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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAIʻI

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ʻEhā Surface Water Management Areas of Waiheʻe, Waiehu, ʻĪao and Waikapū Streams, Maui	Case No. CCH-MA15-01 OFFICE OF HAWAIIAN AFFAIRS, HUI O NĀ WAI ʻEHĀ and MAUI TOMORROW FOUNDATION, INC.'S **MOTION FOR PARTIAL RECONSIDERATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JUNE 28, 2021**; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF PAMELA W. BUNN; EXHIBITS "A" - "E"; CERTIFICATE OF SERVICE

OFFICE OF HAWAIIAN AFFAIRS, HUI O NĀ WAI ʻEHĀ, AND MAUI TOMORROW FOUNDATION, LLC'S JOINT MOTION FOR PARTIAL RECONSIDERATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON JUNE 28, 2021

The Office of Hawaiian Affairs ("OHA") and Hui o Nā Wai ʻEhā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"), by and through their undersigned counsel, hereby respectfully seek reconsideration of two aspects of the Commission on Water Resource Management's ("Commission") June 28, 2021 Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O") (collectively, "Final Decision"). In a groundbreaking decision, the Commission acknowledged the extraordinary patience of, and

burdens on, the affected communities over the nearly two decades of litigation required to recognize and uphold their priority appurtenant and traditional and customary Native Hawaiian rights. Particularly in the context of the burdens on the *pro se* permit applicants seeking recognition of such rights, it would impose a substantial injustice to (1) change the rules of the decade-long process for appurtenant rights recognition by requiring those who successfully completed this arduous process to ***again*** prove their appurtenant rights by conducting a full title search back to the Māhele before receiving their Surface Water Use Permits; and (2) recognize more than 6 million gallons per day of invalid appurtenant rights over more than 40 acres for Wailuku Country Estates, where those rights were undisputedly extinguished by a reservation of water rights in the applicable deeds.

Accordingly, and as discussed more fully in the attached Memorandum in Support of this motion, OHA and the Community Groups request that the Commission reconsider the Final Decision and, on reconsideration:

(1) ***Delete*** Paragraph 198 of the D&O section of the Final Decision (p. 359); and

(2) ***Correct*** the FOFs, COLs, D&O, and appendices pertaining to the appurtenant rights claimed by Wailuku Country Estates Irrigation Company and Wailuku Country Estates Community Association (collectively, "WCE"), as follows:

(a) include a subparagraph in FOF 399 to the effect that the appurtenant rights claimed by WCE were extinguished by the reservation of rights in the 2002 deeds by which the property was conveyed to the developer of WCE;

(b) delete from subparagraph 113(a) of the D&O section of the Final Decision (p. 333) the reference to "appurtenant rights" from the second sentence and the language "that fall within a lot's appurtenant rights" from the fourth sentence;

(c) delete subparagraph 113(b) (p. 334) in its entirety;

(d) delete the central column ("Appurtenant Rights (150,000 gad)"), and sub-columns ("Acreage" and "GAD") from Appendix 2; and

(e) delete Appendix 3 in its entirety.

This motion is brought pursuant to Hawai'i Administrative Rules section 13-167-64, and is based on the memorandum, declaration and exhibits attached hereto, and the records and files herein.[1]

DATED: Honolulu, Hawai'i, July 6, 2021.

/s/ Pamela W. Bunn
JUDY A. TANAKA
PAMELA W. BUNN
Attorneys for Office of Hawaiian Affairs

/s/ Isaac Moriwake
ISAAC MORIWAKE
Attorney for Hui O Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc

[1] Pursuant to Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure, this motion for reconsideration tolls the time for filing an appeal until "30 days after entry of an order disposing of the motion." The Commission must file its order resolving the motion within 90 days after the date the motion is filed, or file a notice that the motion is deemed denied for failure to enter such an order.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

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

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On June 28, 2021, this Commission issued its Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order ("D&O") (collectively, the "Final Decision") after almost two decades of litigation. As described in the Commission's press release, the Final Decision contemplated a "paradigm shift." Having corrected fundamental legal errors regarding appurtenant rights and traditional and customary Native Hawaiian rights for kalo cultivation that led the Hearings Officer's proposed decision astray, the Commission's Final Decision, for the first time, finally gave these rights the recognition and priority that the law requires.

Two related aspects of the Final Decision, however, are antithetical to the Commission's long-overdue protection of traditional kalo cultivation as a public trust purpose. First is the requirement in Paragraph No. 198 in the D&O, newly included in the Final Decision, that applicants for Surface Water Use Permits based on appurtenant rights, after undergoing extensive proceedings that took more than a decade, must ***again*** prove their appurtenant rights by providing a title search back to the Māhele to demonstrate that their appurtenant rights were not extinguished by a deed reservation in their chain of title. As further discussed in Section III below, this requirement contradicts the notice and process established a decade ago for recognizing appurtenant rights and imposes on applicants, particularly *pro se* community

members, an onerous and unjust burden that would amount to an effective or constructive denial of their rights.

Relatedly, and paradoxically, the Final Decision fails to acknowledge that the appurtenant rights claimed by Wailuku Country Estates Irrigation Company and Wailuku Country Estates Community Association (collectively, "WCE") have been extinguished based on the undisputed and established record in this case. Even after correctly concluding that it is bound by the Hawai'i Supreme Court's holding in *Reppun v. Board of Water* Supply, 65 Haw. 531, 552, 656 P.2d 57, 71 (1982)—namely, that a reservation of appurtenant rights by the grantor results in their extinguishment—and unequivocally declaring in the Final Decision that appurtenant rights that have been extinguished by deed reservations "will not be recognized in this proceeding," *id.*, COL 89, the Commission inexplicably recognized appurtenant rights of more than 6 million gallons per day ("gpd") over 40 plus acres of Wailuku Country Estates subdivision. Directly to the contrary, the deeds from WACI to the Developer of WCE contained express reservations of water rights, which were raised in objections to WCE's appurtenant rights claims, acknowledged by the Hearings Officer, and plainly demonstrated in exhibits submitted by WCE in the contested case hearing. *See* Section IV, below.

In the context of the Commission's Final Decision, and given the Commission's recognition of the burdens that have already been placed on the communities of Nā Wai 'Ehā, OHA and the Community Groups hope and expect that the requirement for complete title searches to establish appurtenant rights, and recognition of appurtenant rights that have unambiguously been extinguished by deed reservations, are oversights that can be corrected on reconsideration, rather than legal errors that will require an appeal.

II. RELEVANT FACTUAL BACKGROUND[1]

For many community members, the attempt to establish their appurtenant rights to use water from Nā Wai ʻEhā for kalo cultivation dates back to the original 2007-08 contested case hearing on the IIFS. Numerous Nā Wai ʻEhā community witnesses introduced evidence of their appurtenant rights in the form of Land Commission Awards ("LCAs"), Royal Patents ("RPs"), and Native and Foreign testimony, in order to establish the need for increased stream flow to satisfy their rights.[2] These witnesses and other *pro se* applicants claiming appurtenant rights *again* documented their appurtenant rights both in their April 2009 Surface Water Use Permit Applications ("SWUPAs"), and in their February 5, 2016 supplemental filings. This was a monumental undertaking that could not have been accomplished without the substantial help and support provided by students and staff from Ka Huli Ao Native Hawaiian Law Center and the Environmental Law Clinic pursuant to a contract with OHA to provide direct legal services to rural communities and OHA beneficiaries in particular.

For several years after the SWUPAs were submitted, OHA's Senior Public Policy Advocate and her staff, assisted by OHA's counsel as necessary, spent countless hours working with CWRM staff to answer their questions about the *pro se* community members' appurtenant rights claims. At the same time, OHA, the Community Groups, and other stakeholders engaged in discussions with the Commission's then-Deputy Director and staff regarding the most efficient and reasonable process for determining appurtenant rights. OHA and the Community Groups

[1] Unless otherwise indicated, the factual assertions in this section are supported by the attached Declaration of Pamela W. Bunn.

[2] The Commission at the time declined to recognize any of their rights, based on the contrived excuse that no one had submitted any "petitions" for appurtenant rights. Findings of Fact, Conclusions of Law, & Decision & Order, filed on June 10, 2010, at 119, COL 53 (CCH-MA06-01). Then, as now, neither the State Water Code, HRS Ch. 174-C, nor its implementing rules, dictated any such exclusive procedure for establishing appurtenant rights.

urged that requiring a title search would amount to a *de facto* denial of community members' appurtenant rights claims because the cost for such work—which would run in the thousands of dollars for each applicant—was simply prohibitive. It was also pointed out that requiring every appurtenant rights claimant to do a complete title search back to the Māhele to prove there was nothing in the chain of title that would extinguish the appurtenant rights was inefficient and unnecessary, because information about extinguishment would be expected to be provided by those objecting to the appurtenant rights claim.

The Commission agreed and, on September 27, 2011, approved a three-step process and framework for determining appurtenant rights in Nā Wai ʻEhā: (1) notice to potential claimants; (2) determination whether there are appurtenant rights associated with the land; (3) quantification of the appurtenant right. *See Nā Wai ʻEhā Provisional Order on Claims that Particular Parcels Have Appurtenant Rights* dated December 31, 2014 (CCH-MA13-02) ("12/31/14 Provisional Order"), available at http://files.hawaii.gov/dlnr/cwrm/cch/cchma1302/CCHMA1302-20141231-CWRM.pdf at 22-34[3] (September 27, 2011 Staff Submittal). The September 27, 2011 Staff Submittal, which was approved by the Commission on the same date (*see* Final Decision, FOF 19), pointed out that, ***"[w]hile a title search is not required***," various types of information and documentation would assist the Commission in making judgments about appurtenant rights claims, including TMK maps, Māhele documents, information about the physical features of the parcel, kamaʻāina testimony, and the ***"[c]urrent title or deed to parcel."*** 12/31/14 Provisional Order at 26 (emphasis added). In sum, the process described in the approved September 27, 2011 Staff Submittal for determining whether there was an appurtenant right associated with a parcel (Step 2 above) was that: (1) claimants would first make a prima facie showing of their

[3] Citations to page numbers are to the pdf page numbers in the 12/31/14 Provisional Order, which contains numerous attachments, some with associated exhibits.

appurtenant rights; (2) other interested persons with information on the severance of the rights (or information relevant to other grounds upon which an objection could be based) could come forward with objections and documentary support; to which (3) the claimants could respond to meet their ultimate burden of proof. 12/31/14 Provisional Order at 25-27; *see also id*. at 31-34 (Ex. 3 to Staff Submittal).

Once the process for provisional recognition of appurtenant rights was finally established in September 2011, it took more than ***three years*** to complete. Public Notices of the Commission's intent to determine appurtenant rights were sent, and published in the newspapers, on November 1 and 8, 2011, to give notice that appurtenant rights would be determined and the deadline for submissions was February 6. 2012 See 12/31/14 Provisional Order at 35-36. The public notice indicated that one of the documents that would assist the Commission was "***Current*** title or deed clear of language demonstrating that the appurtenant right has been extinguished (i.e., no severance in deed)." *Id.* at 36.

On August 29, 2012 and September 5, 2012, the Commission published a public notice dated August 24, 2012 of the claims submitted[4] and the opportunity to file written objections by September 19, 2012. *Id*. at 38-49. The notice identified categories of applicable objections including: "Documentation demonstrating that the appurtenant right has been reserved or extinguished." *Id.* at 38 (emphasis added).[5] OHA and the Community Groups timely filed joint objections to several appurtenant rights claims, including those by WCE, on the grounds that any appurtenant rights had been extinguished by a reservation of water rights in the Limited Warranty Deed by which WACI conveyed Lot A-2 of the "Iao Valley Large-Lot Subdivision" to

[4] Approximately half of the appurtenant rights claims were made by WCE claiming appurtenant rights over individual lots and the subdivision's common areas. *See id*. at 42-47.

[5] On March 4 and 11, 2013, the Commission published a public notice dated February 25, 2013 to give notice of claims submitted after the previous public notices and provide an opportunity for objections to those claims by March 25, 2013. *Id*. at 50-51.

the developer of the Wailuku Country Estates subdivision, CGM, LLC. *See* Ex. "A." Wailuku Water Company ("WWC"), successor in interest to WACI, also objected to WCE's appurtenant rights claim on the same (and other) grounds, and in addition to the Limited Warranty Deed, attached Quitclaim Deeds that were recorded on the same date and also contained reservations of water rights. *See* Ex. "B."

More than two years after the objections were filed, the Hearings Officer issued his Findings and Recommendations regarding the provisional recognition of appurtenant rights dated October 14, 2014, *See* 12/31/14 Provisional Order, at 10-103. On October 14 and November 21, 2014, the Commission conducted "due process hearings" on Maui regarding the October 14, 2014 Findings and Recommendation. *Id.* at 1. Some of the discussion at the hearings concerned the October 14, 2014 Findings and Recommendation's discussion of the Hearings Officer's belief that the Code and/or constitution had abrogated the Hawai'i Supreme Court's *Reppun* precedent and nullified prior reservations of water rights, *see id*. at 11-12, 16-17, 21 (Recommendation 1). Based on this view (which the Commission reversed in its Final Decision), the October 14, 2014 Findings and Recommendation proposed to nullify the effect of the deed reservations in this case—raising WCE's deed reservation as a prime example. *See id.* at 16 ("***The Wailuku Country Estates deed reservation*** was dated August 21, 2002" and thus postdated the 1978 constitutional amendment and 1987 enactment of the Code). There was also considerable discussion of the apparent intent in the October 14, 2014 Findings and Recommendation to restrict standing to object to appurtenant rights claims to "those [with] a legal interest in the particular parcel in question." *Id*. at 14.

Ultimately, the Commission did ***not*** adopt that the Hearings Officer's October 14, 2014 Recommendations; it instead adopted his December 31, 2014 Amended and Revised Findings and Recommendations, *id*. at 3, which recommended that the Commission ***"[g]rant standing to***

OHA and the two Community Groups through the entire process," and that any consideration or decision on "the 'severance' issue[s] raised by the *Reppun* decision and other issues of law" be deferred "until a later date" and considered "in the context of the Hearing Officer's proceedings on proposed [FOF, COL, and D&O.]" *Id* at 107, Recommendation Nos. 3, 5 (emphasis added).

The contested case hearing was held over 11 hearing days between July 11 and October 14, 2016, and the *pro se* applicants were required to appear so they could be questioned about their SWUPAs, including their claims to appurtenant rights. Following the conclusion of the evidentiary portion of the contested case hearing, the Community Groups and OHA filed their Joint Proposed FOF, COL, and D&O on February 17, 2017, pointing out the same reservation of water rights raised not only in their 2012 Objections, but also in WCE's own contested case exhibits. See Ex. "C" at 16-17 (FOFs C-158, C-159, C-160); 28 (COL 205).

The Hearings Officer filed his Proposed FOF, COL, and D&O on November 1, 2017 and concluded that, as a matter of law, the effect of the 1978 constitutional amendments and/or the 1987 enactment of the Code turned the common law basis for appurtenant rights into a constitutional or statutory basis, so a reservation of water rights post-dating 1978 does not extinguish the rights. *Id.* at 281-283, COLs 75-86. OHA and the Community Groups filed exceptions to the Proposed FOF, COL, and D&O on January 5, 2018, and specifically took exception to the Hearing Officer's legally erroneous rationale for not following *Reppun* and, in the case of the Community Groups, raised WCE as a "prime example of the disruption [the proposed] ruling would cause." *See* Ex. "D" (Excerpts of OHA's Exceptions); Ex. "E" (Excerpts of Community Groups' Exceptions).

This Commission corrected the error. *See* Final Decision at 271-73 (COLs 78-89).

III. PARAGRAPH NO. 198 IN THE DECISION AND ORDER, REQUIRING APPURTENANT RIGHT-HOLDERS TO PROVIDE A COMPLETE CHAIN OF TITLE, SHOULD BE STRICKEN

OHA and the Community Groups respectfully request that the Commission delete D&O ¶ 198, a provision newly added in the Final Decision, which states: "All permittees that have been awarded water based on appurtenant rights will be required to provide copies of deeds for their properties to the Māhele to confirm that no reservation of water rights have been made in their chain of title." As described above, requiring permit applicants to undergo *yet another* process to prove their appurtenant rights—in addition to the 10-year multi-step process that they have already endured—is grossly burdensome and unfair. The requirement of a chain of title search to the Māhele was specifically rejected when the appurtenant rights recognition process was established. *See* September 27, 2011 Staff Submittal describing process for determining appurtenant rights (specifying that ***"a title search is not required"***). Indeed, such a requirement would cost each applicant thousands of dollars and lead to indefinite delays or effective denials. The injustice in this requirement is particularly severe for *pro se* community applicants, who have already waited too long (and in too many cases have even passed away while waiting) and cannot and should not be subjected to such an additional onerous burden. In short, D&O ¶ 198 should be deleted. Instead, the Commission's determinations of appurtenant rights in the Final Decision, which are based on the extensive record in this case developed over many years, should be the final determinations of appurtenant rights upon which Surface Water Use Permits are issued.

The process for recognizing appurtenant rights has taken almost 10 years and has included three rounds of heroic effort, including research and investigations, written submissions, and in-person testimony—and with ample opportunity over those years to raise objections, submit contrary evidence, and conduct cross-examination. This process has produced

a historically extensive record that assuredly includes documents showing severances where they actually exist.[6] In this context, subjecting community members to yet another round of process and proof requirements, particularly one this onerous that is imposed after the fact without notice, is simply unreasonable and unjust.

The requirement for *pro se* community applicants to "provide copies of deeds for their properties to the Māhele to confirm that no reservation of water rights have been made in their chain of title" will result in the *de facto* denial of protected appurtenant rights. Such title searches cost thousands of dollars, and can take more than a year, particularly if facing a backlog exceeding the capacity of the limited pool of experienced title researchers with the specialized expertise required. Precisely for this reason, such a requirement was never included during the process. No notice has ever been given to the parties suggesting otherwise, and now is not the time to "move the goal posts" on everyone.

As a final observation, this requirement would not only impose an unfair surprise and burden, but would also in many cases likely result in a practical or constructive denial of community members' appurtenant rights. It strains belief that *pro se* applicants would have the technical or economic wherewithal to produce title searches. And after more than 10 years of trying and waiting, one can only wonder how many of these community members may simply give up in response to this latest barrier. Hawai‘i has seen such injustices in its history, most infamously in the original Māhele process—and they cannot be repeated, yet again, here.

With regards to the determination of appurtenant rights, the Hawai‘i Supreme Court emphasized almost 40 years ago that "requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights." *Reppun*, 65 Haw. at 554, 656 P.2d at

[6] Indeed, many community members *voluntarily* and transparently submitted evidence of such severances, subject to the Commission's final ruling on the legal issue. In its final D&O, the Commission went ahead and recognized those severances for many applicants.

72. The same principle applies here: the process in this case has been more than sufficient to prove valid appurtenant rights. At this point, justice delayed any further is justice denied.

IV. WAILUKU COUNTRY ESTATES' APPURTENANT RIGHTS WERE EXTINGUISHED BY A DEED RESERVATION

OHA and the Community Groups are appreciative of, and relieved by, the Commission's rejection of the Hearings Officer's conclusion that *Reppun* need not be followed because it was somehow altered by the 1978 constitutional amendments and the 1987 enactment of the Code. However, there is no way to reconcile the Commission's unequivocal statement that "[p]ursuant to *Reppun*, a reservation of water rights contained in any of the applicants' deeds had the effect of extinguishing those rights and those appurtenant rights ***will not be recognized in this proceeding***," Final Decision, COL 89 (emphasis added), with its recognition of appurtenant rights totaling more than 6 million gallons per day over more than 40 acres of the Wailuku Country Estates subdivision, *id.*, D&O ⁋ 113 (b), which undisputedly has a reservation of water rights in its chain of title.

OHA and the Community Groups, as well as WWC, objected to WCE's appurtenant rights claim in 2012 based upon the deed reservations, and provided the deeds in which the reservations occurred. Exs. "A" and "B." The Hearings Officer acknowledged the reservation in his October 14, 2014 Findings and Recommendations regarding provisional recognition of appurtenant rights, but concluded it did not extinguish the appurtenant rights because it post-dated the 1978 constitutional amendments and the enactment of the Code. *See* 12/31/14 Provisional Order at 16 ("***The Wailuku Country Estates deed reservation*** was dated August 21, 2002."). WCE ***has never disputed*** the water reservation in deeds in its chain of title; to the contrary, it relied on the water reservation (which also reserved groundwater) to explain why on-

site groundwater was not a practicable alternative. *See* 2189-WCEIC-270 (Tom Nance Alternatives Assessment) at 7.

WCE also introduced other exhibits referencing the water reservation. For example, the original developer's Public Offering Statement and Property Report both disclose to potential purchasers of lots in the subdivision that, after the developer acquires the subdivision, "Wailuku [the Seller], its successors and assigns, will have the reserved right to all water and water rights (surface and ground water) within or appurtenant to the Subdivision[.]" Ex. 2189-WCEIC-228, at 4; Ex. 2189-WCEIC-229, at 9. The Declaration of Covenants, Conditions, and Restrictions for Wailuku Country Estates, Ex. 2189-WCEIC-234, which is binding "upon all Persons having any right, title, or interest in any portion of Wailuku Country Estates, their heirs, successors, successors-in-title, and assigns," *id.* at 2, likewise makes clear that "Wailuku Agribusiness, on behalf of itself and its successors and assigns, have reserved the right to all water and water rights (surface and ground water) within or appurtenant to the Property," which is "an encumbrance[] on the Property and all of the Lots," *id*. at 49.

Unable to dispute the water reservation in the chain of title of every lot owner in the subdivision, WCE has instead adopted and advocated for the Hearings Officer's interpretation that *Reppun* only applies to water reservations in deeds that predate the 1978 constitutional amendments. *See, e.g.*, WCE's Proposed FOF, COL, and D&O filed February 17, 2017, COLs 12-14. Given that the Commission has correctly and unambiguously rejected that interpretation, OHA and the Community Groups can only assume that the recognition of WCE's appurtenant rights notwithstanding they have been extinguished by a water reservation is an inadvertent oversight and respectfully requests that it be corrected.

V. CONCLUSION

For the foregoing reasons, OHA and the Community Groups respectfully request that the Commission:

(1) ***Delete*** Paragraph 198 of the D&O section of the Final Decision (p. 359); and

(2) ***Correct*** the FOFs, COLs, D&O and appendices pertaining to the appurtenant rights claimed by WCE as follows:

(a) include a subparagraph in FOF 399 to the effect that the appurtenant rights claimed by WCE were extinguished by the reservation of rights in the 2002 deeds by which the property was conveyed to the developer of WCE;

(b) delete from subparagraph 113(a) of the D&O section of the Final Decision (p. 333) the reference to "appurtenant rights" from the second sentence and the language "that fall within a lot's appurtenant rights" from the fourth sentence;

(c) delete subparagraph 113(b) (p. 334) in its entirety;

(d) delete the central column ("Appurtenant Rights (150.000 gad)"), and sub-columns ("Acreage" and "GAD") from Appendix 2; and

(e) delete Appendix 3 in its entirety.

DATED: Honolulu, Hawai'i, July 6, 2021.

/s/ Pamela W. Bunn
JUDY A. TANAKA
PAMELA W. BUNN
Attorneys for Office of Hawaiian Affairs

/s/ Isaac Moriwake
ISAAC MORIWAKE
Attorney for Hui O Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe'e, Waiehu, 'Īao and Waikapū Streams, Maui	)	Case No. CCH-MA15-01 **DECLARATION OF PAMELA W. BUNN**

DECLARATION OF PAMELA W. BUNN

I, PAMELA W. BUNN, hereby declare:

1. I am an attorney with the law firm of Dentons US LLP and am licensed to practice in the State of Hawai'i. I am one of the attorneys for the Office of Hawaiian Affairs ("OHA") in the above-captioned contested case, and have been involved in the contested case proceedings for approximately fifteen years.

2. I am competent to attest to the facts stated herein which, unless otherwise indicated, are based on my own personal knowledge.

3. I participated in the 2007-08 contested case hearing on the determination of Interim Instream Flow Standards ("IIFS") for Nā Wai 'Ehā, and assisted many community witnesses in assembling documentation of their appurtenant rights, which documentation was entered as exhibits to demonstrate that increased stream flow was necessary for them to exercise their rights.

4. Given the number of Nā Wai 'Ehā community members who wished to exercise their appurtenant and traditional and customary Native Hawaiian rights to cultivate kalo, it was clear that helping the *pro se* community members prepare their Surface Water Use Permit Applications ("SWUPAs") was a bigger task than OHA's staff or attorneys could handle. OHA partnered

with Ka Huli Ao Native Hawaiian Law Center and the Environmental Law Clinic for students and staff to provide direct legal services to the rural community and OHA beneficiaries in particular.

5. Eight law students from the Environmental Law Clinic, with the assistance of the Clinic's Director, an OHA in-house counsel, and volunteers from Hui o Nā Wai 'Ehā, assisted about fifty *pro se* community members with their SWUPAs, including the appurtenant rights documentation. The process took the entire Fall 2008 semester, and many of the students completed pro bono requirements by continuing to work on the SWUPAS in order to get them completed by the April 2009 filing deadline.

6. In the Fall semester of 2015 and Spring semester of 2016, OHA contracted with Ka Huli Ao for the clinic to provide even more assistance. Ten law students, a Post JD Legal Fellow, a professor, and volunteer attorneys assisted the *pro se* community members with drafting their supplemental testimony for the contested case hearing and otherwise preparing for the hearing.

7. During the period from about 2010 to 2012, OHA's Senior Public Policy Advocate and her staff were in frequent communication with CWRM staff, who would email her with questions they had about specific *pro se* community members' appurtenant rights claims, and sometimes about appurtenant rights in general. I was copied on those email communications and would get involved as requested to attempt to resolve issues that were being raised.

8. During the same general time period, I participated in several discussions with William Tam, the Commission's then-Deputy Director, members of CWRM staff, Hui o Nā Wai 'Ehā and Maui Tomorrow (together, the "Community Groups") and other stakeholders,

regarding the most efficient, fair, and reasonable process for determining a large number of appurtenant rights claims.

9. During those discussions, OHA and the Community Groups strongly opposed any requirement for a full title search to demonstrate the absence of a water reservation in the chain of title, because the expense would be so prohibitive it would amount to a *de facto* denial of appurtenant rights claims of *pro se* community members.

10. There was also discussion of the fact that, as a practical matter, a complete title search was probably not efficient or necessary to determine whether appurtenant rights had been extinguished, because all or most of the deeds we had seen that had reservations of water rights were from the same grantor, and that grantor would likely object to appurtenant rights claims based on the reservations in the deeds and produce evidence of the reservations.

11. I am informed by a former law partner of mine who specializes in litigating title disputes, and on that basis I believe, that there are very few experienced title researchers ("less than a handful") in Hawai‘i with the specialized expertise necessary, as well as the willingness, to perform such title searches. My former law partner told me, and on that basis I believe, that the few title researchers in Hawai‘i who do this work charge by the hour, with costs ranging from $5,000 to $10,000 depending on the complexity of the title, and that it is not unusual for a search of the complete chain of title to take more than a year. In general, this information on the cost involved in such work is consistent with my expectations and understandings based on my own experience and expertise in title research, including my work researching title documents in connection with the extensive process for determining appurtenant rights in this case.

12. Attached as Exhibit "A" hereto is a copy of OHA and the Community Groups' Objection to the appurtenant rights claim of Wailuku Country Estates Community Association

and Irrigation Company, et al. filed on September 19, 2012. It differs from the original filed with the Commission in that the Exhibits to the Objection are excerpted, whereas the original filed with the Commission included the complete exhibits.

13. Attached as Exhibit "B" hereto is a true and correct copy of Wailuku Water Company, LLC's Objection to the appurtenant rights claim of Wailuku Country Estates Community Association that I downloaded from the Commission's website.

14. Attached as Exhibit "C" hereto are true and correct excerpts of *Hui o Nā Wai 'Ehā's, Maui Tomorrow Foundation, Inc.'s and Office of Hawaiian Affairs' Joint Proposed Findings of Fact, Conclusions of Law, and Decision and Order* filed on February 17, 2017.

15. Attached as Exhibit "D" hereto are true and correct excerpts of *Office of Hawaiian Affairs' (1) Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed November 1, 2017 and (2) Joinder in Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc.'s Exceptions to Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order Filed November 1, 2017*, filed on January 5, 2018.

16. Attached as Exhibit "E" hereto are true and correct excerpts of *Hui o Nā Wai 'Ehā's and Maui Tomorrow Foundation, Inc.'s Exceptions to the Proposed Findings of Fact, Conclusions of Law, and Decision and Order, Dated November 1, 2017*, filed on January 5, 2018.

I declare under penalty of law that the foregoing is true and correct.

EXECUTED: Honolulu, Hawai'i, July 6, 2021.

/s/ Pamela W. Bunn
PAMELA W. BUNN

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

OBJECTION TO AN APPURTENANT RIGHTS CLAIM

Form APRT-OBJ
For Official Use Only:

Instructions: Complete one (1) "Objection to an Appurtenant Rights Claim Form" (Form APRT-OBJ) for each Appurtenant rights claim to which you object.

- Any person or entity with a legal or material interest in the water may file written objections. Persons filing objections must serve copies of the written objection and all related documentation / evidence 1) on the applicant; and 2) on the Commission on Water Resource Management, P.O. Box 621, Honolulu, HI 96809.
- Appurtenant rights claimants will have an opportunity to submit a rebuttal to the written objections.
- For questions, contact the Commission's Stream Protection and Management Branch at (808) 587-0234.

A. OBJECTOR

NAME/COMPANY	Contact Person
Hui O Na Wai 'Eha and Maui Tomorrow; Office of Hawaiian Affairs	Isaac Moriwake, Earthjustice; Pamela Bunn, Alston Hunt Floyd & Ing

Mailing Address
223 S. King St. 4th Floor Honolulu, HI 96813 (Moriwake); 1001 Bishop St. Suite 1800 Honolulu HI 96813 (Bunn)

Phone	Fax	E-mail Address
599-2436(Moriwake) 524-1800(Bunn)	521-6841 (Moriwake); 524-4591 (Bunn)	imoriwake@earthjustice.org; pbunn@ahfi.com

Explain your legal or material interest in objecting to this Appurtenant rights claim.
See attached.

B. APPLICANT (As listed in the Public Notice)

NAME/COMPANY	Surface Water Use Permit Application No.
Wailuku Country Estates Community Ass'n & Irrigation Co., et al.	2196, 2189, 2190N

Mailing Address
c/o Maui Land Broker & Property Mgm't, Inc. P.O. Box 1673 Wailuku, HI 96793

Identify all Tax Map Keys (TMK) related to this objection:
(2)3-3-017-VAR: 10-11, 24, 29-32, 34-37, 41-47, 49-51, 54-61, 64-65, 68, 104-25, 147-48, 151-63, 170-72, 174-87, 190, 193, 195-98, 207

C. REASON(S) FOR OBJECTION

Select all that apply below. The objector has the burden of proof on all objections.

- ☒ The parcel was not used as a residence or for cultivation at the time of the Mahele.
- ☒ The Appurtenant right to water has been reserved or extinguished.
- ☐ There are materially false statements or representations in the claimant's application for Appurtenant rights.

Summarize carefully your objection and how approval of this Application would adversely affect your legal interests (Use separate page if needed):
See attached.

Supporting documentation / evidence must be provided on separate sheets.

D. OBJECTOR SIGNATURE

☒ *By checking this box (for electronic submissions) or signing below (for hardcopy submissions) indicates that the signatory understands and swears that the information provided is accurate and true to the best of their knowledge.*

Print Name:	Signature:	Date:
Isaac Moriwake Pamela Bunn		9/19/2012

EXHIBIT "A"

ATTACHMENT TO HUI O NĀ WAI 'EHĀ'S AND MAUI TOMORROW FOUNDATION, INC.'S AND THE OFFICE OF HAWAIIAN AFFAIRS' OBJECTIONS TO APPURTENANT RIGHTS CLAIMS OF WAILUKU COUNTRY ESTATES COMMUNITY ASS'N & IRRIGATION CO., ET AL.

Explain your legal or material interest in objecting to this appurtenant rights claim.

Hui o Nā Wai 'Ehā ("Hui") and Maui Tomorrow Foundation, Inc. (collectively, the "Community Groups") and the Office of Hawaiian Affairs ("OHA") are parties with legally established due process interests and standing in ongoing proceedings regarding the waters of Nā Wai 'Ehā, Waihe'e River and Waiehu, 'Īao, & Waikapū Streams. The Hui is a community-based organization that was formed to protect and restore Nā Wai 'Ehā's water resources and the practices that depend on them, including traditional and customary Native Hawaiian practices. Maui Tomorrow, a community-based organization with over 1,000 supporters, is dedicated to protecting Maui's natural and cultural resources, promoting principles of ecologically sound development, and preserving rural lifestyles on Maui. OHA is statutorily and constitutionally mandated to protect the cultural and natural resources of Hawai'i for its beneficiaries – native Hawaiians and Hawaiians. Haw. Rev. Stat. §§ 10-3(3), (5); Haw. Const. art. XI, § 1; Haw. Const. art. XII, § 2.

The Community Groups' members and supporters and OHA beneficiaries rely on, use, or seek to use surface water from the Nā Wai 'Ehā surface water management areas and their nearshore marine waters for purposes including but not limited to fishing and gathering, agriculture, aquaculture, research, education, recreation, artistic activities, aesthetic enjoyment, spiritual observance, and traditional and customary Native Hawaiian practices. The Community Groups' members and supporters and OHA beneficiaries own and reside on land along and around each of the streams within the Nā Wai 'Ehā surface water management areas and hold appurtenant, traditional and customary, and public trust rights to Nā Wai 'Ehā surface water. In sum, the Community Groups and their members and supporters and OHA and its beneficiaries have legally protected rights and interests in Nā Wai 'Ehā surface water, which are legally and materially affected by and adverse with the claims of appurtenant rights at issue. At the Commission's request, the Community Groups and OHA can provide further information regarding their rights and interests in this matter.

Summarize carefully your objection and how approval of this Application would adversely affect your legal interests.

The appurtenant rights, if any, in the land comprising the Wailuku Country Estates ("WCE") subdivision, TMK No. (2) 3-3-017-VAR, have been reserved. See Reppun v. Board of Water Supply, 65 Haw. 531, 552, 656 P.2d 57, 71 (1982) (holding that a reservation of appurtenant water rights "had the effect of extinguishing them"). CGM, LLC, the developer of the WCE subdivision, bought the land from Wailuku Agribusiness Co., Inc. ("Wailuku") by the Limited Warranty Deed recorded in the State of Hawai'i Bureau of Conveyances on August 21, 2002 as Document No. 2002-146581 (attached hereto as Exhibit "1"), subject "to all encumbrances noted on said Exhibit 'A'" to the Limited Warranty Deed. Exhibit "A" to the Limited Warranty Deed, at page 61, makes the conveyance expressly subject to the "Declaration Of Covenants, Conditions, Easements, Reservations And Restrictions" dated August 21, 2002, recorded as Document No. 2002-146579 ("Declaration") (attached hereto as Exhibit "2"), which "includes, but is not limited to, . . . matters related to rights and easements for . . . water." The Declaration includes a "Water Reservation" which states: "For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns all water and water rights (surface and ground water) within or appurtenant to the Property." Id. art. II(d) (emphasis added). This reservation "shall run and pass with each and every portion of the Property and shall be binding upon Purchaser, its successive owners and assigns . . . . whether or not any reference to this Declaration is contained in the instrument by which such person or entity acquired an interest in the Property." Id. art. X(a); see also id. recitals D-F. This reservation had the effect of extinguishing appurtenant rights in the land, which was then subdivided, developed and sold as the WCE subdivision.

Moreover, Community Groups and OHA note that the applications' supporting documentation for LCA 4452, RP 7302, a large grant to H. Kalama, which accounts for many of the appurtenant rights claims, contains no evidence of any cultivation and water use on those lands at the time of the Māhele, nor are the Community Groups and OHA aware of any such evidence. See Peck v. Bailey, 8 Haw. 658, 661 (1867) (maintaining that absent "immemorial usage" of water, land grants "certainly could take nothing by having been a portion of the Ahupuaa").

The Community Groups and OHA reserve the right to raise further objections if the objections above are not sufficient to refute the applications' appurtenant rights claims.

Approval of these applications would adversely affect the rights and interests of the Community Groups and their members and supporters and OHA and its beneficiaries in Nā Wai ʻEhā surface water because it would erroneously recognize priority claims of appurtenant rights to such water without legal and factual basis and contrary to established law, to the prejudice of the opposing rights and interests of the Community Groups and their members and supporters and OHA and its beneficiaries.

R-415 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146581

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX: $10200.00

65 3/9 Z6

LAND COURT SYSTEM | REGULAR SYSTEM

Return by Mail (X) Pickup ( ) To:

TGOH: 200107798-S
TGES: A1-204-1649
MARK RENSCHEN

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

Tax Key: (2) 3-3-002-001
(Lot A-2)

Total No. of Pages: 105

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address is P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee as a tenant in severalty, all of Grantor's

EXHIBIT 1

right, title and interest in and to the real property described in Exhibit "A" attached hereto and by this reference incorporated herein (the "Property"); subject, however, to all encumbrances noted on said Exhibit "A".

TO HAVE AND TO HOLD the same, together with any improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging or appertaining unto the Grantee, the heirs, representatives, administrators, successors and assigns of the Grantee, forever.

AND the Grantor covenants with the Grantee that the former is now seised in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances made by persons claiming by, through or under the Grantor, except the liens and encumbrances hereinbefore mentioned, and except also the liens and encumbrances created or permitted by the Grantee after the date hereof; and that the Grantor will WARRANT and DEFEND the Grantee against the lawful claims and demands of all persons claiming by, through or under the Grantor, except as aforesaid.

The terms "Grantor" and "Grantee", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine or feminine, or neuter, the singular or plural number, individuals or corporations, and their and each of their respective successors, heirs, personal representatives,

and permitted assigns, according to the context hereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

This instrument may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Grantor and Grantee have executed these presents on this 21st day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By _____
Avery B. Chumbley
Its President

By _____
J. Alan Kugle
Its Chairman of the Board

Grantor

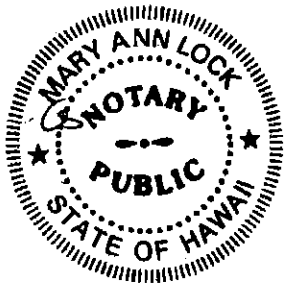
CGM, LLC

By _____
Brian A. Anderson
Its Manager

26158W-23/jmt/8/07/02
IMANAGEDB:429378.3

STATE OF HAWAII)
City &) SS.
COUNTY OF HONOLULU)

On this 19th day of August, 2002, before me personally appeared Avery B. Chumbley and J. Alan Kugle, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

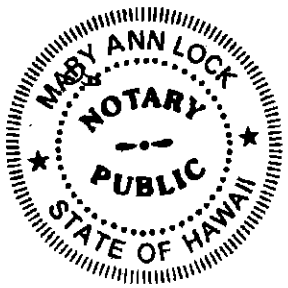


Print Name: Mary Ann Lock
Notary Public, State of Hawaii.

My commission expires: 5/30/04

STATE OF HAWAII)
City &) SS.
COUNTY OF HONOLULU)

On this 19th day of August, 2002, before me personally appeared BRIAN A. ANDERSON, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.



Print Name: Mary Ann Lock
Notary Public, State of Hawaii.

My commission expires: 5/30/04

IAO VALLEY LARGE-LOT SUBDIVISION
DESCRIPTION OF LOT A-2

Land situated on the westerly side of Kahekili Highway at Wailuku, Maui, Hawaii

Being all of R.P. 7774, L.C. Aw. 3335 to Naonohi; R.P. 6101, L.C. Aw. 3388 to Paiwi; R.P. 6102, L.C. Aw. 3294-B: 2 to Moomooiki; R.P. 5289, L.C. Aw. 3488 to Kaawa; R.P. 5366, L.C. Aw. 377 to John Pillitier; R.P. 7432, L.C. Aw. 3498 to Kaupe; R.P. 6102, L.C. Aw. 3294-B:1:M:1 to Moomooiki; R.P. 7790, L.C. Aw. 2495: 1, 2, 3, and 4 to Kaiaholokuaau; R.P. 5376, L.C. Aw. 406:1 to Napela; L.C. Aw. 3292 to Mua; R.P. 997, L.C. Aw. 453:2 to Kuihelani; R.P. 5154, L.C. Aw. 3275-E to Kaleo; R.P. 6630, L.C. Aw. 4461:1 and 2 to Kawaa; R.P. 2009, L.C. Aw. 2436: 1 and 3 to Kahaiki; R.P. 5973, L.C. Aw. 2502:1 to Ihumai; and portions of R.P. 6298-6458, L.C. Aw. 3225 to Opunui; R.P. 6888, L.C. Aw. 3237 to Hewahewa; R.P. 3652, L.C. Aw. 2503:2 to Ohule; R.P. 2009, L.C. Aw. 2436:2 to Kahaiki; R.P. 6529 and 6437, L.C. Aw. 2533:1 to Malaihi; R.P. 997, L.C. Aw. 453:1 to Kuihelani; R.P. 6397, L.C. Aw. 2435 to Kahooke; R.P. 6065, L.C. Aw. 3387 to Pooliilii; R.P. 4424 and 4622, L.C. Aw. 3330 to Lonohiwa; R.P. 7302, L.C. Aw. 4452:9 to H. Kalama; R.P. 6102, L.C. Aw. 3294-B:1:M:2 to Moomooiki; R.P. 5973, L.C. Aw. 2502:3 to Ihumai; Grant 3343 to Claus Spreckels; Kamehameha IV Deed to C. Brewer and Others; and Poalimas.

Beginning at a point on the northeasterly corner of this lot, the coordinates of said point of beginning referred to Government Survey Triangulation "LUKE" being 8,569.44 feet North and 2,250.54 feet West and running by azimuths measured clockwise from True South:

1. 319° 00' 81.39 feet along the remainder of Kamehameha IV Deed to C. Brewer and Others, being also along the westerly side of Lot 12 of Old Waihee Ditch Right-of-Way (formerly known as Spreckels Ditch) to a point;

2. Thence along same on a curve to the right, having a radius of 222.80 feet, the chord azimuth and distance being: 328° 55' 76.74 feet to a point;

3. 338° 50' 186.07 feet along same to a point;

25. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (AGRICULTURAL USE)

DATED : July 26, 2002
RECORDED : Document No. 2002-133340
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

26. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (LARGE LOTS)

DATED : July 26, 2002
RECORDED : Document No. 2002-133341
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

27. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DEFERRAL OF SUBDIVISION REQUIREMENTS AGREEMENT

DATED : July 29, 2002
RECORDED : Document No. 2002-133862
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the DEPARTMENT OF WATER SUPPLY OF THE COUNTY OF MAUI

28. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS

DATED : Aug 21, 2002
RECORDED : Document No. 2002-146679 ,

The foregoing includes, but is not limited to, matters relating to rights and easements for irrigation ditches, reservoirs, water facilities, drainage, water, farming, access, blanket easements, waterline, etc.

R-413 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146579

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES

45 1/9 Z6

Return by Mail (X) Pickup ( ) To:

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

TGOH: 200107798 - S
TGES: A1-204-1649
MARK RENSCHEN

Total Page: 45

Tax Map Key: (2) 3-3-002:01 (portion)

DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS

EXHIBIT 2

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Page

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(continued)

Page

LAND COURT SYSTEM REGULAR SYSTEM

Return by Mail ( ) Pickup ( ) To:

(II) 3-3-002:01 (portion)

DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS

THIS DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS ("Declaration") is made as of August 21, 2002 (the "Effective Date"), by and between WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation ("Wailuku"), whose address is 255 E. Waiko Road, Wailuku, Hawaii 96793, and CGM, LLC, a Hawaii limited liability company ("Purchaser"), whose address is P.O. Box 1237, Kamuela, Hawaii 96743.

RECITALS:

A. Wailuku and CGM a Hawaii limited liability company ("Purchaser") are parties to that certain Real Estate Purchase and Sale Agreement dated November 27, 2001 (as amended, the "Purchase Agreement"), by and between Wailuku as Seller and Purchaser as Purchaser, pursuant to which Purchaser agreed to purchase from Wailuku and Wailuku agreed to convey to Purchaser, the real properties described in Exhibit "A" attached to this Declaration (collectively the "Property").

B. The Purchase Agreement was amended as follows:

i. First Amendment to Real Estate Purchase and Sale Agreement effective February 25, 2002;
ii. Second Amendment to Real Estate Purchase and Sale Agreement effective March 11, 2002;
iii. Third Amendment to Real Estate Purchase and Sale Agreement effective March 25, 2002; and
iv. Fourth Amendment to Real Estate Purchase and Sale Agreement effective as of April 9, 2002.

C. Pursuant to that certain Assignment and Assumption of Real Estate Purchase Agreement dated July 19, 2002, Puluwai did assign, and Purchaser did assume, all of Puluwai's right title and interest to the Purchase Agreement.

D. The Property is located adjacent to and in the vicinity of lands owned by Wailuku or in which Wailuku has interest ("Wailuku Land"). Wailuku and Purchaser have agreed that certain restrictions shall be placed upon the use and development of the Property by Purchaser and Purchaser's successors and assigns.

E. Purchaser has agreed with Wailuku that the Property will be held by Purchaser subject to and in accordance with certain covenants, conditions, easements, reservations and restrictions contained in this Declaration, and Wailuku agreed to convey the Property to Purchaser on the basis of Purchaser's agreement in compliance with such covenants, conditions, easements, reservations and restrictions.

F. Purchaser and Wailuku have agreed that this Declaration shall be executed and delivered by Wailuku and Purchaser at the closing of the conveyance of the Property from Wailuku to Purchaser and that this Declaration shall be recorded prior to any other lien or encumbrance arising out of such conveyance.

ARTICLE I

AGREEMENT AND DECLARATION

Wailuku and Purchaser hereby agree and declare that the Property, including all improvements constructed or to be constructed thereon, from the Effective Date throughout the Term (as defined herein) of this Declaration, shall be held, sold, conveyed, encumbered, occupied, used and improved subject to the provisions of this Declaration.

ARTICLE II

RESERVATIONS OF RIGHTS AND EASEMENTS

For the benefit of Wailuku and Wailuku's Land, Wailuku shall have, and there is hereby reserved and granted to Wailuku, its successors and assigns, the rights and easements described in this Article II through Article VI.

(a) Irrigation Ditches, Reservoirs, Water Facilities. Purchaser acknowledges that the Property is encumbered by three ditches, located approximately as shown on the map attached as Exhibit "B" to this Declaration, and made a part hereof by reference, and identified thereon as "Waihee Ditch Irrigation Easement W-1", "Irrigation Drop Ditch W-4", and "Reservoir 37 Ditch Irrigation Easement W-2" shown approximately on Exhibit "B" to this Declaration (collectively, the "Irrigation Ditches").

(b) Irrigation Ditch Reservation. For the benefit of Wailuku, and Wailuku's Lands, Wailuku shall have, and there is hereby reserved and granted to Wailuku, its successors and assigns, perpetual easements for the use, operation, maintenance, repair, improvement, relocation and/or replacement of the Irrigation Ditches, and the right to use water therefrom, through, along and over the Property in the approximate locations of the Irrigation Ditches as set forth in Exhibit "B" attached hereto and made a part hereof, and together with such rights of way for ingress and egress as shall be reasonably necessary in connection herewith, and as further defined herein.

Purchaser further acknowledges that certain waterways, pipelines, systems, and related water transmission facilities, associated with the Irrigation Ditches ("Water Facilities") are located within the Ditch Easement Areas (defined below). For the benefit of Wailuku, its successors and assigns, and the Wailuku Land, Wailuku shall have and there is hereby reserved and granted to Wailuku, its successors and assigns, perpetual easement rights for use, operation, maintenance, repair, improvement and/or replacement of the Water Facilities, and the right to use water therefrom, together with the right of access thereto and thereon reasonably required or convenient for such purposes. Such easements and other rights shall affect and encumber such portions of the Property as designated as "Waihee Ditch Irrigation Easement W-1"; Irrigation Drop Ditch Easement W-4", "Irrigation Drop Ditch 37 as well as Irrigation Waterline Easement W-5, Kuleana Irrigation Line Easement W-3, as designated on Exhibit "B" ("Ditch Easement Areas") and shall include and be subject to the following terms and conditions.

(i) Purchaser shall not obstruct, divert or otherwise interfere with the full and free flowage of water within and through the Irrigation Ditches, and the Water Facilities, and Purchaser will not cause or allow any person or entity claiming by or through Purchaser, any discharge

therefrom or therein or to do other acts which may affect the free and full use thereof by Wailuku, its successors and assigns, and others entitled thereto;

(ii) Purchaser's withdrawal and use of water from the Irrigation Ditches and/or that certain ditch identified on the attached Exhibit "B" as the "Iao-Maniania Ditch" (withdrawal from the same shall be from Reservoir 45) shall be subject to the terms and conditions of an unrecorded Water Delivery Agreement to be executed on the Effective Date of this Declaration.

(iii) Any maintenance, repair, improvement and/or replacement of the Irrigation Ditches, or the Water Facilities required and performed by Wailuku for use thereof by Wailuku, shall be at the direction and expense of Wailuku, subject to contribution from Purchaser relating to use thereof by Purchaser, as shall be provided in the Water Delivery Agreement, and for damage or interference caused by or through Purchaser;

(iv) Wailuku may delegate or assign all or any portion of its rights hereunder, in all or any portion of the Irrigation Ditches, and the Water Facilities;

(v) Wailuku shall have no obligation to use, operate, maintain, repair, improve and/or replace all or any portion of the Irrigation Ditches, or the Water Facilities, except that Wailuku shall use, operate, maintain and repair the Irrigation Ditches, and the Water Facilities to the extent necessary to satisfy Wailuku's obligations to provide water to Purchaser under the Water Delivery Agreement.

(vi) Wailuku shall indemnify and hold harmless Purchaser against all loss, liability, claims and expenses directly relating to the exercise by Wailuku of its reserved rights relating to the Irrigation Ditches (except loss, liability, claims and/or expenses caused by the negligence, willful act or misconduct of Purchaser, or otherwise relating to the withdrawal and/or use of water from, or other use or occupancy of, the Irrigation Ditches by or through Purchaser).

(vii) The easement reserved in this Article II, Section b, in the Ditch Easement Area identified on Exhibit "B" as "Waihee Ditch Easement W-1" and Reservoir 37, Ditch Irrigation Easement W-2 shall be exclusive.

(viii) The easements reserved in this Article II, Section b, in the other Ditch Easement Areas shall be non-exclusive; provided, however, that Purchaser shall not use the water from nor construct any improvement in any Ditch Easement Area without the prior written consent of Wailuku.

(c) Drainage Easement. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns a perpetual easement over through, and across the Property, and appurtenant to Wailuku's Land, or appropriate portions thereof, as necessary to accommodate drainage from or across Wailuku's Land in its currently existing and/or natural pattern and flow to its natural place of entry upon and through the Property. Purchaser assumes all liability for damage to persons or property caused by or resulting from the flow of drainage from, over, through or across the Property, from Wailuku's Land in their currently existing and/or natural pattern and flow to its place of entry upon the Property or any interference therewith, and agrees to and shall indemnify, defend and hold harmless Wailuku, its successors and assigns from and against any liability, claim, demand, action or suit arising out of or in connection with such drainage (except loss, liability, claims and/or expenses caused by the negligence, willful act or misconduct of Wailuku).

(d) Water Reservation. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns all water and water rights (surface and ground water) within or appurtenant to the Property, provided, however, that in the exercise of such rights, Wailuku, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the Property or any improvements thereon (with the exception of the maintenance of the Irrigation Ditches as herein defined) or take other action that unreasonably interferes with the development or use of the Property for residential purposes. The right to water herein includes the right to acquire all of the ground water which is subterranean of the Property; provided, however, that any well field which is developed by Wailuku, its successors or assigns, to capture such ground water shall not be located on the Property.

(e) Farming Reservation. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns, as appurtenant to the lands which are located adjacent or in the vicinity of the Property and which are now owned or used or hereafter acquired and used by Wailuku, its successors and assigns (collectively the "Land"), the unrestricted right to engage in any type of farming operation, including, but not limited to, open burning, percolating, evaporating, fertilizing, milling, generating power, water diversion, plowing, grading, storing, hauling, spraying pesticides, irrigating, crop dusting, and all other activities incidental to the planting, farming, harvesting and processing of agricultural products and by-products, which operations may from time to time cause noxious emissions such as noise, smoke, dust, light, heat, vapor, odor, chemicals, vibration, and other nuisances to be discharged or emitted over and upon the Property. Purchaser, for itself, and any person or entity claiming through it and their respective successors and assigns, further acknowledges and agrees that Wailuku, its successors and assigns, shall not be held liable for any nuisance, personal injury, illness or other loss, damage or claim which is caused by or related to such operation and/or use of the Land.

Declaration and the Purchase Agreement, the provisions of this Declaration shall control.

Wailuku and Purchaser have executed this Declaration as of the Effective Date.

WAILUKU AGRIBUSINESS CO., INC.,
a Hawaii corporation

By: _____
Name: Avery B. Chumbley
Title: President

By: _____
Name: J. Alan Kugle
Title: Chairman of the Board

CGM, LLC, a Hawaii limited liability Company

By: _____
Name: Brian A. Anderson
Title: Manager

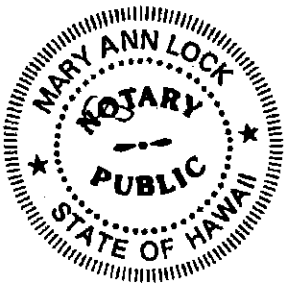
STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 19th day of August, 2002, before me appeared **AVERY B. CHUMBLEY** to me personally known, who, being by me duly sworn, did say that he is the President of **WAILUKU AGRIBUSINESS CO., INC.**, a Hawaii corporation, and executed the foregoing instrument as his free act and deed, and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

Notary Public, State of Hawaii.
Print Name: Mary Ann Lock
My commission expires: 5/30/04

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

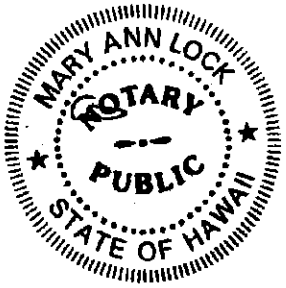
On this 19th day of August, 2002, before me appeared **J. ALAN KUGLE**, to me personally known, who, being by me duly sworn, did say that he is the Chairman of the Board of **WAILUKU AGRIBUSINESS CO., INC.**, a Hawaii corporation, and executed the foregoing instrument as his free act and deed, and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.



Notary Public, State of Hawaii.
Print Name: Mary Ann Lock
My commission expires: 5/30/04

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 19th day of August, 2002, before me appeared **BRIAN A. ANDERSON** to me personally known, who, being by me duly sworn, did say that he is the Manager of **CGM, LLC**, a Hawaii limited liability company, and executed the foregoing instrument as his free act and deed, and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.



Notary Public, State of Hawaii.
Print Name: Mary Ann Lock
My commission expires: 5/4/04

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this date, a true and correct copy of the foregoing document was duly served via first class U.S. mail, postage prepaid:

Wailuku Country Estates Community Ass'n
& Irrigation Co., et al.
c/o Maui Land Broker & Property Mgm't, Inc.
P.O. Box 1673
Wailuku, HI 96793

DATED: Honolulu, Hawai`i, September 19, 2012.

EARTHJUSTICE
223 South King Street, Suite 400
Honolulu, Hawai`i 96813

By: _____
ISAAC H. MORIWAKE
Attorneys for:
HUI O NÄ WAI 'EHÄ & MAUI
TOMORROW FOUNDATION, INC.

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

OBJECTION TO AN APPURTENANT RIGHTS CLAIM

Form APRT-OBJ

For Official Use Only:

2012 SEP 21 PM 1:23

Instructions: Complete one (1) "Objection to an Appurtenant Rights Claim Form" (Form APRT-OBJ) for each Appurtenant rights claim to which you object.

- Any person or entity with a legal or material interest in the water may file written objections. Persons filing objections must serve copies of the written objection and all related documentation / evidence 1) on the applicant; and 2) on the Commission on Water Resource Management, P.O. Box 621, Honolulu, HI 96809.
- Appurtenant rights claimants will have an opportunity to submit a rebuttal to the written objections.
- For questions, contact the Commission's Stream Protection and Management Branch at (808) 587-0234.

A. OBJECTOR

NAME/COMPANY	Contact Person
Wailuku Water Company, LLC	Avery B. Chumbley

Mailing Address
P. O . Box 2790, Wailuku, Hawaii 96793

Phone	Fax	E-mail Address
808/244-7079	808/242-7968	abc@aloha.net

Explain your legal or material interest in objecting to this Appurtenant rights claim.
Wailuku Water Company, LLC is the owner and operator of the private distribution system through which the Applicant receives surface water. Determination of Applicant's claim of an appurtenant right to water that is distributed through Wailuku Water Company, LLC's distribution system may impact the operation of the distribution system and will affect the property rights of Wailuku Water Company, LLC.

B. APPLICANT (As listed in the Public Notice)

NAME/COMPANY
Wailuku Country Estates Comm. Assn.
c/o Maui Land Broker & Property Mgt.

Mailing Address
P.O. Box 1673
Wailuku, HI 96793

Identify all Tax Map Keys (TMK) rela
SWUPA# 2196
TMK: (2)3-3-017-VAR

se Permit Application No.

C. REASON(S) FOR OBJECTION

Select all that apply below. The objector has the burden of proof on all objections.

- ☐ The parcel was not used as a residence or for cultivation at the time of the Mahele.
- ☒ The Appurtenant right to water has been reserved or extinguished.
- ☒ There are materially false statements or representations in the claimant's application for Appurtenant rights.

Summarize carefully your objection and how approval of this Application would adversely affect your legal interests (Use separate page if needed):

The claim must be reviewed in light of the following:
1-Whether the claim properly characterized the source of the water for which the claim is asserted;
2-Whether the rights claimed are subject to Public Utilities Commission Regulation; and
3-Whether the rights have been extinguished.
See the attached sheets which expand on the objections and provide documentary support for the objection(s).

Supporting documentation / evidence must be provided on separate sheets.

D. OBJECTOR SIGNATURE

☐ *By checking this box (for electronic submissions) or signing below (for hardcopy submissions) indicates that the signatory understands and swears that the information provided is accurate and true to the best of their knowledge.*

Print Name:	Signature:	Date:
Avery B. Chumbley, Authorized Representative		September 18, 2012

Other 36506

FILE ID: SWUP. 2196
DOC ID: 0134

EXHIBIT "B"

Whether the Claim Properly Characterized The Source of Water

The claim contains an ambiguity or possibly a mischaracterization on the water source for the appurtenant right.

A claimant to an appurtenant right must establish that the surface water was taken directly from the stream, or from an auwai that was connected to a stream, at the time of the original conversion of the property to fee simple title.

Claims based on surface water taken from a privately owned distribution system and not from a stream, especially a distribution system that did not exist at the time of the original fee simple conversion, does not establish an appurtenant right to surface water delivered through a privately owned distribution system.

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights derives from a diversion that existed at the time of the original fee simple conversion from a stream or an auwai that was then connected to a stream.

In addition, factual and legal questions exist as to whether applicant is required to hold a stream diversion works permit and/or a stream channel alteration permit and whether there is a right to use a privately owned distribution system if the surface water is being diverted through that privately owned distribution system.

Rights Claimed May be Subject to Public Utilities Commission Regulation

The claim asserts a right to use surface water that reaches the claimant's property through a distribution system owned by Wailuku Water Company, LLC

The ability of Wailuku Water Company, LLC to deliver water through that distribution system is the subject of a proceeding pending before the State of Hawaii Public Utilities Commission ("PUC").

Any determination by the Commission on Water Resource Management on claims in which the surface water is delivered through use of the distribution system owned by Wailuku Water Company, LLC must include a condition that the delivery of the surface water is subject to applicable terms, conditions, rules, regulations, decisions, orders, tariffs, and actions of the PUC (collectively "PUC Regulation")

Accordingly, factual and legal questions exist on whether the subject claim for appurtenant rights may be subject to PUC Regulation.

Were Appurtenant Water Rights Extinguished

Appurtenant rights to surface water are created at the time the original conversion to fee simple land. While an appurtenant right to surface water cannot be transferred separately and apart from land to which it attaches, the right can be extinguished.

The appurtenant right to surface water is extinguished if the Grantor of the property transfers the property and either reserves the right to the Grantor or transfers the property without transferring the appurtenant right.

The conveyance document in the chain of title to the subject property contain language to the following effect:

> EXCEPTING, RESERVING AND GRANTING, however, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property, including the right to develop and utilize the same; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon.

Accordingly, factual and legal questions exist as to whether an appurtenant right has been extinguished.

R-415 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146581

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX: $10200.00

65 3/9 Z6

LAND COURT SYSTEM | REGULAR SYSTEM

Return by Mail (X) Pickup ( ) To:

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

TGOH: 200107798 -S
TGES: A1-204-1649
MARK RENSCHEN

Tax Key: (2) 3-3-002-001 (Lot A-2)

Total No. of Pages: 105

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address is P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Grantee as a tenant in severalty, all of Grantor's

and permitted assigns, according to the context hereof. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall for all purposes be joint and several.

This instrument may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Grantor and Grantee have executed these presents on this 21st day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By _____
Avery B. Chumbley
Its President

By _____
J. Alan Kugle
Its Chairman of the Board

Grantor

CGM, LLC

By _____
Brian A. Anderson
Its Manager

25. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (AGRICULTURAL USE)

DATED : July 26, 2002
RECORDED : Document No. 2002-133340
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

26. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : SUBDIVISION AGREEMENT (LARGE LOTS)

DATED : July 26, 2002
RECORDED : Document No. 2002-133341
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the COUNTY OF MAUI

27. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DEFERRAL OF SUBDIVISION REQUIREMENTS AGREEMENT

DATED : July 29, 2002
RECORDED : Document No. 2002-133862
PARTIES : WAILUKU AGRIBUSINESS CO., INC., and the DEPARTMENT OF WATER SUPPLY OF THE COUNTY OF MAUI

28. The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the following:

INSTRUMENT : DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS

DATED : Aug 21, 2002
RECORDED : Document No. 2002-146579

The foregoing includes, but is not limited to, matters relating to rights and easements for irrigation ditches, reservoirs, water facilities, drainage, water, farming, access, blanket easements, waterline, etc.

R-413 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146579

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES

45 1/9 Z6

Return by Mail (X) Pickup ( ) To:

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

TGOH: 200107798 - S
TGES: A1-204-1649
MARK RENSCHEN

Total Page: 45

Tax Map Key: (2) 3-3-002:01 (portion)

DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS, RESERVATIONS AND RESTRICTIONS

(c) Drainage Easement. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns a perpetual easement over through, and across the Property, and appurtenant to Wailuku's Land, or appropriate portions thereof, as necessary to accommodate drainage from or across Wailuku's Land in its currently existing and/or natural pattern and flow to its natural place of entry upon and through the Property. Purchaser assumes all liability for damage to persons or property caused by or resulting from the flow of drainage from, over, through or across the Property, from Wailuku's Land in their currently existing and/or natural pattern and flow to its place of entry upon the Property or any interference therewith, and agrees to and shall indemnify, defend and hold harmless Wailuku, its successors and assigns from and against any liability, claim, demand, action or suit arising out of or in connection with such drainage (except loss, liability, claims and/or expenses caused by the negligence, willful act or misconduct of Wailuku).

(d) Water Reservation. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns all water and water rights (surface and ground water) within or appurtenant to the Property, provided, however, that in the exercise of such rights, Wailuku, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the Property or any improvements thereon (with the exception of the maintenance of the Irrigation Ditches as herein defined) or take other action that unreasonably interferes with the development or use of the Property for residential purposes. The right to water herein includes the right to acquire all of the ground water which is subterranean of the Property; provided, however, that any well field which is developed by Wailuku, its successors or assigns, to capture such ground water shall not be located on the Property.

(e) Farming Reservation. For the benefit of Wailuku, its successors and assigns, there shall be reserved unto Wailuku, its successors and assigns, as appurtenant to the lands which are located adjacent or in the vicinity of the Property and which are now owned or used or hereafter acquired and used by Wailuku, its successors and assigns (collectively the "Land"), the unrestricted right to engage in any type of farming operation, including, but not limited to, open burning, percolating, evaporating, fertilizing, milling, generating power, water diversion, plowing, grading, storing, hauling, spraying pesticides, irrigating, crop dusting, and all other activities incidental to the planting, farming, harvesting and processing of agricultural products and by-products, which operations may from time to time cause noxious emissions such as noise, smoke, dust, light, heat, vapor, odor, chemicals, vibration, and other nuisances to be discharged or emitted over and upon the Property. Purchaser, for itself, and any person or entity claiming through it and their respective successors and assigns, further acknowledges and agrees that Wailuku, its successors and assigns, shall not be held liable for any nuisance, personal injury, illness or other loss, damage or claim which is caused by or related to such operation and/or use of the Land.

Declaration and the Purchase Agreement, the provisions of this Declaration shall control.

Wailuku and Purchaser have executed this Declaration as of the Effective Date.

WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation

By: _____
Name: Avery B. Chumbley
Title: President

By: _____
Name: J. Alan Kugle
Title: Chairman of the Board

CGM, LLC, a Hawaii limited liability Company

By: _____
Name: Brian A. Anderson
Title: Manager

R-416 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146582

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX: $1.00

12 4/9 Z6

LAND COURT SYSTEM | REGULAR SYSTEM

Return by Mail (X) Pickup ( ) To:

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

Accom —
TGOH: 200107798 -S
TGES: A1-204-1649
MARK RENSCHEN

Tax Key: (2) 3-3-02:01 (portions) Total No. of Pages: 12
(Additional Parcels)

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address is P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby give, grant,

convey, release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of the Grantor's right, title and interest in and to the real property described in Exhibits "A-1" through "A-3" attached hereto and by this reference incorporated herein; subject, however, to all encumbrances noted on said Exhibits "A-1" through "A-3".

EXCEPTING AND RESERVING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon or take other action that unreasonably interferes with the development or use of the Property for residential purposes.

TO HAVE AND TO HOLD the same, together with any improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging or appertaining unto the Grantee, forever.

It is understood and agreed that the term "property" shall be deemed to mean and include the property specifically described in Exhibits "A-1" through "A-3", all buildings and improvements thereon (including any personal property described

in Exhibits "A-1" through "A-3") and all rights, easements, privileges and appurtenances in connection therewith, that the terms "Grantor" and "Grantee", as and when used hereinabove or hereinbelow shall mean and include the masculine or feminine, the singular or plural number, individuals, trustees, or corporations, and their and each of their respective successors in interest, heirs, representatives, administrators and permitted assigns, according to the context thereof, and the use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall be and for all purposes deemed to be joint and several.

IN WITNESS WHEREOF, the Grantor has executed this instrument as of the 21st day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By _____
Avery B. Chumbley
Its President

By _____
J. Alan Kugle
Its Chairman of the Board

Grantor

R-417 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
AUG 21, 2002 08:01 AM
Doc No(s) 2002-146583

/s/ CARL T. WATANABE
ACTING
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX: $1.00

26 5/9 Z6

LAND COURT SYSTEM | REGULAR SYSTEM

Return by Mail (X) Pickup ( ) To:

CGM, LLC
P O BOX 1237
KAMUELA HI 96743

Accom
TGOH: 200107798 -S
TGES: A1-204-1649
MARK RENSCHEN

Tax Key: (2) 3-3-02:01 (portions) Total No. of Pages: 26
(Roadway Lots)

QUITCLAIM DEED

KNOW ALL MEN BY THESE PRESENTS:

That WAILUKU AGRIBUSINESS CO., INC., a Hawaii corporation, whose address is 255 East Waiko Road, Wailuku, Hawaii 96793, hereinafter called the "Grantor," for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration to Grantor paid by CGM, LLC, a Hawaii limited liability company, whose address P. O. Box 1237, Kamuela, Hawaii 96743, hereinafter called the "Grantee," the receipt whereof is hereby acknowledged, does hereby give, grant, convey,

release and forever quitclaim unto the said Grantee, as a tenant in severalty, all of the Grantor's right, title and interest in and to the real property described in Exhibits "A-3" through "A-12" attached hereto and by this reference incorporated herein; subject, however, to all encumbrances noted on said Exhibits "A-3" through "A-12".

EXCEPTING AND RESERVING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and ground water) within or appurtenant to the Property; provided, however, that in the exercise of said rights, Grantor, its successors and assigns, shall not have the right to drill for water or otherwise disturb the surface of the land or any improvements thereon or take other action that unreasonably interferes with the development or use of the Property for residential purposes.

TO HAVE AND TO HOLD the same, together with any improvements thereon and the rights, easements, privileges, and appurtenances thereunto belonging or appertaining unto the Grantee, forever.

It is understood and agreed that the term "property" shall be deemed to mean and include the property specifically described in Exhibits "A-3" through "A-12", all buildings and improvements thereon (including any personal property described

in Exhibits "A-3" through "A-12") and all rights, easements, privileges and appurtenances in connection therewith, that the terms "Grantor" and "Grantee", as and when used hereinabove or hereinbelow shall mean and include the masculine or feminine, the singular or plural number, individuals, trustees, or corporations, and their and each of their respective successors in interest, heirs, representatives, administrators and permitted assigns, according to the context thereof, and the use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. If these presents shall be signed by two or more Grantors or by two or more Grantees, all covenants of such parties shall be and for all purposes deemed to be joint and several.

IN WITNESS WHEREOF, the Grantor has executed this instrument as of the 21st day of August, 2002.

WAILUKU AGRIBUSINESS CO., INC.

By _____
Avery B. Chumbley
Its President

By _____
J. Alan Kugle
Its Chairman of the Board

Grantor

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01
	)	HUI O NĀ WAI ‘EHĀ’S, MAUI TOMORROW FOUNDATION, INC.’S, AND OFFICE OF HAWAIIAN AFFAIRS’ JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; CERTIFICATE OF SERVICE

HUI O NĀ WAI ‘EHĀ’S, MAUI TOMORROW FOUNDATION, INC.’S, AND OFFICE OF HAWAIIAN AFFAIRS’ JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

AND

CERTIFICATE OF SERVICE

Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys at Law
A Law Corporation

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

Attorneys for Intervenor:
OFFICE OF HAWAIIAN AFFAIRS

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

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

EXHIBIT "C"

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAIʻI

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ʻEhā Surface Water Management Areas of Waiheʻe, Waiehu, ʻĪao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01
	)	HUI O NĀ WAI ʻEHĀʼS, MAUI TOMORROW FOUNDATION, INC.ʼS, AND OFFICE OF HAWAIIAN AFFAIRS' JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

HUI O NĀ WAI ʻEHĀʼS, MAUI TOMORROW FOUNDATION, INC.ʼS, AND OFFICE OF HAWAIIAN AFFAIRS' JOINT PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Pursuant to Minute Order No. 9, dated November 29, 2016, as last amended by Minute Order No. 11, dated February 10, 2017, Petitioner-Intervenor Hui o Nā Wai ʻEhā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups") and Intervenor Office of Hawaiian Affairs ("OHA") hereby respectfully submit their Joint Proposed Findings of Fact, Conclusions of Law, and Decision and Order in this consolidated contested case hearing.

In this case, numerous individual community members filed SWUPAs and supporting materials and participated in the contested case hearing on a *pro se* basis. Many of these *pro se* community member applicants took up the invitation by the University of Hawaiʻi at Mānoa William S. Richardson School of Law's Environmental Law Clinic offering assistance in preparing the applicants' filings. Because these clinic-assisted applicants follow a consistent format and standard, the Community Groups and OHA address them together as a group for organization purposes in these proposed FOFs. *See* Proposed Findings of Fact, Part VI. To avoid any confusion regarding attribution or representation, the Community Groups and OHA make clear that they are submitting their Joint Proposed FOFs, COLs, and D&O on their own

behalf, to inform and assist the Hearings Officer's and Commission's decisionmaking, and *not at the behest or on behalf of any of the individual applicants*.

The Community Groups and OHA provide a full set of recommendations regarding the determination of interim instream flow standards ("IIFSs"), including key proposed provisions regarding implementation and monitoring. *See* Proposed Conclusions of Law, Part IV. The Community Groups and OHA, however, do not provide recommendations regarding determinations for each and every water use permit application ("SWUPA") in this case, but rather provide their recommendations on certain SWUPAs and reserve their position on the others.

The Community Groups and OHA thank the Commission for this opportunity to submit these proposals, and the Hearings Officer for his long-running years of work on this important case.

DATED: Honolulu, Hawai'i, February 17, 2017.

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I. PROCEDURAL BACKGROUND SUMMARY

A-1. The background procedural history of the previous Nā Wai ʻEhā proceedings is summarized in the Commission's Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order ("D&O") filed on June 10, 2010 ("2010 Decision") and Order Adopting: 1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and 2) Stipulation re Mediator's Report of Joint Proposed FOFs, COLs, D&O, dated April 17, 2014 ("2014 Order") and incorporated by reference herein. *See* 2010 Decision FOFs 1-33, 2014 Order FOFs 1-13. This history extends as far back as 2001, when the petition to designate the ʻĪao and Waiheʻe Aquifers as ground water management areas was filed. The original IIFS proceeding began on June 25, 2004 with the filing of the IIFS petition; the 24-day contested case hearing concluded on October 14, 2008; Hearings Officer-Commissioner Lawrence Miike submitted his proposed decision on April 9, 2009; and the Commission majority issued the 2010 Decision, with the Hearings Officer-Commissioner dissenting, on June 10, 2010.

A-2. On appeal, the Hawaiʻi Supreme Court issued its decision vacating and remanding the 2010 Decision on August 15, 2012. In the remand IIFS proceeding, after completing pre-hearing briefing, the parties entered into mediation, which led to the Commission issuing the 2014 Order on April 17, 2014.

A-3. While the original IIFS proceeding was ongoing, the Commission, in response to the Community Groups' petition, designated Nā Wai ʻEhā as a surface water management area on March 13, 2008, based on the statutory criterion that "serious disputes respecting the use of surface water resources are occurring." *See* Haw. Rev. Stat. § 174C-45(3). This triggered the

water use permitting process that is incorporated in this combined contested case hearing. The effective date of designation was April 30, 2008, when the public notice was published, and the deadline to file existing use permit applications was one year later, April 30, 2009.

A-4. As of the April 30, 2009 "existing use" application deadline, the Commission received 125 SWUPAs, 115 of which were accepted as complete. As of September 27, 2011, 72 SWUPAs for "new uses" were filed, 51 of which were requests for additional water by applicants who had filed existing use SWUPAs. None of the new use SWUPAs were formally accepted.

A-5. In April to June 2009, the Commission served and published a series of six notices and requests for comments on the existing use SWUPAs, dividing the SWUPAs among the six installments. Comments and objections were filed from May to June 2009, within the prescribed deadlines in each notice. Responses to the comments and objections were also filed.

A-6. On December 1 and 2, 2010, the Commission held the initial public hearing on Maui for the SWUPAs for existing uses. The public hearing was left open and continued on a yearly basis until it was closed on October 14, 2015.

A-7. On September 27, 2011, the Commission approved a three-step process for determining appurtenant water rights in Nā Wai ʻEhā: (1) notice to potential claimants of the Commission's intent to address appurtenant rights claims as part of the permitting process; (2) determination of whether the claimant's land has appurtenant rights; and (3) quantification of the amount of water for the appurtenant right. The procedural history related to step one and the "provisional recognition" of appurtenant rights under step two is summarized in the Hearings Officer's Findings and Recommendations, dated October 14, 2014, as modified by the Hearing's Officer's Amended and Revised Findings and Recommendations, dated December 31, 2014

(Attachments A & B, respectively, to the Commission's Nā Wai ʻEhā Provisional Order on Claims that Particular Parcels Have Appurtenant Rights, dated December 31, 2014), and is incorporated by reference herein.

A-8. Notices of appurtenant rights claims were published in November 1 and 8, 2011, August 29 and September 5, 2012, and March 4 and 11, 2013, and written objections were filed on September 19, 2012 and March 25, 2013.

A-9. On August 15, 2013, the Commission delegated authority to the Chairperson to appoint a hearings officer to hear appurtenant rights claims in Nā Wai ʻEhā and make recommendations to the Commission; Dr. Lawrence Miike was appointed. On August 21, 2013, the Commission determined that a contested case hearing is required for the provisional recognition of appurtenant rights in Nā Wai ʻEhā.

A-10. On August 30, 2014, the Hearings Officer issued initial Findings and Recommendations regarding provisional recognition of appurtenant rights, to which parties filed objections on October 9, 2014. The Commission held hearings on Maui on October 14 and November 12, 2014 regarding the proposed provisional recognition and objections.

A-11. On December 31, 2014, the Commission issued its Nā Wai ʻEhā Provisional Order on Claims that Particular Parcels Have Appurtenant Rights ("Provisional Order"). The Provisional Order adopted the Hearing's Officer's Findings and Recommendations and the attached Exhibit 7 summarizing the appurtenant rights information, as amended, and subject to later additional information and determinations. *Id.* at 2-3. The Provisional Order also set forth the steps in which the Commission would address subsequent issues. These included, first, addressing the question of "how much water a particular parcel has a claim to use," and the SWUPAs for "water on parcels involving Appurtenant rights and quantify[ing] the reasonable

beneficial use of water on these parcels." *Id.* at 2. Next, the Commission would consider "all other [SWUPAs] for existing uses." *Id.* Further, "after the full factual record is developed," the Commission would address legal arguments, including but not limited to the issue of "severance" of appurtenant rights under *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982). Provisional Order at 2.

A-12. On January 28, 2015, the Commission determined that a contested case hearing is required for the determination of surface water use permits in Nā Wai ʻEhā and designated authority to the Chairperson to appoint a hearings officer. Dr. Miike was appointed.

A-13. On June 25, 2015, the Hearings Officer issued Minute Order No. 1, which scheduled a prehearing conference for the contested case hearing on appurtenant rights and SWUPAs on August 11, 2015 and also previewed the contested case hearing process, categories of applications, and additional documentation necessary to address the final appurtenant rights and SWUPA determinations.

A-14. At the August 11, 2015 prehearing conference and in subsequent Minute Order No. 2 dated October 6, 2015, the Hearings Officer further discussed (1) the evidence applicants must provide for the quantification of appurtenant rights and the amounts of water requested for water use permits, (2) the procedures for submitting written testimonies and documents, and (3) the tentative start date of the contested case hearing in June 2016 and the date of the next pre-hearing conference on November 5, 2015.

A-15. After the November 5, 2015 prehearing conference, Minute Order No. 3 dated January 15, 2016 set the dates for the prehearing submissions and the start of the contested case hearing and also specified document, format, filing, and service requirements. Minute Order No.

4 dated March 7, 2016 amended the service requirements and the prehearing and hearing timetable in response to concerns regarding pro se applicants' hardships in serving all parties.

A-16. Opening submissions were filed on February 5, 2016, and Minute Order No. 3 extended the time to file until March 18, 2016. Responsive submissions were filed on April 29, 2016. Pursuant to an extension provided in Minute Order No. 5 dated May 16, 2016, Reply submissions were filed on May 31, 2016.

A-17. On March 9, 2016, the Community Groups filed a combined Petition to Amend Upward the Interim Instream Flow Standards for [Nā Wai ʻEhā] ("2016 IIFS Petition"); and Motion to Consolidate or Consider in Parallel with Case No. CCH-MA 15-01. The petition requested an increase in the IIFSs established under the 2014 Order, based on the newly announced pending closure of Hawaiian Commercial & Sugar ("HC&S") and historical precedents of other plantation closures including the *Waiāhole* case. It also requested the Commission to consolidate or consider or parallel the petition and the pending SWUPA proceeding.

A-18. After taking up the 2016 IIFS Petition on June 17, 2016 at its regularly scheduled meeting, the Commission, on July 7, 2016, issued an Order accepting the petition for further consideration and granting the motion to consolidate the petition with CCH-MA 15-01.

A-19. A prehearing conference was held on June 27, 2016 to discuss the organization and schedule of the contested case hearing. At the prehearing conference, the Hearing Officer expressed the expectation that each applicant appear to testify in person during the contested case hearing, unless otherwise excused.

A-20. The contested case hearing was held over 11 hearing days on July 11-13, 18-19, 22, 28-29, September 19-20, and October 14, 2016. During the hearing, a total of 96 witnesses testified, and 77 applicants appeared and presented testimony.

II. INSTREAM USES AND VALUES

A-21. In the original proceeding, the Hawai‘i Supreme Court observed: "as Hui/MT shows, the record contains substantial evidence that establishing mauka-to-makai flow in all the streams of Nā Wai ‘Ehā would support the public interest by fostering many of the statutorily-designated instream uses." *In re ‘Īao Ground Water Mgm’t Area*, 128 Hawai‘i 228, 251, 287 P.3d 129, 152 (2012) ("*Nā Wai ‘Ehā")* .

A-22. This case incorporates the record from the previous proceedings regarding the importance of instream flow—and, conversely, the harms of streamflow diversions—to public trust instream uses. The following summarizes the scientific and cultural foundations in the record, many of which this Commission previously established in findings and the Hawai‘i Supreme Court emphasized on appeal. *See* FOFs *infra*.

A-23. Overall, the Commission has designated each of Nā Wai ‘Ehā’s rivers and streams as "Candidate Streams for Protection," a distinction it conferred on only 44 out of the 376 perennial streams in Hawai‘i and only nine streams on Maui. The Commission also designated the Nā Wai ‘Ehā rivers and streams as "Blue Ribbon Resources," meaning that they featured the "few very best resources" in their respective resource areas. 2010 Decision, FOF 63.

at 163 (2012). MMK further claims that constructing distribution lines is not feasible, but provides no support and does not consider opportunities to share costs with other parties like HC&S and WWC, and to use already existing infrastructure such as the pipeline to Kahului.

C-157. MMK indicates that it has invested millions in its business, including in excess of $10 million to improve the fairways, bunkers, and irrigation system, in excess of $4 million to reconstruct the irrigation systems, and $7.3 million to improve the clubhouses and equipment, fixtures, and furniture. MMK's Open. Br. at 14-15. MMK provides no analysis of the feasibility of similar investments in alternative water sources.

E. Wailuku Country Estates (SWUPAs 2189, 2190N, 2195)

1. Appurtenant Rights Claims

C-158. By the Limited Warranty Deed recorded in the Bureau of Conveyances on August 21, 2002 as Document No. 2002-146581, CGM, LLC, the developer of the Wailuku Country Estates ("WCE") subdivision, bought the land from WACI: "subject, however, to all encumbrances noted on said Exhibit 'A'" to the deed. Community Groups' and OHA's Objections to Appurtenant Rights Claims of [WCE] ("Objections"), filed on September 19, 2012, Ex. 1 at 2. Exhibit "A" to the deed, at page 61, expressly subjects the conveyance to the Declaration of Covenants, Conditions, Easements, Reservations And Restrictions ("CCRs") dated August 21, 2002 and recorded as Document No. 2002-146579. The CCRs include a "Water Reservation" that states: "there shall be reserved unto [WACI], its successors and assigns all water and water rights (surface and ground water) within or appurtenant to the Property." Objections, Ex. 2 at 5, art. II(d). The parties to the transaction agreed that the CCRs "shall be placed upon the use and development of the Property by Purchaser and Purchaser's assigns," that "[WACI] agreed to convey the Property to Purchaser on the basis of Purchaser's agreement in compliance with such [CCRs]," and that the CCRs "shall be recorded prior to any

other lien or encumbrance arising out of such conveyance." *Id.* at 2, recitals D-F. The CCRs "shall run and pass with each and every portion of the Property and shall be binding upon Purchaser, its successive owners and assigns . . . . . whether or not any reference to this Declaration is contained in the instrument by which such person or entity acquired an interest in the Property." *Id.* at 11, art. X(a).

C-159. The Water Reservation also repeatedly appears in numerous other documents in the record, including: the Public Offering Statement dated April 3, 2002 notifying potential buyers of the sale of subdivision lots, *see* Ex. 2189 WCEIC-228 at 4; the Property Report dated May 3, 2002 issued by the developer to buyers of lots, which states at the top of the first page in large capital letters, "READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING," *see* Ex. 2189 WCEIC-229 at 9; and the Declaration of Covenants, Conditions, And Restrictions for Wailuku Country Estates recorded on February 27, 2003 as Document No. 2003-036607, *see* Ex 2189 WCEIC-234 at 49.

C-160. WCE, in fact, cites and relies on the reservation in the CCRs in maintaining that the CCRs preclude WCE from using alternative water sources such as groundwater, in lieu of Nā Wai 'Ehā stream water from WWC. Tr. 7/28/16 (Blackburn) at 161:22 to 163:14; Ex. 2189 WCEIC-476 (Blackburn Dec.), ¶ 85; Ex. 2189 WCEIC-270 (Nance report) at 7.

C-161. In its prehearing filings, WCE claimed appurtenant water rights, but did not provide any quantification of such rights. *See*, *e.g.*, WCE's Open. Br. at 13-16. Instead, WCE presented tables of figures purporting to list what percentage of each WCE lot comprised LCA lands, and what percentage of each LCA was included in WCE lots. *See* Exs. 2189 WCEIC-243a, b, b-1. WCE did not provide analysis quantifying appurtenant rights by showing, *for each individual WCE lot or TMK*, what portion(s) of which LCA(s) were located in the TMK and

PROPOSED CONCLUSIONS OF LAW

I. LEGAL FRAMEWORK

A. Public Trust Doctrine.

1. The public trust doctrine is a fundamental principle of constitutional law in Hawai`i. *In re Waiāhole Combined Contested Case Hr'g*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("*Waiāhole I*"). The Code "does not supplant the protections of the public trust doctrine" or "override the public trust doctrine or render it superfluous." *Id.* at 133, 9 P.3d at 445.

2. The constitutional public trust "embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." *Waiāhole I*, 94 Hawai'i at 139, 9 P.3d at 451. The mandate of protection establishes the duty to "ensure the continued availability and existence of [Hawai'i] water resources for present and future generations." *Id.* "This disposes of any portrayal of retention of waters in their natural state as 'waste.'" *Id.* at 137, 9 P.3d at 449.

3. The mandate of maximum reasonable and beneficial use establishes the standard for water use in Hawai'i. *See Waiāhole I*, 94 Hawai'i at 139, 9 P.3d at 451 (analogizing this constitutional provision to laws mandating the maximum beneficial or highest and best use of water resources). This requires "not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" *Id.* at 140, 9 P.3d at 452.

4. Protected public trust purposes include: maintenance of waters in their natural state or resource protection, with its numerous derivative public uses, benefits, and values; domestic use, particularly drinking water; and the exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights and reservations of water by the Department of Hawaiian Home Lands. *Waiāhole I*, 94 Hawai'i at 136-37 & n.34, 9 P.3d at 448-49 & n.34;

54. "Appurtenant water rights are incidents of land ownership," that constitute "an easement in favor of the property with an appurtenant right as the dominant estate." *Reppun*, 65 Haw. at 551, 656 P.2d at 70-71 (brackets omitted); *see also Peck v. Bailey*, 8 Haw. 658, 661-62 (1867).

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

56. The Hawai'i Supreme Court's ruling in *McBryde* "prevents the effective severance or transfer of appurtenant water rights. This position is consistent with the general rule that appurtenant easements attach to the land to be benefited and cannot exist or be utilized apart from the dominant estate." *Reppun*, 65 Haw. at 551-52, 656 P.2d at 71 (citing Restatement of Property § 487, cmt. b). However, a deed "that attempt[s] to reserve such rights ha[s] the effect of extinguishing them," because "'there is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate.'" *Id.* at 552, 656 P.2d at 71 (quoting Restatement of Property § 487, cmt. b) (brackets omitted).

57. "[T]he proper measure of [appurtenant] rights is . . . the quantum of water utilized at the time of the Mahele." *Reppun*, 65 Haw. at 554, 656 P.2d at 72; *see also McBryde*, 54 Haw. at 188-89, 504 P.2d at 1340. The Hawai'i Supreme Court, however, recognized that "requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights." *Reppun*, 65 Haw. at 554, 656 P.2d at 72. *See also Carter v. Territory*, 24 Haw. 47, 59 (1917) ("It is very difficult at this late day to show what quantity of water was used upon a particular parcel of land by ancient custom when it first became the subject of private ownership.

Where the use of water upon land by ancient custom is shown by satisfactory evidence the right is not to be denied merely because the quantity has not been measured and cannot be proven.").

58. The Court thus provided that when "the same parcel of land is being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to give rise to a presumption that the amount of water diverted for such cultivation sufficiently approximates the quantity of the appurtenant water rights to which that land is entitled." *Id.* at 554, 656 P.2d at 72. *See also Territory v. Gay*, 31 Haw. 376, 383 (1930) (explaining that sometimes "mere reference to the land in the award or in the records of the land commission as 'taro land' ('aina kalo' or 'loi kalo') or as 'cultivated land' ('aina mahi') has sufficed to lead to and to support an adjudication that that land was entitled to use water for agricultural purposes," and that testimony of witnesses before the land commission including such language "or other statements substantially to that effect, have sufficed to support a similar adjudication").

59. The Hawai'i Constitution, art. XI, § 7, directs the legislature to "provide for a water resource agency which, as provided by law, shall . . . establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses . . . ."

60. The Commission is statutorily mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of" the Code." Haw. Rev. Stat. § 174C-5(15).

61. The Code provides: "Appurtenant rights are preserved. Nothing in this part [Part IV, "Regulation of Water Use"] shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application." Haw. Rev. Stat. § 174C-63. Further,"[t]he appurtenant water

rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter." Haw. Rev. Stat. § 174C-101(d).

62. The Hawai'i Supreme Court noted that the public trust's protection of Native Hawaiian T&C rights "also extends to the appurtenant rights recognized in Peck." *Waiāhole I*, 94 Hawai'i. at 137 & n.34, 9 P.3d at 449 & n.34. *See also* Lawrence H. Miike, Water and the Law in Hawai'i 104 (2004) (indicating that the inclusion of appurtenant rights as a public trust purpose should refer to traditional and customary uses, "or else the purposes of the public trust could be easily subverted by the commercial uses of appurtenant rights, thereby turning the public trust on its head and making private gain a public purpose").

E. Extinguishment of Appurtenant Rights.

63. In selling off its former agricultural lands in private land transactions, WWC's predecessor companies consistently reserved all water rights from the land, including appurtenant rights. While *Reppun* holds that such reservations have the effect of extinguishing appurtenant rights, certain parties argue in this case that the *Reppun* precedent has been overridden by the 1978 constitutional amendments and/or the 1987 enactment of the Code.

64. The Hawai'i Supreme Court's holding that such reservations of appurtenant rights have "the effect of extinguishing them," *Reppun*, 65 Haw. at 552, 656 P.2d at 71, is binding legal precedent that the Commission has the duty "to adhere to . . . , without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." *State v. Brantley*, 99 Hawai'i 463, 483, 56 P.3d 1252, 1272 (2002). The court, in turn, "should not depart from the doctrine of stare decisis without some compelling justification." *State v. Romano*, 114 Hawai'i 1, 11, 155 P.3d 1102, 1112 (2007).

"[S]tare decisis has added force when . . . citizens, in the private realm, have acted in reliance in a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations." *State v. Garcia*, 96 Hawai'i 200, 206, 29 P.3d 919, 925 (2002); *see also In re Allen*, 35 Haw. 501, 524 (1940) (citing the principle that courts are "much more reluctant to depart from the law as declared in a prior opinion when such declaration affects individual property rights and commercial transactions whereby such rights are acquired"). Here, the reservations of appurtenant rights were established in private commercial transactions in which the parties agreed on the property rights to be transferred and the corresponding sale prices to be paid. *See* Tr. 7/29/16 (Atherton) at 88:18-89:13.

65. Nothing in the Constitution or Code nullifies or prohibits the ability of private parties in private land transactions to "provid[e] that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate," as the Court recognized based on basic property principles. *Reppun*, 65 Haw. at 552, 656 P.2d at 71 (brackets omitted) (quoting Restatement of Property § 487, cmt. b).

66. Article XI, § 7 of the Hawai'i Constitution calls for the creation of the Commission that "as provided by law, shall . . . establish criteria for water use priorities while assuring appurtenant rights," among other functions. As an initial matter, this provision in the Constitution is not self-executing. *See Waiāhole I*, 94 Hawai'i at 132 n.30, 9 P.3d at 444 n.30 (explaining that art. XI, § 7 is "self-executing to the extent that it adopts the public trust doctrine" and separately "also mandates the creation of any agency to regulate water use 'as provided by law'"). Further, nothing in this provision or its history purports to substantively alter any appurtenant rights or private transactions regarding appurtenant rights.

67. It also may be noted that the Hawai‘i Supreme Court issued its *Reppun* decision in 1982, four years after the 1978 constitutional convention, and even cited the constitutional amendments in article XI in its opinion, yet it did not indicate any limitation on its ruling regarding the extinguishment of appurtenant rights. *See Reppun*, 65 Haw. at 560 n.22, 656 P.2d at 76 n.22 (citing Haw. Const. art. XI, § 7); *id.* at 560 n.20, 656 P.2d at 72 n.20 (citing Haw. Const. art. XI, § 1).

68. Likewise, nothing in the text or history of the Code, including § 174C-63, purports to substantively alter any appurtenant rights or private transactions regarding appurtenant rights, or overrule the Hawai‘i Supreme Court's holding regarding extinguishment of appurtenant rights. In affirming that "[a]ppurtenant rights are preserved," § 174C-63 provides that "[n]othing in this part [relating to water use permitting] shall be construed to deny the exercise of an appurtenant right" and that "[a] permit for water use based on an existing appurtenant right shall be issued upon application." These provisions address the effect and limits of the Code's water use permitting system in relation to appurtenant rights; they do not, in themselves, substantively address or alter any underlying appurtenant rights or control any private transactions regarding appurtenant rights.

69. Thus, § 174C-63 contrasts in purpose and function from the Kuleana Act, Haw. Rev. Stat. § 7-1, which the Hawai‘i Supreme Court held was the statutory origin of riparian rights in Hawai‘i. *See Reppun*, 65 Haw. at 549, 656 P.2d at 69. Unlike § 7-1, § 174C-63 does not affirmatively establish or define any rights, but simply limits the effect of the Code and preserves rights that already exist. Along these lines, it bears noting that § 174C-63 specifically refers to "existing" appurtenant rights. This indicates a recognition that appurtenant rights can be made not to exist; otherwise, the term "existing" would be superfluous.

70. The Hawai‘i Supreme Court based its holding regarding extinguishment of appurtenant rights on basic common-law property principles regarding appurtenant easements. *See Reppun*, 65 Haw. at 552, 656 P.2d at 71 (quoting Restatement of Property § 487, cmt. b). "Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed." *Waiāhole I*, 94 Hawai‘i at 130, 9 P.3d at 442. The Code indicates no such intent to abrogate *Reppun*. In contrast, the Code does indicate such intent to overrule the common-law in § 174C-49(c), which provides that "[t]he common law of the State to the contrary notwithstanding, the Commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed" under certain conditions.

71. Finally, it should be emphasized that *Reppun*'s recognition of the extinguishment of appurtenant rights is consistent with the principles underlying *Reppun* and other seminal Hawai‘i Supreme Court decisions that realigned the law from the plantation-era system based on Western notions of private property toward a new framework based on the public trust—including Native Hawaiian T&C rights, which the Court recognized was the "original intent" of the trust. Appurtenant rights are an example of a customary practice that was translated to a property right, then further converted to a commodity that could be transferred and sold. *See Reppun*, 65 Haw. at 539-48, 656 P.2d at 63-69. Thus, as a part of its "rectification of basic misconceptions concerning water 'rights' in Hawaii," *id.* at 548, 656 P.2d at 69, the Court prohibited the transfer of appurtenant rights, yet allowed that "nothing would preclude the giving of effect" of the "inten[t] to extinguish those rights" in a private transaction. *Id.* at 552, 656 P.2d at 71. More fundamentally, however, the Court "made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this

natural bounty." *Robinson v. Ariyoshi*, 65 Haw. 641, 675, 658 P.2d 287, 312 (1982). It is this public trust interest that forms the foundation for water resources protection and management in Hawai‘i today. This public trust framework does not conflict, but rather aligns, with the Court's rulings on the private interests in appurtenant rights and the legal effect of reservations of such rights.

F. Protection of T&C and Appurtenant Rights in Instream Flow Standards and Water Use Permitting.

72. T&C rights and appurtenant rights bear importance to the determinations of both IFSs and SWUPAs. T&C rights and appurtenant rights (particularly those connected with T&C uses) are public trust purposes, which the Commission must take the initiative to consider, protect, and advance "at every stage of the planning and decisionmaking process." *Waiāhole I*, 94 Hawai‘i at 143, 9 P.3d at 455.

73. In the IFS context, T&C rights are among the "entire range of public trust purposes dependent upon instream flows" that IFSs must "protect and promote." *Waiāhole I*, 94 Hawai‘i at 148, 9 P.3d at 460. As stated above, T&C rights include rights to gather and fish in stream and nearshore waters, as well as rights to cultivate kalo. *See* Haw. Rev. Stat. § 174C-101(c). The Code includes "protection of traditional and customary Hawaiian rights" and "conveyance of irrigation and domestic water supplies to downstream points of diversion" in its definition of "instream use" and mandates that "adequate provision shall be made for the protection of traditional and customary Hawaiian rights." *Id.* §§ 174C-3, -2.

74. Thus, in addition to flows required for instream uses and values such as resource protection, the IFS must also incorporate flows to sustain T&C rights to gather and fish, as well as supply T&C rights to cultivate kalo. *See* Douglas W. MacDougal, Private Hopes and Public

Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?, 18 U. Haw. L. Rev. 1, 46, 61-62 (1996) (recognizing that "[o]ther beneficial instream uses under the Water Code also go beyond this conservation purpose and encompass assuring sufficient water to allow the practice of traditional and customary Hawaiian rights, among other purposes," and that the "[instream flow] standards would incorporate conservation and all other 'beneficial instream uses,' including the conveyance of sufficient water downstream to allow taro growing on kuleana and taro lands").

75. In the *Waiāhole* case, for example, the Hawai'i Supreme Court specifically recognized the Commission's provision of additional flows in the IIFS so that "appurtenant rights, riparian uses, and existing uses would be accounted for." *Waiāhole II*, 105 Hawai'i at 12, 10, 93 P.3d at 654, 652. In contrast, in the original *Nā Wai 'Ehā* IIFS proceeding, the court ruled that the Commission "did not discharge its duty" to protect Native Hawaiian rights where the Commission justified its IIFS determination based on issues regarding amphidromous species, but failed to consider downstream users' T&C rights to cultivate kalo. 128 Hawai'i at 248-49, 287 P.3d at 149-50.

76. In the SWUPA context, the Code mandates that "[a] permit for water use based on an existing appurtenant right shall be issued upon application," Haw. Rev. Stat. § 174C-63, and that T&C rights "shall not be abridged or denied," *id.* § 174C-101(c). Such rights, however, are still properly subject to the constitutional and statutory reasonable-beneficial mandate; *i.e.*, they do not allow the wasting of water. Nonetheless, where T&C and/or appurtenant rights are exercised to cultivate kalo or other traditional products according to traditional means, such water uses should qualify as *prima facie* reasonable-beneficial. Thus, T&C water uses should

not be required to follow different standards of efficiency or seek alternative sources, apart from what traditionally applied to such uses. *See* 2010 Decision COLs 94, 115.

77. Moreover, as discussed below, other permit applicants bear the burden of showing that their proposed uses do not abridge or deny public trust purposes, including T&C and appurtenant rights, and the Commission bears the duty to hold applicants to their burden.

G. Water Use Permit Applicants' Burden of Proof.

78. While the Hawai'i Supreme Court stated that no particular party bore the burden of proof in the original *Nā Wai 'Ehā* IIFS proceeding, *see* 128 *Nā Wai 'Ehā*, 128 Hawai'i at 258, 287 P.3d at 159, this proceeding incorporates water use permit applications and thus is identical to the *Waiāhole* case and subject to all the legal requirements established in *Waiāhole* and other precedents involving water use permitting, including the permit applicants' burden of proof.

79. The burden of proof for permit applicants, particularly private commercial diverters, is established at every level of the law, including the constitution, the Code, as well as the common law. "Under the public trust and the Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. As stated above, the public trust effectively creates this burden through its inherent presumption in favor of public use, access, and enjoyment." *Waiāhole I*, 94 Hawai'i at 160, 9 P.3d at 472. Similarly, under the common law, the "burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer" *Id.* at 142-143, 9 P.3d at 454-55 (quoting *Robinson*, 65 Haw. at 649 n.8, 658 P.2d at 295 n.8.

80. "[A]n applicant for a water use permit bears the establishing that the proposed use will not interfere with any public trust purposes." *Wai'ola*, 103 Hawai'i at 441, 83 P.3d at 704.

with WWC, under which it currently does not pay anything for water, would be negated and replaced by PUC-regulated rates.

E. Wailuku County Estates.

(*See supra* FOFs C-158 to C-191)

Appurtenant Rights

205. The deed by which the developer of the WCE subdivision bought the land from Wailuku Agribusiness was subject to a "Water Reservation," which "had the effect of extinguishing" the appurtenant rights in the various LCAs contained within the subdivision property. *Reppun*, 65 Haw. at 552, 656 P.2d at 71.

206. Consequently, the Commission need not consider the further issues whether WCE met its burden of proving, for each individual WCE lot or TMK, what portion(s) of which LCA(s) were located in the TMK and where they were located, the quantity of water entitled to each portion of an LCA, and the total amount of water entitled to each TMK. *See* Minute Order No. 2 at 1-2. Appurtenant rights are tied to a specific parcel, and cannot be exercised outside that parcel. Thus, the law does not allow an aggregate or "bulk" recognition and quantification of appurtenant rights for WCE to distribute throughout its subdivision.

Water Uses

207. WCE's existing, actually metered uses of 210,980 gpd over 120 lots equals 1,758 gpd per lot. In contrast, WCE seeks an additional 511,700 of new uses for a total of 722,590 gpd for 184 lots, or 3,927 per lot. This amounts to a 223% increase in water use on a per-lot basis. Adding the 540 gpd of water received from the county system increases the per-lot total to 4,467 gpd per lot, which is around 4 to 7 times the 600 to 1,200 gpd that the County allocates for

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams, Maui	)	Case No. CCH-MA15-01
	)	**CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

On February 17, 2017, I caused true and correct copies of the foregoing documents to be served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai 'Ehā Surface Water Management Areas of Waihe'e, Waiehu, 'Īao and Waikapū Streams, Maui	Case No. CCH-MA15-01 **OFFICE OF HAWAIIAN AFFAIRS' (1) EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 1, 2017 and (2) JOINDER IN HUI O NĀ WAI 'EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON NOVEMBER 1, 2017**; CERTIFICATE OF SERVICE

OFFICE OF HAWAIIAN AFFAIRS' (1) EXCEPTIONS TO THE HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED NOVEMBER 1, 2017 and (2) JOINDER IN HUI O NĀ WAI 'EHĀ AND MAUI TOMORROW FOUNDATION, INC.'S EXCEPTIONS TO HEARINGS OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER FILED ON NOVEMBER 1, 2017

Pursuant to Minute Order No. 12, dated November 1, 2017, and HRS § 91-11, Intervenor Office of Hawaiian Affairs ("OHA"), by and through its undersigned counsel, hereby

EXHIBIT "D"

respectfully submits its Exceptions to the Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on November 1, 2017 ("Proposed Decision") and joins in Petitioners Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc.'s Exceptions to the Proposed Decision ("Community Groups' Exceptions"), some of which are highlighted herein and all of which are incorporated herein by reference.[1]

The Proposed Decision represents the commitment of untold effort, time, and resources by the Hearings Officer, the Commission and its staff, and the Parties. More fundamentally, this proceeding, now in its thirteenth year, has required extraordinary patience and inspirational perseverance from the communities of Nā Wai 'Ehā, who have been deprived for generations of the right to practice their culture by the diversion of the stream flows that once made Nā Wai 'Ehā the most abundant area on Maui with one of the largest populations. See FOF 264.

The Hearings Officer has done a remarkable job in digesting and synthesizing the voluminous evidence in a complex, multi-faceted proceeding, and OHA is deeply appreciative and respectful of the tireless dedication with which he has approached this herculean task. Unfortunately, despite that dedication, there are several fundamental legal errors that must be corrected before the Proposed Decision could serve as a template for comprehensive water management consistent with the public trust. OHA urges the Commission to fulfill its role as the primary guardian of public rights under the public trust by correcting these legal errors now, in its Final Decision, rather than compounding the delay by requiring the Hawai'i Supreme Court *again* to rule on well-settled legal principles and remand the case to the Commission years from

[1] Petitioners Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. are hereinafter referred to as the "Community Groups" and cited as "Hui/MTF." Hui o Nā Wai 'Ehā's, Maui Tomorrow Foundation, Inc.'s, and Office of Hawaiian Affairs' Joint Proposed Findings of Fact, Conclusions of Law, and Decision and Order filed on February 17, 2017 is referred to and cited as "Hui/MTF-OHAs' Joint FOF, COL, and D&O." Unless otherwise indicated, citations to "FOF" or "COL" are to the proposed findings of fact or proposed conclusions of law in the Proposed Decision.

Moreover, State agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices." *Ka Pa'akai*, 94 Hawai`i at 46, 7 P.3d at 1083 (citation omitted). The Hawai'i Supreme Court, in *Ka Pa'akai*, explained that "the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection," *id.* at 1087, 7 P.3d at 50, and vacated an agency decision in which the agency "made no specific findings or conclusions regarding the *effects on* or the *impairment of* any Article XII, section 7 uses, or the *feasibility of the protection* of those uses." *Id.* at 1086, 7 P.3d at 49 (emphases in original). *See also, Wai`ola,* 103 Hawai`i at 432, 83 P.3d at 695 (vacating decision where Commission failed to render findings and conclusions regarding impairment of public trust use, which failure "violated its public trust duty to protect [the public trust use] in balancing the various competing interests in the state water resources trust").

Yet, even after the Hawai'i Supreme Court vacated the 2010 Decision and remanded to the Commission for, among other things, "further consideration of the effect the IIFS will have on native Hawaiian practices, as well as the feasibility of protecting the practices," *Nā Wai 'Ehā,* 128 Hawai'i at 249, 287 P.3d at 150, the Proposed Decision recommends IIFS that do not protect public trust instream and T&C uses to the extent feasible. This can be corrected by adopting the IIFS proposed by the Community Groups and OHA, which will provide higher instream flows during high streamflow conditions, and temporarily decrease the IIFS to allow some diversion when streamflow is below a threshold low flow. *See* Community Groups' Exceptions, Section I.C.

III. THE PROPOSED DECISION WOULD ERRONEOUSLY RECOGNIZE APPURTENANT RIGHTS THAT HAVE BEEN EXTINGUISHED AS A MATTER OF HAWAI'I LAW

The Proposed Decision would erroneously conclude that the Hawai'i Supreme Court's

decision in *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982) (*cert. denied, Board of Water Supply v. Nakata,* 471 U.S. 1014, 105 S.Ct. 2015, 85 L.Ed.2d 298 (1985)), was implicitly overruled or otherwise altered by the 1978 constitutional amendments and/or 1987 State Water Code, HRS Chapter 174C (the "Code") and therefore the Commission is free to ignore this binding legal precedent. *See* COLs 75-86. *Reppun* has been the law of Hawai'i for more than three decades, and has not been altered in any way by the Hawai'i Constitution or the Code. The Proposed Decision's rationale will not withstand appeal, but will add years of delay during which persons who knowingly purchased property without appurtenant rights will enjoy a windfall at the expense of public trust purposes.

In 1982, four years ***after*** the Hawai'i Constitution was amended to include, *inter alia*, article XI, section 7, the Hawai'i Supreme Court unambiguously ruled that any attempt by a grantor to reserve appurtenant rights when conveying the property to which the rights attached had the effect of extinguishing the appurtenant rights. *Reppun*, 65 Haw. at 552, 656 P.2d at 71. In *Reppun*, the land on which the plaintiff farmers cultivated kalo had been conveyed by deeds in which the Grantor purported to reserve all water rights; when the plaintiffs sought to enjoin BWS's diversions, BWS argued that it had purchased the water rights from Plaintiffs' Grantor. *Id.* at 535-36, 656 P.2d at 61-62. The trial court, relying on *McBryde v. Robinson,* 54 Haw. 174, 504 P.2d 1330 (1973) (*subs. history omitted*), held that Plaintiffs' water rights could not be severed from the land; the reservations and subsequent conveyances of the water rights to BWS were thus nullities. *Reppun*, 65 Haw. at 536, 656 P.2d at 62. The Hawai'i Supreme Court agreed with the trial court with respect to riparian rights: "the riparian rights purportedly reserved in the plaintiff's [sic – plaintiffs'] respective deeds were statutory creations. They were therefore not subject to reservation by deed; they were not the grantor's to reserve." *Id.* at 551, 656 P.2d at 70.

With respect to appurtenant rights, however, the *Reppun* Court reversed the trial court. Although it agreed that "the rule posited in *McBryde* prevents the effective severance or transfer of appurtenant water rights," the *Reppun* Court held that the trial court "erred in holding that the plaintiffs' lands retained appurtenant rights, inasmuch as ***they were effectively extinguished by the attempted reservation of such rights***." *Reppun,* 65 Haw. at 552, 656 P.2d at 71 (emphasis added). The Court explained that,

> while no appurtenant rights were effectively transferred in this case, the deed that attempted to reserve such rights had the effect of extinguishing them. For while easements appurtenant may not be utilized for other than the dominant estate, ***"[t]here is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant [estate]."***
>
> There appears to be no question here that the plaintiffs' grantors, in attempting to reserve the water rights to themselves in spite of the transfer of the lands, intended to extinguish those rights which would otherwise have attached to plaintiffs' lands. While the nature of the water rights involved necessarily precluded the former, ***nothing would preclude the giving of effect to the latter.***

Id. (emphases added, brackets in original, citation omitted).

The Proposed Decision concludes that "the 1978 constitutional amendments and the 1987 State Water Code now provide appurtenant rights with constitutional and statutory bases, respectively, and appurtenant rights can no longer be extinguished," COL 77, and that "the 1978 constitutional amendment trumps ambiguous decisional law" so *Reppun's* holding does not apply to any deed reservation post-dating 1978, COL 84. There are at least two flaws in that reasoning. As an initial matter, there is absolutely nothing ambiguous about *Reppun's* holding—it could not be clearer. More significantly, the Proposed Decision reflects a fundamental legal misunderstanding. Neither article XI, section 7 of the Hawai'i Constitution, nor anything in the Code, affects or alters the Hawai'i Supreme Court's holding in *Reppun* in any way, or through some kind of alchemy changes the common law basis for appurtenant rights to a constitutional or statutory basis.

The *Reppun* Court was obviously aware of article XI, section 7,[16] yet did not consider it relevant to its holding regarding the extinguishment of appurtenant rights; specifically, the Court did not limit its holding to pre-1978 deed reservations. The Court had no reason to discuss article XI, section 7 in connection with its appurtenant rights holding, because the provision has no bearing on the effect of a deed between private parties reserving appurtenant rights, which was the issue before the Court in *Reppun*.

Article XI, section 7 provides, in pertinent part:

> ***The legislature shall provide for a water resources agency which, as provided by law, shall*** set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; ***establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses*** and establish procedures for regulating all uses of Hawaii's water resources.

Const. Art. X1, § 7 (emphases added). Thus, by its plain language, Article XI, section 7 describes what the new water resources agency to be established by the Legislature can and cannot do, and prevents the ***Commission*** from eliminating appurtenant rights (or existing correlative or riparian uses) in the course of "establish[ing] criteria for water use priorities." The directive that "appurtenant rights and existing correlative and riparian uses" are to be "assured" is a mandate that those rights and uses be "grandfathered" in the framework of the new agency's creation of the mandated statutory water regime. The *Reppun* Court had no reason to discuss article XI, section 7 in its discussion of the effect of deed reservations, because that provision does not purport to (and could not) affect what ***private parties*** do in their deeds conveying land, which is what the Court addressed in concluding that "***nothing*** would preclude the giving of effect to" the intent of private parties "to extinguish those rights which would otherwise have attached to [transferred] lands." *Reppun,* 65 Haw. at 552, 656 P.2d at 71 (emphasis added).

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[16] *See Reppun*, 65 Haw. at 561, n.22, 656 P.2d at 76, n.22 (citing article XI, section 7's reference to "beneficial and reasonable uses").

Nor does the Code prohibit private parties from extinguishing appurtenant rights by deed. When the Legislature enacted the Code it was well aware of *Reppun* but nonetheless ***did not*** include any provision in the Code that would preclude private parties from extinguishing appurtenant rights when they convey land. Rather, pursuant to the mandate of article XI, section 7, the Legislature included § 174C-63, which provides that appurtenant rights "are preserved" and that "[n]othing in ***this part*** [Part IV, Regulation of Water Use] shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." (Emphasis added.) Notably, HRS § 174C-63 specifies that a permit shall be issued upon application for "an ***existing*** appurtenant right." *Id.* (emphasis added). The word "existing" indicates legislative recognition that an appurtenant right could be made not to exist; otherwise, the word would be superfluous. *See Cty. of Kaua'i v. Hanalei River Holdings Ltd.*, 139 Hawai'i 511, 526, 394 P.3d 741, 756 (2017) ("courts are bound, if rational and practicable, to give effect to all parts of a statute, and [] no clause, sentence, or word shall be construed as superfluous, void, or insignificant"). As with the constitution, nothing in the Code contradicts, is inconsistent with, or purports to alter or overturn, the application of *Reppun*. Article XI, section 7 mandated that appurtenant rights (and existing correlative and riparian uses) not be eliminated by the adoption of a water regulatory regime, and the Code implemented that mandate.

Although they are "grandfathered" by the constitution and the Code, appurtenant rights do not now have a constitutional or statutory basis – they continue to be "incidents of ownership of land" with their basis in common law property principles. *Reppun*, 65 Haw. at 551, 656 P.2d at 70. "Where it does not appear there was legislative purpose in superseding the common law, ***the common law will be followed.***" *Waiāhole I*, 94 Hawai'i at 130, 9 P.3d at 442 (emphasis added). There is absolutely no indication in the Code of a legislative purpose to supersede the

common law with respect to appurtenant rights[17]; to the contrary, the "savings" language in article XI, section 7 and HRS § 174C-63 expressly indicates an intent to ***preserve*** certain common law rights and uses in the face of the anticipated new statutory scheme.[18] *Reppun* remains binding legal precedent, unaltered by the 1978 amendment of the constitution or the 1987 enactment of the Code. As in 1982, when *Reppun* was decided, it remains the case today that "[t]here is nothing to prevent a transferor from effectively providing that the benefit of an easement appurtenant shall not pass to the transferee of the dominant [estate]." *Reppun*, 65 Haw. at 552, 656 P.2d at 71 (brackets in original).

Resurrecting extinguished appurtenant rights by effectively invalidating *Reppun* could add years to the delay already endured by OHA's beneficiaries in Nā Wai 'Ehā. Appurtenant rights determinations made in disregard of *Reppun*, as in the Proposed Decision, will simply invite reversal and require further proceedings on remand, years from now, to exclude the extinguished appurtenant rights, reorder the claims for water, and reconsider the IIFS in light of the water that can be used for public trust purposes rather than being allocated as a windfall to those who knowingly purchased land without appurtenant rights. OHA urges the Commission to simply follow the law as it currently exists and leave it to the Hawai'i Supreme Court to overturn *Reppun* if it believes there is a compelling justification for doing so.[19]

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[17] The Legislature certainly knew how to supersede the common law when that was its intent. *See, e.g.*, HRS § 174C-49(c) ("The common law of the State to the contrary notwithstanding," holders of use permits may transport water outside the watershed under certain conditions).

[18] The ultimate manifestation of that intent is the "bifurcated" nature of the Code, in which water use outside of designated water management areas continues to be governed only by the common law and water use within designated water management areas is subject to the permitting requirements of the Code.

[19] As a purely practical matter, persons who knowingly purchased land subject to a reservation of appurtenant rights are unlikely to appeal if the Commission follows *Reppun*. If there were such an appeal, however, it would be far less disruptive than an appeal from a decision resurrecting extinguished appurtenant rights, because nothing would need to change when the Hawai'i Supreme Court inevitably affirms the decision adhering to *Reppun*.

IV. GENERAL OBJECTIONS

A. OHA objects to the proposed rejection or partial rejection of all findings of fact and conclusions of law jointly proposed by the Community Groups and OHA that were not clearly accepted, on the grounds that each Hui/MTF-OHA proposed finding of fact is material to the issues in the case and is supported by the portion of the record cited in each proposed finding, and by the record as a whole, and each Hui/MTF-OHA proposed conclusion of law is an accurate statement of the relevant law.

B. OHA objects to the proposed conclusions of law in the Proposed Decision to the extent that they are inconsistent with, or do not include, each of the proposed conclusions of law jointly submitted by the Community Groups and OHA on the ground that each of the Hui/MTF-OHA proposed conclusions of law is an accurate statement of the relevant law.

DATED: Honolulu, Hawai'i, January 5, 2018.

JUDY A. TANAKA
PAMELA W. BUNN
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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI‘I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ‘Ehā Surface Water Management Areas of Waihe‘e, Waiehu, ‘Īao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01
	)	HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S, EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017; TABLES 1 TO 5; ATTACHMENTS 1 & 2; AND CERTIFICATE OF SERVICE

HUI O NĀ WAI ‘EHĀ’S AND MAUI TOMORROW FOUNDATION, INC.’S EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017

TABLES 1 TO 5

ATTACHMENTS 1 & 2

AND

CERTIFICATE OF SERVICE

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EXHIBIT "E"

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STATE OF HAWAIʻI

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Nā Wai ʻEhā Surface Water Management Areas of Waiheʻe, Waiehu, ʻĪao, & Waikapū Streams, Maui	)	Case No. CCH-MA15-01
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HUI O NĀ WAI ʻEHĀʼS AND MAUI TOMORROW FOUNDATION, INC.ʼS EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED NOVEMBER 1, 2017

Pursuant to Minute Order 12, Petitioner-Intervenor Hui o Nā Wai ʻEhā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"), by their counsel Earthjustice, hereby respectfully submit their Exceptions to the Proposed Findings of Fact ("FOFs"), Conclusions of Law ("COLs"), and Decision and Order ("D&O"), dated November 1, 2017 (collectively, the "Proposed Decision").[1] At the outset, the Community Groups express their sincere appreciation and respect for the tremendous amount of work by the Hearings Officer to process all the information in this case and draft the Proposed Decision. As reflected in the sheer

[1] Summary of citation format: The "2010 Decision" and "2014 Order" refer, respectively, to the Commission's: FOFs, COLs, and D&O, filed on June 10, 2010; and Order Adopting: 1) Hearings Officer's Recommendation on the Mediated Agreement Between the Parties; and 2) Stipulation re Mediator's Report of Joint Proposed FOFs, COLs, D&O, dated April 17, 2014. Citations in this document also include references to evidence in the record and the "Hui-MT/OHA" Joint Proposed FOFs, COLs, and D&O, filed on February 17, 2017. Record citations include exhibits ("Ex."), written testimonies ("WT"), and transcripts ("Tr.") cited by pages and lines ("x:y"), and indicate if they relate to a previous phase (e.g., MA06-01, MA06-01 Remand).

requested acreages are disproportionate from the size ranges of Māhele-awarded kuleanas. No one-acre limit applied at the time of the Māhele, or should legally apply now. The Code "obligates the Commission to ensure that it does not 'abridge or deny' [T&C] rights of Native Hawaiians," which expressly includes "cultivation or propagation of taro on one's own kuleana." Waiāhole I, 94 Hawai'i at 153, 9 P.3d at 465; HRS § 174C-101(c). Moreover, in line with what the Dueys explained, the 2010 Decision expressly recognized:

> [A] subsistence lifestyle can be maintained in today's cash economy, but with different demands on subsistence growers. In the old days, you could pay taxes to chiefs with taro. Those in-kind tax payments are no longer allowable, so even subsistence farmers would inevitably have to sell some of their taro for cash in order to pay taxes.

Id. COL 56.

In sum, where, as here, Native Hawaiian 'ohana are seeking to exercise their T&C rights on traditional kalo land in acreage amounts that do not unreasonably offend the intent of the T&C practice in today's context, imposing a limit like one acre is arbitrary and lacks basis in the record. COL 272.p to s for the Dueys and the corresponding COLs for the other 'ohana listed in Table 3 should delete or avoid this error, and these 'ohana's T&C rights should be recognized in full, for the acreages they requested.

B. Category 2: The Proposed Decision Contradicts Long-Established Precedent On Appurtenant Rights.

1. Resurrecting extinguished appurtenant rights is legal error.

The Proposed Decision also legally errs in seeking to resurrect appurtenant rights that have been reserved and extinguished under long-standing Hawai'i Supreme Court precedent. See Proposed Decision, Part II.D.4, COLs 75-86. Again, these proposed COLs misconstrue the law and improperly attempt to nullify binding precedent. As a result, the Proposed Decision substantially overcalculates total priority "Category 2" appurtenant rights by a total amount of

11.14 mgd (or 111.43 acres at the 100,000 gad applied by the Proposed Decision), compared to 16.06 mgd of valid, unextinguished appurtenant rights (160.63 acres at 100,000 gad), as shown in the attached Table 4. This results in diluting and diminishing the rights of other permittees, including those with actually valid appurtenant rights, and skewing the overall balance toward further offstream diversions.

The Hawai‘i Supreme Court expressly held in Reppun that reservations of appurtenant rights have "the effect of extinguishing them." 65 Haw. at 552, 656 P.2d at 71. This legal ruling is binding on agencies such as this Commission, which have the duty "to adhere to . . . , without regard to their views as to its propriety." State v. Brantley, 99 Hawai‘i 463, 483, 56 P.3d 1252, 1272 (2002).[31] Contrary to the Proposed Decision's assertions, nothing in the Constitution or Code nullifies or prohibits the ability and right of private parties in private land transactions to "provid[e] that the benefit of an easement appurtenant shall not pass to the transferee of the dominant estate," as the Court recognized in Reppun based on basic property principles. 65 Haw. at 552, 656 P.2d at 71 (brackets omitted) (quoting Restatement of Property § 487, cmt. b).

The Proposed Decision points to the clause in article XI, § 7 of the Hawai‘i Constitution calling for the creation of the Commission "which, as provided by law, shall . . . establish criteria

[31] Reppun is also judicial precedent that, under the legal doctrine of "stare decisis," the courts "should not depart from . . . without some compelling justification." State v. Romano, 114 Hawai‘i 1, 11, 155 P.3d 1102, 1112 (2007). Such precedent "has added force" when private citizens "have acted in reliance in a previous decision," and "overruling the decision would dislodge settled rights and expectations." State v. Garcia, 96 Hawai‘i 200, 206, 29 P.3d 919, 925 (2002); see also In re Allen, 35 Haw. 501, 524 (1940) (courts are "much more reluctant" to depart from precedent "when such declaration affects individual property rights and commercial transactions whereby such rights are acquired"). Here, the reservations of appurtenant rights were established in private commercial transactions in which the parties agreed on the property rights to be transferred and the corresponding sale prices to be paid. See, e.g., Tr. 7/29/16 (Atherton) at 88:18-89:13 (explaining that in the sale of land from WWC to Waikapū Properties, the parties specifically negotiated the terms for water rights to enable the buyer to drill wells).

for water use priorities while assuring appurtenant rights and existing riparian and correlative uses," among other functions. Proposed COL 80. To begin with, that cited clause, including the language "assuring appurtenant rights," is not self-executing—i.e., it has no force of law in itself, without follow-up legislative action.[32] In any event, nothing in that language or its history purports to alter any appurtenant rights or reservations of such rights.

Likewise, nothing in the text or history of the Code, including § 174C-63, purports to alter any appurtenant rights or reservations of rights, or overrule the Hawai'i Supreme Court's Reppun holding. In affirming that "[a]ppurtenant rights are preserved," § 174C-63 provides that "[n]othing in this part [relating to water use permitting] shall be construed to deny the exercise of an appurtenant right" and that "[a] permit for water use based on an existing appurtenant right shall be issued upon application." This language, expressed in the terms of a savings clause, describing the effect and limits of the Code's water use permitting system in relation to appurtenant rights. It does not substantively address or alter any underlying appurtenant rights or reservations of rights, or control any private transactions regarding such rights. In other words, § 174C-63 does not affirmatively establish or define any rights, or prohibit or invalidate any reservations of rights, but simply delineates the effect of the Code on existing common-law rights. Along these lines, § 174C-63 specifically refers to "existing" appurtenant rights. This indicates a recognition that appurtenant rights can be made not to exist, i.e., be extinguished; otherwise, the term "existing" would be superfluous.

[32] See Waiāhole I, 94 Hawai'i at 132 n.30, 9 P.3d at 444 n.30 (explaining that art. XI, § 7 is "self-executing to the extent that it adopts the public trust doctrine," but separately "also mandates the creation of any agency to regulate water use 'as provided by law,'" which by its terms is not self-executing and requires legislative action).

As stated, the Hawai‘i Supreme Court based its holding regarding extinguishment of appurtenant rights on basic common-law property principles regarding appurtenant easements. "Where it does not appear there was legislative purpose in superseding the common law, the common law will be followed." Waiāhole I, 94 Hawai‘i at 130, 9 P.3d at 442. The Code indicates no such intent to abrogate Reppun. In direct contrast, the Code does articulate such intent to overrule the common law in § 174C-49(c), which provides that "[t]he common law of the State to the contrary notwithstanding, the Commission shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed" under certain conditions.

The Proposed Decision's upending of Reppun unilaterally and retroactively resurrects around 11 mgd of appurtenant rights that, until now, all parties to the original private transactions understood were extinguished. The Wailuku Country Estates development offers a prime example of the disruption the ruling would cause. The developer of that subdivision bought the land from WWC's predecessor 15 years ago, in 2002, subject to an express reservation of water rights, and that reservation is spelled out in numerous subsequent formal documents, including the "Public Offering Statement" notifying potential buyers of the sale of subdivision lots, the "Property Report" to buyers of lots, and the "Declaration of Covenants, Conditions, And Restrictions" for the subdivision.[33] Yet, now the Proposed Decision awards 4.379 mgd of appurtenant rights to the subdivision's irrigation company (as opposed to any individual lot owners), see Proposed COL 278.r, which places the subdivision's water allocation at an equal priority level as the rights of kuleana landowners who have maintained their lands

[33] See Hui-MT/OHA's Proposed FOFs C-158 to 160 for a review of these and other documents, including citations to the record.

with the water rights intact for generations. Nothing in the modern water rights framework in Hawai‘i justifies such a retroactive windfall for private parties like WCE and a wholesale reshuffling of the water rights landscape.

Finally, while the Proposed Decision suggests that the invalidation of Reppun and resurrection of extinguished appurtenant rights is somehow "in keeping with" the public trust doctrine, see Proposed COLs 85, 81-82, in fact, the Reppun precedent is fully consistent with the history of modern Hawai‘i Supreme Court decisions (including Reppun) that realigned the law from the plantation-era system based on Western notions of private property, toward a new framework based on the public trust—including Native Hawaiian T&C rights.[34] Appurtenant rights are an example of a customary practice that was translated to a property right, then further converted to a commodity that could be transferred and sold. See Reppun, 65 Haw. at 539-48, 656 P.2d at 63-69. Thus, as a part of its "rectification of basic misconceptions concerning water 'rights' in Hawaii," id. at 548, 656 P.2d at 69, the Court prohibited the transfer of appurtenant rights, yet allowed that "nothing would preclude the giving of effect" of the "inten[t] to extinguish those rights" in a private transaction. Id. at 552, 656 P.2d at 71. More fundamentally, however, the Court "made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty." Robinson v. Ariyoshi, 65 Haw. 641, 675, 658 P.2d 287, 312 (1982). It is this public trust interest that forms the foundation for water resources protection and management in Hawai‘i today. This public trust framework does not conflict, but rather aligns, with the Court's rulings on the private

[34] See supra note 27, explaining the distinction between appurtenant rights, which are interests in real property, and T&C rights of Native Hawaiians.

interests in appurtenant rights and the legal effect of private transactions reserving and extinguishing such rights.

The Commission must correct this legal error by (1) correcting Proposed COLs 75-86 along the lines of the discussion above and Hui-MT/OHA's Proposed COLs 63-71, and (2) deleting the recognition of appurtenant rights for applications involving lands on which appurtenant rights have been reserved, as indicated in Table 4.[35]

2. Appurtenant rights of undisputed kalo lands within larger grants must be recognized.

The Proposed Decision commits another legal error in its blanket denial of any and all appurtenant rights on lands conveyed in konohiki awards or government grants, as opposed to kuleana awards. See Proposed COL 54. The Proposed Decision bases this denial on Dr. Kame'eleihiwa's testimony that she "had no opinion on [konohiki and government lands'] use of water at the time of the Māhele nor how to evaluate the proportion of the award or grant that might have been in kalo lo'i." Proposed COL 54.c. The recognition of appurtenant rights, however, is a legal determination, and the law establishes that appurtenant rights apply to "any" land cultivated during the Māhele, including "all the lands conveyed by the King, or awarded by the Land Commission." Peck v. Bailey, 8 Haw. 658, 661 (1867) (emphasis added); see id. at

[35] The Community Groups note that the Proposed Decision would also overturn Reppun in concluding that appurtenant rights of kalo lands are only entitled to 100,000 gpd, while recognizing actual need of 150,000 gpd for lo'i kalo uses. See Proposed COLs 67-71. Those COLs misapply testimony from Mr. Reppun that "[w]e need more today than before to some degree," to conversely justify reducing the amount of water used at the time of the Māhele. While the Community Groups reserve their position on a 100,000 gpd allocation for appurtenant rights generally, certainly in those cases where community members are exercising appurtenant rights for traditional kalo cultivation today, they fall squarely within Reppun's presumption that "the amount of water diverted for such cultivation sufficiently approximates the quantity of appurtenant water rights to which that land is entitled," 65 Haw. at 554, 656 P.2d at 72, and no valid basis exists for contrarily reducing their appurtenant rights to a lesser amount than they actually need, as Proposed COLs 67-71 posit.

and OHA's Joint Proposed Decision, the Community Groups respectfully request that the Commission correct and improve the Proposed Decision as detailed under these four principal areas of: (1) refining the IIFSs to incorporate more flows, as well as adjustment provisions; (2) adjusting the allocations among the permit Categories based on corrected legal determinations; (3) reducing the inflated allocations to several major diverters; and (4) incorporating key implementation requirements.

DATED: Honolulu, Hawai'i, January 5, 2018.

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Table 4b: Extinguished Appurtenant Rights Recognized By Proposed Decision*

Community Member	SWUPA #(s) (existing and new)	Stream	System	Extinguished Rights Recognized
Joseph Alueta	2362N	Waiheʻe	Waiheʻe Downstream	0.4
Hawaiian Islands Land Trust	2706N	Waiheʻe	Waiheʻe Downstream	12.2
			Waiheʻe Downstream Total	**12.6**
Burt Sakata & Peter Fritz	2334, 2335N	Waiheʻe	Waiheʻe Ditch System	6.426
Piko Aʻo, LLC	2264, 2265N	Waiheʻe	Waiheʻe Ditch System	18.72
Lorrin Pang	2283	Waiheʻe	Waiheʻe Ditch System	1.42
John Varel (Koolau Cattle Co.)	2593N	Waiheʻe	Waiheʻe Ditch System	5.62
			Waiheʻe Ditch System Total	**32.186**
Jeff & Ramona Lei Smith	2369N	Waiehu	S. Waiehu Upstream	1.86
			S. Waiehu Upstream Total	1.86
Paul Higashino	2342	Waiehu	N. Waiehu Ditch System	1.258
			N. Waiehu Ditch System Total	**1.258**
Ho'oululāhui, LLC	2243, 2244N	Wailuku	Wailuku Downstream	2.287
Francis Ornellas	2370N	Wailuku	Wailuku Downstream	0.24
Kimberly Lozano	2371N	Wailuku	Wailuku Downstream	1.324
Duke & Jean Sevilla, Christina Smith & County of Maui	2275	Wailuku	Wailuku Downstream	3.994
			Wailuku Downstream Total	**7.845**
Katherine Riyu	2268	Waikapū	Waikapū Downstream	0.61
			Waikapū Downstream Total	**0.61**
Waikapu Properties	2205, 2356/2297N, 3471N, 3472N		Waikapū Ditch System	7.42
Suzuki	2155		Waikapū Ditch System	3.569
Makimoto	2156		Waikapū Ditch System	0.293
			Waikapū Ditch System Total	**11.282**
WCEIC	2189/2190N, 2196		Wailuku Ditch System	43.79
			Wailuku Ditch System Total	**43.79**
			Grand Total	**111.431**

*Does not include numerous rightholders whose domestic uses were exempted from the permit requirement, but whose rights still must be protected

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications, Integration of Appurtenant Rights and Amendments to the Interim Instream Flow Standards, Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams, Maui	)))))))))	Case No. CCH-MA15-01 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

On February 17, 2017, I caused true and correct copies of the foregoing documents to be served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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