

PETER A. HOROVITZ No. 6920-0  
KRISTINE TSUKIYAMA No. 7451-0

MERCHANT ♦ HOROVITZ, LLLC  
2145 Wells Street, Suite 303  
Wailuku, HI 96793  
Telephone (808) 242-5700  
Fax (808) 442-1255  
pah@mhmaui.com

Attorneys for  
WAIKAPU PROPERTIES, LLC and  
MTP OPERATING COMPANY, LLC

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COMMISSION ON WATER  
RESOURCE MANAGEMENT

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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, Waiehu, Iao  
and Waikapu Streams, Maui

Case No. CCH-MA15-01

WAIKAPU PROPERTIES, LLC AND  
MTP OPERATING COMPANY, LLC'S  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION & ORDER; CERTIFICATE  
OF SERVICE

**WAIKAPU PROPERTIES, LLC AND MTP OPERATING  
COMPANY, LLC'S PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION & ORDER**

WAIKAPU PROPERTIES, LLC ("Waikapu Properties") and MTP OPERATING  
COMPANY, LLC ("MTP"), by and through its attorneys, Merchant Horovitz LLLC, and  
pursuant to Minute Order No. 11 issued herein on February 10, 2017, hereby submit their  
proposed Findings of Fact, Conclusions of Law, and Decision & Order as stated below.

## FINDINGS OF FACT

### **I. Factual Findings Applicable to All Appurtenant Rights Claims**

1. Lilikala Kame`eleihiwa, Ph.D, provided expert testimony in Native Hawaiian history and culture as well as analysis of Mahele records for the Na Wai Eha region to aid in the determination of the amount of water used on various parcels of land at the time these lands were converted to fee-simple title. See Written Testimony of Lilikala K. Kame`eleihiwa, Ph.D. at <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/NAWAI-TE.pdf> (“Kame`eleihiwa Written Testimony”).

2. Professor Kame`eleihiwa testified that while precise areas of cultivation cannot be ascertained based on land title records from the Great Mahele, there are certain rebuttable presumptions and guiding principles that provide a reasonable estimation of the amount of water used at the time of fee-simple conversion. Kame`eleihiwa Written Testimony at ¶ 2. Said presumptions and principals are as follows:

a. Presumption No. 1: If no pahale is mentioned in a kuleana award, the entire kuleana should be presumed to be in cultivation.

b. Presumption No. 2: If a pahale is referenced in the kuleana award, but no size of the pahale is provided, the area for the pahale should be presumed to be no more than one quarter of an acre.

c. Presumption No. 3: If the following descriptors are used to describe kuleana or an Apana within a kuleana, without references any other crop or pahale, the entire parcel should be presumed to be cultivated in loi kalo: kalo, loi, loi kalo, pauku kalo, pauku loi, moo kalo, poalima, loi aupuni, loi paahao, aina kalo.

d. Presumption No. 4: All poalima should be presumed to be cultivated in loi

kalo.

e. Presumption No. 5: Where Mahele records for a particular kuleana do not specify the crop being farmed on the land or the presence of a house lot, if the kuleana includes, abuts, or is near to a stream, auwai, or other lands for which loi kalo documentation exists, such as a poalima, it should be presumed that wetland kalo was being cultivated on that kuleana.

f. Guiding Principle No. 1: Where Mahele records are ambiguous in describing the land use for an Apana, or the land use description covers more than one Apana, the land use for neighboring Apana can serve as a guide.

g. Guiding Principle No, 2: Existing cultural land features can help to determine the location and size of the loi on a kuleana or apana, such as remnants of loi walls and terraces.

h. Guiding Principle No. 3: If Mahele records for surrounding kuleana and the subject kuleana's current cultural land features are not helpful, there is no way to arrive at a reasonably accurate water use quantification for that parcel, and an equal distribution of land among the noted land uses may be the only justifiable compromise.

Kame`eleihiwa Written Testimony at ¶¶ 40-47.

3. Paul Reppun provided expert testimony in the water requirements of wetland taro. See Written Testimony of Paul Reppun, Exhibit OHA-1.

4. Mr. Reppun testified that wetland taro needs between 100,000 and 300,000 gallons per acre per day of "new" water, which is water that can still serve the essential function of maintaining temperatures low enough to prevent crop failure due to rot and pests, and which has not been rendered useless for this cooling function by previous use in upstream loi. In the warmer months of the year, the higher figure should be used. Testimony of Paul Reppun, OHA-

1 at ¶ 4.

5. The per acre water use of taro is an average over the entire area, including fallow loi and uncultivated areas such as the banks between the loi. The range of 100,000 to 300,000 gad takes this into account and states an average for a loi complex. Id. at ¶ 14.

6. The figure of 100,000 to 300,000 gad takes into account the various factors affecting water needs for taro, incorporating both periods of less water use and periods of peak water use. Id. at ¶ 25.

7. The Commission has previously set the water budget for wetland taro cultivation at 130,000 to 150,000 in Na Wai Eha proceedings.

## **II. MTP Operating Company, LLC**

8. MTP Operating Company, LLC (“MTP”) is the operator of the Maui Tropical Plantation (“Plantation”) located in Waikapu, Maui. 2203-MTP-2.

9. The working Plantation consists of approximately 59.054 acres identified as Tax Map Key No. (2) 3-6-005-007 and is comprised of twenty (20) Land Commission Awards (LCA) and Grants: LCA 236I:1 to Charles Copp; LCA 8874:1,2,3 to Kaneae; LCA 432 to Anthony Silva; LCA 5774:2,4 to Kaai; LCA 491:1,2,3 to Haawahine; LCA 3527:1 to Kamohai; LCA 462:1,2 to Mahuka; LCA 5324:2 to Keakini; LCA 455:2 to Haa; LCA 416:1,2 to John Crowder; LCA 10160:4 to Mahoe; Grant 2960 to J. Boardman; Grant 2069:1 to Kaai; Grant 2904 to John Crowder; Grant 3043 to J. Boardman; Grant 3152 to Henry Cornwell; Grant 2747:2 to Eugene Bal; Grant 1674 to W. Gleason; Grant 2324 to E. Bal; and Grant 1146 to Antonio Sylva. 2203-MTP-2.

10. MTP submitted one application for a Surface Water Use Permit for Existing Use in the Na Wai Eha, Maui, Surface Water Management Area (“SWUPA 2203”) on April 22,

2009, requesting 124,532 gallons per day of non-potable water from the Waihee ditch for irrigation of 40 acres of rotating row crops, 15 acres of landscaping, and 4 acres of ornamental and nursery plants. 2203-MTP-1.

11. MTP submitted the average metered daily use for the water reporting period of May 2007 through April 2008. 2203-MTP-1.

12. The 12-month actual average daily water use of MTP is 124,532 gallons per day. 2203-MTP-1.

Water Use	Acreage	Quantity of Water Used (gallons per day)	Gallons Per Acre Per Day (gad)
Row Crops	40 acres	82,332	2,058
Landscaping	15 acres	36,000	2,400
Ornamental and Nursery Plants	4 acres	6,200	1,550
TOTAL	59 acres	124,532	2,110

13. MTP has a water delivery commitment from Wailuku Water Company for, inter alia, the irrigation of the Maui Tropical Plantation. Declaration of Michael Atherton, 2/5/16 at ¶ 7.

14. On February 6, 2012, MTP submitted extensive documentation to the Commission on Water Resource Management (“Commission”) asserting appurtenant and riparian rights, including but not limited to the following:

- Proof of ownership or occupancy of the property, including deeds that grant and assign both ground and surface water rights appurtenant to the property;
- TMK map showing boundary of the larger TMK parcel and all LCA parcels embedded within the TMK for which an appurtenant right is being claimed;
- Historical maps showing locations of auwai/ditches and stream location;

- Documents from the State of Hawaii Archives demonstrating that the parcels were used as a residence or for cultivation at the time of the Mahele, including but not limited to:
  - Legible copy of the LCA number
  - English translation of the LCA
  - Royal Patent and number
  - Name of the original awardee
  - Original and translated copies of Native Testimony and/or Foreign Testimony before the Land Commission
- Additional documents consisting of survey field notes and diagrams, parcel drawings, and letter(s) from the Commissioner of Public Lands.

2203-MTP-2.

15. On December 31, 2014, the Commission issued its Na Wai Eha: Provisional Order on Claims That Particular Parcels Have Appurtenant Rights (“Provisional Order”). See <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1302/CCHMA1302-20141231-CWRM.pdf>.

16. While the Provisional Order conditionally recognized and verified appurtenant water rights for ten (10) Land Commission Awards and Grants that comprise the identified TMK, MTP withdraws, without prejudice, its appurtenant rights for all MTP parcels. MTP reserves the right to re-submit a permit application for appurtenant rights at a later date.

17. On February 5, 2016, MTP submitted its Opening Brief, Direct Testimony of Michael Atherton, and initial Exhibits. See <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2203-MTP-OB.pdf>; <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2203-MTP-TE.pdf>; and <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2203-MTP-EX.pdf> respectively.

18. On May 31, 2016, MTP submitted its Joint Reply Brief with the additional

declaration testimony of Michael Atherton, Grant Schule, William Jacintho, and Robert Pahia.

See <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/reply/2203-MTP-2356-3471-3472-WAIKAPU-Reply-Joint.pdf>.

19. Michael Atherton testified in the contested case hearing on July 29, 2016, and September 20, 2016, in support of MTP and Waikapu Properties' surface water permit applications. TR 7/29/16 4:22-93:21, 122:9-155:2; TR 9/20/16 38:10-43:17. Farming and agricultural tenants William Jacintho, Grant Schule, and Robert Pahia also testified in support of MTP and/or Waikapu Properties' surface water permit applications on July 28, 2016. TR 7/28/16 192:11-206:18 (Jacintho), 207:7-226:23 (Schule), 227:13-245:18 (Pahia).

20. MTP's request of 124,532 gallons per day of surface water from Na Wai Eha complies with the requirements of HRS § 174C-48 for a permit:

- a. The request can be accommodated with the available water source. Sufficient water exists for MTP to continue to withdraw water at a rate of 124,532 gallons per day.
- b. The request is for a reasonable-beneficial use as defined in HRS § 174C-3. The Water Code expressly recognizes agriculture as a beneficial use, HRS § 174C-2(c), and for the purpose of the CCH, the Commission has reached conclusions on what are reasonable, economic and efficient uses for MTP, specifically 124,532 gallons per day for use on TMK No. (2) 3-6-005-007.
- c. The proposed use does not interfere with any existing legal use of water.
- d. The proposed agricultural use is consistent with the public interest. Haw. Constitution Article XI, §3; HRS 174C-2(c).
- e. The lands irrigated by the water MTP proposes to use are zoned in the

State Urban District and the State Agricultural district. Such zoning accurately reflects the diverse nature of the property and accounts for MTP's working agricultural farm as well as the commercial shops and restaurants that are also a part of the Maui Tropical Plantation experience. The current uses are consistent with both State and County land use plans and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

f. The continued viability of the Maui Tropical Plantation also serves an important economic interest for the people of Maui. MTP was built by C. Brewer & Company more than 30 years ago and currently employs over 50 local residents on property. MTP is also home to a variety of local businesses and artisans including the Maui Tropical Plantation, Mill House Restaurant (using farm fresh ingredients from MTP lands), Maui Chef's Table, Mill House Café (featuring 100% Maui coffees), Moku Pua Soap Factory, Ron L. Jewelers, Flyin' Hawaiian Ziplines, Maui Ziplines, and Kumu Farms. These businesses, together with MTP, provide a variety of high quality job opportunities for Maui residents and support diverse eco-tourism on the island.

g. The proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

21. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

22. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

23. There are also no existing feeder lines to delivery recycles wastewater from the



County's Kahului Wastewater Treatment plant to MTP's farm, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for MTP.

24. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

25. Municipal ground water is not available for non-potable agricultural uses. MTP has been and continues to use surface water from Na Wai Eha, and there are no other ditch systems currently available to serve MTP.

### III. Waikapu Properties, LLC

26. Michael Atherton is the managing general partner of several related entities, including but not limited to Waikapu Properties, MTP, and Waiale 905 Partners, LLC.

27. In 2005, through various entities, Mr. Atherton acquired significant acreage, in excess of 1,600 acres, involving four parcels of land from Wailuku Agribusiness. Over the past decade, the land has evolved from 100% sugar cane production to a more diversified agricultural production model. This includes the addition of organic row crop cultivation by Kumu Farms, as well as large scale dry land taro, banana, and other row crop production by Hoaloha Farms. Declaration of Michael Atherton, 2/5/16, at ¶ 5.

28. Also, in 2006, through various entities, Mr. Atherton acquired Maui Tropical Plantation, which is comprised of approximately 59 acres. Maui Tropical Plantation has been revitalized as an eco-tourist site, emphasizing agriculture, farm to table values, and other tourist education activities. Over \$10 million has already been expended in the acquisition and development of Maui Tropical Plantation. Declaration of Michael Atherton, 2/5/16, at ¶ 6.

29. As part of the acquisition of real property on Maui, Mr. Atherton obtained water delivery commitments from Wailuku Water Company (WWC) in order to irrigate the aforementioned 1,600 acres of land purchased in Waikapu and the Maui Tropical Plantation. WWC is obligated to deliver up to 2.5 MGD for the development of agricultural crops and for the irrigation needs of the Maui Tropical Plantation. Declaration of Michael Atherton, 2/5/16, at ¶ 7.

30. Waikapu Properties submitted four separate applications for Surface Water Use Permits for both new and existing uses in the Na Wai Eha, Maui, Surface Water Management Area for properties it and its associated entities own in Waikapu, excluding lands that were (at

the time) being leased by HC&S. A summary of the applications was submitted as follows:

SWUPA	TMK NO.	PARCEL ACREAGE	REQUESTED GPD	USE & ACREAGE
2356	3-6-004-003	657.195 acres	516,714 gpd	61.1 Coffee
2297N	3-6-004-003	657.195 acres	1,300,000 gpd	100 Feed and forage 30 Coffee 70 Reforestation
3471N	3-6-004-006	52.976 acres	109,048 gpd	52.98 Herbs
3472N	3-6-006-036	0.72 acres	5,544 gpd	0.72 Feed and forage

Declaration of Michael Atherton, 2/5/16, at ¶ 13.

31. On February 6, 2012, Waikapu Properties submitted extensive documentation to the Water Commission supporting claims for appurtenant water rights for the above properties, including but not limited to the following:

- Proof of ownership or occupancy of the property, including deeds that grant and assign both ground and surface water rights appurtenant to the property;
- TMK map showing boundary of the larger TMK parcel and all LCA parcels embedded within the TMK for which an appurtenant right is being claimed;
- Historical maps showing locations of auwai/ditches and stream location;
- Documents from the State of Hawaii Archives demonstrating that the parcels were used as a residence or for cultivation at the time of the Mahele, including but not limited to:
  - Legible copy of the LCA number
  - English translation of the LCA
  - Royal Patent and number
  - Name of the original awardee
  - Original and translated copies of Native Testimony and/or Foreign Testimony before the Land Commission
- Additional documents consisting of survey field notes and diagrams, parcel drawings, and letter(s) from the Commissioner of Public Lands.

See Exhibit Nos. 2356-Waikapu-3 (re: TMK No. 3-6-004-003), 3471-Waikapu-2 (re: TMK No.

3-6-004-006), and 3472-Waikapu-2 (re: TMK No. 3-6-006-036).

32. On December 31, 2014, the Commission issued its Na Wai Eha: Provisional Order on Claims That Particular Parcels Have Appurtenant Rights (“Provisional Order”). See <http://files.hawaii.gov/dlnr/cwrp/cch/cchma1302/CCHMA1302-20141231-CWRM.pdf>. The Provisional Order conditionally recognized and verified appurtenant water rights for a number of Land Commission Awards and Grants that comprise the identified TMKs. Id.

33. While the Commission granted provisional recognition of appurtenant rights for a number of parcels, Waikapu Properties withdraws, without prejudice, its appurtenant rights for all parcels except the following, which were also granted provisional recognition of appurtenant rights by the Commission:

- LCA 236I:2 to Charles Copp
- LCA 3528:1 to Koa
- LCA 3528:2 to Koa
- LCA 2394 to Kaeha

Waikapu Properties reserves the right to re-submit a permit application for appurtenant rights for other parcels at a later date.

34. Land Commission Award 236I:2 to Charles Copp describes Lot 1 as “containing 16-1/2 acres” and Lot 2 “containing 4 chains, 49 fathoms, 43 square feet.” Foreign testimony refers to “kalo land” and native testimony makes reference to 14 patches and poalima. See 2356-Waikapu-3 at Exhibit 1.

35. Land Commission Award 3528:1 to Koa contains a survey indicating that Apana 1 measures 3-9/10 acres, and native and foreign testimony notes that the parcel is bounded by Waikapu Stream and contains loi and taro pauku. See 2356-Waikapu-3 at Exhibit 13.

36. Land Commission Award 3528:2 to Koa contains a survey indicating that Apana 2 measures 1-56/100 acres, and native and foreign testimony notes that the parcel is bounded by on both sides by a Kahawai and auwai and contains taro pauku with a poalima bounding both sections. See 2356-Waikapu-3 at Exhibit 13.

37. Land Commission Award 2394 to Kaeha contains a survey indicating that Apana 1 is 1-36/100 acres and is bounded on one side by “auwai,” and Apana 2 is 35/100 acres and bounded on one side by a “kahawai.” Foreign testimony notes that “No. 1 is a section of lois. No. 2 is 4 lois” and that both are bounded “Waihee, by creek.” Similarly, native testimony notes that parcel 1 contains taro pauku and parcel 2 contains 4 loi of taro, both parcels also being bounded by a stream. See 2356-Waikapu-3 at Exhibit 8.

38. On February 5, 2016, Waikapu Properties submitted its Opening Brief, Direct Testimony of Michael Atherton, and initial Exhibits. See <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2356-3471-3472-WAIKAPU-OB.pdf>; <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2356-3471-3472-WAIKAPU-TE.pdf>; and <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/opening/2356-3471-3472-WAIKAPU-EX.pdf>, respectively.

39. On May 31, 2016, Waikapu Properties submitted its Joint Reply Brief with the additional declaration testimony of Michael Atherton, Grant Schule, William Jacintho, and Robert Pahia. See <http://files.hawaii.gov/dlnr/cwrn/cch/cchma1501/reply/2203-MTP-2356-3471-3472-WAIKAPU-Reply-Joint.pdf>.

40. On July 25, 2016, only three days before Waikapu Properties was to call its first witness at the contested case hearing, HC&S filed a Notice Regarding SWUPA 2205, wherein HC&S notified the Commission that it would no longer pursue a surface water use permit for the

Iao-Waikapu Fields, which is the subject of SWUPA 2205, because HC&S has decided that it will not continue to lease these lands from Waikapu Properties and its related entities. See HC&S's Notice Regarding SWUPA 2205, filed herein on 7/25/16.

41. Waikapu Properties thereafter notified the Commission that it would continue to pursue SWUPA 2205 in place of HC&S to the extent that SWUPA 2205 seeks water allocations for lands that Waikapu Properties owns, leases, or may lease, as Waikapu Properties' existing tenant farmers – Grant Schule, William Jacintho and Robert Pahia – have the means and desire to utilize former HC&S fields to expand their own farming operations. See Waikapu Properties' Response to HC&S's Notice Regarding SWUPA 2205, filed herein on July 26, 2016.

42. Michael Atherton went on to testify in the contested case hearing on July 29, 2016, in support of MTP and Waikapu Properties' surface water permit applications. TR 7/29/16 4:22-93:21, 122:9-155:2; TR 9/20/16 38:10-43:17. Farming and agricultural tenants William Jacintho, Grant Schule, and Robert Pahia also testified in support of MTP and/or Waikapu Properties' surface water permit applications on July 28, 2016. TR 7/28/16 192:11-206:18 (Jacintho), 207:7-226:23 (Schule), 227:13-245:18 (Pahia).

43. Given the very short amount of time between HC&S' notice regarding its relinquishment of SWUPA 2205 on July 25, 2016, and the commencement of Waikapu Properties' witness testimony on July 28, 2016, Waikapu Properties did not have adequate time to definitively map out the uses and exact water needs for expanded agricultural operations on the former HC&S Iao-Waikapu fields, and Waikapu Properties' witnesses were asked to provide further testimony at a later date.

44. On August 24, 2016, Waikapu Properties submitted additional declaration testimony of Michael Atherton, Grant Schule, Robert Pahia, and William Jacintho regarding

expanding current agricultural operations onto the former HC&S Iao-Waikapu fields. See Second Supp. Decl. of Michael Atherton, First Supp. Decl. of Grant Schule, First Supp. Decl. of Robert Pahia, and First Supp. Decl. of William Jacintho, filed herein on August 24, 2016.

45. Counsel for Waikapu Properties subsequently entered into discussions with counsel for the Office of Hawaiian Affairs (“OHA”) and counsel for Hui O Na Wai Eha and Maui Tomorrow Foundation, Inc. (collectively “the Community Groups”) to modify and clarify Waikapu Properties’ water request. In furtherance of those negotiations, and in light of the newfound ability afforded to Waikapu Properties to re-allocate field usage subsequent to the departure of HC&S with regard to SWUPA 2205, Waikapu Properties filed its Notice With Regard To SWUPA 2205, 2356, 2297N and 3472N, wherein Waikapu Properties provided the Commission with an overview of the proposed changes to its water allocation request in light of the departure of HC&S from the Iao-Waikapu fields. See Waikapu Properties’ Notice With Regard To SWUPA 2205, 2356, 2297N and 3472N, filed herein on September 19, 2016 (“9/19/16 Notice”).

46. As stated in the Notice, the modification accomplishes the following:
- a. Reduction of requested water by more than 50%.
  - b. Removal of water requested for forage for cattle – the only request for cattle will be a reasonable amount for drinking water.
  - c. Eventual relocation of all farming operations to areas makai of the Waihee Ditch, and thus off of Waikapu Stream water:
    - i. Ultimately water from Waikapu Stream will be used only for drinking water for cattle
    - ii. Because Kumu Farms is a certified organic farm, Kumu Farms will

continue to farm 18 acres of land above Waihee Ditch and temporarily draw water from Waikapu Stream for approximately 2-3 years until lands below Waihee Ditch have been out of sugar production for a sufficient time to allow those fields to be certified organic

iii. Hoaloha Farms will be entitled to water and harvest crops that are currently in-ground above Waihee Ditch and which utilize water from Waikapu Stream, and will transition to lands below Waihee Ditch and off of Waikapu Stream water as such crops are harvested.

See 9/19/16 Notice.

47. The result of such negotiations were the field map, attached to the 9/19/16 Notice as Exhibit "A" (Exhibit 2356-Waikapu-33 / 2203-MTP-31), and a table of proposed volumes, attached to the 9/19/16 Notice as Exhibit "B" (the "Usage Table") (Exhibit 2356-Waikapu-34 / 22-3-MTP-32), shown below.



Field	Acres	User	Use	GPD/Acre	Total GPD	Source
731	86.5	Makani Olu	Cattle	250	21,625.00	Waikapu
733	18	Kumu Farms	Row Crop	2058	37,044.00	Waikapu
733	92.5	Beef & Blooms	Cattle	250	23,125.00	Waikapu
735	73.5	Beef & Blooms	Cattle	250	18,375.00	Waikapu
763	51.1	Beef & Blooms	Cattle	250	12,775.00	Waihee
765	63.5	Beef & Blooms	Cattle	250	15,875.00	Waihee
767 (above highway)	81.5	Beef & Blooms	Cattle	250	20,375.00	Waihee
767 (below Highway)	41.5	Ho'aloaha Farms	Taro/Row Crop	5400	224,100.00	Waihee
761	40.5	Kumu Farms	Row Crop	3000	121,500.00	Waihee
757	73.4	Ho'aloaha Farms	Taro/Row Crop	5400	396,360.00	Waihee
753	155.3	Ho'aloaha Farms	Taro/Row Crop	5400	838,620.00	Waihee
751	154.5	Ho'aloaha Farms	Taro/Row Crop	5400	834,300.00	Waihee
749	119	Kumu Farms	Row Crop	3000	357,000.00	Waihee
747	91.8	Kumu Farms	Row Crop	3000	275,400.00	Waihee
737 (portion)	77.3	Beef & Blooms	Cattle	250	19,325.00	Waihee
737 (portion)	66.5	Kumu Farms	Row Crop	3000	199,500.00	Waihee
				<b>Total Waikapu</b>	<b>100,169.00</b>	
				<b>Total Waihee</b>	<b>3,315,130.00</b>	
				<b>Total</b>	<b>3,415,299.00</b>	
MTP	59	MTP/Grant		2110	124,490.00	

Notes:

Field 731 are actual current numbers

Fields 761, 749 and 747 are 45% of State of Hawaii, Department of Agriculture allocations for vegetables.

CURRENT USE EXTRAPOLATION: DOES NOT TAKE INTO ACCOUNT LOWER ELEVATION/DIFFERENCES IN PRECIPITATION

Crop Acres	760.5	2,935,530.00	Based on current usage of 540,000 gpd/140 acres multiplied by total acreage in crop
Cattle Acres	525.9	131,475.00	acreage multiplied by 250 gpd
		3,067,005.00	

48. As stated on the Usage Table, in order to reduce Waikapu Properties' water request, relocate farming operations, and significantly decrease reliance upon water from Waikapu Stream, Waikapu Properties would require a total allocation of 3,415,299 GPD, with the vast majority of water being drawn from Waihee Ditch. The Usage Table also contains calculations extrapolated from current usage which total 3,067,005 GPD. Given that the majority of the additional lands are both southward and makai of the existing usage areas, which receive less rainfall, Waikapu Properties requested a slight increase over then current uses for existing fields, which is still only 45% of the applicable water duty as set forth in the State of Hawaii published resources. See 9/19/16 Notice.

49. The modification proposed in Waikapu Properties' 9/19/16 Notice was based

upon an understanding and good faith agreement with OHA and the Community Groups that OHA and the Community Groups would (i) waive further cross examination of Waikapu Properties, Maui Tropical Plantation, and their representatives and tenants, (ii) not contest the modified water allocation, but allow the Commission and the Hearings Officer to reach a conclusion as to the allocation afforded to Waikapu Properties, and (iii) not object to a reasonable temporary allocation of water from Waikapu Stream for 18 acres of row crop for Kumu Farms and the longer term allocation of drinking water for herd animals grazing in fields above Waihee Ditch. See 9/19/16 Notice; see also Waikapu Properties' Statement Related to OHA and Community Groups' Motion for Leave to Supplement the Record, filed herein on 2/9/17.

50. On September 20, 2016, Mr. Atherton provided further testimony in the contested case hearing to inform the Hearings Officer of the agreement reached with OHA and the Community Groups, specifically (i) the proposed decrease in Waikapu Properties' water requests, and (ii) Waikapu Properties' long-term plan to relocate farming operations below the Waihee Ditch in order to significantly reduce and limit the need for water from the Waikapu Stream to 250 gad for drinking water for cattle. TR 9/30/16 38:4-45:2.

51. At the close of Mr. Atherton's testimony, neither OHA nor the Community Groups had any further questions or cross-examination of Mr. Atherton. TR 9/30/16 43:19-44:1.

52. Mr. Atherton testified that he was thankful for the additional time allotted to work out a collaborative plan with OHA and the Community Groups that hopefully creates a win-win situation for both sides. TR 9/30/16 44:5-24.

53. On November 30, 2016, Waikapu Properties filed its First Amendment to SWUPA 2205 and its First Amendment to SWUPA Nos. 2356, 2297N, 3471N, and 3472N to

reflect the proposed modifications submitted in the 9/19/16 Notice, testified to by Mr. Atherton on 9/30/16, and collaboratively discussed with OHA and the Community Groups. See <http://files.hawaii.gov/dlnr/cwrmm/cch/cchma1501/opening/2206-WAIKAPU-AMEND1.pdf> and <http://files.hawaii.gov/dlnr/cwrmm/cch/cchma1501/opening/2356-3471-3472-WAIKAPU-AMEND1.pdf>, respectively.

**A. First Amendment to SWUPA 2205**

54. SWUPA 2205 was amended by Waikapu Properties as follows:

a. Reduction in the requested water by more than fifty percent (50%) with specific volumes of water per field noted in the chart marked as Exhibit 2356-Waikapu-34. A total of 18,375 gallons per day is requested from Waikapu Stream, and 3,315,130 gallons per day is requested from the Waihee Ditch.

b. Change in the type of crops being grown from sugar cane to taro, row crops, and organic produce as noted in the chart marked as Exhibit 2356-Waikapu-34. A field map reflecting the future uses and tenant farms was submitted as Exhibit 2356-Waikapu-33.

c. Reasonable temporary allocation of water from Waikapu Stream for 73.5 acres of taro and row crop for Field 735 to permit Hoaloha Farms to water and harvest crops that are currently in-ground until farming operations are relocated to areas makai of the Waihee Ditch at the end of July 2017. Based upon current usage, Hoaloha Farms will require a total of 396,900 gallons per day (73.5 acres x 5,400 gallons per acre per day) for Field 735 from now through the first quarter of 2017, with water usage slowly decreasing to zero gallons by the end of July 2017, when all crops on Field 735 are harvested.

d. Allocation of 250 gallons per acre per day for cattle drinking water for Fields 735, 763, 765, and a portion of Fields 737 and 767.

55. In Exhibit A to the First Amendment to SWUPA 2205, Waikapu Properties

provided the following chart regarding its modified water request:

FIELD	ACRES	USER	USE	GPD/ACRE	TOTAL GPD	SOURCE
735	73.5	Beef & Blooms	Cattle	250	18,375	Waikapu Stream
737 (portion)	77.3	Beef & Blooms	Cattle	250	19,325	Waihee Ditch
737 (portion)	66.5	Kumu Farms	Row Crop	3000	199,500	Waihee Ditch
747	91.8	Kumu Farms	Row Crop	3000	275,400	Waihee Ditch
749	119	Kumu Farms	Row Crop	3000	357,000	Waihee Ditch
751	154.5	Ho'aloaha Farms	Taro/Row Crop	5400	834,300	Waihee Ditch
753	155.3	Ho'aloaha Farms	Taro/Row Crop	5400	838,620	Waihee Ditch
757	73.4	Ho'aloaha Farms	Taro/Row Crop	5400	396,360	Waihee Ditch
761	40.5	Kumu Farms	Row Crop	3000	121,500	Waihee Ditch
763	51.1	Beef & Blooms	Cattle	250	12,775	Waihee Ditch
765	63.5	Beef & Blooms	Cattle	250	15,875	Waihee Ditch
767 (above highway)	81.5	Beef & Blooms	Cattle	250	20,375	Waihee Ditch
767 (below Highway)	41.5	Ho'aloaha Farms	Taro/Row Crop	5400	224,100	Waihee Ditch

Total Waikapu	18,375
Total Waihee	3,315,130
<b>TOTAL GPD</b>	<b>3,333,505</b>

Notes:

Fields 761, 749 and 747 are only 45% of State of Hawaii, Department of Agriculture allocations for vegetables.

56. Waikapu Properties' Amended SWUPA No. 2205 request of 3,333,505 gallons per day of surface water from Na Wai Eha complies with the requirements of HRS § 174C-48 for a permit:

- a. The request can be accommodated with the available water source.

Sufficient water exists for Waikapu Properties to withdraw water at a rate of 3,333,505 gallons per day.

- b. The request is for a reasonable-beneficial use as defined in HRS § 174C-3.

The Water Code expressly recognizes agriculture as a beneficial use, HRS § 174C-2(c), and for the purpose of the CCH, the Commission has reached conclusions on what are reasonable, economic and efficient uses for Waikapu Properties: 250 gad for drinking water for cattle; 3,000 gad for row and organic crops; 5,400 for dryland taro for use on former HC&S Field Nos. 735,

737, 747, 749, 751, 753, 757, 761, 763, 765, 767 as shown on 2356-Waikapu-33 and 2356-Waikapu-34.

c. The proposed use does not interfere with any existing legal use of water.

d. The proposed agricultural use is consistent with the public interest. Haw. Constitution Article XI, §3; HRS 174C-2(c).

e. The lands irrigated by the water Waikapu Properties proposes to use are zoned agriculture in the state and county general plans and land use designation, and therefore, consistent with the state and county general plans and land use designations and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

f. The continued viability of Waikapu Properties' and its tenants' agricultural operations also serves an important economic interest for the people of Maui. Kumu Farms is a certified organic farm; Hoaloha Farms is the largest dryland taro farm in the State of Hawaii; Beef & Blooms was the first certified organic ranch in Hawaii; Na`alae Beef Company raises local cattle for on-island markets. Each of these agricultural operations has a proven record of embodying farm to table values and is an integral part of creating a sustainable local food source for Maui residents and businesses.

g. The proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

57. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

58. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of

agricultural crops.

59. There are also no existing feeder lines to delivery recycles wastewater from the County's Kahului Wastewater Treatment plant to Waikapu Properties' agricultural operations, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for Waikapu Properties.

60. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

61. Municipal ground water is not available for non-potable agricultural uses. Waikapu Properties has been and continues to use surface water from Na Wai Eha, and there are

no other ditch systems currently available to serve Waikapu Properties.

62. While Waikapu Properties is in the process of developing five ground wells, those wells have not been permitted for any use currently, and as such, the wells are not available to meet the reasonable and beneficial needs of Waikapu Properties, its lessees, or any other person or entity. Should Waikapu Properties' ground wells become permitted and available as an alternative water source for agricultural uses, the Commission reserves the right to review and/or amend the permits granted to Waikapu Properties herein.

**B. First Amendment To SWUPA Nos. 2356, 2297N, 3471N, and 3472N**

63. SWUPA Nos. 2356, 2297N, 3471N and 3472N were amended by Waikapu Properties as follows:

a. Reduction in the requested water by more than 1.8 million gallons per day, which represents a ninety-six percent (96%) decrease in water drawn from the Waikapu Stream by Waikapu Properties. A total of only 81,794 gallons per day is requested from Waikapu Stream, with specific volumes of water per field noted in the chart below, which was submitted as Exhibit "A" to the First Amendment to SWUPA Nos. 2356, 2297N, 3471N and 3472N.

FIELD	ACRES	USER	USE	GPD/ACRE	TOTAL GPD	SOURCE
731	86.5	Makani Olu	Cattle	250	21,625	Waikapu Stream
733	18	Kumu Farms	Row Crop	2058	37,044	Waikapu Stream
733	92.5	Beef & Blooms	Cattle	250	23,125	Waikapu Stream
<b>TOTAL GPD</b>					<b>81,794</b>	

b. Change in the type of crops being grown from coffee to organic produce and row crops.

c. Water requested from Waikapu Stream to water and maintain Kumu Farms' eighteen (18) acres of Field 733 for organic row crops will continue only until such time as substitute fields as shown on Exhibit 2356-Waikapu-33 are certified organic, at which time

the water allocation for those 18 acres of Field 733 shall be reduced to that necessary for drinking water for cattle (250 gallons per acre per day).

d. Removal of water requested for feed and forage for cattle – the only request for cattle being a reasonable amount (250 gad) for drinking water for the herds.

e. All farming operations will be relocated long-term to areas makai of the Waihee Ditch such that no surface water will eventually be needed from the Waikapu Stream other than 250 gad for drinking water for cattle.

64. Waikapu Properties' Amended SWUPA Nos. 2356, 2297N, 3471N and 3472N request of 81,794 gallons per day of surface water from Na Wai Eha complies with the requirements of HRS § 174C-48 for a permit:

a. The request can be accommodated with the available water source. Sufficient water exists for Waikapu Properties to withdraw water at a rate of 81,794 gallons per day.

b. The request is for a reasonable-beneficial use as defined in HRS § 174C-3. The Water Code expressly recognizes agriculture as a beneficial use, HRS § 174C-2(c), and for the purpose of the CCH, the Commission has reached conclusions on what are reasonable, economic and efficient uses for Waikapu Properties: 250 gad for drinking water for cattle on former HC&S Fields 731 and 733 and 2,058 gad for 18 acres of organic crops on a portion of former HC&S Field No. 733 as shown on 2356-Waikapu-33 and 2356-Waikapu-34.

c. The proposed use does not interfere with any existing legal use of water.

d. The proposed agricultural use is consistent with the public interest. Haw. Constitution Article XI, §3; HRS 174C-2(c).

e. The lands irrigated by the water Waikapu Properties proposes to use are



zoned agriculture in the state and county general plans and land use designation, and therefore, consistent with the state and county general plans and land use designations and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

f. The continued viability of Waikapu Properties' and its tenants' agricultural operations also serves an important economic interest for the people of Maui. Kumu Farms is a certified organic farm; Beef & Blooms was the first certified organic ranch in Hawaii; Na'alaie Beef Company raises local cattle for on-island markets. Each of these agricultural operations has a proven record of embodying farm to table values and is an integral part of creating a sustainable local food source for Maui residents and businesses.

g. The proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

65. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

66. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

67. There are also no existing feeder lines to delivery recycles wastewater from the County's Kahului Wastewater Treatment plant to Waikapu Properties' agricultural operations, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for Waikapu Properties.

68. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced

at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

69. Municipal ground water is not available for non-potable agricultural uses. Waikapu Properties has been and continues to use surface water from Na Wai Eha, and there are no other ditch systems currently available to serve Waikapu Properties.

70. While Waikapu Properties is in the process of developing five ground wells, those wells have not been permitted for any use currently, and as such, the wells are not available to meet the reasonable and beneficial needs of Waikapu Properties, its lessees, or any other person or entity. Should Waikapu Properties' ground wells become permitted and available as an alternative water source for agricultural uses, the Commission reserves the right to review and/or amend the permits granted to Waikapu Properties herein.

**C. Tenant Farmers and Agricultural Operations**

**a. Kumu Farms**

71. Grant Schule is the owner of Kumu Farms and has been a farmer for the past thirty-five years. See TR 7/28/16 (Schule) 207:9-14.

72. As of July 2016, Mr. Schule had been successfully leasing approximately 80 acres from Waikapu Properties for five years to grow over twenty-five diversified crops, fruits, vegetables and herbs, such as papaya, bananas, green vegetables, basil, and carrots. See TR 7/28/16 (Schule) 207:15-22; Grant Schule Declaration, 5/27/16 at ¶ 3.

73. Kumu Farms' Waikapu operation employs approximately 20 people of various backgrounds and markets directly to customers on Maui, ships inter-island to Oahu, and exports sunrise papaya to the U.S. mainland. Grant Schule Declaration, 5/27/16 at ¶¶ 3-4.

74. Kumu Farms donates weekly to the Maui Food Bank, Feed My Sheep, and other charitable organizations, and is an integral part of Maui's agricultural community – committed to growing the cleanest possible fresh food. Grant Schule Declaration, 5/27/16 at ¶¶ 5-6.

75. Affordable water is critical to keeping business costs down so that Kumu Farms can compete with imported produce. In order to employ more people and expand local agricultural operations, Kumu Farms requires affordable water. TR 7/28/16 210:11-23.

76. As of early 2016, Kumu Farms has been using approximately 250,000 gallons per day over 80 acres, which is approximately 3,125 gad. TR 7/28/16 222:15-223:6.

77. Kumu Farms has the desire and means to expand its existing agricultural operations onto lands formerly leased by HC&S and would grow the same types of crops as it currently farms. Grant Schule Declaration, 5/27/16 at ¶8; TR 7/28/16 211:4-6.

78. However, because Kumu Farms is a certified organic farm, it will continue to

maintain eighteen (18) acres of Field 733 for organic row crops until such time as substitute fields as shown on Exhibit 2356-Waikapu-33 are certified organic, at which time Kumu Farms will relocate its operations to the former HC&S fields below the Waihee Ditch.

**b. Na`alae Beef Company and Beef & Blooms**

79. William Jacintho and his family are the owners of Na`alae Beef Company and Beef & Blooms of Kula, Maui. Declaration of William Jacintho, 5/27/16 at ¶ 2.

80. While the ranch's home base is located in Kula, Mr. Jacintho maintains additional pasture lands throughout Maui, including approximately 100 acres of leased pasture lands from Waikapu Properties in Waikapu, Maui, making up a microclimate ranch. Declaration of William Jacintho, 5/27/16 at ¶ 2; TR 7/28/16 193:5-8.

81. Mr. Jacintho is a fourth generation rancher and has been independently ranching for over 30 years, raising primarily Brangus, and Angus cattle from cow to calf to market animals. Na`alae Beef Company carries approximately 60 head conventionally. In addition, Mr. Jacintho has been raising some Wagyu cattle for the past 10 years. Declaration of William Jacintho, 5/27/16 at ¶ 3; TR 7/28/16 193:11-194:11.

82. In 2005, Beef & Blooms became the first Certified Organic Ranch in the State of Hawaii. Beef & Blooms has approximately 80 head of certified organic cattle. Declaration of William Jacintho, 5/27/16 at ¶ 3; TR 7/28/16 202:11-22.

83. Beef from Mr. Jacintho's ranches is sold to dozens of restaurants on Maui, including The Mill House restaurant at the Maui Tropical Plantation in Waikapu. Mr. Jacintho works closely with The Mill House to demonstrate to residents and tourists the partnership between beef in the field and beef on the menu, being a true farm to table restaurant. Declaration of William Jacintho, 5/27/16 at ¶ 4.

84. Mr. Jacintho also has an agricultural degree in Vegetable Crop Production, Nursery Management, and Landscape Maintenance and is the “farm manager” at the University of Hawaii Maui College. He has been working as a part of the UHMC Agricultural and Nature Resources Degree Program for the past 34 years. Declaration of William Jacintho, 5/27/16 at ¶ 5.

85. Because students earning an AS Degree in Horticulture and Landscape Maintenance, Sustainable Crop Production, and Cultural and Natural Resource Management from UHMC have limited options following graduation, Mr. Jacintho has been working with the Maui Tropical Plantation and fellow farmer Robert Pahia to help establish long-term farming opportunities for those graduates on the permanent agricultural components of the future Waikapu Country Town Development. Declaration of William Jacintho, 5/27/16 at ¶ 5.

86. Mr. Jacintho indicated that he has both the need, desire, and means to expand operation to adjacent former sugar cane lands as they become available and as shown on Exhibit 2356-Waikapu-33. Declaration of William Jacintho, 5/27/16 at ¶ 6; TR 7/28/16 195:11-13.

87. However, without sufficient water for his cattle, his cattle will die and his farming operations will cease. TR 7/28/16 194:13-21.

88. An average cow weighing approximately 1,000 pounds will drink at least 10-20 gallons of water a day. TR 7/28/16 205:1-7.

**c. Hoaloha Farms**

89. Robert Pahia is the owner and operator of Hoaloha Farms, which leases land from Waikapu Properties. TR 7/28/16 227:13-228:10.

90. Mr. Pahia has been farming kalo in Waikapu since 2010, beginning at the Maui Tropical Plantation, and has expanded the acreage under cultivation to over 61.6 acres. Hoaloha

Farms is now the largest producer of dryland kalo in the state of Hawaii. Declaration of Robert Pahia, 5/29/16 at ¶ 3; TR 7/28/16 228:11-12, 234:19-235:1.

91. In addition to kalo, Hoaloha Farms also produces mai`a (bananas), `uala (sweet potato), and `ulu (breadfruit), crops that have not been grown in Waikapu for 150 years.

Declaration of Robert Pahia, 5/29/16 at ¶ 3; TR 7/28/16 228:13-19.

92. Hoaloha Farms employs 8 individuals and provides large amounts of kalo to Hoaloha Na Ekolu and their restaurants, including Old Lahaina Luau, Aloha Mixed Plate, Star Noodle, and Leoda's Kitchen & Pie Shop. Other large customers include Mama's Fish House and other Oahu based customers. Large amounts of kalo are also exported to the mainland for processing into kalo flour for the baked foods industry. The trend of partially replacing wheat flour with kalo flour in breads has shown dramatic growth. Declaration of Robert Pahia, 5/29/16 at ¶ 4; TR 7/28/16 228:20-229:13.

93. Through experimentation on the Waikapu Properties' land, Hoaloha Farms has been able to develop sustainable models of kalo production, including non-pesticide approaches with farm-made fertilizers, mulch and nitrogen-fixing cover crops. Declaration of Robert Pahia, 5/29/16 at ¶ 5.

94. The Hoaloha Farm in Waikapu actively promotes agriculture and perpetuates the Hawaiian culture, partnering with other farmers, distributing healthy kalo starts, and educating prospective growers, student groups, and all the Hoaloha Na Ekolu staff about Hawaiian practices and values. Declaration of Robert Pahia, 5/29/16 at ¶ 6.

95. Without sufficient amounts of water at an affordable rate, Hoaloha Farms' agricultural operations in Waikapu will cease to exist. TR 7/28/16 231:1-14.

96. Mr. Pahia indicated that he has both the desire and means to expand farming

acreage as HC&S vacates leased Waikapu Properties' land as shown on Exhibit 2356-Waikapu-33. Declaration of Robert Pahia, 5/29/16 at ¶ 7.

**D. Waikapu Country Town Development**

97. Waikapu Properties has long-term plans to develop a portion of its lands as housing for Maui residents (the "Housing Project"). Declaration of Michael Atherton, 5/31/16, at ¶ 5.

98. The Housing Project requires significant governmental and regulatory approvals. The pace of such approvals is beyond Waikapu Properties and MTP's control, and because there is a high likelihood that the various governmental Boards, Commissions, and Agencies may impose conditions, restrictions, or other limitations on the Housing Project that will determine its size, scope and time-frame, it is not entirely certain when the Housing Project will commence or conclude. Declaration of Michael Atherton, 5/31/16, at ¶¶ 6-8.

99. The Housing Project seeks to redistrict approximately 485 acres of State Agricultural District land to the State Urban and Rural Districts and maintain approximately 1,077 acres within the State Agricultural District. Declaration of Michael Atherton, 5/31/16, at ¶ 9.

100. The Housing Project contemplates that roughly 800 acres of the agricultural land will be permanently protected through an agricultural easement or dedication to facilitate long-term farming on these lands. Declaration of Michael Atherton, 5/31/16, at ¶ 10.

101. As part of the Housing Project, and in recognition of Maui's long-term needs, Waikapu Properties is also developing five (5) wells. Declaration of Michael Atherton, 5/31/16, at ¶ 11.

102. Three wells have been identified as suitable for potable use and have undergone

testing to determine water quality. The fourth and fifth wells have shown low salinity levels, and testing has been conducted to determine the viability of those wells for domestic use, and if not, for possible non-potable use. Declaration of Michael Atherton, 5/31/16, at ¶ 12.

103. Availability of ground water for agricultural purposes in the future will depend greatly on (1) the results of water quality testing, (2) a determination as to whether all or some of the wells will be transferred to the County of Maui or remain a private water system, and (3) developments of the infrastructure to transmit and deliver the water from the wells to the intended recipients. Declaration of Michael Atherton, 5/31/16, at ¶ 13.

104. As with the Housing Project, when, or even if, those alternative sources become available is not within Waikapu Properties' control. Further, what restrictions the relevant governmental agencies place on such water, i.e., for domestic or non-potable uses exclusively, or both, is also not within Waikapu Properties' control. Declaration of Michael Atherton, 5/31/16, at ¶ 14.

105. Regardless of what the well water may be used for in the future, if it is available, because it has not been permitted for any use currently, it is not available to meet the reasonable and beneficial needs of Waikapu Properties, its lessees, or any other person or entity. Declaration of Michael Atherton, 5/31/16, at ¶ 15.

## CONCLUSIONS OF LAW

### **I. Appurtenant Water Rights**

1. 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 fee simple lands.” Reppun v. Board of Water Supply, 65 Haw. 531, 554-556 (1982).

2. When land allotted by the Mahele was confirmed to the awardee by the Land



Commission and/or when a Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for cultivation generally, but not exclusively, of taro. McBryde Sugar Co., Ltd. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973).

3. Once an appurtenant right is recognized and quantified, current use is not limited to its specific use at the time of the Mahele. Rather, when a party has the right of water, he can use it for any purpose, although different from the original use, and in a different place, if the change does not effect injuriously the rights of others. Peck v. Bailey, 8 Haw. 658, 665 (1867).

4. Both the Hawaii Constitution and the State Water Code preserve appurtenant rights, whether being exercised or not at the time the area in which those rights pertain to is designated a water management area. Hawaii State Constitution, Article XI, §7; State Water Code, HRS §§ 174C-63, 174C-27, 174C-101(d).

5. In 1978, the Hawaii State Constitution was amended by adding Article XI, section 7, which expressly protected 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, watershed 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.

Haw. Const. Art. XI, Section 7 (emphasis added).

6. The Constitution's protection of appurtenant rights was reflected in the 1987 State Water Code, Hawaii Revised Statutes § 174C-63.

Appurtenant rights are preserved. Nothing in this part 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. Such permit shall be subject to section 174C-26 and 174C-27 and 174C-58 to 174C-62.

Haw. Rev. Stat. § 174C-63.

7. The Commission is required to determine appurtenant water rights, including quantification of the amount of water entitled to by that right. HRS § 174C-5(14).

8. “[W]hile the proper measure of those [appurtenant] 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.” 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.” Reppun v. Board of Water Supply, 65 Haw. 531, 554, 656 P.2d 57, 72 (1982) (“Reppun”).

9. A parcel’s appurtenant water rights may also be quantified by multiplying the number of acres of land which had been under cultivation at the time of the initial Land Commission Award by the average quantity of water used per day per acre in growing taro. See McBryde Sugar Co., 54 Haw. at 188, 504 P.2d at 1339.

10. For proper kalo cultivation, a substantially greater amount of water is needed for inflow above what is consumed. At times of peak use, at least 260,000 gad mean (average) flow or 150,000 gad median (50 percent of flows above, and 50 percent below 150,000 gad) flow is needed. CCH-MA06-01, 6/10/10, COL 55.

11. Current kuleana lands receive more than 130,000 to 150,000 gad for kalo loi,

translating to about 260,000 to 300,000 gpd when adjusted for the 50 percent of time that no water is needed to flow into the loi. These amounts are sufficient for proper kalo cultivation and sufficient flow. CCH-MA06-01, 6/10/10, COL 56.

12. Kuleana lands also use stream waters for domestic and other uses (vegetables, trees and plants). The Maui County Department of Water Supply (MDWS) allocates up to 540 gpd for households and 600 to 1,200 gpd for agricultural development lots, which are reasonable amounts for these purposes. CCH-MA0a6-01, 6/10/10, COL 60.

**A. Reservation of Water Rights**

13. While the Hawaii Supreme Court in *Reppun* concluded that an attempted reservation of appurtenant water rights could extinguish the right, more recent analysis of constitutional and historical material indicate that appurtenant rights do pass with land title and are not severed. Such appurtenant rights are not extinguished even if a land owner attempts to reserve water upon a sale of the property.

14. In *Reppun*, taro farmers observed decreased flow in the Waihee Stream in windward Oahu in 1975. They brought a lawsuit in 1976 to enjoin the Honolulu Board of Water Supply from diverting any of the stream's waters. Two years later in 1978, Hawaii's Constitution was amended to expressly preserve all appurtenant rights, not just appurtenant use. The 1987 Water Code carried forward this protection.

The situation before the trial court in *Reppun* occurred in 1975-1976, two years before the 1978 constitutional amendment. The Hawaii Supreme Court did not address the 1978 Constitutional amendment because the 1976 trial took place before the 1978 Constitutional Amendment. The *Reppun* Court addressed the law as it was understood at the time of the trial, as courts are generally reluctant to apply a new law retroactively to a trial court's decision that

occurred before the new law came into effect.

Given the 1978 Constitutional Amendment expressly preserving appurtenant rights without exception and for all time, post-1978 efforts to reserve water must be reviewed in accordance with the 1978 Constitutional Amendment and cannot be treated in the same manner as in *Reppun*.

15. Accordingly, any post-1978 reservation of water rights by a land owner does not extinguish appurtenant rights.

**B. MTP's Appurtenant Rights**

16. MTP has withdrawn, without prejudice, its appurtenant rights for all parcels and reserved the right to re-submit a permit application for appurtenant rights at a later date. As such, no appurtenant rights determination for MTP will be made at this time.

**C. Waikapu Properties' Appurtenant Rights**

17. While the Commission granted Waikapu Properties provisional approval of appurtenant rights for a number of parcels, Waikapu Properties has withdrawn, without prejudice, its appurtenant rights for all parcels except the following:<sup>1</sup>

- LCA 236I:2 to Charles Copp
- LCA 3528:1 to Koa
- LCA 3528:2 to Koa
- LCA 2394 to Kaeha

18. Waikapu Properties has sufficiently established the existence of and quantification of appurtenant water rights for LCA 236I:2, LCA 3528:1, LCA 3528:2, and LCA

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<sup>1</sup> Waikapu Properties' expressly reserves the right to submit a permit application for appurtenant rights at a later date.

2394.

19. Surface Water Use Permit Application No. 2356 and supporting documents affecting TMK No. 3-6-004:003 submitted by Waikapu Properties establishes that LCA 236I:2 to Charles Copp is approximately 0.25 acres and was used for growing kalo at the time of the Mahele. Utilizing 150,000 gallons per acre per day (gad) as the established water duty standard for lo`i, the resultant appurtenant water allocation for LCA 236I:2 is 37,500 gad ( $150,000 \text{ gad} \times 0.25 \text{ acres} = 37,500 \text{ gad}$ ).

20. Surface Water Use Permit Application No. 2356 and supporting documents affecting TMK No. 3-6-004:003 submitted by Waikapu Properties establishes that LCA 3528:1 to Koa is 3.9 acres and was used for growing kalo at the time of the Mahele. Utilizing 150,000 gad as the established water duty standard for lo`i, the resultant appurtenant water allocation for LCA 3528:1 is 585,000 gad ( $150,000 \text{ gad} \times 3.9 \text{ acres} = 585,000 \text{ gad}$ ).

21. Surface Water Use Permit Application No. 2356 and supporting documents affecting TMK No. 3-6-004:003 submitted by Waikapu Properties establishes that LCA 3528:2 to Koa is 1.56 acres and was used for growing kalo at the time of the Mahele. Utilizing 150,000 gad as the established water duty standard for lo`i, the resultant appurtenant water allocation for LCA 3528:2 is 234,000 gad ( $150,000 \text{ gad} \times 1.56 \text{ acres} = 234,000 \text{ gad}$ ).

22. Surface Water Use Permit Application No. 2356 and supporting documents affecting TMK No. 3-6-004:003 submitted by Waikapu Properties establishes that LCA 2394 to Kaeha consists of 1.71 acres (1.36 acres for Lot 1 and 0.35 acres for Lot 2) and was used for growing kalo at the time of the Mahele. Utilizing 150,000 gad as the established water duty for lo`i, the resultant appurtenant water allocation for LCA 2394 is 256,500 gad ( $150,000 \text{ gad} \times 1.71 \text{ acres} = 256,500 \text{ gad}$ ).

## II. Water Use Permit Application (“WUPA”) Requirements

23. Each WUPA must demonstrate that the proposed use of water (1) can be accommodated with the available water source, (2) is a reasonable-beneficial use, (3) will not interfere with any existing legal use of water, (4) is consistent with the public interest, (5) is consistent with state and county general plans and land use designations, (6) is consistent with county land use plans and general policies, and (7) will not interfere with the rights of the Department of Hawaiian Home Lands. HRS § 174C-49(a).

24. “Reasonable-beneficial use” is 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. HRS § 174C-3.

25. An offstream user can prove that a use is reasonable and beneficial by providing details on “acres to be used, the crops to be planted, and the water needed as to each group.” In re Waiahole Ditch Combined Contested Case Hearing, 105 Haw. 1, 25, 93 P.3d 643, 667 (2004) (“Waiahole II”).

26. The Commission is to “weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law and “accommodating both instream and offstream uses where feasible.” In re Water Permit Applications, 94 Haw. 97, 142, 9 P.3d 409, 455 (2000) (“Waiahole I”).

27. The Hawaii Supreme Court has recognized that private commercial use for economic development, although not a cognizable trust objective, may produce important public benefits and must figure into any balancing of competing interests of water. In the Matter of the Contested Case Hearing on Water Use (Waiola O Molokai, Inc.), 103 Hawaii 401, 432, 83 P.3d 664, 695 (2004); see also Waiahole, 94 Hawaii at 139, 9 P.3d at 451 (noting that the water

State Urban District and the State Agricultural district. Such zoning accurately reflects the diverse nature of the property and accounts for MTP's working agricultural farm as well as the commercial shops and restaurants that are also a part of the Maui Tropical Plantation experience. The current uses are consistent with both State and County land use plans and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

f. The continued viability of the Maui Tropical Plantation also serves an important economic interest for the people of Maui. MTP was built by C. Brewer & Company more than 30 years ago and currently employs over 50 local residents on property. MTP is also home to a variety of local businesses and artisans including the Maui Tropical Plantation, Mill House Restaurant (using farm fresh ingredients from MTP lands), Maui Chef's Table, Mill House Café (featuring 100% Maui coffees), Moku Pua Soap Factory, Ron L. Jewelers, Flyin' Hawaiian Ziplines, Maui Ziplines, and Kumu Farms. These businesses, together with MTP, provide a variety of high quality job opportunities for Maui residents and support diverse eco-tourism on the island.

g. The proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

30. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

31. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

32. There are also no existing feeder lines to delivery recycles wastewater from the

State Urban District and the State Agricultural district. Such zoning accurately reflects the diverse nature of the property and accounts for MTP's working agricultural farm as well as the commercial shops and restaurants that are also a part of the Maui Tropical Plantation experience. The current uses are consistent with both State and County land use plans and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

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31. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

32. There are also no existing feeder lines to delivery recycles wastewater from the



County's Kahului Wastewater Treatment plant to MTP's farm, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for MTP.

33. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

34. Municipal ground water is not available for non-potable agricultural uses. MTP has been and continues to use surface water from Na Wai Eha, and there are no other ditch systems currently available to serve MTP.

**B. Waikapu Properties' Amended SWUPA No. 2205**

35. Waikapu Properties' Amended SWUPA No. 2205 request of 3,333,505 gallons per day of surface water from Na Wai Eha complies with the requirements of HRS § 174C-48 for a permit:

a. The request can be accommodated with the available water source.

Sufficient water exists for Waikapu Properties to withdraw water at a rate of 3,333,505 gallons per day.

b. The request is for a reasonable-beneficial use as defined in HRS § 174C-3.

The Water Code expressly recognizes agriculture as a beneficial use, HRS § 174C-2(c), and for the purpose of the CCH, the Commission has reached conclusions on what are reasonable, economic and efficient uses for Waikapu Properties: 250 gad for drinking water for cattle; 3,000 gad for row and organic crops; 5,400 for dryland taro for use on former HC&S Field Nos. 735, 737, 747, 749, 751, 753, 757, 761, 763, 765, 767 as shown on 2356-Waikapu-33 and 2356-Waikapu-34.

c. The proposed use does not interfere with any existing legal use of water.

d. The proposed agricultural use is consistent with the public interest. Haw. Constitution Article XI, §3; HRS 174C-2(c).

e. The lands irrigated by the water Waikapu Properties proposes to use are zoned agriculture in the state and county general plans and land use designation, and therefore, consistent with the state and county general plans and land use designations and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

f. The continued viability of Waikapu Properties' and its tenants' agricultural operations also serves an important economic interest for the people of Maui. Kumu

Farms is a certified organic farm; Hoaloha Farms is the largest dryland taro farm in the State of Hawaii; Beef & Blooms was the first certified organic ranch in Hawaii; Na' alae Beef Company raises local cattle for on-island markets. Each of these agricultural operations has a proven record of embodying farm to table values and is an integral part of creating a sustainable local food source for Maui residents and businesses.

g. The proposed use will not interfere with the rights of the Department of Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

36. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

37. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

38. There are also no existing feeder lines to delivery recycles wastewater from the County's Kahului Wastewater Treatment plant to Waikapu Properties' agricultural operations, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for Waikapu Properties.

39. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site

improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

40. Municipal ground water is not available for non-potable agricultural uses. Waikapu Properties has been and continues to use surface water from Na Wai Eha, and there are no other ditch systems currently available to serve Waikapu Properties.

41. While Waikapu Properties is in the process of developing five ground wells, those wells have not been permitted for any use currently, and as such, the wells are not available to meet the reasonable and beneficial needs of Waikapu Properties, its lessees, or any other person or entity. Should Waikapu Properties' ground wells become permitted and available as an alternative water source for agricultural uses, the Commission reserves the right to review and/or amend the permits granted to Waikapu Properties herein.

**C. Waikapu Properties' Amended SWUPA Nos. 2356, 2297N, 3471N and 3472N**

42. Waikapu Properties' Amended SWUPA Nos. 2356, 2297N, 3471N and 3472N request of 81,794 gallons per day of surface water from Na Wai Eha complies with the requirements of HRS § 174C-48 for a permit:

- a. The request can be accommodated with the available water source.

Sufficient water exists for Waikapu Properties to withdraw water at a rate of 81,794 gallons per day.

- b. The request is for a reasonable-beneficial use as defined in HRS § 174C-3.

The Water Code expressly recognizes agriculture as a beneficial use, HRS § 174C-2(c), and for the purpose of the CCH, the Commission has reached conclusions on what are reasonable, economic and efficient uses for Waikapu Properties: 250 gad for drinking water for cattle on former HC&S Fields 731 and 733 and 2,058 gad for 18 acres of organic crops on a portion of former HC&S Field No. 733 as shown on 2356-Waikapu-33 and 2356-Waikapu-34.

- c. The proposed use does not interfere with any existing legal use of water.

- d. The proposed agricultural use is consistent with the public interest. Haw. Constitution Article XI, §3; HRS 174C-2(c).

- e. The lands irrigated by the water Waikapu Properties proposes to use are zoned agriculture in the state and county general plans and land use designation, and therefore, consistent with the state and county general plans and land use designations and the public interest. HRS § 205-4.5; Maui County Code Chapters 19.04 and 19.06.

- f. The continued viability of Waikapu Properties' and its tenants' agricultural operations also serves an important economic interest for the people of Maui. Kumu Farms is a certified organic farm; Beef & Blooms was the first certified organic ranch in Hawaii; Na' alae Beef Company raises local cattle for on-island markets. Each of these agricultural operations has a proven record of embodying farm to table values and is an integral part of creating a sustainable local food source for Maui residents and businesses.

- g. The proposed use will not interfere with the rights of the Department of

Hawaiian Homelands as provided in Section 221 of the Hawaiian Homes Commission Act.

43. There are no viable alternative ground water sources. An alternate is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics. Waiahole II, 105 Haw. at 19, 93 P.3d at 661.

44. There are currently no desalinization plants on Maui, and given the current technology and power costs, it would be cost prohibitive to desalinate water for irrigation of agricultural crops.

45. There are also no existing feeder lines to delivery recycles wastewater from the County's Kahului Wastewater Treatment plant to Waikapu Properties' agricultural operations, and based upon the information and technology available to date, the cost of constructing such infrastructure would be costs prohibitive for Waikapu Properties.

46. In 2014, HC&S commissioned the engineering firm of Austin, Tsutsumi & Associates, Inc. to prepare a feasibility report pertaining to the use of reclaimed water produced at the County's Wailuku-Kahului Wastewater Reclamation Facility for irrigation of sugar cane. See Feasibility Report for HC&S Use of Reclaimed Water From Wailuku-Kahului Wastewater Reclamation Facility, dated January 22, 2014 ("Feasibility Report"). The Feasibility Report concluded that the construction costs alone for upgrades at the treatment facility and off-site improvements necessary to utilize the reclaimed water would total \$16.9 million. In addition, the operating and maintenance costs, including purchasing the limited supply of water at the County's current rate of \$0.15/1000 gallons for "Major Agriculture" usage, is expected to be approximately \$521,000 per year. These figures do not include additional costs that HC&S (or any entity seeking to use reclaimed water from the treatment facility) will need to incur related to operational changes necessary to comply with relevant laws and regulations. See Feasibility

Report at p.38.

Furthermore, such a system would not be operational until 2020 or 2021 at the earliest because of the permit requirements associated with implementation of the reuse system. In light of these factors, use of reclaimed County wastewater is simply not a viable alternative.

47. Municipal ground water is not available for non-potable agricultural uses. Waikapu Properties has been and continues to use surface water from Na Wai Eha, and there are no other ditch systems currently available to serve Waikapu Properties.

48. While Waikapu Properties is in the process of developing five ground wells, those wells have not been permitted for any use currently, and as such, the wells are not available to meet the reasonable and beneficial needs of Waikapu Properties, its lessees, or any other person or entity. Should Waikapu Properties' ground wells become permitted and available as an alternative water source for agricultural uses, the Commission reserves the right to review and/or amend the permits granted to Waikapu Properties herein.

### **DECISION AND ORDER**

#### **I. MTP**

MTP is awarded a surface water use permit for 124,532 gallons per day of surface water collected from the Na Wai Eha surface water management area.

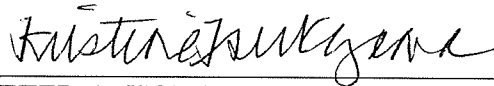
#### **II. Waikapu Properties**

Waikapu Properties is awarded a surface water use permit for 3,415,299 gallons per day from the Na Wai Eha surface water management area.

The following quantities are recognized as being awarded pursuant to Waikapu Properties' appurtenant rights:

- 37,500 gad allocated to LCA 236I:2 to Charles Copp.
- 585,000 gad allocated to LCA 3528:1 to Koa
- 234,000 gad allocated to LCA 3528:2 to Koa
- 256,000 gad allocated to LCA 2394 to Kaeha

DATED: Wailuku, Hawaii, February 17, 2017.



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PETER A. HOROVITZ  
KRISTINE TSUKIYAMA  
Attorneys for  
WAIKAPU PROPERTIES, LLC and  
MTP OPERATING COMPANY, LLC



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, Waiehu, Iao  
and Waikapu Streams, Maui

Case No. CCH-MA15-01

CERTIFICATE OF SERVICE

On February 17, 2017, copies of the foregoing document were served

on the following parties by electronic service as indicated below:

ELECTRONIC SERVICE

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

alana89@juno.com

Douglas Bell  
1420 Honua Place  
Waikapu, HI 96793

puna.papabell@gmail.com

Doyle Betsill  
c/o Betsill Brothers  
P.O. Box 1451  
Wailuku, HI 96793

teresa@bbcmaui.com

Francisco Cerizo  
P.O. Box 492  
Wailuku, HI 96793

cerizof@gmail.com

Heinz Jung & Cecilia Chang  
P.O. Box 1211  
Wailuku, HI 96793

cici.chang@hawaiiantel.net

Jordanella (Jorrie) Ciotti  
484 Kalua Road  
Wailuku, HI 96793

jorrieciotti@gmail.com

Fred Coffey  
1271 Malaihi Road  
Wailuku, HI 96793

[hawaii50peleke@yahoo.com](mailto:hawaii50peleke@yahoo.com)

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

[jimdodd47@gmail.com](mailto:jimdodd47@gmail.com)

Kathy De Hart  
P.O. Box 1574  
Wailuku, HI 96793

[kdehart17@gmail.com](mailto:kdehart17@gmail.com)

John V. & Rose Marie H. Duey  
Hooululahui LLC  
575 A Iao Valley Road  
Wailuku, HI 96793  
cc: Nani Santos

[jduey@maui.net](mailto:jduey@maui.net)

[nanisantos808@gmail.com](mailto:nanisantos808@gmail.com)

Stanley Faustino  
c/o Kanealoha Lovato-Rodrigues  
384 Waihee Valley Road  
Wailuku, HI 96793

[kanealoha808@gmail.com](mailto:kanealoha808@gmail.com)

William Freitas  
c/o Kapuna Farms LLC  
2644 Kahekili Highway  
Wailuku, HI 96793

[kapunafarms@gmail.com](mailto:kapunafarms@gmail.com)

Diannah Goo  
c/o April Goo  
2120 C Kahekili Highway  
Wailuku, HI 96793

[ag2517@aol.com](mailto:ag2517@aol.com)

Nicholas Harders on behalf of:

[waikapu@me.com](mailto:waikapu@me.com)

- Karl & Lee Ann Harders  
1422 Nuna Place  
Wailuku, HI 96793

- Theodore & Zelig Harders  
T&Z Harders FAM LTD PTNSHP  
Theodore & Zelig Harders Family Ltd.  
Partnership  
1415 Kilohi Street  
Wailuku, HI 96793

Greg Ibara  
227 Kawaipuna Street  
Wailuku, HI 96793

gregibara56@gmail.com

Evelyn Kamasaki  
Cynthia Ann McCarthy  
Claire S. Kamasaki  
1550 Nukuna Place  
Wailuku, HI 96793

cmcmaui@live.com

Charlene E. & Jacob H. Kana, Sr.  
P.O. Box 292  
Wailuku, HI 96793

char1151@hawaii.rr.com

Kimberly Lozano  
P.O. Box 2082  
Wailuku, HI 96793

pauahi808@aol.com

Renee Molina  
P.O. Box 1746  
Wailuku, HI 96793

myoheo@yahoo.com

Douglas Myers  
1299 Malaihi Road  
Wailuku, HI 96793

upperwaiehu@yahoo.com

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

nokamura@kiheigardens.net

Lorrin Pang  
166 River Road  
Wailuku, HI 96793

pangk005@hawaii.rr.com

Victor & Walette Pellegrino  
c/o Hokuao Pellegrino  
213 West Waiko Road  
Wailuku, HI 96793

hokuao.pellegrino@gmail.com

L. Ishizawa  
Piko Ao, LLC  
2839 Kalialani Circle  
Pukalani, HI 96768

lorilei@hawaii.edu

Michael Rodrigues  
2518 W. Main Street  
Wailuku, HI 96793

mikerodmaui@yahoo.com

Waldemar & Darlene Rogers  
1421 Nuna Place  
Wailuku, HI 96793

rogersw001@hawaii.rr.com

Burt Sakata  
107 Waihee Valley Road  
Wailuku, HI 96793

waihee89@yahoo.com

Bryan Sarasin, Sr.  
c/o Bryan Sarasin, Jr.  
P.O. Box 218  
Wailuku, HI 96793

mauifishfarm@hawaiiantel.net

Duke & Jean Sevilla & Christina Smith  
702 Kaae Road  
Wailuku, HI 96793

sevillad001@hawaii.rr.com

Jeff & Ramona Lei Smith  
P.O. Box 592  
Wailuku, HI 96793

ohianui.ohana@gmail.com

Murray & Carol Smith  
P.O. Box 11255  
Lahaina, HI 96761

murray@jps.net

Crystal Smythe  
John Minamina Brown Trust  
727 Wainee Street, Suite 104  
Lahaina, HI 96761

cytl@maui.net

Clayton Suzuki  
Linda Kadosaki  
Reed Suzuki  
Scott Suzuki  
P.O. Box 2577  
Wailuku, HI 96793

csuzuki@wailukuwater.com

John Varel  
191 Waihee Valley Road  
Wailuku, HI 96793

jvarel@fusionstorm.com

Michele & Leslie Vida, Jr.  
135 Pilikana Place  
Wailuku, HI 96793

mikievida@hotmail.com

Leslie Vida, Sr.  
c/o Donna Vida  
125 Pilikana Place  
Wailuku, HI 96793

dmlavida@yahoo.com

Roger Yamaoka  
Kevin Yamaoka  
1295 Old Waikapu Road  
Wailuku, HI 96793

rryamaoka@aol.com  
kty@hawaii.rr.com

Caleb Rowe, Esq.  
Kristin Tarnstrom, Esq.  
County of Maui  
Department of the Corporation Counsel  
200 South High Street  
135 Pilikana Place  
Wailuku, HI 96793  
(County of Maui, Department of Water Supply)

caleb.rowe@co.maui.hi.us  
kristin.tarnstrom@co.maui.hi.us  
susan.pacheco@co.maui.hi.us

Colin J. Lau, Esq.  
465 King Street, Room 300  
Honolulu, HI 96813  
cc: Russell Kumabe  
Holly McEldowney  
(Department of Land & Natural Resources,  
Division of State Parks)

colin.j.lau@hawaii.gov

russell.p.kumabe@hawaii.gov  
holly.mceldowney@hawaii.gov

Yvonne Izu, Esq.  
Wayne E. Costa, Jr., Esq.  
Kris N. Nakagawa, Esq.  
Morihara Lau & Fong LLP  
400 Davies Pacific Center  
841 Bishop Street  
Honolulu, HI 96813  
cc: Garret Hew  
(Hawaiian Commercial & Sugar Co./HC&S)

yizu@moriharagroup.com  
wcosta@moriharagroup.com  
knakagawa@moriharagroup.com

ghew@hcsugar.com

Hawaiian Islands Land Trust, HILT  
P.O. Box 965  
Wailuku, HI 96793  
cc: Scott Fisher  
Penny Levin

scott@hilt.org  
pennysfh@hawaii.rr.com

Isaac Moriwake, Esq.  
Summer Kupau-Odo  
Earthjustice  
850 Richards Street, Suite 400  
Honolulu, HI 96813  
(Hui O Na Wai Eha and Maui Tomorrow  
Foundation)

imoriwake@earthjustice.org  
skupau@earthjustice.org  
jbrown@earthjustice.org  
jparks@earthjustice.org

Avery & Mary Chumbley  
363 West Waiko Road  
Wailuku, HI 96793  
(Makani Olu Partners LLC)

abc@aloha.net

Jodi Yamamoto, Esq.  
Wil Yamamoto, Esq.  
Yamamoto Caliboso  
1099 Alakea Street, Suite 2100  
Honolulu, HI 96813  
(MMK Maui, LP/The King Kamehameha Golf  
Club, Kahili Golf Course)

jyamamoto@ychawaii.com  
wyamamoto@ychawaii.com

Pamela Bunn, Esq.  
Alston Hunt Floyd & Ing  
1001 Bishop Street, Suite 1800  
Honolulu, HI 96813  
(Office of Hawaiian Affairs)

pbunn@ahfi.com

Craig Nakamura, Esq.  
Catherine L.M. Hall, Esq.  
Carlsmith Ball LLP  
2200 Main Street, Suite 400  
Wailuku, HI 96793  
(Wahi Hoomalu Limited Partnership)

cnakamura@carlsmith.com  
chall@carlsmith.com

Peter A. Horovitz, Esq.  
Kristine Tsukiyama, Esq.  
Merchant Horovitz, LLLC  
2145 Wells Street, Suite 303  
Wailuku, HI 96793  
(Waikapu Properties, LLC and MTP  
(Maui Tropical Plantation) Operating  
Company, LLC)  
cc: Albert Boyce

pah@mhmaui.com  
kkt@mhmaui.com

albertboyce@gmail.com

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

bkang@wik.com  
ekaimuloa@wik.com

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

pmancini@mrwlaw.com  
jgeiger@mrwlaw.com

Tim Mayer, Ph.D.  
Supervisory Hydrologist  
Water Resources Branch  
U.S. Fish and Wildlife Service  
911 NE 11<sup>th</sup> Avenue  
Portland, OR 97232-4181  
cc: Frank Wilson

tim\_mayer@fws.gov

Earleen Tianio  
Takitani Agaran & Jorgensen, LLLP  
24 North Church Street, Suite 409  
Wailuku, HI 96793  
(Ken Ota, Saedene Ota, Kurt Sloan, Elizabeth  
Sloan, Anthony Takitani, Audrey Takitani  
Kitagawa Motors, Inc., SPV Trust and Gerald  
W. Lau Hee)

earleen@tonytlaw.com

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

lhmiike@hawaii.rr.com

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

linda.l.chow@hawaii.gov

DATED: Wailuku, Hawaii, Feb. 17, 2017, 2017.

*Kristine Tsukiyama*

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PETER A. HOROVITZ  
KRISTINE TSUKIYAMA  
MERCHANT HOROVITZ LLLC  
Attorneys for  
WAIKAPU PROPERTIES, LLC and  
MTP OPERATING COMPANY, LLC