone bears the burden of proving its own actual need. Waiāhole I, 94 Haw. at 161, 9 P.3d at 473.

The Community Groups have fully detailed in their closing submissions HC&S's failures to meet its burden of proof, which include:

- producing a never-ending cycle of shifting and conflicting water use figures (ranging from 4,485 gallons per acre per day (gad) to over 10,000 gad) that are impossible to keep track of, much less rely on as a foundation for objective fact-finding. See Community Groups' Closing Br. (Offstream Uses), pp. 43-44 (reviewing the chronology since 2004).

- submitting in this hearing figures containing a patent error (miscalculated figures for the recycled water supply from Maui Land & Pine), which overstated the use of Nā Wai 'Ehā water by as much as 2.4 million gallons a day. See id. at 46.

- failing to make the required showing of "actual need," and instead reporting only three years of use from 2004 to 2006 from all its years of operation. (Notably, although HC&S reported use of 6,826 gad for the Waihe'e-Hopoi fields from 2004 to 2006, it reported significantly lower use of 5,595 gad for the three years between 2000 to 2002, begging the question whether figures from those years, or any other three-year window, would be a more reliable and representative gauge of actual need.) See id. at 30-31, 46-47.

- devoting its testimony to a litany of excuses why it "may" use excess water beyond its crop water needs, yet in each instance, (1) failing to substantiate how much more excess water, if any, it may use, and (2) failing to justify such excess use as reasonable-beneficial and simply

presuming that any mitigation or alternative that may bear any cost or inconvenience justifies using excess water instead.[2] Such excuse-making is unprecedented and would eviscerate the reasonable-beneficial mandate. See id. at 47-51.

- ultimately providing only a single figure of need: 6,826 gad (a "historical daily requirement" "based on a historical evapotranspiration for an area that's in the Waihe'e Hopoi fields") which, as the Proposed Decision's COL 81 observes, measures only evaporation without taking into account rainfall and, thus, exceeds irrigation requirements. See Closing Br., pp. 31-32.

In sum, given the lack of any coherent or reliable evidence of actual need from HC&S, Dr. Fares's calculations provide not only the best evidence, but the only substantive evidence to inform the Commission's task of comprehensive water management and allocation.

The Proposed Decision, however, makes a math error in modifying Dr. Fares's figures, which results in greatly overstating HC&S's actual water needs. Specifically, the Proposed Decision increases Dr. Fares's calculations by 25 percent, based on an interpretation of the methodology as providing water only 80 percent of time, and no water 20 percent of the time. In fact, the 80 percent figure Dr. Fares used is an industry standard expressing a statistical "non-exceedance value," meaning the amount that 80 percent of the time will satisfy or exceed crop needs, and 20 percent of the time will be slightly short, but only by an amount within the difference between the 80 percent

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[2] The Proposed Decision notes several of the most spurious excuses. FOF 478. For example, HC&S's argument that irrigation water may not necessarily be available to meet Dr. Fares's calculated soil moisture levels would result in less water use than Dr. Fares calculated. Its excuse that it leaves the water running because of a lack of personnel 24 hours a day directly contradicts its representations to this Commission that "HC&S has people working 24/7 -- any problems with irrigation system are reported and addressed immediately." (Exh. A-141, p. 5.) HC&S also revealed it intentionally over-irrigates past the root zone to create a "reserve" of water, which not only contradicted its own exhibits, see Exh. E-36, p. 338; Exh. E-46, p. 1; Exh. E-31, p. 162 (over-irrigation "saturates the lower horizons," restricts "the depth of effective rooting," and loses water and nutrients to deep percolation), but also falsely presumes that it has "water to spare," see Tr. 2/20/08 (Nakahata), p. 140, l. 16 to p. 141, l. 1 (admitting that "when [it] do[esn't] have water to spare, that's not something [it] would do").

amount and the maximum value which will satisfy or exceed crop needs 100 percent of the time.

As Dr. Fares explained, the methodology calculates continuous crop cultivation over the long term of the historical data, which includes many decades of rainfall and evaporation data. (Exh. A-80, pp. 1-2.) Dr. Fares then performs statistical analysis to calculate a range of irrigation requirements including the maximum and minimum values, as well as "values having non-exceedance probabilities of 50%, 80%, 90%, and 95%," which "correspond[] to an average climate year, 1 in 5 year, 1 in 10 year, and 1 in 20 year drought conditions, respectively." (Id. at 5-6.) The value having a non-exceedance probability of 80 percent, for example, means that in 80 percent of the years (four in five years) the irrigation requirement will probably be equal to or less than that amount, and in 20 percent of the years (one in five years) the irrigation requirement will probably be a "little bit" more, potentially up to the maximum value. (Tr. 2/15/08, p. 56, l. 12 to p. 57, l. 12.) Stated conversely, the 80 percent non-exceedance value would fully satisfy or exceed crop needs in four of five years, but come slightly short in one of five years, by an amount within the difference between the 80 percent non-exceedance value and the maximum (100 percent non-exceedance) value.

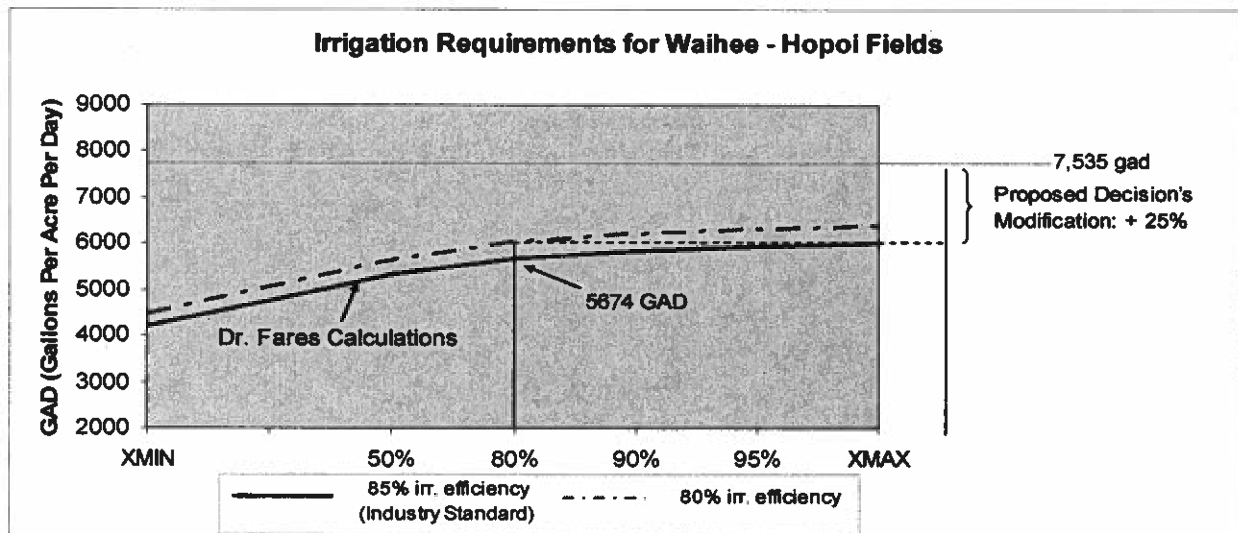
Thus, for example, for HC&S's Waihe'e-Hopoi fields, Dr. Fares calculated a minimum value (XMIN) of 4,211 gad, a maximum value (XMAX) of 6,005 gad, and a 80 percent non-exceedance value of 5,674 gad. (Exh. A-80, p. 6.) Dr. Fares explained that the 80 percent non-exceedance value is the industry standard for calculating crop water duties in both the government and private sectors: "that's what we need to allocate." (Id. at 5-7; Tr. 2/15/08, p. 35, ll. 10-15.)

Although no one disputed the use of the 80 percent non-exceedance value as the industry standard, the Proposed Decision does not use this value, but instead contemplates that "[i]f HC&S water requirements are daily requirements – i.e., not the probability that water will be needed four out of five days but instead needed every day – then the water requirements would increase from four to five days, or by 25 percent." COL 87. Then, after adjusting Dr. Fares's 80 percent non-exceedance value for the

difference between drip irrigation efficiency standards,[3] the Proposed Decision further increases the amount by an entire 25 percent. Thus, for the Waihe'e-Hopoi fields, after adjusting 5,674 gad to 6,028 gad based on the difference in irrigation efficiency, the Proposed Decision further increases the 6,028 gad by 25 percent to 7,535 gad. COL 88. The Proposed Decision then uses this 7,535 gad figure as the Waihe'e-Hopoi fields' "water use requirement." COL 92.

This wholesale increase of 25 percent misconstrues Dr. Fares's calculations. In effect, the Proposed Decision interprets Dr. Fares's 80 percent non-exceedance value to mean that in one out of five years, the crops receive no irrigation. The 80 percent non-exceedance value, however, means an irrigation amount that the crops would receive every year, but in one out of five years may be slightly less than required. Even though the irrigation requirement may be higher in one of five years, in no event would it exceed the maximum value (XMAX), which is the year with the highest irrigation requirement during the entire long-term analysis (i.e., the 100 percent non-exceedance value). Again, for the Waihe'e-Hopoi fields, this maximum amount is 6,005 gad.

The significant disparity caused by the Proposed Decision's modification of Dr. Fares's calculations is illustrated by the following graph:



[3] Dr. Fares uses the "minimum" industry standard for drip irrigation efficiency of 85 percent (Tr. 2/15/08, p. 128, ll. 2-3; p. 129, ll. 19-22; p. 132, ll. 6-11), while HC&S "assumes" a rate of 80 percent (Tr. 2/20/08 (Nakahata), p. 74, ll. 8-11), but publicly reports efficiency of "90 percent or more" (Exh. C-29, pp. 6, 22, 31).

The increase of Dr. Fares's industry standard figure by 25 percent results in HC&S's actual needs being overstated by many millions of gallons of day beyond even the maximum irrigation that would satisfy crop needs 100 percent of the time. Notably, the modified figure of 7,535 gad for the Waihe'e-Hopoi fields exceeds even HC&S's own claimed "historical daily requirement" of 6,826 for those fields, which the Proposed Decision observed already overstates irrigation requirements by excluding rainfall. COL 81.

In sum, the Community Groups respectfully request the Commission to adopt the undisputed industry standard of using the 80 percent non-exceedance value and apply water duties of 5,674 gad for the Waihe'e-Hopoi fields and 5,026 gad for the 'Īao-Waikapū fields without Field 920. See FOFs 464, 467. Even if one were to disregard the industry standard figure and instead give HC&S the maximum irrigation allowance, the Waihe'e-Hopoi fields would require a maximum amount of 6,005 gad (6,380 gad if adjusted for differences in irrigation efficiency), and the 'Īao-Waikapū fields without Field 920 would require a maximum amount of 5,444 gad (5,784 gad if adjusted for differences in irrigation efficiency).

B. HC&S's Acreages Need Slight Correction.

The Community Groups request correction of the total acreages of HC&S sugar cultivation stated in the Proposed Decision. See Waiāhole I, 94 Haw. at 164, 9 P.3d at 476 (requiring precision in determining cultivated acreage). First, the Proposed Decision understated the acreage of the Waihe'e-Hopoi fields as 3,250 acres by subtracting from the 3,950 total acres the 600 acres HC&S leases to Monsanto, FOFs 428-29, as well as "100 acres leased to [a] third-party lessee," FOF 436, which is actually part of the 600 acres leased to Monsanto. Thus, the sugar cane acreage in the Waihe'e-Hopoi fields should be about 3,350 acres (3,950 minus 600).

At the same time, the Proposed Decision overestimates the acreage of the 'Īao-Waikapū fields as 1,330 acres by including the acreage of Field 920, a field that HC&S understood for years "is very sandy and has a low yield history" (Exh. D-56, p. 2) and is no longer farming and has slated for development because of its "marginal" quality (Tr.

1/31/08 (Holaday), pp. 68-69; Exh. A-204, p. 3; Exh. C-48).[4] HC&S did not establish that it would cultivate Field 920 again; it could only "think that it could possibly be another candidate to put back into service" if remediation work succeeded. (Tr. 1/30/08 (Volner), p. 160, ll. 4-6.) As the Proposed Decision recognized, because HC&S is no longer cultivating Field 920, it added Field 767 to its existing lease of the 'Īao-Waikapū fields, FOF 311; however, only about 40 acres will be added to the lease because "development plans are in progress" for the remaining 89 acres, FOF 310. Thus the sugar cane acreage in the 'Īao-Waikapū fields should be 1,080 acres for the original "Leased Fields," plus 40 additional acres in the newly leased field 767, or <u>1,120 acres</u>.

C. <u>HC&S Can Reasonably Use More Than 14 MGD From Well No. 7.</u>

The Community Groups take exception to the Proposed Decision's COL 230 that only 14 mgd of nonpotable water from HC&S's Well No. 7 is a reasonable alternative for its Waihe'e-Hopoi fields, when the record indicates that HC&S has previously used, and can still feasibly use, far more than that amount. For more than half a century, up until Wailuku Sugar ceased sugar operations and "surplus" water became available, HC&S consistently used from Well No. 7 a long-term average of about 21 mgd (7.7 billion gallons a year), with a maximum in some years of more than 30 mgd. (Exh. A-148, pp. 1-2, 5.) Now, HC&S chooses to "minimize[] its use of Well No. 7" because it rather exploit this surplus "rather than being substantially reduced . . . [as] was the previously the case under the sharing arrangement between HC&S and [Wailuku]." (Volner Dec. 9/14/07, ¶ 7.) The law, however, does not allow HC&S to presume a "surplus" to "minimize" use of an established alternative source. <u>Waiāhole I</u>, 94 Haw. at 155, 9 P.3d at 467 (rejecting the "idea of public streams serving as convenient reservoirs for offstream private use").

COL 230 states that "[t]he additional 14 mgd [beyond the 14 mgd deemed reasonable] would incur costs of $1 million and constraints on the power to run the

[4] For years, HC&S poured on Field 920 staggering amounts of water routinely ranging in the 10,000 to 14,000 gad range, which continued the entire time the Community Groups' Waste Complaint was pending. (Exh. A-141, p. 17; Tr. 1/30/08 (Volner), p. 101, l. 25 to p. 105, l. 3.)

pumps on a consistent and sustained basis because of HC&S's power contract with MECO." This conclusion not only lacks support, relying solely on bare claims by HC&S,[5] but also contradicts the evidence in the record, including HC&S's own admissions. Even after minimizing its use of Well No. 7 with Wailuku Sugar's closure, HC&S still used substantial amounts when it chose to (e.g., 28.4 mgd from June to October 1996 and 13.3 over the entire year; 20.7 mgd from June to October 2000 and 11.9 mgd over the entire year (Exh. A-148, pp. 3-4)), and actually increased its overall groundwater use from all its wells from 67 mgd from 1986 to 1990 to almost 90 mgd from 1991 to 2000 (Exh. C-74, pp. HCS 06008-06022). Thus, contrary to claims of "constraints on the power," HC&S conceded it "would be a good generalization" that its nonuse of Well No. 7 is "simply an economic decision." (Tr. 1/30/08 (Volner), p. 120, ll. 15-18.)

COL 230's reference to HC&S's $1 million quote for a second booster pump to send the additional 14 mgd to HC&S's "Waihe'e" mainline irrigation ditch ($525K) and an additional pipeline to Field 715 ($475K) also misses the point. Initially, HC&S admitted that no additional booster pump would be necessary to pump Well No. 7 in excess of 14 mgd to irrigate Field Nos. 904, 908, and 909 (315 acres of which are in sugar, with the remainder leased to Monsanto). (Tr. 1/29/08 (Volner), p. 176, ll. 1-18; Tr. 1/30/08, p. 34, l. 10 to p. 35, l. 12; p. 41, l. 9 to p. 42, l. 1.) Thus, depending on the water duty used, HC&S could use an additional amount of approximately 2.0 additional mgd without any additional booster pump.

Moreover, HC&S's figures have "little meaning without evidence and analysis of the actual per-unit breakdown of these costs relative to the cost of ditch water and other alternatives." Waiāhole I, 94 Haw. at 165, 9 P.3d at 477. In fact, these figures pale in comparison to those that the offstream users quoted in Waiāhole, which ultimately reduced to small per-unit water costs that were deemed practicable. HC&S failed to

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[5] See generally Mitchell v. BWK Joint Venture, 57 Haw. 535, 543, 560 P.2d 1292, 1297 (1977) ("merely summariz[ing] the testimony of all the witnesses" does not suffice in making findings of fact); Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 232-33, 751 P.2d 1031, 1035 (1988) ("[M]ere recapitulations of evidence do not constitute findings of fact.").

show why this case would be any different, and in fact, the $525,000 and $475,000 that HC&S quoted translates to mere pennies per thousand gallons of water, which is a small fraction of what other agricultural users pay. See Community Groups' Proposed FOF F-176.[6] The Community Groups thus respectfully request that COL 230 be amended to recognize that least 21 mgd of nonpotable water from HC&S's Well No. 7 is a reasonable alternative for its Waihe'e-Hopoi fields, which is the amount that HC&S historically used from that well prior to Wailuku Sugar's closure.

D. HC&S Can Reasonably Mitigate More Than 6 To 8 MGD Of Its System Losses.

The Community Groups agree with the Proposed Decision's determination in COL 229 that HC&S can prevent the 6 to 8 mgd of losses from its Wai'ale Reservoir, given HC&S's complete failure to prove that such mitigation is impracticable. HC&S, however, has identically failed to prove that it could not practicably prevent the additional 3 to 4 mgd of losses from other parts of its ditch system, including its ditches and Reservoir Nos. 91 and 92. In total, from 2004 to 2006, HC&S admitted almost 10 billion gallons, or an average of 9.02 mgd, were unaccounted for and unused by HC&S for irrigation. This exceeds 25 percent of the total volume of water delivered to the Wai'ale Reservoir for use on the Waihe'e-Hopoi fields. The Commission must hold HC&S to its burden of proof and require it to mitigate this waste throughout its system, not just at Wai'ale Reservoir. See In re Waiāhole Ditch Combined Contested Case Hr'g, 105 Haw. 1, 27, 93 P.3d 643, 669 (2004).

E. HC&S Failed To Prove The Economic Impact To Its Own Operations.

The Community Groups take exception to COLs 150-52, which criticize Catherine Chan-Halbrendt, Ph.D., an expert economist who testified at the request of the Community Groups and OHA, for "substituting her approach to economic analysis

[6] COL 230 also cites HC&S's "state[ment] that pumping from Well No. 7 will exacerbate the degree to which the sustainable yield of the Kahului aquifer is already being exceeded," but this argument is a red herring: HC&S itself has insisted to this Commission that "all [its wells] have been in place and operated for many decades without any long term deterioration in water quality." (Exh. C-90, p. 2.)

for the balancing test that the Commission must perform" and "expressing a legal opinion." During the hearing, Dr. Chan-Halbrendt made clear she was not usurping the Commission's function, but rather simply pointing out the need for "good faith rigorous analysis," rather than "statements . . . without substantial evidence to back it up," which she "hope[d] that's [not] how society makes decisions." (Tr. 2/22/08, pp. 91-92.) Dr. Chan-Halbrendt also never purported to conduct any economic analysis (which was not her responsibility in any event), but rather examined HC&S's claims of economic impact in light of the available information, including A&B/HC&S's own public reports, to highlight "why supporting analysis, and not just bare assertion, is needed." (Exh. C-46, p. 2.)

Indeed, HC&S itself repeatedly admitted that it did not provide <u>any</u> economic analysis to support its conclusory claims of economic impact, even though it controls the relevant information and can and does conduct such analysis when it suits itself:

- HC&S has not assessed the impact of using some of its power to operate Well No. 7; rather it would conduct that cost-benefit analysis if Nā Wai 'Ehā water became unavailable. (Tr. 1/30/08 (Volner), p. 159, ll. 3-23; p. 200, ll. 12-16.)

- HC&S has not done any analysis of the economic impact of increasing the cost of the particular input of water on its business. (Tr. 1/31/08 (Holaday), p. 80, l. 23 to p. 81, l. 2.)

- HC&S has not done any economic analysis of the effect of reducing water on yield, and any resulting financial impact. (<u>Id.</u> p. 81, ll. 7-14.)

- HC&S has not "done any analysis on how a reduction of available surface water in this case would force HC&S to shutdown." (<u>Id.</u> p. 114, ll. 6-14.)

- In rebuttal during the hearing, HC&S asserted for the first time that "we do an analysis that would be called a partial equilibrium analysis" (Tr. 2/22/08 (Holaday), p. 110, l. 20; p. 111, l. 13), which is the basic analysis that Dr. Chan-Halbrendt recommended to show the impact on HC&S's profitability of scenarios such as "use of pumped ground water or conservation measures," "projected change in yield," "shifts in cultivated acreage," "or a combination of factors" (Exh. C-46, p. 1). Yet, HC&S still did not provide any such analysis for anyone else, including the Commission, to review and evaluate.

- A&B/HC&S maintained there "would be a directly calculable cost" and an analysis it would conduct to determine the financial impact of reducing irrigation water to accommodate its desired surface water treatment plant, but admitted it "ha[s]n't done that analysis to date." (Tr. 2/22/08 (Kuriyama), p. 25, ll. 7-23.)

The Community Groups agree with the Proposed Decision's observation in COL 153 that "[t]he issue before the Commission in this CCH is a balancing of instream values and non-instream uses for the Nā Wai 'Ehā waters and not an all-or-nothing choice between the two," but disagree that "[b]oth HC&S and Dr. Chan-Halbrendt focused their analytical approach on the impact of HC&S's total sugar operations over 35,000 acres." Rather, Dr. Chan-Halbrendt emphasized in both written and oral testimony that HC&S should address the economic impact of "incremental reductions on use of Nā Wai 'Ehā water" on "approximately 15% of its total cultivated acreage" (Exh. C-46, p. 1), because "you don't do an analysis all or nothing" (Tr. 2/22/08, p. 88, ll. 14-15).

HC&S bears the burden of proving the economic impacts on itself based on information in its sole possession. The Community Groups respectfully request that the Commission not fault Dr. Chan-Halbrendt for what amounts to HC&S's failure to meet its own burden.

IV. KULEANA WATER USERS

A. The Commission Should Recognize the Kuleana Users' Undisputed Appurtenant Water Rights.

The Community Groups object to the Proposed Decision's failure to recognize any appurtenant or kuleana rights of the many kuleana water users who testified on their water rights and uses in this case, even though: (1) each witness provided documentation and testimony establishing that his or her land has appurtenant rights to water; (2) none of the parties -- including WWC, whose own ditch system supplies many of the kuleanas -- disputed any of the claims or evidence; and, thus, (3) the kuleana users' claims of rights stand entirely uncontroverted in the record. The only explanation the Proposed Decision offers is that "there were no petitions to the

Commission from kuleana landowners for appurtenant rights and the amounts of water that such rights would be entitled to from the Nā Wai 'Ehā streams, as required by law," and that "kuleana landowners who successfully petition for recognition of their claimed appurtenant rights may subsequently submit WUPAs for the amounts of water recognized as accompanying those rights." COLs 53-54. The authority cited, Haw. Rev. Stat. § 174C-5(15), mandates that the Commission "[s]hall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter." While nothing in this or any other law mentions anything about "petitions," the kuleana users have, for all intents and purposes, already made such petitions by specifically requesting the Commission to recognize their appurtenant rights to water and taking the time and effort to provide the supporting information, none of which was disputed. Failing to recognize the kuleana users' undisputed rights in balancing the various uses and determining the IIFS, and imposing additional hurdles on protecting these rights unfairly burdens the kuleana users, contrary to the high priority their rights command under the law and the Commission's fiduciary duty to uphold them.

As the Proposed Decision recognized, appurtenant rights are protected at every level of the law, including the Constitution, Code, and common law. The exercise of appurtenant rights are also a "public trust purpose," Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34, which the Commission has the affirmative duty to take "into account in the planning and allocation of water resources, and to protect . . . whenever feasible," id. at 141, 9 P.3d at 453. See also Ka Pa'akai o Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 46, 7 P.3d 1068, 1083 (2000) (agencies such as this Commission "may not act without independently considering the effect of their actions on Hawaiian traditions and practices").[7] While the Community Groups disagree with the treatment of kuleana use as an offstream use,[8] in any event, the Commission cannot fulfill its duty to consider

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[7] Most of the kuleana users who testified are Native Hawaiian.

[8] As the Proposed Decision recognized, most of the water flows for lo'i kalo normally return to the stream, COL 220. See also Reppun, 65 Haw. at 541, 656 P.2d at 64-65 (recognizing the same); Tr. 12/3/07 (Reppun), p. 122, l. 25 to p. 123, l. 4

and protect kuleana and Native Hawaiian rights in balancing the various uses and determining the IIFS without even taking the first step of recognizing such rights where they exist. The Commission, indeed, must take the initiative to investigate kuleana rights to ensure their protection; at the very least, it should recognize such rights when kuleana users come to the Commission and ask that their rights be recognized, and no one objects or disputes any of the evidence.

The failure of the Commission to recognize even the uncontested rights of the kuleana users does not give their rights the full consideration and protection they deserve in the determination of the IIFS. It also imposes needless, repetitive burdens on recognizing appurtenant rights. Cf. Reppun, 65 Haw. at 554, 656 P.2d at 72 (declining to impose burdensome proof requirements on appurtenant rights). The requirement of additional proceedings on undisputed matters also does not conserve the limited resources of the parties and Commission and promote judicial efficiency. The Community Groups, therefore, respectfully request the Commission to recognize the undisputed appurtenant rights of the kuleana users for their existing and proposed uses as set forth in the Community Groups' Proposed COLs 128, 131-33, 135-36, 138-39, 141-46, 149, 151-52, 154-56, 158-60, 162-63, 165, 167, 172-73, 175, 177-78, 180.

B. The Companies' Obligation To Provide Water To Kuleana Users Is Undisputed.

The Proposed Decision not only fails to recognize the kuleana users' constitutionally protected appurtenant rights, but goes an extra step to conclude that WWC:

> is not legally obligated to continue providing water to kuleana lands through its system, except perhaps through those parts of its system that is built on or uses the 'auwai that historically carried stream waters from the banks to the kuleana lands. If WWC ceases to provide water through its system and kuleana landowners want to continue their use, they would

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(explaining that wetland lo'i connected to the stream function "just like a natural system"); Carter v. Territory, 24 Haw. 47, 61, 57-58 (1917) (recognizing that the ancient ditch systems connected with running streams were "regarded virtually as natural water-courses"); Haw. Rev. Stat. § 174C-3 (recognizing as instream use the "conveyance of irrigation and domestic water supplies to downstream points of diversion").

> have to prove that they have easements accompanying their appurtenant rights (which also has to be recognized by the Commission) on the lands underlying WWC's ditch system.

COL 134. This conclusion has no basis in any of the Proposed Decision's findings or any evidence in the record. In fact, the uniform, overwhelming evidence in the record establishes the complete opposite: that WWC and its predecessors (collectively, "WWC") and HC&S, in dewatering the streams and preventing the kuleana users from accessing water directly from the streams via traditional 'auwai, assumed the obligation to satisfy the kuleana users' superior rights, and that WWC and HC&S have consistently recognized this obligation in written water agreements dating back to their initial arrangement in 1924. The Community Groups have reviewed this extensive record in detail in their final submissions, see Closing Br. (Instream Uses), pp. 54-56, 59-72, and summarize it here for the Commission's benefit.

The earliest cases on water in Hawai'i made clear that WWC's water diversions were "subject to the rights of tenants," including "taro patches and the water necessary for their cultivation." Peck, 8 Haw. at 661-62. Once sugar plantations' diversions began draining the streams dry and precluding others' use of the streams, the plantations were obligated to make provision for kuleana uses. In doing so, WWC connected the 'auwai to its plantation ditch system, replacing and rerouting the 'auwai as it saw fit. See, e.g., Kamasaki WT 9/14/07, ¶ 3; Tr. 1/16/08 (Chumbley), p. 142, l. 16 to p. 143, l. 20.

The uncontroverted testimony of the kuleana users connected to WWC's system established a consistent practice over the years of WWC and its predecessors unilaterally modifying the kuleana 'auwai. See Closing Br. (Instream Uses), pp. 59-72. For example, the 'auwai WWC calls "Waihe'e Valley North," the northernmost 'auwai in Nā Wai 'Ehā, historically supplied kuleana users with water from Waihe'e River for kalo cultivation. See, e.g., Exhs. A-33, A-97, A-121 (kuleana users' LCA awards showing the 'auwai). The 'auwai used to receive water directly from the Waihe'e River, but in the late 1970s or early 1980s, WWC augmented its mauka diversions, leaving insufficient instream flow for the 'auwai, then blocked the 'auwai intake and connected

it to WWC's system. (Faustino WT 9/14/07, ¶¶ 3-4; Tr. 12/13/07, p. 13, ll. 17-20, p. 16, ll. 8-15; Freitas WT 10/26/07, ¶¶ 4-5; Exhs. A-34, A-35.) See also Kamasaki WT 9/14/07, ¶ 3 (describing a similar situation in Waikapū of WWC rerouting the kuleana 'auwai's direct connection with the stream to WWC's reservoir). In other cases, such as the "Piihana/Mill," "Piihana-Field 49," and "Puuohala" kuleanas located in more urbanized areas of Nā Wai 'Ehā around Wailuku, WWC created new conduits through plantation ditches and pipes, much of which it laid underground. See, e.g., Tr. 12/7/07 (Santiago), p. 116, l. 18 to p. 118, l. 16; Cockett WT 10/26/07, ¶¶ 4-5; Tr. 12/7/07 (Brito), p. 33, ll. 4-18.

Thus, whereas in some cases like the "Waihe'e Valley North" 'auwai, the kuleana users could restore (and seek to restore) their direct connection to the stream should the Commission restore sufficient instream flows, in other cases, WWC has all but eliminated the historical 'auwai and thus made the kuleanas entirely dependent on its system.

Even apart from the kuleana users' uncontroverted testimony, the Commission need look no further than WWC's own consistent acknowledgement of its "obligation" to satisfy kuleana "rights" in its many water agreements dating back almost a century. In the very first written agreement between Wailuku Sugar and HC&S in 1924, the parties expressly acknowledged that their diversions were "subject to existing water rights of third parties therein," including "for all kuleanas of such third parties." (Exh. D-52, pp. 33, 38-39.) To satisfy the rights of kuleana users in Waihe'e, for example, the Companies agreed that kuleana "rights shall as far as practicable . . . be supplied from the water flowing in [Waihe'e River] . . . , and any deficiency for such kuleanas shall be supplied by the [Companies] from the waters flowing in the New Waihee Ditch[.]" (Id. at 38-39.) In the 1994 "Temporary Water Agreement" whereby the Companies modified their allocations in connection with HC&S's lease of the Īao-Waikapū fields, the Companies continued to acknowledge that "Kuleana water has priority over any other uses," and that the Companies' uses were limited to the amount of water "remaining after fulfilling Kuleana water users' rights." (Exh. C-64, pp. 2-3.) See also Tr. 1/24/08 (Chumbley), p. 25, ll. 12-20 (acknowledging that kuleana rights are treated the same

under the 1924 agreement as the 1994 temporary agreement). Similar acknowledgments are contained in all other written material on the subject from WWC in the record:

- In its 2003 "white paper" proposing the sale of its "watershed lands and associated water system improvements" to the County, WWC documented the "remaining capacity" of water available "after system losses and kuleana water obligations (combined total of approximately 11.4 [mgd])." (Exh. C-24, p. 3.)

- In a 2005 letter to its shareholders, WWC indicated that "the Company provides water to several kuleana users free of charge (a kuleana is a parcel of land that was growing taro at the time of the Great Mahele in 1848 and is entitled to water as an appurtenant right)." (Exh. B-5, p. 3.)

- Contracts between WWC and its customers state the same in various ways:

    - expressly subjecting any water use to "priority use by Wailuku's kuleana obligations." See, e.g., Exh. C-71, p. 4; Exh. C-72, p. 4; Exh. D-86, p. 4; Exh. D-87, p. iii; Exh. D-90, p. 4; Exh. D-92, p. 3.

    - recognizing the priority of WWC's "preexisting delivery commitments, " see, e.g., Exh. C-69A, pp. 5-6; Exh. D-89, p. 3; Exh. D-59, p. 1, which include "Existing Consumptive Uses for . . . downstream kuleanas" (Exh. C-69A (Exh. B)).

    - making clear that during times of low streamflow, WWC will ration water among its end users with "priority given to kuleana users." See, e.g., Exh. C-71, p. 4; Exh. C-72, p. 4; Exh. D-58, p. 2-3; Exh. D-60, p. 2; Exh. D-61, p. 2; Exh. D-62, p. 2; Exh. D-63, p. 2; Exh. D-64, p. 2; Exh. D-65, p. 2; Exh. D-66, p. 2; Exh. D-67, p. 2; Exh. D-68, p. 2; Exh.D-69, p. 2; Exh. D-70, p. 2; Exh. D-71, p. 2; Exh. D-72, p. 2; Exh. D-73, p. 2; Exh. D-75, p. 2; Exh. D-76, p. 2; Exh. D-77, p. 2; Exh. D-78, p. 2; Exh. D-80, p. 2; Exh. D-81, p. 2; Exh. D-82, p. 2; Exh. D-83, p. 2; Exh. D-84, p. 2; Exh. D-85, p. 2; Exh. D-86, p. 3; Exh. D-87, p. iii; Exh. D-90, p. 4; D-92, p. 4 (emphasis added); see also Tr. 1/24/08 (Chumbley), p. 101, ll. 7-9; p. 106, ll. 2-4.

These admissions by WWC, along with the community testimony, establish the universally shared understanding of WWC's obligation to kuleana users. As aptly explained by 85-year old Teruo Kamasaki, who worked for Wailuku Sugar for 42 years

and served as the "water luna," kuleana users had "preference over sugar," and the plantation recognized its obligation to provide kuleana users with adequate water for their crops, including larger amounts for taro. (Tr. 12/4/07, pp. 219-21.)

COL 134's declaration that WWC "is not legally obligated to continue providing water to kuleana lands through its system" is contrary to all the evidence in the record, including WWC's own repeated, consistent admissions, and unjustifiably favors WWC in a manner that WWC itself never advocated. The Community Groups thus respectfully request that COL 134 be deleted, or alternatively, be replaced with the opposite conclusion: that WWC has an obligation to provide water to kuleana lands through the ditch system so long as its diversions prevent kuleana users from drawing water from the stream directly, or WWC's modifications to the kuleana 'auwai have made kuleana users dependent on the ditch system to receive their kuleana water.

C. The Determination Of Reasonable Kuleana Use Needs Clarification.

Finally, the Community Groups request clarification of the conclusion that only 6.84 mgd is sufficient to satisfy current and prospective needs of the kuleana users. COL 220. The Proposed Decision acknowledges the uniform testimony of the kuleana users that this current amount, the bulk of which is based on WWC's estimates (Table 2, FOF 227), is inadequate for their current uses, let alone their prospective uses. FOFs 296, 335. The Proposed Decision, however, reasons that since 6.84 mgd, divided by the acreage of those kuleana users who testified, yields gad figures that the Proposed Decision deems adequate, and because USGS testimony noted return flows and leakages from ditches, then waste must be occurring. Specifically, FOF 336 and COLs 57 and 111 state that "substantial losses through the ditches are likely occurring," "much of the water reported by WWC as being delivered to the kuleana lands is being lost," and the 'auwai "must be leaking to such an extent that water is inefficiently being delivered to the kuleanas."

The USGS testimony cited, however, refers to "return flows and leakage from the kuleana ditches hav[ing] been observed" only in one instance, in relation to South

Waiehu Stream (USGS WT 9/14/07, ¶¶ 38-42),[9] which does not support such broad conclusions of waste. Rather than the conclusion that water "must be leaking" to an inefficient extent, the far more evident and supportable basis for this shortfall is the undisputed existence of other existing kuleana users other than those who testified in this proceeding. Many of the community witnesses identified other kuleana users on their 'auwai.[10] WWC's own list of kuleana users, Exh. D-7, includes many more landowners and parcels beyond those covered by the testifying witnesses, and the Proposed Decision incorporates this information in its own tables, see Tables 3 to 6. These parcels include those cultivated in the kalo farming operations of Aloha Poi, which was specifically referenced by Magdalen Ho'opi'i, one of many landowners who lease kuleana land to that farm. See Ho'opi'i WT 10/26/07, ¶ 16; Exh. A-110, see also Exh. A-12, pp. 3, 42-45 (describing study sites as areas "where commercial cultivation generally is viable," including Waihe'e Valley).

The Community Groups thus respectfully request that the Commission: (1) remove the statements above in FOF 336 and COLs 57 and 111 and instead conclude that the reason existing kuleana users receive inadequate water is the undisputed fact that more kuleana users exist than those who testified, which reduces each users' proportion of the current estimated supply of 6.84 mgd below amounts necessary for kalo cultivation; and (2) clarify that 6.84 mgd is reasonable use for those kuleana users who testified in this case, and that more may be required for other identified and unidentified existing and prospective kuleana users.

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[9] The testimony also refers without specificity to "return flow and leakage from ditches" into Waihe'e River, which may or may not include kuleana 'auwai, and "leaks from the ditch systems" into 'Īao Stream, which evidently does not refer to any kuleana 'auwai, and does not mention any leakage into Waikapū Stream. (Id.)

[10] See, e.g., Tr. 12/7/07 (Ellis), p. 24, ll. 11-19; Tr. 12/13/07 (Faustino), p. 18, ll. 3-19; Freitas WT 10/26/07, ¶ 4; Tr. 12/13/07 (Freitas), p. 38, l. 23 to p. 39, l. 3; p. 42, l. 20 to p. 43, l. 5; Tr. 12/13/07 (Kana), p. 25, ll. 14-18; Santiago WT 10/26/07, ¶¶ 7, 10; Tr. 12/7/07 (Santiago), p. 106, ll. 2-5; p. 111, ll. 13-19; p. 116, l. 21 to p. 117, l. 1; see also Jeremiah Dec. 1/28/08, ¶¶ 14, 18, 21; Kaulukukui Dec. 10/26/07, ¶ 4; Exh. A-194 A to D; Exh. D-7, p. 3.

V. NINE MGD ALLOCATION FOR A&B'S DESIRED TREATMENT PLANT

The Community Groups object to the Proposed Decision's determination of 9 mgd for the Maui Department of Water Supply ("MDWS") as "reasonable" in the absence of any definite plans for the project or meaningful analysis of reasonable-beneficial use, including practicable mitigation and alternatives.[11] Initially, the classification of the entire 9 mgd as "MDWS use" based on the statement that MDWS "is in discussions to obtain 9 mgd by the end of 2009" lacks factual basis given that all evidence on the subject indicates that A&B is taking the lead on the project (Tr. 1/13/08 (Eng), p. 208, ll. 9-23), and that in return, not only will both A&B and WWC charge the County for the water (Tr. 2/22/08 (Kuriyama), p. 9, l. 4 to p. 20, l. 9), but A&B will receive a reservation of part of the water (potentially half) for its development projects (id. p. 20, l. 17 to p. 21, l. 21; Tr. 12/13/07 (Eng), p. 210, ll. 10-15; Tr. 12/14/08, p. 9, ll. 4-18).

The Proposed Decision does not examine the alternatives to A&B's plant other than to adopt MDWS's arguments, which the Hearings Officer qualified during the hearing. (Tr. 12/14/07, p. 51, l. 24 to p. 52, l. 7; p. 53, ll. 1-13; p. 55, l. 23 to p. 56, l. 7.) For example, the consent decree MDWS cites as restricting its ability to use water from East Maui, FOFs 372-73; COL 99, simply requires the County to conduct a cost-benefit analysis of various alternative sources, which it has not done. (Tr. 12/13/07 (Eng), p. 204, l. 22 to p. 205, l. 17; Tr. 12/14/07, p. 53, ll. 1-13.) The Proposed Decision also does not mention the alternatives of conservation, which is "going to be pretty comprehensive over time," a "pretty successful way of recovering water," and "the direction this county has to take" (Tr. 12/13/07, p. 107, l. 4 to p. 108, l. 8; Tr. 12/14/07, p. 22, ll. 4-11; p. 24, ll. 14-20; Exh. A-186); and expanded reclaimed water use, which MDWS "fully support[s]" and, if implemented, "will be probably fairly helpful and a quick resolution to the situation we're in right now" (Tr. 12/14/07, p. 21, ll. 1-4; Tr.

[11] The Community Groups also reiterate their objection to classifying MDWS's municipal uses as a "public trust purpose," COL 240. As explained in further detail in their November 16, 2007 rebuttal brief (pp. 10-12) and proposed COLs 104-08, equating large-scale municipal use with domestic use contradicts long-established legal distinctions between the two and unduly undermines the public trust doctrine.

12/13/07, p. 108, ll. 9-22). COL 62 reasons that, since the Commission found MDWS's uses to be reasonable-beneficial in the previous Shaft 33 proceeding, its existing and proposed uses would be reasonable if the uses "are for the same purposes," but this reasoning would render any MDWS use automatically reasonable-beneficial, contrary to the Commission's public trust obligations.

In the end, A&B's treatment plant plans are too speculative to be seriously considered in this proceeding. See Tr. 12/13/07 (Eng), p. 206, ll. 15-17 (noting that "everything is up in the air" for the project). Among the indefinite details is the amount of water to be used, where the County's planning analysis assumes a 6 mgd capacity for the plant (Exh. B-1, p. 5), and A&B/HC&S revealed that previous plans for the plant were "much smaller," "two or three, four million gallons," and included potential nonuse of the plant during the summer months (Tr. 1/31/08 (Holaday), p. 76, l. 15 to p. 77, l. 9). Any prospective use for the plant cannot be deemed reasonable without such details, including a proper showing on alternatives.

VI. ʻĪAO AND WAIEHU STREAMS

The Community Groups commend the Proposed Decision for restoring stream flows to Waiehu and ʻĪao Streams and rejecting the offstream diverters' attempt to "write off" ʻĪao Stream because of the channelization, but submit that the Proposed Decision placed undue and unnecessary significance on the 20′ vertical drop in ʻĪao Stream, which it deemed a potential "a larger obstacle," "the most prohibitive obstacle," and "the formidable obstacle," COLs 208, 216, 263; and the smaller drops on Waiehu Stream, which it called "significant physical impediments" and, in the case of the drop on South Waiehu Stream, a "grave obstacle," COLs 215, 255.

Even HC&S's consultant, Mr. Ford, did not consider such features to be a significant obstacles, noting that the drop in ʻĪao Stream "may be a further impediment" and the drop in South Waiehu below HC&S's diversion, "coupled with the horizontal intake grate on the top of the dam, could create an impediment." (Exh. E-53, pp. 8, 23.) Mr. Ford also described the vertical concrete apron in lower Waiehu Stream as a "potential impediment," but recognized that similar structures "are known to allow

passage of amphidromous fishes and shrimps." (Id. at 23; Tr. 10/14/08 (Ford), p. 127, l. 22 to p. 128, l. 18.) No one, including Mr. Ford, testified to the relative significance of these drops in relation to other factors.

It is general scientific knowledge that species of 'o'opu and 'ōpae are adapted to climb waterfalls. See, e.g., DAR, Adaptations of Hawaiian Freshwater to Stream Life http://hawaii.gov/dlnr/dar/streams_adaptation.html (last visited May 11, 2009). Indeed, a well-cited study by Way et al., submitted as Exh. A-221, documents two waterfalls >15m high near the mouth of Makamakaole Stream on Maui, a relatively undiverted stream in which the study documented consistently higher rates of 'o'opu reproduction compared to a heavily diverted stream. See id. at 54. Dr. Benbow maintained that continuous flow in 'Īao Stream would allow reestablishment of amphidromous species in the stream's upper reaches, "based upon my studies of how well these things climb. The fish in particular, and the shrimp as well . . . ." (Tr. 12/10/07, p. 169, ll. 10-23.) Thus, all the available evidence indicates that the vertical drops, at most, "could" be an impediment, but not a significant one for native species migrating upstream.

VII. WAIKAPŪ STREAM

The Community Groups request clarification or modification of the location of the IIFS for Waikapū Stream. The Proposed Decision designates the IIFS at 4 mgd below the Reservoir 6 diversion, which is the lowest of three active WWC diversions on Waikapū Stream, COL 266 and D&O p. 189; see Figure 4. However, the uppermost diversion, the South Waikapū Ditch, has the capability of draining the stream practically dry (USGS 9/14/07 WT, ¶ 48), while a separate ditch, the Waihe'e Ditch, has the capability of dumping water into the streambed further downstream, see Exh. A-90; Tr. 2/22/08 (Santiago), p. 142, l. 8 to p. 143, l. 7. Within the potentially dewatered stretch between these two points lies the "North Waikapū" kuleana 'auwai which supplies numerous 'ohana including the Pellegrinos, Shimizus, Soongs, Gushis, Harders, and Miyamotos. See Community Groups' Proposed FOFs D-369 to -405. See also Proposed Decision, Figure 4 ("Pelligrino [sic] Kuleana Ditch").

To remove any potential confusion and difficulty, the Community Groups request that the Commission: (1) designate the IIFS below the South Waikapū diversion, with a corresponding amount below the Reservoir 6 diversion, taking into account the needs of kuleana users on the North Waikapū 'auwai;[12] and (2) notwithstanding any later modification of the IIFS at Reservoir 6 based on whether flows reach Kealia Pond, COL 266(4), retain the IIFS below the South Waikapū diversion to provide adequate water for the kuleana users on the North Waikapū 'auwai.

DATED: Honolulu, Hawai`i, May 11, 2009.

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[12] This tracks the approach of the IIFS for 'Īao Stream, which is set below the upstream Īao-Waikapū/Maniania diversion and the downstream Spreckels Ditch diversion.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing document was duly served by U.S. mail, postage pre-paid to the following parties addressed as follows:

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