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MOLOKA'I NŌ KA HEKE

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

OF THE STATE OF HAWAII

In the Matter of:	) MOLOKA'I NŌ KA HEKE'S
	) COMBINED (1) PETITION TO AMEND
PETITION TO AMEND THE INTERIM	) THE INTERIM INSTREAM FLOW
INSTREAM FLOW STANDARDS FOR	) STANDARDS FOR WAIKOLU,
WAIKOLU, KAWELA, MANAWAINUI,	) KAWELA, MANAWAINUI,
KAUNAKAKAI STREAMS, AND THEIR	) KAUNAKAKAI STREAMS, AND THEIR
TRIBUTARIES, (2) COMPLAINT	) TRIBUTARIES, (2) COMPLAINT
AGAINST WASTE, AND (3) PETITION	) AGAINST WASTE, AND (3) PETITION
FOR DECLARATORY ORDER	) FOR DECLARATORY ORDER;
	) EXHIBITS 1-10; CERTIFICATE OF
	) SERVICE
_____	)

MOLOKA'I NŌ KA HEKE'S COMBINED (1) PETITION TO AMEND THE INTERIM INSTREAM FLOW STANDARDS FOR WAIKOLU, KAWELA, MANAWAINUI, KAUNAKAKAI STREAMS, AND THEIR TRIBUTARIES, (2) COMPLAINT AGAINST WASTE, AND (3) PETITION FOR DECLARATORY ORDER

EXHIBITS 1 TO 10

AND

CERTIFICATE OF SERVICE

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Exhibit 6 Commission Schematic of Molokaʻi Ranch Mountain Water System (Sept. 30, 1993)

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Exhibit 8(a) Belt, Collins & Associates, Figure 11, Schematic of the Molokaʻi Ranch System's Mountain Sources (Sept.1982)

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I. INTRODUCTION

Pursuant to Hawai‘i Revised Statutes ("HRS") § 174C-71(2) (2011) and Hawai‘i Administrative Rules ("HAR") § 13-169-40 (1988), Moloka‘i Nō Ka Heke, through its counsel Earthjustice, petitions the Commission on Water Resource Management ("Commission") to amend upward and establish numeric interim instream flow standards ("IIFSs") for Kawela, Kaunakakai, Manawainui, and Waikolu Streams and their tributaries on Moloka‘i (collectively the "Moloka‘i Mountain Streams"). These four streams, located in the central region of the island, were historically diverted by Moloka‘i Ranch[1] through its Mountain Water System ("MWS"), and the existing "status quo" IIFSs set by HAR § 13-169-47 (effective June 15, 1988) merely rubber-stamped the Ranch's claimed diversion levels during that time. These IIFSs have never protected the public trust, nor have they reflected the Ranch's actual water uses, which were far less than it declared in the 1990s, and are now practically nonexistent after the Ranch shut down in 2008. The Commission must fulfill its duty under the Hawai‘i Constitution and the State Water Code ("Code") to restore these streams and the public trust purposes that depend on them, including native instream and nearshore ecosystems, recreation and aesthetic values, ground water recharge, and Native Hawaiian water rights and traditional and customary practices.

Moreover, pursuant to HRS § 174C-13 (2011) and HAR §§ 13-167-81, -82 (1988), Moloka‘i Nō Ka Heke submits a citizen complaint against the waste of water by the Ranch. Although the Ranch shut down over 10 years ago and has not reported any of its MWS

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[1] Moloka‘i Ranch is a trade name for Moloka‘i Properties Limited, a domestic limited liability corporation, dba Moloka‘i Ranch, which is a subsidiary of Singapore-based GL Ltd. The Ranch has been up for sale, most recently, since September 2017. *See* https://www.businessinsider.com/hawaiian-island-for-sale-molokai-ranch-2017-9 (last visited July 1, 2019).

diversions for almost 13 years, the Ranch recently resumed submitting reports, purporting to take stream flows at levels comparable to its diversions during the heyday of its operations in the mid-2000s. Given that the Ranch has little or no actual use and need for water from the Molokaʻi Mountain Streams and has actually abandoned most of the MWS's diversions, this recently resumed reporting either overstates the Ranch's actual diversions and uses, perhaps in connection with the Ranch currently being up for sale, or reflects the ongoing waste of water, since the Ranch continues to bank diverted stream flows in full reservoirs that simply dissipate the water through seepage and evaporation. The Ranch must be compelled to show that any diverted stream flows are being put to reasonable-beneficial use, and to immediately cease and prevent any waste.

Third, Molokaʻi No Ka Heke requests that the Commission issue a declaratory order enforcing the Commission's rules and requiring the Ranch to follow the legally required procedures to report the termination of its certified water uses under HAR § 13-168-6(c) (1988), and the abandonment of diversions under HAR § 13-16-35(a) (1988). The Ranch has long abandoned many of the intakes on the MWS (leaving only two intakes operating on Kawela and Waikolu Streams), but it has not complied with the required procedures to document this downsizing of its diversion system and conduct removal and remediation actions. Such lack of compliance prevents public accountability and management of the Ranch's diversions, allowing it to reopen the diversions at will, or to simply abandon the structures and associated refuse in place as a public nuisance. Again, public trust accountability over these diversion operations is well overdue.

Finally, Molokaʻi No Ka Heke request that the Commission also issue a declaratory order that the Ranch:

● violated HAR § 13-168-7 (1988) and an express requirement the Commission imposed on the Ranch in 1997, in failing to report its water diversions for almost 13 years, between February 2005 and November 2017; and

● violated HAR §§ 13-168-6(c) and 13-168-35, in failing to report termination of certified water uses and abandonment of diversions; and

● thus, is subject to administrative penalties pursuant to HRS § 174C-15 (2001) and HAR § 13-168-3 (1988) for these violations.

As explained below, the Commission requires monthly diversion reports not only pursuant to established rule, but also specifically in this case as an express condition of allowing the Ranch in 1997 to expand its diversion capacity by installing new 15 and 16 million gallon water reservoirs. The Commission rules also require compliance with procedures regarding termination of uses and abandonment of diversions, to enable proper management of diversions and public trust resources. The violations of these requirements has only benefitted the Ranch by undermining such public accountability over its diversions. The Commission has the authority to levy administrative penalties of up to $5,000 per day for these violations, *see* HRS § 174C-15; HAR § 13-168-3,[2] and should impose an appropriate amount of fines for the Ranch's long-running non-compliance, and to deter such irresponsible conduct in the future.

In this combined IIFS petition, waste complaint, and declaratory ruling petition, Molokaʻi Nō Ka Heke initially sets forth the governing law in Part II. Part III establishes that Molokaʻi Nō Ka Heke has standing to petition this Commission for the requested relief. Part IV provides information regarding the Molokaʻi Mountain Streams and their natural and cultural significance.

[2] Over the 12 years and 10 months the Ranch violated its reporting obligations, the total maximum total potential fines amount to $23,415,000.

Part V reviews the background of the MWS, the Ranch's historical diversions, and its current waste of water and lack of accountability. Part VI summarizes the benefits of stream flow restoration for public trust purposes, and the minimal or no impacts to the Ranch's offstream uses. Finally, Part VII sets forth the requested relief.

II. LEGAL FRAMEWORK

A. Public Trust Doctrine.

The Hawai‘i Constitution, article XI, sections 1 and 7, incorporate the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i and establish the foundation for the State Water Code, HRS Chapter 174C (the "Code"). *See In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai‘i 97, 130-33, 9 P.3d 409, 442-45 (2000) ("*Waiāhole*"). The constitutional public trust embodies a dual mandate of (1) protection, which ensures "the continued availability and existence of [state] water resources for present and future generations," and (2) maximum reasonable and beneficial use, which is "not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'" *Id.* at 139-40, 9 P.3d at 451-52.

The public trust confers on the state "an affirmative *duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id.* at 141, 9 P.3d at 453. Protected public trust purposes include: maintenance of waters in their natural state or resource protection, with its numerous derivative public uses, benefits, and values; the exercise of Native Hawaiian and traditional and customary rights; domestic (as distinct from municipal) use; and reservations of water by the Department of

Hawaiian Homelands ("DHHL"). *See id.* at 136-37, 9 P.3d at 448-49; *In re Wai'ola o Moloka'i*, 103 Hawai'i 401, 431, 83 P.3d 664, 694 (2004) ("*Wai'ola*").

The public trust mandates that "any balancing between public and private purposes must begin with a presumption in favor of public use, access, and enjoyment" and "establishes use consistent with trust purposes as the norm or 'default' condition." *Waiāhole,* 94 Hawai'i at 142, 9 P.3d at 454. Thus, private commercial uses require a "higher level of scrutiny," and "the burden ultimately lies with those seeking or approving [private commercial uses] to justify them in light of the purposes protected by the trust." *Id.* As trustee and "primary guardian of public rights under the trust," the Commission "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455.

The public trust also incorporates the precautionary principle, which maintains that scientific uncertainty "should not be a basis for postponing effective measures to prevent environmental degradation," but rather militates "in favor of choosing presumptions that also protect the resource." *Id.* at 154, 9 P.3d at 466. In other words, "[u]ncertainty regarding the exact level of protection necessary justifies neither the least protection feasible nor the absence of protection." *Id.* at 155, 9 P.3d at 467. The Commission "may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.* at 143, 9 P. 3d at 455.

B. Native Hawaiian Water Rights.

The Hawai'i Constitution and the Code both provide specific protections for Native Hawaiian water rights and traditional and customary practices. The constitutional public trust protects such rights as a public trust purpose. *Waiāhole*, 94 Hawai'i at 137, 9 P.3d at 449. The

state also bears the constitutional duty under article XII, section 7 of the Hawai‘i Constitution to protect Native Hawaiian rights "to the extent feasible" and, thus, "may not act without independently considering the effect of [its] actions on Hawaiian traditions and practices" and, "at a minimum," making "specific findings and conclusions" on the existence of Native Hawaiian rights, the extent of their impairment, and feasible action to protect them. *Ka Pa‘akai O Ka ‘Aina v. Land Use Comm'n*, 94 Hawai‘i 31, 35, 46-47, 7 P.3d 1068, 1072, 1083-84 (2000). Further, the Code independently "obligates the Commission to ensure that it does not 'abridge or deny'" traditional and customary rights. *Waiāhole*, 94 Hawai‘i at 153, 9 P.3d at 465; *see* HRS § 174C-101(c), (d) (2011).

Similarly, DHHL's right to water for homesteading is protected by the constitutional public trust and the Code. HRS §§ 174C-101(a), -49(e); *Wai‘ola*, 103 Hawai‘i at 431, 83 P.3d at 694. DHHL's water rights originate in the Hawaiian Homes Commission Act sections 220 and 221, which establish that access to water is critical to the overall purpose and success of the homesteading program.[3] Hawaiian homesteaders are also entitled to two-thirds of the water captured by the State's Moloka‘i Irrigation System ("MIS"), which is obtained from an extensive system of surface and ground water diversions located in Waikolu Valley. *See* HRS § 168-4 (1987).

C. Instream Flow Standards.

The Code requires that the Commission "establish and administer a statewide instream use protection program designed to protect, enhance, and reestablish, where practicable, beneficial instream uses of water in the State." HRS § 174C-5(3) (2011); *accord id.* § -71(4)

[3] *See* Hawaiian Homes Commission Act of 1920, §§ 220, 221, 42 Stat. 108, as amended ("HHCA").

(2011). "Instream flow standards are an integral part of the regulatory scheme established by the Code" and the "primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows." *Waiāhole*, 94 Hawai‘i at 147-48, 9 P.3d at 459-60 (footnote omitted).

The Commission "must designate instream flow standards as early as possible . . . particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." *Id.* at 148, 9 P.3d at 460. Notwithstanding any existing diversions, the Commission "may reclaim instream values to inevitable displacement of existing offstream uses," and its "duty to establish proper instream flow standards continues." *Id.* at 149-50, 9 P.3d at 461-62. "[T]he establishment of bona fide, 'permanent' instream flow standards [i]s an ultimate objective in [the Code's] mandated 'instream use protection program.'" *Id.* at 150, 9 P.3d at 462. Interim standards are established pending the development of permanent standards, but this "does not alter the Commission's duty to protect instream uses": interim standards "must still protect instream values to the extent practicable." *Id.* at 151 & n.55, 155, 9 P.3d at 463 & n.55, 467.

On June 15, 1988, the Commission adopted "status quo" IIFSs for Moloka‘i streams, which did "nothing more than ratify the major diversions already existing." *Id.* at 150, 9 P.3d at 462; *see also* HAR § 13-169-47; *infra* Part V.B. The Code provides that "[a]ny person with the proper standing may petition the Commission to adopt an IIFS for streams in order to protect the public interest pending the establishment of a permanent instream flow standard." HRS § 174C-71(2)(A). The burden of justifying interim standards, however, does not fall on citizen petitioners. *Waiāhole*, 94 Hawai‘i at 153, 9 P.3d at 465. Rather, the Commission bears the

"affirmative duty under the public trust to protect and promote instream trust uses," which are favored by "presumption" and "default." *Id.* at 153, 142, 9 P.3d at 465, 454.

D. Prohibition Against Waste and Requirement to Report Diversions and Follow Procedures for Abandonment.

The Code contains a specific provision against waste, obligating the Commission to "investigate and take appropriate action" against allegations of waste, including "deficient operation and upkeep" of ditches. HRS § 174C-13; *Waiāhole*, 94 Hawai'i at 172, 9 P.3d at 484. The Commission has recognized, and the Hawai'i Supreme Court has affirmed, that water not actually used for reasonable-beneficial use must be left undiverted to avoid unlawful waste. *See Waiāhole*, 94 Hawai'i at 118, 156, 9 P.3d at 430, 468; *see also* HRS § 174C-3 (2011) (requiring use in "such a quantity as is necessary for economic and efficient utilization").

As part of managing and regulating water use to prevent waste, the Commission requires the filing of monthly water use reports. HAR § 13-168-7. The Commission's rules also set forth procedures for terminating water uses and abandoning diversions. Specifically, the Commission requires that "[w]henever a certified use of water is terminated, the person with the certificate *shall* file a report with the commission, proving all information required on forms provided by the commission." HAR § 13-168-6(c) (emphasis added). Additionally, "[t]he owner of any stream diversion works wishing to *abandon* or remove such work *shall* first obtain a stream diversion permit issued or caused to be issued by the commission." *Id.* § 13-168-35(a) (emphases added). Penalties for failure to report water use, or to follow any other provision of law including orders of the Commission, include fines of up to $5,000 per day. HRS § 174C-15; HAR § 13-168-3.

III. MOLOKAʻI NŌ KA HEKE HAS STANDING

Petitioner Molokaʻi Nō Ka Heke is a non-incorporated community-based organization dedicated to protecting and restoring the quality of life on Molokaʻi, and ensuring that public trust resources are maintained and preserved for the use and enjoyment of future generations. Molokaʻi Nō Ka Heke's members are Native Hawaiian cultural practitioners, hunters, fishers, hula dancers, educators, and other residents with an interest in the use, enjoyment, preservation and restoration of the Molokaʻi Mountain Streams, and the connected ground water aquifers, estuaries, nearshore marine resources, and mountain ecosystems that rely on healthy stream flows.

Molokaʻi Nō Ka Heke's members use or wish to use the Molokaʻi Mountain Streams for a variety of cultural, subsistence, educational, recreational, and aesthetic purposes including, without limitation: gathering instream resources like hīhīwai, ʻōpae, and ʻoʻopu; using running water to drink while hunting in the mountains and for other subsistence and recreational purposes; using near-stream plants and natural resources for laʻau lapaʻau (medicine), hula, and other spiritual practices; cultivating limu and fish in nearshore fishponds; gathering marine resources that thrive in brackish water; mālama ʻāina and appreciation of flowing water in its natural state; enjoyment of birds and other wildlife that thrive in and around streams and in nearshore estuaries; and educating others about these instream uses and values.

Molokaʻi Nō Ka Heke members include, but are not limited to, the following individuals who rely on healthy watersheds adversely affected by the Ranch's diversions:

- Walter Ritte — TMK #5-2-23-08: Farmer, Hunter, Homesteader
- Loretta Ritte — TMK #5-2-23-08: Farmer, Homesteader, Subsistence Gatherer
- Kalaniua Ritte — TMK #5-2-23-08: Farmer, Subsistence Gatherer, Homesteader
- Karen Holt — TMK #5-3-04-16: Long-time Molokaʻi Resident, Bird Watcher
- Lohiao Paoa — TMK #5-4-013-03: Fisher, Subsistence Gatherer, Hunter
- Timmy Leong — TMK #5-4-013-14: Fisher, Subsistence Gatherer

- Tiare Holm TMK #5-4-013-25: Farmer, Subsistence Gatherer, Hunter
- Michael Holm TMK #5-4-013-25: Farmer, Subsistence Gatherer, Hunter
- Troy Heen TMK #5-4-013-31: Farmer, Subsistence Gatherer, Hunter, Fisher
- Teave Heen TMK #5-4-013-31: Fisher, Subsistence Gatherer, Hunter
- Tomba Heen TMK #5-4-013-31: Farmer, Subsistence Gatherer, Hunter, Fisher
- Madonna Dizon TMK #5-2-23-04: DHHL Beneficiary, Cultural Practitioner
- Chad Kaʻahanui TMK #5-2-23-04: Hunter, Farmer, Fisher, DHHL Beneficiary

The lack of meaningful IIFSs that protect, enhance, and restore beneficial instream uses and values, and the Ranch's long-standing practice of treating public streams as private property, without accountability to this Commission, directly and adversely affect Petitioner's members.

Both the Commission and the Hawaiʻi Supreme Court have repeatedly recognized that Native Hawaiian cultural practitioners have standing to challenge diversions that restrict the exercise of traditional and customary practices. For example, in the *Waiʻola* case, the Commission recognized that subsistence fishers and gatherers had standing to challenge ground water pumping by the Ranch that could diminish nearshore discharge of spring waters critical to the growth of limu and other marine resources. 103 Hawaiʻi at 414, 83 P.3d at 677.[4] The dewatering of the Molokaʻi Mountain Streams likewise damages healthy marine environments and impairs Molokaʻi Nō Ka Heke's members' related ability to engage in traditional and customary practices in and around the streams. Additionally, diversion of water from Waikolu stream diminishes the flow of water available to Hawaiian homesteaders through the MIS system, which relies exclusively on water from the Waikolu watershed.

The Native Hawaiian water rights at issue in this case, alone, are a sufficient basis for finding that Molokaʻi Nō Ka Heke has standing. Further, Molokaʻi Nō Ka Heke's members have constitutional rights to a clean and healthful environment under Hawaiʻi Constitution article

[4] Molokaʻi Nō Ka Heke member Walter Ritte was among the individuals granted standing to protect traditional and customary practices in the *Waiʻola* case.

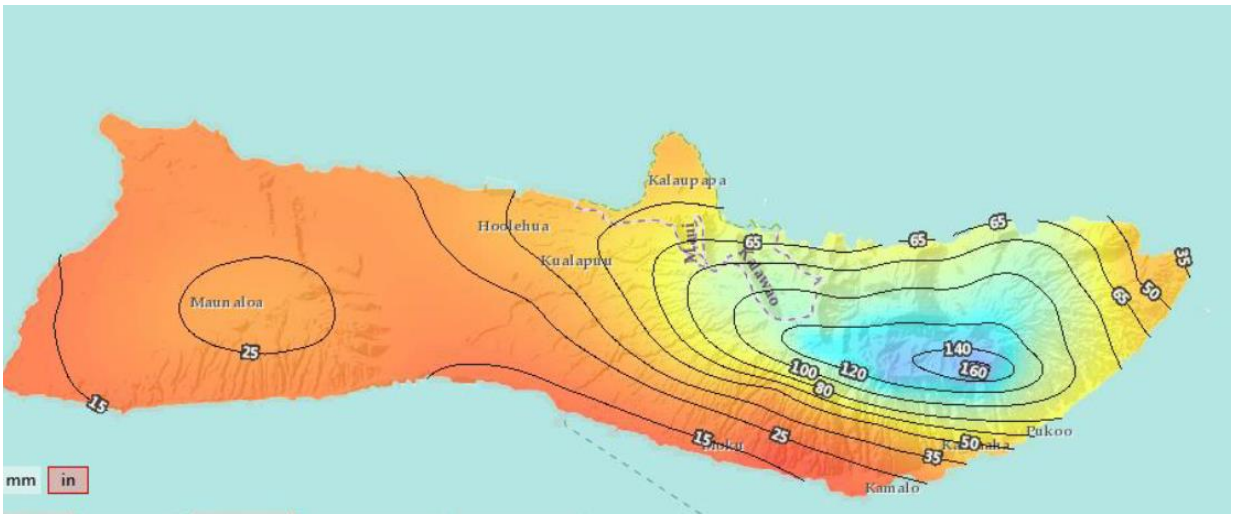
XI, section 9, which are "a 'legally protected interest' adequate to confer standing." *In re Hawai'i Elec. Light Co.,* __ P.3d __, 2019 WL 2065921 at 19 (2019). The diversions of the Moloka'i Mountain Streams Stream negatively affect these rights by diminishing the free flow of water in its natural state and Moloka'i Nō Ka Heke's members' use and enjoyment of the streams. *See id.*[5] Finally, the Commission's rules specifically provide Petitioner's members with the right to participate in IIFS proceedings because they are residents of the relevant hydrologic units (40202, 40301, 40302 and 40403). *See* HAR § 13-167-54 (1988); *see also Wai'ola*, 103 Haw. at 439, 83 P.3d at 702 (recognizing standing to protect Hawaiian Homelands water rights from impacts of ground water pumping in an adjacent aquifer). Accordingly, for all these reasons, Moloka'i Nō Ka Heke has standing before this Commission.

[5] *See also Citizens for Prot. of N. Kohala Coastline v. County of Haw.*, 91 Hawai'i 94, 100, 979 P.2d 1120, 1126 (1999) (holding that plaintiffs with recreational interests in ocean had standing to challenge development of coast); *Akau v. Olohana Corp*., 65 Haw. 383, 389, 652 P.2d 1130, 1135 (1982) (holding that plaintiffs with recreational interest in use of public shoreline had standing to protect access).

IV. THE NATURAL AND CULTURAL SIGNIFICANCE OF THE MOLOKA‘I MOUNTAIN STREAMS

A. Moloka‘i’s Natural And Cutural Landscape.

The island of Moloka‘i comprises mainly two shield volcanoes: the older West Moloka‘i Volcano, which rises to an altitude of 1,380 feet, and the younger East Moloka‘i Volcano, which rises to an altitude of 4,970 feet.[6] All of the Moloka‘i Mountain Streams originate from the East Moloka‘i Volcano, at altitudes above 2,000 feet, where rainfall is abundant.



Source: http://rainfall.geography.hawaii.edu/ (rainfall by elevation)

In general, streams in the windward northeastern valleys of Moloka‘i, like Waikolu Stream, are perennial.[7] In contrast, streams that drain to the southern coast are usually perennial in their upper reaches, but intermittent in lower elevations, where surface water seeps into the underlying ground water table due to the permeability of the lava in lower elevation areas. USGS 1997 Report at 15, 28. Water from losing streams infiltrates into the streambed and

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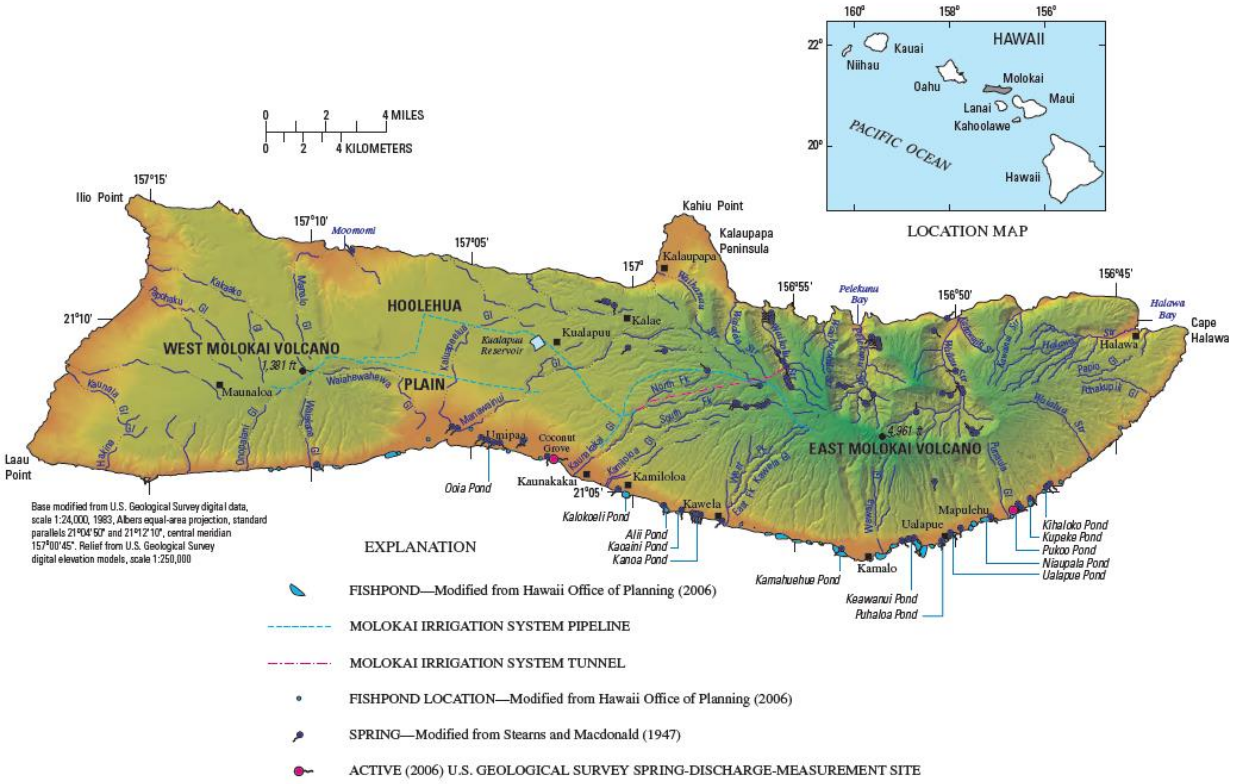
[6] H.T. Stearns & G.A. Macdonald, *Geology and Ground-Water Resources of the Island of Moloka‘i, Hawai‘i* 1 (1947) (“Stearns & Macdonald”).

[7] Delwyn S. Oki, USGS, *Geohydrology and Numerical Simulation of the Ground-water Flow System of Moloka‘i, Hawai‘i* 15 (1997) (“USGS 1997 Report”).

recharges the underlying ground water body. *Id.*[8] In turn, the ground water naturally flows from the aquifer into the ocean through coastal springs and seeps.[9]

This natural flow of fresh water to the coast through streams and springs has traditionally fostered the productivity of ocean resources such as limu and fish along Moloka‘i’s South Shore and led ancient Hawaiians to build a host of loko i‘a (traditional Native Hawaiian fishponds)



Source: USGS 2006 Report, Figure 1

along that coastline dating back hundreds of years, to the 16th century. USGS 2006 Report at 4. These abundant fishponds have prominently contributed to Moloka‘i’s traditional reputation as

[8] *See also* Delwyn S. Oki, USGS, *Surface Water in Hawai‘i* (2003).

[9] Delwyn S. Oki, USGS, *Numerical Simulation of the Hydrologic Effects of Redistributed and Additional Ground-Water Withdrawal, Island of Moloka‘i, Hawai‘i* 4, 11 (2006) (“USGS 2006 Report”).

"the land of plenty."[10] As recognized by Hawaiian historian Samuel M. Kamakau: "Fishponds were things that beautified the land, and a land with many fishponds was called 'fat.'"[11] To this day, kamaʻāina refer to the island as "Molokaʻi ʻāina momona" because the land and shoreline feed many residents who continue traditional subsistence farming and gathering practices.

Pre-contact Native Hawaiians developed a thriving aquaculture tradition based on fishponds that greatly increased the yield of limu and fish. Experts have observed that the Hawaiian fishpond was 100 times more efficient than the natural food chain[12] and have likened fishponds to estuaries, which are "20 times as productive as the open sea, 7 times as productive as an alfalfa field, and twice as productive as a corn field."[13] As late as 1901, many years after the Mahele displaced the traditional construction and maintenance system, fishponds yielded fully 19.6 percent of the fish caught on Molokaʻi. Farber at 14.

Brackish water ponds such as those found along Molokaʻi's South Shore were the most productive of all the Hawaiian fishponds because they contained the most nutrient-rich waters. Farber at 8; Summers at 2-3. This fertile environment on Molokaʻi's South Shore was created by healthy hydrologic systems, as well as technical expertise of Native Hawaiian aquaculturalists. Kikuchi at 116-22. Most fishponds and fish traps were located in close proximity to springs, streams, and seeps that provided high amounts of fresh water to the enclosures. *Id.* at 87; Stearns

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[10] E.S. Craighhill Handy, Elizabeth Green Handy, & Mary Kawena Pukui, *Native Planters in Old Hawai'i: Their Life, Lore, and Environment* 515 (rev. ed. 1991) ("Native Planters").

[11] Catherine C. Summers, *Hawaiian Fishponds* 1 (1964) ("Summers") (citing S.M. Kamakau).

[12] Joseph M. Farber, *Ancient Hawaiian Fishponds: Can Restoration Succeed on Moloka'i?* 8 (1997) ("Farber").

[13] William K. Kikuchi, *Hawaiian Aquacultural Systems* 1-2 (1973) ("Kikuchi") (citation omitted).

& Macdonald at 56. With the inflow of fresh water, the fishponds became thriving gardens of limu, attracting herbivorous and omnivorous fish to graze on the abundant resources. Streams "benefited the ponds by washing in inorganic material, thus fertilizing and consequently increasing the food supply." Kikuchi at 118; Farber at 8. Additionally, fish from fishponds were most prized for their taste derived from the limu and other fishpond nutrition they fed on. Farber at 7.

Modern science has shown what Native Hawaiian aquaculturalists knew from experience: certain types of limu grow best in areas where the ocean has been diluted by the influx of freshwater.[14] Seaweed agriculture, where beds of limu are cultivated for sustenance, is popularly known as "limu culture." On Molokaʻi, limu gathering and cultivation practices have been handed down through generations dating back to time immemorial, and are closely related to fishpond practices.

The following maps of the fishponds of Molokaʻi's South Shore are reproduced from Kikuchi, starting from Kamalo in the east in Figure 15 and ending at Kukuku in the west in Figure 17. The fishponds of Kawela are shown in Figure 15, the fishponds of Kaunakakai in Figures 15 and 16, and the fishponds of Manawainui in Figure 17.[15] These abundant fishponds along Molokai's South Shore highlight how the interconnected hydrology of the Molokaʻi

[14] *See* E.A. Laws & J.L. Berning, *Photosynthetic Efficiency Optimization Studies with the* Macroalga Gracilaria tikvihae*: Implications for CO_2 Emission Control from Power Plants*, 37 Bioresource Technology 25-35 (1991).

[15] The symbols after each fishpond name indicate the six main type of fishponds and fish traps. The most common fishpond depicted below are the loko kuapā (walled fishpond), symbolized by a circle, and loko ʻumeʻiki, symbolized by a triangle. *Id.* at 12. The loko ʻumeʻiki is similar to a loko kuapā, but is characterized by the presence of numerous stone lanes used to trap fish during high and low tides. *Id.* at 9.

Mountain Streams, ground water recharge, and nearshore ocean seepage supported a thriving ecosystem from ma uka to ma kai.

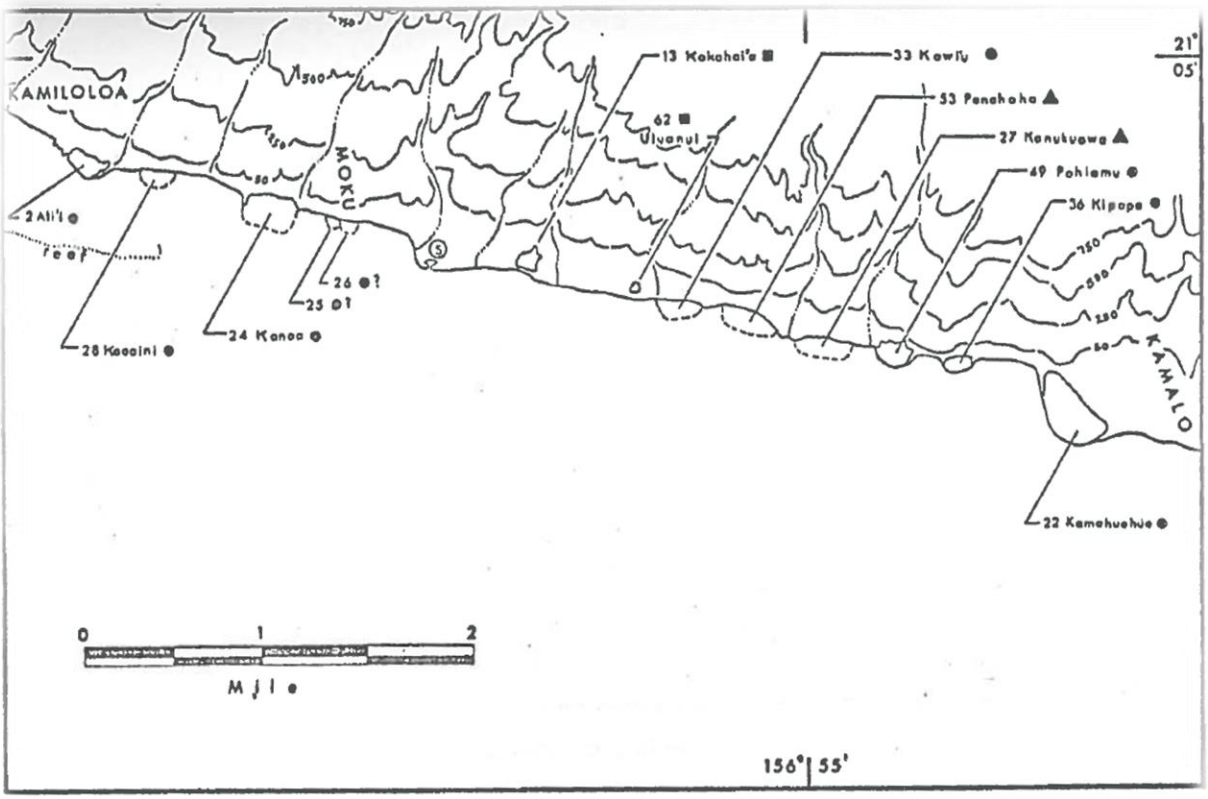


Fig. 15. Kamalo-Kamiloloa, Moloka'i Detail

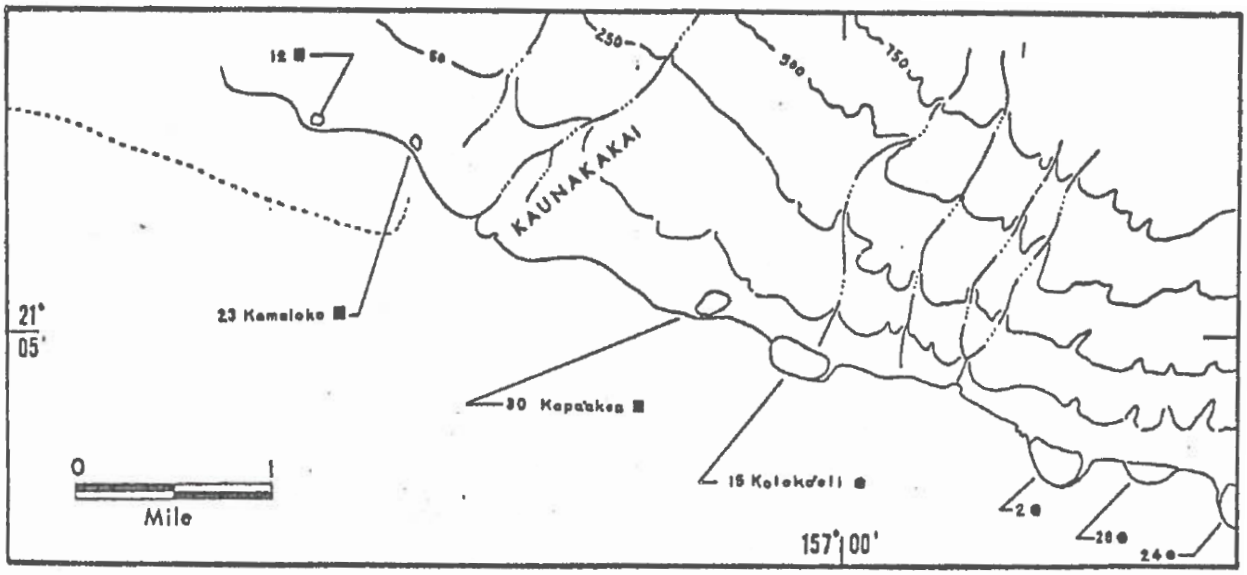


Fig. 16. Kamiloloa-Kaunakakai, Moloka'i Detail

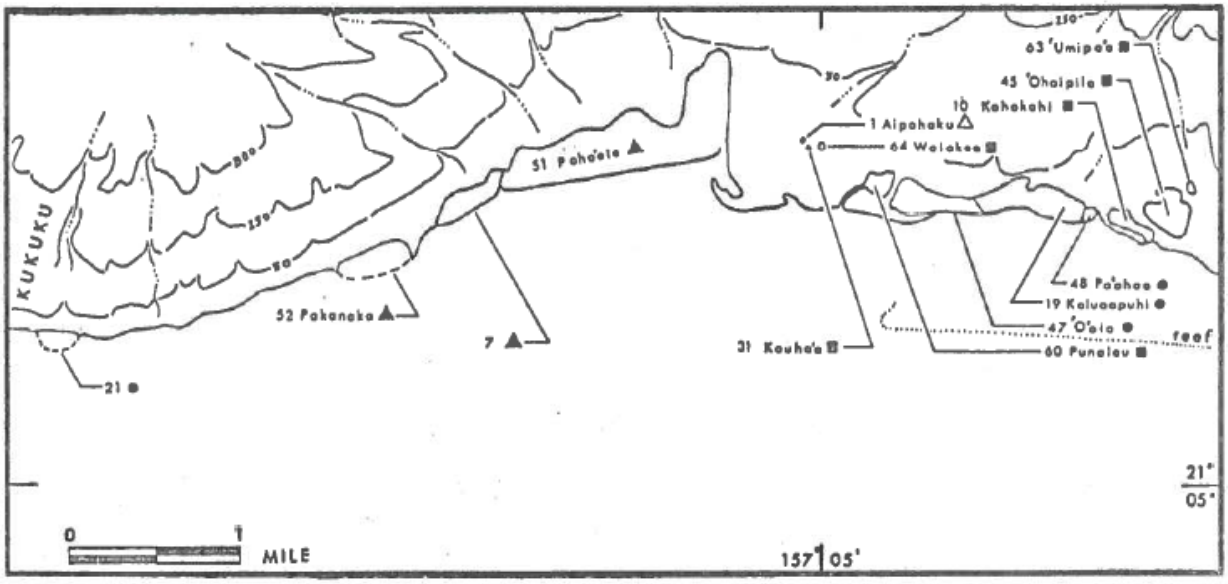
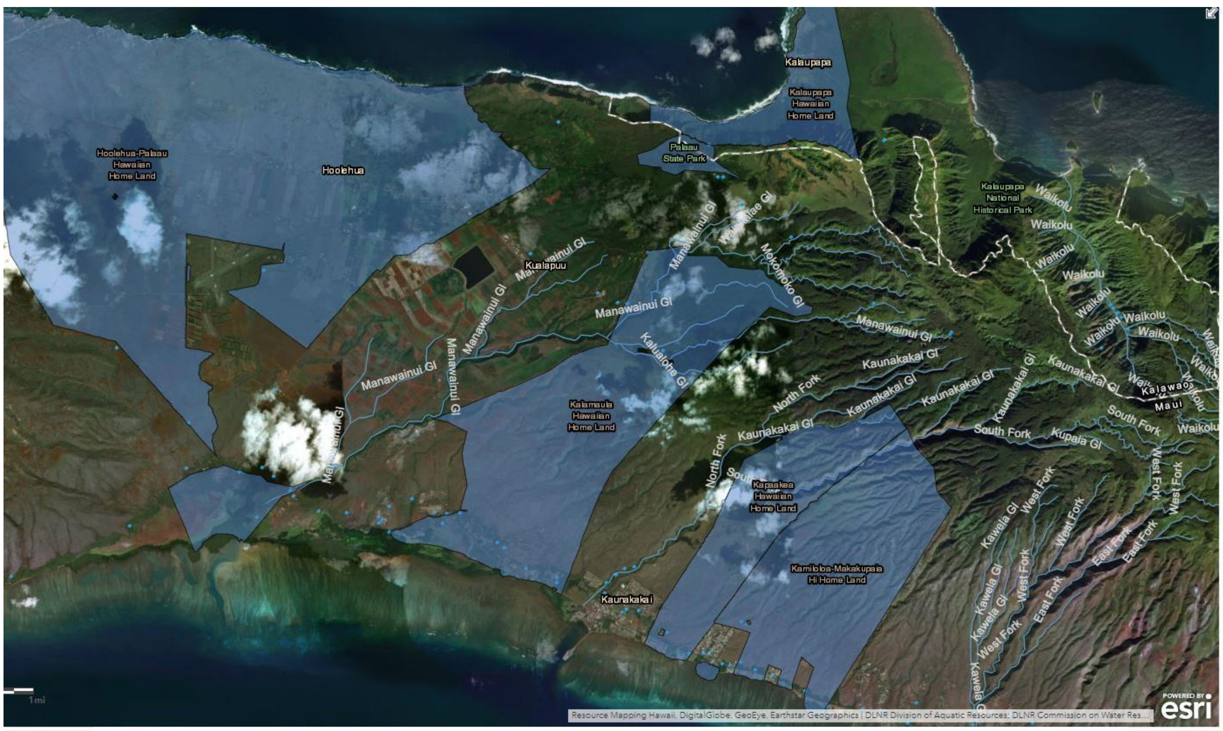


Fig. 17. Kaunakakai-Kukuku, Moloka'i Detail

Today, Moloka‘i’s natural resources continue to support a population that is uniquely committed to perpetuating traditional and customary subsistence practices. Moloka‘i is often referred to as the “last Hawaiian island” because of the high concentration of Native Hawaiians living there. The 2010 census revealed that the population of East Moloka‘i is 58.1% Native Hawaiian, and the population of West Moloka‘i is 67.8% Native Hawaiian. Statewide, Native Hawaiians comprise a much smaller 21.3% of the total population.[16] Moloka‘i is also home to the original homesteading communities of Ho‘olehua and Kalama‘ula, which in the 1920s were a test case for the viability of the recently enacted HHCA.



Source: ARC GIS (Moloka‘i Mountain Streams and overlaid DHHL lands)

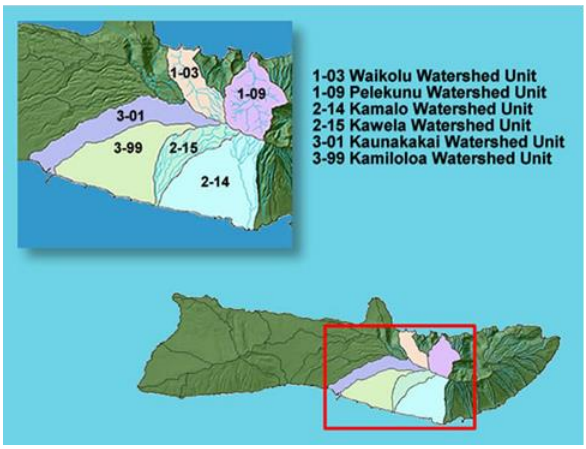
[16] These population data are available in U.S. Bureau of the Census 2010, 2010 Summary Files 1 and 2 (compiled at www.ohadatabook.com Table QT-P9 and SF2-PCT 11).

In 1994, Molokaʻi residents estimated they acquired 28% of their food through subsistence activities. Among Native Hawaiian ʻohana, the percentage was estimated to be even higher, at 38%.[17] This Commission more recently described marine-based subsistence lifestyles on Molokaʻi as follows:

> The gathering of crab, fish, limu, and octopus are traditional and customary practices that have persisted on Molokaʻi for generations. The population of the island of Molokaʻi consists primarily of Hawaiians, many of whom rely on the natural resources of the land and ocean for such subsistence activities that include gathering of marine resources including fish, shellfish, ʻula, heʻe, and limu to feed their ʻohana (extended family).

In re Kukui (Moloka'i), Inc., 116 Hawaiʻi 481, 508, 174 P.3d 320, 347 (2007) (quoting the Commission) (brackets and quotation marks omitted). The Molokaʻi Mountain Streams are an integral part of this natural and cultural landscape, which depends on freshwater flows.

B. Watershed Characteristics and Stream Flow.



Source: https://www.ctahr.hawaii.edu/wq/nps319/molokai/molokaiwatersheds.htm

1. Waikolu Stream

Waikolu is the largest stream diverted by the MWS and flows into the ocean on Molokaʻi's rugged North Shore, near the Kalaupapa peninsula. Waikolu Stream literally

[17] These data on subsistence were published in Jon K. Matsuoka et al., Governor's Molokaʻi Subsistence Task Force Final Report 5 (1994) ("Subsistence Report").

translates as "three waters," referring to its three unnamed tributaries.[18] The Waikolu watershed is a single steep valley, the entirety of which is classified as conservation land.[19]

Waikolu Falls below intake

Historically, the ahupuaʻa of Waikolu was a site of wetland kalo cultivation.[20] The ahupuaʻa includes three known heiau, as well as an unidentified structure that may have been a koʻa (fishermen's shrine) or kūʻula (stone god used to attract fish). Summers Survey at 185-87. Near the east end of Waikolu Valley is a point called Leinapapio, where traditionally the people of Molokaʻi learned to leap off cliffs on woven mats for sport. Summers Survey at 185.

Waikolu Stream has been widely recognized for its outstanding aquatic, riparian, and recreational resources.[21] Surveys have found that Waikolu Stream is home to all four native freshwater fauna that the HSA has classified as "indicator species" representative of high quality stream ecosystems: ʻoʻopu hiʻukole (or alamoʻo), ʻoʻopu nōpili, and hīhīwai (or wī). *Id.* at 135-36, 153; Atlas at 21-22.

[18] Mary Kawena Pukuʻi, Samuel H. Elbert & Esther T. Mookini, *Place Names of Hawaiʻi* 223-24 (2nd ed. 1989) ("Pukui Place Names").

[19] James E. Parham, et al., *Atlas of Hawaiian Watersheds & Their Aquatic Resources* 19 (2008) ("Atlas").

[20] *Native Planters* at 516; Catherine C. Summers, *Molokaʻi: A Site Survey* 185 (1971) ("Summers Survey").

[21] *See* Hawaiʻi Cooperative Park Service Unit, *Hawaii Stream Assessment: A Preliminary Appraisal of Hawaii's Stream Resources*, 256, 193, 260 (1990) ("HSA").

Based on its pristine location and the quality of aquatic life, the HSA recommended that Waikolu be included as a candidate on a list of "Blue Ribbon" streams. *Id.* at 275. Of the 500 streams surveyed in the HSA, only 43 were listed as blue ribbon candidates, reflecting the outstanding qualities of the Waikolu Stream system.

The Ranch's Hanalilolilo diversion on Waikolu Stream

Over the past century, three different gages have measured the flow levels of Waikolu Stream at various elevations. All three gages, however, were located below the Ranch's Hanalilolilo intake, the MIS's four stream diversions, and several of the MIS's five wells.[22] The highest gage, located at an altitude of 900 feet, operated from October 1960 until September

[22] *See* Department of Land and Natural Resources, Division of Water and Land Development, *Moloka'i Irrigation System, Moloka'i, Hawai'i* (Sept. 1977) (listing elevations of diversion structures); Lance T. Santo, Haw. Ag. Research Ctr., *Assessment and Improvement Recommendations for the Moloka'i Irrigation System* 7-9 (2001) (same).

2003 (USGS 16405500).[23] During this 43-year period, the mean monthly flow level was 11 cfs (7.1 mgd) for January and 1.3 cfs (0.840) mgd for September. The second gage, located two miles ma uka of the stream mouth, operated from July 1920 to June 1923 and recorded a mean monthly flow of 15.4 cfs (9.95 mgd) (USGS 16406000). The lowest gage was located at an elevation of 252 feet, one mile ma uka of the stream mouth, near Kalaupapa (USGS 16408000). From July 1919 through October 1996, the mean monthly flow fluctuated between a high of 26 cfs (16.8 mgd) for April and a low of 9.7 cfs (6.3 mgd) for September, confirming that Waikolu is a perennial stream. The HSA estimated the median flow of Waikolu at 12 cfs (7.75 mgd) at an unspecified elevation.

2. Kawela Stream

Kawela Stream, which flows to Molokaʻi's south shore, is 49.3 miles long and includes many smaller tributaries. Kawela literally means "the heat." Pukui Place Names at 99. The primary land classification in Kawela is agricultural (60.6%), followed by conservation (39.1%) and urban (0.2%). Atlas at 247. Historically, Native Hawaiian farmers cultivated the ahupuaʻa of Kawela with taro, as well as the uʻala (sweet potato) characteristic of the island's south side.[24] Land Commission Awards ("LCAs") in Kawela included "kalo" lands.[25]

[23] Stream flow data is from the USGS National Water Information System, *available at* https://nwis.waterdata.usgs.gov/nwis/sw, unless another source is cited.

[24] *Native Planters* at 516; Subsistence Report at 86; Munekiyo & Hiraga, Inc., *Final Environmental Assessment for Kawela Bridge Replacement, Molokaʻi, Hawaiʻi* 18 (Jul. 2009) ("Kawela Assessment").

[25] *See* various LCAs available at https://www.papakilodatabase.com/.

East Kawela Stream when flows overtop the East Kawela Dam

Kawela is home to a vast residential and agricultural complex that includes remains of both aliʻi and makaʻāinana residences, petroglyphs, family shrines, agricultural terraces, burial platforms, heiau, and a hōlua (slide). *Id.* at 7-13; Summers Survey at 91-92.[26] To this day, Kawela is recognized by island residents for having a puʻuhonua (traditional place of refuge). *See also* Summers Survey at 91-92. Kamaʻāina testimony suggests that the puʻuhonua was established during the famous battles that took place there during the time of Kamehameha I, and earlier between Molokaʻi chiefs together with Alapaʻinui of Hawaiʻi against Kapiʻiohokalani of

[26] An inventory of historic sites in Kawela is available online at https://kipukadatabase.com.

Oʻahu. *See also* Summers Survey at 92. Kamaʻāina testimony and written sources also confirm that the ahupuaʻa contains a number of large burial sites. *See also* Kawela Assessment, App. A at 10.

The fishponds in Kawela include Kakahaiʻa,[27] which is a puʻuone or inland type of fishpond that is exceedingly rare.[28] Only a handful of puʻuone still exist in the Hawaiian Islands today. The Kānoa fishpond is relatively large and covers approximately 50 acres of the nearshore waters in the Kawela ahupuaʻa. Clark Place Names at 161. Two smaller unnamed fishponds are located just east of Kānoa. *Id.* Further east of those ponds, in close proximity to the muliwai (estuary) of Kawela Stream, is a traditional fishing ground known as Waiokama, which Kamehameha III made kapu (sacred or reserved for special use) in 1839. Summers Survey at 91.

The historical record indicates that Kawela traditionally flowed ma uka to ma kai much more frequently and sustained an extensive agricultural complex within the ahupuaʻa, before decades of diversions altered this traditional natural and cultural system. USGS 1997 Report at 47. Kawela Stream also continues to support nearshore springs in the ocean through ground water recharge, which facilitates the nutrient-rich brackish water conditions that are vital to the health of the coastal ecosystems and fishpond resources and the Native Hawaiian cultural practices that depend on them.

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[27] This fishpond has been converted into the Kakahaiʻa National Wildlife Refuge which includes a freshwater pond and marsh with dense thickets of bulrush. Native birds such as the ʻalae keʻokeʻo (Hawiian coot) and aeʻo (Hawaiian stilt) are found here, along with migratory seabirds and waterfowl. John R. K. Clark, *Hawaiʻi Place Names* 146 (2002) ("Clark Place Names").

[28] Puʻuone is an inland fishpond near the shore, as connected to the sea by a stream or ditch. *See* Kikuchi at 9; Summers at 19.

East Kawela Dam and Intake

DAR surveys have documented in Kawela two of the HSA's four indicator species—oʻopu hiʻu kole and ʻoʻopu nōpili—both of which are severely restricted in range, limited to the upper reaches of the Kawela watershed, ma uka of the stream diversion. Atlas at 24 9. This current limited presence of native stream life indicates the opportunity and value of restoring more consistent flows to support their natural amphidromous life cycle.[29]

[29] *See* Robert Nishimoto, Div. of Aquatic Res., *Hawaiian Streams*, https://dlnr.hawaii.gov/dar/habitat/streams/about-streams/ (last visited July 1, 2019).

The HSA identifies Kawela Stream as having "substantial" riparian resources and "outstanding" cultural and recreational resources. *Id.* at 193, 221. Similarly, the Watershed Atlas identifies Kawela as a potential heritage stream based on a multi-attribute prioritization of streams. Atlas at 250. The strong riparian and cultural resources in Kawela signal a once-thriving ecosystem that included significant animal and human populations supported by abundant fresh water resources. Given the high quality habitat in the watershed and the cultural significance of the area, Kawela Stream remains a prime candidate for stream flow restoration.

Dry mouth of Kawela Stream immediately ma uka of Kamehameha V Highway

The full natural stream flow of Kawela is unknown because the Ranch's three diversions are located at elevations between 3,750 and 3,800 feet, above the streamflow gages. *See* Exs. 1(a) and 1(b). In 1946, USGS installed a gage on the east fork of the Kawela Stream, at an elevation of 3,625 feet (USGS 16415000). During its 25 years of operation, this meter recorded a high monthly mean of 4.2 cfs (2.71 mgd) for December and low monthly mean of 0.63 cfs (0.407 mgd) for September. The second gage is located below the confluence of the east and

west forks, at an altitude of 40 feet (USGS 16415600). This lower gage was installed in 2004 and remains in operation. Between October 2004 and January 2018, the monthly mean streamflow level at this elevation fluctuated between a high of 4.7 cfs (3.04 mgd) for the month of January and a low of 0.65 cfs (0.42 mgd) for the month of June. The HSA estimated the average annual flow of Kawela at 2.38 cfs (1.54 mgd) and the median flow at 0.4 cfs (0.26 mgd). HSA at 56.

3. Kaunakakai Stream

According to Molokaʻi Nō Ka Heke members who have walked the watershed, Kaunakakai Stream begins in the ahupuaʻa of Kawela and passes through the ahupuaʻa of Makakūpāʻia, Kamiloloa, and Kapaʻakea to Kaunakakai Gulch and the ocean. Historically, Kaunakakai was known for its abundant seafood. Summers Survey at 20. The name Kaunakakai is derived from "Kaunakahakai," which translates as "beach landing," in part because this area was a place for canoes to come ashore. Pukui Place Names at 95; Atlas at 297. "It was the place for the canoes to come, for here there was plenty of fish." Summers Survey at 87.

The main fork of the stream is 63.5 miles long, not including tributaries. Atlas at 298. The lands in the watershed are classified 64.6% agricultural, 28.7% conservation, 2.4% rural, and 4.3% urban. *Id.* at 297. The south fork of Kaunakakai Stream is perennial above an altitude of 1,900 feet, where it is fed by a combination of spring water and discharge from high-altitude mountain swamps. Both the north and south forks are losing in their lower reaches, and below

their confluence, the stream runs dry for some portion of the year. Kaunakakai, however, is perennial near its mouth, where it is hydraulically connected to the ground water system.[30]

Kaunakakai was famous for a particular delicacy, the aloalo (crayfish like crustacean). Native Planters at 520. En route to conquering Oʻahu, Kamehameha I first took control of Molokaʻi and resided in Kaunakakai because of its key location as a landing area and its bounty of provisions. *Id.* at 20. The ahupuaʻa of Makakūpāʻia, Kamiloloa, Kapaʻakea, and Kaunakakai all have numerous fishponds along their shores, highlighting the interconnected freshwater system from ma uka to ma kai. *Id.* at 88-92; Kikuchi, Figures 16 & 17, *supra.* Two of the island's largest fishpond restoration efforts to date have taken place in this ahupuaʻa, at Aliʻi and Kelokoʻeli fishponds.[31]

The USGS historically gaged Kaunakakai Gulch Stream in two locations. The first gage, installed in January 1950, was operational through September 1998 (USGS 16414000). This gage measured stream flow below the confluence of the east and west forks, near Kaunakakai town, at an approximate elevation of 240 feet. During this 48-year time period the monthly mean discharge fell significantly, particularly during the dry summer months of June through September. The monthly mean streamflow level at this elevation fluctuated between a high of 5.2 cfs (3.36 mgd) for the month of January and a low of 0.03 cfs (0.02 mgd) for the month of June. The second gage has been operational since March 2003 and is located at an altitude of 75 feet (USGS 16414200). The mean monthly flow at this gage over the past 15 years is 0.96 cfs (0.62 mgd), with a high monthly mean of 3.1 cfs (2.0 mgd) in March.

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[30] The foregoing hydrologic information on Kaunakakai Stream comes from Delwyn S. Oki, USGS *Effects of Ground-Water Withdrawal on Kaunakakai Stream Environmental Restoration Plan, Molokaʻi, Hawaiʻi* 5-7 (2007).

[31] *See* www.kuahawaii.org (documenting these restoration efforts).

4. Manawainui Stream

Manawainui means "large water branch." Pukui Place Names at 145. The stream originates in the Kahuaawi Gulch and eventually feeds Manawainui Gulch, which runs through the ahupuaʻa of Kalamaʻula, Kahānui, Nāʻiwa, and Pālāʻau. These are major ahupuaʻa that sustained large populations prior to and after western contact. Summers Survey at 77-84. At one time, Pālāʻau village, which abuts Manawainui Gulch, was rich in both wetland and dryland kalo. *Id.* at 77. Manawainui Gulch was the only site of wetland taro cultivation on the west end of the island. Native Planters at 515. These areas were also famous for ʻuala (sweet potato) cultivation. *Id.* at 517. Numerous archaeological sites, including heiau, petroglyphs, and salt ponds, have been documented throughout these ahupuaʻa, further evidencing a once-thriving population. Summers Survey at 77-84. Fishing was also prominent on the shores of these ahupuaʻa, as documented by the historical existence of loko iʻa and fishing koʻa (fishing shrines) in these areas. *Id.*; Kikuchi, Figures 16 & 17, *supra*.

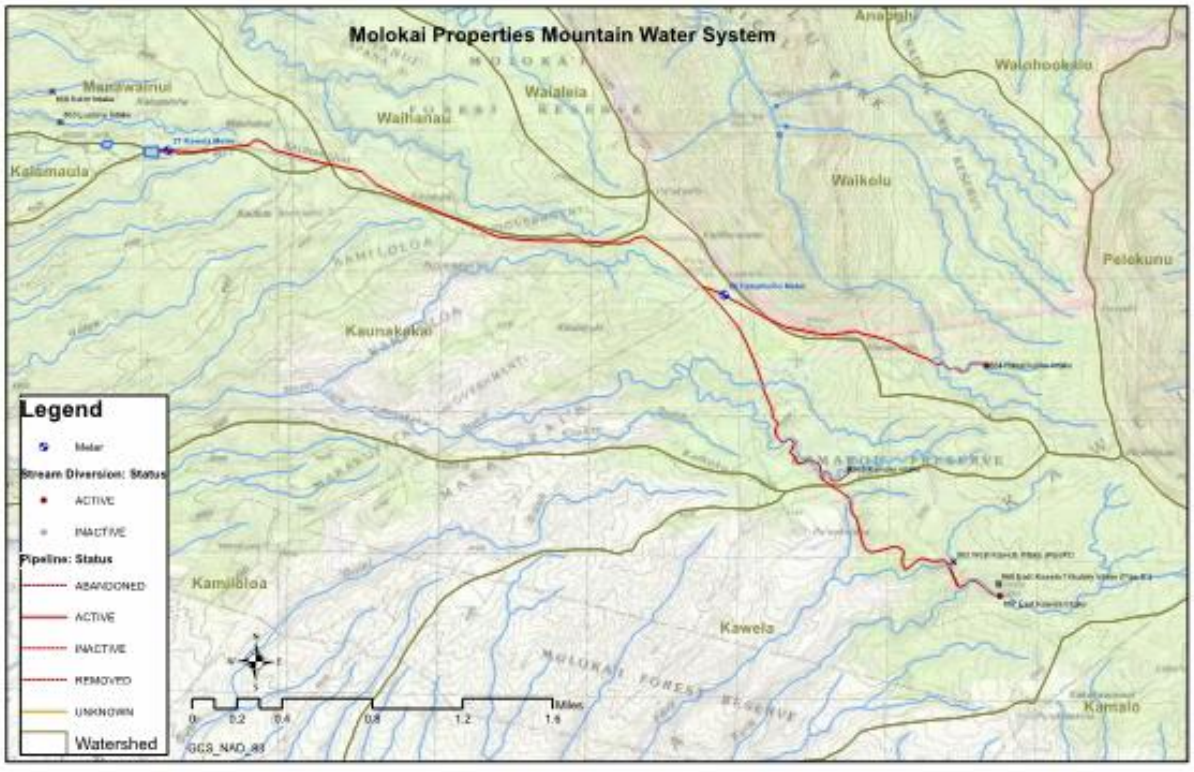
The area of the watershed is 35.2 square miles; 90.2% is classified as agricultural, 9.2% as conservation, and 0.6% as urban. Atlas at 313. Manawainui Gulch Stream is a perennial stream that runs 80.5 miles to the ocean. *Id.* at 314. Manawainui is a losing stream in its lower reaches and runs dry during dry weather months. Surveys have documented ʻoʻopu hiʻu kole in Manawainui. *Id.* at 315.

The only gage on this system is located on Manawainui Stream, near Kualapuʻu, at an elevation of 250 feet (USGS 16413500). This is a crest-stage gage, which measures peak streamflow levels on an annual basis. This gage has been in operation since December 20, 1964, during which time it recorded a maximum peak of 3,620 cfs (2,339 mgd) on April 4, 1989.

V. OVERVIEW OF MOLOKA‘I RANCH’S MOUNTAIN WATER SYSTEM AND DIVERSIONS

A. Summary Description of the MWS.

The MWS includes three intakes on Kawela Stream: the East Kawela (0654-03), East Kawela Tributary (0654-02), and West Kawela (0654-01) Intakes. *See* Ex. 4 (certificates of water use). The Hanalilolilo Intake (0754-02) is located on Waikolu Stream, and the Kamoku Intake (0754-01) diverts water from the south fork of Kaunakakai Stream. The Lualohe (0857-01) and Kalihi (0857-02) Intakes both capture water from the Kahuaawi Gulch Stream, a tributary of Manawainui Stream. All seven intakes are dams, with the exception of the Lualohe Intake, which is a six-inch pipe located in the streambed. According to the Commission’s staff, only two of the MWS’s seven diversions are currently in use: Hanalilolilo Intake on Waikolu Stream and the East Kawela Intake on Kawela Stream. These two diversions are marked in red on the following Commission map.



Currently, the Kawela Meter (Meter 27) measures the aggregate diversions of the MWS, except for any diversions of Manawainui Stream via the Kalihi and Lualohe Intakes, which are located below the meter. The Hanalilolilo Meter (Meter 26) is no longer in service. *See* Ex. 9.

B. Historical Background of the MWS.

During much of the past century, Dole and Del Monte used stream water diverted by the MWS for their pineapple operations on Ranch lands.[32] After these operations shut down in the mid-1980s, the Ranch used the MWS to supply its ranching and other businesses, as well as residences on its lands. The Ranch shut down in 2008, but continues to operate its two wholly owned water utility subsidiaries: Waiʻola o Molokaʻi, Inc., which controls the non-potable MWS system; and Molokaʻi Public Utilities, Inc., which uses potable water from Well 17.

The American Sugar Company initially built a "Lualohi tunnel" in 1900, before the Ranch acquired the system around 1911.[33] The tunnel intake is not included in the Commission's records, and it appears the tunnel fell out of service before the Ranch registered its diversions with this Commission. The Ranch added the Hanalilolilo diversion in 1917 and the first of several diversions from Kawela Stream between 1919 and 1921. Cooke at 30-31. The Ranch built the Lualohe, East Kawela Tributary, Kamoku, and Kalihi dams in 1930. *See* Exs. 1(a)-(c) (diversion registrations and water use declarations). The Ranch added the East Kawela Intake in 1939 and the West Kawela Intake in 1988. *See id.*

Historically, the MWS transmitted water to the central region and west end for agricultural and municipal use through two primary transmission systems. Libby, McNeill and

[32] *See* Joyce D. Kahane, *The Molokaʻi Irrigation System: A Management Study* (1987).

[33] George P. Cooke, *Moʻolelo o Molokaʻi: A Ranch Story of Molokaʻi* 29 (1949) ("Cooke").

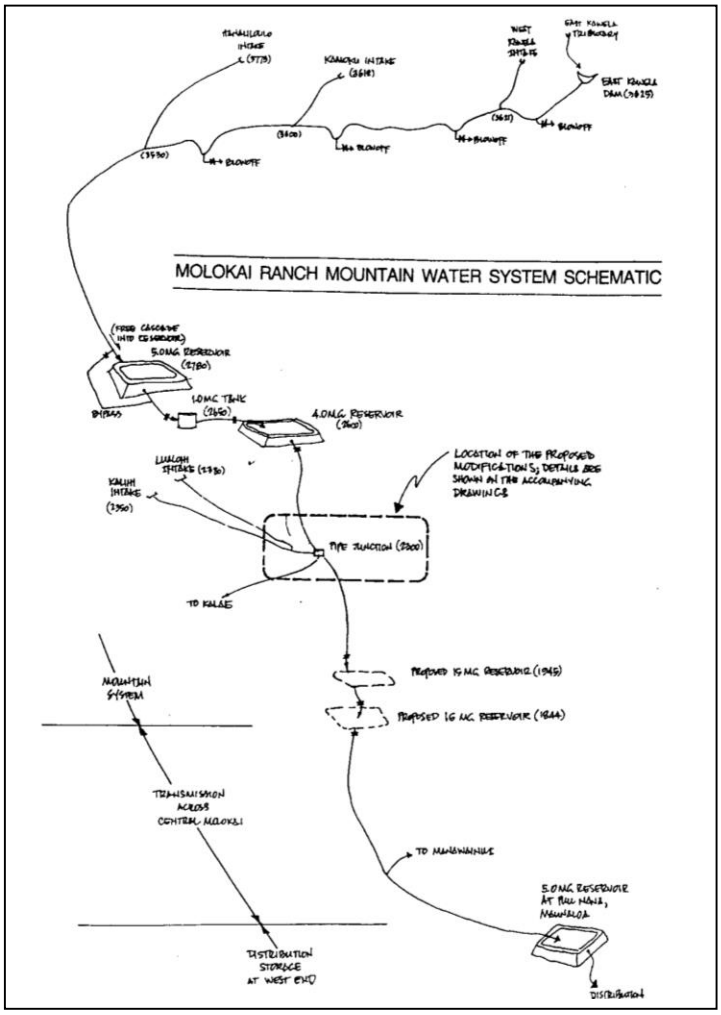
Libby (later Dole) built one system to service land it leased from the Ranch for growing pineapple, as well as the plantation town of Maunaloa.[34] Del Monte built the other system to supply the Kualapuʻu area. Belt Collins Report at 30. As of 1982, when Belt Collins performed its inventory of water transmission systems on Molokaʻi, the Libby-Dole system serviced 206 residences in Maunaloa, 21 residences in Kipu, and 6 residences in Manawainui, as well as several commercial business and municipal users. *Id.* at 28. The Del Monte system serviced 120 employee residences, its office, and its maintenance yards. *Id.* at 30.

The Belt Collins Report estimated that water from the MWS diversions to the two transmission systems fluctuated between a low of 0.1 mgd and a high of 0.8 mgd, but noted that the Ranch did not keep written records of its meter readings. *Id.* at 23. The Report also indicated that, historically, the more numerous intakes above the "Libby Connection" along Kawela, Waikolu, and Kaunakakai Streams supplied the larger number of end users located on the former Libby/Dole lands in Maunaloa, Manawainui and Kipu, while the fewer remaining intakes supplied the Del Monte lands in Kualapuʻu. *See* Ex. 8 (maps from Belt Collins Report at 25-26, Figures 11 & 12).[35] Del Monte received only about one-quarter of the water flowing through the MWS, with shortages met using water from the MIS at a local connection point in Kualapuʻu. Belt Collins Report at 23, 30. The Libby/Dole and Del Monte systems later became known, respectively, as the "Dole" and "Ranch" lines. *See*. Ex. 6 (Commission schematic).

[34] Tom Nance, Belt, Collins & Associates, *Molokaʻi Water Systems Plan* 23 (1982) (report prepared for the Maui County Department of Water Supply) ("Belt Collins Report").

[35] Commission records from the mid-1990s depict the opposite, indicating that the Lualohe and Kalihi Intakes along Manawainui feed the "Dole Line" to Maunaloa town, but that appears to be incorrect. *See* Ex. 6 and also Ex. 4.

In 1993, the Ranch connected the MWS to the MIS to store "excess" water collected from the Moloka'i Mountain Streams in the MIS's Kualapu'u Reservoir.[36] The 1994 agreement between the MIS Water Users Advisory Board and the Ranch concerning management and operation of the shared transmission lines stipulated that: "the RANCH presently owns and operates a surface water catchment system and *has water excess to its needs*." MIS Assessment, App. A (emphasis added). It is unclear why the Ranch was diverting such "excess" water beyond its needs and how such practice may reflect on the Ranch's declarations and representations of its water uses to the Commission. *See infra* Part V.C.



Source: Ex. 7 (Ranch Letter dated Dec. 5, 1997)

In 1998, shortly after connecting the MWS to the MIS, the Ranch constructed two new reservoirs of 15 and 16 million gallons below the convergence of the former Dole and Ranch Lines. *See* Ex. 7 (image of revised schematic); MWS schematic above. These new reservoirs greatly increased the Ranch's water banking capacity.

[36] *See Final Environmental Assessment for Moloka'i Irrigation System After-the-Fact Pipeline Connection Kualapu'u, Moloka'i, Hawai'i* at 5-6 ("MIS Assessment").

During discussions surrounding construction of the reservoirs, the Commission considered whether to amend the existing IIFSs. Ultimately, this Commission decided not to amend the IIFSs based on the following representations made by the Ranch:

1. The addition of the 15 million and 16 million gallon reservoirs to the MWS would not increase the overall volume of water diverted from each stream;

2. The Ranch would install three meters to capture diversion amounts from "1) East Kawela, East Kawela Tributary, West Kawela and Kamoku; 2) Hanalilolilo, a tributary of Waikolu Stream; and 3) Kalihi and Lualohe, both branches of Kahuaawi Gulch"; and

3. The Ranch would report all water use and diversion amounts to the Commission.

Ex. 7 (Ranch Letter dated May 14, 1997). The Commission affirmed the Ranch's obligation to report water diversion amounts pursuant to HAR § 13-168-7, in a letter dated July 8, 1997. *See* Ex. 7 (Commission Letter dated Jul 8, 1997).

Despite the Ranch's explicit representations, it failed to report any water use or diversion amounts between February 2005 and November 2017. *See* Ex. 9 (Ranch water use reports).[37] Further, the Ranch has never reported any diversion amounts for the Kalihi and Lualohe Intakes on branches of Manawainui Stream; the available reports show only combined flows diverted from Kawela, Kaunakakai, and Waikolu Streams. *See id.* Finally, because Meter 26, located below the Hanalilolilo Intake, is no longer active, the current water use reports measure only the *aggregate* diversion amounts from Kawela, Kaunakakai, and Waikolu Streams, with no way to separate out the diversion amounts for Waikolu Stream. The current reporting thus fails to comply with the Commission's condition and requirement to separately meter and report diversion amounts for each of the Moloka'i Mountain Streams.

[37] The Ranch's reporting also contains other substantial gaps—e.g., from July 2002 to December 2003.

C. The Ranch's Overstated Water Use Declarations vs. Actual Historical Uses.

As detailed below, the publicly available record establishes that the Ranch grossly overstated its claimed water use amounts to the Commission during the water use declaration and certification process around the early 1990s. To the extent that the existing "status quo" IIFSs also simply rubberstamped the inflated diversion amounts the Ranch claimed, these IIFSs do not properly reflect the actual conditions at the time, let alone what present day conditions and the law require today.

On May 26, 1989, the Ranch submitted declarations for East Kawela, West Kawela, Kamoku, Kalihi, and Lualohe Intakes. *See* Ex. 1(a). The 1989 declarations did not include diversion amounts. On July 16, 1991, the Ranch submitted declarations for East Kawela Tributary, Kalihi, Ōhi'alele, and Hanalilolilo Intakes. *See* Ex. 1(b). The 1991 declarations included estimated diversion amounts for East Kawela Tributary and Kalihi Intakes, but not for the Ōhi'alele and Hanalilolilo Intakes (which the Commission determined were the same intake). The Commission's files also include another set of undated declarations with estimated diversion amounts for all intakes except Hanalilolilo. *See* Ex. 1(c). Information in the Commission files suggest that the Ranch provided these undated diversion estimates in 1990.[38]

[38] *See* Ex. 2 (referencing updated declaration form dated June 21, 1990 for East Kawela, West Kawela, Kamoku, Kalihi, and Lualohe Intakes).

Table 1 – Declarations of Water Use

Diversion	1989 Form, Exhibit 1(a)	Undated Form, Exhibit 1(c)
East Kawela	4 domestic service connections; other: cattle	4 domestic service connections; other: cattle
East Kawela Tributary	n/a	4 domestic service connections; other: cattle, agriculture (West End)
West Kawela	4 domestic service connections; other: cattle	4 domestic service connections; other: cattle (West End)
Kamoku	1 domestic service connection; other: cattle	1 domestic service connection; other: cattle (West End)
Ōhi‘alele	n/a	livestock
Hanalilolilo	n/a	domestic, livestock, irrigation
Lualohe	2 domestic service connections	2 domestic service connections; other: livestock, agriculture (Na‘iwa)
Kalihi	1 domestic service connection	1 domestic service connection; other: livestock, agriculture

The Commission documents attached as Exhibits 2, 3, and 4 demonstrate that the certificates issued by the Commission were based exclusively on the Ranch's *claimed* diversions amounts, as opposed to any actual measurements, or any independent verification by the Commission. Exhibit 2 is an internal Commission memo of field notes that acknowledges for each stream: "The quantity diverted is not measured." Exhibit 3 is a letter from the Commission to the Ranch summarizing its intent to "[b]ase quantity of use on reported data" for each individual stream. Exhibit 4 are the certificates stating that the authorized diversion amount for each intake on the MWS is "[b]ased on data submitted in Declaration."

The certificates, file-stamped May 3, 1996, refer to total diversions of up to 1.238 mgd from the seven intakes of the MWS in the following amounts:

- East Kawela Intake (Kawela Stream): 0.562 mgd
- East Kawela Tributary Intake (Kawela Stream): 0.067 mgd
- West Kawela Intake (Kawela Stream): 0.067 mgd
- ‘Ōhi‘alele/Hanalilolilo (Waikolu Stream): 0.130 mgd
- Kamoku Intake (Kaunakakai Stream): 0.071 mgd
- Kalihi Intake (Manawainui Stream): 0.071 mgd
- Lualohe Intake (Manawainui Stream): 0.270 mgd

These amounts appear to be the total annual diversion amounts declared by the Ranch for each diversion, divided by 365 days per year (and averaged where the Ranch provided estimated use for two consecutive years). *Compare* Ex. 1(c) *with* Ex. 4. The basis for the Hanalilolilo diversion amount is unknown and does not appear in the Commission's records. *See* Exs. 1 to 6.

Documents in the public record, however, consistently show the Ranch actually diverted far less water than the amounts that the Commission rubber-stamped in the certificates. For example, on March 29, 1996, just several months before the certificates were issued, the Ranch sent a letter to the Commission responding to an inquiry on recent damage to a MWS pipeline, and revealing that actual total diversions between 1986 and 1995 were 0.53 mgd, less than half the 1.238 mgd stated in the certificates. *See* Ex. 5. Specifically, aggregate diversions from Kawela, Kaunakakai, and Waikolu Streams averaged 0.348 mgd, as opposed to the 0.897 mgd in the certificates, and aggregate diversions from Manawainui Stream averaged 0.184 mgd, instead of the 0.341 mgd in the certificates. *Compare* Ex. 4 *with* Ex. 5.

Public water use planning documents produced in the same early-1990s timeframe as the Ranch's declarations to the Commission similarly show that the Ranch grossly inflated its declared diversion amounts.[39] In these water use plans, the Ranch reported actual water use in 1990 of only 0.275 mgd, versus the 1.238 mgd it declared to the Commission, which was almost five times that amount. In fact, even the total future expanded water needs that the Ranch was projecting in the water use plans for 2010 (i.e., 20 years later), were less than the amounts it declared to the Commission.

[39] *See* Fukunaga & Associates, Inc., *Moloka'i Integrated Water System Study for County of Maui Dep't of Water Supply* 5-7, 10-11 (1989); Maui County Water Use and Development Plan 40 (1990).

The following table compares the Ranch's reported figures of actual water use in 1990 and projected water use needs for 2010 under the water use plans, and the amounts claimed in the Ranch's declarations around 1990 and rubber-stamped in the certificates in 1996.

Table 2 – Actual v. Declared and Projected Water Use Levels

YEAR	1990- Actual Water Use	1990- Declared Water Use	2010- Projected Water Use[40]
MGD	0.275	1.238	0.934

As another point of comparison, Table 3 adds the 2009 reported customer use for the Ranch's Waiʻola utility, which is authorized to provide water service to Maunaloa, Kipu, Manawainui, and the Molokaʻi Industrial Park Area using the MWS and other water sources.[41] In 2009, 20 years after the Ranch declared its residential and agricultural uses to the Commission, Waiʻola reported actual customer use amounts that had *decreased* to less than half of the amounts reported in the water use plans in 1990, and less than a *tenth* of the amount declared and certified in the 1990s.

[40] In some published sources, the Ranch inflated its projected water use needs for 2010 as high as 10 mgd. *See, e.g.,* Comm'n on Water Res. Mgm't, *Final Report of the Molokaʻi Working Group* (1993).

[41] *See In re Waiʻola o Molokaʻi Inc.*, Docket No. 2009-0049 ("*Waiʻola Rate Case*"), Decision and Order, filed on February 8, 2011, at 3, *available at* https://dms.puc.hawaii.gov/dms/. Waiʻola's service area is coextensive with areas serviced by the MWS system in 1990, and its publicly listed agricultural customers include end users also claimed by the Ranch when it filed its declarations in the early 1990s. *See, e.g.*, Ex. 6; *In re Waiʻola o Molokaʻi Inc.*, Docket No. 2011-0063, Waiʻola o Molokaʻi Inc.'s Responses to The Division of Consumer Advocacy's Submission of Information Requests, filed on July 12, 2011, at CA-IR-7.

Table 3 – Waiʻola Actual Customer Usage

YEAR	1990- Ranch Actual Water Use	1990- Ranch Declared Water Use	2009-Waiola Actual Customer Use	2010- Ranch Projected Water Use
MGD	0.275	1.238	0.112[42]	0.934

In sum, the documents filed with the Commission when certifying the Ranch's diversions and setting the "status quo" IIFSs for the Molokaʻi Mountain Streams did not accurately reflect the Ranch's actual stream diversions and water uses. Moreover, when issuing certificates to the Ranch, the Commission did not conduct any independent verification whether the diverted water was being put to reasonable-beneficial use as required by the constitution and Code. As a result, the Ranch's declared diversion amounts were inflated far beyond any actual water needs existing in 1990, or even 20 years later. Yet, the Ranch has prevented full scrutiny of its diversions and uses by failing to comply with the requirement to monitor and report its diversions from Waikolu, Manawainui, and Kawela/Kaunakakai Streams, which this Commission imposed as a condition of its decision not to amend the IIFSs for the Molokaʻi Mountain Streams in 1997—and which is a legal obligation of diverters in any event.

D. Water Waste.

On April 5, 2008, Molokaʻi Ranch ceased all operations, citing economic hardship. The Maunaloa Lodge, Kaupoa Beach Village, Kaluakoʻi Golf Course, a gas station in Maunaloa, Maunaloa Tri-Plex Cinema, and all of the Ranch's cattle operations were shut down.[43] Even

[42] *See Waiʻola Rate Case*, Decision and Order, filed on February 8, 2011, at 3, 24 n. 31, 25 n. 33.

[43] *See* Andrew Gomes, *Molokai Ranch to close, lay off 120*, Honolulu Advertiser, Mar. 25, 2008, a*vailable at* http://the.honoluluadvertiser.com/article/2008/Mar/25/ln/hawaii803250367.html (last visited July

though the Ranch closed over 10 years ago, it only recently resumed filing water diversion reports in December 2017. These reports claim diversion levels comparable to what the Ranch diverted at the peak of its operations during the early to mid-2000s.

Table 4 – Reported Diversion Levels (Meter 27)

YEAR	2001	2004	2018
MGD (Based on monthly mean)	0.4495	0.543	0.394*

*Based on seven months of data reported by the Ranch in 2018.

The Ranch's current reported level of diversions from the Molokaʻi Mountain Streams, 10 years after shutting down its operations, raises manifest concerns of water hoarding and waste. As discussed above, the Ranch has *never* used anywhere near the amount of water that it claimed when it filed its declarations, and since that time, the Ranch's actual water use needs have only *decreased*.

Further, around 2016, the Ranch announced its plans to separate its potable and non-potable water supplies and end its controversial practice of using the non-potable MIS to convey the Ranch's potable well water to its west end customers.[44] The Ranch would thus avoid having to treat non-potable stream water for drinking. *See also* Ex. 10 (map from Ranch's website indicating separate potable and non-potable systems). The MWS, in turn, would "remain operational to solely serve agricultural activities."[45] Currently, Molokaʻi Nō Ka Heke's

1, 2019). The following commercial end-users listed in the Commission files, *see* Exs. 5, 6(a), have also since shut down: Swenson Construction, Patterson Construction, Interisland Concrete, Friendly Isle Contracting, Molokaʻi Ready Mix, Molokaʻi Sea Farms. *See* httsp://hbe.ehawaii.gov (Business Registration Division Website, Dep't of Commerce & Consumer Affairs) (last visited June 17, 2019).

[44] *See* Molokaʻi Properties Ltd., *Molokaʻi Properties Water*, http://www.molokaipropertieswater.com/ (last visited July 1, 2019).

[45] Molokaʻi Properties Ltd., *Water Infrastructure Upgrading Project Fact Sheet*, http://www.molokaipropertieswater.com/fact-sheet/ (last visited July 1, 2019).

understanding is that the MWS supplies minimal uses for a limited amount of cattle and goat pasturage.

In sum, this discrepancy between the Ranch's reported diversions and actual uses indicates the Ranch is either:

► inflating its reported diversion amounts on paper (along the lines of its original water use declarations); or

► diverting excessive amounts of water beyond any known or reported uses, and wasting the water by hoarding it in oversized reservoirs where it is lost through evaporation and seepage.

The Ranch installed these new larger reservoirs while its plans for the failed Lā'au Point development project were underway, which would have substantially increased the Ranch's water uses.[46] Now that these and other plans for expanded water uses have failed, the Ranch has no reason to continuously fill these reservoirs with diverted stream water. Yet, that is exactly what the Ranch persists in doing, as shown in the current photographs of its reservoirs below.

The first photograph shows one of the newer, larger reservoirs completely filled; the second shows one of the older, smaller reservoirs currently being filled with water. The second photograph was taken *on the same day as the photograph of Kawela Stream in Part IV.B.2 above, showing the stream completely dewatered, and no water flowing over the dam.*

[46] *See, e.g.*, Moloka'i Properties Ltd., *La'au Point Draft EIS, West Moloka'i, Molokai Hawai'i,* at 122-29 (2008) (discussing water plans and the Ranch's available water sources).

New reservoir installed in 1998, currently filled (see schematic at page 33 and Ex. 7)

Recent dumping into old, pre-1998 reservoir

E. Abandoned Diversions and Refuse.

Moreover, while many of the MWS's diversions are purportedly currently inactive and effectively abandoned, the diversion structures remain in place. Therefore, absent compliance with the required procedures to formally abandon these intakes, nothing would prevent the Ranch from resuming diversions downstream of the currently functioning water gages (i.e., the Kalihi and Lualohe Intakes) and effectively avoiding reporting of diversions from Manawainui Stream. Moreover, if the Ranch intends to abandon the diversions, then it should be required to follow the required procedures for abandonment, remove and remediate the diversion structures, and ensure that any material left in or around the stream does not pose any environmental harm or safety hazards.

Indeed, several diversions are in serious disrepair and create such public nuisances. For example, at the abandoned West Kawela Intake, located in the Kamoku Preserve, the Ranch has discarded multiple broken pipes and at least one large lead acid battery lying adjacent to a public trail, which are a pollution and safety hazard. A pipe from the intake also continues to run water into a plastic storage tank and onto the ground, which serves no purpose and constitutes waste. This lack of public accountability by the Ranch must cease.

Discarded waste at West Kawela diversion (old battery in background)

VI. INSTREAM FLOW RESTORATION WILL BENEFIT PUBLIC TRUST USES AND PREVENT UNLAWFUL WATER BANKING AND WASTE

The Ranch's historic and ongoing diversions have impaired the Molokaʻi Mountain Streams and the many public trust purposes they support. Given the abandonment of most of the MWS diversion intakes and the evident hoarding and waste of water from the two remaining diversions on Waikolu and Kawela Streams, the time is long overdue for this Commission to restore flows to the Molokaʻi Mountain Streams through fully protective numeric IIFSs.

A. Benefits to Public Trust Purposes.

The return of flows to the Molokaʻi Mountain Streams will benefit the range of public trust purposes protected by the constitution and Code, including:

- Maintenance of fish and wildlife habitats

Restored stream flows will support the nearshore habitats of Molokai's South Shore and the stream habitats, in which various native stream species have been found to persist. Molokaʻi Nō Ka Heke members have fished and gathered in these areas and wish to continue doing so in the future. But these resources and the community practices they support have been compromised by the ongoing diversions, such as in Kawela Stream where the diversions limit the stream's ability to flow ma uka to ma kai. Both the Commission and Hawaiʻi Supreme Court have long recognized the "positive effect" of restored stream flows and its correlation to increased support for biological processes and increased habitat. *Waiāhole*, 94 Haw. at 146, 9 P.3d at 470. These benefits of stream flow restoration have been repeatedly validated over the years—beginning in *Waiāhole* and continuing in many other examples, including Nā Wai Ehā, East Maui, and Kahoma Streams on Maui—and can no longer be genuinely disputed.

- Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation

Restored streams flows will also support the broader ecosystems such as estuaries, wetlands, and stream vegetation. The Molokai Mountain Streams' estuaries are an integral part of the extensive network of nearshore fisheries and fishponds on the Molokaʻi South Shore. Molokaʻi Nō Ka Heke members have a long history of promoting restoration of loko iʻa for traditional food production, and they also gather shoreline fish, limu, and other resources supported by freshwater inflows. *Waiāhole* established the particular importance of "high base flows" for the stream and estuary ecosystem because they carry "the steady load of nutrients that is essential for estuarine productivity . . . throughout the year." *Waiāhole*, 94 Haw. at 158, 9 P.3d at 470. Likewise, consistent fresh water input through estuary and ground water flows is essential for Molokai's South Shore fisheries and fishponds.

In addition, numerous species listed under the federal Endangered Species Act, 16 U.S.C. §§ 1531-1543, have designated critical habitat located along the Molokaʻi Mountain Streams.[47] Endangered species such as the ʻAkohekohe (Crested Honey Creeper or *Palmeria dolei*) and the Hawaiian Picture-Wing Fly (*Drosophila differens*), as well as many plant species, depend on healthy forest habitats along the Molokaʻi Mountain stream gulches for their survival and recovery. The designation of critical habitat only underscores the importance of restoring Molokaʻi Mountain Streams as integral components of this overall native forest ecosystem.

- Outdoor recreational activities and scenic beauty

Stream flow restoration is also necessary for recreation and aesthetic purposes valued by members of Molokaʻi Nō Ka Heke and the broader community, including fishing, swimming,

[47] *See* Endangered Species Critical Habitat, Pacific Islands Fish and Wildlife Office, https://ecos.fws.gov/ipac/location/KOS2NJ774JFHDCHKHWKQPSGCPI/resources (last visited June 25, 2019).

hiking, and scenic enjoyment. As can be seen in the photographs of Kawela Stream in Part IV.B.2 above, for example, the stream offers exceptional aesthetic values; yet the contrast with the bone dry stream mouth could not be starker. Molokaʻi residents attest that during their lifetimes a popular swimming pool in Kawela Stream, about half a mile upstream from the bridge crossing at the coast, has dried up. Kawela Stream is particularly important for community recreational and aesthetic uses because it is the largest stream flowing to Molokaʻi's South Shore and the only stream that Molokaʻi residents can access in the central area of the island where most of the population lives, compared to the more remote north and east sides of the island.

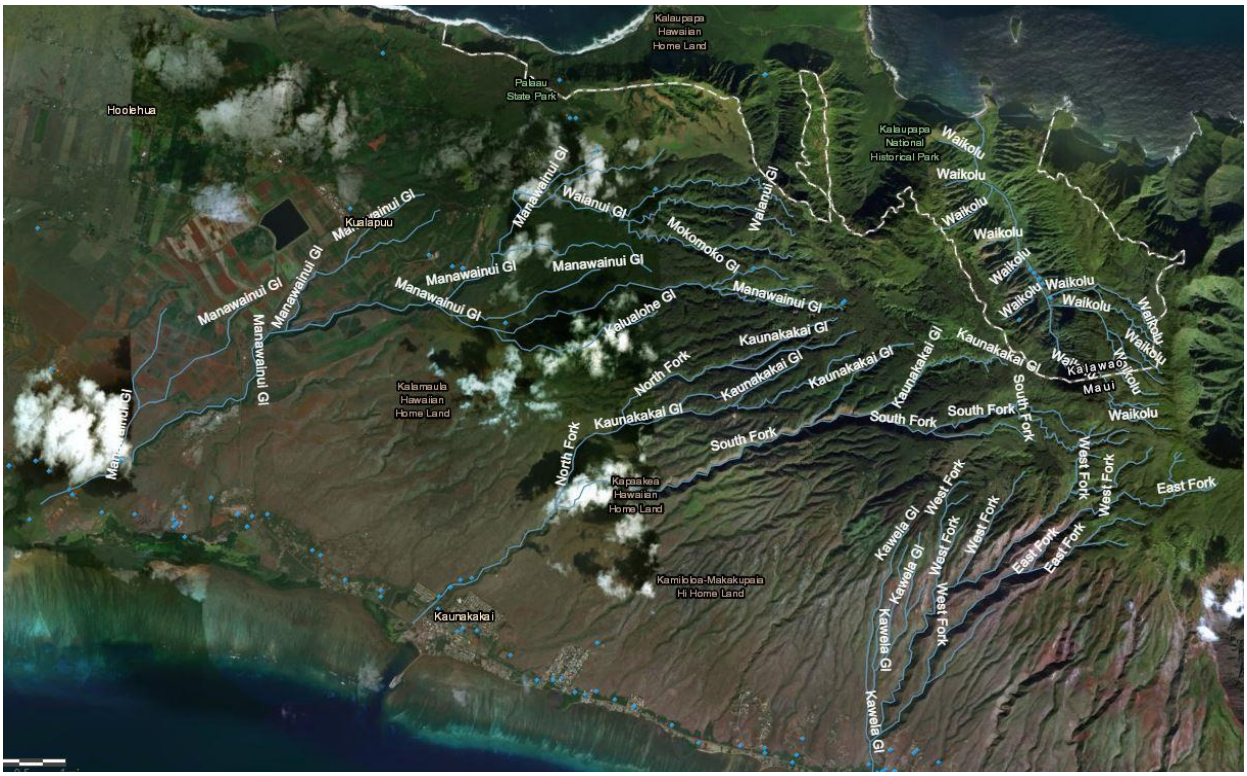
- Ground water recharge and water quality

Increased stream flows will correspondingly increase recharge of the underlying ground water aquifers. USGS studies have shown how stream flow restoration increases recharge of the underlying ground water aquifers and augments their capacity and sustainable yield.[48] The Molokaʻi Mountain Streams recharge the critical Kualapuʻu, Kamiloloa, Manawainui, Kawela, and Waikolu aquifers in central Molokaʻi, which is the region that provides the island's drinking water.[49] Increased recharge of these aquifers will support the ground water flow that is essential for the productivity of the South Shore fisheries and fishponds. It will also help sustain the viability of potable water supplies; Kawela Stream, for example, flows directly through an area that supplies several county and private wells.

[48] *See*, *e.g.*, Stephen B. Gingerich, USGS, Ground-Water Availability in the Wailuku Area, Maui, Hawaiʻi (2008); Delwyn S. Oki, USGS, Effects of Surface-Water Diversion on Streamflow, Recharge, Physical Habitat, and Temperature, Nā Wai ʻEhā, Maui, Hawaiʻi (2010).

[49] *See* Ground Water Hydrologic Unit Map, Island of Molokaʻi, *available at* https://dlnr.hawaii.gov/cwrm/groundwater/hydrounits/.

Stream flow restoration also benefits instream water quality, by diluting pollutant loads and reducing the accumulation of sediment loads that results in concentrated runoff during high-flow events. Such sediment runoff impairs both stream and ocean water quality and poses recognized harms to the reef and fishpond ecosystem on the South Shore.[50]



Source: ARC GIS (Moloka‘i Mountain Streams and nearby wells, indicated by the blue dots)

- Protection of traditional and customary and Hawaiian Homelands rights

Restoration of the Moloka‘i Mountain Streams will also protect and promote Native Hawaiian rights, including traditional and customary practices and Hawaiian Homelands water rights, both of which are expressly recognized public trust purposes. Moloka‘i Nō Ka Heke members include Native Hawaiians who exercise traditional and customary rights in the streams

[50] *See* Michael E. Field et al., *The Coral Reef of South Moloka‘i, Hawai‘i-Portrait of a Sediment Threatened Fringing Reef* (2008).

and their interconnected nearshore areas that depend on stream flows. These include fishing and gathering resources such as stream life, limu, and ocean fish, and caretaking and cultivating loko ʻia. Such practices are especially critical on Molokaʻi given its more predominant Native Hawaiian population and reliance on traditional subsistence lifestyles. Fishponds on the South Shore would particularly benefit from the restoration of the natural stream flow regime, including increased fresh water input and more controlled sediment runoff. The Molokaʻi community has identified thirty one fishponds that it would like to restore, mostly on the South Side. *See* Farber at 1.

The restoration of flow to Waikolu Stream will also support the public trust purpose of Hawaiian Homelands water rights, since the Ranch's Hanalilolilo Intake diverts water from the stream above the intakes for the MIS and thus diminishes the supply available for Hawaiian homesteads. Hawaiian Homelands has two-thirds prior rights to Waikolu stream water provided by the MIS. *See* HRS § 168-4.

B. No Effect on the Ranch's Uses by Ending Waste.

As detailed above, the Ranch's actual water uses and needs have never been more than a fraction of the diversion amounts it declared around the early 1990s, on which the Commission relied in issuing the Ranch's certificates and setting the existing "status quo" IIFSs. The Ranch's uses have only further diminished after the Ranch shut down its ranching and hotel operations 10 years ago in 2009. The last time the Ranch's Waiʻola utility reported its end uses to the Public Utilities Commission, it supplied only around 382 customers an estimated total of 0.112 mgd of water. This water use amount is far less than the diversion amounts that the Ranch has represented in its recently resumed reporting, and an entire order of magnitude less than the amounts the Ranch originally declared to this Commission. Today, the Ranch has abandoned most of the MWS diversions and has separated its non-potable MWS from its potable water

system, and few if any end uses of the MWS appear to remain beyond limited pasturage uses. Based on these long-running historical circumstances, the restoration of flows to the Moloka'i Mountain Streams through amended IIFSs will pose little or no impact to the Ranch's water uses. Indeed, such restoration is *required* to prevent unlawful waste.

VII. REQUESTED REMEDIES

First, this Commission must amend upward and properly establish numeric IIFSs for the Molokaʻi Mountain Streams. As detailed above, instream flow standards are the "primary mechanism by which the Commission is to discharge its duty to protect and promoted the entire range of public trust purposes dependent upon instream flows." *Waiāhole*, 94 Hawaiʻi at 147-48, 9 P.3d at 459-60. The existing "status quo" IIFSs, however, simply rubber-stamped the Ranch's declared water use amounts without any independent verification of the Ranch's actual needs, consideration of the facts at that time and since showing the Ranch's actual uses have been far less than its declared amounts, or recognition of the need to protect and promote instream public trust uses. *See* Exs. 1 to 4. The time has come for this Commission to set numeric IIFSs that restore the natural flow regime of the Molokaʻi Mountain Streams and their watersheds from ma uka to ma kai and confirm the current status quo of the Ranch abandoning most of its diversions and having little or no reasonable-beneficial use of the diverted stream flows.

Second and related to the previous, Molokaʻi Ranch bears the burden to justify its diversions of public trust water resources, provide transparent and accurate reporting, and show its uses are reasonable-beneficial, as opposed to waste in violation of the Code and public trust doctrine. *See* HRS § 174C-13; *Waiāhole*, 94 Hawaiʻi at 142, 156, 9 P.3d at 454, 468 (explaining the presumptions and burdens under the public trust and the prohibition against waste). As early as 1994, the Ranch admitted it was diverting "excess" water from the Molokaʻi Mountain

Streams, and its actual needs have only declined after the Ranch shut down its operations in 2008. Yet, the Ranch's recently resumed water reporting indicates it is taking water at levels rivaling the mid-2000s when the Ranch was at peak operation. *See* Ex. 9; *infra* Table 4. The Commission must address this discrepancy and place the burden on the diverter to justify any diversions. An effective remedy available to the Commission is to issue an order to show cause and compel any and all necessary action by the Ranch to cease and prevent wasting water. *See*, *e.g.*, *Waiāhole*, 94 Hawai'i at 112, 9 P.3d at 424.

Third, Moloka'i No Ka Heke requests that this Commission issue a declaratory order enforcing the Commission's rules and requiring the Ranch to follow the legally required procedures to report the termination of its certified water uses, HAR § 13-168-6(c); and the abandonment of diversions, HAR § 13-168-35(a), including the East Kawela Tributary Intake (Stream Diversion 0654-02), West Kawela Intake (Stream Diversion 0654-01), Kamoku Intake (0754-01), Lualohe Intake (Stream Diversion 0857-01), and Kalihi Intake (Stream Diversion 0857-02). As part of this process, the Ranch should be required to remove and remediate the diversion structures, as well as any related discarded material in and around the streams, such as the refuse at the abandoned West Kawela intake shown above in Part V.B.

Finally, Moloka'i No Ka Heke requests that the Commission also issue a declaratory order that the Ranch:

- violated HAR § 13-168-7 and the requirements in the Commission's letter dated July 8, 1997, in completely failing to report its water diversions for almost 13 years between February 2005 and November 2017, *see* Ex. 9; and
- violated HAR §§ 13-168-6(c) and 13-168-35, in failing to report termination of certified water uses and abandonment of diversions; and

- thus, is subject to administrative penalties pursuant to HRS § 174C-15 and HAR § 13-168-3 for these violations.

As explained above, the Commission requires monthly diversion reports not only pursuant to established rule, but also specifically in this case as an express condition of allowing the Ranch to expand its diversion capacity by installing new 15 and 16 million gallon water reservoirs. *See* Ex. 7. The Commission rules also require timely compliance with procedures regarding termination of uses and abandonment of diversions, which is necessary to keep the Commission apprised of actual diversion conditions, and to ensure that diverters maintain full responsibility over their diversions and are not allowed to leave diversions dormant and reopen them at will, or to simply abandon the diversions and related refuse in place. The violations of these requirements has only benefitted the Ranch by undermining public scrutiny and proper Commission management of these public trust resources. The Commission has the authority to levy administrative penalties of up to $5,000 per day for these violations, *see* HRS § 174C-15; HAR § 13-168-3,[51] and should impose an appropriate amount of fines for the Ranch's long-running non-compliance, and to deter such irresponsible conduct in the future.

VIII. CONCLUSION

The Molokaʻi Mountain Streams are a treasure and lifeline for the island's environment and people. While the Ranch has freely drained these streams for a century, the Commission must now fulfill its public trust mandate to protect and restore them for present and future generations. For the reasons set forth above, Molokaʻi Nō Ka Heke respectfully requests that this Commission:

[51] Over the 12 years and 10 months the Ranch violated its reporting obligations the maximum potential fines accrued to $23,415,000.

(1) Amend upward and properly establish numeric IIFSs for the Molokaʻi Mountain Streams to restore natural flows to the streams;

(2) Investigate the Ranch's diversions and issue an order to show cause to place the burden on the Ranch to prove any actual, reasonable-beneficial use, justify any diversions, and cease and prevent any waste;

(3) Issue an order (a) requiring the Ranch to comply with the legally required procedures for termination of certified water uses and abandonment of diversions; (b) declaring that the Ranch violated the Commission's rules and requirements for failing to report its diversions and comply with the termination and abandonment procedures; and (c) imposing appropriate administrative penalties.

DATED: Honolulu, Hawaiʻi, July 1, 2019.

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