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HEALOHA CARMICHAEL, LEZLEY

JACINTHO and NĀ MOKU AUPUNI O

KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY
JACINTHO, and NĀ MOKU AUPUNI O
KO'OLAU HUI,

Plaintiffs,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, et al.,

Defendants.

) CIVIL NO. 15-1-0650-04 RAN
) (Environment; Declaratory Judgment)
)
) PLAINTIFFS' MEMORANDUM IN
) OPPOSITION TO DEFENDANT COUNTY
) OF MAUI, DEPARTMENT OF WATER
) SUPPLY'S APPLICATION FOR LEAVE
) TO TAKE INTERLOCUTORY APPEAL OF
) THE ORDER GRANTING PLAINTIFF'S
) MOTION FOR PARTIAL SUMMARY
) JUDGMENT, FILED OCTOBER 21, 2015
) AND MOTION FOR STAY OF
) PROCEEDINGS AND/OR ENFORCEMENT
) OF THE ORDER PENDING APPEAL
) FILED JANUARY 13, 2016;
) DECLARATION OF COUNSEL; EXHIBITS
) A, B, C-3 & H; CERTIFICATE OF
) SERVICE
)
) HEARING:
) Date: February 1, 2016
) Time: 9:30 a.m.
) Judge: Honorable Rhonda A. Nishimura

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY'S APPLICATION FOR LEAVE TO TAKE
INTERLOCUTORY APPEAL OF THE ORDER GRANTING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT, FILED OCTOBER 21, 2015 AND MOTION FOR
STAY OF PROCEEDINGS AND/OR ENFORCEMENT OF THE ORDER PENDING
APPEAL FILED JANUARY 13, 2016

I. INTRODUCTION

This court should deny the Defendant County of Maui Department of Water Supply's ("the County") request to file an interlocutory appeal of the Order Granting Plaintiff's Motion for Partial Summary Judgment and for a stay of proceedings and/or enforcement of the order pending appeal. The County fails to satisfy the legal standard for an interlocutory appeal or a stay of the proceedings.

II. LEGAL STANDARD

The County seeks leave to file an appeal pursuant to HRS § 641-1(b).¹ The standard is fairly strict:

Subparagraph (b) of HRS § 641-1 expressly allows interlocutory appeals at the discretion of the trial court. However, **this discretion is not unfettered** but is circumscribed; it is limited to those appeals "whenever the circuit court may think the same advisable for the speedy termination of litigation." The words "speedy termination" are therefore crucial to the determination of whether the trial court exercised its discretion properly. Although these words are not specifically defined in the statute, they are not to be read in isolation but are to be read in the context of the nature and purpose of HRS § 641-1 and the previous admonitions by this court. **The saving of time and litigation expenses, without more, do not meet the requirement of speedy termination. See *Barthrop v. Kona Coffee Co.*, *supra*.** On the other hand, **if the appeal may put an end to the action, obviously the requirement is met.**

Lui v. Honolulu, 63 Haw. 668, 671-72, 634 P.2d 595, 598 (1981)(emphases added). "[I]t is necessary that appeals from other than final judgments, which form a significant portion of the appellate case load, be strictly limited to those situations where they are allowable under Rule 54(b), HRCPP or DCRCP, or HRS § 641-1(b)." *Mason v. Water Res. Int'l*, 67 Haw. 510, 511, 694

¹ The County does not rely on rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCPP). A circuit court may certify an order for appeal pursuant to HRCPP rule 54(b) only "where (1) more than one claim for relief is presented or multiple parties (at least three) are involved, . . . and (2) the judgment entered completely disposes of at least one claim or all of the claims by or against at least one party." *Elliot Megdal and Associates v. Daio USA Corporation*, 87 Hawai'i 129, 133, 952 P.2d 886, 890 (ICA 1998) (citations omitted) (emphasis added). "The general rule is that where a claimant prays for several kinds of damages arising from the same set of facts, an order disposing of only some of the claims for damages cannot be made into a judgment under Rule 54(b)." *Id.* at 133, 952 P.2d at 890 (citations and internal quotation marks omitted).

P.2d 388, 389 (1985).

A stay should not be granted without “a showing that appellant is threatened with irreparable injury and that there is great likelihood, approaching near certainty, that he will prevail.” *MDG Supply v. Ellis*, 51 Haw. 480, 482, 463 P.2d 530, 532 (1969); *Life of Land v. Ariyoshi*, 59 Haw. 156, 157, 577 P.2d 1116, 1117 (1978).

III. BACKGROUND

Although this court granted the plaintiffs’ motion for **partial** summary judgment on January 8, 2016, it still must resolve several issues. It must still consider and decide:

- Alexander & Baldwin, Inc., East Maui Irrigation Co., Ltd and Hawaiian Commercial and Sugar, Co.’s (collectively A&B) motion for rehearing/reconsideration filed on December 28, 2015;
- the plaintiffs’ motion to amend their complaint filed on January 12, 2016; and
- the plaintiffs’ motion to transfer/change venue, filed on January 12, 2015.

All three motions were filed **before** the County filed its motion. In addition, this court has not had an opportunity to consider all the relief requested by the plaintiffs in their complaint. It is during the injunctive relief portion of this case that this court will have the opportunity to weigh the balance of harms and decide what form of injunctive relief to issue and the manner and extent to which, if at all, the County’s interests may be impacted.

IV. DISCUSSION

The County has failed to meet its burden. “The saving of time and litigation expenses, without more, do not meet the requirement of speedy termination.” *Lui*, 63 Haw. at 672, 634 P.2d at 598. An appeal now would not speedily terminate litigation. An interlocutory appeal is unnecessary because the County faces no immediate harm. In contrast, an appeal – and a stay – would delay the plaintiffs’ ability to obtain injunctive relief.

A. An appeal would not speedily terminate litigation.

An appeal would not put an end to this action. It would actually prolong it – particularly given the pending motions and the need to consider injunctive relief.

The County fails to acknowledge that A&B’s motion for a partial summary judgment was denied, and that if the order granting plaintiff’s motion for a partial summary judgment is overturned, all that means is that the case goes to trial. In other words, an interlocutory appeal will only delay resolution of this case.

Appeals generally take two years to complete after final judgment – far longer than it would take for this court to decide what injunctive relief to provide.

The County’s theory is that since there is a chance, however small, that an appellate court could conclude that this court erred, this court must allow the County to appeal immediately. Such a reading of HRS § 641-1(b) would create an exception that swallows the rule. Every partial summary judgment motion could be appealed immediately.

B. The County faces no immediate harm.

In its January 8, 2016 order, this court concluded that revocable permit numbers 7263, 7264, 7265 and 7266 are invalid. It did not, however, order any injunctive relief. The plaintiffs made clear that the issue of injunctive relief would be addressed separately and subsequently. Thus, the specter of “disastrous impacts to public health and safety of a large section of the population” is premature, speculative, and absurd. As the County’s spokesman, Rod Antone, told the Maui News, this court’s ruling will not affect Upcountry water availability. Exhibit A.

Furthermore, the County’s alarm is disingenuous. The EMI ditch system currently transports 126 million gallons of water per day on average. Exhibit C-3 at ¶ 30. The County states on the fourth page of its memorandum that it receives approximately 8.6 million gallons of water a day from East Maui Irrigation Company. According to A&B, however, one-third of the

water flowing through the EMI ditch system does not originate from state lands. Exhibit C-3 at ¶¶ 4, 13, 15. In other words, if all the diversions of all the streams within the areas covered by revocable permit numbers 7263, 7264, 7265 and 7266, were ordered to be shut down, one third of the water currently flowing through the EMI ditch would continue to flow. Exhibit B at 3. Exhibit H shows that the EMI ditch collects water from state land (yellow) **and from EMI land** (green). It shows that from the Nahiku license area, 4.98% of the water is “private water”; from the Keanae license area, 20.81% is “private water”; from the Honomanu license area 52.61% is “private water”; and from the Huelo license area, 35.51% is “private water.” Neither this case, nor this Court’s ruling the revocable permit numbers 7263, 7264, 7265 and 7266 invalid has any effect whatsoever on the water derived from EMI’s land – what A&B incorrectly calls “private water.” More than 40 million gallons of water on average – far more than the 8.6 that the County uses – will remain in the EMI ditch system. Thus, plenty of water will remain in the EMI ditch system for the County. The County has presented no evidence that there is an insufficient supply of “private water” in the EMI ditch system to meet its needs. Further, this Court’s invalidation of A&B and EMI’s revocable permits do not prevent EMI from continuing to service the County’s upcountry customers with its “private water” supply.

Finally, any harm that the County believes that it faces can be addressed during this Court’s decisionmaking on the injunctive relief that plaintiffs will be requesting shortly.

C. The plaintiffs would be harmed by an appeal and delay.

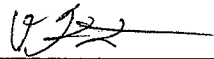
The County is, in effect, asking this court to deny the plaintiffs’ request for injunctive relief without giving the plaintiffs an opportunity to make their case and present any evidence. The plaintiffs described at length in their declarations how the diversions adversely affect them. An appeal would further delay the plaintiffs’ ability to obtain injunctive relief. For decades, they have been trying to restore water to the East Maui streams that they use. For decades, they have

been waiting for the BLNR to uphold its public trust duties. Any further delay thwarts the interest of justice.

V. CONCLUSION

This court should deny the County's motion because it fails to meet the applicable legal standards, is unnecessary, and would prejudice the plaintiffs.

DATED: Honolulu, Hawaii, January 22, 2016.



SUMMER L.H. SYLVA
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Attorneys for Plaintiffs
HEALOHA CARMICHAEL, LEZLEY
JACINTHO and NĀ MOKU AUPUNI O
KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

HEALOA CARMICHAEL, LEZLEY
JACINTHO, and NĀ MOKU AUPUNI O
KO'OLAU HUI,

Plaintiffs,

VS.

BOARD OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Interim Chairperson of the Board of Land and Natural Resources, the DEPARTMENT OF LAND AND NATURAL RESOURCES, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION CO., LTD., HAWAIIAN COMMERCIAL AND SUGAR CO., and COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY,

Defendants.

CIVIL NO. 15-1-0650-04 RAN
(Environment; Declaratory Judgment)

DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, Summer L. H. Sylva, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I am one of the attorneys representing Plaintiffs Healoha Carmichael, Lezley Jacintho, and Nā Moku Aupuni O Ko`olau Hui in this matter.
3. Attached as Exhibit A is a true and correct copy of a January 19, 2016 article in The Maui News.

4. Attached as Exhibit B is a true and correct copy of East Maui Irrigation Co., Ltd's (EMI) report to the State for fiscal year 1987-1988. It is referenced in paragraph 15 of the declaration of Garrett Hew, which is Exhibit C-3 here.

5. Attached as Exhibit C-3 is the declaration of Garrett Hew, which A&B admitted was true and accurate in paragraph 60 of Exhibit D attached to the plaintiffs' motion for partial summary judgment.

6. Attached hereto as Exhibit H is a true and correct copy of a map of EMI's system of integrated diversions, ditches, intakes, and tunnels which collect water from streams located on watersheds totaling approximately 50,000 acres, of which approximately 33,000 acres in the Huelo, Honomanu, Ke'anae and Nahiku watersheds are owned by the State of Hawai'i. Garret Hew refers to this same EMI map as Exhibit C-1 in his declaration. The map was prepared by EMI and admitted into evidence in the contested case hearing conducted by the commission on water resource management (CWRM) in *In re Petition to Amend Interim Instream Flow Standards For Honopou, Huelo (Puolua), Hanehoi, Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Puanlau/Kolea, Honomanii, Nuaailua, Piinaau, Palauhulu, Ohia (Waianu), Waiokamilo, Kualani, Wailuanui, West Wailuaiki, East Wailuaiki, Kopili`ula, Puakaa, Waiohue, Paakea, Waiaaka, Kapaula, Hanwai, and Makapipi Streams*, Case No. CCH-MA-13-01 (the "East Maui IIFS CCH"). This exhibit was previously provided to this Court in the plaintiffs' reply in support of summary judgment.

DATED: Honolulu Hawai'i, January 22, 2016.



SUMMER L. H. SYLVA

EXHIBIT A

The Maui News

Newspaper Since 1900

TUESDAY, January 19, 2016

A&B water diversion permits ruled invalid

By LEE IWADA
Managing Editor

An Oahu judge has invalidated state water diversion permits to Alexander & Baldwin for its winning Maui sugar operations in a ruling that a member of the plaintiff's group called "a historic victory." The permits have been extended annually for 13 years without an official environmental review.

First Circuit Judge Rhonda Nishimura ruled Jan. 8 against permitting East Maui stream diversions through a series of ditches and siphons built in the 1870s. While the water continues to flow from East Maui to Central and Upcountry Maui, what happens next has yet to be determined.

Defendant A&B, whose subsidiary Hawaiian Commercial & Sugar Co. will be shutting down operations at the end of the year, has asked the judge to reconsider her decision.

The County of Maui, also a defendant because it draws about 6 million gallons a day from the sys-

tem, has filed a direct appeal of Nishimura's ruling to the Intermediate Court of Appeals. A hearing is set for Feb. 1, said plaintiff's attorney Summer Sylva.

The judge ruled that the Board of Land and Natural Resources' practice of extending revocable permits on an annual basis to A&B from 2001 to 2014 violated state law. The permits covered the Hanalei, Huelo, Keanae and Nāhiku areas, with A&B paying the state a total of \$13,200 per month for the permits.

Nishimura said that the BLNR granted the permits on a "holdover status," which allows for "temporary occupation of public lands." However, the statute does not apply to "A&B's continuous uninterrupted use of these public lands on a holdover basis for the last 13 years."

"Otherwise, holdover tenants could arguably be allowed to occupy public lands almost in perpetuity for continuous, multiple one-year periods," Nishimura said in her six-page ruling. "Such a prospect is in-

consistent with the public interest and legislative intent."

The next steps the judge could take include halting the diversions, which county officials have put at between 40 million and 137 million gallons a day, or ordering the Department and Board of Land and Natural Resources to properly license the diversions, Sylva said Friday.

"Our hope with this case was to restore water to the East Maui watershed in defense of the environment and the taro farmers and gardeners... and in the interest of the public," said Sylva, an attorney with the Native Hawaiian Legal Corp., which is representing the plaintiffs. "These are water resources belonging to the people of the state."

Sylva noted that there has never been an environmental assessment or environmental impact statement performed on the diversions to assess the harm to users, the flora and fauna of the streams, and the resources themselves.

"This has been a long time com-

Water

Continued from Page A1

In 2001, the group challenged EMI's application with the state to lock in diversions through 30-year licenses - and won, Wendt said. Judge Eden Elizabeth Hifo ruled in 2003 that long-term leases could not be considered or issued until the defendants completed an environmental assessment.

No assessment was done. Instead, the Board of Land and Natural Resources has been issuing revocable permits on a holdover basis, Wendt explained. Nishimura has now ruled that process is in violation of state law.

"We obviously disagree with the judge's decision and have asked her to reconsider it," Rick Volner, general manager of HC&S, said in a statement Friday. "We have been

following the procedures for securing a state water lease since 2001, but the process has been repeatedly delayed due to numerous legal challenges by those opposing diversions of stream water.

"We are unsure whether Judge Nishimura understands that this is the primary source of drinking and irrigation water for 36,000 Upcountry Maui residents and farmers. We will be working with the state and county to identify the quickest way to address this situation."

A&B announced earlier this month that HC&S, the last sugar plantation in the state, will end its sugar production this year. By the end of the year, more than 600 workers will be unemployed.

A&B cited \$30 million in losses in 2015 and a future of more "significant losses" in announcing the closure. Other factors mentioned by A&B officials included poor weather forecasts that would reduce crop yields, lots of sugar on the world market driving down prices, and opposition by anti-cane burning groups. There was no mention of problems with water licenses.

Sylva noted that A&B was on notice since mid-December through the judge's "minute order" that the ruling was not going its way.

Given the plans to shut down the plantation, A&B may be able to obtain enough

water from land it currently owns. One-third of the water comes from A&B land, Sylva said, meaning that even if the state revoked all permits it still would have one-third of its current take. It's enough to supply the county's needs, and "they arguably have enough to satisfy their transition into a different crop for the time being," she said.

"Sharing the resources may be reasonable at this time," she said.

This lawsuit is separate from a contested case currently before the state water commission on stream flow standards for 27 East Maui streams, from which A&B draws water, said Sylva, who also represents Na Moku in that case.

The state water commission issued stream flow decisions in 2008 and 2010 and denied a contested case hearing request from Na Moku in 2010. Two years later, the Intermediate Court of Appeals ruled that a contested case hearing should have been granted.

Hearings were held on Maui in the spring on setting stream flow standards for the 27 East Maui streams and the release of the hearing's officer's recommendations is pending.

Lee Iwada can be reached at leeiwada@mauinews.com.

See WATER on Page A4

EXHIBIT B

EAST MAUI IRRIGATION COMPANY, LIMITED

A SUBSIDIARY OF ALEXANDER & BALDWIN, INC.

P. O. BOX H
PAIA, MAUI, HAWAII 96779

August 22, 1988

Mr. Manabu Tagomori
Manager-Chief Engineer
Division of Water & Land Development
Department of Land & Natural Resources
P. O. Box 373
Honolulu, Hawaii 96809

Dear Manabu:

File ✓ WATER LICENSES - Fiscal Year 1987-88

WASTE WATER AND YIELDS: During fiscal year 1987-88 waste water period, Hawaiian Commercial and Sugar Company did not waste any water to recharge the central Maui basal ground water.

We submit the following tables:

- 1 - East Maui Water License Yield
- 2 - Sale of Water to County of Maui from E.M.I.Co.'s Haiku Uka watershed
- 3 - Water pumped into the Koolau Ditch at Nahiku by Maui Pineapple Co., Ltd.

Very truly yours,

Robert L. Warzecha
Manager

CH:mc
encls.
cc: M. J. Ching w/encls.
R. F. Cameron
W. Paty, Chrmn, DLNR

EAST MAUI IRRIGATION COMPANY, LIMITED
SALE OF WATER to DEPARTMENT OF WATER SUPPLY, COUNTY OF MAUI
FISCAL YEAR 1987/88
(in M.G.D.)

<u>1987</u>	<u>Reservoir Weir</u>	<u>Olinda Residents' Meters (2)</u>	<u>TOTAL @ OLINDA</u>	<u>PIIHOLO RESERVOIR</u>
July	25.141 *	-0-	25.141	69.781 **
August	21.416 *	.062	21.478	80.744 **
September	40.933	-0-	40.933	77.472
October	43.444	.045	43.489	78.685
November	28.987	-0-	28.987	42.893
December	30.716	.045	30.761	33.229
 <u>1988</u>				
January	26.428	-0-	26.428	34.851
February	38.152	.040	38.192	51.091
March	40.129	-0-	40.129	51.962
April	32.715	.027	32.742	51.314
May	41.295	-0-	41.295	63.771
June	23.836	.029	23.865	44.460
			<u>393.440</u>	<u>680.253</u>

*8/13/86 - Weir & recorder removed for construction of treatment plant.
Consumption estimated @ .811 mgd.
**5/20/87- From this date, consumption estimated due to broken meter.

EAST MAUI WATER LICENSE YIELD

FISCAL YEAR 1987 - 88

MEASUREMENT POINT	YEAR MG	TOTAL MG	*WATER WASTED MG	NET AFTER WASTING			
				TOTAL MG	GOV'T %	PRIVATE MG	GOV'T MG
<u>HONOPOU BOUNDARY</u>							
Olinda water to County of Maui	393	66,594	0	66,594	70.00	19,978	46,616
Lower Kula pipeline Pihiolo Reservoir	680						
Wailoa Ditch	ø43,711						
New Hamakua Ditch	10,973						
Lowrie Ditch	6,641						
Haihu Ditch	4,196						

ø Adjusted for water pumped into ditch (Maui Land & Pineapple Co. pumped 114 mg.)

* Water wasted to recharge Maui basal body.

WATER PUMPED INTO KOOLAU DITCH @ NAHIKU

By Maui Pineapple Co., Ltd.

FISCAL YEAR 1987/88

(in M.G.D.)

	1987						1988					
Date	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June
1	-0-	.593	.541	.192	.576	-0-	.481	-0-	.580	-0-	-0-	.574
2	-0-	.593	.538	-0-	.581	-0-	-0-	-0-	.574	-0-	-0-	.574
3	-0-	.593	.538	-0-	.581	-0-	-0-	.585	.573	-0-	.569	.574
4	-0-	.593	.540	.333	.573	.561	-0-	.585	.576	-0-	.549	.574
5	-0-	.591	.540	.581	.573	.561	-0-	.587	.576	-0-	.549	.574
6	-0-	.591	.539	.581	.576	-0-	-0-	.587	.576	-0-	.574	.576
7	-0-	.571	.540	.581	.576	-0-	-0-	.587	.578	-0-	.573	.216
8	-0-	.571	.213	.581	.576	-0-	-0-	.587	.578	-0-	.573	-0-
9	-0-	-0-	.493	.580	.466	-0-	-0-	.587	.577	-0-	.271	-0-
10	-0-	.589	.493	.580	-0-	-0-	-0-	.588	.576	-0-	.271	.574
11	-0-	.589	-0-	.580	.572	.572	-0-	.588	.574	-0-	-0-	.574
12	-0-	.589	-0-	.576	.572	.119	-0-	.578	.574	-0-	-0-	.335
13	-0-	.589	-0-	.576	.575	-0-	-0-	.120	.574	.557	-0-	.571
14	-0-	.587	.325	.579	.575	-0-	-0-	-0-	-0-	.557	-0-	.571
15	-0-	.587	.557	.579	.575	-0-	-0-	-0-	-0-	.582	-0-	.574
16	-0-	.587	.559	.558	.576	-0-	-0-	-0-	-0-	.582	-0-	.574
17	.587	.588	.559	.558	.264	-0-	-0-	-0-	-0-	.582	-0-	.575
18	.587	.588	.087	.558	-0-	-0-	-0-	.351	-0-	.583	.572	.575
19	.587	.583	.475	.562	-0-	-0-	.533	.578	-0-	.583	.530	.575
20	-0-	.583	.600	.562	-0-	-0-	.578	.578	-0-	.584	.624	.575
21	-0-	.556	.329	.376	-0-	-0-	.578	.578	.613	.584	.600	.575
22	-0-	.556	.584	-0-	-0-	-0-	.580	.590	-0-	.587	-0-	.573
23	-0-	.556	.583	-0-	-0-	.577	.580	-0-	-0-	.587	-0-	.573
24	-0-	.540	.583	-0-	-0-	.577	.580	-0-	-0-	.587	-0-	.574
25	-0-	.540	.586	-0-	-0-	.577	.578	-0-	-0-	-0-	.572	.574
26	-0-	.546	.586	-0-	-0-	.577	-0-	-0-	-0-	-0-	.477	.574
27	.588	.546	.586	.576	-0-	.577	-0-	-0-	-0-	-0-	.869	-0-
28	.589	.544	.347	.578	-0-	.577	-0-	-0-	-0-	-0-	-0-	-0-
29	.588	.544	.577	.577	-0-	.577	-0-	.578	-0-	-0-	-0-	-0-
30	.588	.544	.580	.576	-0-	.577	-0-	-----	-0-	-0-	-0-	-0-
31	.593	.541	-----	.576	-----	.577	-0-	-----	-0-	-----	-0-	-----

4.707

17.168

13.478

12.956

9.787

7.006

4.488

9.232

8.099

6.955

8.173

13.178

GRAND TOTAL 114.227

EXHIBIT C-3

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

PETITION TO AMEND INTERIM
INSTREAM FLOW STANDARDS FOR
HONOPOU, HUELO (PUOLUA),
HANEHOI, WAIKAMOI, ALO,
WAHINEPEE, PUOHOKAMOA,
HAIPUAENA, PUNALAU/KOLEA,
HONOMANU, NUAAILUA, PIINAAU,
PALAUHULU, OHIA (WAIANU),
WAIOKAMILO, KUALANI, WAILUANUI,
WEST WAILUAIKI, EAST WAILUAIKI,
KOPILIULA, PUAKAA, WAIQHUE,
PAAKEA, WAIATAKA, KAPAULA,
HANAWI, AND MAKAPIPI STREAMS

Case No. CCH-MA13-01

DECLARATION OF GARRET HEW

DECLARATION OF GARRET HEW

I, GARRET HEW, hereby declare:

Background and Employment

1. I am the President of East Maui Irrigation Co., Ltd. ("**EMI**"), a subsidiary of Alexander & Baldwin, Inc. ("**A&B**"). EMI operates the system of diversions, intakes, ditches and tunnels that collects and transports water from the East Maui watersheds that are more particularly described below. I am also the Water Resources Manager for Hawaiian Commercial and Sugar Company ("**HC&S**"), which is the division of A&B that operates A&B's sugar operations on Maui.

2. I was born and raised on Maui and attended Oregon State University where I received a Bachelor of Science degree in Horticulture in 1978. Following receipt of my degree I returned to Maui where I operated a truck farm in Kula from 1978 to 1983. From 1983 to 1985, I was employed by HC&S in various supervisory positions. In 1985, I was employed by EMI as a senior supervisor, administration, and I have been continuously employed by EMI ever since.

Over the course of the more than thirty years that I have been at EMI, I have become intimately familiar with the operations of EMI, the physical components of its systems, and the management of the flows that are collected and transported by the system. I have also become generally familiar with the history of the system.

3. From January of 2004 through May of 2008, in addition to my continuing duties at EMI, I was employed by HC&S as its Paia Farm Manager. The Paia farm is one of the four farms that make up HC&S' sugar cultivation operations on Maui. In May of 2008, I assumed my current position with HC&S as its Water Resources Manager. In that position, I am responsible for EMI, which currently has a total of 17 employees besides myself, and a water resources crew at HC&S. I oversee all surface and ground water resources of the farming operations, including the direction and management of all capital improvement projects related to water resources and HC&S land matters such as leases and rights of way.

Overview of the EMI Ditch System

4. The EMI system is an integrated system of diversions, ditches, intakes and tunnels that collects water from streams located on the rainy windward slopes of East Maui and transports it to HC&S' sugarcane fields in Central Maui as well as to the Maui County Department of Water Supply for the domestic water needs of upcountry Maui and the irrigation needs of small farms in Kula. The watersheds from which it collects water total approximately 50,000 acres, of which EMI owns approximately 17,000 acres. Approximately 33,000 acres in the Huelo, Honomanu, Keanae and Nahiku watersheds are owned by the State of Hawaii and have historically been leased to EMI. Exhibit C-1 is an EMI map of the ditch system which shows the four license areas as well as the EMI owned portions of the watersheds.

5. The Ditch System was constructed in phases beginning in the 1870's and extending to the completion of the current system in 1923. Exhibit C-2 is a copy from EMI's archives of a September 13, 1876 Agreement between Hamakua Ditch Company and Hawaiian Government that recites circumstances and terms under which some of the early development of the system was undertaken. Major milestone completion dates of the current system include the Koolau Ditch in 1904, the Haiku Ditch in 1914, the Kauhikoa Ditch in 1915 and the Wailoa Ditch in 1923.

6. Since 1938, the relationship between the government of Hawaii and EMI with regard to the coordinated operation of the Ditch System on government and EMI owned lands has been based on an agreement (the "*1938 Agreement*") dated March 18, 1938 between the Territory of Hawaii and EMI. Exhibit C-3 is a copy of the 1938 Agreement.

Recent History of EMI's BLNR Water Licenses and Permits

7. The 1938 Agreement provided a framework for a transition from a patchwork of previously issued water leases with differing lease and rental terms, to the subsequent issuance by the Territory, following public auction, of long term water licenses for each of the four watersheds that comprise the current license areas shown on Exhibit C-1 under a uniform set of terms and conditions.

8. The Huelo license area is 8,752.690 acres. Exhibit C-4 is a copy of the last long term license issued to EMI for the Huelo license area. Following its expiration, annual revocable permits were issued by the Board of Land and Natural Resources of the State of Hawaii ("*BLNR*"). Exhibit C-5 is a copy of Revocable Permit No. S-7264 to A&B, which is the last such permit issued before the license went into holdover status due to the contested case hearing that is currently pending before the BLNR.

9. The Honomanu license area is 3,381 acres. Exhibit C-6 is a copy of the last long term license issued to EMI for the Honomanu license area. Following its expiration, annual revocable permits were issued by the BLNR. Exhibit C-7 is a copy of Revocable Permit No. S-7263 to A&B, which is the last such permit issued before the license went into holdover status due to the contested case hearing that is currently pending before the BLNR.

10. The Keanae license area is 10,768 acres. Exhibit C-8 is a copy of the last long term license issued to EMI for the Keanae license area. Following its expiration, annual revocable permits were issued by the BLNR. Exhibit C-9 is a copy of Revocable Permit No. S-7265 to A&B, which is the last such permit issued before the license went into holdover status due to the contested case hearing that is currently pending before the BLNR.

11. The Nahiku license area is 10,111.220 acres. Exhibit C-10 is a copy of the last long term license issued to EMI for the Nahiku license area. Following its expiration, annual revocable permits were issued by the BLNR. Exhibit C-11 is a copy of Revocable Permit No. S-7266 to EMI, which is the last such permit issued before the license went into holdover status due to the contested case hearing that is currently pending before the BLNR.

Water License Yields

12. For an extended number of years prior to my 1985 employment by EMI, it is my understanding that the State of Hawaii contracted with the United States Geological Survey ("*USGS*") to operate gaging stations at various locations in the Ditch System to measure the volume of water collected from each license area from State owned lands. USGS would then provide an annual report to the State for each fiscal year (July 1 through June 30) utilizing the information from its gages and information provided by EMI regarding amounts of water (i) carried in the Ditch System that were delivered to the County of Maui from EMI's Haiku Uka

watershed, (ii) added to the system at Nahiku by Maui Pineapple Co. Ltd., and (iii) discharged into gulches and reservoirs to recharge the basal aquifer in lieu of being used for irrigation pursuant to the provisions of the long-term license. My understanding of the reason for breaking down the above amounts is as follows:

A. Water sold to the County of Maui from EMI's Haiku Uka watershed was removed from the Ditch System east of Honopou Stream, the western boundary of the license areas, and was therefore not captured in the readings of the ditch gages at Honopou Stream. This water therefore needed to be added back to the totals measured at the ditch gages on the Honopou boundary.

B. Water added to the system by Maui Pineapple Co. Ltd. ("MPC") from its Kuhiwa well and Nahiku pump and transported by EMI via the Ditch System for withdrawal by MPC was not collected from State lands (the Nahiku pump pumped surface water from MPC land back into the Koolau Ditch; the Kuhiwa well, situated on EMI land formerly leased to MPC, pumped groundwater into the Koolau Ditch), and thus needed to be excluded from the license yield calculations.

C. The long term licenses provided that EMI, during January, February and December, could take water:

for the purposes of replenishing the ground water resources of the Central Maui area (and not for the irrigation of sugar cane or other plant crops) . . . and discharge the same into gulches, reservoirs and other places approved by the Territorial Hydrographer . . . without the payment of rental therefor.

See, e.g., Ex. C-8 at p. 8. Because rentals were not charged on such water, the amount of such water needed to be excluded from the yields before calculating the rents due to the State.

13. Exhibit C-12 is a copy of EMI's October 24, 1985 letter to the USGS reporting for the 1984/1985 fiscal year, followed by USGS' November 6, 1985 report for the same period

to the State. The USGS report includes a table, the last column of which lists the "NET AFTER WASTING" yield of water from government owned lands for each of the four license areas. This number was derived by applying separately, for each license area, a percentage factor derived from historical data, to estimate the amount of water yielded from government versus EMI owned lands in the watersheds. Beginning with Fiscal Year 1985-1986, the State no longer contracted with USGS for this service and EMI took over the operation of the ditch gages previously operated by USGS and reported the water license yields directly to the State.

14. Exhibits C-13 and C-14 are copies of EMI's reports to the State for Fiscal Year 1985-1986 and 1986-1987, respectively. These followed the format of the previous USGS reports.

15. Exhibit C-15 is a copy of EMI's August 22, 1988 report to the State for 1987-1988. The format of Ex. C-13 differs from that of the prior reports in that a single annual yield from government owned lands is reported which is derived by aggregating the readings from the four license areas and applying a single factor of 70%. This change came about as the result of discussions between EMI and the State once the Honomanu Water License (Ex. C-6), the last of the long term water licenses, had expired, and all four license areas were the subject of one year permits. The 70% factor was based on comparisons of the average yields reported by USGS in prior years and a series of isohyetal studies from 1949 to 1985. This reporting format and formula has been used for all subsequent years.

16. Exhibit C-16 consists of copies of EMI's reports to the State for Fiscal Years 1988-1989 through 2013-2014.

17. While EMI's reporting format to the State continues to include a column for water "wasted" or "released" to recharge the basal aquifer, the last Fiscal Year for which EMI has a

record of this occurring is Fiscal Year 1982-1983. Exhibit C-17 is a copy of the USGS report to the State dated December 7, 1983.

18. MPC no longer uses the Ditch System to transport water to Central Maui. The last month in which such usage was reported was September of 2008, as reflected on Exhibit C-18, which is a copy of the East Maui Water License Yield report for Fiscal Year 2007-2008.

EMI's Water Deliveries to the County of Maui DWS

19. There is a long history of written agreements between EMI and the County of Maui Department of Water Supply ("*DWS*") pertaining to the delivery by EMI to DWS of water from the EMI Ditch System, which includes the following:

A. Exhibit C-19 is a copy of an agreement entered into on December 22, 1961 (the "*1961 Agreement*") which cancelled all previous agreements and was for a term extending from January 1, 1962 through June 30, 1986.

B. Exhibit C-20 is a copy of a Memorandum of Understanding (the "*1973 MOU*") entered into as of December 31, 1973 with an initial term extending from January 1, 1974 through December 31, 1993.

C. Exhibit C-21 is a copy of a July 27, 1982 letter setting forth additional understandings related to the 1961 Agreement and the 1973 MOU.

D. Exhibit C-22 is a copy of an Amendment to the 1973 MOU entered into on May 18, 1992 which extended its term through December 31, 1995.

E. Exhibit C-23 is a copy of a Second Amendment to the 1973 MOU which modified the amount of water to be delivered to DWS in Nahiku.

F. Exhibit C-24 is a copy of a Third Amendment to the 1973 MOU which, among other things, extended its term through December 31, 1996.

G. Exhibit C-25 is a copy of an Agreement regarding the 1973 MOU dated March 21, 1996 conditioned upon the development by DWS of a reservoir at Kamole Weir. The reservoir was never developed, so the conditions of this agreement never went into effect.

H. Exhibit C-26 is a copy of a Fourth Amendment to the 1973 MOU which, among other things, extended its term through December 31, 1997.

I. Exhibit C-27 is a copy of a Fifth Amendment to the 1973 MOU which, among other things, extended its term through December 31, 1998.

J. Exhibit C-28 is a copy of a Sixth Amendment to the 1973 MOU which, among other things, extended its term through December 31, 1999.

K. Exhibit C-29 is a copy of a Seventh Amendment to the 1973 MOU which, among other things, extended its term through February 29, 2000.

L. Exhibit C-30 is a copy of an Eighth Amendment to the 1973 MOU which, among other things, extended its term through April 30, 2000.

20. Since April 30, 2000, the delivery of water by EMI from its Ditch System to DWS has been pursuant to the terms and conditions of an unwritten informal agreement that essentially has continued the practices and performance that developed under the prior written agreements. Maui County's access points to the EMI system for water that it takes, treats and delivers as potable water to its customers on its Makawao, Kula and Nahiku systems are at the Waikamoi upper pipeline (near the Olinda water treatment plant), the Waikamoi lower pipeline (near the Piholo water treatment plant), the western end of the Wailoa Ditch (near the Kamole water treatment plant) and in a development tunnel in the Koolau Ditch (Nahiku). In addition,

non-potable water is taken by Maui County from HCS' Hamakua Ditch at Reservoir 40 for delivery to the Kula Agricultural Park.

21. Payment by DWS to EMI is calculated monthly by DWS based on meters that it operates at the rate of \$.06 per thousand gallons (\$60.00 per million gallons) as reflected on invoices prepared by DWS and sent to EMI for approval. Exhibit C-31 consists of copies of the monthly invoices for calendar year 2013, showing the meter readings and the calculated payment amounts approved by and paid to EMI in 2013.

Surface Water Use Reports to CWRM

22. In my capacities as President of EMI and Water Resources Manager for HC&S I have overseen the preparation and submission to the Commission on Water Resources Management ("*CWRM*") Monthly Surface Water Use Reports covering surface water collected by EMI and also surface water received by HC&S from the separate ditch systems operated by HC&S and Wailuku Water Company in West Maui. Exhibit C-32 is a set of copies of these reports for the months of December, 2007 through August, 2014.

Schematic Overview of HC&S' Irrigation Infrastructure

23. Exhibit C-33 is a schematic diagram which depicts the EMI ditch system and the HC&S ditch and reservoir systems. The EMI side of the system is the "supply" side and is east of Maliko Gulch. The HC&S side is the "use" side of the system and is west of Maliko Gulch. The schematic also depicts the locations and capacities of HC&S' reservoirs and the locations of its pumps. The delivery capacity of the EMI system is 450 million gallons per day ("*mgd*").

24. EMI records the amount of water that is delivered to HC&S based on ditch gages located where each of the four main ditches crosses Maliko Gulch. Exhibit C-34 is a summary of Total Monthly and Annual East Maui Ditch Deliveries from 1925 through August of 2014.

Most of the water that is measured at this point was collected in the portions of the EMI Ditch System that is covered by the 1938 Agreement, but some additional water is collected from diversions of streams to the west of Honopou Stream, which represents the westernmost boundary of the Water License Areas.

25. In addition to the surface water imported from the EMI Ditch System and the West Maui Ditch System, the HC&S irrigation infrastructure includes fifteen brackish water wells and associated pumps that can add ground water to the irrigation ditches operated within certain areas of the plantation. The location of the wells and pumps are shown schematically on Exhibit C-33. For a better visual understanding of spatial relationships, Exhibit C-35 is a copy of an HC&S field map color coded to show the water sources available to each field. The blue and green areas represent the approximately 30,000 acres of the plantation that can be serviced by surface water from the EMI Ditch System but not from West Maui. The blue area is irrigated only with EMI ditch water. The green area is serviced by a combination of EMI water and well water, depending upon ditch deliveries. The brown area is serviced by a combination of Nā Wai 'Ehā water imported from the West Maui Ditch System and pumped from Well 7. The red area is serviced solely by Nā Wai 'Ehā water from the West Maui Ditch System.

26. Of the fifteen brackish water wells used by HC&S for irrigation, fourteen can be used to irrigate 17,200 of the approximately 30,000 acres that are serviced by water from the EMI Ditch System. The current service areas for each well are shown on the following field maps:

A. Exhibit C-36 is a copy of an HC&S field map color coded to show the service area of Well 1;

B. Exhibit C-37 is a copy of an HC&S field map color coded to show the service area of Well 2;

C. Exhibit C-38 is a copy of an HC&S field map color coded to show the service area of Well 3;

D. Exhibit C-39 is a copy of an HC&S field map color coded to show the service area of Well 4;

E. Exhibit C-40 is a copy of an HC&S field map color coded to show the service area of Well 6;

F. Exhibit C-41 is a copy of an HC&S field map color coded to show the service area of Well 7. Due to its location on the upslope of the West Maui mountains, it is only configured to supply irrigation water to HC&S' west Maui fields, the surface water source for which is the West Maui Ditch System that collects water from the Nā Wai 'Ehā streams.

G. Exhibit C-42 is a copy of an HC&S field map color coded to show the service area of Well 8;

H. Exhibit C-43 is a copy of an HC&S field map color coded to show the service area of Well 9;

I. Exhibit C-44 is a copy of an HC&S field map color coded to show the service area of Well 11;

J. Exhibit C-45 is a copy of an HC&S field map color coded to show the service area of Well 12;

K. Exhibit C-46 is a copy of an HC&S field map color coded to show the service area of Well 13;

L. Exhibit C-47 is a copy of an HC&S field map color coded to show the service area of Well 16;

M. Exhibit C-48 is a copy of an HC&S field map color coded to show the service area of Well 17;

N. Exhibit C-49 is a copy of an HC&S field map color coded to show the service area of Well 18;

O. Exhibit C-50 is a copy of an HC&S field map color coded to show the current service area of Well 19, in yellow, and an area that formerly was but is no longer served, in orange. The orange area was served in the past through the use of booster pumps (18C1 and 18C2) and a pipeline to pump water uphill from Well 18. The infrastructure that was previously used to service this has not been used since 2003 due to deterioration, obsolescence, and the relative inefficiency of expending electrical power to transport water from Well 18 to fields at this elevation versus other locations.

27. During periods of heavy rainfall, water overflows EMI's stream diversions and remains in the streams. In addition, EMI operates gates that control the maximum amount of flow that is diverted in order to meet interim instream flow standards set by CWRM and to prevent the system from exceeding its capacity or delivering water in excess of what the HC&S system of ditches and reservoirs needs and can handle. Substantially all of the water that is taken into its system and transported by EMI is delivered to Maui County or HC&S. All the water delivered to HC&S is used by HC&S for irrigation and factory operations. No water, once delivered to HC&S, i.e., where the EMI ditches cross Maliko Gulch, is discharged into the ocean by either EMI or HC&S.

28. The HC&S irrigation system is designed to operate to the maximum extent

possible on the gravity flow of water from higher to lower elevations. This minimizes pumping, which consumes precious electric power. To accomplish this, it is critical that the maximum possible amount of water is taken into the HC&S system at the Wailoa Ditch, the ditch at the highest elevation, which has a capacity of 195 mgd. Taking in the maximum amount of water at this point maximizes HC&S' flexibility to distribute water by gravity flow to the fields with the highest irrigation priority at any given time, as well as to maximize the use of HC&S' hydro power generation capacity.

29. Wailoa Ditch flows are an important benchmark of the system. During extreme drought conditions, the Wailoa Ditch flow rate can drop as low as the 10 mgd measured at Honopou Stream in October of 1984. Under these conditions, essentially no water can be supplied by EMI to HC&S since the County would draw all or most of the available flow from the Wailoa Ditch at its Kamole Water Treatment Plant. When the Wailoa Ditch flow is extremely low, the lower ditches have little or no water. While October of 1984 was a rare event, surface water flows from East Maui can fluctuate tremendously from day to day and cannot be relied upon at times to meet the irrigation requirements of HC&S.

30. Over its history, the long-term average delivery by EMI to HC&S has been approximately 165 mgd. Since 1999, however, deliveries have declined significantly. In the ten year period from 2004 through 2013, the average delivery was 126 mgd. This water is distributed within the ditches and reservoirs of the plantation on a day to day basis and supplemented with well water at the direction of the HC&S farm managers in consultation with HC&S' agronomist, Mae Nakahata, and HC&S' manager, Richard Volner.

HC&S' Ground Water Use Reports

31. Exhibit C-51 consists of copies of HC&S' monthly ground water use reports by year from 1986 through August of 2014 by well and pump numbers.

HC&S' June 10, 2008 Comment Letter re Draft IFSARs Dated March 2008

32. Exhibit C-52 is a copy of HC&S' June 10, 2008 letter and enclosures submitting comments and information to CWRM in response to the May 2008 Public Review Draft Inseam Flow Standard Assessment Reports ("*IFSARs*") for the Hydrologic Units of Honopou (6034), Hanehoi (6037), Piinaau (6053), Waiokamilo (6055) and Wailuanui (6056).

33. One of the concerns of EMI and HC&S expressed in Exhibit C-52, a concern that continues with regard to the setting of Interim Instream Flow Standards for all the streams at issue in this proceeding, is the reliance by CWRM on estimates of stream flows developed statistically from rainfall and drainage basin data without taking adequate account of seepage losses. This leads to unrealistic expectations regarding the quantitative relationship between high elevation releases at the Koolau Ditch and increased flow in the lower reaches of streams that are known to have losing reaches. The example of Waiokamilo Stream is discussed in some detail in Exhibit C-52. HC&S no longer diverts Waiokamilo Stream, which is the primary source of irrigation water for taro in Wailua Valley, even though the dry weather low flows at the Koolau Ditch level, due to leaky sections of the stream below, usually do not make it to the taro growing areas. Those areas currently, as they have been historically, are watered by springs and seeps that consistently augment stream flow far below EMI's discontinued Koolau Ditch diversion of Waiokamilo Stream. Similar conditions also exist on Palauhulu Stream and Makapipi Stream.

34. Exhibit C-53 is a copy of a letter from EMI to CWRM dated October 30, 2009 providing my comments and observations with regard to the losing reaches of Makapipi Stream below the EMI diversions.

35. Exhibit C-54 is a copy of a USGS letter report dated November 5, 2010 documenting the results of flow measurements during a release from EMI's Koolau diversion of Makapipi Stream which showed that the release amounts were all lost in seepage between the Koolau Ditch and where the stream crosses the Hana Highway.

36. Of the 27 streams that are the nominal subject of petitions to amend IIFS, EMI only operates diversions on 23 of them. The following streams are not diverted at all by EMI:

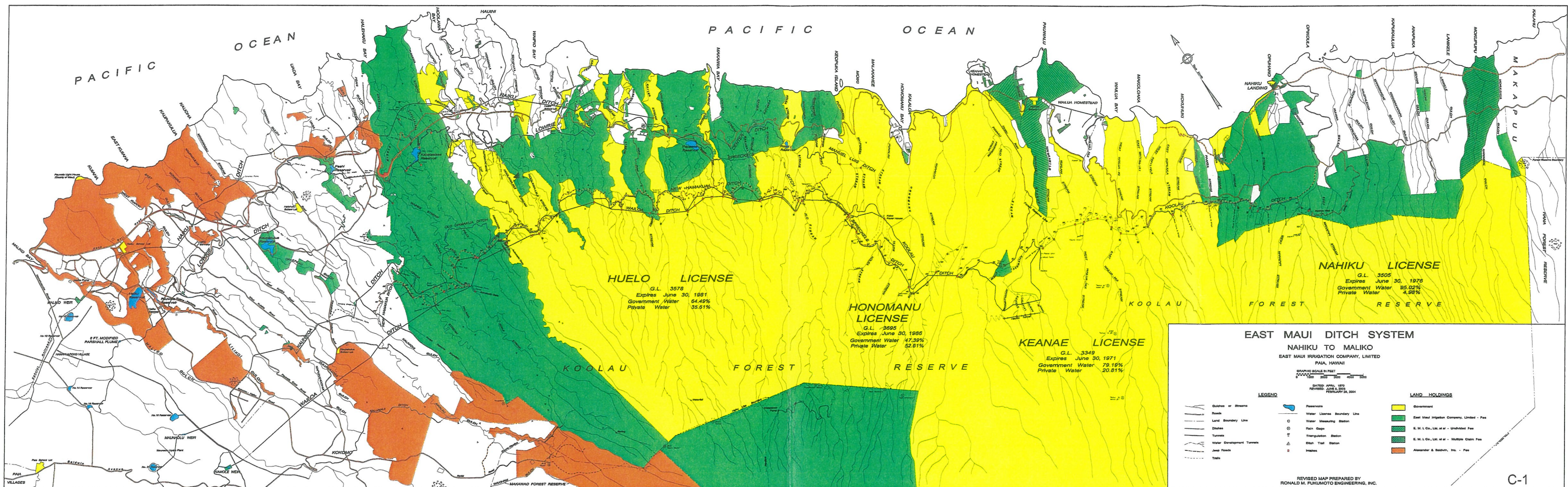
- A. Waiokamilo Stream has not been diverted since 2007;
- B. Waianu Stream is below the EMI Ditch System and has never been diverted;
- C. Kualani Stream is also below the EMI Ditch System and has never been diverted.
- D. Waikani is not a stream, but rather a waterfall along Wailuanui Stream, which is the subject of its own petition.

I, GARRET HEW, declare, verify, certify, and state under penalty of perjury that the foregoing is true and correct.

DATED: Maui, Hawaii, _____.

GARRET HEW

EXHIBIT H



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY)	CIVIL NO. 15-1-0650-04 RAN
JACINTHO, and NĀ MOKU AUPUNI O)	(Environment; Declaratory Judgment)
KO'OLAU HUI,)	
)	CERTIFICATE OF SERVICE
Plaintiffs,)	
)	
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, et al.)	
)	
Defendants.)	
)	
)	
)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following parties at their last known address in the manner indicated below on January 22, 2016.

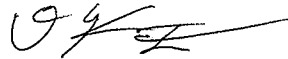
	HAND DELIVERY	U.S. MAIL
Linda L. Chow	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Deputy Attorney General		
465 S. King Street, Room 300		
Honolulu, Hawaii 96813		
Attorney for the Board of Land		
and Natural Resources, Carty		
Chang, in his official capacity		
as Interim Chairperson of the		
Board of Land and Natural		
Resources, and the Department		
of Land and Natural Resources		
David Schulmeister	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cades Schutte		
1000 Bishop Street, 12 th Floor		
Honolulu, Hawaii 96813		
Attorney for East Maui		
Irrigation Co., Ltd., Alexander		
& Baldwin, Inc. and Hawaiian		
Commercial and Sugar Co.		

Caleb P. Rowe
Department of the
Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793
Attorney for County of Maui,
Department of Water Supply

[]

[X]

DATED: Honolulu, Hawai'i, January 22, 2016.



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Attorneys for Plaintiffs,
HEALOHA CARMICHAEL, LEZLEY
JACINTHO AND NA MOKU AUPUNI O
KO'OLAU HUI

Civil No. 19-1-0019-01 (JPC)

Defendant A&B/EMI's Exhibit AB-168

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____