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LAND USE COMMISSION
STATE OF HAWAII

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LĀNA`I RESORTS, LLC  To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	DOCKET NO. A89-649 **PETITIONER LĀNA`I RESORTS, LLC'S EXCEPTIONS TO INTERVENOR LĀNA`IANS FOR SENSIBLE GROWTH'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; APPENDIX "A"; CERTIFICATE OF SERVICE**

BEFORE THE LAND USE COMMISSION

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In the Matter of the Petition of LĀNA`I RESORTS, LLC  To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	DOCKET NO. A89-649 **PETITIONER LĀNA`I RESORTS, LLC'S EXCEPTIONS TO INTERVENOR LĀNA`IANS FOR SENSIBLE GROWTH'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

PETITIONER LĀNA`I RESORTS, LLC'S EXCEPTIONS TO INTERVENOR LĀNA`IANS FOR SENSIBLE GROWTH'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Petitioner LĀNA`I RESORTS, LLC (**Petitioner**) respectfully submits its exceptions to Intervenor (**LSG**)'s *Proposed Findings of Fact, Conclusions of Law, and Decision and Order* filed December 29, 2016 (**LSG's Proposed FOF/COL**).

Petitioner's detailed exceptions to specific proposed findings of fact (**FOFs**) and conclusions of law (**COLs**) are in Appendix "A" attached hereto and incorporated herein by reference. This section will provide a broad overview of the fundamental flaws in LSG's Proposal.

A. LSG's Proposed FOF/COL is Based on the Premise that Condition No. 10 is Defined by the federal Safe Water Drinking Act and National/State Primary Drinking Water Regulations

LSG's Proposed FOF/COL is entirely based on the premise that Condition No. 10 is defined by the federal Safe Water Drinking Act (**SDWA**) and national/state primary drinking water regulations.

Petitioner's *Partial Stipulation and Proposed Findings of Fact, Conclusions of Law, and Decision and Order* filed December 29, 2016 (**Petitioner's Proposed FOF/COL**) shows why LSG's premise is incorrect: (1) The 1991 Order[1] contains no reference to the SDWA or the national/state primary drinking water regulations. The term "potable" appears only six times in the 1991 Order. LSG's FOF 80 cites all six references. None of those references allude to the SDWA or the national/state primary drinking water regulations. (2) The administrative records of the 1991 Order proceedings contain no reference to these regulations. None of the parties or the Commissioners alluded to the regulations. During the 1991 Order proceedings, LSG filed proposed findings of fact and conclusions of law, and LSG's own proposed language never alluded to the regulations. (3) Joanna Seto testified that the terms "potable" and "non-potable" do not exist in the regulations. (4) The federal regulations did not apply to ground water until November 8, 2006, and the State Department of Health (**DOH**) did not adopt state ground water regulations until after November 8, 2006.

All of LSG's FOFs can be condensed into one premise: that the only relevant piece of evidence would be a test of Wells 1 and 9 under the national/state primary drinking water regulations, and because no test was performed, Petitioner's evidence should be discredited.

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[1] All short cites and abbreviations used herein are identical to those used in Petitioner's Proposed FOF/COL, unless otherwise specified.

Although LSG provides many FOFs repeating this premise, it does not provide any evidence from the 1991 Order or the administrative record to support its interpretation of Condition No. 10.

In addition to the lack of evidence supporting LSG's interpretation of Condition No. 10, its interpretation is also internally inconsistent and incorrectly states the law. There is no dispute that Condition No. 10 is "plain and unambiguous." *See, e.g.,* LSG's COL 23 (stating, "The term 'potable' as used in Condition 10 is plain and unambiguous as it is not used in a way that indicates it be given a special interpretation other than its common and general meaning" (emphasis added)); LSG's COL 21 (stating, "Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning").

LSG's interpretation relies on a rule of statutory construction, stated in Hawaii Revised Statutes (**HRS**) § 1-16. HRS § 1-16 states, "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." LSG's COL 27 (citing HRS § 1-16). According to LSG, Condition No. 10 must be construed with reference to the national/state primary drinking water regulations.

LSG's reliance on this rule of statutory construction is incorrect. First, a condition drafted by the Land Use Commission (**Commission**) and water quality regulations promulgated by the DOH are not laws "upon the same subject matter."

Second, under Hawaii law, "it is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning." *Bhakta v. County of Maui*, 109 Hawai`i 198, 208, 124 P.3d 943, 953 (2005)

(brackets omitted, emphases added). Because Condition No. 10 is undisputedly plain and unambiguous, the Commission is not at liberty to look beyond Condition No. 10 and to regulations promulgated by another agency.

Finally, the SDWA and the national/state primary drinking water regulations are highly complex, technical, and specialized laws that require knowledge at both the federal and state level. These regulations are not a "common and general meaning," but rather specific "terms of art."

In Petitioner's Proposed FOF/COL, COLs 2-4 set forth common and general meanings for the terms "potable" and "non-potable," based solely on the plain language of Condition No. 10, and without relying on other agencies' regulations or rules of statutory construction. OP and the County have stipulated to these COLs.

Many of LSG's FOFs and COLs are irrelevant because they are based on LSG's underlying premise, which is an incorrect and unsupported interpretation of Condition No. 10. These irrelevant FOFs and COLs are identified in Appendix "A."

B. LSG's Proposed FOF/COL Are False, Misleading, Misstate Witnesses' Testimony, And Take Statements Out of Context

LSG's Proposed FOF/COL presents an incomplete and distorted portrait of the evidence, omitting key testimony without explanation, or taking isolated statements out of context.

For example, LSG's FOF 142 claims, "Dr. Thomas' testimony . . . corroborates the finding that pumping induced leakage into the Palawai Basin is occurring." But Dr. Thomas's testimony was the exact opposite of what LSG claims:

[By Petitioner]

Q. Do you also disagree with Mr. Meyer's opinion that the pumping of brackish wells is inducing leakage of potable water into the brackish wells?

A. I do. I see no evidence so far that that's occurring.

Tr., 11/10/2016, at 279:13-17.

LSG also wholly ignores Dr. Thomas's testimony and his empirical evidence that demonstrates that the chemistries of the higher elevation potable wells are dramatically different from that of the lower elevation brackish wells, and that the chemistries show no evidence of leakage between the wells. Dr. Thomas's testimony must be addressed; it cannot be simply hidden away without any evidence to rebut his testimony.

Further, it is notable that LSG provided testimony from its President and Secretary, Reynold "Butch" Gima, yet only a single FOF (LSG's FOF 192) refers to Mr. Gima's testimony. LSG's Proposed FOF/COL sweeps the rest of his testimony under the rug, even though his testimony is the only evidence of LSG's position.

LSG's Proposed FOF/COL omits Mr. Gima's admission that Petitioner's current usage is not threatening the water resource:

[By Petitioner]

Q. . . . Are you saying that the current usage is threatening that water resource?

A. I don't believe I said that in my recent testimony.

Q. So you're not saying that?

A. Yeah, that's what I just told you.

* * * *

[By Hearings Officer Scheuer]

> Q. I'm going to go little back to Condition 10. Just in your personal opinion, do you believe there is harm that occurs from the use of Wells 1 and 9 for irrigation of the golf course at Manele, or a long-term threat?
>
> A. No, I can't come up with any objective criteria or measurable means to say that something has specifically been harmed.

Tr., 11/16/2016, at 731:21 – 732:1; 753:6-13.

Mr. Gima admitted that LSG is not taking a position on whether Wells 1 and 9 are potable or non-potable:

> Q. Okay. Now, you've -- is it your position that the water from Wells 1 and 9 are potable wells?
>
> A. I believe it's not LSG's kuleana to determine that. It's my understanding that the resorts has to show that Wells 1 and 9 are either nonpotable wells or they have to show that Wells 1 and 9 are not potable wells.
>
> Q. Okay. So LSG is not taking a position on whether Wells 1 and 9 are potable or nonpotable? You're saying that it's really up to us to show that it's nonpotable? You're not taking a position –
>
> A. That's my understanding –

Id., at 738:16 – 739:2.

Mr. Gima agreed with defining "brackish" water as water having chlorides above 250 mg/l, and that Wells 1 and 9 are indeed "brackish" water wells:

> Q. (By Mr. Kudo) Okay. Based on the definition in the Water Use Development Plan on page 29, Appendix A, for brackish water and the testimony that has been submitted to this body by other witnesses that the chlorides of Wells 1 and 9 exceed 250 parts per million, do you consider Wells 1 and 9 to be brackish?
>
> A. Using the 250 threshold, it would seem that, yeah, that's consistent with how some people use the term "brackish."

Id., at 744:16-24.

Mr. Gima's testimony also revealed LSG's disingenuousness about its position on desalination. He testified that LSG was "a proponent of the desal project" and "saw desal as a potential win-win for the community," yet at the final Lanai Planning Commission meeting on Petitioner's special use permit, he opposed granting a permit longer than five years, making the plant financially unviable. *Id., 748:2-19, 749:7-10.* He said his opposition was because "this was such a new concept" and "we didn't know enough about desal to know what questions to ask," yet he admitted he did no investigation about desalination plants before voicing his position at the Lanai Planning Commission hearing. *Id., at 749:1 – 750:5.*

LSG had ample opportunities to learn about desalination. Kurt Matsumoto testified that during the permit application process, Petitioner held "several sessions in front of the Planning Commission in which we answered multiple questions. We answered every single question, and we made available all the expert witnesses and did whatever we could to inform the Planning Commission about what it would take to implement this project. We did site visits – and just thinking back, I don't know of anything else that we really could have done to inform the members of the Planning Commission." *Id., at 637:10-19.*

Now, LSG's Proposed FOF/COL appears to be claiming that a desalination plant is a viable source for irrigation water, despite LSG's own illogical and baseless opposition to the project, and despite Mr. Matsumoto's testimony at the LPC and at this hearing that the plant is no longer financially viable. *See LSG's FOFs 149, 175, 179.* LSG's allusions to desalination as a solution are as misleading and incongruous as the rest of its positions in this case.

Appendix "A" identifies the specific FOFs and COLs that are false, misleading or taken out of context.

C. Conclusion

Based on the exceptions and explanations stated herein, Petitioner respectfully requests that the Hearings Officer reject LSG's Proposed FOF/COL.

Dated: Honolulu, Hawaii, January 6, 2017.

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LĀNA`I RESORTS, LLC  To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	DOCKET NO. A89-649 **APPENDIX "A"**

APPENDIX "A"

LSG's Proposed FOF/COL is replicated in full below. Petitioner's exceptions are stated in bold below the pertinent Finding of Fact or Conclusion of Law to which Petitioner takes exception.[1]

I. FINDINGS OF FACT

The Land Use Commission of the State of Hawai`i ("Commission") makes the following findings of fact. To the extent that these findings of fact contain conclusions of law, they shall be considered as such.

Procedural History

[1] **LSG's Proposed FOF/COL is provided in full for ease of reference. Because LSG's document was converted from pdf format to Word format, the conversion may have resulted in minor typographical or formatting discrepancies.**

1. On November 29, 1989, Lanai Resort Partners, the predecessor-in-interest to Lana`i Resorts, LLC (both individually and including all successors and predecessors in interest, the "Resort" or "Petitioner"), filed a petition for a district boundary amendment to the Commission for a development project at Manele Bay. See Land Use Commission Docket No. A89-649. The project included the development of a golf course at Manele Bay (the "golf course").

2. Lanaians For Sensible Growth ("LSG"), Office of Hawaiian Affairs, and individual petitioners moved to intervene in the petition proceedings. Docket No. A89-649, Petition To Intervene filed February 9, 1990.

3. On March 9, 1990, the Commission allowed Office of Hawaiian Affairs ("OHA"), and LSG to intervene. The individual petitioners were denied participation as their interests were deemed to be represented by LSG and OHA. Docket No. A89-64, Order Granting In Part and Denying In Part Petition To Intervene filed March 9, 1990. The Commission determined that LSG represents the interests of individual Lana`i residents who are affected by the Mamie project. *Id.*

4. After intervening, LSG, OHA, and the Resort entered into a Memorandum Agreement wherein the Resort represented that they would not use any water from the high level aquifer on Lana`i to irrigate the golf course. Ex. I-20. Based on this promise and representation, LSG and OHA withdrew its opposition to the 1989 Petition.

FOF 4: Irrelevant. Petitioner questions the relevance of a document (i.e., a Memorandum of Agreement) "which has similar but not identical language" to Condition 10. *Transcript of LUC Hearing (Tr.), 11/16/2016, at 730:3-4 (page:line number).* In light of the Hawaii Supreme Court's 2004 decision, it is clear that prohibiting the use of all water

from the high level aquifer is incorrect. Mr. Reynold "Butch" Gima testified that this Memorandum of Agreement is "not part of these proceedings." ***Tr. 11/16/16, at 750:20.***

5. On April 16, 1991, the Commission approved the Resort's petition, imposing several conditions when it reclassified the Resort's property to allow construction of the golf course. Docket No. A89-649, Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991 ("1991 Order"); Ex. 28. One of these conditions, Condition No. 10, requires that:

> Petitioner shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

Id. The 1991 Order does not define the term "potable," nor does it use the term inconsistent with its plain meaning. *Id.*

FOF 5: Misleading and illogical. LSG states that the term "potable" is not defined within Condition 10, then concludes that the lack of definition supports a definition of that term contained in Webster's dictionary, then concludes that the dictionary definition supports a definition based on the SDWA and national/state primary drinking regulations. There is no logical connection between these conclusions.

6. Condition 10 was based on repeated representations by the Resort to the Commission that no water from the high level aquifer would be used to irrigate the golf course. *See Lanai Co. v. Land Use Comm'n*, 105 Hawai`i 296, 302, 97 P.3d 372, 378 (2004) (noting the representations by the Resort that no water from the high level aquifer would be used to irrigate the golf course at Manele).

FOF 6: False and misleading. LSG's finding is incorrect and, in fact, the opposite is true. The Commission rejected LSG's proposed finding which stated that no water from the high level aquifer could be used to irrigate the Manele Golf Course. The Commission instead adopted Petitioner's and OP's draft language which allowed for the use of non-potable water from the high level aquifer. *Lanai Co. v. Land Use Comm'n*, 105 Hawai'i at 309-10.

7. The Commission issued an Order to Show Cause on October 13, 1993 ordering the Resort to demonstrate why the Manele property reclassified by the 1991 Order should not revert to its former classification due to the failure to comply with Condition 10 of the 1991 Order. Docket No. A89-649, Order to Show Cause filed October 13, 1993.

8. On May 17, 1996, the Commission issued its findings of fact and conclusions of law. Docket No. A89-649, Findings of Fact, Conclusions of Law, and Decision and Order filed May 17, 1996 ("1996 Order"). Based on the evidence presented and the Resort's admissions, the Commission found that the Resort was irrigating its golf course with water from Wells 1 and 9, which are located in the Palawai Basin, a portion of the high level aquifer. 1996 Order at 6.

FOF 8: False and misleading. LSG neglects to mention that the LUC also found that "Petitioner has completed an extended pump test of Wells No. 1 and 9, which are within the high level aquifer <u>and provide non-potable, brackish water</u>." 1996 OSC Order at 6 (emphasis added).

9. The Commission also noted that the pumping of Wells 1 and 9 cause water from the upper levels of the aquifer to leak into the Palawai wells, and that the Resort never performed a comprehensive test on the potability of the water from Wells 1 and 9. *Id.* at 8.

FOF 9: False and misleading. The LUC also erroneously assumed that "it is likely that the salinity will drop as more potable water leaks into the dike compartments in the secondary recharge zone to replace the water being pumped." 1996 OSC Order at 8. In fact, and to the contrary, nearly 20 years later, salinity levels have remained stable in Wells No. 1 and 9, *Tr., 11/10/2016, at 208:23-209 (Testimony of J. Stubbart).* This is further corroborated by Petitioner's submission of recent evidence indicating that no leakage is occurring between the potable and non-potable dike compartments. *Tr. 11/10/2016, at 274:23-277:7; 289:8-22 (Testimony of D. Thomas).*

10. The Commission held that the Resort violated Condition 10 by using water from Wells 1 and 9 to irrigate its golf course, and ordered a compliance plan to be prepared by the Resort within 60 days from the date of the 1996 Order. *Id.*

11. After various levels of appeals, the Hawaii Supreme Court reversed and vacated the Commission's 1996 Order. *Lanai Co. v. Land Use Comm'n*, 105 Hawai`i 296 (2004).

12. The Supreme Court ruled that Condition 10 does not prohibit the Resort from using any water from the high level aquifer, only potable water, but that the Commission did not issue any specific finding or conclusion on whether the Resort was using potable water for golf course irrigation. *Id.*

13. The Supreme Court recognized that there was evidence that potable water was leaking into the high level wells located in the Palawai basin, and that the Commission must clarify and determine whether the leakage of water into the basin wells is caused by the Resort's pumping, and whether such leakage constitutes the "use" of potable water. *Lanai Co.*, 105 Hawai`i at 319.

FOF 13: False and misleading. The Supreme Court did not recognize or validate such evidence. The Court noted that the Commission had found some evidence of leakage, but noted other inconsistent findings.

14. The Supreme Court "remanded to the [lower] court with instructions that the court remand this case to the LUC for clarification of its findings, or for further hearings if necessary, as to whether [the Resort] used potable water from the high level aquifer, in violation of Condition No. 10." *Id.*

15. On remand, the Commission elected to hold a contested case hearing to determine whether the Resort was using potable water in violation of Condition 10. *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai`i 298 (App. 2016). The contested case hearing was held on June 7 and 8, 2006, but after all other parties were able to present their case, LSG was denied the same opportunity. *Id.*

16. Instead of ruling on the contested case hearing, the Commission ended the proceedings and changed Condition 10 to prevent only water containing a chloride concentration of less than 250 mg/1 from being used for golf course irrigation. Docket No. A89-649, Order Vacating 1996 Cease and Desist Order; denying Office of Planning's Revised Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order Filed April 16, 1991; and Granting Petitioner's Motion for Modification of Condition No.10, With Modifications filed January 25, 2010 ("2010 Order").

17. After an intervening appeal regarding the Circuit Court's jurisdiction to rule on appeal from the 2010 Order, *see Lanaians for Sensible Growth v. Land Use Comm'n*, 128 Hawai`i 128 (App. 2012), the Circuit Court in Civ. No. 10-1-0415-02 vacated the Commission's 2010 Order and remanded the proceeding to the "LUC with instruction to conduct **de novo**

further evidentiary hearings with a new hearings officer, pursuant to LUC's decision to do so[.]" Civ. No. 10-1-0415-02 Order Vacating Appellee Land Use Commission's Order Vacating 1996 Cease and Desist Order; denying Office of Planning's Revised Motion to Amend Findings of Fact, Conclusions of Law, and Decision and Order Filed April 16, 1991; and Granting Petitioner's Motion for Modification of Condition No.10, With Modifications entered January 25, 2010, and Remanding Matter to the Land Use Commission, filed November 8, 2010 ("2012 Circuit Court Remand Order").

18. After the Resort appealed the 2012 Circuit Court Remand Order, the Intermediate Court of Appeals affirmed the 2012 Circuit Court Remand Order in *Lanaians for Sensible Growth* on March 21, 2016. Judgment on appeal was entered April 18, 2016.

19. The Resort's current owner was aware of Condition 10 and this ongoing matter prior to the purchase of the Resort four years ago. 4 Trans. 651:17-19; 4 Trans. 667:13-16.

20. On June 24, 2016, the Commission issued its Order Appointing Hearings Officer, wherein Vice-Chairperson Jonathan Likeke Scheuer was appointed hearings officer in this docket.

21. On June 28, 2016, Lanaians for Sensible Growth moved to substitute Läna`ians For Sensible Growth ("LSG") as Intervenor to reflect an administrative named change. No parties objected to the Motion For Substitution of Parties. The Hearings Officer deferred the decision on the Motion until the contested case hearing in this docket was held. Minute Order No. 2.

22. On July 6, 2016, the Commission issued Minute Order No. 2, setting the issues for the instant hearing and the relevant pre-hearing deadlines. *Id.*

23. On August 11, 2016, Maui Planning Department filed a positional statement. On August 12, 2016, Office of Planning ("OP"), the Resort, and LSG filed positional statements. By way of their positional statements, the parties disagreed as to the issues on remand and the scope of the remanded contested case hearing.

24. On August 18, 2016, the Commission held a site visit on Lana`i, attended by the Hearings Officer, Commission staff, and attorneys and representatives of the parties.

25. On September 14, 2016, LSG filed a Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause, seeking to clarify that the scope of the present docket on remand includes all violations of Condition 10 regardless of the alleged well source or time of infraction.

26. On September 14, 2016, the Resort filed a Motion to Set Issues on Remand of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated May 17, 1996, seeking to limit the present docket's scope on remand to only the uses of Wells 1 and 9 from 1991 to 1993.

27. Following a September 30, 2016 pre-hearing conference on the two September 14, 2016 motions, the Commission issued Minute Order No. 6, limiting the scope of, and resolving all disputes regarding, the issues on remand as follows:

> [1.] The scope of the remand is limited to the use of wells 1 and 9 to irrigate the golf course and whether such use violates condition 10 of the LUC Decision and Order dated April 6, 1991. Evidence will be accepted with regard to wells 1 and 9 from the date of the 1991 Decision and Order until present. If the use of any other wells in the aquifer has relevance to the issue of whether the use of wells 1 and 9 to irrigate the golf course results in a violation of condition 10, evidence of such may be considered. However, allegations that the use of additional wells not a part of the 1996 proceedings (i.e., the original order to show cause proceedings) are in and of themselves a violation of Condition 10 are not a part of the remand.

[2.] Has Lanai Resorts utilized potable water from the high-level groundwater aquifer to irrigate the golf course?

[3.] What does the phrase "potable" mean in condition 10?

[4.] Is there leakage of potable water to the wells in the Palawai Basin and if so does such leakage constitute utilization of potable water as prohibited by condition 10?

28. The hearing in this docket began on November 9, 2016 at the Lana`i Community Center. Public testimony was taken prior to the evidentiary portion of the hearing.

29. At the November 9, 2016 hearing, LSG's Motion For Substitution of Parties was granted.

30. Each party presented opening statements on November 9, 2016.

31. The evidentiary portion of the hearing began on November 9, 2016, and continued at the Lāna`i Community Center through November 10, 2016. The evidentiary portion of the hearing continued at the Maui Arts and Cultural Center on November 15 and 16, 2016.

32. At the November 9, 2016 hearing on this matter, Joanna Seto and Leo Asuncion testified on behalf of the State Office of Planning; and John Stubbart testified on behalf of the Resort.

33. At the November 10, 2016 hearing on this matter, John Stubbart (continued from November 9, 2016), Donald Thomas, and Seril Shimizu testified on behalf of the Resort; Roy Hardy testified on behalf of the State Office of Planning; and Sally Kaye testified on behalf of LSG.

34. At the November 15, 2016 hearing on this matter, Tom Nance, Allan Schildknecht, Mike Donoho, and Bruce Plasch testified on behalf of the Resort.

35. At the November 16, 2016 hearing on this matter, Kurt Matsumoto testified on behalf of the Resort; David Taylor and William Spence testified on behalf of the County of Maui; and Reynold "Butch" Gima testified on behalf of LSG.

36. At the November 9, 2016 hearing on this matter, Petitioner Resort Exhibits 1 through 49A and 49B; State Office of Planning Exhibits OP-1 through OP-12; County of Maui Exhibits 1 through 6, and R-1 and R-2; and LSG Exhibits I-1 through I-21, inclusive of I-15A were received into evidence.

37. At the November 10, 2016 hearing on this matter, Petitioner Resort Exhibits 49C and 49D were received into evidence.

38. At the November 15, 2016 hearing on this matter, Petitioner Resort Exhibits 41B and 45D; and LSG Exhibits I-22 and I-23 were received into evidence.

39. The evidentiary portion of the hearing concluded on November 16.

40. Closing arguments were taken at the Maui Arts and Cultural Center on December 8, 2016. All parties presented closing arguments.

Ground Water of Lanai

41. This hearing concerns the use of groundwater wells on the island of Lana`i.

42. Lana`i has basal and high-level dike confined aquifers. Ex. I-14 at 5.

43. The high level aquifers are composed of permeable lavas intersected by impermeable dikes and other structures associated with the caldera of the original volcano and its rift zones. These aquifers are collectively referred to as the "high level aquifer." Ex. I-3 at 1.

FOF 43: Misleading. LSG cites John F. Mink's August 10, 1988 Summary Statement, but omits the distinctions made in the first paragraph. A close reading reveals that while Mink indeed referred to "high level aquifers" he also noted that fresh water

aquifers were "restricted to an approximately 14 square mile area in the highest part of the island..." and recognized the existence of brackish groundwater. Ex. I-3 at 1.

44. The high level aquifer is interconnected and compartmentalized, connected by fractures which permit hydraulic continuity within the aquifer such that the aquifer can be treated as a single unit in determining sustainable yield of the resource. Ex. I-3 at 1; Ex. I-2 at 5, 7.

FOF 44: Refer to exception noted under proposed FOF 43.

45. The Palawai Basin, an area located within the leeward portion of the high level aquifer, contains both fresh and somewhat brackish water. Ex. I-2.

FOF 45: Inaccurate and misleading. Wells 1 and 9 produce water that is considered brackish, not "somewhat" brackish, as testified to by Roy Hardy, John Stubbart, and Tom Nance. ***Tr., 11/10/2016, at 211:20-22; Tr., 11/10/2016, at 164:11 – 12; Tr., 11/15/2016, at 421:18 – 423:6.***

46. The Palawai Basin is over an ancient volcanic caldera, which still has a thermal source. This feature may cause some wells located in the Palawai Basin to have elevated chloride levels and temperature. Exhibits I-1 at 4; I-9 at 3-4; I-6; I-4 at 5; R. V. XXX III, June 7, 2006 at 171.[1]

47. Lana`i has the only known high level aquifer in the State of Hawai`i which contains brackish water. 3 Trans. 386:8:12.

48. Lanai's drinking water is supplied by the high level aquifer. Ex. I-13 at 2; 1 Trans. 158:1-159:6.[2]

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[1] The administrative record is cited to as R.(record) V.___(volume), ____(document number and/or date) at (page number).

[2] The transcripts for the 2016 hearing dates are cited to as(volume) Trans._____(page number):__(line numbers).

49. The sustainable yield of the high level aquifer on Lana`i is set by the Commission on Water Resource Management ("CWRM") at 6 million gallons per day ("MGD"). Ex. 32; Ex. I-9 at 5; Ex. I-2 at 4; Ex. I-3 at 2.

50. The high level aquifer is divided into a leeward and windward system. Ex. I-9 at 5.

51. The yield for each system is 3 MGD each. Id.

52. The sustainable yield of the island is relatively small. Ex. I-9 at 1.

53. Lanai has no major surface water source. Ex. I-9 at 6.

54. Lanai is not located to benefit from favorable annual average rainfall over a large area and consequently, its water resources are limited. Ex. I-3 at 1.

55. Recharge of the island's sole aquifer is highly dependent on fog drip collected by its forested watershed, which is mesic and rather low elevation for a cloud forest, making it vulnerable to climate change, fires, invasive species, and other factors. Ex. I-9 at 1, 5; Ex. I-14 at 102.

Groundwater Well Resources

56. All groundwater wells on Lāna`i are owned and operated by the Resort through Lāna`i Water Company, a PUC and Department of Health-regulated water utility. 1 Trans. 155:23-156:6; Ex. I-9 at 6-7.

57. Eight wells are currently in operation, Wells 1, 9, 14, 15, 3, 4, 6, and 8. 1 Trans. 163:14-16.

58. Lana`i's groundwater wells are divided into several independent water distribution systems for domestic use, irrigation water, and recycled wastewater. Ex. I-9 at 8; 1 Trans. 158:4-159:6.

FOF 58: Inaccurate. LSG uses the description "domestic use, irrigation water and recycled wastewater." The actual language used in Exhibit I-9 at 8 and Tr., 11/9/2016, at 158:4 – 159:6 is "potable water, brackish water and recycled wastewater."

59. Wells 6 and 8 provide water to the Ko'ele Project District, Lana`i City, and Kaumalapau for domestic and commercial use. Ex. I-9 at 9.

FOF 59: Inaccurate and misleading. LSG misquotes the terms used in Exhibit I-9 and substitutes the word "domestic" for the word used in the exhibit which is "potable". Ex. I-9 at 9.

60. Wells 3 and 4 provide irrigation water to the Palawai Irrigation Grid, as well as water for domestic use to the Mānele Project District. Ex. I-9 at 9.

FOF 60: False and inaccurate. Inaccurate citation to the LWUP. Wells 2 & 4 provide "potable" water to the Palawai Irrigation Grid, as well as "potable" water to the Mānele Project District. Ex. I-9 at 9. Well 3 is not mentioned on the page cited by LSG.

61. Wells 1, 9, 14 and 15 produce water which is currently being used for irrigation at the Manele Project District and for irrigation of the Challenge at Manele golf course. Ex. I-9 at 9; Ex. I-4; 2 Trans 197:15-20; 2 Trans. 442:1-9; 3 Trans 650:9-16.

FOF 61: Inaccurate. LSG omits the word "brackish" as stated in the LWUP, and instead uses the term "irrigation". Ex. I-9 at 9.

62. Wells 1, 9, 14 and 15, are located in the high level aquifer. Ex. I-4; 2 Trans 197:15-20; 2 Trans. 442:1-9; 3 Trans 650:9-16; Ex. I-11.

63. Wells 1, 9, 14, and 15 are located in the Palawai Basin. 1 Trans. 159:1-6.

64. Well 1 has been used to irrigate the golf course since 1991. Well 9 has been used to irrigate the golf course since July 1993. 3 Trans. 405:24-406:7.

65. Though categorized as "brackish" wells by the Resort, Wells 1 and 9 have seen a continuous drop in chloride and water levels since the wells were drilled. 3 Trans. 394:2-4; 3 Trans. 431:11-14; 3 Trans. 444:8-445:15; Ex. 43B.

FOF 65: Incomplete and misleading. Wells 1 and 9 have also been categorized as "brackish" by the LWUDP. In addition, Mr. Gima testified that Wells 1 and 9 "are listed as brackish wells" in the LWUDP. ***Tr. 11/16/16 743:7-8.***

66. Well 1,which initially produced chlorides at above 800 mg/L when it was drilled in 1948, Ex. I-4 at 1; Ex. 43B, and in the range of 314-325 in 2006 (excluding readings the Resort's witness Tom Nance admits are invalid), consistently produces water with chlorides under 300 mg/l. Ex. 24.

FOF 66: Inaccurate and misleading. Well 1 has produced several readings above 300 mg/l—characterizing Well 1's chloride levels as "consistently" under 300 mg/l is not shown by the evidence and is therefore inaccurate.

67. Well 9, which produced chlorides in the range of 452-485 in 2006 (excluding readings the Resort's witness Tom Nance admits are invalid), now consistently produces water with chlorides under 430 mg/1. *Id.*

FOF 67: Inaccurate and misleading. Characterizing chloride levels of Well 9 as "consistently" producing water below 430 mg/l is not supported by the evidence and is therefore inaccurate.

68. The Resort's witness Tom Nance has repeatedly testified in this matter that, given the continuous decline in the chloride levels of Wells 1 and 9, these wells will eventually produce water under 250 mg/1. R. V. XXXIII June 7, 2016 at 112; *Id.* at 119; 3 Trans. 431.11-14.

FOF 68: Misleading. Mr. Nance states that "sometime after I'm dead and gone . . . 200, 300 years from now, we <u>might</u> be approaching 250 [chlorides mg/l]." ***Tr. 11/15/2016, at 431: 16-18.***

69. The Resort is currently pumping on average 1.95 MGD of the total leeward sustainable yield. Ex. 43-J.

70. The Resort uses, on average, 475,000 gallons daily from the high level aquifer to irrigate the golf course. 2 Trans. 368:20-22.

71. The present sustainable yield given the current well locations and settings of the Resort's well pumps is 2.4 MGD for the entire island. 1 Trans 188:11-18.

72. Due to the impermeableness of the aquifer medium, the effects of well pumping on other compartments within the aquifer are not immediately apparent. Stabilization of sources of withdrawal may take decades to stabilize, and transition periods may take several years or decades. Exhibit I-2 at 5; R. V. XX no. 582 at 139.

73. On March 2, 1989, CWRM received a written petition to designate the island of Lāna`i as a Water Management Area. Exhibit I-1.

74. On January 31, 1990, CWRM staff recommended that Lanai not be designated as a water management area at that time, but that the CWRM should re-institute water management area designation proceedings if the static water level of any well falls below one half its original elevation above mean sea level, or if the Resort does not develop alternative water sources as contained in the Resort's water development plan and full land development continues. Ex. I-1; Ex. 32.

75. In addition to the CWRM redesignation levels, the Resort has set voluntary action levels based on the recommendation of Tom Nance. Ex. I-9 at 3-8.

76. On Lāna`i, there has been a continuous decline in water levels across nearly all wells:

Well	Initial Static water level (Ex. I-14 at 50; Ex. I-9 Fig 3-8)	1/2006 Level (Ex. 25)	7/14/16 Static water level (Ex. 25: Ex. 43K)	CWRM Trigger Static Level (Ex. I-9 Fig 3-8)	Action Level (per Nance) (Ex. I-9 Fig. 3-8)
1	818	700	636	414	550
9	808	660	686	404	550
14	551	531	461	275	400
15	-	Drilled 2012	459	-	-
2	1544	-	1446.87	772	1050
3	1124	1030	1001	562	750
4	1589	1498	1510	794.2	1100
5	1570	NIS	1496	735	1100
6	1005	936	883	502.5	750
7	650	NIS	-	325	-
8	1014	961	930	507	750

FOF 76: Inaccurate. Well 5 was not in service as of July 2016, as shown on Exhibit 25. The source of Well 5's 1496 water level is not cited and is therefore inaccurate and misleading.

Misleading. There is no evidence of harm or threat posed to the water resource. Mr. Gima testified on LSG's behalf that no harm or long-term threat occurs from the use of Wells 1 and 9 for golf course irrigation. *Tr., 11/16/2016, at 753:6-13.* Mr. Hardy testified that the condition of the water resource has not changed since 1990, except for decreased

pumping, and that there is no harm or threat. ***Tr., 11/10/2106, at 224:15 – 225:12.*** **In December 2009, CWRM wrote to Mr. Gima re-affirming its decision to not designate the island as a water management area.** ***Petitioner's Exhibit 44A.*** **Mr. Nance confirmed that the wells are not being overpumped or overused. He further testified that it is practically impossible to cause irreversible harm from overpumping, because compartments are not physically damaged and recover over time, and because the wells are constantly monitored and operated to allow recovery.** ***Tr., 11/15/2016, at 391:7 – 392:15; 467:9 – 468:25.***

Definition of "Potable"

77. Condition 10 of the 1991 Order prohibits the use of "potable water" from the high-level groundwater aquifer to irrigate the Manele golf course. Ex. 28.

78. The 1991 Order does not define "potable" in a way that differs from its plain and obvious meaning. *Id.*

79. Webster's Dictionary defines "potable" as "water suitable for drinking." *See Lanai Co.*, 105 Hawai`i at 299 n. 8. The Oxford Dictionaries defines the term as "safe to drink; drinkable." Office of Planning's Position Statement at 7.

FOF 79: Misleading. See exception to LSG's FOF 5.

80. In the six times the term "potable" appears in the 1991 Order, it is not used in a way which indicates that it is to be given a special interpretation different from its common and general meaning:

> [Findings of Fact]
>
> *46.* The proposed golf course at Mānele of which the Property is to be a part, will be irrigated with nonpotable water from sources other than potable water from the high level aquifer.
> . . .

90. Maui planning Department recommends that any use of potable groundwater for golf course irrigation should be limited and terminated within five years.

91. Petitioner intends to irrigate the golf course with nonpotable water, leaving only the clubhouse which will use potable water[.]

. . .

117. Petitioner has stated that the Mānele golf course will be irrigated with nonpotable water from sources other than the potable water from the high level aquifer.

. . .

[Order]

10. Petitioner shall not utilize the potable water from the high-level groundwater aquifer for golf course irrigation use, and shall instead develop and utilize only alternative non-potable sources of water (e.g., brackish water, reclaimed sewage effluent) for golf course irrigation requirements.

11. Petitioner shall fund the design and construction of all necessary water facility improvements . . . to provide adequate quantities of potable and non-potable water to service the subject property.

FOF 80: Misleading. Petitioner clarifies that the lack of a definition of "potable" within the language of Condition 10 supports the use of the only defined term—"non-potable" (e.g., brackish water, reclaimed sewage effluent).

81. Office of Planning's witness Roy Hardy of the State Commission on Water Resource Management ("CWRM") testified that the "common sense" definition of "potable" is water that is "safe to drink." 1 Trans. 215:1-14.

FOF 81: Inaccurate and misleading. Testimony taken out of context. Petitioner clarifies that Roy Hardy testified that "CWRM doesn't have an official legal term for "potable" . . . [.]" *Tr. 11/10/16 215:1-2.*

82. The Resort concedes that the plain meaning of potable means water that is suitable or safe for drinking. Petitioner Lana`i Resort's LLC's Statement of Position at 3 ("In the absence of a definition, the supreme court looked to the plain and ordinary meaning, derived from Webster's dictionary, and defined potable as 'suitable for drinking.") (emphasis added); 4 Trans. 653:13-14 (Matsumoto Testimony) ("But 'potable' to me means 'drinkable.'").

FOF 82: Inaccurate and misleading. Quotation taken out of context. In the next sentence of Petitioner's Statement of Position, Petitioner states that "In the instant situation, we should not now adopt and apply a new definition of 'potable.' As the supreme court stated, "The LUC cannot now enforce a construction of Condition 10 that was not expressly adopted[.]"' ***Statement of Position, at 3.*** **Petitioner then states that "[a]ttempting to bring meaning to a term adopted but not defined by the LUC some 25 years after the fact is problematic" and further states that using the adopted definition of "non-potable" embedded in Condition 10 is more appropriate.** ***Statement of Position, at 4.***

83. No evidence of a definition of "potable" that differs from its plain meaning of water suitable or safe to drink was introduced at the hearing.

FOF 83: Misleading. See exception to LSG's FOF 82.

84. The CWRM defers to the State of Hawai`i Department of Health ("DOH") to determine whether water is safe to drink. 2 Trans. 240:23-25; 2 Trans. 231:15-19; HRS § 174C-66 ("The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law.").

FOF 84: Irrelevant and misleading. LSG refuses to accept that under the language of Condition 10, brackish water is deemed non-potable. To circumvent this clear language, LSG seeks to adopt a definition of "potable" that was not discussed or adopted by the

Commission during the initial hearings nearly 30 years ago. Petitioner emphasizes the Hawaii Supreme Court's statement that "[t]he LUC cannot now enforce a construction of Condition 10 that was not expressly adopted. . . . Parties subject to an administrative decision must have fair warning of the conduct the government permits or requires. . . . An administrative agency, such as the LUC, has the responsibility of stating with ascertainable certainty what is meant by the conditions it has imposed." *Lanai Co.*, 105 Hawai'i at 314.

85. The DOH regulates "public water systems" which deliver potable water for domestic consumption. HAR § 11-20-2; 1 Trans. 137:2-13.

FOF 85: Irrelevant and misleading. See exception to LSG's FOF 84.

86. The DOH implements standards for water suitable for human consumption which considers whether maximum levels of certain contaminants have been reached. HAR §§ 11-20-3 to 11-20-7.5; 1 Trans. 136:24-137:22.

FOF 86: Irrelevant and misleading. See exception to LSG's FOF 84.

87. HAR Chapter 11-20 mirrors the National Primary Drinking Water Regulations set by the U.S. Environmental Protection Agency ("EPA") which also determines whether water is suitable for drinking by way of setting maximum contaminant levels. 40 CFR § 141; 4 Trans. 680:24-681:10 (Taylor testimony).

FOF 87: Irrelevant and misleading. See exception to LSG's FOF 84.

88. Both the DOH's regulations, as well as the EPA's National Primary Drinking Water Regulations, set maximum contaminant levels "at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." HRS § 340E-2; 40 CFR § 141.2 (defining "maximum contaminant level").

FOF 88: Irrelevant and misleading. See exception to LSG's FOF 84.

89. If water satisfies the regulations set forth in HAR Chapter 11-20, the DOH will allow that water to be used for domestic purposes, including drinking. 1 Trans. 137:14-22.

FOF 89: Irrelevant and misleading. See exception to LSG's FOF 84.

90. Testing for potability by way of DOH and/or EPA primary contaminants is not cost prohibitive and costs less than $5,000 per test. 3 Trans. 460:12-15.

FOF 90: Irrelevant and misleading. See exception to LSG's FOF 84.

91. The DOH also defines the term "potable water" to mean "water free from impurities in amounts sufficient to cause disease or harmful physiological effects" in its administrative rules concerning the protection of public water systems from contaminants and pollutants. HAR § 11-21-2.

FOF 91: Irrelevant and misleading. See exception to LSG's FOF 84.

92. The County of Maui defines potable water in the context of golf course irrigation as follows:

> "Potable water" **means water that meets the standards established by the department of health as suitable for cooking or drinking purposes.** A supply of water that at one time met the standards established by the department of health as potable water may not be used for golf course irrigation or other nondomestic uses, regardless of whether it is rendered nonpotable through such activities including, but not limited to, mixing or blending with any source of nonpotable water, storage in ponds or reservoirs, transmission through ditch systems, or exceeding the established pump capacity for a groundwater well.

MCC § 14.08.20 (emphasis added).

FOF 92: Irrelevant, misleading, and inapplicable. See exception to LSG's FOF 84. Petitioner also clarifies that this definition was adopted in 2009 and applies only to new golf courses seeking a permit for construction. This was confirmed by David Taylor's testimony in which he referred to Maui County Code § 14.08.010 and testified that the

Manele Golf Course does not fall under this "potable water" definition because the golf course is not "new." *Tr. 11/16/16 673:25 – 674:1-7.* The Manele Golf Course was constructed in 1992. *Tr., 11/16/2016, at 613:1-3 (Testimony of K. Matsumoto).*

Chlorides, Brackish Water, and Potability

93. The 1991 Order does not define the term "brackish." Ex. 28.

FOF 93: False and misleading. There are ample references to the 250 mg/l chloride limit to show that the parties at the time of the original hearing, understood that water which exceeded this limit was considered "brackish" or "nonpotable." Exhibit I-13, at 21-22 ("[T]hese concentrations are considerably below the potable limits (e.g. the limit for chloride is 250mg/l[.]"); See also Petitioner's Proposed FOFs 66, 68, 69, 70, citing *Tr., 7/12/1990, at 113:21-25, 172:14 – 173:22, 178:21 – 179:8, 186:22 – 187:9.*

94. Webster's Dictionary defines "brackish" as "somewhat salty, distasteful." *Lanai Co.*, 105 Hawai`i at 299 n.10.

95. John Stubbart and Roy Hardy testified that water with chloride levels exceeding 250 mg/1 is brackish. 2 Trans. 220:1-7; 2. Trans 230:15-17.

FOF 95: Incomplete. Tom Nance also confirmed that 250 mg/l is considered brackish water. *Tr., 11/15/2016, at 421:18 – 423:6.* In addition, LSG President and Secretary Mr. Reynold "Butch" Gima testified that Wells 1 and 9 "are listed as brackish wells" in the LWUDP, which includes a definition of "brackish" as "water that is too salty too salty to drink, generally defined by U.S. EPA as having 250 milligrams per liter of chlorides." *Tr. 11/16/16 743:7-8, 20-23; 744:22-24.*

96. Chlorides are not considered a public water system contaminant by the DOH. 1 Trans. 138:10-12; Ex. I-12; Ex. OP-4.

FOF 96: Irrelevant and misleading. See exception to LSG's FOF 84.

97. The DOH, Safe Drinking Water Branch has never been asked to take action on water which exceeds 250 mg/L by consumers or recipients of such water. 1 Trans. 141:22¬142:1.

FOF 97: Irrelevant and misleading. See exception to LSG's FOF 84.

98. Chlorides are not considered a primary contaminant and are not regulated by health-based standards by the EPA. Ex. I-12; 2 Trans 205:23-206:13 (Stubbart Testimony).

FOF 98: Irrelevant and misleading. See exception to LSG's FOF 84.

99. Chlorides in drinking water are not regulated by the DOH. 1 Trans. 138:10-12; Ex. I-12; Ex. OP-4.

FOF 99: Irrelevant and misleading. See exception to LSG's FOF 84.

100. According to the CWRM, "you cannot determine potability just based on chlorides." 2 Trans. 230:13-14; R. V. XXXIII June 8, 2006 at 152:16-153:1 ("[I]t's really wrong to look at chlorides as a sole indicator of potability.").

FOF 100: Irrelevant and misleading. See exception to LSG's FOF 84. In addition, Petitioner clarifies that the second quote ("It's really wrong to . . .") is also quoted from LSG's question to Mr. Hardy. Further, CWRM clarified in the following questions that using chlorides to determine brackishness is acceptable. *Tr. 11/10/16 230:10-17.*

101. Instead of an indicator of potability, chlorides are used as an operational parameter in locating and drilling wells. 2 Trans. 217:9-12 (Hardy Testimony) ("[Chlorides] comes into play when your design . . . of wells, how you build wells in accordance with these

different — different demarcations of brackish, fresh and saltwater."); 3 Trans. 422:11-14 (Nance Testimony).

FOF 101: Irrelevant and misleading. See exception to LSG's FOF 84.

102. Chlorides are considered a secondary contaminant that affects only the "aesthetic qualities" of drinking water. Ex. I-12; 40 CFR § 143.1.

FOF 102: Irrelevant and misleading. See exception to LSG's FOF 84.

103. The federal regulations regarding chloride levels are not legally enforceable and are only suggestions for "reasonable goals for drinking water quality." *Id.*

FOF 103: Irrelevant and misleading. See exception to LSG's FOF 84.

104. The DOH does not implement secondary regulations. Ex. I-12.

FOF 104: Irrelevant and misleading. See exception to LSG's FOF 84.

105. The Resort's witness Dr. Thomas testified that "chlorides is, to me, not the important constituent" to consider in determining potability. 2 Trans 291:12-19.

FOF 105: Misleading. Testimony taken out of context. Dr. Thomas referenced the toxicity of several substances (i.e., total dissolved solids) in addition to chlorides. Dr. Thomas's point was that some ions, such as magnesium and sodium, cannot be blended to lower levels as LSG has claimed may occur with chlorides. *Tr. 11/10/16 291:16-25, 293:8-24, 295:9-13.*

106. Taste concerns with chloride levels appear well before any health concerns would arise from high chloride levels. 4. Trans. 682:13-17.

FOF 106: Irrelevant and misleading. See exception to LSG's FOF 84.

107. The DOH would allow public water systems to provide water in excess of 250 mg/1 chlorides for domestic use. 1. Trans. 138:18-22.

FOF 107: Irrelevant and misleading. See exception to LSG's FOF 84.

108. The DOH has stated that "there are water systems that have served drinking water in excess of 250 mg/l." Ex. I-12.

FOF 108: Irrelevant and misleading. See exception to LSG's FOF 84.

109. It is "typical" for county water supplies to use water pumped at or above 250mg/l in their domestic water systems. 2. Trans. 250:13-251:9; 2. Trans 238:9-14.

FOF 109: Irrelevant and misleading. See exception to LSG's FOFs 84 and 112. Additionally, the word "typical" is taken out of context. Mr. Hardy's testimony continues and states that water with chloride levels above 250 mg/l is blended with other water to bring it down to 160 parts per million, per direction from the Honolulu Board of Water Supply. ***Tr. 11/10/16 250:20-24.***

110. Currently, potable wells on O`ahu are producing water over 250 mg/l. *Id.*

FOF 110: Irrelevant and misleading. See exception to LSG's FOFs 84 and 109.

111. While Director of the Department of Water Supply for Maui County Dave Taylor testified that his department's water meets all relevant water quality standards, it "wouldn't surprise him" if Maui wells produced water with over 250mg/1 chlorides. 4 Trans. 681:2-14.

FOF 111: Irrelevant and misleading. See exception to LSG's FOF 84.

112. County of Maui Water Supply has served water pumped at over 350 mg/1 chlorides and blended with fresher water to improve the taste for drinking. R. V XXXIII, June 8, 2006 at 201:18-25.

FOF 112: Irrelevant and misleading. See exception to LSG's FOF 84. Petitioner notes that the question is not whether non-potable water can be blended to become potable. Following LSG's logic, sewage effluent can be made potable by blending it with potable water sources. The relevant question is whether water emanating from Wells 1 and 9 are potable or non-potable.

113. County of Maui has served water at 300 mg/1 chlorides for drinking and without blending to improve the taste. *Id.* at 202:12-203:4.

FOF 113: Irrelevant and misleading. See exception to LSG's FOF 84.

114. Blending high chloride water to improve taste and palatability is an accepted public water system industry standard. 1 Trans. 138:4-6; 4 Trans. 682:13-683:4; R. V. XXXIII, June 8, 2006 at 219:11-25; 2 Trans. 200:2-201:8; 3 Trans. 423:9-20.

FOF 114: Irrelevant and misleading. See exception to LSG's FOF 112.

115. The Resort currently blends the water in each of its potable public water systems. 2 Trans. 200:2-201:8

FOF 115: Irrelevant and misleading. See exception to LSG's FOF 112.

116. Blending water to make it more palatable is not cost prohibitive. 4 Trans. 683:5-13.

FOF 116: Irrelevant and misleading. See exception to LSG's FOF 112.

117. The Resort, through its subsidiary Lana`i Water Company, does not classify chlorides as a drinking water contaminant in its water quality disclosures made to the public. For example, "to ensure water is safe for drinking and day-to-day use, Lanai Water Company conducts regular testing . . . [to] demonstrate the purity" of the water they serve to residents for

drinking and day-to-day use in the two potable public water systems on Lana`i. Ex. I-15a; I¬15; 2 Trans. 202:2-203:9.

FOF 117: Irrelevant and misleading. See exception to LSG's FOF 84.

118. The results of these required tests are reduced to a report entitled "Lana`i Potable Water System Report to the Consumer for Calendar Year 2015." *Id.*; Ex. I-15.

FOF 118: Irrelevant and misleading. See exception to LSG's FOF 84.

119. Lanai Water Company's Potable Water System Report does not measure chloride levels in reporting the quality of its potable water. Ex. I-15; 2 Trans. 202:2-203:9.

FOF 119: Irrelevant and misleading. See exception to LSG's FOF 84.

120. Maui County similarly does not report on chloride levels in its annual water quality report for its domestic customers. 4 Trans. 683:20-684:9.

FOF 120: Irrelevant and misleading. See exception to LSG's FOF 84.

121. Based on the above, water with chloride levels above 250 mg/L can be safe to drink, and brackish water can be potable.

FOF 121: Irrelevant, misleading, and leads to an absurd result. LSG ignores the language of Condition 10. If brackish water can be potable, the definition of non-potable embedded in Condition 10 is rendered meaningless and leads to an absurd result. In addition, water with chloride levels above 250 mg/l can be unsafe for human consumption, and brackish water as defined in Condition No. 10 is non-potable water.

Potability of Water in Wells 1 and 9

122. On or about October 18, 2006, at a regular meeting of the Lana`i Planning Commission, Cliff Jamile, former Director of Utilities of Lanai Water Company, testified before

the Commission that Wells 1, 9, and 14 were tested for potability, and that the wells were contaminant free:

> [T]he EPA sets certain guidelines, sets certain requirements that we have to comply with, and that is the first stage contaminant list in there. There must be about 25 to 30-contaminant that we have to test for including E.D.B., DBCP, TCP, you know, and all of these things. So we send those to the lab . . . and the lab runs those test exactly as they are suppose to do in accordance with EPA's requirements and test methods. And so far as I know, well I do know for sure that wells #1, 9, and 14 were tested and no contaminants were found present in the water.

Ex. 1-21 at 12.

FOF 122: Irrelevant. Cliff Jamile's comments are irrelevant because Condition No. 10 does not define the term "potable" by using the SDWA or any other the federal or state primary drinking water standards.

Unreliable. Mr. Jamile was deceased at the time of these hearings and, therefore, not available for live testimony or cross-examination by the parties or the Hearings Officer. ***Tr., 11/10/2016, at 335:19-23.*** **Mr. Jamile did not have firsthand personal knowledge of the tests and was not qualified as an expert witness, therefore his comments about the tests cannot be relied upon. Further, since these alleged tests may have occurred under the aegis of the former Petitioner, Castle & Cooke, we have no documentation of the tests that he referred to. John Stubbart testified that he is not aware of any tests of Wells 1 and 9 for EPA primary contaminants.** ***Tr., 11/9/2016, at 173:10 – 174:2.*** **There is no evidence of when, how, or who conducted the tests, so it is impossible to evaluate whether the testing methods and results were reliable, accurate, or performed according to industry standards.**

123. Sally Kaye, former Lana`i Planning Commission member and chairperson who was present at the October 18, 2006 meeting, testified that the draft "minutes" of the October 18,

2006 meeting, received into evidence as Ex. 1-21, were prepared according to the Läna`i Planning Commission's regular practice of transcribing verbatim planning commission meetings from a taped recording and allowing members of the planning commission to review them to ensure accuracy. 2 Trans. 324:11-25.

FOF 123: Irrelevant. The October 18, 2006 meeting "minutes" are hearsay, and without an opportunity to question Cliff Jamile, are unverified and should be weighed as such by the Commission.

124. The October 18, 2006 meeting minutes, contained in Ex. 1-21, were formally adopted by the Lana`i Planning Commission at its February 2, 2007 meeting. 2 Trans. 335:2-7.

FOF 124: Irrelevant. See exceptions to FOFs 122-123.

125. Ex. 1-21 is identical to the form of the minutes adopted by the Lanai Planning Commission on February 2, 2007. 2 Trans. 350:19-351-3.

FOF 125: Irrelevant. See exceptions to FOFs 122-123.

126. Mrs. Kaye testified that Ex. 1-21, and Mr. Jamile's testimony at page 12 therein, accurately reflects what was said at the October 18, 2006 meeting. 2 Trans. 327:22-24.

FOF 126: Irrelevant. See exceptions to FOFs 122-123.

127. The Commission finds Mrs. Kaye's testimony, and Ex. 1-21, credible.

FOF 127: Irrelevant. See exceptions to FOFs 122-123.

128. Mr. Jamile's testimony refers to EDB, DBCP, and TCP, primary contaminants regulated by HAR § 11-20-24.

FOF 128: Irrelevant. See exceptions to FOFs 122-123. Additionally, Condition No. 10 is not defined by national/state primary drinking water regulations, therefore FOF 128 is irrelevant.

129. Mr. Jamile's testimony in Ex. 1-21 indicates that Wells 1, 9 and 14 were tested for potability under state and/or federal standards, and that the water from those wells tested safe. Ex. 1-21 at 12-13.

FOF 129: Irrelevant and unreliable. Mr. Jamile did not give testimony at this hearing, and his comments at the Lanai Planning Commission were not made under oath. LSG's use of the word "indicates" is an acknowledgment that Mr. Jamile's comments are not reliable.

130. Mr. Jamile's testimony is corroborated by an August 23, 1994 letter from the Resort wherein the Resort admits that Well 1 produces potable water. Ex. 1-8 at 1 ("Our goal is to develop a brackish, more salient water source further away from the high level potable groundwater in Well 1.").

FOF 130: False and misleading. Exhibit I-8 explicitly talks about Well 1 being used to irrigate the Manele Golf Course. E.g., "Subject to the new well's capability to produce at least 450 GPM on a consistent basis of a suitable quality for irrigation, Well #1 (and its 600 GPM pump) will become a stand-by source, per our discussion[.]" (Emphasis added.).

131. No evidence that Wells 1, 9, 14, and 15 contain any of the primary contaminants regulated by HAR Chapter 11-20 and 40 CFR § 141 in levels exceeding the maximum levels set for such contaminants by the DOH or the EPA at any time was introduced at the hearing.

FOF 131: Irrelevant and misleading. The federal and state regulations cited are not probative of any definition of "potable" water as used by the Commission in its 1991 Order or Condition No. 10.

132. Other than the test referenced in Exhibit 1-21, no evidence that the Resort, any other parties, or their witnesses or agents ordered and/or performed a test for potability as

determined by DOH and EPA primary drinking water regulations on Wells 1 and 9 at any other time was introduced at the hearing. 1 Trans. 150:7-18 (Asuncion testimony); 1 Trans. 140:24¬141:9 (Seto testimony); 2 Trans. 201:9-202:1 (Stubbart Testimony); 2 Trans. 240:19-25 (Hardy Testimony); 2 Trans. 307:7-12 (Thomas testimony); 3 Trans. 442:10-443:4 (Nance Testimony) 3 Trans. 517:13-21 (Schildknect testimony); 3 Trans. 551:17-22 (Donoho Testimony); 4 Trans. 655:23-656:20 (Matsumoto Testimony).

FOF 132: Irrelevant and misleading. Petitioner has not tested the wells for contaminants listed under the federal or state primary drinking water standards because Condition No. 10 is not based on said standards. Petitioner's burden in this case does not entail producing evidence that is not relevant to Condition No. 10, or producing evidence to support LSG's argument

There is no evidence that LSG ever attempted to test Wells 1 and 9 or demanded that Petitioner test the wells. ***See LSG's FOF 132*** **(admitting that there is "no evidence that . . . any other parties, or their witnesses or agents ordered and/or performed a test"). LSG also admits that testing "is not cost prohibitive[.]"** ***LSG's FOF 90.*** **If LSG believed that a test would provide relevant and conclusive evidence, LSG should have ordered and paid for a test itself.**

Butch Gima, President and Secretary of LSG, was also a member of LWAC and worked on the LWUDP for over 14 years, and he could have also demanded or ordered a test in that capacity. But his own testimony indicates he never discussed the issue with Petitioner, even though LWAC was required to include two members from Petitioner. ***Tr., 11/16/2016, at 714:8-14 (Testimony of B. Gima).*** **Mr. Gima stated, "[E]ven if we did try to take it up in LWAC meetings, I don't believe the company would have made any type of**

commitments one way or the other[.]" *Id. at 717:9-16* (emphasis added). Mr. Gima's failure to even discuss with Petitioner is inexplicable and inconsistent with LSG's current demand that Petitioner should have tested Wells 1 and 9 on its own, despite the fact that Wells 1 and 9 are brackish water wells.

133. The Resort did not produce a sample of the water from Wells 1, 9, 14, and/or 15 at the hearing on this matter.

FOF 133: Irrelevant. Petitioner provided decades of reports and test data on all of these wells.

134. The Resort did not produce any relevant evidence that the water in Wells 1, 9, 14, and 15 was ever or is now not potable.

FOF 134: False and misleading. Numerous reports and test data on all of these wells were submitted into evidence showing the "brackish" quality of the water from these wells. For example, Petitioner's Exhibits 24 – 26 are the periodic water reports (PWRs) of all of the wells operated by Lāna'i Water Company. These reports have been generated every 28 days from 1991 to the present, and the reports show the chloride levels, temperature, water levels and pumpage of each well.

Leakage of Potable Water (alternative basis)

135. According to a theory known as "Darcy's Law," the rate of flow across a hydraulic medium increases as the difference in water level or pressure increases. Ex. I-14; 2 Trans. 233:1¬11.

FOF 135: False and misleading. LSG's FOFs 135 – 138 cite portions of Roy Hardy's testimony and his numerical model out of context.

136. Generally, pumping of a well increases the rate of flow of water within an aquifer in the direction of the pumping. 2 Trans. 233:23-25.

FOF 136: Irrelevant and misleading. Even if pumping increases the rate of flow in the direction of the pumping, it does not lead to a conclusion that potable water is leaking from the higher elevation wells into the lower elevation brackish wells. Moreover, Dr. Thomas and Mr. Nance testified that they have found no evidence of leakage, even after decades of pumping. ***Tr., 11/10/2016, at 274:23 – 277:7; 289:8-22; Tr., 11/15/2016, at 397:20 – 398:4.***

137. A numerical groundwater model for Lanai, prepared by the CWRM, concludes that consistent pumping of .650 MGD would cause a 10 to 30 foot drop in water levels in the upper gradient potable wells in Lana`i's aquifer. 1-14 at 113; 2 Trans. 234:1-235:8.

FOF 137: False and misleading. There is no evidence of leakage, and Mr. Hardy testified that CWRM reviews the periodic water reports (PWRs) generated by Lāna'i Water Company and has not noticed any change over time except that the rate of pumpage is "much less now" than it was during pineapple agricultural uses. ***Tr., 11/10/2016, at 214:15 – 225:7.***

138. Wells 1 and 9 have continually declined in chloride levels, with both wells seeing a greater than 25mg/1 reduction in chloride levels in the past six years. Ex. 24.

FOF 138: False and misleading. Mr. Hardy testified that the PWRs show "relatively stable" chloride levels, "nothing alarming," no change except a decrease in pumping, and no actual harm or impending threat to the water resource. ***Id., at 224:21 – 225:13.***

139. The Resort's witness Tom Nance has testified repeatedly in this matter that, given the consistent decline in the chloride levels of Wells 1 and 9, these wells will eventually produce water under 250 mg/l. R. V. XXXIII June 7, 2016 at 112; Id. at 119; 3 Trans. 431:11-14.

FOF 139: Inaccurate and misleading. Mr. Nance's actual testimony was, "Sometime after I'm dead and gone, you know, 200, 300 years from now, we might be approaching 250 [mg/l of chlorides]." *Tr., 11/15/2016, at 431:16-18* (emphasis added).

140. The water flowing into the Palawai basin from upper compartments are fresher than the water in the Palawai basin, 2 Trans. 236:5-9, and given Mr. Nance's testimony that Wells 1 and 9 will eventually reach 250 mg/1 chlorides, the water flowing into the basin must be potable water with less than 250 mg/1 chlorides.

FOF 140: False, inaccurate, and misleading. First, LSG cites no testimony or evidence for its "finding" that "the water flowing into the basin must be potable water with less than 250 mg/1 chlorides."

Second, this finding is inconsistent with Dr. Thomas's testimony that the water of the higher elevation potable wells has a dramatically different chemistry from the water of the lower brackish wells, and that the chemistry of the brackish wells show no evidence of leakage from the potable wells.

This finding is also inconsistent with Mr. Nance's testimony that the chlorides could be from accumulated salts in the soil, which sit on top of the groundwater. These salts could be pumped until eventually flushed out, or re-accumulated from sea salt aerosol *Tr., 11/15/2016, at 435:6 – 436:21.*

141. The pumping of the Palawai Basin wells, including Wells 1 and 9, necessarily induce more downgradient flow, or leakage, from higher level compartments into the Palawai Basin, and Wells 1 and 9, than would occur naturally. 2 Trans. 234:1-235:8.

FOF 141: False, inaccurate, and misleading. Inconsistent with Dr. Thomas's testimony regarding the different chemistries of the potable and brackish wells, and Mr. Hardy's opinion that the chloride levels have remained relatively stable.

142. Dr. Thomas' testimony that a continuing trend of the freshening of the Palawai Basin wells over time could indicate leakage from higher level compartments corroborates the finding that pumping induced leakage into the Palawai Basin is occurring. 2 Trans. 311:13-22.

FOF 142: False, inaccurate, and misleading. Misstates Dr. Thomas's testimony. Dr. Thomas's testimony was that he found no evidence of leakage. ***Tr., 11/10/2016, at 274:23 – 277:7***

143. The Resort's witness Tom Nance admits that water taken out of Wells 1 and 9 reduces the water available for drinking under the 6 MGD sustainable yield by the same amount. Ex. I-6.

FOF 143: Irrelevant. CWRM monitors sustainable yield as one of the criteria for ground water management designation (Hawaii Revised Statutes (HRS) § 174C-44), and specifically as part of its decision not to designate the island of Lāna'i.

Misleading. As Mr. Hardy explained, the calculation of sustainable yield does not differentiate between potable or non-potable water and incorporates all water that has some utility. ***Tr., 11/10/2016, at 216:1-10.*** **Thus, the sustainable yield includes not only water for drinking, but also water for irrigation. Withdrawing irrigation water from the aquifer**

does not mean that the withdrawal "reduces the water available for drinking," as LSG states.

144. The lowering of chloride levels in Wells 1 and 9 is more likely than not due in part to pumping induced leakage of fresher water from the upper compartments.

FOF 144: Inaccurate and misleading. Cites no supporting evidence and fails to address any of the evidence to the contrary.

The Resort's Case

145. Evidence of potential adverse economic effects resulting from the possible closure of the golf course does not inform the Commission as to whether the Resort has violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 3 Trans. 568:16-580:5; 4 Trans. 623:17-625:3.

FOF 145: Misleading. The evidence of potential adverse economic effects was not submitted for the purpose stated in LSG's FOF 145. Rather, evidence of potential adverse economic effects was introduced to address whether Petitioner's use of Wells 1 and 9 were and continue to be a "reasonable and beneficial use" under the public trust doctrine. LSG appears to be claiming that Petitioner's use is not consistent with the public trust doctrine. To rebut that claim, Petitioner has presented evidence that its use is "reasonable and beneficial," which is a key element of the public trust doctrine. LSG's own COL 5 states, "The public trust is, therefore, the duty and authority to . . . assure that the waters of our land are put to reasonable and beneficial uses." *Kauai Springs, Inc. v. Planning Comm'n of County of Kauai*, 133 Hawai`i 141, 172, 324 P.3d 951, 982 (2014) (emphasis added).

146. Evidence of the Resort's water conservation efforts, watershed restoration projects, and water system improvement efforts does not inform the Commission as to whether

the Resort has violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 4 Trans. 626:19-628:24; 3 Trans. 528:6-548:3; 3 Trans. 551:9-16.

FOF 146: Misleading. Again, this evidence was not submitted for the purpose stated in LSG's FOF 146. This evidence was submitted to address whether Petitioner's use is consistent with the public trust doctrine's dual mandate of "protection" and promoting "reasonable and beneficial use."

147. Evidence of whether or not there are competing uses for the water in Wells 1 and 9, whether the Resort is following best management practices for golf course irrigation, whether the use of Wells 1 and 9 for golf course irrigation is a reasonable and beneficial use, and other testimony regarding the public trust doctrine does not inform whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 10 1 Trans 168:10-12; 3 Trans. 504:13-22; 3 Trans. 551:9-16.

FOF 147: Misleading. See exceptions to LSG's FOFs 145 and 146.

148. Evidence of existing pumpage rates not being a threat to Lana`i's groundwater aquifer does not inform the Commission whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer to irrigate the golf course. *See, e.g.*, 2. Trans. 271:16-272:6; 2 Trans. 229:15-22.

FOF 148: Misleading. See exceptions to LSG's FOFs 145 and 146.

149. Evidence of whether or not there are alternatives to Wells 1 and 9 for irrigating the Manele golf course does not inform whether the Resort violated Condition 10 by utilizing potable water from the high level aquifer, 1 Trans 171:11-172:4 (Stubbart Testimony), and is

otherwise rebutted by the Resort's special use permit to construct and operate a reverse osmosis desalination plant. Ex. 20.

FOF 149: Misleading. See exceptions to LSG's FOFs 145 and 146.

150. The Resort's reliance on Lana`i Water Use Development Plan's ("LWUDP") characterization of Wells 1 and 9 as "non-potable brackish" wells is not credible for purposes of this hearing as no testing for potability was conducted on Wells 1 and 9 by the Lana`i Water Advisory Committee or by the County of Maui in preparing the LWUDP. 4 Trans. 717:17-718:2; 4 Trans. 685:23-686:10; 4 Trans. 740:18-741:2; Ex. 12.

FOF 150: False and misleading. As an official State and County document, the LWUDP is credible evidence. LSG's President and Secretary, Butch Gima, was a member of LWAC since its origination and worked on the LWUDP for over 14 years. *Tr., 11/16/2016, at 737:1-13.* The LWUDP's characterization of Wells 1 and 9 as "non-potable brackish" wells amounts to an admission. The LWUDP is also evidence that the community has considered the impacts and appropriateness of using Wells 1 and 9 as non-potable brackish wells.

151. Further, the CWRM's representative admitted that the LWUDP is a guideline and planning document not promulgated as an administrative rule. 2 Trans. 243:24-244:13.

FOF 151: Irrelevant. The LWUDP does not need to be an administrative rule to be credible evidence or to have effect. The LWUDP is reviewed and approved by the County of Maui and CWRM, and is required under the State Water Code, HRS § 174C-31, to be adopted by CWRM as a part of the State Water Plan. CWRM's letter to LWAC dated December 4, 2009, confirming its decision not to designate Lāna'i as a ground water management area, stated that CWRM "will look to the WUDP for guidance[.]" *Petitioner's*

Exhibit 44A. **Mr. Hardy testified that CWRM would look to the LWUDP to "raise issues to things that were in conflict with the plan[.]"** ***Tr., 11/10/2016, at 245:1-2.***

152. The testimony of John Stubbart, the Director of Utilities for the Resort, that testing Wells 1 and 9 for potability was not done due to the cost, 1 Trans 173:11-174:3, is not credible given the conflicting testimony of the Resort's witness Tom Nance that the costs for such a test is less than $5,000 per test, 3 Trans. 460:12-15, and given the admission that the Resort has invested several hundreds of millions of dollars on Lanai in the last four years. 4 Trans. 645:7-10 (Matsumoto Testimony).

FOF 152: False, inaccurate, and misleading. Mr. Stubbart testified that Wells 1 and 9 were not tested for primary contaminants because the tests were not necessary. Wells 1 and 9 are not drinking water wells, and primary contaminant testing is not required by any agency for brackish water. ***Tr., 11/9/2016, at 173:16 – 174:2.***

153. John Stubbart's testimony that Wells 1 and 9 are not potable is not credible given that Mr. Stubbart admitted to not testing the wells for potability. 1 Trans 206:14-19.

FOF 153: Irrelevant and misleading. Condition No. 10 is not defined by the SDWA and national/state primary drinking water regulations, therefore this FOF is irrelevant.

154. John Stubbart's testimony that chloride and hardness levels in Wells 1 and 9 render the wells non-potable is not credible given that chlorides and hardness are not considered primary contaminants which render water unsafe to drink by the DOH and the EPA. 1 Trans 206:20-207:1.

FOF 154: Irrelevant and misleading. Condition No. 10 is not defined by primary contaminants listed under national/state primary drinking water regulations, therefore this FOF is irrelevant.

155. John Stubbart's testimony that Wells 1 and 9 do not meet the CWRM's standards for potable water wells, 1 Trans. 212:2-19, is not credible given that the CWRM's representative testified that the CWRM does not restrict whether a well is used for potable or non-potable purposes, and a well operator does not need to seek approval to change the use of a well from non-potable to potable. 2 Trans. 246:11-248:2.

FOF 155: Inaccurate and misleading. Mr. Nance explained that CWRM developed well construction standards for potable wells that were designed to limit the potential for contamination. Wells 1 and 9 were constructed under "substantially different" standards and are not suitable for potable water use. ***Tr., 11/15/2016, at 439:21 – 440:22.***

156. The testimony of Dr. Don Thomas is not credible.

FOF 156: False. The challenges to Dr. Thomas's credibility stated in the FOFs below have no basis or merit.

157. Dr. Don Thomas' testimony regarding Lana`i's hydrogeology is not credible at this time as he has not yet developed a numerical groundwater model for Lana`i, 2 Trans. 309:2-18, he has not conducted an independent mapping of Lana`i's groundwater dike complexes, 2 Trans 309:19-310:1,and he has not conducted any groundwater recharge studies on the Palawai Basin. 2 Trans. 310:2-13.

FOF 157: Inaccurate and misleading. FOF 157 is an attack on Dr. Thomas's qualification as an expert witness, not his credibility. LSG did not object to Dr. Thomas's qualifications. Further, LSG's attack has no merit. An expert witness is allowed to rely on research and studies that others have done. Further, developing a numerical ground water model has no relevance to Dr. Thomas's expert opinions on hydrogeology. Dr. Thomas testified that Mr. Hardy's numerical model had limitations and did not replicate Lāna'i's

hydrogeology. Mr. Hardy's model itself includes a section on "Model Limitations" and a "Summary of Assumptions and Uncertainties." Exhibit I-14 at pp. 120-23.

158. Dr. Thomas' testimony that there is no proof that the flow of water from higher level, fresher compartments into the Palawai basin is greater than zero, 2 Trans. 266:5-277:07, is not credible given the substantial evidence to the contrary, Ex. 1-13 at 17; Ex. 1-14 at 6-9; Ex. 1-2 at 7; Ex. 1-3 at 1, his admissions that it is impossible to conclusively prove such a theory, 2 Trans. 310:23-311:4, his admission that evidence of freshening of the Palawai Basin wells over time could indicate leakage from higher level compartments, 2 Trans. 311:13-22, his reliance upon the incorrect assumption that the chloride level of Well 1 has remained steady, 2 Trans. 278:4-279:12, and his reliance upon Exhibit 43B, 2 Trans 278:14-279:17; 2 Trans. 313:6-9, prepared by Tom Nance, which is inaccurate and unreliable due to the inclusion of invalid data. 3 Trans. 445:24¬448:11.

FOF 158: False, inaccurate, and misleading. The exhibits that LSG cites are decades old and do not rebut Dr. Thomas's testimony:

- **Exhibit I-13 is a 1983 study by John F. Mink prepared for Petitioner.**
- **Exhibit I-14 is Mr. Hardy's 1995 numerical model, which includes an entire section on "Model Limitations" and a "Summary of Assumptions and Uncertainties." *Id.,* at pp. 120-23.**
- **Exhibit I-2 is a 1989 study prepared for Petitioner.**
- **Exhibit I-3 is a 1988 study by John F. Mink regarding sustainable yield.**

None of these exhibits rebut Dr. Thomas's recent research and opinions.

LSG misstates Dr. Thomas's testimony and explanation of the null hypothesis. Dr. Thomas accurately acknowledged the possibility of leakage, but testified that he has found no evidence that leakage is occurring.

LSG misstates Dr. Thomas's testimony regarding chlorides. Dr. Thomas's precise testimony is as follows: "[W]e see basically a trend towards a salt content of 300 parts per million here that has held quite steady. And that salinity is substantially higher than water from the high-level fresh aquifers." *Tr., 11/10/2016, at 279:6-9.*

LSG misstates Mr. Nance's testimony regarding the chloride level data. Mr. Nance testified that for a period between 2005 and 2006, the chloride levels were recorded at an incorrectly lower rate because of differences in testing methods. Mr. Nance testified that if the chloride levels had been tested correctly during that period, the levels would actually be higher. Nevertheless, Mr. Nance plotted the levels at the lower incorrect rate. *Tr., 11/15/2016, at 480:18 – 481:1.* Thus, a person reviewing the data would see lowered chloride levels (which, according to LSG, would tend to show freshening). The inaccuracies in the data would tend to support LSG's theory. However, the fact that Dr. Thomas reviewed this data and still found no evidence of leakage is significant.

159. Dr. Thomas' testimony that "chlorides is, to me, not the important constituent" to consider in determining potability, 2 Trans. 291:12-19, and that "the chloride issue is not tremendously relevant," 2 Trans. 292:10-11, conflicts with and undermines the Resort's position that chloride levels alone render Wells 1 and 9 not potable.

FOF 159: Misleading. Takes Dr. Thomas's testimony out of context. Dr. Thomas testified about his concern about the presence of other constituents in the water making the water non-potable:

> **[By Petitioner]**
>
> **Q: So there is a probability that the brackish water wells in the Palawai Basin, as distinguished from the higher -- relatively higher level potable wells, because of the geothermal influence**

of the Palawai Basin wells, would have chemicals or minerals associated with it that potable water would not contain?

A. Absolutely, yes.

Q. Given the chemistry of the brackish water wells, would you consider that water to be potable?

A. No, I would not.

Q. Why wouldn't you consider it to be potable?

A. In a sense, you have a higher – significantly higher total dissolved solids. But in looking at the compositions specifically, chloride is, to me, not the important constituent. . . .

I have listened to the discussion of mixing of water and using high saline water. And at least in my mind, though, the chloride issue is not tremendously relevant. What is relevant is essentially potential health effects of the other ions in that water, whether it be in, say, the pure content of the well or in the mixed content. And if -- you may reduce -- I guess maybe another way of stating that is you certainly can reduce the chloride concentration to what would otherwise be considered an acceptable level. But the other ions could potentially pose a health threat to vulnerable members of the community. And sodium is one of the ions of concern. The other ion of concern to me is the magnesium. Magnesium has potentially deleterious effects on someone with a compromised health system.

Tr., 11/10/2016, at 291:5 – 293:22.

160. Dr. Thomas' testimony that the water in the Palawai Basin wells are not potable, 2 Trans. 291:12-14, is not credible given his admission that he did not test the wells for potability. 2 Trans 307:7-12.

FOF 160: Vague. Unclear what "test for potability" this FOF refers to. Assuming this FOF refers to testing for primary contaminants listed under federal/state primary drinking water regulations, Condition No. 10 is not defined by said regulations, therefore this FOF is irrelevant.

161. Dr. Thomas' testimony that the salinity in the Palawai Basin wells render the wells not safe to drink is not credible as it conflicts with his testimony that the sodium levels in Wells 1 and 9 are relatively low in relation to the chloride levels in the wells as compared to water from other sources. 2 Trans. 291:19-292-13.

FOF 161: Inaccurate and misleading. Dr. Thomas's research compared the ratio of sodium ions to chlorides. Petitioner's Exhibit 49A. Water with low chlorides could have correspondingly low levels of sodium. Water with high chlorides but depleted sodium ions (like the brackish wells) could have a low ratio of sodium to chlorides, but still have an unhealthily higher level of sodium.

162. Dr. Thomas' testimony that sodium and magnesium levels may present health effects is not credible as such testimony is outside of his area of training, education, professional experience, and expertise, *see* 2 Trans. 293:25-294:5, and given that Ex . 49D, relied upon by Dr. Thomas in reaching his conclusion, admits that the EPA's recommendation on sodium levels "is not federally enforceable," that "[d]rinking water does not play a significant role in sodium exposure," and that the World Health Organization established a drinking water guideline of 200 mg/sodium/L." Ex. 49D.

FOF 162: Irrelevant. LSG did not object to Dr. Thomas's qualification as an expert witness in the fields of chemistry and geochemistry. ***Tr., 11/10/2016, at 260: 16-24.*** **Dr. Thomas explained, "[A]s a chemist, I have to always be cognizant of toxicity. I work with all kinds of toxic stuff. And so that is sort of a survival mechanism for a chemist, is to understand toxicity of the stuff that you're working with."** ***Id., at 291:22 – 292:1.***

163. Dr. Thomas' testimony that sodium levels may present health effects is not credible given his admission that he is not aware of any health-based regulations regarding sodium by the DOH. 2 Trans. 308:18-20.

FOF 163: Misleading. Dr. Thomas is undisputedly qualified to testify about health effects within his expertise as a chemist, without requiring further expertise in specific health laws or regulations.

164. The testimony of Tom Nance is not credible.

FOF 164: False. The challenges to Mr. Nance's credibility stated in the FOFs below have no merit.

165. Mr. Nance's testimony is not credible or reliable given his submission of graphs of historic chloride levels in Wells 1 and 9 submitted in Ex. 42B-C which contain data that Mr. Nance previously testified to as being inaccurate. 3 Trans. 445:24-448:11; 3 Trans. 451:9-452:5.

FOF 165: Misleading. See exceptions to LSG's FOF 158.

166. Mr. Nance admitted that his graphs of historic chloride levels in Wells 1 and 9 submitted in Ex. 42B and 42C contain inaccurate data which alters the chloride level trend line for Wells 1 and 9. 3 Trans. 445:24-448:11; 3 Trans. 451:9-452:5.

FOF 166: Misleading. See exceptions to LSG's FOF 158.

167. Mr. Nance's testimony is not credible given that he misrepresented his prior testimony on the geothermal contribution of chlorides in Wells 1 and 9. 3 Trans. 456:11-460:3.

FOF 167: Misstates Mr. Nance's testimony. Mr. Nance testified as follows:

> **[By LSG]**
>
> **Q. Now, you have previously wrote and testified in this matter that the chloride levels in Well 1 and 9 were due to -- were the product of geothermal activity, right?**

A. I'm not sure that that's the case. I mean, there is geothermal activity in the basin, but that their responsible for chlorides, I can't recall saying that that's the reason. . . .

Q. For the record, I'm referring to Exhibit I-6. And Exhibit I-6 is a letter from you to Mr. Tom Leppert of Castle & Cooke. And it says, quote, "The water in Wells 1 and 9 is brackish. Elevated temperature, high silica, and the other indicators suggest that the salt content is most likely the product of geothermal activity." Was that your opinion at the time?

A. Okay. But what I referred to there is the -- I didn't mention chlorides. High silica and those kind of things are very likely the result of the geothermal activity.

Q. And salt? You mentioned salt?

A. Yeah. Well, calcium, magnesium, all dissolved solids.

Q. Okay. And salt is generally sodium and chloride together, right?

A. No. The salt ... There are hundreds of different constituents.

Tr., 11/15/2016, at 456:11 – 457:17 (emphases added).

168. Mr. Nance's testimony regarding the availability of water resources on Lanai is not credible given his admission that he has never been involved in the calculation of a sustainable yield, and he has never conducted or commissioned any recharge studies for the Palawai Basin. 3 Trans. 441:18-24.

FOF 168: Irrelevant. An expert witness is permitted to rely on other studies and research.

169. Mr. Nance's testimony regarding the water quality in Wells 1 and 9 is not credible given his admission that he did not test the wells for potability. 3 Trans. 442:10-443:4.

FOF 169: Irrelevant. Again, it is unclear what test FOF 169 refers to, but assuming this FOF refers to testing for primary contaminants listed under federal/state primary

drinking water regulations, Condition No. 10 is not defined by said regulations, therefore this FOF is irrelevant.

170. Mr. Nance's admission that chlorides are not regulated by the DOH, and that chlorides and hardness are secondary contaminants, undermines the Resort's position that the chlorides in wells 1 and 9 render the wells not potable. 3 Trans 443:5-19.

FOF 170: Irrelevant. Condition No. 10 is not defined by national/state primary drinking regulations, therefore FOF 170 is irrelevant.

171. Mr. Nance's testimony that pumpage of one aquifer compartment does not affect other compartments based on short term pumping tests, 3 Trans. 403:14-404:5, is not credible given his prior admissions that, given the permeability of the dikes, it could take years to observe the effects of pumping, R. V. XX, no. 582 at 139, and that the pumping tests do not rule out hydraulic interconnections between the dike compartments in the high level aquifer. Ex. 1-4 at 7.

FOF 171: False, inaccurate, and misleading. The short term pumping tests were part of the evidence that Mr. Nance considered in forming his opinion. Mr. Nance cited the decades of pumping data that showed no evidence of connection between the wells, stating,

> **[F]rom everything we've done, let's say everything that I could examine before I became involved on Lana'i, which is primarily the record compiled by Keith Anderson and in the – up through 1984 and the periodic reports up through 1992, when I got involved, I can't find in that record any place where the pumpage of one of the wells in one compartment created an effect in another compartment. The compartments themselves are extremely tight.**

Tr., 11/15/2016, at 397:20 – 398:3. **The short term pumping tests corroborated the decades of records.**

172. Mr. Nance's testimony that Wells 1 and 9 would not be accepted by a county water supply for potable use, 3 Trans. 412:24-413:2, is not credible given his admission that he never consulted Maui Water Supply regarding Wells 1 and 9. 3 Trans. 444:2-7.

FOF 172: Misleading. As an expert, Mr. Nance is allowed to form an opinion based on his overall professional experience working in well development with the various county water departments. Further, his testimony is corroborated by the State Water Resource Protection Plan, which states, "The county water departments generally limit chloride levels of water within their municipal system to less than 160 ppm." Petitioner's Exhibit 14 at p. 3-11.

173. The testimony of Allan Schildknecht, of Irrigation Design Consultants, is not credible.

FOF 173: False. The challenges to Mr. Schildknecht's credibility stated in the FOFs below have no merit.

174. Mr. Schildknecht admitted that he is unaware if the golf courses he studied in forming his opinions are restricted from using potable water from a high level aquifer in the same manner as is in Condition 10. 3 Trans. 518:19-519:1; Exs. 45C and 45D.

FOF 174: Misleading. The purpose of Mr. Schildknecht's testimony was to establish irrigation practices in the golf course industry and the common understanding of the terms "potable," "non-potable," "alternative sources," and "brackish."

175. Mr. Schildknecht's testimony that high-level brackish water and reclaimed sewage effluent are the only water sources on Lana`i that could be used for golf course irrigation is not credible given his admission that he is not a water quality expert, 3 Trans. 500:19-501:2; 3 Trans.

516:20-21, and that a golf course can use water from a desalination plant for irrigation. 3 Trans. 516:7-9.

FOF 175: Misleading. LSG did not object to Mr. Schildknecht's qualification as an expert in the field of landscape and golf course irrigation. Therefore, he is qualified to opine about the appropriateness and availability of water sources for golf course irrigation. A hypothetical desalination plant is not at issue and is outside the scope of these proceedings.

176. The testimony of Dr. Bruce Plasch, principal of Plasch Econ Pacific, LLC, is not credible. 3 Trans. 583:11-584:7.

FOF 176: False. The challenges to Dr. Plasch's credibility stated in the FOFs below have no merit.

177. Dr. Plasch's testimony regarding his findings on economic impacts of the closure of the golf course is not credible given his admission that his findings are based on full development and operation of the resort, and not the current level of operations. 3 Trans. 563:23-24.

FOF 177: Misleading. LSG did not object to or cross-examine Dr. Plasch on his analysis of full development as being flawed or inaccurate, thereby waiving the objection. ***See Tr., 11/15/2016, at 581:13 – 583:1.*** **Moreover, at full development, the project would have more revenues and would be in a better position to absorb the loss of the Manele Golf Course than the current level of operations.**

178. Dr. Plasch's testimony as to the economic benefits provided by full capacity resort residential development is not credible given his admission that he does not know the projected per-unit consumption of water for those units and he "assumed that there'd be sufficient water to

supply the residents" and he "didn't get into the source of the water." 3 Trans. 566:10 — 567:22; and 582:18-20.

FOF 178: Irrelevant and misleading. The purpose of Dr. Plasch's testimony was to analyze the economic benefits and impacts of the Manele Golf Course, not to analyze the effects on water resources. Other witnesses and exhibits addressed the effects on water resources (e.g., LWUDP, Mr. Hardy, Mr. Nance, Mr. Stubbart).

179. Dr. Plasch's testimony is not credible given his admission that he did not do an economic assessment of the golf course using water from a desalination plant. 3 Trans. 582:21-583:1.

FOF 179: Misleading. A desalination plant's economics is not relevant to the issues presented in this case.

180. Mr. Matsumoto's testimony regarding whether Condition 10 is being violated is not credible as Mr. Matsumoto admitted that he is not a hydrologist. 4 Trans. 656:21-24.

FOF 180: Irrelevant and misleading. According to LSG's FOF 180, one must be a hydrologist to credibly evaluate whether Condition No. 10 is being violated. Following that logic, neither the Hearings Officer in this case nor the Commission can then credibly evaluate whether Condition No. 10 is being violated.

181. Mr. Matsumoto's personal opinion that the use of brackish groundwater to irrigate the Mänele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not aware that golf course irrigation is not a protected public trust resource and that there are no vested rights in water for commercial use. 4 Trans. 622:19-623:3 ("the use of brackish groundwater to irrigate the golf course is a reasonable and beneficial use of the resource"); 643:5-12 ("Wells -- brackish wells 1 and 9 are also contributing as a reasonable

and beneficial use of water for the residents of the island."); 643:19-25 ("I believe that it is a reasonable and beneficial use meant for the residents of the island."); 644:1-6 ("It is a reasonable and beneficial use."); and 657:2-8.

FOF 181: Misleading and argumentative. "In this jurisdiction, the water resources trust also encompasses a duty to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state." *In re Water Use Permit Applications*, 94 Hawai`i 97, 139, 9 P.3d 409, 451 (2000) (emphasis added). As with the public witness testimony, Mr. Matsumoto's testimony can be weighed and credited when evaluating Wells 1 and 9's use to "maximize their social and economic benefits."

182. Mr. Matsumoto's testimony as to the doomsday scenario of the golf course closure is not credible given his admission that the loss of the golf course is not at issue at this hearing. 4 Trans. 623:17-625:3 and 651:20-24.

FOF 182: False and misleading. The Manele Golf Course's role in Lāna'i's economy is relevant to whether the use of water is a "reasonable and beneficial use" under the public trust doctrine.

LSG misstates Mr. Matsumoto's testimony. Mr. Matsumoto testified, "[T]his isn't meant to be a dooms-day scenario. I mean, it's just kind of a reality that we have to face. We have just that one economic engine . . . And it is fragile, and it needs help, it needs support, it needs cooperation, collaboration . . . we're not looking for that dooms-day scenario. We're looking for the success scenario. We're looking for sustainability. We're looking for a way to maintain the lifestyle on that island." *Tr., 11/16/2016, at 624:19 – 625:3; 667:1-4.*

County of Maui's Case

183. Director of the Department of Water Supply for Maui County Dave Taylor's testimony that water which is not disinfected is not potable under Maui County code § 14.01.040, 4 Trans. 673:14-674:7, is not credible given his admission that section 14.01.040 only applies to the County of Maui's distribution system. 4 Trans. 674:8-12.

FOF 183: Misleading. Mr. Taylor's testimony is credible evidence of how the water utility industry interprets and applies the term "potable."

184. Planning Director of the County of Maui William Spence's testimony that the use of Wells 1 and 9 for golf course irrigation is consistent with the Water Use and Development Plan, does not inform whether the Resort utilizing potable water from the high level aquifer to irrigate the Manele golf course in violation of Condition 10. 4 Trans. 693:13-19.

FOF 184: Irrelevant and misleading. Mr. Spence testified that the use of Wells 1 and 9 is consistent not only with the LWUDP but also the Lāna'i Community Plan and all County land use plans and laws . *Tr., 11/16/2016, at 693:16-22; 697:1-18.* His testimony is relevant to whether the use of Wells 1 and 9 to irrigate the Manele Golf Course is a "reasonable and beneficial use" as defined under Chapter 174C, HRS.

Office of Planning's Case

185. The DOH, State of Hawai`i, takes no position on the questions raised in Condition 10. 1 Trans. 134:6-8; Ex. OP-4.

186. DOH, Safe Drinking Water Branch Manager Joanna Seto's testimony that Safe Drinking Water Branch, through its drinking water regulations at HAR 11-20, does not determine whether water "is or is not suitable for drinking" is not credible given her admission that "if water meets the standards in Chapter 11-20, it can be used in drinking water systems" and

it can be "distributed for domestic use, like washing dishes . . . . and drinking[.]" 1 Trans. 137:5-22.

FOF 186: False and misleading. Ms. Seto's testimony is credible and consistent. Her full testimony is that DOH "analyzes whether a particular water supply meets State Primary Drinking Water Standards, not whether it is or is not suitable for drinking." ***Exhibit OP No. 4.*** **Because people have widely varying sensitivities and health histories, and because "suitable for drinking" is open to varying definitions, it is reasonable for DOH to limit its role to implementing certain regulations as required by law.**

187. The testimony of Leo Asuncion, Director of the State of Hawai`i Office of Planning, is not credible for the purpose of this hearing.

FOF 187: False. The challenges to Mr. Asuncion's credibility stated in the FOFs below have no merit.

188. Mr. Asuncion's testimony that brackish water and potable water are mutually exclusive, OP-2 at 8, is not credible given his admission that it is "correct" that "brackish water does not violate any Safe Drinking Water standards, and can be used for drinking water." *Id.*

FOF 188: Irrelevant and misleading. Condition No. 10 is not defined by the SDWA and national/state primary drinking water regulations, therefore FOF 188 is irrelevant.

189. Mr. Asuncion's testimony that the use of brackish groundwater to irrigate the Manele golf course is a reasonable and beneficial use of that resource is not credible given his admission that he is not familiar with public trust law. 1 Trans 149:2-150:2.

FOF 189: Misleading. All state agencies are obligated to apply the public trust doctrine. During cross-examination, LSG's counsel asked whether Mr. Asuncion was familiar with public trust case law, and Mr. Asuncion responded, "I have heard about it. . .

I'm aware." *Id. at 149:17 – 150:1.* Mr. Asuncion's written and hearing testimony explained why he believed Petitioner's use complies with the public trust doctrine and is a reasonable and beneficial use. *Tr., 11/9/2016, at 149:1-16; 151:10 – 152:10; Exhibit OP No. 2.* Therefore, his opinion is entitled to weight.

190. Mr. Hardy's testimony that Wells 1, 9, and 14 are "probably not drinkable" is not credible given his admission that such determination should be made by the DOH, and his admission that the CWRM has not tested Wells 1 and 9 for potability. 2 Trans. 218:3-6; 2 Trans. 240:19-25.

FOF 190: Irrelevant and misleading. Condition No. 10 is not defined by the SDWA and national/state primary drinking water regulations, and therefore FOF 190 is irrelevant.

LSG's Case

191. Sally Kaye's testimony that Cliff Jamile, former Director of Utilities of Lana`i Water Company, testified before the Läna`i Planning Commission that Wells 1, 9, and 14 were tested for potability, and that the wells were contaminant free is credible given that she was present at the meeting as a commissioner and that she has first-hand knowledge that the draft "minutes" of the October 18, 2006 meeting which contains Mr. Jamile's testimony are accurate and were prepared according to the Lanai Planning Commission's regular practice of transcribing verbatim planning commission meetings. 2 Trans. 324:11-25.

FOF 191: Irrelevant. Mr. Jamile's comments are irrelevant and unverifiable for the reasons stated above. Mrs. Kaye's testimony is also irrelevant and misleading because its sole purpose was to pass on Mr. Jamile's comments. Mrs Kaye has no first-hand knowledge of any of the matters that Mr. Jamile discussed, therefore her testimony is hearsay.

192. President and Secretary of LSG Reynold "Butch" Gima's testimony that Wells 1, 9, 14, or 15 were not tested for potability as part of the creation of the LWUDP was credible given that he is a member of the Lanai Water Advisory Committee ("LWAC") which and given that his testimony was not rebutted. 4 Trans. 717:17-24.

FOF 192: Misleading and irrelevant. As discussed above, LSG admits there is no evidence that LSG ever discussed testing with Petitioner, even though Petitioner's representatives were mandatory members of LWAC, and even though Mr. Gima and LWAC worked on the LWUDP for over 14 years.

LSG also omits other critical portions of Mr. Gima's testimony, as detailed above in Petitioner's Exceptions. The omissions include Mr. Gima's admission that Petitioner's usage is not threatening the water resource; that LSG has no position on whether Wells 1 or 9 are potable or non-potable; and the inconsistencies of LSG's positions regarding desalination.

II. CONCLUSIONS OF LAW

Public Trust

1. "All public natural resources are held in trust by the State for the benefit of the people." Hawai'i State Constitution Art. XI, § 1.

COL 1: Irrelevant, argumentative. COLs 1-11 are irrelevant because LSG admits the Commission has carried out its public trust duties via the 1991 Order and Condition No. 10 (*cf.* LSG's COL 12-14). Therefore, a reiteration of the Commission's public trust duties is unnecessary and argumentative.

2. "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." Hawai'i State Constitution Art. XI, § 1.

COL 2: Irrelevant, argumentative. See exception to LSG's COL 1.

3. These sections "incorporate the notion of the public trust into our constitution." *In re Water Use Permit Applications*, 94 Haw. 97, 131 (2000) (*Waiahole I*).

COL 3: Irrelevant, argumentative. See exception to LSG's COL 1.

4. "Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state." *Waiahole I*, 94 Haw. at 141.

COL 4: Irrelevant, argumentative, and misleading. The public trust doctrine "embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." *Kauai Springs*, 133 Hawai`i at 171-72 (emphasis added).

5. As the Hawai`i Supreme Court has ruled:

> In Hawaii, this court has recognized . . . a distinct public trust encompassing all the water resources of the State. The public trust doctrine applies to all water resources without exception or distinction. The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use. The public trust is, therefore, the duty and authority to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.

Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 133 Hawai`i 141, 171-72 (2014) (internal citations and quotations omitted).

COL 5: Irrelevant, argumentative. See exception to LSG's COL 1.

6. "Based on the plain language of our constitution and a reasoned modern view of the sovereign reservation, we confirm that the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction." *Waiahole I*, 94 Hawai'i at 135.

COL 6: Irrelevant, argumentative. See exception to LSG's COL 1.

7. "[S]tates have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources." *Waiahole I*, 94 Haw. at 137; *Kaua'i Springs*, 133 Haw. at 172 ("[T]he public trust protects domestic water use, in particular, protecting an adequate supply of drinking water.").

COL 7: Irrelevant, argumentative. See exception to LSG's COL 1.

8. "[N]o person or entity has automatic vested rights to water." *Kauai Springs*, 133 Hawai`i at 172.

COL 8: Irrelevant, argumentative, and misleading. The common law applies to water use in areas not designated as a water management area under Chapter 174C, HRS. *In re Waiola O Molokai, Inc.*, 103 Hawai`i 401, 433, 83 P.3d 664, 696 (2004). COL 8 ignores the correlative rights rule, which is a common law rule that states that individuals who own land overlying a ground water source or aquifer has correlative rights to the waters and is entitled to a reasonable use of the waters, with due regard to the rights of co-owners in the same waters. *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929). Correlative rights are recognized and protected under the Hawaii Constitution, case law, and the State Water Code. *Waiahole I*, 94 Hawai`i at 17-78, 9 P.3d at 489-90 (citing Haw. Const. art. XI, § 7 (referring to "correlative uses"); HRS § 174C-27(a).

9. "[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain." *Waiahole I*, 94 Hawai'i at 138. Therefore, a higher level of scrutiny is employed when considering or private commercial use. *Kauai Springs*, 133 Hawai`i at 172 (citing *Waiahole I* at 142).

COL 9: Irrelevant, argumentative. As LSG admits, the Commission has already scrutinized Petitioner's private commercial use via the 1991 Order and Condition No. 10, and Petitioner introduced uncontroverted evidence of the lack of competing uses.

10. Golf course irrigation as a use of public trust water carries a heavy burden to prove entitlement thereto. *Waiahole I*, 94 Haw. at 138.

COL 10: Irrelevant, argumentative. See exception to LSG's COL 1.

11. Where uncertainty exists, a trustee's duty to protect a public trust resource mitigates in favor of choosing presumptions that also protect the resource. *Waiahole I*, 94 Haw. at 154.

COL 11: Irrelevant, argumentative. As LSG admits, the Commission has already applied presumptions that protect the resource (by prohibiting the use of potable water from the high level aquifer for golf course irrigation (see LSG's COL 13)).

12. Condition 10 of the 1991 Order is the Commission's attempt to discharge its public trust duty to protect the domestic use of water and ensure an adequate supply of drinking water by restricting high level potable water from use for golf course irrigation. Ex. 28.

COL 12: Mischaracterization. Rather than characterizing the 1991 Order as the "Commission's attempt to discharge its public trust duty," the 1991 Order should be characterized as the Commission's fulfillment of its public trust duty.

13. Condition 10 of the 1991 Order already determined the reasonable and beneficial use of Lana`i's potable high-level water in the context of the Manele project district by prohibiting the use of potable high-level water from golf course irrigation. Ex. 28.

14. The terms of the 1991 Order, and specifically Condition 10, are not open to relitigation to now determine whether the use of brackish water, regardless of potability, to

irrigate the golf course complies with the public trust doctrine. *See Lanai Co.*, 105 Hawai`i at 317 ("Accordingly, we remand the issue of whether [the Resort] has violated Condition 10 by utilizing potable water from the high level aquifer[.]"); Minute Order No. 6; *Tabieros v. Clark Equip. Co.*, 85 Hawai`i 336, 352 n.8 (1997) (Describing the "law of the case doctrine" as mandating that a determination made in the course of an action "becomes the law of the case and may not be disputed by a reopening of the question at a later stage of the litigation.").

COL 14: Misleading, argumentative. Relies on LSG's incorrect premise that brackish water can be potable because potability is defined by the national/state primary drinking water regulations.

Petitioner's Burden

15. At issue in this hearing is whether the Resort's use of water from Wells 1 and 9 violate Condition 10. Minute Order No. 6; *Lanai Co.*, 105 Hawai`i at 317.

16. The 1993 Show Cause Order directs the Resort to show cause why it is not violating Condition 10. Ex. 9; *see also* HAR 15-15-59(a).

17. The Resort bears the burden to demonstrate that their past and present use of high level aquifer water to irrigate its golf course does not violate Condition 10. *Waiahole I*, 94 Haw. at 142-143 ("[T]he burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust).

COL 17: Misleading. *Waiahole I* assigned the burden of proof to applicants seeking to "justify[] their proposed uses in light of protected public rights in the resource." *Waiahole I*, 94 Hawai`i at 160 (emphasis added). As LSG admits, Petitioner met its burden of justifying its proposed golf course use during the 1991 Order proceedings.

18. Allocating the burden of proof to the petitioner, while a departure from the common law rule, is necessary where the protection of public trust resources is implicated:

> The rational for this allocation [of the burden of proof] represents a departure from the common law rule that the burden of proving harm rests upon one who objects to the utilization of resources, but in the days of the formulation of this common law rule there was neither the scarcity of resources nor the sharply competitive demands placed upon them that exists today. Allocation of the burden of proof often serves as an effective tool for shaping social policies, **and since it is imperative that the need for environmental protection and conservation be adequately reflected in the law, the consumer of natural resources should bear the responsibility for justifying his actions.**

CEEED v. Cal. Coastal Zone Conservation Com., 43 Cal. App. 3d 306, 330 (1974) (emphasis added).

COL 18: Argumentative. LSG cites no Hawaii law to support this proposition, and no reason why the Commission should adopt non-Hawaii law.

19. The Resort therefore bears the burden to demonstrate that it has not utilized potable water from the high-level groundwater aquifer to irrigate the golf course. See Minute Order No. 6; *Waiahole I*, 94 Haw. at 142-143.

COL 19: Argumentative. Petitioner can satisfy its burden of showing its compliance with Condition No. 10/lack of violation of Condition No. 10 by demonstrating that it has utilized only non-potable water.

Definition of Potable Water

20. The general principles of construction which apply to statutes also apply to administrative agencies. *International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone Company*, 68 Haw 316, 323 (1986).

COL 20: Misleading. Rules and principles of statutory construction are not used when the language is plain and unambiguous. An agency is "not at liberty to look beyond that language for a different meaning." *Bhakta v. County of Maui*, 109 Hawai`i 198, 208, 124 P.3d 943, 953 (2005).

21. Where a term is plain and unambiguous, it must be interpreted by its "plain and obvious meaning." *Chang v. Buffington*, 125 Hawai`i 186, 193, 256 P.3d 694, 701 (2011); *see Lanai Co.*, 105 Hawai`i at 308 (relying on the "plain language of Condition 10").

22. This Commission may "resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." *Davis v. Four Seasons Hotel Ltd.*, 122 Hawai`i 423, 448 (2010).

23. The Commission cannot "depart[] from the plain and unambiguous language" unless there is an "indication in the regulation that the term . . . be given a special interpretation other than its common and general meaning." *Singleton v. Liquor Comm'n*, 111 Hawai`i 234, 244 (2006).

24. The term "potable" as used in Condition 10 is plain and unambiguous as it is not used in a way that indicates it be given a special interpretation other than its common and general meaning. *Singleton*, 111 Hawai`i at 244.

25. The plain and obvious meaning of "potable" as used in Condition 10 is water that is safe and suitable for drinking. *Lanai Co.*, 105 Hawai`i at 299 n. 8. (citing Webster's Dictionary).

COL 25: Argumentative, misleading. In *Lanai Co.*, 105 Hawai`i at 299 n. 8, the Hawaii Supreme Court cited Webster's Dictionary as one definition of the term "potable," and noted that the parties disagreed about the definition and that the Commission did not

define the term. The Hawaii Supreme Court did not hold that the dictionary definition is the only correct definition or that the Commission should use that dictionary definition.

26. The term "potable" as used in Condition 10 means water that is safe and suitable for drinking.

COL 26: Argumentative, misleading. See exception to COL 25.

27. To determine what makes water safe or suitable for drinking, the Commission looks to other statutes and rules on the same subject matter. HRS § 1-16 ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other."); *Richardson v. City & Cty. of Honolulu*, 76 Haw. 46, 868 P.2d 1193 (1994) (holding that what is clear in one statute or rule may be "called in aid to explain what is doubtful in another.")

COL 27: Argumentative, misleading. Rules of statutory construction apply only when a statute is ambiguous. LSG admits Condition No. 10 is unambiguous, therefore there is no need to look beyond its plain meaning. Further, LSG cites no authority for its premise that a Land Use Commission decision and water quality regulations promulgated by the Department of Health are laws "upon the same subject matter."

28. In Hawaii, the DOH determines and administers regulations regarding safe drinking water. HRS § 174C-66 ("The department of health shall exercise the powers and duties vested in it for the administration of the State's water quality control program as provided by law."); HRS § 340E-2.

COL 28: Irrelevant, misleading. The Commission cannot look beyond the plain language of Condition No. 10.

29. HRS Chapter 340E places upon the DOH the duty to create and enforce State Primary Drinking Water Regulations, which mirror the National Primary Drinking Water

Regulations established by the United States Environmental Protection Agency, to protect the health of Hawai`i's citizens to the extent feasible. HRS § 340E-2.

COL 29: Irrelevant, misleading. Condition No. 10 is not defined by national/state primary drinking water regulations, therefore COL 29 is irrelevant.

30. The State Primary Drinking Water Regulations at HAR Chapter 11-20, as well as the National Primary Drinking Water Regulations at 40 CFR § 141, establish criteria to determine whether water is safe to drink based on maximum contaminant levels "set at a level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." HRS § 340E-2; 40 CFR§ 141.2 (defining "maximum contaminant level").

COL 30: Irrelevant, misleading. Condition No. 10 is not defined by the SDWA or the national/state federal drinking water regulations, therefore COL 30 is irrelevant.

31. Using HAR Chapter 11-20 and 40 CFR § 141 to inform whether water is potable is consistent with the County of Maui's definition of "potable water" in the context of golf course irrigation to mean "water that meets the standards established by the department of health as suitable for cooking or drinking purposes." MCC § 14.08.20.

COL 31: Irrelevant, misleading, misstates the evidence. Dave Taylor testified that MCC § 14.08.20 does not apply to the Manele Golf Course. Mr. Taylor also testified that the County of Maui defines potable water as water that has been disinfected, and water that is not disinfected is not potable or suitable for drinking. ***Tr., 11/16/2016, at 673:16 – 674:7.***

32. Using HAR Chapter 11-20 and 40 CFR § 141 to inform whether water is potable is consistent with the DOH rules defining the term "potable water" to mean "water free from

impurities in amounts sufficient to cause disease or harmful physiological effects" in its administrative rules concerning the protection of public water systems from contaminants and pollutants. HAR § 11-21-2.

COL 32: Irrelevant, misleading, incorrect application of rule of statutory construction.

33. Given that HAR Chapter 11-20 and 40 CFR § 141 set forth regulations that determine whether water is safe and suitable for serving in a system which provides water for human consumption, HAR § 11-20-2 and 40 CFR § 141.2 inform whether water is potable.

COL 33: Irrelevant, misleading, incorrect application of rule of statutory construction.

34. Accordingly, the term "potable" as used in Condition 10 means water that is safe to drink.

COL 34: Irrelevant, misleading. Condition No. 10 is not defined by the SDWA or the national/state federal drinking water regulations, therefore COL 34 is irrelevant.

35. Testing for potability by way of DOH and EPA primary drinking water regulations informs whether water is safe and suitable for drinking.

COL 35: Irrelevant, misleading. Condition No. 10 is not defined by national/state primary drinking water regulations, therefore COL 35 is irrelevant.

36. Condition 10's prohibition on the use of potable water, and its mandate of the use of non-potable alternate sources, must be treated as two separate, equally enforceable clauses. *In re Ainoa*, 60 Haw. 487, 490 (1979) (noting the cardinal rule of statutory construction which requires tribunals "to give effect to all parts of a statute, and no sentence, clause or word shall be

construed as surplusage if a construction can be legitimately found which will give force to and preserve all the words of the statute.").

COL 36: Misleading. If Petitioner is using only non-potable water for golf course irrigation, then logically it is not using potable water, and it is not violating any clause of Condition No. 10.

37. Therefore, the Commission cannot ignore Condition 10's prohibition on the use of potable water to instead focus only on whether brackish water is being utilized. *Id.; see Lanai Co.*, 105 Hawai`i at 317 ("Accordingly, we remand the issue of whether [the Resort] has violated Condition 10 by utilizing potable water from the high level aquifer[.]").

COL 37: Misleading. See exception to COL 36.

38. The terms "brackish" and potable are not mutually exclusive as used in Condition 10. *Lanai Co.*, 105 Hawaii 296, 312-316 (2004) (Court noted that even though the LUC considered Wells 1 and 9 "brackish" in 1991, the Court nonetheless considered that the fact that the Resort has never performed a comprehensive test to determine the potability of Wells No. 1 and 9 "imply that [the Resort] was using potable water[.]").

COL 38: Misleading. The 1991 Order does use the terms "brackish" and "potable" in a mutually exclusive manner. *See, e.g.*, 1991 Order FOFs 46, 48.[3] The Hawaii Supreme

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[3] The 1991 Order states,

> 46. The proposed golf course at Manele of which the Property is to be a part, will be irrigated with nonpotable water from sources other than potable water from the high level aquifer.
>
> 48. Petitioner proposes to provide alternate sources of water for golf course irrigation by developing the brackish water supply. According to Petitioner, Well Nos. 9 and 12 . . . have been tested but are not operational. Currently available also is brackish water from Well No. 1 which is operation and which has a capacity of about 600,000 gpd.

Court did not hold or find that a comprehensive test was necessary. It merely noted that in the 1996 OSC Order, the Commission included a finding about the lack of a comprehensive test, but it did not explain why a comprehensive test was relevant or necessary. Thus, the Hawaii Supreme Court found that the Commission "failed to make its findings reasonably clear[.]" *Lanai Co.*, 105 Hawai`i at 316, 97 P.3d at 392.

39. If brackish water was *per se* not potable, the Supreme Court in *Lana 'i Company* could not have remanded this hearing for further proceedings given the Commission's previous findings. *Lanai Co.*, 105 Hawai`i at 312-316.

COL 39: Misleading. The Hawaii Supreme Court remanded because the Commission's findings were not reasonably clear. For example, the 1996 Order "states that irrigation is 'primarily' being supplied from brackish wells, [which] would not preclude the possibility that some potable water is also being used." *Lanai Co.*, 105 Hawai`i at 316, 97 P.3d at 392 (emphasis added). In this hearing, Petitioner has presented unrebutted evidence that irrigation water is only being supplied from brackish wells and reclaimed sewage effluent.

40. Based on the record, brackish water and potable water as used in Condition 10 is not mutually exclusive.

COL 40: Misleading, inconsistent with the rest of the 1991 Order's language which defines brackish water as an alternative non-potable source of water that can be used for golf course irrigation. *See* 1991 Order FOFs 46, 48.

41. Further, Condition 10's use of "e.g., brackish" in hypothetically positing that brackish water can be considered to be non-potable, does not create a per se exception for all

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(Emphases added.).

brackish water use regardless of potability; if that was the intent of the Condition, it would have defined potable and non-potable to reflect that intent, or it would have used "i.e." instead. See *People v. Alsup*, 241 Ill. 2d 266, 280 (2011).

COL 41: Misleading, inconsistent with 1991 Order language. See exception to COL 40.

42. Therefore, whether Wells 1 and 9 produce brackish water is irrelevant to whether the Resort has utilized potable water to irrigate the golf course.

COL 42: Incorrect. See exception to COL 40.

43. The record demonstrates, by the preponderance of the evidence, that Wells 1 and 9 are and were at all relevant times potable.

COL 43: Based on an incorrect interpretation of Condition No. 10 and not supported by reliable evidence.

44. Even assuming *arguendo* that the record was not sufficient to affirmatively establish that the water in Wells 1 and 9 are potable, the Resort has failed to meet its burden to demonstrate that the water used to irrigate the golf course is, or ever was, not "potable."

COL 44: Incorrect. Petitioner has provided sufficient credible evidence of its compliance with Condition No. 10. *See* Petitioner's Proposed FOF/COL.

45. The Resort has utilized potable water from the high level aquifer to irrigate the golf course.

COL 45: Incorrect. Petitioner has provided compelling and uncontroverted credible evidence of its compliance with Condition No. 10. LSG's position is based on an incorrect and unsupported interpretation of Condition No. 10.

46. The Resort has violated Condition 10 of the 1991 Order. Ex. 28.

COL 46: Incorrect. See exception to LSG's COL 45.

Pumping Induced Leakage Is Use of Potable Water (Additional or Alternative Basis)

47. In the alternative, this Commission is tasked with clarifying whether pumping induced leakage into the Palawai Basin constitutes the "use of potable water." *Lanai Co.*, 105 Hawai`i at 316.

48. Webster's Dictionary defines "use" as "the act or practice of employing something."

49. Given that pumping of Wells 1 and 9 for golf course irrigation is causing fresh, potable water to flow into those wells, and that the withdrawal of water from Wells 1 and 9 ultimately limits the available potable water for domestic use by the same amount, Ex. 1-4, potable water from the high level aquifer is being utilized to irrigate the golf course. *Lanai Co.*, 105 Hawai`i at 316.

COL 49: Not supported by evidence. (1) There is no evidence that when the Commission adopted the 1991 Order, it contemplated leakage as a violation of Condition No. 10 or as a "use" of potable water. Petitioner and OP filed a joint stipulated draft order that the Commission adopted, with very few changes, as the 1991 Order. Petitioner and OP did not contemplate leakage as a violation of Condition No. 10. LSG cites no evidence from the administrative record of the 1991 Order proceedings that indicates that the Commission contemplated leakage as a violation.

(2) Petitioner provided substantial evidence and witness testimony to show that there is no evidence that leakage is occurring. LSG did not provide any witnesses to rebut this evidence, and no evidence that leakage is occurring. An unsupported theory is not

enough. The written testimony of William Meyer is over ten years old, fails to rebut Petitioner's recent evidence, and leaves no opportunity for questioning by the Hearings Officer or by the parties.

(3) The word "use" or "utilize" connotes an action. Even assuming *arguendo* that some *de minimis*, undetectable amount of leakage is occurring, said leakage is too attenuated to constitute an action or violation by Petitioner. "Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies." *Lanai Co.*, 105 Hawai`i at 314, 97 P.3d at 390. Construing undetectable leakage as a violation of Condition No. 10 is absurd and fails to give Petitioner fair warning.

50. The pumping induced leakage of potable water into the Palawai Basin constitutes the utilization of potable water as prohibited by Condition 10.

COL 50: Incorrect. See exception to LSG's COL 49.

Remedy

51. In show cause proceedings on violations of boundary amendment conditions, the Commission has two choices for enforcement of conditions where substantial commencement of the approved land use activity has already occurred: (1) declare that a violation has occurred, order that the violation of the condition cease and refer to the County of Maui for enforcement of that order, or (2) hold a reversion hearing which follows the procedures set forth in HRS § 205-4. *DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Hawai`i 187 (2014); *Lanai Co.*, 105 Hawai`i at 319.

COL 51: Irrelevant. Petitioner has shown by a preponderance of the evidence that it has not violated Condition No. 10. Therefore, discussion of remedies for a violation are irrelevant.

52. As set forth in this Commission's Minute Order No. 6 , this hearing "is limited to the use of Wells 1 and 9 to irrigate the golf course and whether such use violates condition 10 of the LUC Decision and Order dated April 6, 1991); *Lanai Co.*, 105 Hawai`i at 319.

53. The Resort has substantially commenced use of the property subject of Doc. No. A89-649.

54. Therefore, the only available enforcement action to the Commission in this hearing is to declare that the Resort is violating Condition 10 of the 1991 Order, order the Resort to cease violations of Condition 10, and refer this matter to the County of Maui for enforcement.

COL 54: Irrelevant. See exception to LSG's COL 51.

Scope of Hearing

55. While evidence of the balance of harms to the parties and the public interest as a result of the possible closure of the Manele golf course may be relevant if the County of Maui seeks judicial enforcement against the Resort to cease the use of Wells 1 and 9 for irrigation of the golf course, such evidence is irrelevant to the Commission's sole charge in this hearing to determine whether Condition 10 of the 1991 Order has been violated. *Life of Land v. Ariyoshi*, 59 Haw. 156, 158 (1978) (holding that the three-part test for injunctive relief is "(1) Is the plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction?"); Minute Order No. 6; *Lanai Co.*, 105 Hawai`i at 319.

COL 55: Irrelevant, misleading. Evidence of potential adverse public interest effects is relevant to whether Petitioner's use is a "reasonable and beneficial use" under the public trust doctrine.

56. Testimony as to whether or not there are competing uses for the water in Wells 1 and 9, whether the Resort is following best management practices for golf course irrigation, whether the use of Wells 1 and 9 for golf course irrigation is a reasonable and beneficial use, and other testimony regarding the public trust doctrine is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

COL 56: Misleading. This evidence is relevant to Petitioner's exercise of its correlative rights and whether Petitioner's use is consistent with the public trust doctrine's dual mandate of "protection" and promoting "reasonable and beneficial use."

57. Evidence of potential adverse economic effects resulting from the possible closure of the golf course is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

COL 57: Misleading. See exception to LSG's COL 56.

58. Evidence of the Resort's water conservation efforts, watershed restoration projects, and water system improvement efforts is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

COL 58: Misleading. See exception to LSG's COL 56.

59. Evidence of the Resort's community improvement efforts and projects is irrelevant to whether the Resort is utilizing potable water to whether Condition 10 was violated. Minute Order No. 6.

COL 59: Misleading. See exception to LSG's COL 56.

60. Evidence of existing pumpage rates not being a threat to Lana`i's aquifer is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

COL 60: Misleading. See exception to LSG's COL 56.

61. Evidence of whether or not there are alternative sources of water to Wells 1 and 9 for irrigating the Manele golf course is irrelevant to whether Condition 10 was violated. Minute Order No. 6.

COL 61: Misleading. See exception to LSG's COL 56.

62. Evidence as to the water quality in Wells 1 and 9 as being "brackish," without including evidence of primary contaminant levels under DOH and EPA drinking water standards, is irrelevant to whether Condition 10 was violated. Minute Order No. 6; *Lanai Co.*, 105 Hawai`i at 312-316.

COL 62: Misleading, based on an incorrect and unsupported interpretation of Condition No. 10.

ORDER

Based on the evidence and arguments presented and in light of the above Findings of Fact and Conclusions of Law, good cause having been shown,

IT IS HEREBY DECLARED AND ORDERED that:

1. The Resort has violated Condition 10 of the 1991 Order;

2. The Resort is continuing to violate Condition 10 of the 1991 Order;

3. The Resort shall comply with Condition No. 10 of the 1991 Order and cease its use of Wells 1 and 9 for golf course irrigation; and

4. This matter is referred to County of Maui for enforcement action pursuant to HRS § 205-12.

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of LĀNA`I RESORTS, LLC  To consider further matters relating to an Order To Show Cause as to whether certain land located at Mānele, Lāna`i, should revert to its former Agricultural and/or Rural land use classification due to Petitioner's failure to comply with Condition No. 10 of the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order filed April 16, 1991. Tax Map Key No. 4-9-002:049 (por.), formerly Tax Map Key No. 4-9-002:001 (por.).	DOCKET NO. A89-649 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the **PETITIONER LĀNA`I RESORTS, LLC'S EXCEPTIONS TO INTERVENOR LĀNA`IANS FOR SENSIBLE GROWTH'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; APPENDIX"A"; CERTIFICATE OF SERVICE** was served upon the following as indicated below:

BRYAN C. YEE, ESQ. DAWN TAKEUCHI APUNA, ESQ. Department of the Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawaii 96813 Attorney for State Office of Planning	Via U.S. Postal Mail
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DATED: Honolulu, Hawaii, January 6, 2016.

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