Of Counsel:
ASHFORD & WRISTON LLP
A Limited Liability Law Company
BENJAMIN A. KUDO 2262-0
CLARA PARK 9785-0
999 Bishop Street, Suite 1400
Honolulu, Hawaii 96813
Telephone: (808) 539-0400
Attorneys for
LĀNA'I RESORTS, LLC

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 **PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; CERTIFICATE OF SERVICE**

PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

AND

CERTIFICATE OF SERVICE

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 **PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Pursuant to Amended Minute Order No. 9 filed December 27, 2016, Petitioner LĀNA`I RESORTS, LLC **(Petitioner)** respectfully submits this Partial Stipulation and Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

The Office of Planning, State of Hawai'i (**OP**) and the County of Maui Department of Planning (**County**) stipulate to the entry of the Conclusions of Law and Decision and Order attached herein, subject only to reservation of their rights to make further stipulations on the Findings of Fact portion of this document, or to make further additions to the proposed Findings of Fact and Conclusions of Law, on or by the response date of January 6, 2017.

DATED: Honolulu, Hawaii, December 29, 2016.

BENJAMIN A. KUDO
CLARA PARK
Attorneys for
LĀNA`I RESORTS, LLC

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 **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

On October 13, 1993, the Land Use Commission of the State of Hawai'i (**Commission**) entered an "Order to Show Cause" to Lanai Resort Partners, predecessor entity of the present Petitioner Lāna'i Resorts, LLC (dba Pūlama Lāna'i)[1] (**Petitioner**) based upon the Commission having reason to believe that Petitioner failed to substantially comply with Condition No. 10 of the Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated April 16, 1991.

The Hearings Officer, having examined the public and witness testimony, evidence, pleadings, and arguments of counsel presented by the Petitioner; the Office of Planning, State of Hawai'i (**OP**); the County of Maui Department of Planning (**County**); and Intervenor Lāna'ians

[1] The Petitioner's name and ownership has changed throughout the proceedings, from Castle & Cooke Resorts, LLC; to the current Lāna'i Resorts, LLC (dba Pūlama Lāna'i). For clarity, all entities will hereinafter collectively be referred to as the "Petitioner."

for Sensible Growth (**LSG**), and the entire record herein, hereby makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

I. PROPERTY DESCRIPTION

1. The subject property is that certain parcel of land consisting of approximately 138.577 acres situate at Manele, Lāna'i, Hawai'i, identified in this docket as Tax Map Key No.: 4-9-002:049 (por.) (formerly Tax Map Key No.: 4-9-002:001 (por.)), and currently identified as Tax Map Key Nos: 4-9-017:008 (por.), 009 (por.), and 010 (por.) and 4-9-002:001 (por.) (**Property**).

2. The Property was reclassified from the Rural and Agricultural Districts to the Urban District pursuant to the Commission's April 16, 1991 "Findings of Fact, Conclusions of Law, and Decision and Order" (the **1991 Order**). The 1991 Order reclassified approximately 110.243 acres of land from the Rural District to the Urban District, and approximately 38.334 acres of land from the Agricultural District to the Urban District for the development of an eighteen hole golf course, and related uses.

3. The Property is currently being utilized for the Manele Golf Course, and other related uses including a clubhouse.

4. Condition No. 10 of the 1991 Order reads as follows:

> 10. Petitioner shall not utilize the potable water from the high-level groundwater aquifer for the 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.

> In addition, Petitioner shall comply with the requirements imposed upon the Petitioner by the State Commission on Water Resource Management as outlined in the State Commission on Water Resource Management's Resubmittal - Petition for Designating the Island of Lanai as a Water Management Area, dated March 29, 1990.

1991 Order, Condition No. 10, at p. 45.

II. PROCEDURAL BACKGROUND

5. On October 13, 1993, the Commission issued an "Order to Show Cause" (**OSC**) commanding Petitioner to appear before the Commission to "show cause why [the Property] should not revert to its former land use classification or be changed to a more appropriate classification," based on "reason to believe that [Petitioner] failed to perform according to Condition No. 10 of the [1991 Order.]" *OSC*, at p. 1-2.

6. On May 17, 1996, the Commission entered its "Findings of Fact, Conclusions of Law, and Decision and Order" on the OSC (the **1996 OSC Order**), ordering Petitioner to comply with Condition No. 10 and "immediately cease and desist any use of water from the high level aquifer for golf course irrigation requirements." *1996 OSC Order*, at p. 9-10.

7. Petitioner appealed the 1996 OSC Order to the Circuit Court, which reversed the Commission's 1996 OSC Order.

8. On May 20, 1999, LSG filed a notice of appeal to the Hawaii Supreme Court. On May 21, 1999, the Commission filed its notice of appeal.

9. On September 17, 2004, the Hawaii Supreme Court concluded that the Commission's "1996 [OSC] Order was clearly erroneous in deciding that [Petitioner] violated Condition No. 10 of the 1991 Order for using water from the high level aquifer[.]" *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai`i 296, 308, 97 P.3d 372, 384 (2004).

10. The Supreme Court remanded this case to the Commission "for clarification of its findings, or for further hearings if necessary, as to whether [Petitioner] used potable water from the high level aquifer, in violation of Condition No. 10." *Id.* at 319, 97 P.3d at 395.

11. Following the Supreme Court's remand, the Commission conducted further hearings. On January 25, 2010, the Commission entered its "Order Vacating [the 1996 OSC 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" (the **2010 Order**).

12. On March 21, 2016, the Intermediate Court of Appeals vacated the Commission's 2010 Order and remanded this case back to the Commission. *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai`i 298, 369 P.3d 881 (App. 2016).

13. On June 24, 2016, the Commission entered its "Order Appointing Hearings Officer," appointing Jonathan Likeke Scheuer as the Hearings Officer for the hearing in the above-captioned docket.

14. The Hearings Officer entered Minute Order Nos. 1-9, for the purpose of setting hearing dates, clarifying the issues, considering pre-hearing motions, and discussing deadlines and other procedural matters.

15. Pursuant to Minute Order No. 3, the Hearings Officer and the parties held a site visit on Lāna'i on August 18, 2016.

16. Pursuant to Minute Order No. 6, the Hearings Officer directed the parties to prepare to address the following issues at the hearing:

> 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 Lāna'i 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 Pālāwai Basin and if so does such leakage constitute utilization of potable water as prohibited by condition 10?

17. Pursuant to Minute Order No. 7, the Hearings Officer gave written notice of the hearings to be conducted on November 9-10, 2016, at the Lāna'i Community Center, Lāna'i City, Lāna'i, and on November 15-16, 2016, at the Maui Arts and Cultural Center – Haynes Meeting Room, Kahului, Maui. The minute order also gave notice that public testimony was to be taken prior to the evidentiary portion of the hearing on November 9, 2016.

18. On November 9, 2016, the Hearings Officer commenced the hearing in Lāna'i City, Lāna'i. Benjamin A. Kudo, Esq., Clara Park, Esq., and Sarah M. Simmons, Esq. appeared on behalf of Petitioner. Bryan C. Yee, Esq. and Leo R. Asuncion, Jr. appeared on behalf of OP. Michael Hopper, Esq., Caleb Rowe, Esq., William Spence, and Danny Dias appeared on behalf of the County. David Kauila Kopper, Esq., Li'ulā Nakama, Esq., and Reynold "Butch" Gima appeared on behalf of LSG.

19. At this hearing, the Hearings Officer entered into the record the written testimonies received on the matter and heard public testimony from David Gardner, Donna Domingo, Richard Brooke, La'ikealoha Hanog, Tom Roelens, Rachel Sprague, Lida Teneva, Dennis Velasco, Gabe Johnson, Ann Suzuki-Hough, Kendric Kimizuka, Roger Alconcel, Noemi

Barbadillo, Michael Inouye, Gerald Rabaino, Fairfax Reilly, Rick Dunwell, Bruno Amby, Simon Tajiri, Ken Dunford, Winifred Basques, Caron Green, David Green, Jim Clemens, David Theno, Jennifer French, Anela Evans, Charles Palumbo, Ron McComber, Benjamin Ostrander, Donna Stokes, Albert De Jetley, and Bradley Bunn.

20. Following the receipt of public testimony, "Intervenor Lanaians for Sensible Growth's Motion for Substitution of Parties" filed June 28, 2016 was granted with no objections from the parties. The Hearings Officer then entered the exhibits of Petitioner, OP, the County, and LSG into the record of this proceeding and heard opening statements from the parties.

21. On November 9 and 10, 2016, the Hearings Officer heard testimony from the following witnesses: OP's witnesses Joanna Seto from the State of Hawai'i Department of Health, Safe Drinking Water Branch (expert witness in state water quality); Leo R. Asuncion, Jr., OP Director (expert witness in land use and environmental planning) and W. Roy Hardy from the State of Hawai'i Department of Land and Natural Resources, Commission on Water Resource Management (**CWRM**) (expert witness in water resources and hydrology); Petitioner's witnesses John Stubbart (expert witness in water systems management and operation), Donald Thomas, Ph.D. (expert witness in chemistry and geochemistry, with emphases in hydrology, geology, and geophysics), and Seril Shimizu; and LSG's witness Sally Kaye. At the conclusion of witness testimony on November 10, the Hearings Officer recessed the hearing and continued the matter to November 15 and 16, 2016.

22. On November 15 and 16, 2016, the Hearings Officer resumed the hearing in Kahului, Maui. Benjamin A. Kudo, Esq., Clara Park, Esq., and Sarah M. Simmons, Esq. appeared on behalf of Petitioner. Bryan C. Yee, Esq. and Rodney Y. Funakoshi appeared on behalf of OP. Michael Hopper, Esq., Caleb Rowe, Esq., William Spence, and Danny Dias

appeared on behalf of the County. David Kauila Kopper, Esq. and Li'ulā Nakama, Esq., appeared on behalf of LSG.

23. The Hearings Officer heard testimony from the following witnesses: Petitioner's witnesses Tom Nance (expert witness in hydrology, water resource development, and water sampling and analysis), Allan Schildknecht (expert witness in golf course irrigation management), Mike Donoho (expert witness in natural resource management), Bruce Plasch, Ph.D. (expert witness in economic analysis), and Kurt Matsumoto; from the County's witnesses Dave Taylor, Director of the County of Maui Department of Water Supply (expert witness in water supply) and William Spence, Director of the County of Maui Department of Planning (expert witness in planning and land use); and from LSG's witness Reynold "Butch" Gima.

24. At the conclusion of witness testimony on November 16, 2016, the Hearings Officer closed the evidentiary portion of the hearing. Pursuant to Minute Order No. 8, the Hearings Officer held a continued hearing solely for the purpose of closing argument on December 8, 2016, at the Maui Arts and Cultural Center – Haynes Meeting Room, Kahului, Maui.

III. THE HAWAII SUPREME COURT REMAND

25. In *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 97 P.3d 372 (2004), the Hawaii Supreme Court concluded that the Commission's 1996 OSC Order was "clearly erroneous" and remanded this matter to the Commission.

26. The Supreme Court ruled that the 1996 OSC Order was "clearly erroneous in deciding that [Petitioner] violated Condition No. 10 of the 1991 Order for using water from the high level aquifer in light of (1) the plain language of Condition No. 10, (2) the use of "potable" and "non-potable" as separate and distinct terms in other parts of the order, (3) LUC's rejection of Sensible Growth's proposed 1991 order, and (4) the map submitted to the LUC which clearly

indicated that Well No. 1 was inside the high-level aquifer." *Lanai Co., Inc.*, 105 Hawai`i at 384, 97 P.3d at 308.

27. The Supreme Court concluded that Petitioner "was not prohibited from using all water from the high level aquifer by Condition 10," and accordingly, it remanded "the issue of whether [Petitioner] has violated Condition No. 10 by utilizing potable water from the high level aquifer[.]" *Lanai Co., Inc.*, 105 Hawai`i at 390, 392, 97 P.3d at 314, 316.

28. For the reasons stated herein, Petitioner has proved by a preponderance of the evidence that it has fulfilled its obligations under Condition No. 10. Petitioner has provided substantial credible evidence that the water being used to irrigate the Manele Golf Course was and is non-potable. Further, there is no substantial credible evidence that Petitioner has ever used potable water for irrigation of the Manele Golf Course.

IV. INTERPRETATION OF THE PLAIN LANGUAGE OF CONDITION NO. 10

29. OP's position is that "'potable water' as used in Condition 10 excludes alternative water such as brackish water, that Condition 10 allows Petitioner to use brackish water to irrigate the Manele Golf Course, and that Petitioner is using brackish water consistent with Condition 10 to irrigate the Manele Golf Course." *Office of Planning's Position Statement, filed August 12, 2016*, at p. 10.

30. The County's position is that "there is no ground at this time to conclude that [Petitioner] is in non-compliance with Condition 10" and "cannot support finding a violation." *Testimony of the Maui Planning Department, filed August 11, 2016*, at p. 3.

31. LSG is the only party taking the position that Petitioner may be violating Condition No. 10.

32. All parties, including LSG, agree the plain language of the 1991 Order controls, and that "the Hearings Officer does not need to, and should not, go further than Condition 10." *Intervenor Lanaians for Sensible Growth's Positional Statement,* filed August 12, 2016, at p. 8.

33. It is also undisputed that a definition of the term "potable" is not set forth in the 1991 Order or anywhere in the administrative record of the 1991 Order proceedings.

A. "Potable Water From the High-Level Groundwater Aquifer"

34. Condition No. 10 states in part, "Petitioner shall not utilize the potable water from the high-level groundwater aquifer for the golf course irrigation use[.]"

35. All of the wells that Petitioner operates are within the high-level aquifer. *Petitioner's Exhibits 11, 12 at p. 3-13.* The hydrogeology of Lāna'i is unusual in various respects, including the predominance of high-level water and the presence of high-level brackish water accompanied by geothermal heating in the area of the Pālāwai Basin. *Petitioner's Exhibit 12, at p. 3-4.*

36. During the instant hearing, the president and secretary of LSG, Reynold "Butch" Gima, testified on behalf of LSG about LSG's position. According to Mr. Gima, LSG's position is that no water from the high-level aquifer can be used to irrigate the golf course. Because Wells 1 and 9 are within the high-level aquifer, Wells 1 and 9 cannot be used to irrigate the golf course. *Transcript of LUC Hearing (**Tr.**), 11/16/2016, at 728:7-22 (page:line number).*

37. Mr. Gima testified that LSG's interpretation was based on a memorandum of understanding between LSG, the Petitioner, and other parties (**MOU**). *Id.* However, Mr. Gima acknowledged that the MOU is "not part of these proceedings." He further acknowledged that the MOU's language differs from Condition No. 10. He agreed that the Commission, in its 1991 Order, adopted the language proposed by Petitioner, and did not adopt the MOU language that LSG proposed. *Tr., 11//16/2016, at 729:14 – 730:8; 750:16 – 751:11.*

38. Moreover, the Hawaii Supreme Court rejected the interpretation of Condition No. 10 as prohibiting the use of all water from the high-level aquifer, stating, "the LUC's 1996 [OSC] Order was clearly erroneous to the extent it interpreted Condition No. 10 of its 1991 Order as precluding the use by [Petitioner] of 'any' or all water from the high level aquifer." *Lanai Co., Inc.*, 105 Hawai'i at 298, 97 P.3d at 374.

39. LSG's Positional Statement and the arguments of LSG's counsel present a different interpretation of Condition No. 10. LSG's Positional Statement argues that the term "potable" should be defined by the federal Safe Drinking Water Act (**SDWA**) and national primary drinking water regulations promulgated under the SDWA by the United States Environmental Protection Agency (**EPA**). The State of Hawai'i Department of Health (**DOH**) follows federal standards and promulgates and enforces the state primary drinking water standards set forth in Chapter 11-20 of the Hawaii Administrative Rules (**HAR**). *LSG's Positional Statement* at p.7; *Exhibit OP No. 4.*

40. LSG's definition of "potable" based on EPA and DOH regulations is not supported by the plain language of the 1991 Order, the evidence, and the record herein.

41. First, there is no evidence from the administrative records of the 1991 Order that the Commission ever considered the SDWA or related regulations to define the term "potable." The 1991 Order contains no reference to the SDWA or related regulations. No reference to the SDWA or related regulations has been found anywhere in the transcripts or exhibits from the 1991 Order proceedings.

42. Second, as stated in the written testimony of Joanna Seto, Engineering Program Manager for the DOH Safe Drinking Water Branch (**SDWB**) (expert witness in state water quality), "The terms 'potable' and 'non-potable' do not exist in these State or federal primary

drinking water regulations," and "The terms 'potable' or 'non-potable' are not used by SDWB." *Exhibit OP No. 4.*

43. At the hearing, Ms. Seto confirmed that the federal Safe Drinking Water Act does not define or use the terms "potable" or "non-potable," and that the SDWB does not define the terms "potable" or "non-potable." *Tr., 11/9/2016, at 134:24 – 135:8.*

44. W. Roy Hardy, CWRM's Hydrologic Program Manager (expert witness in water resources and hydrology), testified that CWRM also does not have a position on the definition of the term "potable." *Tr., 11/10/2016, at 251:16 – 21.*

45. Third, Ms. Seto testified that the federal regulations distinguish between surface water and groundwater. *Id. at 135:25 – 136:10.* The National Primary Drinking Water Regulations: Ground Water Rule, which contains the federal regulations that regulate public water systems that use groundwater as a source of drinking water, and regulates the testing of groundwater for primary contaminants, was published on November 8, 2006. *Petitioner's Exhibit 44B.*

46. Ms. Seto testified that DOH did not adopt groundwater regulations until after the federal Ground Water Rule was published in 2006, and therefore the groundwater regulations were not in force during the Commission's proceedings on the 1991 Order and the 1996 OSC Order. *Tr., 11/9/2016, at 136:5-10.*

47. Fourth, Leo Asuncion, Jr., Director of OP (expert witness in land use and environmental planning), testified that during the 1991 Order proceedings, OP stipulated with the original Petitioner on the language of Condition No. 10. OP does not adopt LSG's interpretation of Condition No. 10, and its opinion is that there is no evidence that Petitioner has violated Condition No. 10 by using potable water. *Tr., 11/9/2016, at 143:21 – 144:4.*

48. Finally, the Hawaii Supreme Court found that the 1991 Order did not define the term "potable," and therefore defined the term by its plain and ordinary meaning as "suitable for drinking," not by reference to the federal or state primary drinking water regulations.

49. As the Supreme Court stated in its remand opinion, "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. . . . 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., Inc.*, 105 Hawai`i at 314, 97 P.3d at 390.

50. The absence of any reference to the SDWA in the 1991 Order gives Petitioner no notice that the terms "potable" and "non-potable" should be defined by the SDWA or related regulations, which did not even apply to groundwater when the Commission entered the 1991 Order.

51. Therefore, LSG's position that the term "potable" should be defined by reference to the national or state primary drinking water regulations is not supported by the record herein.

52. Consequently, LSG's demand that Wells 1 and 9 be tested for contaminants listed in the national and state primary drinking water regulations is not persuasive or relevant to whether Wells 1 and 9 are potable or non-potable.

B. "Alternative Non-Potable Sources Of Water (e.g., Brackish Water, Reclaimed Sewage Effluent)"

1. The Commission Characterized Wells 1 and 9 as "Brackish" and "Nonpotable" in the 1991 Order and 1996 OSC Order

53. Although the 1991 Order does not define the term "potable," under a plain reading, Condition No. 10 does define "non-potable" water. Condition No. 10 defines

"alternative **non-potable** sources of water" by way of example, as "e.g., **brackish water, reclaimed sewage effluent.**" *1991 Order, Condition No. 10,* at p. 45 (emphases added).

54. LSG argues that brackish water can be potable water, based on its above-referenced use of the SDWA to define the term "potable." According to LSG, brackish water or reclaimed sewage effluent is potable if the water does not exceed the maximum contaminant levels set forth in the SDWA and its regulations.

55. LSG's position is not persuasive because (1) as discussed above, the 1991 Order does not define potability by the SDWA or its regulations, and (2) in the context of Condition No. 10, brackish water and reclaimed sewage effluent are alternative non-potable sources of water that Petitioner may use for golf course irrigation, as evidenced by the plain language of the 1991 Order and other evidence in the record.

56. The 1991 Order references the subject wells, Wells 1 and 9, as brackish wells.

57. In Finding of Fact (**FOF**) 48 of the 1991 Order, the Commission found, "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 yet operational. . . . Currently available also is **brackish water from Well No. 1** which is operational and which has a capacity of about 600,000 gpd." *1991 Order, FOF 48*, at pp. 14-15 (emphases added).

58. FOF 89 states, "Petitioner is now in the process of developing the **brackish water supply for irrigation of the proposed golf course.** According to Petitioner, **Well No. 1, which is operational and available, and Well Nos. 9**, 10 and 12, which have been subjected to full testing, have **aggregate brackish source capacity in excess of the projected requirements of**

624,000 gdp to 800,000 gpd for the Manele golf course." *1991 Order, FOF 89*, at pp. 27-28 (emphases added).

59. FOF 91 states, "Petitioner intends to irrigate the golf course with **nonpotable water**, leaving only the clubhouse which will use potable water, the requirement for which should be insignificant." *Id., FOF 91*, at p. 28.

60. As the Supreme Court stated, "the mention of Wells No. 1 and 9 in finding 48 of the 1991 Order, suggests that the use of these wells, and their brackish water supply, was permissible." *Lanai Co., Inc.*, 105 Hawai`i at 313, 97 P.3d at 389.

61. The 1991 Order's characterization of Wells 1 and 9 as "brackish water supply for irrigation of the proposed golf course," and the calculation of the wells' capacity to meet the projected requirements of the Manele golf course, clearly indicates that Wells 1 and 9 were intended to serve as "alternative non-potable sources of water" under Condition No. 10.

62. Moreover, the above FOFs and entire exact language of Condition No. 10 originated from a "Stipulation for Proposed Findings of Fact, Conclusions of Law, and Decision and Order" by Petitioner and OP and filed by the Petitioner on February 20, 1991, meaning that Petitioner reviewed and agreed to the language of Condition No. 10. It would be absurd and illogical for Petitioner to propose a condition that would prohibit it from irrigating with the brackish water wells that it had already installed, tested, and in the case of Well 1, was already operating.

63. The record of the Commission proceedings leading up to the 1991 Order support the characterization of Wells 1 and 9 as brackish wells, and the permissibility of using Wells 1 and 9 for golf course irrigation.

64. During the proceedings leading up to the 1991 Order, the original Petitioner and other parties defined brackishness based on level of chlorides, used the terms "brackish" and "non-potable" interchangeably, and referenced the use of brackish water for irrigating the Manele Golf Course.

65. On cross-examination by OP, Tom Leppert testified on behalf of the original Petitioner as follows:

> [By OP]
>
> Q. And will you agree to . . . **utilizing only alternative sources of water, in other words, brackish or effluent for golf course irrigation purposes**?
>
> A. Yes, we included that in our application, and a significant amount of resources to insure the implementation of that come together.

Tr., 7/12/1990, at 82:21 – 83:5 (emphasis added).

66. The original Petitioner's witness James Kumagai described Well 9 as follows: "Now, Well 9 has proved to have higher chlorides than what we had anticipated, it's somewhere around 500, 600 milligrams or parts per million chlorides. It's **brackish** and we consider that right now **nonpotable, but suitable for landscape irrigation.**" *Tr., 7/12/1990, at 113:21-25* (emphases added).

67. On cross-examination by the County, Mr. Kumagai testified that reclaimed sewage effluent would be a small component of the alternative sources used for irrigation, and that brackish water would be the remainder.

> [By County of Maui]
>
> Q. I haven't done the calculations, but as I recall, Lanai is a small population, 2500 people or something. I find it hard to imagine that the 2500 people are going to produce a million gallons a day in terms of effluent for that golf course.

A. No, you're right, they will not produce a million gallons per day, you're right on that. In terms of the Manele golf course, **the sewage effluent component of what we call an alternate is a small portion of that,** the remainder we are looking at most likely is something we calling **brackish water source**.

Id., at 144:21 – 145:7.

68. During LSG's cross-examination of Mr. Kumagai, LSG noted that Well 1's chloride level was "over the 250 milligram per liter safe drinkable limitation established."

[By LSG]

Q. Let's get back to some of the wells, and the old wells. . . . [CWRM's] staff hydrologist indicated that the chloride content for **Well 1,** which as we previously noted, is about .1 MDG in yield, is 407 milligrams per liter, and I was wondering whether that particular well is factored into you current or your existing sustainable yield figure, given that **it is over the 250 milligram per liter safe drinkable limitation established**?

A. . . . [U]p to now the output from Well 1 goes to irrigation, is blended with the other water. . . . [T]here is an attempt . . . to try to keep the Palawai sources **separate from the potable water source.** . . .

Q. Well, at some point we have to move **Well 1** from the potable to **nonpotable** column?

A. Yes.

Id., at 172:14 – 173:22 (emphases added).

69. LSG then asked Mr. Kumagai about Well 9:

[By LSG]

Q. What is the **chloride content** in that well [Well 8]?

A. About 40 or so.

Q. So it's potable?

A. Oh, definitely.

Q. **Well 9**, you projected originally in your report .4 MGD, that's coming in **nonpotable**?

A. That is correct.

Q. Now, can all that be used for golf course irrigation even at its very high chloride content of over 1000 milligrams per liter?

A. **Well 9 can be used for irrigation**, that's what we said, and definitely it's one of the wells that we can set aside and **dedicate for nonpotable use**.

Id. at 178:21 – 179:8 (emphases added).

70. Later, LSG again used chloride levels as a determinant of whether water was drinkable.

[By LSG]

Q. I guess what I'm trying to get at in a somewhat inarticulate manner, is I would like to hear a little bit about the data relating to the **nonpotable water source.**

Is Well 10 . . . a source of nonpotable water that you can state with some assurance is available now for productive use?

A. Yes. . . .

Q. That's **at 330 milligrams per liter, so it can't be used for drinking water?**

A. No, it's probably higher . . . .

Id. at 186:22 – 187:9.

71. Mr. Kumagai also testified that brackish water was commonly used in golf course irrigation at the time.

Mr. Chairman: With respect to the potential for using **nonpotable sources, or brackish water, easier put**, where else do they use brackish water, and to what success?

The Witness: Brackish water is used like Wailea, a Maui golf course irrigation, brackish water primarily, landscape irrigation, that sort of brackish water sources are principally that I'm aware of.

Mr. Chairman: Any outside of Wailea?

> The Witness: Brackish water, if you look down on Maui, I think in Kaanapali some, although they have their own water source, brackish water, Silver Sword, sewage effluent, and I think Wailea.
>
> Now, the Big Island, in fact, all the golf courses along the Kona area, I believe, use brackish water, in the Kona area all brackish water sources. I'm not aware of any single golf course that use[s] totally potable water resources.

Tr., 7/13/1990, at 31:2-17 (emphasis added).

72. The Commission's 1996 OSC Order states that Wells 1 and 9 "provide **non-potable, brackish water.**" *1996 OSC Order, FOF 16*, at p. 6.

2. Other Evidence that Wells 1 and 9 are Brackish, Non-Potable Wells

73. In addition to the plain language of the 1991 Order, there is other substantial evidence in the record that Wells 1 and 9 were and continue to be brackish, and that their use for golf course irrigation is permissible under Condition No. 10.

74. Well 1 was drilled in 1945 and put into service around the early 1950s. *Tr., 11/9/2016, at 164:13-25 (Testimony of J. Stubbart).*

75. From 1948 to present, the documented chloride levels of the water from Well 1 have always been greater than 250 mg/L. *Petitioner's Exhibits 24, 43B.*

76. Well 9 was drilled in 1990 and connected to the brackish water system around 1992. *Tr., 11/9/2016, at 165:9-18 (Testimony of J. Stubbart).*

77. From 1993 to present, the documented chloride levels of the water from Well 9 have always been greater than 250 mg/L. *Petitioner's Exhibits 24, 43C.*

78. Well 1 in particular was known to be brackish long before the 1991 Order proceedings. Well 1's principal purpose was to provide supplemental irrigation for pineapple. *Tr., 11/9/2016, at 164:13-20 (Testimony of J. Stubbart).* Because of its high levels of chlorides and salinity, however, the well was used as little as possible and was generally the last one to be

turned on and the first to be turned off. Well 1 has always been considered brackish and connected to the irrigation system, as opposed to the potable water system. *Tr., 11/15/2016, at 406:10-14; 407:5-10, 471:17 – 472:4 (Testimony of T. Nance).*

79. Well 1 was also known to be in the high-level aquifer before the 1991 Order proceedings. During the 1991 Order proceedings, the original Petitioner submitted exhibits that showed Well 1 on a map and depicted Well 1 as being located within the high-level aquifer in the Pālāwai Basin. *1991 Order proceedings, Petitioner's Exhibit 14, at pp. 8; App. 2; Exhibit 37 at p. 43.*

80. The chloride levels of both Wells 1 and 9 have been consistent and steady throughout their use for irrigating the Manele golf course. Mr. Stubbart testified that Well 1's chloride levels have been around 320 mg/l, and Well 9's chloride levels have been around 475 mg/l, regardless of pumping rate. *Tr., 11/10/2016, at 208:23 – 209 (Testimony of J. Stubbart).*

81. Since 1975, periodic water reports (**PWRs**) have been prepared and sent to CWRM. The PWRs report the pumping, water level, temperature, and chloride levels of each well. A PWR is generated every 28 days, and the PWRs are distributed to CWRM, other agencies such as the United States Geological Survey and the County Department of Water Supply, and certain members of LSG including Mr. Gima. The PWRs are also available to the public and are posted online and in public spaces. *Tr., 11/9/2016, at 160:7 – 163:1 (Testimony of J. Stubbart).*

82. Petitioner's practice is to test the chloride levels of the Pālāwai Basin wells (including Wells 1 and 9) in triplicate, by three different entities. One set of samples is tested by Lāna'i Water Company Staff, a second by Tom Nance, and third by another laboratory. The

average of the three results is reported in the PWRs. *Tr., 11/15/2016, at 392:21 – 393:11 (Testimony of T. Nance).*

83. No party presented any evidence of any substantial errors or flaws in Petitioner's sampling or testing methods of Wells 1 or 9.

84. No party presented any evidence that the chloride levels of either Well 1 or 9 has ever dropped below 250 mg/L.

85. As noted above, the records from the 1991 Order proceedings indicate a chloride level of 250 mg/L was understood by the parties, including LSG, to be the limit for safe drinking or potability.

86. The EPA's national secondary drinking water regulations set a chloride limit of 250 milligrams per liter (**mg/L**). *Tr., 11/15/2016, at 421:18-23 (Testimony of T. Nance).*

87. The Water Resource Protection Plan (**WRPP**) was prepared for CWRM and is one of five major plans that comprise the Hawaii Water Plan, established pursuant to Chapter 174C, Hawaii Revised Statutes (**State Water Code**). *Petitioner's Exhibit 14* at p. 1-1.

88. The WRPP defines brackish water as water with "excessive chlorides (salt) content" and states, "Water exhibiting chloride concentrations greater than 250 milligrams per liter (mg/L) is generally considered unacceptable for drinking purposes. The county water departments generally limit chloride levels of water within their municipal system to less than 160 [parts per million]." *Id.* at p. 3-11.

89. At the time the Manele Golf Course began operations, the Maui County Code (**MCC**) contained a chapter entitled "Restrictions on Use of Potable Water for Golf Courses." MCC § 20.24.020 defined "potable water" in the context of golf course irrigation as "ground-water extracted at an acceptable rate and containing less than 250 milligrams per liter (mg/L)

chlorides." *Petitioner's Exhibit 23*. A subsequent 2009 ordinance, Ordinance No. 3688, which changed the definition of potable water as set forth in MCC § 14.08.020, applies only to new golf courses not in operation before September 21, 2009, the effective date of the ordinance. Therefore, MCC § 14.08.020 does not apply to the Manele Golf Course, which was in existence before the ordinance's effective date. *County Exhibit R-2; LSG Exhibit I-20.*

90. The Lāna'i Water Use and Development Plan (**WUDP**) contains numerous and consistent references to Wells 1 and 9 as being "non-potable" and "brackish" water sources. *Petitioner's Exhibit 12, at pp. 9, 3-41, 3-54, 6-87.* Appendix A of the WUDP, which includes the 1997 draft of the WUDP, defines "brackish water" as "water that is too salty to drink, generally defined by US EPA as having 250 mg/L of chlorides," and defines "potable" as "water that can be drunk without noticeable salty taste or without being bad to public health." *Id. at App. A, p. 29.*

91. The WUDP was developed by the Lāna'i Water Advisory Committee (**LWAC**) and the County Board of Water Supply, and was the product of over a decade of work.

92. Mr. Gima has been a member of the LWAC since its formation in the early 1990s. *Tr., 11/16/2016, at 737:1-6 (Testimony of B. Gima).* LWAC was specifically required to include two members of LSG in its composition. *Tr., 11/9/2016, at 175:5-8 (Testimony of J. Stubbart).*

93. Mr. Gima testified that LWAC's development of the WUDP was a "long" process, and that he "personally spent a lot of time" on the project. Finalizing the WUDP from its draft form to its final form took over a decade, from 1997 to 2011. *Tr., 11/16/2016, at 737:7-13.*

94. Mr. Gima admitted that the WUDP identifies Wells 1 and 9 as "brackish" wells. *Id. at 743:2 – 744:24.*

95. Mr. Gima further admitted that under the WUDP's definition of "brackish water" ("water . . . having 250 mg/L [or more] of chlorides"), Wells 1 and 9 are brackish. *Id., at 744:16-24.*

96. Tom Nance (expert witness in hydrology, water resource development, and water sampling and analysis) testified that he would define brackish water based on the EPA's secondary standards as water having chlorides of 250 mg/L or above. Mr. Nance testified that this standard has been the generally accepted level in use for the development of drinking water wells in the State of Hawai'i. *Tr., 11/15/2016, at 421:18 – 423:6.*

97. Mr. Nance and Mr. Hardy also confirmed the WRPP's statement that in practice, county water departments generally limit chloride levels of water within their municipal system to less than 160 mg/L, or at most, under the EPA's secondary standard of 250 mg/L. *Id; Tr., 11/10/2016, at 250:20 – 251:2.* Therefore, Wells 1 and 9 would not be accepted by the County as a potable well. *Tr., 11/15/2016, at 412:24 – 413:2.*

98. Mr. Nance testified that water with chloride levels at or above 250 mg/L causes complaints from customers, taste issues, and issues with the water system itself such as corrosion and deposits in the pipelines. For example, the corrosiveness of the water in Well 9 causes frequent problems with the submersible pumps in the well. *Tr., 11/15/2016, at 411:8-23; 422:1 – 423:24.*

99. Allan Schildknecht (expert witness in landscape and golf course irrigation) began working with golf courses in Hawai'i in 1985, and he testified that brackish water is generally considered an alternative non-potable source of water in the context of golf course irrigation. *Tr., 11/15/2016, at 488:22 – 489:22; 491:21-24.*

100. In Mr. Schildknecht's professional opinion and expertise, brackish water is defined in the golf course irrigation context as water with chloride levels above 250 mg/L. The chloride levels of the brackish water presently used for golf course irrigation in Hawai'i range from about 250 mg/L up to 1500 mg/L. *Id. at 494:25 – 495:15.*

101. Mr. Schildknecht testified, "In the late '80s and early '90s, it was very common to use brackish water" for golf course irrigation, and "most of the golf courses [were] using brackish water." *Id. at 513:14 – 514:1.* Petitioner's Exhibit 45D is a list prepared by Mr. Schildknecht identifying golf course in Hawai'i that were using brackish water on or before 1991. *Id. at 496:1-18.*

102. In 1991, brackish water was also commonly used for other irrigation purposes, such as irrigating parks or agricultural lands. *Id. at 498:11-22*

103. Presently, about 59 percent of the golf courses in Hawai'i use brackish water as the primary water source. In terms of total volume of water, brackish water accounts for about 79 percent of the water used. *Id. at 493:19 – 494:4.*

104. Brackish water is commonly used in Hawai'i because it can be easy to obtain and fairly inexpensive compared to other water sources, and its use is a "best management practice" for utilizing alternative water sources. *Id. at 494:18-24.*

105. The Hawaii Water Conservation Plan dated February 2013 and prepared for CWRM and the U.S. Army Corps of Engineers, lists "use of alternative irrigation water sources" as a best management practice category for golf courses, and "brackish water use" and "reclaimed water use" as specific best management practices. *Petitioner's Exhibit 45B.*

106. John Stubbart, Director of Utilities for Lāna'i Water Company (expert witness in water systems management and operations) testified that from the time he began working with

Petitioner in December 2008, his understanding of the plain language of Condition No. 10 was that allowed the use of reclaimed sewage effluent and brackish water from the high-level aquifer to irrigate the Manele Golf Course. No governmental agency has ever asked Lāna'i Water Company to cease and desist using Wells 1 and 9 for golf course irrigation. *Tr., 11/9/2016, at 166:9 – 167:20; 168:1-8.*

107. Lāna'i Water Company operates a potable water system and a brackish water system. The two systems are separate. Wells 1 and 9, as well as Wells 14 and 15, make up the brackish water irrigation system. *Id. at 156:3-5, 158:22 – 159:5.*

108. Wells 1, 9, 14, and 15 and reclaimed sewage effluent are the sole sources of irrigation water for the Manele Golf Course. *Tr., 11/9/2016, at 167:13-16; 11/10/2016, at 197:15-20 (Testimony of J. Stubbart).*

109. During the time period at issue in the 1996 OSC Order, Wells 1 and 9 and reclaimed sewage effluent were the sole sources of irrigation water for the Manele Golf Course. *Tr., 11/15/2016, at 406:5-7 (Testimony of T. Nance).* Wells 14 and 15 were not in existence when the Commission entered the 1996 OSC Order.

110. No water from any other wells, including the potable wells in the potable water system, has ever been used to irrigate the Manele Golf Course. *Tr., 11/9/2016, at 164:1-4 (Testimony of J. Stubbart), Tr., 11/10/2016, at 366:12-15 (Testimony of S. Shimizu).*

111. Mr. Stubbart and Mr. Nance testified that Wells 1 and 9 cannot be connected to Lāna'i Water Company's potable water systems because the wells do not meet CWRM's standards for drinking water wells. Both Wells 1 and 9 are wells with open-bored casings, which raise a potential for contamination and are not permitted under CWRM's standards. *Tr.,*

11/10/2016, at 211:23 – 212:19 (Testimony of J. Stubbart); Tr., 11/15/2016, at 439:21 – 440:12 (Testimony of T. Nance).

112. Aside from the brackish water from the high-level aquifer, no other feasible alternative source of water for irrigation exists. Although reclaimed sewage effluent is also being used as a source of water for golf course irrigation, Lāna'i Water Company's wastewater treatment plant generates roughly 40,000 to 60,000 gallons of effluent per day, which is a fraction of the golf course's irrigation needs. *Tr., 11/9/2016, at 172:4 – 173:5 (Testimony of J. Stubbart).*

113. Mr. Stubbart's testimony regarding the use of both brackish water and reclaimed sewage effluent combined to produce sufficient irrigation water is consistent with the testimony of the original Petitioner's witness Mr. Kumagai.

114. Moreover, the mere fact that Wells 1 and 9 can be treated or blended with other water to lower chloride levels and produce potable water does not mean that Wells 1 and 9 contain potable water, or that the use of Wells 1 and 9 constitutes a violation of Condition No. 10.

115. All water, even ocean water or reclaimed sewage effluent, can be treated or blended with other water to become potable water. Condition No. 10 cannot be interpreted to prohibit the use of water that can be treated or blended to become potable, because such an interpretation renders Condition No. 10 and its distinction between potable and non-potable water absurd and meaningless. The interpretation is also inconsistent with the Hawaii Supreme Court's ruling that Petitioner was permitted to use non-potable water and was not prohibited from using all water from the high-level aquifer by Condition 10. *Lanai Co., Inc.*, 105 Hawai`i at 390, 392, 97 P.3d at 314, 316.

116. During the original OSC proceedings, the Commission stated that "in order to prove that it was fulfilling its obligations under Condition No. 10, [Petitioner] had to demonstrate that the water being used to irrigate the golf course was non-potable." *Lanai Co., Inc.*, 105 Hawai'i at 314 at n.45, 97 P.3d at 390 at n.45.

117. There is substantial evidence that Wells 1 and 9 contain brackish, non-potable water, and therefore the use of Wells 1 and 9 for golf course irrigation is expressly permissible under Condition No. 10.

C. No Evidence to Support LSG's Claim That Leakage of Potable Water Constitutes a Utilization of Potable Water in Violation of Condition No. 10

118. LSG's position is that potable water from the higher wells leaks into Wells 1 and 9, and that such "leakage" constitutes a use of potable water. LSG states, "The pumpage of the [Petitioner's] wells in the Palawai Basin has caused the movement of water from the upper level wells into the Basin which would not have occurred but for the pumpage in the Basin. This is a use of potable water prohibited by Condition 10." *LSG's Positional Statement*, at p. 10.

119. However, LSG failed to produce substantial evidence that supports the "leakage" theory.

1. Evidence Presented During Hearings

120. Donald Thomas, Ph.D. (expert witness in chemistry and geochemistry, with emphases in hydrology, geology, and geophysics) is a research professor of geochemistry at the University of Hawaii's Hawaii Institute of Geophysics and Planetology. Dr. Thomas is currently conducting a research project on Lāna'i relating to groundwater geochemistry, and as part of his project, he has researched the hydrology and groundwater resources of Lāna'i. *Tr., 11/10/2016, at 256:9-16; 259:2-15; 261:11-15.*

121. Dr. Thomas is an independent expert witness not paid, hired, or affiliated with Petitioner. Dr. Thomas testified that at the time he developed his research project and gathered data, he was unaware of this litigation. *Id. at 259:19 – 260:5.*

122. Dr. Thomas described the leakage theory as a null hypothesis, meaning that it is impossible to prove that absolutely no leakage is occurring because it is impossible to prove a negative. However, Dr. Thomas testified that in his professional opinion and based on his studies, he found no sound evidence that supports the leakage theory, and no evidence that any leakage is occurring. *Id., at 274:23 – 277:7; 289:8-22.*

123. Dr. Thomas testified that the geology of Lāna'i has several features that act as barriers to groundwater flow. Lāna'i's groundwater resources are made up of a highly complex system of dike compartments, with an unknown number of dikes and intervening compartments intersecting in various ways. The dikes are formed by dense impermeable rock with few fractures, which strongly inhibit water flow across the direction of the dike and parallel to the rift zone. Moreover, ring faults surrounding the Pālāwai Basin alters the rock and creates deposits of clay that act as another barrier to groundwater flow from the higher rim elevations to the lower elevation caldera. *Id., at 262:7 – 266:23.*

124. During the proceedings on the 1996 OSC Order, Mr. Hardy presented a numerical model for the island of Lāna'i.

125. Dr. Thomas explained that numerical models are designed to simplify reality and cannot accurately model every characteristic within a particular geologic environment. The Hardy model characterizes hydraulic conductivity as being uniform in all directions, though hydraulic conductivity is undisputedly lower across the dikes, therefore limiting the model's

ability to provide an accurate depiction or predictions relating to hydraulic conductivity. *Id. at 267:22 – 271:10.*

126. The relatively stable salt levels of the brackish wells suggest that no leakage is occurring, because if leakage were occurring, the salt content would be eventually washed out. *Id. at 284:13 – 285:7.*

127. The data that Dr. Thomas obtained for his research project provides further evidence that leakage is not occurring. As part of his research project, Dr. Thomas examined the ion chemistry profiles of the potable and brackish wells on Lāna'i, and he found that the brackish wells have a distinctly different profile from the potable wells. *Id. at 285:17 – 287:25.*

128. Dr. Thomas explained that the changes in ion chemistry are likely due to the interaction of water with rock formations underground. As water passes through rock formations, it effectively dissolves some of the rock and picks up various constituents of the minerals, changing the water's ion chemistry. *Id. at 288:1 – 289:7.*

129. The brackish wells in the Pālāwai Basin show significant depletion of the sodium ion, a pattern that takes a long time to develop (on the order of thousands of years), and would not develop if water from the potable wells was leaking into the brackish wells. *Id. at 288:17 – 289:7, 296:7-13.*

130. Based on this difference in ion chemistry, Dr. Thomas concluded that the higher elevation potable wells and brackish wells located in the Pālāwai Basin are "very distinct, separate" water sources. *Id. at 287:24-25.*

131. Mr. Nance provided further testimony against the leakage theory. He concurred with Dr. Thomas's testimony that the direction of the rift zone and dikes on Lāna'i creates a physical barrier that impedes flow or leakage.

132. Mr. Nance also testified that based on his experience working on Lāna'i since 1992, and his review of records before 1992, he found no evidence that pumpage of a well in one dike compartment creates any effect on another compartment. *Tr., 11/15/2016, at 397:20 – 398:4.* Every well that has been drilled into the high-level aquifer on Lāna'i taps into separate groundwater compartments (with the exception of Well 3A, which replaced the collapsed Well 3). There is not one instance in the available record indicating that pumping of one well produced a water level drawdown in another well. *Petitioner's Exhibit 43K.*

133. Mr. Nance has performed several pump tests to detect whether leakage is occurring. Mr. Nance performed an extended pump test of Wells 3A and 7. He found that the rate of the wells' recovery to static water level was slow, indicating that leakage is not occurring. If leakage were occurring, the recovery to static level would be much faster. *Id., at 398:5-24.*

134. Mr. Nance also performed extended pump tests in which Wells 1 and 2 were pumped continuously, while the water level of nearby Well 2 and Shaft 3 (respectively) were recorded. The tests showed no connection, even between Well 2 and Shaft 3 which are only approximately 150 feet apart. *Id., at 403:15 – 405:24; Exhibit 43K.*

135. LSG's primary evidence in support of its leakage theory is the previous testimony of William Meyer, submitted as LSG's Exhibit I-17. Mr. Meyer's testimony is entitled to less weight, however, because Mr. Meyer was not made available for live testimony or for cross-examination, and no witness adopted or corroborated Mr. Meyer's testimony.

136. Further, Mr. Meyer's testimony is less credible because his testimony was produced on or before 2006. Therefore, his opinions do not reflect recent evidence and data gathered over the subsequent decade, and does not rebut the testimonies of Dr. Thomas or Mr. Nance.

137. Therefore, there is no evidence that leakage of water from the potable wells to the wells in the Pālāwai Basin is occurring at a measurable or detectable quantity. Further, there is no evidence of any causal connection between Petitioner's golf course irrigation and the alleged leakage.

2. The Plain Language of the 1991 Order and Evidence from the 1991 Order Proceedings

138. Nothing in the plain language of the 1991 Order indicates that the use of high elevation non-potable brackish water constitutes a violation of Condition No. 10 because of the leakage argument.

139. Further, nothing from the record of the 1991 Order proceedings indicates that leakage of potable high level water into lower elevation brackish water compartments constituted a violation of Condition No. 10.

140. During the 1991 Order proceedings, Petitioner's experts testified that leakage between dike compartments may be a naturally-occurring feature of the aquifer. *E.g., 1991 Order proceedings, Petitioner's Exhibit 37,* at pp.4-5; *Transcript, August 30, 1990 LUC hearing,* at pp. 9-12 (Testimony of John F. Mink, Ph.D., expert witness in hydrology).

141. "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. . . . 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., Inc.*, 105 Hawai`i at 314, 97 P.3d at 390. If the Commission considered leakage a violation of Condition No. 10, the Commission could and would have so stated in the 1991 Order, but it did not.

142. The leakage theory also leads to an absurd result and is inconsistent with Condition No. 10 and the Hawaii Supreme Court's opinion. If a *de minimis* or undetectable amount of leakage of potable water into non-potable wells constitutes a violation of Condition No. 10, then Petitioner would be effectively prohibited from using any water from the high-level aquifer.

143. Therefore, there is no evidence of leakage of potable water to the wells in the Pālāwai Basin. Further, leakage does not constitute utilization of potable water as prohibited by Condition No. 10.

V. THE PUBLIC TRUST DOCTRINE

144. In the 1991 Order, the Commission made several findings of fact that addressed the proposed Manele golf course's impact on water resources, and established that Petitioner's use of water for golf course irrigation was consistent with the public trust doctrine. The Commission found, *inter alia*:

> **IMPACT UPON RESOURCES OF THE AREA**
>
> Water Resources
>
> 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 which have capacities of about 300,000 gpd and 200,000 gpd, respectively, have been tested but are not yet operational. Well No. 10 which has a capacity of approximately 100,000 gpd with a possible potential of 150,000 gpd has also been tested and will be available. Currently available also is **brackish water from Well No. 1** which is operational and which has a capacity of about 600,000 gpd.
>
> * * * *

ADEQUACY OF PUBLIC SERVICES AND FACILITIES

Water Service

89. Petitioner is now in the process of developing the **brackish water supply for irrigation of the proposed golf course.** According to Petitioner, **Well No. 1**, which is operational and available, and **Well Nos. 9**, 10 and 12, which have been subjected to full testing, have aggregate brackish source capacity in excess of the projected requirements of 624,000 gpd to 800,000 gpd for the Manele golf course.

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, the requirement for which should be insignificant.

* * * *

CONFORMANCE WITH THE HAWAII STATE PLAN

112. The reclassification of the Property to allow the development of the proposed Manele golf course conforms to the Hawaii State Plan, Chapter 226, [Hawaii Revised Statutes] HRS, as amended, including the following objectives, policies and guidelines: . . .

§ 226-12(b)(1) Promote the preservation and restoration of significant natural and historic resources.

§ 226-13(b)(2) Promote the proper management of Hawaii's land and water resources.

§ 226-13(b)(3) Promote effective measures to achieve desired quality in Hawaii's surface, ground and coastal waters.

1991 Order, at pp. 14-15, 27-28, 33-34 (emphases added).

145. None of the parties are challenging, disputing, or seeking to amend the 1991 Order.

146. As discussed herein, Petitioner has presented substantial evidence that it did not violate Condition No. 10 and has consistently complied with Condition No. 10.

147. LSG argues that under the public trust doctrine, the Commission "has a constitutional mandate to consider the negative affect of the [Petitioner's] pumping on Lāna'i" and asks that the Commission consider whether Petitioner's use negatively affects past, current or future uses of potable water from the high-level aquifer. *Intervenor [LSG's] Motion for Clarification of Scope of Hearing, or in the Alternative, for an Order to Show Cause*, filed September 14, 2016, at p. 7.

148. To the extent that LSG alleges that the water resource is being harmed notwithstanding Petitioner's compliance with Condition No. 10, or that Condition No. 10 is insufficient to protect the water resource, such allegations are outside the scope of the Supreme Court's remand and are contradictory to the Commission's undisputed findings of fact in the 1991 Order.

149. Moreover, Petitioner has provided substantial evidence that its use of water for golf course irrigation, consistent with Condition No. 10, satisfies public trust principles.

150. Hawai`i has a bifurcated system of water rights. In areas designated by CWRM as water management areas, the provisions of the state Water Code, HRS Chapter 174C, prevail. In non-designated areas, water rights are governed by the common law. *In re Waiola O Molokai, Inc.*, 103 Hawai`i 401, 433, 83 P.3d 664, 696 (2004)

151. The island of Lāna'i is a non-designated area. *Exhibit I-1.*

152. The correlative rights rule 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).

153. With respect to non-designated areas, "[t]his state continues to recognize the 'correlative rights rule." . . . [T]he rule of correlative rights applies to all ground waters of the state." *In re Water Use Permit Applications*, 94 Hawai'i 97, 17-78, 9 P.3d 409, 489-90 (2000) (citing Haw. Const. art. XI, § 7 (referring to "correlative uses"); HRS § 174C–27(a) (1993) (same)); *cf. In re Waiola O Molokai, Inc.*, 103 Hawai'i at 449, 83 P.3d at 712 (stating that the common law doctrine of correlative rights was inapplicable because the entire island of Moloka'i had been designated a water management area).

154. Petitioner is the majority landowner on Lāna'i and owns the lands overlying the subject high-level aquifer. No party has identified any other overlying landowner aside from Petitioner.

155. Mr. Stubbart, Mr. Nance, and Mr. Matsumoto testified that aside from Petitioner, there is no other competing user of the brackish water source. *Tr., 11/10/2016, at 211:11-13 (Testimony of J. Stubbart); 11/15/2016, at 418:11-17; 11/16/2016, at 643:13-18 (Testimony of K. Matsumoto).*

156. Mr. Stubbart testified that Petitioner has the right to use the groundwater from Wells 1 and 9, based on its correlative rights as the overlying landowner. *Tr., 11/10/2016, at 211:14-17.*

157. The WUDP identifies Wells 1 and 9 as non-potable, brackish wells that have been and continue to be used for irrigating the Manele golf course. The WUDP does not identify any competing users. *Petitioner's Exhibit 12.*

158. OP's position is that the WUDP reflects public input, the considered judgment of water use decision-makers, and objective tests and practical experience, and is therefore consistent with the public trust doctrine. *Tr., 11/9/2016, at 151:20 – 152:13.*

159. Similarly, the County's position is that the WUDP is the product of a "comprehensive planning process that affords sufficient time for agency analysis and public input [and] is the most appropriate methodology to arrive upon a solution regarding the water allocation on Lanai." *Testimony of the Maui Planning Department*, filed August 11, 2016, at p. 5.

160. In addition to the substantial evidence of Petitioner's compliance with Condition No. 10, there is substantial evidence that Petitioner's use of water for irrigation of the Manele golf course has been and continues to be a reasonable and beneficial use of water and that there is no threat of impending harm to the water resource.

161. The Hawaii Supreme Court "has described the public trust relating to water resources as the authority and duty '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.' Similarly, article XI, section 1 of the Hawai'i Constitution requires the state both to 'protect' natural resources **and** to promote their 'use and development.' The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." *In re Water Use Permit Applications*, 94 Hawai`i at 138–39, 9 P.3d at 450–51 (citation omitted; emphases in original).

162. "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." *Id.* at 139, 9 P.3d at 451.

163. Mr. Asuncion, Mr. Stubbart, Mr. Shimizu, Mr. Nance, Mr. Schildknecht, Dr. Plasch, and Mr. Matsumoto testified that Petitioner's use of Wells 1 and 9 to irrigate the Manele Golf course is a "reasonable and beneficial use" of the water resource and is in the public

interest. *Tr., 11/9/2016, at 146:12-15 (Testimony of L. Asuncion); 11/10/2016, at 222:17-25 (Testimony of J. Stubbart); at 368:2-9 (Testimony of S. Shimizu); 11/15/2016, at 412:6-10 (Testimony of T. Nance); at 503:20 – 504:21 (Testimony of A. Schildknecht); at 580:6-16 (Testimony of B. Plasch); 11/16/2016, at 622:21-25 (Testimony of K. Matsumoto).*

164. It is undisputed that before water began being used to irrigate the Manele Golf Course, the water had been used for decades for the commercial farming of pineapple. The amount of water used for pineapple irrigation was substantially greater than the amount used for golf course irrigation today, and pineapple cultivation involved the use of contaminants, fertilizers, and other chemicals that could have affected the water resource. *Tr., 11/16/2016, at 722:22 – 724:11 (Testimony of B. Gima); Tr., 11/15/2016, at 389:23 – 390:15 (Testimony of T. Nance).*

165. Mr. Schildknecht testified that using brackish water for golf course irrigation was a common industry practice before 1991 through today, and the use of brackish water is a reasonable practice consistent with best management practices for golf course irrigation. *Tr., 11/15/2016, at 504:13-22.* Additionally, Mr. Schildknecht testified that the golf course was originally designed for water conservation, incorporating non-irrigated areas that have since increased to further reduce water use. *Id. at 501:6-22.*

166. Seril Shimizu, golf course superintendent at the Manele Golf Course, testified that water conservation is a priority at the golf course. The Manele Golf Course was originally designed to conserve water, and since then the course has made further changes to reduce water usage. These changes include reducing the amount of landscaped area, changing the type of turf grass, and updating its irrigation system. *Tr., 11/10/2016, at 354:1-21; 355:23 – 356:19; 357:22 – 361:16.*

167. Due to the current Petitioner's efforts, water usage at the Manele Golf Course has dropped by 18 to 20 percent from 2009 to 2015. *Id., at 364:20 – 365:6.*

168. Mr. Stubbart testified that if the Commission issued a ruling that prohibited Lāna'i Water Company from using Wells 1 and 9 for golf course irrigation, Lāna'i Water Company would not have an adequate water supply to provide constant, reliable service to the golf course and to the residential area that is also connected to the brackish water irrigation system. Although Wells 14 and 15 are part of the brackish water irrigation system, the water from those two wells would not be enough to meet the demand. *Tr., 11/9/2016, at 171:4 – 172:3.*

169. Assuming that potable water cannot be used for irrigation, brackish water from the high-level aquifer and reclaimed sewage effluent are the only water sources on Lāna'i that can be used to irrigate the Manele Golf Course. No other feasible alternative water source exists. *Id. at 172:4-10 (Testimony of J. Stubbart); Tr., 11/15/2016, at 500:19 – 501:2 (Testimony of A. Schildknecht).*

170. Lāna'i Water Company is implementing the conservation measures called for in the WUDP. Its projects include repairing and replacing fixtures to minimize leaks and reduce unaccounted-for water, investing in a new water-metering system, and identifying new water sources including new wells. *Tr., 11/9/2016, at 178:13 – 185:14 (Testimony of J. Stubbart).*

171. The current Petitioner is also implementing the WUDP's conservation measures and other measures aimed at increasing water resources. Mike Donoho, Vice President of Natural Resources for Pūlama Lāna'i (expert witness in natural resource management), testified that Pūlama Lāna'i's efforts include the development of a comprehensive watershed protection plan, maintaining and adding increment fencing around the watershed, the removal of grazing animals such as axis deer and mouflon sheep, replacing invasive species with native species,

implementing fire protection measures, designating a no-development area in the watershed, and partnering with the U.S. Fish and Wildlife Service and other agencies. *Tr., 11/15/2016, at 532:9 – 533:24; 535:7-22; 537:1-23; 545:3 – 546:7.* Compared to its predecessor entity, Castle & Cooke, Pūlama Lāna'i is employing an additional 20 or so employees to work in natural resources, with a projected 2017 budget of close to $2,000,000, not including capital expenditures. *Id., at 530:3-25.*

172. Bruce Plasch, Ph.D. (expert witness in economic analysis), testified that the Manele Golf Course provides "substantial economic benefits," such as contributing to millions in tax revenue to the State and County and approximately 780 direct jobs on the island and 1,270 jobs statewide. These benefits would be generated only if there is sufficient water to irrigate the golf course. *Tr., 11/15/2016, at 563:16; 568:1-14; 580:6-16.*

173. Dr. Plasch testified that in his opinion and experience, he believed there is no other viable economic activity that has a potential for replacing the economic activity generated by the Manele Golf Course and its contributions to the hotel operations and resort development. *Id., at 580:1-5.*

174. Kurt Matsumoto, Chief Operating Officer of Pūlama Lāna'i, testified that the Manele Golf Course is crucial to the rest of Pūlama Lāna'i's operations and economic viability. The golf course provides an amenity and attraction that is necessary because Lāna'i is more isolated and has fewer attractions compared to other resort locations. Thus, the loss of the golf course would be "catastrophic" to the rest of Pūlama Lāna'i's operations. *Tr., 11/16/2016, at 618:21 – 622:18; 624:6-25.*

175. Mr. Matsumoto testified that Pūlama Lāna'i's activities on the island include rehabilitating housing and community areas such as the pool, Lāna'i Theater, and the island's

water system; creating the Natural Resources Department and the Culture and Preservation Department; collaborating on a dual-college-credit program; and staffing over 70 percent of its management workforce with employees who were either born and raised on Lāna'i or have lived on the island for over 20 years. *Id., at 595:17 – 596:25; 597:1-24; 598:16-25;606:1-4.*

176. Mr. Asuncion testified that the Manele Golf Course conforms to the Hawaii State Plan and the State Land Use Urban District standards, and that therefore the Manele Golf Course is a permitted use consistent with the State Land Use plans and laws. OP finds that the public trust obligations of the State are being met with respect to the Manele Golf Course and the use of Wells 1 and 9 for irrigation of the golf course. *Tr., 11/9/2016, at 144:19 – 146:11.*

177. William Spence, Director of the County of Maui Planning Department, testified that the County does not see a violation of Condition No. 10. *Tr., 11/16/2016, at 692:8-9.* He further testified that the Manele Golf Course conforms to the Lāna'i Community Plan and is permitted and consistent with County land use plans and laws. *Id. at 697:2-17.*

178. Therefore, there is substantial evidence that Petitioner's use of Wells 1 and 9 to irrigate the Manele Golf Course is a "reasonable and beneficial use" of the water resource and is consistent with State and County standards and laws.

179. Finally, there is substantial evidence that Petitioner's use of water for golf course irrigation has not created a threat of actual or impending harm to the water resource.

180. As stated above, no water management areas have been designated on Lāna'i. On March 2, 1989, CWRM received a written petition to designate Lāna'i as a water management area. Following an investigation, hearings, and a determination, CWRM entered its "Resubmittal - Petition for Designating the Island of Lanai as a Water Management Area," dated March 29,

1990 (**1990 CWRM Resubmittal**), which denied the petition and decided against designating Lāna'i as a water management area. *Exhibit I-1.*

181. By letter dated December 4, 2009, CWRM wrote to Mr. Gima and the LWAC responding to a request to hold annual meetings or reopen designation proceedings. The letter confirmed the satisfaction of the 1990 CWRM Resubmittal's requirements and evaluated the eight groundwater designation criteria. The letter concluded, "As of now, we do not see the urgency of resuming annual meetings nor reopening designation proceedings." *Petitioner's Exhibit 44A.*

182. Mr. Hardy testified that CWRM observed and carried out its public trust obligations through its efforts addressing the petition for designation. *Tr., 11/10/2016, at 223:11-16.*

183. CWRM receives and reviews the PWRs that Lāna'i Water Company produces every 28 days. Mr. Hardy testified that the PWRs produced since the 1990 CWRM Resubmittal show no changes that pose a threat to the water resources on the island. The only change is that pumpage is now lower than it was when pineapple agricultural uses were ongoing. *Id., at 224:13 – 225:7.*

184. Public testimony and the testimony of Mr. Stubbart confirmed that no water use restrictions have been placed on any residents of the island, even during long periods of drought such as the recent drought from 2008 to 2012. *Tr., 11/10/2016, at 208:11-22 (Testimony of J. Stubbart).*

185. Mr. Stubbart testified that Lāna'i Water Company has a water shortage plan that sets forth a prioritization of water uses in the event of a water shortage. The plan mirrors the

prioritization shown in the State's plan. Both plans assign domestic (residential) uses as the first priority, and golf course irrigation uses as the lowest priority. *Tr., 11/9/2016, at 189:7-22.*

186. Mr. Hardy and Mr. Nance testified that has been no actual harm to the aquifer, and there is no threat of irreparable or irreversible permanent harm. *Tr., 11/10/2016, at 229:15-22 (Testimony of R. Hardy); 11/15/2016, at 391:7-19 (Testimony of T. Nance).*

187. LSG's witness Mr. Gima admitted that no harm or long-term threat is posed by the use of Wells 1 and 9 to irrigate the Manele Golf Course. *Tr., 11/16/2016, at 753:6-13 (Testimony of B. Gima).*

188. Therefore, there is substantial evidence that Petitioner's use of Wells 1 and 9 to irrigate the Manele Golf Course has not created actual harm or a threat of irreversible harm to the water resource.

RULINGS ON PROPOSED FINDINGS OF FACT

189. Any of the findings of fact submitted by Petitioner or other parties not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

190. Any conclusion of law herein improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

1. Pursuant to Chapter 205, HRS, and the Land Use Commission Rules under Chapter 15-15, Hawaii Administrative Rules (**HAR**), and upon consideration of the Commission decision-making criteria under HRS § 205-17, this Commission finds upon a clear preponderance of the evidence that Petitioner has performed according to Condition No. 10 of

the 1991 Order and that there was insufficient evidence to support the Commission's 1996 OSC Order finding a violation of Condition No. 10.

2. Condition No. 10 does not specifically define the term "potable."

3. Condition No. 10 defines "alternative non-potable sources of water" by way of example as "e.g., brackish water, reclaimed sewage effluent." Therefore, brackish water and reclaimed sewage effluent are "alternative non-potable sources of water," and Condition No. 10 permits Petitioner to utilize brackish water and reclaimed sewage effluent for golf course irrigation requirements.

4. Condition No. 10 prohibits the use of potable water from the high level aquifer to irrigate the Manele Golf Course, and instead requires Petitioner to use alternative non-potable water to irrigate the Manele Golf Course. Accordingly, in order to define the terms consistent with each other, "potable water" as that term is used in Condition No. 10 must mean water that is not "non-potable" as that term is used in Condition No. 10.

5. Wells 1 and 9 were the subject of the original order to show cause proceedings and the 1996 OSC Order that were remanded by the Hawaii Supreme Court to the Commission. Wells 1 and 9 are brackish, non-potable sources of water that Petitioner may utilize.

6. Wells 1 and 9 and reclaimed sewage effluent were the only sources of water that Petitioner utilized for golf course irrigation during the proceedings leading up to the 1996 OSC Order.

7. Petitioner has not utilized potable water from the high-level groundwater aquifer to irrigate the Manele Golf Course.

8. Petitioner has proved its compliance with Condition No. 10 by a preponderance of the evidence.

9. There is no substantial evidence of leakage of potable water to the wells in the Pālāwai Basin. Further, such leakage does not constitute utilization of potable water as prohibited by Condition No. 10.

10. Article XI, Section 1 of the Hawai'i State Constitution requires the State to "conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources," and to "promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."

11. Article XI, Section 7 of the Hawai'i State Constitution requires the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" and provide a water resources agency that shall "set overall water conservation, quality and use polices; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources."

12. Article XI, Section 1 of the Hawai'i State Constitution states that all public natural resources are held in trust by the State for the public benefit. Government bodies are "precluded from allowing an applicant's proposed use to impact the public trust in the absence of an affirmative showing that the use does not conflict with those principles and purposes." *Kauai Springs, Inc. v. Planning Comm'n of County of Kauai*, 133 Hawai`i 141, 174, 324 P.3d 951, 984 (2014).

13. The Commission concludes Petitioner has made an affirmative showing that its use of Wells 1 and 9 to irrigate the Manele Golf Course does not conflict and is consistent with public trust principles and purposes.

14. Petitioner's correlative use of the water resource is a "reasonable and beneficial use," and there is no actual harm or threat of irreparable or irreversible harm to the water resources caused by Petitioner's use.

15. The Commission concludes that it has observed and carried out its public trust duties in this case, as set forth under Article XI, Sections 1 and 7 of the Hawai'i State Constitution.

VI. ORDER

IT IS HEREBY ORDERED that (1) Petitioner has proved its compliance with Condition No. 10 by a preponderance of the evidence, and therefore the 1996 OSC Order is hereby VACATED, and (2) the Commission's "Order to Show Cause" entered October 13, 1993 has been resolved, and no further action shall be taken.

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 **PARTIAL STIPULATION AND PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER; 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
LEO R. ASUNCION, Jr., AICP, Director RODNEY Y. FUNAKOSHI Office of State Planning 235 South Beretania Street, 6th Floor Honolulu, Hawaii 96813	Via U.S. Postal Mail

WILLIAM SPENCE, Director Planning Department, County of Maui 2200 Main Street One Main Plaza, Suite 315 Wailuku, HI 96793	Via U.S. Postal Mail
PATRICK K. WONG, ESQ. MICHAEL HOPPER, ESQ. CALEB ROWE, ESQ. Office of the Corporation Counsel 200 South High Street Wailuku, Hawaii 96793	Via U.S. Postal Mail
DAVID KOPPER, ESQ. LI`ULA NAKAMA, ESQ. Native Hawaiian Legal Corporation 1164 Bishop Street, Suite 1205 Honolulu, Hawaii 96813 Attorney for Intervenor LANAIANS FOR SENSIBLE GROWTH	Via U.S. Postal Mail

DATED: Honolulu, Hawaii, December 29, 2016.

BENJAMIN A. KUDO
CLARA PARK
Attorneys for
LĀNA`I RESORTS, LLC