

TAKITANI AGARAN & JORGENSEN, LLLP
 GILBERT S.C. KEITH-AGARAN 4677-0
 24 N. Church St., Rm. 409
 Wailuku, Maui, Hawaii 96793
 TEL. NO. (808) 242-4049
 FAX NO. (808) 244-4021

Attorney for KEN OTA, SAEDENE OTA.
 KURT SLOAN, ELIZABETH SLOAN,
 ANTHONY TAKITANI, AUDREY TAKITANI,
 SPV TRUST, and GERALD W. LAU HEE

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-MA 15-01 JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN, ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, AND GERALD W. LAU HEE; CERTIFICATE OF SERVICE
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JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR
 APPLICANTS KEN OTA, SAEDENE OTA.
 KURT SLOAN, ELIZABETH SLOAN,
 ANTHONY TAKITANI, AUDREY TAKITANI,
SPV TRUST, AND GERALD W. LAU HEE

APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN,
 ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, and GERALD W. LAU HEE (collectively
 "THE WAIKAPU RANCH APPLICANTS") submit the following proposed findings of fact and
 conclusions of law:

FINDINGS OF FACT

1. APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN, ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, and GERALD W. LAU HEE are all owners of lots in the Waikapu Ranch Subdivision.¹

2. APPLICANTS KEN OTA and ANTHONY TAKITANI testified in the contested case hearing on July 19, 2016. KEN OTA ORAL TESTIMONY, HRG. TR. (7/19/16), pp. 70-103; ANTHONY TAKITANI ORAL TESTIMONY, HRG. TR. (7/19/16), pp. 103-115. APPLICANT KURT SLOAN testified on July 22, 2016. KURT SLOAN ORAL TESTIMONY, HRG. TR. 7/22/16, pp. 106-133. KAEO LAU HEE testified on behalf of his family and father APPLICANT GERALD LAU HEE on September 19, 2016. KAEO LAU HEE ORAL TESTIMONY, HRG. TR. 9/19/16, pp. 73-94. The written direct testimony of MICHAEL VICTORINO, for APPLICANT SPV TRUST, was submitted in the hearing on September 20, 2016. HRG. TR. (9/20/16).

3. On May 21, 2004, Wailuku Agribusiness Co., Inc., as Grantor, conveyed to Makena Real Estate Corporation, as Grantee, lands designated by the County of Maui as TMK (2) 3-5-004-23 by deed recorded May 27, 2004 [See EXHIBIT (EXH.) OHA-29]. The deed included the following language: “EXCEPTING, RESERVING AND GRANTING, HOWEVER, unto Grantor, its successors and assigns, all water and water rights (surface and groundwater) within or appurtenant to the Property. . . .” [EXH. OHA-29, p. 2].

4. TMK (2) 3-5-004-23 is comprised of a portion of the consolidation of Royal Patent 6338, Land Commission Award 3702 to David Malo; Royal Patent 3132, Land Commission Award 2203 to Nahema and portions of Grant 1714, Apana 2 to Francis Silva; Royal Patent 3116, Land Commission Award 2225 to Kuamu; Royal Patent 497, Land Commission Award 443 to John Richardson; Royal Patent 2004, Land Commission Award 920, Apana 2 to John Richardson & Co.; Royal Patent 5926, Land Commission Award 8875 to Kanaina; Grant 2007, Apana 3 to John Richardson; and Royal Patent 6483;

¹ APPLICANT KITAGAWA MOTORS, another landowner in the Waikapu Ranch Subdivision, has withdrawn its application at this time. See HEARING TRANSCRIPT (“HRG. TR.”) September 20, 2016 (“9/20/16”).

Land Commission Award 8672, Apana 1 to Kaluau. [See EXH. OHA-29, p. 8] The consolidation was subdivided in Waikapu Ranch, Inc. Subdivision into eight lots (along with three lots for private roadways and a road widening lot). KEN OTA Written Direct Testimony (“OTA WDT”), ¶4; [EXH. OTA-1; EXH. OHA-26]. APPLICANTS OTA, TAKITANI, SLOAN, SPV and LAU HEE jointly own roadway LOT-10. See EXHs. OTA-1, OTA-15, TAKITANI-1, SLOAN-1, SPV-1, LAU HEE-1; see OHA-26

5. APPLICANTS KEN OTA and SAEDENE OTA purchased Lot 3 (TMK (2) 3-5-004-109 of the Waikapu Ranch Subdivision on April 4, 2008. OTA WDT, ¶1; EXH. OTA-15.

6. As subdivided, Lot 3 included a portion of Grant 2007, Apana 3 to John Richardson. EXH. OTA-15; KEN OTA ORAL TESTIMONY, HRG. TR. (7/19/16), pp. 89-90.

7. APPLICANT OTA requested a surface water use permit for his current and future reasonable beneficial uses in the amount of 170,000 gallons per month, or 5,666.7 gallons per day. OTA WDT, ¶3; SURFACE WATER USE PERMIT APPLICATION (SWUPA) NO. 3665.

8. APPLICANTS KURT SLOAN and ELIZABETH SLOAN purchased Lot 5 (TMK (2) 3-5-004-111 of the Waikapu Ranch Subdivision on April 22, 2008. As subdivided, Lot 5 included all of Royal Patent 3131, Land Commission Award 2203 to Nahema, and portions of Royal Patent 5926, Land Commission Award 8875 to Kanaina, Royal Patent 6338, Land Commission Award 3702 to David Malo. [EXH. SLOAN-1]; KURT SLOAN ORAL TESTIMONY, HRG. TR. 7/22/16, pp. 107-08.

9. Land Commission Award No. 8875, to Kanaina [EXH. OTA-6] comprised 0.96 acres. SLOAN SUPP. WDT, ¶5. Approximately 90% (0.864 acres) of Land Commission Award No. 8875 is part of the SLOAN Lot 5. SLOAN SUPP. WDT, ¶5 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27). Land Commission Award 8875 to Kanaina describes Lot 1 as “Houselot at Paleileiha, Waikapu, Maui.” See [EXH. OTA-6]. The Native Testimonies regarding Royal Patent 5926, Land Commission Award 8875 to Kanaina include references to the house lot and to four taro lo’i at Palailaiha, Waikapu. [EXH. OTA-7]. OTA WDT, ¶7.

10. Land Commission Award No. 3702 to David Malo [EXH. OTA-8] comprised 2.21 acres. SLOAN SUPP WDT, ¶6. Approximately 25% (0.5525 acres) of Land Commission Award No. 3702 is part

of SLOAN's Lot 5. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27). The remainder of Land Commission Award No. 3702 is part of ANTHONY TAKITANI's Lot 7 with a small portion as part of the flag/driveway of SHANE VICTORINO's Lot 6. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27).

11. Land Commission Award 3702 to David Malo [EXH. OTA-8] describes the lands in Paleileiha Ili at Waikapu as "taro, dryland & houselot". The Native Testimony notes there is a Poalima at Malo's lands at ili Palailaiha in Waikapu, Maui [EXH. OTA-9]. OTA WDT, ¶8. In Mahele records, "poalima" refers to lands cultivated in lo'i kalo as opposed to other crops. LILIKALA KAME'ELEIHIWA WDT, ¶30.

12. Land Commission Award 2203 to Nahema [EXH.OTA-10] comprised 0.97 acres. SLOAN SUPP WDT, ¶7. All (0.97 acres) of Land Commission Award No. 2203 is part of SLOAN's Lot 5. SLOAN SUPP.WDT, ¶7 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27). Royal Patent 3132, Land Commission Award 2203 to Nahema [EXH. OTA-10] refer to the property as "taro lands". OTA WDT, ¶6. Royal Patent 3132, Land Commission Award 2203 to Nahema describes the Waikapu property as "Taro (land) at Paleileiha" and 97/100 acre. [EXH. OTA-10] The Native Testimony also notes that the land is a "section of lo'i." [EXHS. OTA-11, 13]; OTA WDT, ¶9.

13. APPLICANT SLOAN requested a surface water use permit for his current and future reasonable beneficial uses in the amount of 2,666.7 gallons per day. SLOAN WDT, ¶3; SWUPA No. 3761; KURT SLOAN ORAL TESTIMONY, HRG. TR. (7/22/16), pp. 109-110, 112.

14. APPLICANTS ANTHONY TAKITANI and AUDREY TAKITANI purchased Lot 7 (TMK (2) 3-5-004-113 of the Waikapu Ranch Subdivision on May 6, 2008. As subdivided, Lot 7 included a portion of Royal Patent 6338, Land Commission Award 3702 to David Malo, and Royal Patent 3116, Land Commission Award 2225 to Kuamu.. EXH. Takitani-1; ANTHONY TAKITANI ORAL TESTIMONY, HRG. TR. (7/19/16), pp. 104-105.

15. Most of Land Commission Award No. 3702 is part of TAKITANI's Lot 7 with a small portion as part of the flag/driveway of Shane Victorino's Lot 6. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27). Land Commission Award No. 3702 to David Malo [EXH. OTA-8] comprised 2.21 acres. SLOAN SUPP WDT, ¶6. Approximately 25% (0.5525 acres) of Land Commission Award No. 3702 is part of SLOAN's Lot 5. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27).

16. Royal Patent 3116, Land Commission Award 2225 to Kuamu [EXH. OTA-12] is referred to as "taro lands." OTA WDT, ¶6.

17. APPLICANT TAKITANI requested a surface water use permit for his current and future reasonable beneficial uses in the amount of 2,833.3 gallons per day. TAKITANI WDT, ¶3; SWUPA No. 4444.

18. APPLICANT SPV TRUST purchased Lot 6 (TMK (2) 3-5-004-112 of the Waikapu Ranch Subdivision on February 5, 2014. As subdivided, Lot 6 included a portion of Royal Patent 6338, Land Commission Award 3702 to David Malo. EXH. SPV-1.

19. While most of Land Commission Award No. 3702 is part of TAKITANI's Lot 7, a small portion is part of the flag/driveway of VICTORINO's Lot 6. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27). Land Commission Award No. 3702 to David Malo [EXH. OTA-8] comprised 2.21 acres. SLOAN SUPP WDT, ¶6. Approximately 25% (0.5525 acres) of Land Commission Award No. 3702 is part of SLOAN's Lot 5. SLOAN SUPP.WDT, ¶6 (comparing Waikapu Ranch Subdivision map (EXH. OTA-1) with EXH. OHA-27).

20. Shane Victorino, through his father Mike Victorino, requested a surface water use permit for his current and future reasonable beneficial uses in the amount of 50,000 gallons per month, or 1,666.7 gallons per day. S. VICTORINO WDT, ¶3; M. VICTORINO WDT, ¶3; SWUPA No. 4445.

21. APPLICANT GERALD LAU HEE purchased Lot 1 (TMK (2) 3-5-004-023 (por.) of the Waikapu Ranch Subdivision in 2015, along with his spouse JANICE MICHIE LAU HEE and his son KAE0 AKIRA JOSEPH LAU HEE. [EXH. LAU HEE-1]; G. LAU HEE WDT, ¶1. Lot 1 included a

portion of Royal Patent 6483; Land Commission Award 8672, Apana 1 to Kaluau, and Royal Patent 3116, Land Commission Award 2225 to Kuamu. [EXH. LAU HEE-1]; KAE0 LAU HEE ORAL TESTIMONY, HRG. TR. (9/19/16), pp. 76-77.

22. In the prior proceeding to provisionally recognize appurtenant rights, Makani Olu Partners, LLC received provisional recognition of appurtenant rights for the portions of its property derived from Royal Patent 6483; Land Commission Award 8672, Apana 1 to Kaluau. See PROVISIONAL RECOGNITION ORDER, EXH. 7 and MAKANI OLU PARTNERS, LLC APPURTENANT RIGHTS DOCUMENTATION (http://files.hawaii.gov/dlnr/cwrm/rights/2207_Makani_Olu.pdf) Land Commission Award 8672 included 1.86/100 acres with 11 lo'i. The remainder of Land Commission Award 8672 is part of LAU HEE's Lot 1. KAE0 LAU HEE ORAL TESTIMONY, HRG TR (9/17/16), pp. 92-93.

23. APPLICANT LAU HEE requested a surface water use permit for his current and future reasonable beneficial uses in the amount of 50,000 gallons per month, or 1,666.7 gallons per month. G. LAU HEE WDT, ¶3; KAE0 LAU HEE ORAL TESTIMONY, HRG. TR. (9/19/16), pp. 90-91; SWUPA No. 4442.

SWUPA NO. 3665

24. APPLICANTS KEN OTA and SAEDENE OTA submitted Surface Water Use Permit Application (SWUPA) NO. 3665N on September 24, 2012 (filed September 27, 2012), requesting 25,600 gallons per day. See link <http://files.hawaii.gov/dlnr/cwrm/swma/swupapplications/SWUPA.3665.6.pdf> from Commission on Water Resource Management Summary Table of Filings, including links to Surface Water Use Applications and Appurtenant Rights Documentation (March 18, 2016) (CWRM SUMMARY TABLE 3/18/16) through Wailuku Water Company's ditch system.

25. In Table 3, APPLICANT OTA provided the following statements regarding alternatives to use of diverted surface water: SWUPA NO. 3665:

	B. Analysis of Non-Potable Alternatives
Municipal Sources	Water for non-potable use is not available from Department of Water Supply

Wastewater reuse	The Kahului treatment plant has no feeder lines in the area. The cost to install a distribution line from the plant to this property is prohibitive
Ditch system	There are no other ditch systems available
Desalinization	There are no desalinization plants on Maui
Ground water	Pumping of ground water in the Iao Aquifer is under a CWRM Designation and capacity is limited
Other (specify)	Storm water reclamation has no facilities or infrastructure in place at this time and is cost prohibitive

SWUPA No. 3665, Table 3.

26. Subsequently, APPLICANTS KEN OTA and SAEDENE OTA submitted an amended SWUPA on June 13, 2016 (filed July 5, 2016), changing their request from 25,600 gallons per day to 5,667 gallons per day based on the OTA's actual plantings. AMENDED SWUPA NO. 3665 [EXH. OTA-16, p. 1.; CWRM SUMMARY TABLE (7/8/16), link < <http://files.hawaii.gov/dlnr/cwrn/swma/swupapplications/SWUPA.3665.6B.pdf>>]; KEN OTA ORAL TESTIMONY, TR. HRG. (7/19/16) pp. 77, 82.

SWUPA 3761

27. APPLICANTS KURT SLOAN and ELIZABETH SLOAN submitted SWUPA NO. 3761 on October 4, 2012 (filed October 9, 2012), requesting 25,600 gallons per day. SWUPA NO. 3671 (10/9/12) [EXH. SLOAN-2; See CWRM SUMMARY TABLE (3/18/16), link <http://files.hawaii.gov/dlnr/cwrn/swma/swupapplications/SWUPA.3671.6.pdf>] through Wailuku Water Company's ditch system.

28. In Table 3, APPLICANT SLOAN provided similar statements as the OTAs regarding alternatives to use of diverted surface water delivered through the Wailuku Water Company ditch system. See SWUPA NO. 3671, Table 3 [EXH. SLOAN-2].

29. Subsequently, APPLICANTS KURT SLOAN and ELIZABETH SLOAN submitted an amended SWUPA on (filed July 5, 2016), changing their request from 25,600 gallons per day to 2,166.7 gallons per day. AMENDED SWUPA NO. 3671 [EXH. SLOAN-3, p. 1; CWRM SUMMARY TABLE (7/8/16), link < <http://files.hawaii.gov/dlnr/cwrn/swma/swupapplications/SWUPA.3671.6B.pdf>>]

SWUPA NO. 4444

30. APPLICANTS ANTHONY TAKITANI and AUDREY TAKITANI submitted a Surface Water Use Permit Application (SWUPA) on June 13, 2016 (filed July 5, 2016), requesting 2,833.3 gallons per day. SWUPA NO. 4444 [EXH. TAKITANI-2, p. 1; CWRM SUMMARY TABLE (7/8/16), link <http://files.hawaii.gov/dlnr/cwrmswma/swupapplications/SWUPA.4444.6.pdf>] through Wailuku Water Company's ditch system.

31. In Table 3, APPLICANT TAKITANI provided similar statements as the OTAs regarding alternatives to use of diverted surface water delivered through the Wailuku Water Company ditch system. See SWUPA NO. 4444, Table 3 [EXH. TAKITANI-2].

SWUPA 4445

32. MIKE VICTORINO for his son SHANE VICTORINO, the principal of APPLICANT SPV TRUST submitted a Surface Water Use Permit Application (SWUPA) on June 13, 2016 (filed July 5, 2016), requesting 1,666.7 gallons per day. SWUPA NO. 4445 [EXH. SPV-2 p. 1;. CWRM SUMMARY TABLE (7/8/16), link <http://files.hawaii.gov/dlnr/cwrmswma/swupapplications/SWUPA.4445.6.pdf>] through Wailuku Water Company's ditch system.

33. In Table 3, APPLICANT SPV provided similar statements as the OTAs regarding alternatives to use of diverted surface water delivered through the Wailuku Water Company ditch system. See SWUPA NO. 4445, Table 3 [EXH. SPV-2].

SWUPA NO. 4442

34. APPLICANT GERALD LAU HEE submitted a Surface Water Use Permit Application (SWUPA) on June 13, 2016 (filed July 5, 2016), requesting 1,666.7 gallons per day. SWUPA4442 [EXH. LAU HEE-2, p. 1; CWRM SUMMARY TABLE (7/8/16), link <http://files.hawaii.gov/dlnr/cwrmswma/swupapplications/SWUPA.4442.6.pdf>]; see KAEO LAU HEE ORAL TESTIMONY, HRG. TR. (9/19/16), pp. 89-91 through Wailuku Water Company's ditch system.

35. The amount requested by the LAU HEEs is the daily equivalent of the 50,000 gallons per month requested in the submitted written testimony. KAEO LAU HEE ORAL TESTIMONY, HRG TR. (9/19/16), pp. 89-91.

36. In Table 3, APPLICANT LAU HEE provided similar statements as the OTAs regarding alternatives to use of diverted surface water delivered through the Wailuku Water Company ditch system. See SWUPA NO. 4442, Table 3 [EXH. LAU HEE-2].

37. APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN, ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, and GERALD W. LAU HEE did not participate in the proceedings to provisionally recognize appurtenant rights. The LAU HEEs purchased their property in 2015 after the provisional recognition proceedings. KAEO LAU HEE ORAL TESTIMONY, HRG TR. (9/19/16), p.94.

38. In the prior proceeding to provisionally recognize appurtenant rights, Makani Olu Partners, LLC received provisional recognition of appurtenant rights for the portions of its property derived from Royal Patent 6483; Land Commission Award 8672, Apana 1 to Kaluau. See PROVISIONAL RECOGNITION ORDER, EXH. 7.

39. In connection with their respective SWUPAs, APPLICANTS requested recognition of their appurtenant rights, if any, associated with their property. OTA WDT, ¶3; TAKITANI WDT, ¶3; SLOAN WDT, ¶3; S. VICTORINO WDT, ¶3; G. LAU HEE WDT, ¶3.

40. LILIKALA KAME'ELEIHIWA provided expert testimony in Native Hawaiian history and culture and on the Mahele records. LILIKALA KAME'ELEIHIWA ORAL TESTIMONY, HRG. TR. (7/11/160, p. 38. Generally, precise areas of cultivation cannot be ascertained based on land title records from the Great Mahele. Nevertheless, Mahele records can provide information on what was being cultivated on a particular kuleana. KAME'ELEIHIWA WDT, ¶¶2a-2b.

41. Professor Kame'eleihiwa suggested a number of presumptions about kuleana awards based on patterns observed in the Mahele records. KAME'ELEIHIWA WDT, ¶¶39-44.

42. If no pahale is mentioned in a kuleana award, the entire kuleana should be presumed to be in cultivation. KAME'ELEIHIWA WDT, ¶40.

43. 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. KAME'ELEIHIWA WDT, ¶41.

44. The entire parcel should be presumed to be cultivated in lo'i kalo if the following descriptors are used to describe kuleana or an 'apana within a kuleana, without reference to any other crop or pahale: Kalo, Loi, Loi kalo, Pauku kalo, Pauku loi, Moo kalo, Poalima, Loi aupuni, Loi paahao, Aina kalo. KAME'ELEIHIWA WDT, ¶42.

45. All poalima should be presumed to be cultivated in loi kalo. KAME'ELEIHIWA WDT, ¶43.

46. 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. KAME'ELEIHIWA WDT, ¶44.

47. Professor Kame'eleihiwa indicated the patterns and distinctions she observed in the Mahele records and described in paragraphs 38 through 44 of her written testimony applied throughout the Na Wai 'Eha region. LILIKALA KAME'ELEIHIWA ORAL TESTIMONY, HRG. TR. (7/11/16), p. 61. Further, she testified that the rebuttable presumptions and the guiding principles for interpreting Mahele records as described in paragraphs 39 through 47 of her written testimony apply to the land uses throughout the Na Wai 'Eha region. LILIKALA KAME'ELEIHIWA ORAL TESTIMONY, HRG. TR. (7/11/16), pp. 61-62.

48. Professor Kame'eleihiwa indicated that once a kuleana was privately owned, the person who owned it did what they wanted with it. LILIKALA KAME'ELEIHIWA ORAL TESTIMONY, HRG. TR. (7/11/16), pp. 99-101.

49. The Land Commission Awards and Grants consolidated into Waikapu Ranch Inc. Subdivision included references to use as taro lands. OTA WDT, ¶14. Royal Patent 3132, Land

Commission Award 2203 to Nahema [EXH. OTA-10] and Royal Patent 3116, Land Commission Award 2225 to Kuamu [EXH. OTA-12] both refer to those properties are “taro lands”. OTA WDT, ¶6.

50. Land Commission Award 8875 to Kanaina describes Lot 1 as “Houselot at Paleileiha, Waikapu, Maui” and 96/100 acre. See [EXH. OTA-6]. The Native Testimonies regarding Royal Patent 5926, Land Commission Award 8875 to Kanaina include references to the house lot and to four taro lo`i at Palailaiha, Waikapu. [EXH. OTA-7]. OTA WDT, ¶7. Land Commission Award 3702 to David Malo describes the lands in Paleileiha Ili at Waikapu as “taro, dryland & houselot” and 2-21/100 acres. [EXH. OTA-8]. The Native Testimony notes there is a Poalima at Malo’s lands at ili Palailaiha in Waikapu, Maui [EXH. OTA-9]. OTA WDT, ¶8. Based on the Kame’eleihiwa presumptions, the house lots associated with Land Commission Award 8875 to Kanaina and Land Commission Award 3702 to David Malo should be no more than .25 acres each.

51. Royal Patent 3132, Land Commission Award 2203 to Nahema describes the Waikapu property as “Taro (land) at Paleileiha” and 97/100 acre. [EXH. OTA-10] The Native Testimony also notes that the land is a “section of lo`i.” [EXHS. OTA-11, 13]. OTA WDT, ¶9.

52. Land Commission Award 2225 to Kuamu describes four lots as “Taro & dryland at Palaileiha” and 3-31/100 acres. [EXH. OTA-12]. Native Testimony regarding Royal Patent 3116, Land Commission Award 2225 to Kuamu identifies four parcels in the ili of Palailaiha, Waikapu as three “Taro pauku” and one “Wauke kula.” [EXH. OTA-13] ; OTA WDT, ¶10.

53. 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. JOHN REPPUN WDT, ¶4.

54. Under a normal production system, farmers grow taro in complexes of multiple lo`i in various stages of cultivation, to ensure regular harvest and adequate fallowing. The per acre water use of taro is thus an average over the entire area, including fallow lo`i and uncultivated areas such as the banks between the lo`i. The range of 100,000 to 300,000 gad takes this into account and states an average for a lo`i complex. REPPUN WDT, ¶14.

55. The figure of 100,000 to 300,000 gad takes into account the various factors affecting water needs for taro, including both periods of less water use and periods of peak water use. REPPUN WDT, ¶25.

56. The Commission previously has set 130,000 to 150,000 as the water budget for taro cultivation in Na Wai Eha.

57. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE have planted or will be planting crops consistent with farm plans submitted to the County of Maui and the applicable zoning of their lots. [EXH. OTA-16; EXH. TAKITANI-2; EXH. SLOAN-2; EXH. SLOAN-3; EXH. SPV-2; EXH. LAU HEE-2; EXH. OHA-28, EXH. OHA-31; EXH. OHA-33; EXH. OHA-47].

NON-POTABLE AGRICULTURAL WATER

58. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE do not have access to non-potable agricultural water from the County of Maui. OTA WDT, ¶16; TAKITANI WDT, ¶16; SLOAN WDT, ¶16; S. VICTORINO WDT, ¶16; G. LAU HEE WDT, ¶16; EXH. OTA-16, Table 3; EXH. TAKITANI-2, Table 3; EXH. SLOAN-2, Table 3; EXH. SPV-2, Table 3; EXH. LAU HEE-2, Table 3;

59. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE receive non-potable agricultural water delivered through the Wailuku Water Company ditch system. EXH. OTA-16; EXH. TAKITANI-2; EXH. SLOAN-2; EXH. SPV-2; EXH. LAU HEE-2; KEN OTA ORAL TESTIMONY, HRG. TR. (7/19/16), p. 74; ANTHONYTAKITANI ORAL TESTIMONY, HRG. TR. (7/19/16), p. 105. The APPLICANTS do not have written agreements for water deliver with Wailuku Water Company although they do receive invoices from Wailuku Water Company. KEN OTA ORAL TESTIMONY, HRG. TR. (7/19/16), p. 87; ANTHONYTAKITANI ORAL TESTIMONY, HRG. TR. (7/19/16), p. 105.

60. Wailuku Water Company had a water delivery agreement with Waikapu Ranch, LLC the predecessor landowner of the APPLICANTS, for the lands at Tax Map Key No. (2) 3-5-004-023. [EXH. OHA-34].²

61. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE have no practicable alternative to non-potable water delivered through the Wailuku Water Company ditch system. EXH. OTA-16, Table 3 EXH. TAKITANI-2, Table 3; EXH. SLOAN-3, Table 3; EXH. SPV-2, Table 3; EXH. LAU HEE-2, Table 3.

62. The WAIKAPU RANCH APPLICANTS have not been able to locate definitive evidence of the size and volume of water used in each of the Land Commission Awards at the time of the Mahele when they were originally awarded that are embedded in my property. OTA WDT, ¶11; TAKITANI WDT, ¶11; SLOAN WDT, ¶11; S. VICTORINO WDT, ¶11; M. VICTORINO WDT, ¶11; G. LAU HEE WDT, ¶11.

63. The WAIKAPU RANCH APPLICANTS are aware that others in their community have located creditable reference to historical lo`i sizes in the publication “Water and the Law in Hawaii” by Lawrence H. Miike. At page 47, is a reference to excerpts from a journal of a Prussian botanist named “F.J.F. Meyan dated 1831” whereby he states “The fields of taro, which are planted under water, extend in this [Nu’uanu] valley to an elevation of 800 feet and give a very interesting appearance when seen from above. These fields are generally square pirces of land, 40 to 50 feet wide and just as long. Since it is a sloping valley they are laid out in terraces, as has already been mentioned, the water from one basin can drain down into the next when it has attained the necessary height in the former.” OTA WDT, ¶12; TAKITANI WDT, ¶12; SLOAN WDT, ¶12; S. VICTORINO WDT, ¶12; M. VICTORINO WDT, ¶12; G. LAU HEE WDT, ¶12.

² The Water Delivery Agreement for Waikapu Ranch, LLC was previously EXH. D-90 in the IIFS Contested Case. See OHA’s Third Supplemental Exhibit List, p. 4.

64. Based on that reference, a conservative figure of 40 by 40 feet would mean a size of 1,600 square feet per lot. OTA WDT, ¶13; TAKITANI WDT, ¶13; SLOAN WDT, ¶13; S. VICTORINO WDT, ¶13; M. VICTORINO WDT, ¶13; G. LAU HEE WDT, ¶13.

65. The WAIKAPU RANCH APPLICANTS are seeking water from the same source as Avery B. Chumbley, owner and manager of Makani Olu Partners, LLC. The water that flows to Makani Olu Partners, LLC initially passes through Waikapu Ranch Inc. Subdivision. OTA WDT, ¶15; TAKITANI WDT, ¶15; SLOAN WDT, ¶15; S. VICTORINO WDT, ¶15; M. VICTORINO WDT, ¶15; G. LAU HEE WDT, ¶15.

66. The WAIKAPU RANCH APPLICANTS do not have access to County of Maui agricultural water. OTA WDT, ¶16; TAKITANI WDT, ¶16; SLOAN WDT, ¶16; S. VICTORINO WDT, ¶16; M. VICTORINO WDT, ¶16; G. LAU HEE WDT, ¶16.

67. APPLICANT OTA is requesting a water use permit for 170,000 gpm for agricultural irrigation purposes on his property. OTA WDT, ¶16.

68. APPLICANT TAKITANI is requesting a water use permit for 85,000 gpm for agricultural irrigation purposes on his property TAKITANI WDT, ¶16.

69. APPLICANT SLOAN is requesting a water use permit for 65,000gpm for agricultural irrigation purposes on his property. SLOAN WDT, ¶16.

70. APPLICANT VICTORINO is requesting a water use permit for 50,000 gpm for agricultural irrigation purposes on his property S. VICTORINO WDT, ¶16; M. VICTORINO WDT, ¶16.

71. APPLICANT LAU HEE is requesting a water use permit for 50,000 gpm for agricultural irrigation purposes on his property G. LAU HEE WDT, ¶16.

72. APPLICANT OTA's requested quantity of water requested is necessary for the economic and efficient irrigation of his property yard, non-commercial plantings, including avocado, mango and citrus, and for certain commercial plantings, including landscape trees. OTA WDT, ¶17;

73. APPLICANT TAKITANI's requested quantity of water requested is necessary for the economic and efficient irrigation of his property yard, non-commercial plantings, including avocado, mango and citrus, and for certain commercial plantings, including landscape trees. TAKITANI WDT, ¶17.

74. APPLICANT SLOAN's requested quantity of water requested is necessary for the economic and efficient irrigation of his property yard, non-commercial plantings, including avocado, mango and citrus, and for certain commercial plantings, including landscape trees. SLOAN WDT, ¶17.

75. APPLICANT VICTORINO's requested quantity of water requested is necessary for the economic and efficient irrigation of his property yard, non-commercial plantings, including avocado, mango and citrus, and for certain commercial plantings, including landscape trees. S. VICTORINO WDT, ¶17; M. VICTORINO WDT, ¶17.

76. APPLICANT LAU HEE's requested quantity of water requested is necessary for the economic and efficient irrigation of his property yard, non-commercial plantings, including avocado, mango and citrus, and for certain commercial plantings, including landscape trees. G. LAU HEE WDT, ¶17.

77. The WAIKAPU RANCH APPLICANTS believes the use of water will be economic and efficient because they will be utilizing irrigation equipment that minimizes water use. OTA WDT, ¶18; TAKITANI WDT, ¶18; SLOAN WDT, ¶18; S. VICTORINO WDT, ¶18; M. VICTORINO WDT, ¶18; G. LAU HEE WDT, ¶18; see OTA-16; TAKITANI-2; SLOAN-3; SPV-2; LAU HEE-2.

78. Water use for agricultural crops on my agriculture zoned property is both reasonable and consistent with state and county land use plans and the public trust. OTA WDT, ¶19; TAKITANI WDT, ¶19; SLOAN WDT, ¶19; S. VICTORINO WDT, ¶19; M. VICTORINO WDT, ¶19; G. LAU HEE WDT, ¶19.

79. The WAIKAPU RANCH APPLICANTS believe that their request can be accomplished with the available water source; is a reasonable-beneficial use as defined in Hawaii Revised Statutes section 174C-3, will not interfere with any existing legal use of water; is consistent with the public interest; is consistent with state and county general plans and land use designations; is consistent with county plans

and policies; and will not interfere with the rights of the Department of Hawaiian Home Lands as provided in Section 221 of the Hawaiian Homes Commission Act (Haw. Rev. Stat. section 174C-49(a)). OTA WDT, ¶20; TAKITANI WDT, ¶20; SLOAN WDT, ¶20; S. VICTORINO WDT, ¶20; M. VICTORINO WDT, ¶20; G. LAU HEE WDT, ¶20.

CONCLUSIONS OF LAW

1. The Hawaii State Constitution, adopted in 1978, at Article XI, Section 7, expressly protects appurtenant rights:

Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

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.

2. The Hawaii State Water Code reflects the Constitution's protection of appurtenant rights:

Appurtenant rights. 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 sections 174C-26 and 174C-27 and 174C-58 to 174C-62.

Haw. Rev. Stat. [§174C-63].

3. 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).

4. 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 v. Robinson, 54 Haw. 174, 187-191 (1973).

5. 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. Bailey, 8 Haw. 658, 665 (1867); Haw. Rev. Stat. §174C-3.

6. The Commission on Water Resource Management has the authority to determine appurtenant rights pursuant to Haw. Rev. Stat. §174C-5(14) (“[The Commission s]hall determine appurtenant rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter.”).

7. In Reppun, the Hawaii Supreme Court, treating appurtenant rights as an incident of land ownership that parties could mutually agree to modify, ruled that attempting to reserve appurtenant rights in a deed could extinguish the appurtenant rights for that parcel. 65 Haw. at 551.

8. The Reppun case involved a situation that arose prior to the 1978 amendment of the Hawaii Constitution that added express protection of appurtenant rights. See Hearing Officer’s Findings and Recommendations Appurtenant Rights- Provisional Determination, Na Wai Eha, Maui (August 30, 2013), p. 6.

9. While Hawaii Supreme Court has not revisited the Reppun ruling on deed reservations of appurtenant rights, the Commission, based on the 1978 Constitution, should preserve appurtenant rights by not treating attempted reservations in deeds after the adoption of the 1978 Constitution as extinguishing the appurtenant rights associated with a parcel.

10. While APPLICANTS OTA, SLOAN, TAKITANI, VICTORINO and LAU HEE did not participate in the provisional recognition of appurtenant rights phase before the Commission, the Hawaii State Water Code provides that an applicant for appurtenant rights can apply for such rights at any time. Haw. Rev. Stat. §174C-63.

11. APPLICANTS OTA, SLOAN, TAKITANI, VICTORINO and LAU HEE all applied for appurtenant rights, if any, associated with their properties in filing their respective SWUPAs. See OTA-16, TAKITANI-2, SLOAN-2, SLOAN-3, SPV-2, LAU HEE-2.

12. The amount of appurtenant water rights recognized as associated with each parcel shall be calculated using the Commission’s water budget 130,000 to 150,000 gallons per day per acre for Na Wai Eha.

13. The claim of APPLICANTS KURT SLOAN and ELIZABETH SLOAN for appurtenant water is recognized for the following, subject to a reduction for a house lot on Land Commission Award No. 8875, to Kanaina, and a apportioned reduction for a house lot with APPLICANTS TAKITANI and VICTORINO for Land Commission Award No. 3702 to David Malo:

Land Commission Award No. 8875, to Kanaina	0.864 acres less 0.25 acres for a house lot
Land Commission Award No. 3702 to David Malo	0.5525 acres less apportioned .0625 for a house lot
Land Commission Award 2203 to Nahema	0.97 acres
TOTAL	2.074 acres

Appurtenant water in the amount of 269,620 is recognized for APPLICANTS SLOAN (2.074 acres x 130,000 gallons per day per acre).

14. The claim of APPLICANTS ANTHONY TAKITANI and AUDREY TAKITANI for appurtenant water is recognized for the balance of Land Commission Award No, 3702 to David Malo (70% or approximately 1.547 acres) with a small portion for SPV TRUST (5% or approximately 0.2442 acres). Subject to a reduction for a house lot with APPLICANTS SLOAN and VICTORINO for Land Commission Award No. 3702 to David Malo, appurtenant water in the amount of 178,000 gallons per day is recognized for APPLICANT TAKITANI (1.372 acres x 130,000 gallons per day per acre).

15. The claim of APPLICANT SPV TRUST for appurtenant water is recognized for a small portion of Land Commission Award No, 3702 to David Malo (5% or approximately 0.2442 acres). Subject to a reduction for a house lot on Land Commission Award No. 8875, to Kanaina, and a apportioned reduction for a house lot with APPLICANTS TAKITANI and SLOAN for Land Commission Award No. 3702 to David Malo, appurtenant water in the amount of 30,121 gallons per day is recognized for APPLICANT SPV. (0.237 acres x 130,000 gallons per acre per day).

16. The claim of APPLICANT GERALD LAU HEE for appurtenant water is recognized for the portion of Royal Patent 6483; Land Commission Award 8672, Apana 1 to Kaluau that is not owned by Makani Olu Partners, LLC.

17. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE have planted or will be planting crops consistent with farm plans submitted to the County of Maui and the applicable zoning of their lots.
18. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE do not have access to non-potable agricultural water from the County of Maui.
19. APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE have no practicable alternative to non-potable water delivered through the Wailuku Water Company ditch system.
20. The new use amounts requested by APPLICANTS OTA, TAKITANI, SLOAN, SPV TRUST and LAU HEE are reasonable-beneficial.
21. APPLICANTS KEN OTA and SAEDENE OTA are entitled to a water use permit for 5,666.7 gallons per day.
22. APPLICANTS KURT SLOAN and ELIZABETH SLOAN are entitled to a water use permit for 2,166.7 gallons per day.
23. APPLICANTS ANTHONY TAKITANI and AUDREY TAKITANI are entitled to a water use permit for 2,833.3 gallons per day.
24. APPLICANT SPV TRUST is entitled to a water use permit for 1,666.7 gallons per day.
25. APPLICANT GERALD LAU HEE is entitled to a water use permit for 1,666.7 gallons per day.

DATED: Wailuku, Maui, Hawaii, _____

FEB 08 2017



GILBERT S.C. KEITH-AGARAN

Attorney for KEN OTA, SAEDENE OTA,
KURT SLOAN, ELIZABETH SLOAN,
ANTHONY TAKITANI, AUDREY TAKITANI,
SPV TRUST, and
GERALD W. LAU HEE

TAKITANI AGARAN & JORGENSEN, LLLP
GILBERT S.C. KEITH-AGARAN 4677-0
24 N. Church St., Rm. 409
Wailuku, Maui, Hawaii 96793
TEL. NO. (808) 242-4049
FAX NO. (808) 244-4021

Attorney for KEN OTA, SAEDENE OTA.
KURT SLOAN, ELIZABETH SLOAN,
ANTHONY TAKITANI, AUDREY TAKITANI,
KITAGAWA MOTORS, INC., SPV TRUST, and
GERALD W. LAU HEE

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-MA 15-01 CERTIFICATE OF SERVICE REGARDING JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN, ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, AND GERALD W. LAU HEE AND WITHDRAWAL OF KITAGAWA MOTORS, INC.
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CERTIFICATE OF SERVICE REGARDING JOINT PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR APPLICANTS KEN OTA, SAEDENE OTA.
KURT SLOAN, ELIZABETH SLOAN,
ANTHONY TAKITANI, AUDREY TAKITANI,
SPV TRUST, AND GERALD W. LAU HEE AND WITHDRAWAL OF KITAGAWA MOTORS, INC.

The undersigned hereby certifies that, on February 8, 2017, a true and correct copy of the JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR APPLICANTS KEN OTA, SAEDENE OTA. KURT SLOAN, ELIZABETH SLOAN, ANTHONY TAKITANI, AUDREY TAKITANI, SPV TRUST, AND GERALD W. LAU HEE, and the WITHDRAWAL OF KITAGAWA MOTORS, INC. were duly served on the following parties by U.S. Mail or electronic service, as indicated below:

ELECTRONIC SERVICE

Commission on Water Resource Management
1151 Punchbowl Street, Room 227
Honolulu, HI 96813

kathy.s.yoda@hawaii.gov

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

teresa@bbcmaui.com

cerizof@gmail.com

Heinz Jung and Cecilia Chang
P.O. Box 1211
Wailuku, Hawaii 96793

cici.chang@hawaiiantel.net

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

jorrieciotti@gmail.com

Fred Coffey
1271 Malaihi Road
Wailuku, Hawaii 96793

hawaii50peleke@yahoo.com

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

jimdodd47@gmail.com

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

kdehart17@gmail.com

John V. & Rose Marie H. Duey
Hoolulahu LLC
575 A Iao Valley Rd.
Wailuku, Hawaii 96793
Cc: Nani Santos

jduey@maui.net

nanisantos808@gmail.com

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

kanealoha808@gmail.com

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

kapunafarms@gmail.com

Diannah Goo
c/o April Goo
2120 C Kahekili Hwy.
Wailuku, Hawaii 96793

ag2517@aol.com

Nicholas Harders on behalf of
Karl & Lee Ann Harders
1422 Nuna Pl.
Wailuku, Hawaii 96793

waikapu@me.com

Nicholas Harders on behalf of
Theodore & Zelig Harders
T&Z Harders Fam Ltd. Partnership
1415 Kilohe St.
Wailuku, Hawaii 96793

waikapu@me.com

Greg Ibara
227 Kawaipuna Street
Wailuku, HI 96793

gregibara56@gmail.com

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

cmcmaui@live.com

Charlene E. and Jacob H. Kana, Sr.
P.O. Box 292
Wailuku, Hawaii 96793

char1151@hawaii.rr.com

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

pauahi808@aol.com

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

nokamura@kiheigardens.com

Lorrin Pang
166 River Road
Wailuku, Hawaii 96793

pangk005@hawaii.rr.com

Victor and Walette Pellegrino
1420 Kilohi Street
Wailuku, Hawaii 96793

hokuao.pellegrino@gmail.com

L. Ishikawa
Piko Ao, LLC
2839 Kalialani Circle
Pukalani, Hawaii 96768

lorilei@hawaii.edu

Michael Rodrigues
2518 W. Main Street
Wailuku, Hawaii 96793

mikerodmaui@yahoo.com

Waldemar & Darlene Rogers
1421 Nuna Place
Wailuku, HI 96793

rogersw001@hawaii.rr.com

Burt Sakata
107 Waihee Valley Rd.
Wailuku, Hawaii 96793

waihee89@yahoo.com

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

mauifishfarm@hawaiiantel.net

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

sevillad001@hawaii.rr.com

Jeff and Ramona Lei Smith
P.O. Box 592
Wailuku, Hawaii 96793

ohianui.ohana@gmail.com

Murray and Carol Smith
P.O. Box 11255
Lahaina, Hawaii 96761

murray@jps.net

Crystal Smythe
John Minamina Brown Trust

cycl@maui.net

727 Waivee Street, Suite 104
Lahaina, Hawaii 96761

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

csuzuki@wailukukwater.com

John Varel
191 Waihee Valley Road
Wailuku, Hawaii 96793

jvarel@fusionstorm.com

Michele and Leslie Vida, Jr.
135 Pilikana Place
Wailuku, Hawaii 96793

mikievida@hotmail.com

Leslie Vida, Sr.
c/o Donna Vida
115 Pilikana Street
Wailuku, Hawaii 96793

dmlavida@yahoo.com

Roger and Kevin Yamaoka
1295 Old Waikapu Road
Wailuku, Hawaii 96793

rryamaoka@aol.com
ky@hawaii.rr.com

Caleb Rowe, Esq.
Kristin Tarnstrom, Esq.
County of Maui
Department of the Corporation Counsel
200 South High Street
(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 S. King Street, Room 300
Honolulu, Hawaii 96813
Cc: Russell Kumabe
Holly McEldowney
(Department of Land and Natural Resources, Division of State Parks)

colin.j.lau@hawaii.gov

Russell.p.kumabe@hawaii.gov
holl.mceldowney@hawaii.gov

Yvonne Izu, Esq.
Wayne E. Costa, Jr., Esq.
Kris N. Nakagawa, Esq.
Morihara Lau & Fong LLP 400
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

Tina Aiu, Esq.
Oahu Island Director
Hawaiian Islands Land Trust, HILT
P.O. Box 965
Wailuku, Hawaii 96793
Cc: Scott Fisher
Penny Levin

christina@hilt.org

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

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

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

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

abc@aloha.net

Jodi Yamamoto, Esq.
Wil Yamamoto, Esq.
Yamamoto Caliboso
1099 Alakea Street
Suite 2100
Honolulu, Hawaii 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, Hawaii 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, Hawaii 96793
(Wahi Hoomalu Limited Partnership)

cnakamura@carlsmith.com
chall@carlsmith.com

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

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, 23rd Floor
Honolulu, Hawaii 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, Hawaii 96732
(Wailuku, Water Company, LLC)

pmancini@mrwlaw.com
jgeiger@mrwlaw.com

Tim Mayer, Ph.D.
Supervisory Hydrologist Water Resources
Branch US Fish and Wildlife Service
911 NE 11th Avenue
Portland, OR 97232-4181
Cc: Frank Wilson

tim_mayer@fws.gov

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

frank.wilson@sol.doi.gov

lhmiike@hawaii.rr.com

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

linda.l.chow@hawaii.gov

SERVICE BY MAIL

JOSEPH ALUETA
P.O. BOX 785
WAILUKU, HI 96793

MICHAEL BAILIE
PO BOX 1433
WAILUKU, HI 96793

VERNON BAL
230 KOELI STREET
WAILUKU, HI 96793

DOROTHY BELL
1419 NUNA PLACE
WAIKAPU, HI 96793

ALAN BIRNIE
175 W. WAIKO ROAD
WAILUKU, HI 96793

GARY & EVELYN BRITO
2160A PUUOHALA ROAD
WAILUKU, HI 96793

DAVID & ANNE BROWN
2525 KAHEKILI HWY
WAILUKU, HI 93793-9233

REGINO CABACUNGAN
304 HOOMALU PLACE
WAILUKU, HI 96793

THOMAS CERIZO
1740 KAMAMALU PLACE
WAILUKU, HI 96793

CORDELL CHANG
2315 KAHEKILI HWY.
WAILUKU, HI 96793

JOSHUA CHAVEZ
P.O. BOX 6240
KAHULUI, HI 96733

WINIFRED & GORDON COCKETT
115 PIIHANA ROAD
WAILUKU, HI 96793

PAULINE KANEGAI CURRY
P.O. BOX 3172
WAILUKU, HI 96793

CHARLES DANDO, SR & JR
85 E. KANAMELE LOOP
WAILUKU, HI 96793

ALFRED & PATRICIA DEMELLO
P.O. BOX 1394
LOCKEFORD, CA 95237

MICHAEL DOHERTY
41 WAIHEE VALLEY RD
WAILUKU, HI 96793

RICHARD EMOTO
2032 B ULEI LANE
WAILUKU, HI 96793

PATRICIA FEDERCELL
88 S. PAPA AVE., Apt 404
KAHULUI, HI 96732-3307

RUDY & PERLITA FERNANDEZ
P.O. BOX 330808
KAHULUI, HI 96733

RODERICK FONG
FONG CONSTRUCTION
CO. INC.
495 HUKILIKE ST. BAY 4
KAHULUI, HI 96732

PETER FRITZ
107 WAIHEE VALLEY RD.
WAILUKU, HI 96793

DAVE GOMES
HAWAIIAN CEMENT – MAUI
CONCRETE & AGGREGATE
P.O. BOX 488
KAHULUI, HI 96732

RUSSELL GUSHI
185 WEST WAIKO RD
WAILUKU, HI 96793

VALENTINE HALEAKALA
2160 PUUOHALA ROAD
WAILUKU, HI 96793

STEVE HALLER
1060 EAST KUIAHA ROAD
HAIKU, HI 96708

ROBERT HANUSA
895 MALAIHI ROAD
WAILUKU, HI 96793

DARRELL HIGA
918 KANAHEA LOOP
LAHAINA, HI 96761

GEORGE & YONEKO HIGA
592 S. PAPA AVE
KAHULUI, HI 96732

PAUL & JENNIFER
HIGASHINO
P.O. BOX 239
WAILUKU, HI 96793

HIOLANI RANCH LLC
P.O. BOX 34167
SAN DIEGO, CA 92163

BRIAN IGE
RCFC KEHALANI, LLC
2005 MAIN STREET
WAILUKU, HI 96793

RONALD JACINTHO
POHAKULEPO RECYCLING
150 PAKANA STREET
WAILUKU, HAWAII 96793

RONALD JACINTHO
ROJAC TRUCKING, INC
150 PAKANA STREET
WAILUKU, HI 96793

AMANDA JONES
SPENCER HOMES INC.
P.O. BOX 97
KIHEI, HI 96753

KAANAPALI KAI, INC.
2145 WELLS STREET
SUITE 3301
WAILUKU, HI 96793

KAUI KAHALEKAI
202 WAIHEE VALLEY RD
WAILUKU, HI 96793

KENNETH KAHALEKAI
240 WAIHEE VALLEY RD
WAILUKU, HI 96793

ALFRED KAILIEHU, SR.
ALFRED KAILIEHU, JR.
3660 KAHEKILI HWY.
WAILUKU, HI 96793

LEINAALA KIHM
1415 HONU A PLACE
WAILUKU, HI 96793

STERLING KIM
HALE MUA PROPERTIES
250 ALAMAHA ST. STE N18
KAHULUI, HI 96732

CLIFFORD & CRISTAL KOKI
P.O. BOX 442
WAILUKU, HI 96793

LAWRENCE KOKI
2585 KAHEKILI HWY
WAILUKU, HI 96793

MARY JANE KRAMER, NA
MALA O WAIHBE PRVT
WATER CO. INC.
C/O COMMERCIAL
PROPERTIES OF MAUI
1962-B WELLS ST.
WAILUKU, HI 96793

DONALD KUEMMELER
RCFC KEHALANI, LLC
555 CALIFORNIA ST.
SUITE 3450
SAN FRANCISCO, CA 94104

JONATHON KURTZ
LIVING WATERS LAND
FOUNDATION, LLC
P.O. BOX 2327
WAILUKU, HI 96793

JANE LAIMANA
45-520 ALOKAHI ST
KANEHOE, HI 96744

WAIOLANI MAUKA COMM.
ASSOC.
C/O MAUI LAND BROKER
P.O. BOX 1067
WAILUKU, HI 96793

DAVID & KATHERINE
LENGKEEK
128 RIVER ROAD
WAILUKU, HI 96793

ANTHONY MANOUKIAN
ANTHONY ARAM &
DOWNEY RUGTRIV
MANOUKIAN TR.
P.O BOX 1609
WAIANA, HI 96792

NADAO MAKIMOTO
1480 HONOAPIILANI HWY
WAILUKU, HI 96793-5930

GLENN MCLEAN
350 WEST WAIKO RD
WAILUKU, HI 96793

KENNETH MENDOZA
2160B PUUOHALA RD
WAILUKU, HI 96793-0463

LAWRENCE MIYAHIRA
JASON MIYAHIRA
P.O. BOX 762
WAILUKU, HI 96793

ELSIE MIYAMOTO
1455 MILOIKI STREET
HONOLULU, HI 96825-3229

JINSEI MIYASHIRO TRUST
P.O. BOX 235
WAILUKU, HI 96793

GLYNNIS NAKAI
MAUI NATIONAL WILDLIFE
REFUGE COMPLEX, USFWS
P.O. BOX 1042
KIHEI, HI 96753

LESTER NAKAMA
ALOHA POI FACTORY, INC
800 LOWER MAIN ST
WAILUKU, HI 96793

DAVID NIEHAUS
1630 PIHOLO ROAD
MAKAWAO, HI 96768

DAVID NOBRIGA
NOBRIGA'S RANCH INC.
P.O. BOX 1170
WAILUKU, HI 96793

NELSON OKAMURA
KIHEI GARDENS &
LANDSCAPING CO, LLP
P.O. BOX 1058
PUUNENE, HI 96784

FRANCIS ORNELLAS
340 IAO VALLEY ROAD
WAILUKU, HI 96793

KEN & SAEDENE OTA
2261 AUPUNI ST
SUITE 101
WAILUKU, HI 96793

KALANI & TERA PALEKA
P.O. BOX 342
WAILUKU, HI 96793

ROBERT PINTO
C/O CLAIRE PINTO
130 PILIKANA PLACE
WAILUKU, HI 96793

MILLA RICHARDSON
94 LAUKAHI ST
KIHEI, HI 96753

KATHERINE RIYU
P.O. BOX 696
WAILUKU, HI 96793

MELVIN RIYU &
JUDITH YAMANOUE
P.O BOX 696
WAILUKU, HI 96793

WALDEMAR & DARLENE
ROGERS
1421 NUNA PLACE
WAILUKU, HI 96793

ALFRED SANTIAGO &
COLIN KAILPONI
2445 C VINEYARD ST.
WAILUKU, HI 96793

IONE SHIMIZU
219-K WEST WAIKO RD
WAILUKU, HI 96793

DONNALEE & DAVID
SINGER
P.O. BOX 3017
WAILUKU, HI 96793

WARREN SOONG
245A WEST WAIKO RD
WAILUKU, HI 96793

YOSHIE SUEHIRO &
NATALIE HASHIMOTO
915 MALAIHI ROAD
WAILUKU, HI 96793

NOEL & KATHERINE TEXEIRA
P.O. BOX 2846
WAILUKU, HI 96793

THOMAS & PATRICIA
TEXEIRA & DENISE
TEXEIRA
205 WAIHEE VALLEY RD
WAILUKU, HI 96793

WALDO ULLERICH
EMMANUEL LUTHER
CHURCH & SCHOOL
P.O. BOX 331194
KAHULULU, HI 96733

DATED: Wailuku, Maui, Hawaii, _____

~~FEB~~ 08 2017



GILBERT S.C. KEITH-AGARAN

Attorney for KEN OTA, SAEDENE OTA,
KURT SLOAN, ELIZABETH SLOAN,
ANTHONY TAKITANI, AUDREY TAKITANI,
KITAGAWA MOTORS, INC., SPV TRUST, and
GERALD W. LAU HEE