

Wilma Noelani Joy
[REDACTED]
Hoolehua, HI 96729
April 18, 2022

State of Hawaii
Department of Land and
Resources
Commission on Water Resource Management
P. O. Box 621
Honolulu, HI 96809

RE: Commission Meeting of April 19, 2022
Action Item C-3

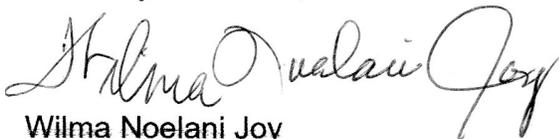
I am Hawaiian Homesteader, lot 70 in Hoolehua, Molokai currently serviced by the Molokai Irrigation System (MIS) that receives water from Waikolu Stream. I am concerned that item C-3 will negatively impact Hawaiian Homesteader access to irrigation water from the MIS. All water developed by the MIS is needed by users of the MIS. MIS water use is approved as current use and needs to be protected.

Also state statute, HRS 168-4, gives 2/3 preference to water developed by the MIS. I have personally used the preference to deny DOA-MIS from restricting my water use. How will this water reservation affect the 2/3 preference? If they take from the MIS then 2/3 of nothing is nothing and render the 2/3 preference waterless and worthless.

Since Hawaiian Homes has no land in the Waikolu valley, I am unsure what rights DHHL is claiming to Waikolu stream. I saw documents that Hawaiian Homes surrender their rights to all water in Waikolu to develop the MIS to bring the water to the Kualapuu area, Hoolehua Homesteads, and Molokai Agriculture Park. This should be investigated.

Therefore, I request that water reservation request should include protection for current water use, protect the 2/3 preference and have further investigations to DHHL rights to the waters of Waikolu Stream and what Hawaiian Home Lands it will service.

Sincerely submitted,



Wilma Noelani Joy
Hoolehua Hawaiian Homestead
MIS Water User

Glenn I. Teves

Ho'olehua, HI 96729

April 18, 2022

TO: Commission of Water Resource Management
FROM: Glenn I. Teves
RE: Testimony for April 19 meeting

Aloha. I would like to comment on two agenda items:

1. **Hawaiian Home Lands Reservation:** As a Hoolehua homesteader, I'm in support of the 6 mgd reservation for DHHL. With over 25,000 acres of land on Molokai, this water is critical for residential, subsistence, and also small agriculture outside of the Hoolehua area. Climate change has increased water needs along with severe drought we're experiencing already this year. The change in wind direction from NE trades to easterly winds have dramatically decreased rainfall as both Maui and Hawaii island are blocking the new prevailing winds and changing rainfall patterns. I'm not really sure what RESERVATION means as DHHL waited 27 years to receive an additional 240,000 gpd from their 2.095 reservation, and when they were already using this amount 27 years ago?!?!?
2. **Molokai Ranch:** Molokai Ranch has to own up to the fact that no one knows how much water they're using because they haven't shared records and I question if they really have accurate water records! Water allocations are based on records of existing water use, and if they cannot show records how can CWRM approve additional water? The fact that Molokai Ranch has NEVER had a water allocation for Well 17 is very troublesome, yet they continue to pump water from this well with no repercussions for their misdeeds. They cannot continue to bank water as they've done in the past and were caught dumping water in a gulch on West Molokai?!? They cannot be allowed to dewater our streams because this water if left there will recharge some our important aquifers. They have taken the mantra, "It's better to ask for forgiveness than to ask for permission" to a new level. CWRM needs to seriously consider imposing fines on Molokai Ranch for violation of the Water Code. Otherwise, others will do the same. Furthermore, they have not sought an EIS after they decoupled from the Molokai Irrigation System as called for when crossing State land. In closing, I will be proposing to the Hawaiian Homes Commission at their meeting on Molokai today and tomorrow that they just take the water they need for homesteading without asking permission in an effort to determine what is the higher law, the Hawaiian Homes Act or the State Water Code? They cannot wait another 27 years when awarding new homesteads.

Mahalo for this opportunity to provide testimony.



April 18, 2022

Via Electronic Mail

Commission on Water Resource Management
Kalanimoku Building
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Honolulu, Hawai'i 96813
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Re: Agenda Item C.2: Address Portions of Complaint Against Waste by Moloka'i Ranch, filed by Moloka'i Nō Ka Heke (CDR.5310.4) by Amending Interim Instream Flow Standards for the Surface Water Hydrologic Units of Kawela (4037), Kaunakakai (4039), and Manawainui (4041), Moloka'i

Agenda Item C.3: Approval of Surface Water Reservation of 6.0914 Million Gallons per Day for the Department of Hawaiian Home Lands and Amend the Interim Instream Flow Standards for Waikolu Stream for the Surface Water Hydrologic Unit of Waikolu (4003), Moloka'i

Dear Chair Case and Commissioners:

On behalf of Moloka'i Nō Ka Heke, Earthjustice urges this Commission to (1) fully restore Kawela Stream, (2) require abandonment and removal of the Kawela diversion intake structures, and (3) establish interim instream flow standards ("IIFSs") for intakes at three neighboring tributaries of Manawainui and Kaunakakai Streams. These stream diversions, together with another diversion of a tributary of Waikolu Stream, feed into the Moloka'i Ranch's Mountain Water System ("MWS"), although all but two have long been inactive. For over a century, the MWS has diverted the bulk of Kawela's water and piped it across the island to arid Kaluako'i Ahupua'a in West Moloka'i. While private entities have bought, sold, and traded these lands since the time of the Kingdom and have consistently drained Kawela Stream dry, no attempt to exploit Kaluako'i for profit has survived the test of time.¹

Full restoration of Kawela Stream is practicable because existing and planned offstream uses can be met by responsibly managing surface water inputs from other streams and more efficiently utilizing MWS infrastructure, including existing storage capacity. Indeed, the data

¹ Moloka'i Nō Ka Heke incorporates by reference its written testimony on agenda items B.4 and B.5 of this Commission's March 15, 2022 meeting, at which the Commission considered these issues but deferred decision-making.

presented in Staff's submittals for agenda items C.2 ("Submittal C.2") and C.3 ("Submittal C.3") do not support Staff's assertion that Kawela must be diverted to meet all offstream uses.² By managing existing MWS infrastructure to enable full restoration of Kawela Stream, the Commission can effectuate its kuleana to enhance and restore these long-overexploited public trust resources to the extent practicable, while supporting and honoring the Kawela community's kuleana to ensure that their 'āina will thrive for generations to come. Given the overwhelming evidence of wasteful diversions by the MWS, this Commission should take firm action to rectify these wrongs and allow Kawela Ahupua'a to recover from over a century of abuse.

Regarding the Staff recommendations for agenda item C.3, Moloka'i Nō Ka Heke supports reservation of water from Waikolu Stream for use by the Department of Hawaiian Home Lands ("DHHL"), including the portion of Waikolu water diverted into the MWS. As discussed below, all offstream needs can readily be met by better managing the MWS as a whole.

I. Legal Duty to Protect and Restore Instream Flows to the Extent Practicable

While Staff's Submittal summarizes several of the legal underpinnings for the Commission's authority to manage surface water resources, Moloka'i Nō Ka Heke further emphasizes the legal principles and standards governing the Commission's decision in this case. In addition to the Water Code provisions and appellate court holdings noted in the Submittal, the public trust doctrine—as enshrined in our Constitution and expressed through the Water Code—expressly mandate that this Commission:

- (1) Protect and restore instream uses and values "to the extent practicable," *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 156 (2000) ("*Waiāhole*");
- (2) "[P]rotect, enhance, and reestablish, where practicable, beneficial instream uses of water," *id.* at 149;
- (3) "[R]eassess previous diversions and allocations," *id.* at 149; and
- (4) Consider "physical solutions, including . . . modification of [water] project operations, changes in time and rate of diversion, *uses of water from alternative sources, or any other solution*," to "minimize the impact" of stream restoration on existing uses, Haw. Rev. Stat. § 174C-71(1)(E) (emphasis added).

II. The Mountain Water System

The MWS consists of dams, intakes, reservoirs, and a network of pipelines transmitting diverted mountain stream water across the island and pumping it back uphill at the base of Maunaloa.

² See, e.g., Submittal C.2, Table 9 at 35.

Streams and Intakes. The estimated diversion capacities for each MWS intake,³ and the estimated quantities diverted in 1992,⁴ are as follows:

| MWS Intake | Divertible Capacity (gpd) | 1992 Diversions (gpd) | Status |
|------------------------|---------------------------|-----------------------|----------|
| East Kawela | 500,000 | 562,000 | active |
| East Kawela Tributary | unknown | 67,000 | unusable |
| West Kawela | 100,000 | 67,000 | inactive |
| Kamoku (Kaunakakai) | 150,000 | 71,000 | inactive |
| Lualohe (Manawainui) | 100,000 | 270,000 | inactive |
| Kalihi (Manawainui) | 70,000 | 71,000 | inactive |
| Hanalilolilo (Waikolu) | 150,000 | 120,000 | active |

In recent years, only two MWS intakes have been utilized: East Kawela and Hanalilolilo (Waikolu).⁵ The remaining five intakes are dormant, and at least the East Kawela Tributary intake is damaged beyond repair.

Reservoirs. The MWS storage infrastructure consists of four large reservoirs on the eastern mountain, two large reservoirs on the west side, and various smaller livestock reservoirs.⁶ The names and capacities of each MWS reservoir (or group) are:

1. Kawela (east): 5,000,000 gallons
2. Dole (east): 4,000,000 gallons
3. "Mountain Reservoir 1" (east): 15,000,000 gallons
4. "Mountain Reservoir 2" (east): 15,000,000 gallons
5. Pu'unānā (west) (+ ag tank): 7,250,000 gallons
6. Mauna Loa (west): 3,200,000 gallons
7. Livestock reservoirs (west): not stated, but comprising the largest acreage⁷
8. Total storage: **49,450,000 gallons**

Based on the combined acreage of all MWS reservoirs, Staff estimates that the reservoirs can lose around 33,000 gallons every day to evaporation.⁸ While those evaporative losses

³ Submittal C.3, Table 4 at 13. Although the Staff submittals generally express quantities in millions of gallons per day (mgd), we use gallons per day (gpd) for consistency and comparison with the data for water uses that are reported in smaller quantities.

⁴ Submittal C.2, Table 2 at 8.

⁵ Submittal C.2 at 19.

⁶ *Id.*

⁷ Submittal C.2, Table 6 at 21.

⁸ Submittal C.2, Table 6 at 21.

should certainly be mitigated, the large capacity of available storage for the MWS, if managed efficiently, can feasibly supply offstream needs for months at a time with zero inputs from any stream.⁹

Transmission Infrastructure. Stream water diverted at the MWS intakes is gravity-fed through pipes to a sump house combining inputs from all active diversions. From this structure, the water is gravity-fed to the two smaller (and older) east side reservoirs and, from there, to the much larger and slightly newer “Mountain Reservoirs.”¹⁰ From the large reservoirs in the east, the water is gravity-fed down and across Moloka’i to the Mahana pump house, where diesel pumps push the water back uphill to the Pu’unānā reservoir, to be again gravity-fed to the reservoir at Mauna Loa and the network of smaller agricultural reservoirs.¹¹

III. MWS Diversion Capacities Grossly Exceed Current and Planned Offstream Uses

The network of MWS intakes is capable of taking far more water than is actually needed for reasonable-beneficial offstream use. Even now, with only two of the seven available intakes open, the MWS diverts *nine times* the water needed to meet stated needs—an egregious level of waste that by all indications has been continuing unchecked for years.

Maximum Diversion Capacities. Based on information presented in the Submittals, the maximum diversion capacity of the East Kawela intake is 500,000 gpd.¹² The Hanalilolilo intake on Waikolu Stream can divert up to 150,000 gpd, the same amount of water Staff recommends this Commission reserve for the Department of Hawaiian Home Lands (“DHHL”) out of the mauka reach of the Waikolu hydrologic unit, *i.e.*, Hanalilolilo.¹³ The remaining five MWS intakes have been inactive for years, but the combined diversion capacity for Kamoku, Lualohe, Kalihi, and West Kawela is listed at 420,000 gpd,¹⁴ and in 1992 the amount diverted from the five unused intakes was estimated to total 546,000 gpd.¹⁵ Thus, at full capacity, the MWS can easily divert well over a million gallons a day.

Diversion Rates. Diversion flow statistics for the MWS are presented in Table 4 of Submittal C.3.¹⁶ In the early 2000s, mean daily diversions totaled 690,000 gpd, including water taken at Lualohe and Kalihi intakes, but not Kamoku.¹⁷ When the Lualohe and Kalihi intakes

⁹ Submittal C.2 at 21.

¹⁰ *Id.* at 19.

¹¹ *See id.*

¹² Submittal C.3, Table 4 at 13.

¹³ *Id.*; *see also id.* at 36.

¹⁴ *Id.*, Table 4 at 13.

¹⁵ Submittal C.2, Table 2 at 8.

¹⁶ Submittal C.3 at 13.

¹⁷ *Id.*

on Manawainui Stream were most recently in use, their daily mean inputs to the MWS were 139,000 gpd and 53,000 gpd, respectively.¹⁸ Subtracting the inputs from Kawela, mean daily diversions in 1992 totaled 466,000 gpd.¹⁹ Although Table 4 of Submittal C.3 does not include any potential contributions from the Kamoku intake, Table 3 of Submittal C.2 notes that in 1992, 71,000 gpd was diverted at Kamoku.²⁰ From 2019 to the present, the *mean daily diversion rate has been 372,000 gpd*, diverting water only at the Kawela and Hanalilolilo (Waikolu) intakes.²¹

Current and Potential Offstream Uses. Staff reports that currently, offstream use of MWS water totals approximately *42,000 gpd*, and future non-DHHL offstream uses are predicted to total around 138,000 gpd.²² If the Commission approves Staff's recommendation regarding agenda item C.3 to reserve 150,000 gpd to DHHL from the MWS portion of the Waikolu hydrologic unit (*i.e.*, from the Hanalilolilo intake), and assuming full implementation of that reservation, potential future uses of MWS water add up to a total of approximately 288,000 gpd. In March 2022, Staff noted rates of diversion that are absurdly out of proportion to MPL's uses, stating that "[t]he current daily rate of water diverted (mean of 370,000 gpd) is approximately 9x the amount used (42,000 gpd)."²³

IV. All Offstream Uses Can Be Met Without Diverting Any Water From Kawela

Moloka'i Nō Ka Heke respectfully disagrees with Staff's assessment that under Alternative # 2, only MPL's needs can be met.²⁴ Based on the information presented in Staff's submittals, a minor amendment to provide for reconnection of one additional intake would allow for all future offstream needs to be met without diverting any water from Kawela.

Staff's Proposed Reservation of Waikolu Surface Water to DHHL Provides For DHHL's Planned Offstream MWS Uses. Agenda item C.3 proposes to reserve 6.0914 million gallons per day ("mgd") to DHHL from the Waikolu surface water hydrologic unit.²⁵ This reservation includes 150,000 gpd of Waikolu water from the MWS.²⁶ Hanalilolilo is the only MWS intake that diverts water from the Waikolu hydrologic unit.²⁷ Hanalilolilo provides 150,000 gpd to the

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ Submittal C.2, Table 2 at 8. Kamoku intake would be capable of capturing up to 150,000 gpd during high flow events if reconnected, Submittal C.3, Table 4 at 13, representing potentially vast quantities of water over the course of a year.

²¹ *Id.*

²² Submittal C.2, Table 7 at 28.

²³ Submittal B.4 (Mar. 15, 2022) at 30.

²⁴ Submittal C.2, Table 9 at 35.

²⁵ Submittal C.3 at 36.

²⁶ *Id.*

²⁷ Submittal C.3, Figure 1 at 2.

MWS when fully utilized.²⁸ Thus, for the purpose of demonstrating that non-DHHL offstream uses of MWS water can be met without diverting water from Kawela Stream, the 150,000 gpd available from Hanalilolilo and the 150,000 gpd DHHL reservation of Hanalilolilo water are set aside from consideration. In reality, however, the amount of water proposed to be set aside for the DHHL reservation would continue to be available for Ranch use until the time that DHHL is actually able to use the water.

Kawela Stream Can Be Fully Restored Without Constraining Planned Offstream Uses of MWS Water. Exhibits 18 and 19 to Submittal C.2 present estimated low flow statistics and water availability for each of Staff's proposed alternatives. Median flows at Kamoku, Lualohe, and Kalihi intakes are estimated at 33,000 gpd, 72,000 gpd, and 6,000 gpd, respectively, for a total of 111,000 gpd.²⁹ Staff recommends IIFSs for Lualohe and Kamoku that would allow diversion of 70,000 gpd to the MWS on a mean daily basis.³⁰ Because Staff did not propose to establish an IIFS for Kalihi intake, the availability of water from Kalihi is not stated in Exhibit 18 or 19, but the flow available at Kalihi is estimated at 6,000 gpd.³¹ In the early 2000s, when Lualohe and Kalihi intakes were active (and excluding Kamoku), they provided reported mean daily diversions of 139,000 gpd and 53,000 gpd, respectively (192,000 gpd total) to the MWS.³²

Most importantly, Exhibits 18 and 19 "do[] not consider the storage of excess water diverted during flows greater than Q_{50} and made available during lower flow periods."³³ The amount that can be diverted in excess of Q_{50} extends to the maximum divertible capacity of each intake, as listed in Part II, *supra*. When last connected, the maximum divertible capacities of Kamoku, Lualohe, and Kalihi intakes were 150,000 gpd, 100,000 gpd, and 7,000 gpd, respectively, totaling 257,000 gpd.³⁴ The MWS's total storage capacity is nearly 50 million gallons, enough to meet all offstream needs for months at a time without any diversion of stream water whatsoever.³⁵ Thus, by capturing high-flows at maximum intake capacity to fill the reservoirs, the MWS can meet offstream needs with less or no further inputs during lower-flow periods.³⁶ Given the MWS's significant storage capacity, there is no need or justification to set the IIFSs to accommodate continual diversions by ensuring that the "mean divertible flow" is equal to the stated planned offstream uses at all times. Rather than imposing the burden on the Kawela Stream and community to ensure the continual availability of water for offstream

²⁸ *Id.*, Table 4 at 13.

²⁹ Submittal C.2, Ex. 18.

³⁰ *Id.*

³¹ *Id.* Furthermore, it is our understanding that, unlike most of the other MWS intakes, Staff has not recently measured flow at Kalihi intake.

³² Submittal C.3, Table 4 at 13

³³ Submittal C.2, Ex. 18; *see also id.*, Ex. 19.

³⁴ Submittal C.3, Table 4 at 13.

³⁵ Submittal C.2 at 21.

³⁶ *See id.*

diversion, the diverter should meet its kuleana to efficiently manage its system consistent with 21st century public trust principles—and allow full restoration of Kawela Stream in the process.

V. DHHL Surface Water Reservation

Moloka'i Nō Ka Heke supports Staff's proposal to reserve surface water to DHHL from the Waikolu hydrologic unit. Reservation of water for current and foreseeable future use on DHHL lands "constitutes a public trust purpose," *In re Waiola O Moloka'i*, 103 Hawai'i 401, 431 (2004) ("*Waiola*"), and "is an essential mechanism by which to effectuate the State's public trust duty" to protect water sources for present and future generations. *Id.* Thus, DHHL reservations of water are entitled to the "full panoply of constitutional protections" afforded public trust purposes and take precedence over non-public trust uses, *id.*, and are among the "enduring public rights" in public trust waters that are "separate from, and superior to, the prevailing private interests in the resources at any given time." *Waiāhole*, 94 Hawai'i at 138. Non-public trust uses, conversely, do not enjoy these constitutional protections. *Waiola*, 103 Hawai'i at 429 (citing *Waiāhole*, 94 Hawai'i at 138 ("private commercial use," for example, "is *not* a public trust purpose") (emphasis in original)). Thus, DHHL's needs should be prioritized in allocating surface water resources.

Moloka'i Nō Ka Heke does not, however, waive its request in its 2019 Petition that the Commission establish an IIFS for Waikolu at the Hanalilililo intake. Indeed, an IIFS would serve an important purpose of protecting Waikolu Stream until such time as DHHL would be able to utilize the reservation. Without an IIFS, the DHHL reservation would act as a form of "buffer" for the Ranch to continue offstream diversions in the meantime, which does not protect and restore instream flows in Waikolu Stream to the extent practicable. *See Waiāhole*, 94 Hawai'i at 156, 9 P.3d at 468 (holding a "buffer" available for diversion to be inconsistent with stream protection mandates). For Honokōhau Stream on Maui, the Commission adopted a two-phase IIFS, which included different IIFS levels, before and after the commencement of DHHL water uses. The Commission should consider a similar approach here.

VI. Alternative # 4, If Adopted, Should Be Amended To More Reasonably Maximize Restoration of Kawela Stream

As discussed above, full restoration of Kawela Stream is practicable. Staff's recommended IIFS of 339,000 gpd will provide an estimated 180,000 gpd to the system, far more than is needed for any additional "buffering" or padding of diversion inputs from the three smaller MWS intakes not being proposed to be abandoned.³⁷ Planned non-DHHL offstream MWS uses are estimated at 138,000 gpd. Even counting only the median inputs from Kamoku and Lualohe (70,000 gpd), and assuming all potential future uses actually materialize, the MWS

³⁷ Submittal C.2 at 32.

would theoretically fall short of offstream uses by less than 70,000 gpd.³⁸ Such a shortfall, however, excludes any consideration of the MWS's ability to capture and store high flows, which should be a practicable mitigation and alternative solution to enable the fullest restoration of Kawela Stream practicable.

Given the MWS's ability to store nearly 50 million gallons for use during low flow periods, the MWS need only divert the *highest* flows from Kawela; thus, any IIFS for Kawela can and should be set *much higher* than 339,000 gpd. Because only an additional 70,000 gpd is needed to accommodate Staff's proposal under alternative # 4, the East Kawela IIFS can and should be increased by at least 110,000 gpd, which is the amount of water in excess of maximum daily uses which Staff proposes to divert from Kawela.³⁹ Moloka'i Nō Ka Heke nevertheless maintains that no such "buffer" is either required or warranted; rather, the key to a successful management paradigm for the MWS will be the diverter's initiative and obligation to effectively manage the MWS in its totality.

VII. Conclusion

For the foregoing reasons, and for the additional reasons set forth in Moloka'i Nō Ka Heke's March 15, 2022 written testimonies, Moloka'i Nō Ka Heke respectfully requests this Commission approve and adopt Staff's full restoration alternative (# 2), with the following amendments to ensure that water resources are conserved, protected, and restored to the maximum amount practicable, while meeting all offstream needs:

- Establish an IIFS for Kalihi intake representing 100% of base flow;
- Instruct the diverter to submit, within 90 days, a plan to rehabilitate the MWS reservoirs to full capacity, reconnect the Kamoku, Lualohe, and Kalihi intakes, and remove the three Kawela dams;
- Require rehabilitation of MWS reservoirs to full working capacity within 180 days;
- Require reestablishment and connection of the smaller intakes within 270 days; and
- Require completion of formal abandonment processes, including removal of the East Kawela, East Kawela Tributary, and West Kawela impoundments, to be completed no later than April 12, 2023.

Mahalo for taking action to proactively protect and manage Moloka'i's surface water resources. Restoring Kawela's mauka flow will significantly benefit both the 'āina and people of Kawela, particularly with the passage of time and consistent daily flow of water toward

³⁸ See *supra* at 6; Submittal C.2, Ex. 18.

³⁹ Submittal C.2 at 32 ("approximately [180,000 gpd] will be available for off-stream use from East Kawela with an [IIFS] of the Q₅₀ flow").

Commission on Water Resource Management

April 18, 2022

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Kawela's makai area. We look forward to participating in the Commission's continued efforts to address water resource issues on Moloka'i, including the remainder of Moloka'i Nō Ka Heke's 2019 Petition.

He ali'i ka 'Āina,

/s/ Mahesh Cleveland

Mahesh Cleveland

Leinā'ala L. Ley

Isaac Moriwake

EARTHJUSTICE,

Attorneys for

MOLOKA'I NŌ KA HEKE