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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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, Waihehu, Iao and
Waikapu Streams, Maui

Case No. CCH-MA 15-01

WAHI HO'OMALU, LP'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW, DECISION AND ORDER;
CERTIFICATE OF SERVICE

**WAHI HO'OMALU, LP'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER**

WAHI HO'OMALU, LP ("Wahi Ho'omaluu"), by and through its attorneys, Carlsmith Ball LLP, submits the following proposed Findings of Fact, Conclusions of Law, Decision and Order regarding the new use permit identified as SWUPA 2351N, and recognition and quantification of Wahi Ho'omaluu's appurtenant water rights.

FINDINGS OF FACT

To the extent that any of the following Findings of Fact shall be determined to be Conclusions of Law, they shall be deemed as such.

WAHI HO'OMALU'S PROCEDURAL BACKGROUND

1. On April 30, 2009, Wahi Ho'omaluu filed a Surface Water Use Permit Application

("SWUPA"). Thereafter, Wahi Ho'omalulu filed a revision to the SWUPA by letter dated July 7, 2010 ("Revision"), and an addendum ("Addendum"); both of which updated the Application for a water permit for a proposed "New Use" on Wahi Ho'omalulu's 834 acres of land identified Tax Map key ("TMK") (2) 3-3-002-001 ("**Parcel 001**"), and TMK (2) 3-3-002-026 ("**Parcel 026**"), located in Waiehu, Maui, Hawaii adjacent to Waihehu Stream. (Wahi Ho'omalulu's Application, Revision, and Addendum are referred to collectively hereafter as "**Original SWUPA**").

2. The Original SWUPA requested 994,516 gallons per day ("**GPD**") total of water, which consisted of 240,000 GPD potable water for domestic use for eighty (80) connections on forty (40) lots on 647 acres of agriculturally zoned lands, and 739,200 GPD for irrigation of 168 acres planted in macadamia nuts on Parcel 001, and 5,316 GPD for flood irrigation to grow taro on Parcel 026.

3. On May 9, 2011, Wahi Ho'omalulu filed a Petition Requesting a Contested Case Hearing before the Commission on Water Resource Management ("**Petition for CCH**"). The Petition for CCH was requested because Wahi Ho'omalulu is entitled to both appurtenant and riparian water rights, and appurtenant and riparian water rights should be considered before existing use applications. Wahi Ho'omalulu also recognized that no water would be available for its proposed new use unless its appurtenant and riparian water rights were recognized. (Petition for CCH).

4. On May 17, 2011 Wahi Ho'omalulu submitted a Supplement to the Petition for CCH, ("**CCH Supplement**"). The CCH Supplement contained evidence on early use of the kuleanas in Wahi Ho'omalulu's land to support Wahi Ho'omalulu's claims for appurtenant water rights. The CCH Supplement provided evidence of native and foreign testimony for LCAs within Parcel 001 and Parcel 026. In total, Wahi Ho'omalulu claimed seventeen (17) LCAs in

Parcel 001 had appurtenant rights, and one (1) LCA in Parcel 026.

5. On December, 31, 2014, the Water Commission issued its Provisional Order on Claims That Particular Parcels Have Appurtenant Rights, ("**Provisional Order**"). In the Provisional Order, the Water Commission made a preliminary determination that twelve (12) of the 17 LCAs in Parcel 001 have provisional recognition of appurtenant water rights. One (1) LCA was denied without prejudice, and five (5) have not yet been determined (4 in Parcel 001 and the one LCA in Parcel 026). The five without provisional recognition remain pending. The Water Commission's provisional recognition for the 18 LCAs is set forth more fully below.

	LCA (TMK (2) 3-3-002-001)	Provisional Recognition by Water Commission
1.	1806:3	not yet determined
2.	2461:2	yes
3.	2468:1	not yet determined
4.	2468:2	yes
5.	2554:1	yes
6.	2554:2	yes
7.	3259	yes
8.	3275D	yes
9.	3275E2	not yet determined
10.	3275E3	yes
11.	3275E4	not yet determined
12.	3275E6	yes
13.	3275W	yes
14.	3451	yes
15.	11222	yes
16.	1806:2	yes
17.	3459:4	denied w/o prejudice
18.	3456 in TMK (2) 3-3-002-026	not yet determined

6. On February 5, 2015, Wahi Ho'omalulu filed its Opening Brief ("**Wahi Opening Brief**"), including a Declaration of John Russell ("**Decl. of Russell**") requesting that it be granted quantification of its appurtenant water rights on 17 LCAs, the 12 that were provisionally approved, and the 5 that had not yet been determined, and requesting that its water permit be amended to include water to grow kalo on all of its LCAs with appurtenant water rights.¹ (Wahi Opening Brief, Decl. of Russell ¶ 16).

7. As the Contested Case Hearing on July 19, 2016 John Russell testified and clarified that Wahi Ho'omalulu wanted its new use application, SWUPA 2351, to include a request for water to grow kalo on all of the parcels Wahi Ho'omalulu owned with appurtenant water rights. John Russell testified that for the appurtenant water rights he was seeking quantification for on his kuleana lands, he wanted a water permit for growing kalo in accordance with the amount of quantification. (See Tr. 7/19/16, p. 168, ¶ 9-12).

8. By Supplemental Declaration of John Russell filed herein on July 28, 2016 ("**Supp. Decl. of Russell**"), Wahi Ho'omalulu further amended (1) its request for appurtenant water right quantification, and (2) its water permit request under SWUPA 2351. The water permit was amended to request water for growing wetland kalo on only six of Wahi Ho'omalulu's LCAs with appurtenant water rights, namely LCAs 2554:2, 3259, 3451, 11222, and 1806:2 in Parcel 001 and the LCA 3456 in Parcel 026. In doing so, Wahi Ho'omalulu characterized the request as scaling back its request for water because its general request as set forth in the Opening Brief and at the hearing July 19, 2016 was for a permit to grow kalo on all of its LCAs with appurtenant water rights). Wahi Ho'omalulu left unchanged its request for a new use water permit to grow

¹ Of the original 18 LCA listed in ¶6, LCA 3459:4 (which was previously denied) was not requested, leaving only 17 remaining LCAs.

macadamia nut trees on 168 acres, should there be enough water to allocate to such a use. Wahi Ho'omalulu requested that if the appurtenant water rights to parcel 026 were deemed to have been severed, it would alternately request its water permit be issued for a portion of LCA 2468:1, which covered .21 acres of land area. The "alternate" request regarding LCA 2468:1 was made to avoid any possible duplication with LCA 3456, but to ensure the water permit included this parcel which was deemed particularly appropriate for growing kalo by John Russell upon inspection. (Supp. Decl. of Russell, Tr. 9/19/16, p. 90-91).

APPURTENANT WATER RIGHT QUANTIFICATION

9. Wahi Ho'omalulu acquired land from Wailuku Agribusiness Co., Inc. in 2003-2004, including a 834.016 acre parcel designated as TMK (2) 3-3-002-001 (Parcel 001) and a .886 acre parcel designated as TMK (2) 3-3-002-026 (Parcel 026) (collectively, the "Subject Property"). Title to all of the Subject Property is confirmed by Title Reports. (Ex. 2351-Wahi-13 and 14; Opening Brief).

10. Land owned by Wahi Ho'omalulu in TMK (2) 3-3-02:001 ("Parcel 001") includes the following Land Commission Awards for which it seeks appurtenant water right quantification ("LCAs"): LCA 1806:2, LCA 2461:2, LCAs 2468:1 and 2, , LCAs 2554:1 and 2, LCA 3259, LCA 3275D, LCAs 3275:E2, E3, and E6, LCA 3275W, LCA 3451, LCA 11222. (Opening Brief, Decl. of Russell, Supplemental Decl. of Russell, Ex. 2351-Wahi-13 and 14).

11. Wahi Ho'omalulu also owns land located in TMK (2) 3-3-02:026 ("Parcel 26"), which is LCA 3456, .886 acres. (Opening Brief, Decl. of Russell, Supplemental Decl. of Russell, Ex. 2351-Wahi-13, 14, 15).

12. According to a survey map attached as part of Ex. 2351-Wahi-15, the land awarded in LCA 3456 is also a portion of the same land awarded in LCA 2468:1. (Ex.-2351-

Wahi- 15). Wahi Ho'omaluku clarified in testimony of John Russell on (Tr. 7/19/16 and is not requesting duplicate quantification or new use permits. Wahi Ho'omaluku has requested quantification and a new use for LCA 3456, in Parcel 026. Should that request be denied due to the attempted deed reservation, Wahi Ho'omaluku has an alternative claim for both the quantification and the permit under LCA 2468:1. (Ex.-2351-Wahi- 15).

13. Ex. 2351-Wahi- 13 is a title report for TMK (2) 3-3-002-001, an area of 834.016 acres, pursuant to which Wahi Ho'omaluku owns "**all of that certain parcel of land**" being the land described in and covered by the following LCAs: 2461:2, 2468:1, 2468:2, 2554:1, 2554:2, 3259, 3275D, 3275E2, 3275 E3, 3275E6, 3275W, 3451, 11222. 1806:2. (Ex. 13 p. 33. (Ex.- 2351-Wahi- 15) (emphasis added).

14. As set forth in Ex. 2351-Wahi-13, at p. 35, Wahi Ho'omaluku's ownership of certain lands was "**further confirmed by**" but is not limited to the quiet title work in Civil No. 06-1-0140(3). (Ex. 2351-Wahi-13 p. 35, TR. 9/19/16, p. 73-74).

15. Ex. 2351-Wahi-14 is a title report for TMK (2)3-3-002-026, an area of .886 acres, pursuant to which Wahi Ho'omaluku owns all of that certain parcel of land being the land described in and covered by the LCA 3456.

16. From the original 18 LCAs, one was denied, then Wahi Ho'omaluku withdrew its request for appurtenant water rights on LCA 1806:3 and LCA 3275E4, leaving 15 LCAS. (TR. 9/19/16).

17. For all of Wahi Ho'omaluku's LCAs for which Wahi Ho'omaluku currently requests appurtenant water rights recognition and/or quantification, Wahi Ho'omaluku presented evidence including true and correct copies of the Land Commission Award, foreign and native testimony related to the awards, and translations where necessary.

18. To determine the water use on each parcel at the time of the grant Wahi Ho'omalū provided evidence of the size of the LCA and evidence that the LCA was used for kalo and loī at the time of the grant.

19. Wahi Ho'omalū's Original SWUPA, Supplement, Wahi Opening Brief, Decl. of Russell; Wahi Ho'omalū Exhibits 2351-Wahi-1 to 46 inclusive (see Wahi Ho'omalū, LP's Exhibit List and Second Supplemental Exhibit List), Suppl. Decl. of Russell, and by testimony at the hearing on July 19, 2016 and September 19, 2016 together contain all evidence in support of its application and request on all LCAs (14, with an alternative request).

20. LCA 2461:2 has appurtenant water rights, to be quantified based on .45 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 2, 18, and 29 setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to six patches for Section 2 and foreign testimony that refers to loīs.

21. LCA 2468:2 has appurtenant water rights, to be quantified based on 2.94 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 3, 20, and 30, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to 7 taro patches for Section 2, and foreign testimony that refers to areas of loīs.

22. LCA 2554:1 has appurtenant water rights, to be quantified based on .50 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 4, 21, and 31, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes foreign testimony that refers to areas of Kalo.

23. LCA 2554:2 has appurtenant water rights, to be quantified based on 1.38 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 4, 22, and 31, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony

that refers to taro, and foreign testimony that refers to areas of Kalo.

24. LCA 3259 has appurtenant water rights, to be quantified based on 4.83 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 5, 19, and 32, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to 1 taro section and 2 poalimas, and foreign testimony that refers to large kalo plots. The LCA refers to Chief's Taro Plantation I and II.

25. LCA 3275D has appurtenant water rights, to be quantified based on 1.03 acres (the area of 2.06 acres being reduced by 1/2), pursuant to evidence in Exhibits 2351-Wahi-1A, 6, 23, and 33, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to multiple patches in Sections 2-6, and foreign testimony that refers to kalo and kula in parcel 1, 1 loi in parcels 2 and 3, 3 lois in parcel 4, 46 lois in parcel 5, and 6 lois in parcel 6. The LCA refers to Chief's Taro Plantation.

26. LCA 3275E:2 has appurtenant water rights, to be quantified based on 1.12 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 7, 24, and 34, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes foreign testimony that refers to loi sections and kalo.

27. LCA 3275E-3 has appurtenant water rights, to be quantified based on 6.62 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 7, 24, and 34, setting forth this is the size of the LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to 22 taro patches for Section 3, and foreign testimony that refers to 22 lois. The LCA refers to Chief's Taro Plantation.

28. LCA 3275E:6 has appurtenant water rights, to be quantified based on 3.39 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 7, 24, and 25, setting forth this is the size of the

LCA that was using water at the time of the Mahele. The evidence includes native testimony that refers to taro pauka in section 6, and foreign testimony that refers to loi sections and kalo.

29. LC 3275W has appurtenant water rights, to be quantified based on .24 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 8, and 26, setting forth that the LCA is .49 acres, but .24 acres is the size of the LCA that was using water at the time of the Mahele because the evidence includes native testimony that refers to 1 house site, which is presumed to be 1/4 acres of the LCA.

30. LCA 3451 has appurtenant water rights, to be quantified based on .76 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 9, and 35, setting forth that the LCA is 1.53 acres, but the size of the LCA that was using water at the time of the Mahele is reduced by 1/2 as the evidence includes foreign testimony that refers to kalo and kula.

31. LCA 11222 has appurtenant water rights, to be quantified based on .79 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 10, and 36, setting forth that the LCA is 1.58 acres, but the size of the LCA that was using water at the time of the Mahele is reduced by 1/2 as the evidence includes foreign testimony that refers to kalo and kula.

32. LCA 1806:2 has appurtenant water rights, to be quantified based on .21 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 16, and 27, setting forth that the LCA is .46 acres, but the size of the LCA that was using water at the time of the Mahele is reduced by 1/4 acre as the evidence includes the LCA which refers to a house site. The native testimony refers to 3 taro patches for section 2, foreign testimony refers to kalo land of 3 lois.

33. LCA 3456 (in TMK (2)3-3-002-026) has appurtenant water rights, to be quantified based on .886 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 12, 37, and 38, setting forth this is the size of the LCA that was using water at the time of the Mahele. The

evidence includes the LCA that refers to taro land, native testimony that refers to 3 sections in the ilis of Waihehu, taro pauka, 25 taro patches, 3 taro patches, and foreign testimony that refers to kalo land and 3 lois.

34. There is a deed reservation to LCA 3456 at Exhibit 2352-Wahi-15 that attempts to reserve the appurtenant water rights. If the quantification for this parcel is denied, Wahi Ho'omalulu's LCS 2468:1 (which is the same parcel of land awarded under a different grant and owned as part of Parcel 001) has appurtenant water rights, to be quantified based on .21 acres, pursuant to evidence in Exhibits 2351-Wahi-1A, 3, 20, 15, and 30, setting forth that the portion of this LCA that is not in neighboring TMKs is .43 acres, but this is the size of the LCA that was using water at the time of the Mahele is reduced by 1/2 as the evidence includes foreign testimony that refers to areas of lois, kala and kula land.

WATER REQUIREMENTS AND PRESUMPTIONS ON QUANTIFICATION

35. The Commission agreed to permit the Findings of Fact Decision and Order from the 2006 Interim Instream Flow Standards ("**2006 Order**") hearing as evidence on how much water is needed for kalo growing, so long as "the conditions that lead to this determination on how much water was required have not changed." (See 2006 Order p. 3). It is not clear what "conditions" the Commission was referring to in this statement. There is no evidence that conditions have changed, nor is there any update at this time to conditions that lead to Instream flow standards, such as weather and precipitation. As stated in Minute Order #2, "[t]he amount of water that is available for off-stream use, after the interim Instream flow standard has been met, will be determined based on updates from CWRM staff that will be presented at the beginning of the contested case hearing." *Id.* The 2006 Order states that the water use requirements for wetland Kalo production is approximately 150,000 gallons per acre per day ("GPD"). This is the number that should therefore be used to calculate the quantification of an

appurtenant rights water use for kalo cultivation.

36. The amounts of water required for wetland kalo production per the 2006 Provisional Order is median amount of 150,000 GPD for wetland taro cultivation.

37. Paul Reppun testified that wetland taro needs between 100,000 and 300,000 gallons per acre per day of "new" water. In warmer months of the year, he testified the higher figure should be used. (TR 7/19/16 at 157-160).

38. In 2009 in its Original SWUPA Wahi Ho'omalulu calculated the amount of water for the new use water permits by using an Oahu Water Requirements Forecast which indicated macadamia trees require 4,400 GPD per acre and that taro requires 6,000 GPD per acre. (Original SWUPA).

39. Generally speaking, one cannot ascertain precise areas of cultivation based on Mahele records. Certain Rebuttable Presumptions Should Be Applied When Estimating Water Use Quantification (p. 13-15 of Testimony of Lilikala K. Kame'eleihiwa, Ph.D.; HUI and OHA's Opening Brief, filed herein on February 5, 2016, 7/19/16 Testimony of Lilikala K. Kame'eleihiwa, Ph.D.). The following presumptions apply to quantification of water rights:

- Presumption No. 1: "if no pahale is mentioned in a kuleana award, the entire kuleana should be presumed to be in cultivation."
- Presumption No. 2: "If a pahale [house lot] is referenced in the kuleana award, but no size of pahale is provided, the area for the pahale should be presumed to be no more than one quarter of an acre..."
- Presumption No. 3: "if the following descriptors are used to describe kuleana, without referencing any other crop or pahale, the entire parcel should be presumed to be

cultivated in lo'i kalo . . . [Kalo, Loi, Loi kalo, Pauku kalo, Pauku loi, Moo kalo, Poalima, Loi aupouni, etc.]"

- Presumption No 4: "All po'alima should be presumed to be cultivated in loi kalo."
- Presumption No. 5: ". . . if the kuleana . . . is near a stream....it should be presumed that wetland kalo was being cultivated on that kuleana."
- Guiding Principle No. 3: "if the parcel is described as 'loi and kula,' fifty percent of the land should be attributed to lo'i and the other fifty percent should be attributed to kula."

40. Where the kuleanas in Wahi Ho'omalua's lands are described by terms loi, kalo, pauka kalo, etc, the entire acreage of that LCA is presumed to be in cultivation for quantification purposes. Where kula is referenced, the size of the LCA for quantification purposes is reduced by 50%.² Where a house lot (pahalae) is mentioned, the size of the house lot should be presumed to be .25 acres, and the entire acreage reduced accordingly. (Decl. of Lilikala K. Kame'eleihiwa, Ph. D.)

41. The chart below contains a compilation of each LCA for which Wahi Ho'omalua claims appurtenant water rights, the size of the LCA for quantification purposes, the exhibits containing the evidence which support the size of each LCA being used for water right quantification for each parcel, and the resulting quantification based on an average of 150,000 gallons per acre per day.

² Reference to Kula invokes the presumption that the land presumed to be in taro cultivation should be reduced by half. See Tr. 9/19/16 p. 76-79 ("if kula is mentioned, then you have to reduce your quantification.")

WAHI HO'OMALU'S APPURTENANT WATER RIGHT QUANTIFICATION

	Land Commission Award ("LCA") (unless otherwise noted, in TMK (2) 3-3-002-001)	Provisional Rights Recognition	Size of LCA for quantification purposes (in Acres)	Exhibit No. 2351-Wahi- (with evidence for water use at time of LCA):	Appurtenant water right quantification based on 150,000 gallon of water per day per acre for wetland kalo
1.	2461:2	yes	.45	Exs. 1A, 2, 18, 29, 40, 41. NT refers to 6 patches for Section 2. FT refers to lois	67,500
2.	2468:2	yes	2.94	Exs. 1A, 3, 20, 30, 40, 41. NT refers to 7 taro patches for Section 2. FT refers to lois	441,000
3.	2554:1	yes	.50	Exs. 1A, 4, 21, 31, 40, 41. FT refers to areas of Kalo	75,000
4.	2554:2	yes	1.38	Exs. 1A, 4, 22, 31, 40, 41. NT refers to taro. FT refers to areas of Kalo.	207,000
5.	3259	yes	4.83	Exs. 1A, 5, 19, 32, 40, 41. NT refers to 1 taro section and 2 poalimas. FT refers to large kalo plots. LCA refers to Chief's Taro Plantation I and II	724,500
6.	3275D	yes	2.06 1.03 (reduced by half due to reference to kula in parcel 1)	Exs. 1A, 6, 23, 33, 40, 41. LCA refers to Chief's Taro Plantation NT refers to multiple patches in Sections 2-6.	154,500

				FT refers to kalo and kula in parcel 1, 1 loi in parcels 2 and 3, 3 lois in parcel 4, 46 lois in parcel 5, and 6 lois in parcel 6.	
7.	3275E2	not yet determined	1.12 ^[1]	Exs. 1A, 7, 24, 34, 40, 41. FT refers to loi, sections, and kalo	168,000
8.	3275E3	yes	6.62	Exs. 1A, 7, 24, 34, 40, 41. LCA refers to Chief's Taro Plantation NT and FT refer to 22 taro patches/lois in Section 3..	993,000
9.	3275E6	yes	3.39	Exs. 1A, 7, 24, 25, 34, 40, 41. NT refers to taro pauku in Section 6. FT refers to loi, sections, and kalo	508,500
10.	3275W	yes	.49 .24 (revised as house site is presumptively 1/4 acre)	Exs. 1A, 8, 26, 40, 41. NT refers to 1 house site	36,000
11.	3451	yes	1.53 .76 (reduced by half due to reference to kula)	Exs. 1A, 9, 35, 40, 41. FT refers to kalo and kula	114,000
12.	11222	yes	1.58 .79 (reduced by half due to reference to kula)	Exs. 1A, 10, 36, 40, 41. FT refers to loi, ex. 36 kalo and kula	118,500
13.	1806:2	yes	.46 .21 (revised, as the house site is presumptively 1/4 acre)	Exs. 1A, 1, 16, 27, 40, 41. LCA refers to housesite, NT refers to 3 taro patches for Section 2, FT refers to kalo lands 3 lois	31,500

^[1] This total area of all the apanas in LCA 3275E consists of 14.4 acres as noted in Ex. 2351-Wahi-24, and 34 re. 3275E3.

14	3456 (TMK (2) 3-3-002-026)	not yet determined	.886 (despite deed to this parcel has reservation)	Exs. 1A, 12, 37, 38, 40, 41. LCA refers to taro land NT refers to 3 sections in the ilis of Waiehu, taro pauku, 25 taro patches, 3 taro patches. FT refers to kalo land and 3 lois	132,900*
*15	2468:1	not yet determined	<i>.43-.21 (revised, now not including the area of land in TMK (2) 3-3-001-014 and reduced by half due to reference to kula).</i>	Exs. 1A, 3, 20, 30, 40, 41. FT refers to lois, kala and kula land)	31,500(<i>this is an alternative claim to that made for LCA 3456 to avoid dupicaion</i>)
APPURTENANT RIGHTS QUANTIFICATION TOTAL ACRES: 25.146 acres Quantified at 150,000 GPD = 3,771,900 GPD (or 3.77 MGD)					

WAHI HO'OMALU'S APPLICATION FOR NEW USE PERMIT

42. By the Suppl. Decl. of Russell filed July 28, 2016, Wahi Ho'omaluu amended its new use application by withdrawing its request for 240,000 GPD for 40 housetlots which was made in the Original SWUPA. Wahi Ho'omaluu also amended the request for water to grow kalo to just six of its 6 LCAs with appurtenant water rights. (Suppl. Decl of Russell, TR 9-19-16 p. 46-50.

43. At the hearing on September 19, 2016, John Russell testified that Wahi Ho'omaluu requested its water permit include water for kalo farming on LCAs 2554:2, 1806:2, 3259, 3451 and 11222 in Parcel 001 and LCA 3456 in Parcel 026. Wahi Ho'omaluu quantification and corresponding request for water was refined during direct and cross examination to the amounts set forth in the chart listed above, at FOF ¶ 38, *supra*. (Tr. 9/19/2016 at 45-91). John Russell testified that any water quantification would be reduced by 50% if kula was mentioned in describing any of the LCAs. (Tr. 9/19/16, p. 46-91). John Russell further testified that if LCA

3456 in Parcel 026 is denied appurtenant water right recognition because of the attempted deed reservation, Wahi Ho'omalū requests that the duplicate LCA, 2468:1 which is located in TMK 001 instead be quantified at .21 acres, and that the new use permit be granted under that LCA since this parcel was granted out under two different LCAs, as discussed more fully in testimony at the hearing on July 19, 2016. (Tr. 7/19/16 p. , 9/19/16 at 46-91, Ex. 2351-Wahi)

44. Pursuant to the Findings of Fact, Conclusion of Law, and Decision and Order dated June 10, 2010 in Case No. CCH-MA06-01, the approximate amount of water needed for wetland taro cultivation is (at least) 150,000 gallons per acre per day.

45. As set forth in its Opening Brief, Decl. of Russell; Supp. Decl. of Russell, and at the hearing on September 19, 2016, Wahi Ho'omalū requests a new use water permit to cultivate wet land taro on six LCAs, which is reasonable and beneficial, and necessary for economic and efficient utilization of the lands. The wetland taro cultivation proposed on these LCAs is for agricultural purposes, and will be done in manner which is both reasonable and consistent with the state and county land use plans for agricultural lands, and in the public interest.

46. By Suppl. Decl. of Russell and further testimony at the September 19, 2016 hearing by John Russell, SWUPA 2351 was finally amended to request 396,000 GPD of water for kalo cultivation on six LCAs with Appurtenant Water Rights, as follows:

	Land Commission Award ("LCA") (unless otherwise noted, TMK (2) 3-3-002-001)	Prov. Rights Recognition	Size of LCA (in Acres) used for quantification of (total acreage may be reduced by reference to kula or house lot where so indicated)	New Use Water Requested for this LCA for taro cultivation
1.	2554:2	yes	1.38	75,000 GPD (requesting water permit for kalo farming on 1/2 acre only)
2.	3259	yes	4.83	75,000 GPD (requesting water permit for kalo farming on 1/2 acre only)
3.	3451	yes	.76	75,000 GPD (requesting water permit for kalo farming on 1/2 acre only)

4.	11222	yes	.79	75,000 GPD (requesting permit for kalo farming on 1/2 acre only)
5.	1806:2	yes	.21	31,500 GPD (requesting permit for kalo farming on .21 acre)
6.	3456 (TMK (2) 3-3-002-026)	not yet	.886 (Ex. 14, the deed to this parcel has reservation, thus the alternate permit request for the duplicate LCA is listed below)	64,500 GPD (requesting permit for water for kalo farming on .43 acre only)
*(<i>Alt.</i>)	2468:1	<i>not yet</i>	.21	31,500 GPD (<i>Alternative request to above, but requesting for only .21 acre if permit issued for this LCA</i>)
Total amount of water requested for growing Kalo = 396,000 GPD <i>(reduce by 33,000 GPD if alternate LCA used)</i>				

47. Taro farming is good for food production in Hawaii. Taro is a very productive crop, one of the most productive crops in the terms of pounds per acre; taro makes sense. (Testimony of Paul Reppun, Tr. 7/19/16 p. 157-160).

48. Wahi Ho'omalulu wants to put its agricultural lands to good agricultural use by growing kalo on the six LCAs in the chart listed above at FOF ¶ 43, *supra*. (Opening Brief; Decl. of John Russell, Supplemental Decl. of Russell, Tr. 7/19/16 and 9/19/16).

49. Wahi Ho'omalulu's request for water to grow kalo on LCAs 2554:2, 1806:2, 3259, 3451 and 11222 in Parcel 001 and LCA 3456 in Parcel 026 is for a reasonable and beneficial use; the use of water requested is in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest. (Wahi Opening Brief, Suppl. Decl. of Russell, TR. 7/19/16 and 9/19/16).

50. Wahi Ho'omalulu requested a new use permit for watering another 168 acres of macadamia nut trees on its agricultural zoned land (4,400 GPD x 168 acres = 739,200 GPD).

Should there be water left over for proposed new uses after the priority allocation to appurtenant water rights parcels and existing uses, Wahi Ho'omalū requests that a permit be issued for this purpose. (Original SWUPA).

51. Wahi Ho'omalū's mac nut trees are on 168 acres of lands zoned agriculture within an area of approximately 337 acres zoned agricultural in the larger 834.016 acres in TMK (2) 3-3-002-001). (See Tr. 7/19/16 at 137; Ex. 13 p. 42).

52. The mac nuts trees on the 168 acres within TMK (2) 3-3-002-001 were originally planted in the 1980s, but since 2008 Wahi Ho'omalū has not currently been using water to grow the mac nut trees on this land, and is not actively harvesting the trees, although the trees are productive. (Tr. 7/19/16 at 137-141).

53. Wahi Ho'omalū Original SWUPA contains estimated water use requirements for Macadamia Nut production of 4,400 GPD. Based on these requirements, the Original SWUPA requested 739,200 GPD for agriculture use for macadamia nuts on approximately 168 acres (4,400 GPD x 168 acres = 739,200GPD). (Original SWUPA, Oahu Water Requirements Forecast, Wahi Opening Brief).

54. Wahi Ho'omalū's proposed use for watering its macadamia nut trees on 168 acres, is reasonable and beneficial, as well as necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest. (Decl. of Russell, Suppl. Decl. of Russell).

CONCLUSIONS OF LAW

To the extent that any of the following Conclusions of Law shall be determined to be Findings of Fact, they shall be deemed as such.

1. Appurtenant water rights are constitutional, statutory, and common law rights.

2. In 1978, the Hawaii State Constitution was amended by adding Article XI, section 7 which expressly protects appurtenant rights:

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.

3. The Constitution's protection of appurtenant rights was reflected in the 1987 State Water Code, Haw. Rev. Stat. § 174C-63.

4. The Commission has the legal authority to determine appurtenant rights pursuant to Haw. Rev. Stat. § 174C-5(15): "The Commission shall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter."

5. Appurtenant rights are incidents of land ownership and "are rights to the use of water utilized by parcels of land at the time of the original conversion into fees simple lands." Reppun v. Board of Water Supply, 65 Haw. 531, 554-556 (1982). The rights are not personal.

6. The measure of an appurtenant right is the amount of water utilized at the time of the Mahele, generally, but not exclusively, for taro cultivation. McBryde Sugar Co. v. Robinson, 54 Haw. 174, at 191, 504 P.2d 1330, at 1341 (1973); affd on rehearing, 55 Haw. 260, 517 P.2d 26 (1973); appeal dismissed for want of jurisdiction and cert. denied, 417 U.S. 962 (1974). "[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[.]" Id.

7. "(A)ppurtenant water right(s) to taro land attached to the land when title was confirmed by the Land Commission Award and title conveyed by the issuance of Royal

Patent." Id. at 190, 504 P.2d at 1340; see also Territory v. Gay, 31 Haw. 376, at 383 (1930); aff'd, 52 F.2d 356 (9th Cir. 1931); cert denied, 284 U.S. 677 (1931).

8. "(W)hile the proper measure of those rights is indeed the quantum of water utilized at the time of the Mahele, requiring too great a degree of precision in proof would make it all but impossible to ever establish such rights." Reppun v. Bd. of Water Supply, 65 Haw. 531, 554, 656 P.2d 57, 72 (1982) (emphasis added).

9. Based on the 1978 Constitution appurtenant rights associated with a given parcel should not be extinguished by any attempted deed reservation.

10. Once an appurtenant right is recognized and quantified, current use is not limited to its specific use at the time of the Mahele, but for uses on the parcel of land that are reasonable and beneficial. Peck v. Vailey, 8 Haw. 658, 665 (1867) ("If land has a water right, it will not be contended that the water shall be used forever for the same crop, be it kalo or cane. It may be used for any purpose which the owner may deem for his interest[.]")

11. Evidence required for an appurtenant right to be quantified is evidence of the amount of land in the LCA (from which the current TMK is derived) that was using water at the time of the original award. This requires translations of the original documents to show approximately what parts of the TMK were using water, an estimate of the acreage using water at that time, and the purpose(s) of those uses (e.g., wetland kalo, crops such as bananas and sweet potatoes, pasture, household use, etc.). (Minute Order #2, p. 1).

12. Evidence necessary for a permit for a new use must meet the Water Code's requirement that the amounts requested are for a reasonable and beneficial use. "Reasonable-beneficial use" means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with

the state and county land use plans and the public interest. (See Haw. Rev. Stat. § 174C-49, and 3 (defining reasonable and beneficial use); Minute Order #2, p. 2).

13. The Hawaii Supreme Court has recognized that private commercial use for economic development may produce important public benefits and must figure into any balancing of competing interest of water. In re Water Use Permit Applications, 94 Haw. 97, 138 9 P.3d 409, 450 (2000).

DECISION AND ORDER

For the foregoing reasons, it is hereby Decided and Ordered that Wahi Ho'omalulu is entitled to and shall be granted:

(1) the following amounts of appurtenant water rights quantification for each of Wahi Ho'omalulu's LCAs with appurtenant water rights, as follows:

Land Commission Award	Acreage used for Quantification	Appurtenant Water Right Quantification at 150,000 GPD per acre (in GPD)
2461:2	0.45	67,500
2468:2	2.94	441,000
2554:1	0.5	75,000
2554:2	1.38	207,000
3259	4.83	724,500
3275D	1.03	154,500
3275E2	1.12	168,000
3275E3	6.62	993,000
3275E6	3.39	508,500
3275W	0.24	36,000
3451	0.76	114,000
11222	0.79	118,500
1806:2	0.21	31,500
3456 (TMK (2) 3-3-002-026)	0.886	132,900* ³
TOTAL	0.21	3,771,900

³If this parcel is denied, an alternate claim is requested for LCA 2468:1 being .21 acres at 31,500 GPD.


(2) a permit for a new use for a total of 396,000 GPD for kalo cultivation on six land commission awards with appurtenant water rights, wherein the water permit for each LCA shall be used only on that LCA, as follows:

	Land Commission Award ("LCA") (unless otherwise noted, TMK (2) 3-3-002-001)	Prov. Rights Recognition	Evidence Shows Size of LCA (in Acres) to be used for quantification (total acreage may be reduced by reference to other crops, housesite or kula)	Evidence Shows Water Use at time of LCA (using presumptions 2 and 5 this evidence supports water use on entire LCA)	New Use Water Requested for this LCA for taro cultivation
1.	2554:2	yes	1.38	Exs. 1A, 4, 22, 31, 40, 41. NT refers to taro. FT refers to areas of Kalo.	75,000 GPD (for 1/2 acre)
2.	3259	yes	4.83	Exs. 1A, 5, 19, 32, 40, 41. NT refers to 1 taro section and 2 poalimas. FT refers to large kalo plots. LCA refers to Chief's Taro Plantation I and II	75,000 GPD (for 1/2 acre)
3.	3451	yes	.76	Exs. 1A, 9, 35, 40, 41. FT refers to kalo. Kula reference reduces acreage used by 1/2	75,000 GPD (for 1/2 acre)
4.	11222	yes	.79	Exs. 1A, 10, 36, 40, 41. FT refers to loi. Kula reference reduces acreage used by 1/2	75,000 GPD (for 1/2 acre)
5.	1806:2	yes	.21	Exs. 1A, 1, 16, 27, 40, 41. LCA refers to housesite, NT refers to 3 taro patches for Section 2, FT refers to kalo lands 3 lois	31,500 GPD (for .21 acre)

6.	3456 (TMK (2) 3-3-002-026)	not yet	.886 (Ex. 14, the deed to this parcel has reservation, thus alternate permit for duplicate LCA is below)	Exs. 1A, 12, 14, 37, 38, 40, 41. LCA refers to taro land NT refers to 3 sections in the ilis of Waiehu, taro pauku, 25 taro patches, 3 taro patches. FT refers to kalo land and 3 lois. Mention of Kula land reduces appurtenant right by 1/2.	64,500 GPD (for .43 acre)
*(Alt.)	2468:1	not yet	.21	Exs. 1A, 3, 20, 30, 40, 41. FT referes to lois	31,500 GPD (for .21 acre)
Total Amount of Water and New Use Permit to Grow Kalo on 6 LCAs with Appurtenant Rights=					396,000 <u>GPD</u>

(3) a new use permit request for another 739,200 GPD for water for agriculture use for macadamia nut cultivation on 168 acres on Parcel 001.

Dated: Wailuku, Maui, Hawaii, February 17, 2017.


 CRAIG G. NAKAMURA
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 Attorneys for Wahi Ho'omalua, LP

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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, Waihehu, Iao and
Waikapu Streams, Maui

Case No. CCH-MA 15-01

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

On February 17, 2017 the aforementioned document was served on the Commission on Water Resource Management by US mail and by electronic service and to the parties listed below by electronic service.

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