



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
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STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

August 21, 2013
Honolulu, Hawaii

Motion to Hold a Contested Case Hearing for the
Provisional Recognition of Appurtenant Rights
Na Wai Eha Surface Water Management Areas
Waihee, Waiehu, Iao, and Waikapu Streams, Maui, Hawaii

SUMMARY OF REQUEST

Request that the Commission determine a contested case hearing is required for the provisional recognition of Appurtenant Rights in the Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao, and Waikapu Streams, Maui, Hawaii.

BACKGROUND

On September 27, 2011, the Commission approved a three (3)-step process for determining appurtenant water rights in the Wailuku District (Waihee, Waiehu, Iao and Waikapu), Na Wai Eha Surface Water Management Areas (SWMAs), Maui.

On November 1 and November 8, 2011, the Commission published notice in the Maui News and the Honolulu Star Advertiser that appurtenant rights would be determined in the Na Wai Eha Surface Water Management Areas.

On August 15, 2012, the Commission delegated authority to the Chairperson to appoint a Hearings Officer for Appurtenant rights claims for surface water use permit applications in the Na Wai Eha Surface Water Management Areas, Maui. Dr. Lawrence Miike was selected as the Hearings Officer.

On August 29 and September 5, 2012, the Commission published notice in the Maui News and the Honolulu Star Advertiser, describing how written objections to the appurtenant rights claims should be filed.

On March 4 and March 11, 2013, the Commission published a second notice in the Maui News and the Honolulu Star Advertiser, because a number of claimants submitted the relevant documentation after the deadline set in the August 29, 2012 public notice.

On August 6, 2013, the Commission issued a Notice to Applicants and Those Filing Objections in the *Provisional* Recognition of Appurtenant Rights for Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao and Waikapu Streams. The Notice stated that on August 30, 2013, the Commission will hold a *due process* hearing in Wailuku, Maui to receive and act on the Hearings Officer's Findings and Recommendations, which were made available via the Commission's website. The Notice was sent to all surface water use permit applicants and their representatives.

ANALYSIS

The Na Wai Eha water issues cover four streams (Waihee, Waiehu, Iao, and Waikapu) in western Maui and their respective watersheds. The Commission must address three (3) separate, but ultimately related, processes in these areas: 1) Appurtenant rights; 2) Surface Water Use Permit Applications ("SWUPAs"); and (3) amendments to the Instream Flow Standards ("IFS") for the four streams in question.

Under the State Water Code, "the commission . . . [s]hall determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of this chapter." Hawaii Revised Statutes §174C-5(15).

In this initial stage, the only issue to be addressed is whether, provisionally, the parcel of land which is the subject of an application has an appurtenant right.

A person or entity with a legal interest in the parcel and standing to address the "title" claim may exercise their due process right to present and cross examine evidence and witnesses on the sole question whether the parcel has an appurtenant right. The proceedings are limited to the applicant and those with legal rights in the proceedings. There will no public testimony.

Hawaii Administrative Rule §13-167-52(a) provides, *inter alia*, that a "hearing on a contested matter may be requested by the commission on its own motion or upon written petition by any government agency or interested person." This proceeding, by its very nature, is a legally contested matter in which due process must be provided. *A fortiori*, the hearing must be a contested case.

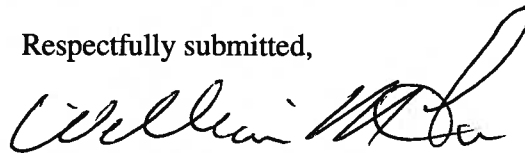
As an administrative and procedural matter, the staff requests that the Commission on its own motion formally determine a contested case hearing is required for the provisional recognition of Appurtenant Rights in the Na Wai Eha Surface Water Management Areas.

RECOMMENDATION:

Staff recommends that the Commission:

1. Determine a contested case hearing is required for the provisional recognition of Appurtenant Rights in the Na Wai Eha Surface Water Management Areas of Waihee, Waiehu, Iao, and Waikapu Streams, Maui, Hawaii.

Respectfully submitted,



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Deputy Director

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson