

WAIKAPU PROPERTIES LLC
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COMMISSION ON WATER
RESOURCE MANAGEMENT
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June 30, 2009

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

Re: Waikapu Properties LLC's response to objections of Office of Hawaiian Affairs to
SWUPA-E no. 2356

Dear Chairperson Thielen and Deputy Director Kawahara;

By letter dated June 22, 2009, the Office of Hawaiian Affairs ("OHA") filed comments on the above-referenced Surface Water Use Permit Application ("SWUPA") of Waikapu Properties LLC. Pursuant to HAR 13-171-18(c), the applicant submits this response to the OHA comment letter.

OHA lacks standing to assert an objection to this application. HAR 13-171-18 (a), states that "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. A party is a "person or agency named as a party, or **properly seeking and entitled as of right** to be admitted as a party" HAR 13-167-2 (a) (Emphasis added). OHA has not filed an application for a water use permit for Waikapu Stream, which is the hydrologic unit from which Waikapu Properties, LLC seeks a permit for its existing use. Similarly, OHA is not mentioned anywhere within the rules that govern water use permits (HAR 13-171-11 to 13-171-27). As such, OHA is neither named as a party nor is OHA entitled as of right to be admitted as a party. If it is not a party, OHA does not have the right to submit any objections to Waikapu Properties LLC's SWUPA. The comment letter dated June 22, 2009 should be stricken.

Addressing the specific objections in the OHA letter but without waiving the objection to OHA's participation in this application, Waikapu Properties LLC provides the following responses.

Deferral until IIFS is established.

Waikapu Properties LLC believes it would be premature for the Commission to process applications to permit existing or new uses until the Commission adopts amended interim instream flow standards ("IIFS") for the Waikapu Stream. This Commission's rules require that competing existing use applications which in the aggregate exceed the established instream flow standards shall be addressed in "a hearing to determine the

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quantity of water that may be consumed and the conditions to be imposed on each existing use.” HAR 13-171-14(c). Whether this Commission must hold a combined hearing can be determined only after an amended IIFS is established. As such, it is premature for this Commission to act on any of the SWUPAs for the Waikapu Stream.

Documentation of Appurtenant Rights is Not Appropriate in This Proceeding.

The assertion that the SWUPA process is the appropriate forum in which appurtenant rights are to be determined is not supported by statute or regulation. Neither the State Water Code (HRS 174C) nor the Hawaii Administrative Rules dealing with water use permits in water management areas (HAR 171, Title 13) provide a basis by which the Commission can or should determine whether appurtenant rights exist in the context of a SWUPA. HAR 13-171-1 says that the purpose of the applicable regulations is to establish administrative control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development and management of the water resources. The rules say “Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time.” HAR 13-171-27.

These provisions make clear that the Commission did not intend to address, determine or affect any claim of appurtenant rights under the Water Use Permit application process.

Other applicants confirmed this position with the Commission’s staff, which told those applicants to not include the information that OHA has demanded in its objections. Since the staff confirmed that appurtenant rights were not the subject of a SWUPA and, as such, any documentation concerning appurtenant rights would be irrelevant to the proceedings, such documentation should not be included with an application and should not be a condition or requirement for a complete application. OHA’s comment is an attempt to expand the scope of these proceedings and asks the Commission to exceed its powers under the SWUPA process. As such, this objection is unfounded.

Existing Use Is Reasonable and Beneficial.

Waikapu Properties LLCs application is for use on its parcel that consists of 657.2 acres that is designated as agriculture by the State and agriculture by the County of Maui. At the time of the filing deadline, only 61.6 acres was under irrigation. As the application states, that portion of the parcel was planted in sugar cane and, following the harvest of that crop in summer, 2009, coffee will be planted on that acreage. Whether in sugar cane or in coffee, the use is consistent with the state and county land use plans. Further, maintaining agricultural lands in agricultural production is in the public interest and is a compelling state interest. HRS 205-41. As such, the existing use is both reasonable and beneficial.

The Application Will Not Be Duplicative.

In its application, Waikapu Properties, LLC provided notice to the Commission that the company that is presently growing sugar cane on a portion of the parcel had filed an application for an existing use for the portion of the parcel used by that applicant. The application went on to state that that company and the growing of sugar cane would cease in the summer of 2009, after which time Waikapu Properties LLC would be growing coffee. The use for farming will continue and, to prevent Waikapu Properties LLC from losing its right to receive and use water from the Waikapu Stream, Waikapu Properties, LLC filed an application to maintain the existing use at the current levels of usage.

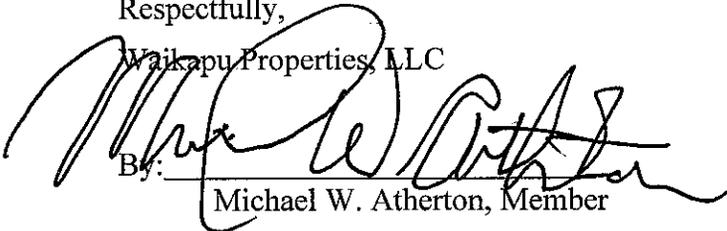
Existing Use is Demonstrated by Metered Readings.

In accordance with the application, Waikapu Properties, LLC obtained records of the actual use of water on the parcel. Water used to irrigate the crops on the parcel was delivered from a source reservoir to the parcel. The intake at the source reservoir was metered. The meter measures actual amounts of water that is delivered to the parcel. For the one year period that began in May, 2007 and ended in April, 2008, the total water delivered to the parcel averaged 516,714 gallons per day ("gpd"). This was the actual use for the twelve month period that preceded the deadline for filing the permit application and was based on metered readings, as opposed to other applications which are based on estimates of time taken to fill buckets or per acre requirements of crops which were not based on crops grown in the Waikapu Stream hydrological unit. Accuracy in readings should and does count in permit applications.

Thank you for this opportunity to provide a response, should you need additional information please feel free to contact me.

Respectfully,

Waikapu Properties, LLC

By: 

Michael W. Atherton, Member

Cc: Clyde W. Namuo, Administrator
Office of Hawaiian Affairs
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