

JODI S. YAMAMOTO 6757
WIL K. YAMAMOTO 7817

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YAMAMOTO CALIBOSO
A Limited Liability Law Company
1100 Alakea Street, Suite 3100
Honolulu, Hawaii 96813
Phone No. (808) 540-4500
Facsimile No. (808) 540-4530
Emails: iyamamoto@ychawaii.com
wyamamoto@ychawaii.com

Attorneys for MMK MAUI, LP

COMMISSION ON WATER RESOURCE MANAGEMENT
STATE OF HAWAII

Surface Water Use Permit Applications,) Case No. CCH-MA15-01
Integration of Appurtenant Rights and)
Amendments to the Interim Instream) MMK MAUI, LP'S MOTION FOR
Flow Standards, Na Wai Eha Surface) CLARIFICATION OR, IN THE
Water Management Areas of Waihee) ALTERNATIVE, FOR PARTIAL
River, Waiehu Stream, Wailuku River) RECONSIDERATION OF THE
(previously known as Iao Stream) and) FINDINGS OF FACT, CONCLUSIONS
Waikapu Streams, Maui) OF LAW, DECISION & ORDER FILED
) JUNE 28, 2021; MEMORANDUM IN
) SUPPORT OF MOTION; CERTIFICATE
) OF SERVICE

MMK MAUI, LP'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR PARTIAL RECONSIDERATION OF THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER FILED JUNE 28, 2021

MMK Maui, LP ("MMK"), by and through its counsel Yamamoto Caliboso, hereby respectfully moves the Commission on Water Resource Management, State of Hawaii (the "Commission"), pursuant to Hawaii Administrative Rules ("HAR") §§ 13-167-64 and 13-167-58, for clarification or, in the alternative, for partial reconsideration of the

Commission's Findings of Fact, Conclusions of Law, and Decision & Order, issued June 28, 2021 ("D&O").¹

MMK respectfully requests that the Commission grant this motion to clarify or, in the alternative, partially reconsider the 762,500 gallons per day ("GPD") existing use permit granted to MMK such that the monitoring of said permit will be on a 12-month moving average ("12-MAV"), consistent with the Hearing Officer's Proposed Conclusions of Law regarding the 12-MAV, which we believe was neither discussed nor amended in the Commission's D&O.

The basis for this motion, as further discussed in the Memorandum in Support of Motion and incorporated by reference, is that it is reasonable to resolve this ambiguity and the uncertainty created by the D&O with respect to the monitoring of the existing use permit granted to MMK in the D&O.

DATED: Honolulu, Hawaii, July 6, 2021.



JODI S. YAMAMOTO
WIL K. YAMAMOTO

Attorneys for MMK MAUI, LP

¹ MMK's Motion for Clarification and/or Partial Reconsideration is timely filed. Pursuant to HAR § 13-167-64, a motion for reconsideration shall be made not later than five business days after the decision or any deadline established by law for the disposition of the subject matter, whichever is earlier. The D&O was issued on June 28, 2021. The fifth business day following June 28th is Tuesday, July 6, 2021, given that Monday, July 5th, is a State holiday.

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,) Case No. CCH-MA15-01
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Flow Standards, Na Wai Eha Surface) MOTION
Water Management Areas of Waihee)
River, Waiehu Stream, Wailuku River)
(previously known as Iao Stream) and)
Waikapu Streams, Maui)
_____)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

MMK Maui, LP ("MMK") respectfully moves the Commission on Water Resource Management, State of Hawaii (the "Commission"), pursuant to Hawaii Administrative Rules ("HAR") §§ 13-167-64 and 13-167-58, for clarification or, in the alternative, for partial reconsideration of the Commission's Findings of Fact, Conclusions of Law, and Decision & Order, issued June 28, 2021 ("D&O").

For the reasons set forth herein, MMK respectfully requests that the Commission grant this motion to clarify or, in the alternative, reconsider the 762,500 gallons per day ("GPD") existing use permit granted to MMK such that the monitoring of said permit will be on a 12-month moving average ("12-MAV"), consistent with the Hearing Officer's Proposed Conclusions of Law regarding the 12-MAV,² which we believe was neither discussed nor amended in the Commission's D&O. In the alternative, if it was not the intent of the Commission to address how the existing use permit would be monitored, MMK

² See Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Decision & Order, filed November 1, 2017, at page 505, lines 16 to 24.

respectfully requests that the Commission reconsider addressing how the permit should be monitored and confirm that monitoring on a 12-MAV is acceptable.

MMK respectfully requests that the Commission confirm that monitoring on a 12-MAV is acceptable as it will significantly affect MMK's ability to optimize and most efficiently utilize the limited water available under the existing use permit in light of seasonal variations in weather and rainfall throughout a given year (e.g., wetter winter months vs drier summer months). Absent this flexibility, MMK's ability to operate its business and maintain its golf courses could be severely impaired if not completely disabled. Accordingly, MMK respectfully requests confirmation that the permitted use of 762,500 GPD can be exceeded, as long as the 12-MAV is within MMK's 762,500 GPD allocation.

II. PROCEDURAL HISTORY AND BACKGROUND.

MMK owns and operates two golf courses, the King Kamehameha Golf Course and the Kahili Golf Course (collectively, the "Golf Courses"), located in Waikapu, Wailuku, Maui. The Golf Courses, which encompass approximately 350 acres of land and employ approximately 130 employees, provide the Maui community with opportunities for golf, club membership, banquets, weddings, food and beverage, tours, and a meeting place for the Maui community.³ MMK's operations generate significant economic benefits for Maui County and the State by way of wages and tax revenue for the State and County.⁴ Without sufficient water to maintain the turf at the Golf Courses, MMK could be forced to shut down the Golf Courses and terminate its employees as the banquets and events

³ See MMK's Opening Brief, filed February 5, 2016 ("Opening Brief"); see also Direct Written Statement of Scott Carroll, filed February 5, 2016 ("Carroll Testimony"), at paragraph 15.

⁴ See Carroll Testimony at paragraph 16.

portion of the business would have a very difficult time surviving as stand-alone operations without the Golf Courses, potentially affecting approximately 130 Maui jobs and 365 members.⁵

On April 22, 2009, MMK submitted and filed its Application for Surface Water Use Permit for Existing Use in the Na Wai Eha, Maui, Surface Water Management Areas (“MMK SWUPA”) for 1.29 million GPD.⁶ MMK later amended and reduced its request to 1.25 million GPD based on what is reasonable and necessary due to seasonal variations in annual weather and rainfall.⁷ MMK further explained that the amount of water necessary to irrigate the Golf Courses is heavily dependent on weather conditions, and that the water demands of the Golf Courses fluctuate greatly from season to season, and month to month.⁸ Typically, the water needs of the Golf Courses decrease during the winter months and increase during the summer months and fluctuate significantly depending on seasonal variations and the climate.⁹

On November 1, 2017, the Hearings Officer submitted his Proposed Findings of Fact, Conclusions of Law, and Decision & Order (“Proposed D&O”). The Proposed D&O proposed to grant MMK a Category 2 existing-use permit for 1.037 million GPD, and stated:

Moreover, monitoring of permits is on a 12-month moving average (“12-MAV”), so the permitted use for 1.037 mgd can be exceeded, as long as the 12-MAV is within the 1.037 mgd.¹⁰

⁵ See Carroll Testimony at paragraph 18.

⁶ See cover letter to MMK SWUPA.

⁷ See Direct Written Statement of Ikaika Bechert, filed February 5, 2016 (“Bechert Testimony”), at paragraphs 27-33.

⁸ See Opening Brief, at 15; see also Bechert Testimony at paragraphs 25-27 and Exhibit No. 2186-MMK-4, submitted on February 5, 2016, which is a chart showing the water use of the Golf Courses from June 2006 through December 2015.

⁹ See Bechert Testimony, at paragraph 27.

¹⁰ See Proposed D&O, at page 505, lines 16 to 24.

On June 28, 2021, the Commission issued its Findings of Fact (“FOF”) related to the MMK SWUPA in which it discusses the use of a 12-MAV in evaluating the water requested in the MMK SWUPA.¹¹ The D&O ultimately grants MMK an existing use permit for 762,500 GPD;¹² however, did not discuss or amend the Proposed D&O’s direction to monitor the permit using a 12-MAV.

III. DISCUSSION.

A. Legal Standard.

MMK respectfully submits that clarification of the D&O is appropriate and reasonable if there is language in the D&O that is vague and/or ambiguous.¹³ The absence of language regarding the 12-MAV that was included in the Proposed D&O creates uncertainty such that MMK may be unable to appropriately evaluate and implement its granted Permit. As noted by the Hawaii Supreme Court, an agency’s finding must be “reasonably clear,” and “[t]he parties ... should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency.”¹⁴

In addition, HAR § 13-167-64 provides that the Commission may reconsider a

¹¹ See D&O, at pages 238-239.

¹² See D&O, at page 355.

¹³ There is no Hawaii caselaw that discusses the standard for a motion for clarification. However, several other jurisdictions have explained that the general purpose of a motion for clarification is to explain or clarify something that is ambiguous or vague, not to alter or amend. Kirwa v. United States Dep’t of Def., 315 F.Supp.3d 266, 267 (D.D.C. 2018)(“[t]he general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend.”); Perry v. Perry, 130 Conn.App. 720, 726, 24 A.3d 1269, 1273 (2011)(“Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision ... but, not where the movant’s request would cause a substantive change in the existing decision.”); Ebert v. Twp. of Hamilton, No. CV 15-7331, 2018 WL 4961467, at *2 (D.N.J. Oct. 15, 2018)(“[t]he general purpose of a motion for clarification is to explain or clarify something ambiguous or vague, not to alter or amend.”); Greenberg v. Scholastic, Inc., No. CV 16-6353, 2018 WL 6268411, at *1 (E.D. Pa. Nov. 30, 2018).

¹⁴ In re Water Use Permit Applications, 94 Hawai’i 97, 157, 9 P.3d 409, 469 (2000)(“Waiahole I”)(internal citations omitted).

decision it has made on the merits only if the party can show: (1) new information not previously available would affect the result; or (2) that a substantial injustice would occur.

B. The D&O is Ambiguous With Respect to How MMK's Granted Existing Use Permit Will Be Monitored, Thus Creating Uncertainty.

The D&O imposes conditions applicable to all permits, which includes the condition that each permittee will be required to report their monthly water use to the Commission in accordance with HAR § 13-168-7.¹⁵ However, unlike the Hearing Officer's Proposed D&O, the D&O does not specify whether a 12-MAV will be used to monitor compliance with MMK's existing use permit.

The D&O also sets forth that the Commission is adopting the Q_{70} flow as the basis for setting the Interim Instream Inflow Standards ("IIFS") and issuance of water permits, and that by doing so there will be times when offstream permittees will have no water or insufficient water.¹⁶ The D&O further sets forth that the available water from each river or stream will vary with stream flows, thus, there will also be times when the requirements from a particular source cannot be met because of a deficiency between available water and irrigation requirements.¹⁷ To resolve this deficiency, the D&O states, "[t]o assist in meeting irrigation requirements during low-flow periods, the Commission is supportive of permittees maximizing their reservoir storage capacities when stream flows exceed Q_{50} [and] [p]ermittees may be allowed to divert water in excess of their permit allocations in order to fill their reservoirs subject to a stream diversion modification approved by the Commission."¹⁸ Thus, the D&O recognizes that there may a deficiency between available

¹⁵ D&O, at 358.

¹⁶ D&O, at 283-284.

¹⁷ D&O, at 284.

¹⁸ D&O, at 284. The D&O further states that "[p]ermittees may be allowed to divert water in excess of their permit allocations in order to fill their reservoirs subject to a stream modification approved by the Commission."

water and irrigation requirements, and allows permittees to divert water in excess of their permit allocations in order to fill their reservoirs to assist in meeting irrigation requirements during low-flow periods. A 12-MAV would similarly allow MMK the flexibility to utilize water in excess of its permit allocation in a given day or month to meet its irrigation requirements, so long as the 12-MAV is within the 762,500 GPD granted under MMK's existing use permit.

In Waiahole I, appeals were taken with respect to a Decision and Order issued by the Commission following a contested case hearing related to a ditch system for collecting fresh surface water and ground water.¹⁹ During the appeal, the Commission indicated that a 12-MAV is “generally used for all water use reporting requirements.”²⁰ The Hawaii Supreme Court did not prohibit the use of a 12-MAV but expressed concerns that a 12-MAV applied to leeward offstream uses was based on streams that were potentially subject to “extreme and potentially harmful fluctuations in base flow over the course of a year.”²¹ In light of these concerns, the Hawaii Supreme Court directed the Commission to “consider measures such as coordination of the times and rates of offstream uses, construction and use of reservoirs, and use of a shorter time period over which to measure average usage” to mitigate the impact of offstream demand on instream base flows, and “[i]f necessary ... designate the WIIFS so as to accommodate higher offstream demand at certain times of the year.”²² On remand, the Commission considered mitigation measures pursuant to the direction of the Hawaii Supreme Court.²³ With respect to

¹⁹ 94 Hawai'i 97, 9 P.3d 409 (2000).

²⁰ Waiahole I, 94 Hawaii at 171-72, P.3d at 483-84.

²¹ Waiahole I, 94 Hawaii at 171, P.3d at 483.

²² Waiahole I, 94 Hawaii at 171-72, P.3d at 483-84 (emphasis added).

²³ CCH-OA95-01: In the Matter of the Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations For the Waiahole Ditch Combined Contested Case Hearing, on Remand; Legal Framework, Findings of Fact, and Decision and Order, filed December

alternatives to a 12-MAV, the Commission noted that if “permittees are not allowed to exceed their allotments even for a day, their allotments in practice would have been capped at that amount, and their average use will be de facto below (and possibly significantly below) what they had been permitted” and accordingly, “in effect, the permitted uses would have been capped at the use for any one day.”²⁴ In doing so, the Commission stated that it would be faced with two choices.²⁵ First, the Commission could pick an “average” use number in practice which would be the maximum amount that a permittee would be allowed on any day, however, because of the highly variable amounts of water needed for these operations, this would result in reducing water allotments to the point of endangering the viability of the permittee.²⁶ Or, second, the Commission could pick a maximum use number, but this would have led to greatly underutilized permitted water, at the expense of other applicants, along with a potential charge that the Commission had made an unreasonable allocation.²⁷ The Commission ultimately determined that the best practicable approach to mitigate the impact of variable offstream demand consisted of several elements, which included the continued use of a 12-MAV.²⁸ The Commission’s decision to continue to apply the 12-MAV in the remanded proceeding was not disturbed by the Hawaii Supreme Court.

As described and contained in the record before the Commission, MMK’s use of

28, 2001 (“2001 Waiahole D&O”).

²⁴ 2001 Waiahole D&O, at 114.

²⁵ 2001 Waiahole D&O, at 114.

²⁶ 2001 Waiahole D&O, at 114-115.

²⁷ 2001 Waiahole D&O, at 114.

²⁸ 2001 Waiahole D&O, at 113-119. The approach adopted by the Commission to mitigate the impact of offstream demand on instream base flows consisted of the following elements: (1) continued use of the 12-MAV; (2) designation of the IIFS to allow for variability on a limited, monthly basis; and (3) add water to the streams to meet the amended IIFS before any water could be used by leeward permittees. 2001 Waiahole D&O, at 116.

water to irrigate the Golf Courses will vary significantly based upon seasonal weather and rainfall throughout a given year. For example, the water needs of the Golf Courses decrease during the winter months and increase during the summer months. Absent sufficient water to maintain the Golf Courses on a year-round basis, including the drier summer months, MMK could be forced to shut down the Golf Courses and terminate its approximately 130 employees. Accordingly, MMK respectfully requests that the Commission grant this motion to clarify that the monitoring of MMK's 762,500 GPD existing use permit will be on a 12-MAV, consistent with both the Hearing Officer's Proposed Conclusions of Law regarding the 12-MAV and the Commission's decision in the 2001 Waiahole I D&O to continue to apply the 12-MAV, which decision was not disturbed by the Hawaii Supreme Court. In the alternative, if it was not the intent of the Commission to address how the existing use permit would be monitored, MMK respectfully requests that the Commission reconsider addressing how the permit should be monitored and confirm that monitoring on a 12-MAV is acceptable.

IV. CONCLUSION.

For the reasons set forth herein, MMK respectfully requests that the Commission grant the instant Motion and clarify that MMK's Permit will be implemented and monitored in accordance with a 12-MAV.

DATED: Honolulu, Hawaii, July 6, 2021.



JODI S. YAMAMOTO
WIL K. YAMAMOTO

Attorneys for MMK MAUI, LP

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

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_____)

CERTIFICATE OF SERVICE

On July 6, 2021, true and correct copies of the foregoing documents were served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

ELECTRONIC SERVICE

Noelani & Alan Almeida alana89@juno.com
Gordon Almeida
P.O. Box 1005
Wailuku, HI 96793

Douglas Bell puna.papabell@gmail.com
1420 Honua Place
Waikapu, HI 96793

Doyle Betsill teresa@bbcmaui.com
c/o Betsill Brothers
P.O. Box 1451
Wailuku, HI 96793

Francisco Cerizo cerizof@gmail.com
P.O. Box 492
Wailuku, HI 96793

Heinz Jung and Cecilia Chang cici.chang@hawaiiantel.net
P.O. Box 1211
Wailuku, HI 96793

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

jorrieciotti@gmail.com

Fred Coffey
1271 Malaihi Road
Wailuku, HI 96793

hawaii50peleke@yahoo.com

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

jimdodd47@gmail.com

Steve Haller
1060 East Kuiaha Road
Haiku, HI 96708

hallerlandscapes@gmail.com

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

kdehart17@gmail.com

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

jduey@maui.net

nanisantos808@gmail.com

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

kanealoha808@gmail.com

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

kapunafarms@gmail.com

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

ag2517@aol.com

Nicholas Harders on behalf of:

waikapu@me.com

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

Theodore & Zelig Harders

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

Greg Ibara
227 Kawaipuna Street
Wailuku, HI 96793

gregibara56@gmail.com

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

cmcmaui@live.com

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

char1151@hawaii.rr.com

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

pauahi808@aol.com

Downey Rugtiv Manoukian TTEE
POB 1609
Waianae, HI 96792

downrm@yahoo.com

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

myoheo@yahoo.com

Douglas Myers
1299 Malaihi Road
Wailuku, HI 96793

upperwaiehu@yahoo.com

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

nokamura@kiheigardens

Francis Ornellas
340 Iao Valley Road
Wailuku, HI 96793

kumuwiliwili@gmail.com

Lorrin Pang
166 River Road
Wailuku, HI 96793

pangk005@hawaii.rr.com

Victor and Walette Pellegrino
c/o Hokuao Pellegrino
213 West Waiko Road
Waikapu, HI 96793

hokuao.pellegrino@gmail.com

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

lorilei@hawaii.edu

Michael Rodrigues
2518 W. Main Street
Wailuku, HI 96793

mikerodmaui@yahoo.com

Waldemar & Darlene Rogers
1421 Nuna Place
Wailuku, HI 96793

rogersw001@hawaii.rr.com

Burt Sakata
107 Waihee Valley Road
Wailuku, HI 96793

waihee89@yahoo.com

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

mauifishfarm@hawaiiantel.net

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

sevillad001@hawaii.rr.com

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

ohianui.ohana@gmail.com

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

murray@jps.net

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

nalanismythe@yahoo.com

Clayton Suzuki
Linda Kadosaki
Reed Suzuki

cssuzuki@hawaiiantel.net

Scott Suzuki
P.O. Box 2577
Wailuku, HI 96793

John Varel
191 Waihee Valley Road
Wailuku, HI 96793

jvarel@fusionstorm.com

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

mikievida@hotmail.com

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

dmlavida@yahoo.com

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

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

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

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

Colin J. Lau, Esq.
465 S. King Street, Room 300
Honolulu, Hawaii 96813
cc: Russell Kumabe
Holly McEldowney
(DLNR, Division of State Parks)

colin.j.lau@hawaii.gov

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

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

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

ghew@hcsugar.com

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

christina@hilt.org

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

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

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

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

abc@aloha.net

Judy Tanaka, Esq.
Pamela Bunn, Esq.
DENTONS US LLP
1001 Bishop Street, Suite 1800
Honolulu, HI 96813
(Office of Hawaiian Affairs)

judy.tanaka@dentons.com
pamela.bunn@dentons.com

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

cnakamura@carlsmith.com
chall@carlsmith.com

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

pah@mhmaui.com
kkt@mhmaui.com

albertboyce@gmail.com

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

bkang@wik.com
ekaimuloa@wik.com

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

pmancini@mrwlaw.com
jgeiger@mrwlaw.com

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

tim_mayer@fws.gov

frank.wilson@sol.doi.gov

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

earleen@tonytlaw.com

Jae B. Park, Esq.
Ashford & Wriston
999 Bishop Street, Suite 1400
Honolulu, HI 96813
(Mahi Pono, LLC)

jpark@awlaw.com

Mahi Pono, LLC
c/o Grant Nakama
PO Box 1104
Puunene, HI 96784

grant.nakama@mahipono.com

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

lhmiike@hawaii.rr.com

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

linda.l.chow@hawaii.gov

DATED: Honolulu, Hawaii, July 6, 2021.



JODI S. YAMAMOTO
WIL K. YAMAMOTO

YAMAMOTO CALIBOSO
A Limited Liability Law Company

Attorneys for MMK MAUI, LP