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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT
OF THE STATE OF HAWAII

In the Matter of)	SWUPA-E (NA WAI EHA, MAUI)
)	NO. 2186
Na Wai Eha Surface Water Use Permit)	
Application of MMK MAUI, LP)	MMK MAUI, LP'S OBJECTIONS
)	AND RESPONSE TO COMMENTS
)	AND OBJECTIONS OF STATE OF
)	HAWAII OFFICE OF HAWAIIAN
)	AFFAIRS TO SWUPA-E (NA WAI
)	EHA, MAUI) NO. 2186

MMK MAUI LP'S OBJECTIONS AND RESPONSE TO COMMENTS AND
OBJECTIONS OF STATE OF HAWAII OFFICE OF HAWAIIAN AFFAIRS TO
SWUPA-E (NA WAI EHA, MAUI) NO. 2186

MMK Maui, LP ("MMK") owns and operates two golf courses, The King Kamehameha Golf Club and the Kahili Golf Course (the "Golf Courses"), located in Waikapu, Wailuku, Maui. MMK is an existing user of water from Na Wai Eha, which is comprised of the Waihee, Waiehu, Iao, and Waikapu streams, all of which are located in Wailuku, Maui.

On April 22, 2009, MMK submitted an Application for Surface Water Use Permit for Existing Use in the Na Wai Eha, Maui, Surface Water Management

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Areas (“MMK’s Application”). On June 12, 2009, MMK received in the mail a letter dated May 26, 2009, from the State of Hawaii Office of Hawaiian Affairs (“OHA”) to the Commission on Water Resource Management (the “Commission”) objecting to MMK’s Application (the “Objection Letter”). The Objection Letter was “Received June 12, 2009” by MMK. See Objection Letter attached to this Response and corresponding envelope postmarked June 8, 2009. MMK objects to the Objection Letter and moves that it be stricken from the record of this matter as OHA is not a party to the proceeding. However, subject to and without waiving its objections to OHA’s participation in this proceeding, MMK hereby submits its response in support of its Application and its opposition to OHA’s comments and objections in accordance with Section 13-171-18 of the Hawaii Administrative Rules.¹

A. OHA Does Not Have Standing to Object.

Section 13-171-18(a) of the Hawaii Administrative Rules (“HAR”) states in relevant part that, “Within ten working days after the last public notice of the pending permit application, a **party** may file with the commission, written objections to the proposed permit” (Emphasis added.) To file an objection, OHA must be a party to the proceeding, which it is not. Thus, the Commission must not consider OHA’s Objection Letter.

A party is defined in section 13-67-2(a), HAR, as a “person or agency named

¹ Section 13-171-18 of the Hawaii Administrative Rules provides that a party may file with the Commission written objections to the proposed permit. Such party must serve copies of the objections upon the applicant and, within 10 working days after the filing of an objection with the Commission, any other party may file with the Commission a brief in support of the proposed permit. In this case, while OHA presumably filed its Objection Letter on May 26, 2009, the Objection Letter was not postmarked until 13 days later on June 8, 2009, and was not received until 17 days later on June 12, 2009. MMK is filing its response on June 15, 2009, the first working day after receipt of the Objection Letter. MMK requests that the Commission consider its response as timely in light of the circumstances described above and as a matter of fairness.

as a party, or **properly seeking and entitled as of right** to be admitted as a party . . .” (Emphasis added.) The rules that govern water use permits (HAR §§ 13-171-11 through 13-171-27) do not mention OHA at all. As such, OHA is neither named as a party nor entitled as of right to be admitted as a party. Based on a plain reading of this Commission’s rules governing water use permits, OHA is not a party to MMK’s Application. As such, OHA’s comments must be rejected and stricken from the record in this matter.

Without waiving its objection to OHA’s participation in this proceeding, MMK hereby responds to OHA’s Objection Letter

B. MMK’s Use Will Not Divert Stream Water From the Water Management Area.

OHA objects to MMK’s Application for golf course and landscaping irrigation because it fails to meet the “heavy burden” OHA believes MMK bears under the law to show why stream water should be diverted out of its watershed of origin for such purposes. See Objection Letter, p. 2, citing Waiahole I, 94 Haw. 97, 168, 9 P.3d 409, 480, citing the Commission on Water Resource Management (the “Commission”). In Waiahole I, stream water was being diverted out of its watershed of origin from the Windward side of Oahu to irrigate golf courses in the arid Leeward side of Oahu, and the Commission concluded that ground water and/or reclaimed water were available, thereby creating the “heavy burden” to show why stream water should be utilized². However, in MMK’s case, its Golf Courses are located in Waikapu, Wailuku, Maui, the same water management area from which Na Wai Eha flows. Thus, surface water is not being transported from one side of Maui to

²Waiahole I also involved dike-impounded ground water.

another as was the case in Waiahole I. Further, while the Commission concluded in Waiahole I that ground water and/or reclaimed water were available to the golf courses in that case, alternative water sources are not available to MMK. Thus, MMK respectfully submits that the “heavy burden” noted by OHA does not apply to MMK.

C. MMK Does Not Have Access to Reasonable Alternate Water Sources.

OHA argues in its Objection letter that MMK has failed to show the lack of practicable mitigation and alternative water sources. See Objection Letter, p. 2. However, alternative water sources, such as ground water and reclaimed water, are not potential alternatives for MMK. Specifically with regard to ground water, section 20.24.010 of the Maui County Code prohibits the use of potable water³ for irrigation and golf course use. Therefore, potable groundwater is not a viable alternative for MMK and would be, in fact, an illegal use of potable water. Regarding reclaimed water, there are no existing transmission lines to transport the needed water from either the Kahului Wastewater Treatment Plant or the Kihei Treatment Plant to MMK’s Golf Courses. Both treatment plants are located a straight line distance of approximately 8 to 10 miles from the Golf Courses, and transmissions lines would likely be considerably longer in light of the actual route for the lines due to topography, natural elements, landmarks and similar considerations. Establishing the necessary infrastructure to bring a distribution line from the treatment plants to the Golf Courses is not feasible. The ability to obtain rights of way and/or easements and construct the necessary infrastructure has prevented even the

³“Potable water” is defined as ground water meeting certain standards and treated surface water. Maui County Code § 20.24.020.

County of Maui from advancing such a project. Given that a private party does not have the eminent domain capabilities as does the County, it would be near impossible for MMK to succeed with such a project.

Contrary to OHA's assertions, MMK has taken steps to mitigate its water use. For example, MMK utilizes Bermuda grass, which is commonly known as a drought-resistant species of grass, as its turf grass. Further, MMK utilizes landscaping that is likewise drought-tolerant though still tropical in nature. Nonetheless, a reasonable amount of water is still required in order for MMK to properly maintain the Bermuda grass and landscaping, no matter how drought-resistant the vegetation may be. Thus, MMK has explored all reasonably available alternatives and has mitigated its water needs to the extent practicable.

D. MMK's Request for Water is Representative of its Actual Need.

In its Objection Letter, OHA claims that MMK is "overstating its actual water needs." See Objection Letter, p. 2. OHA is mistaken. In accordance with the Application's instructions, MMK reported its 12-month average daily use of water during the months of May 2007 through April 2008. Its metered water usage for each month during this period is listed in the Application, as required, and the average daily use calculated in accordance with the Application is 1,292,704 GPD. It is irrelevant whether MMK's water usage may have been more or less than 1,292,704 GPD during other periods of time over the years, and it is not surprising that MMK's water use has varied over time⁴. However, for the period from May

⁴ Note that MMK's average daily water use was estimated at 1.6 to 2.2 million GPD as of September 2007 (Declaration of B. Russell Dooge dated September 14, 2007, ¶ 12) and at 1.2 million GPD for all of 2006 (Transcript of Oral Testimony of B. Russell Dooge from Interim Instream Flow Standards Contested Case Hearing, p. 159, l. 25 to p. 161, l. 22). MMK's request for water is 1,292,704 GPD, which is only slightly higher than the amount cited by OHA of 1.2 million GPD for 2006.

2007 through April 2008, MMK's water usage was 1,292,704 GPD as correctly reported by MMK and as requested in the Application, and 1,292,704 GPD represents MMK's actual need for water to irrigate its two Golf Courses.

E. Conclusion.

For the reasons noted above, MMK requests that the Commission strike OHA's Objection Letter from this proceeding as OHA does not have standing to object or, to the extent that the Objection Letter is not stricken from the record, disregard OHA's comments and objections to MMK's Application and approve MMK's request for continued use of water in the amount of 1,292,700 GPD.

DATED: Honolulu, Hawaii, June 15, 2009.



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HRD09/4347

May 26, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

RE: Request for comments on MMK Maui, LP's Surface Water Use Permit Application – Existing Uses, Nā Wai `Ehā Surface Water Management Areas, Maui.

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on MMK Maui, LP's (MMK) Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (*Waiāhole*) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, MMK should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

Indeed, as a private commercial user who seeks to irrigate two golf courses (that it purchased for pennies on the dollar in 2004, *after* the IIFS Petition was filed), MMK's use should have the *last* priority

for Nā Wai `Ehā water. Because its is for golf course irrigation, MMK's use is subject to a "higher level of scrutiny," see *Waiāhole*, 94 Hawai'i at 142, 161, 9 P.3d at 454, 473, and, in addition to justifying its use in light of the public trust, also has the "heavy burden" to show why stream water should be diverted out of its watershed of origin. *Id.* at 168, 9 P.3d at 480 (citing the Commission). MMK has not met that burden and OHA objects to its SWUPA.

In 1992, the Office of State Planning reported that these two golf courses (which were previously the Waikapū Golf Course and Sandalwood Golf Course) used a total of 1.2 million gallons per day of water. (See Exh. C-49 in IIFS contested case.) The superintendent of the golf courses testified at the IIFS contested case that, after installing a state of the art irrigation system to increase the irrigation efficiency, the golf courses used 1.2 mgd of water in 2006, but that was "more than normal" because in the early part of the year the grass was still coming in so MMK was "throwing a lot of water down." Now, MMK is asking for more water than it used when it was "throwing a lot of water down" and more water than used before it increased the efficiency of the irrigation system.

In addition to overstating its actual water needs, MMK has failed to show a lack of practicable mitigation or alternative water sources. An offstream diverter cannot meet the heavy burden make that showing simply by claiming that other alternatives "are cost prohibitive" with no analysis whatsoever, which is all that MMK has done. (Table 4.)

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians."¹ (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Administrator

¹ OHA is a party in the on-going `Īao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe`e, Waiehu, `Īao, and Waikapū Streams Contested Case Hearing (Case No. CCH-MA06-01) ("IIFS contested case") and has numerous beneficiaries have property interests in, and/or use surface water from, the the `Īao, Waihe`e, Waiehu, and Waikapū surface water management areas.

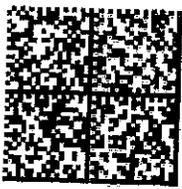
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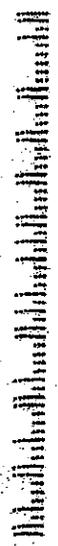
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CERTIFICATE OF SERVICE

I hereby certify that I have on the date noted below served a copy of the foregoing upon the following parties by depositing the same in the United States mail, postage prepaid, to the following at their last known address:

Clyde W. Namu'o
Administrator
OFFICE OF HAWAIIAN AFFAIRS
711 Kapiolani Boulevard, Suite 500
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, June 15, 2009.



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