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RESOURCE MANAGEMENT  
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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

Surface Water Use Permit Applications,	)	Case No. CCH-MA15-01
Integration of Appurtenant Rights and	)	
Amendments to the Interim Instream Flow	)	<b>OFFICE OF HAWAIIAN AFFAIRS'</b>
Standards, Nā Wai 'Ehā Surface Water	)	<b>SUPPLEMENTAL RESPONSE TO</b>
Management Areas of Waihe'e, Waiehu, 'Īao	)	<b>HAWAIIAN COMMERCIAL &amp; SUGAR</b>
and Waikapū Streams, Maui	)	<b>COMPANY AND MAHI PONO, LLC'S</b>
	)	<b>JOINT MOTION FOR WITHDRAWAL</b>
	)	<b>AND SUBSTITUTION OF PARTIES</b>
	)	<b>FOR SWUPA 2206, FILED MAY 14,</b>
	)	<b>2019; CERTIFICATE OF SERVICE</b>
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**OFFICE OF HAWAIIAN AFFAIRS' SUPPLEMENTAL RESPONSE TO HAWAIIAN  
COMMERCIAL & SUGAR COMPANY AND MAHI PONO, LLC'S JOINT MOTION  
FOR WITHDRAWAL AND SUBSTITUTION OF PARTIES FOR SWUPA 2206, FILED  
MAY 14, 2019**

**I. INTRODUCTION**

Mahi Pono's "Omnibus Reply" filed on July 5, 2019 disclosed *for the first time* that, although Mahi Pono acknowledges the Nā Wai 'Ehā communities' urgency in having their

entitlement to water finally resolved after 150 years of plantation diversions and 15 years of litigation, Mahi Pono (1) does *not* intend to step into HC&S's shoes with respect to SWUPA 2206, but rather anticipates reopening the contested case for potentially "protracted litigation," and (2) seeks *to continue for three months* the hearing on the HC&S-MP Joint Motion. Because the understandings on which OHA's June 21, 2019 Response was expressly predicated have turned out to be false, OHA respectfully submits this supplemental response to address the positions Mahi Pono did not initially disclose.

OHA opposes any attempt by Mahi Pono to reopen the contested case hearing for further litigation. If that is the reason Mahi Pono seeks to substitute in for HC&S now, rather than having HC&S transfer SWUPA 2206 to Mahi Pono once the permit is issued,<sup>1</sup> OHA opposes the HC&S-MP Joint Motion; OHA also opposes any continuance of the hearing on the Joint Motion.

## II. RELEVANT FACTUAL BACKGROUND

### A. Summary Timeline of Related Prior Proceedings

- 06/25/2004** Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (collectively, the "Community Groups") filed petition to establish Interim Instream Flow Standards ("IIFS") for Nā Wai 'Ehā streams.
- 02/15/2006** Commission voted to order a combined contested case hearing on the IIFS Petition and Water Use Permit Applications ("WUPAs") for high level dyke sources in the 'Āao Ground Water Management Area, designated as CCH-MA06-01.
- 2007-2008** Combined Contested Case Hearing held on Maui in CCH-MA06-01.
- 03/13/2008** Commission designated Nā Wai 'Ehā a surface water management area in response to the Petition filed by the Community Groups on 12/06/2006.
- 04/09/2009** Hearing Officer filed Proposed Findings of Fact, Conclusions of Law, and Decision & Order ("Proposed D&O") in CCH-MA06-01.
- 04/22/2009** HC&S filed Surface Water Use Permit Application ("SWUPA") 2206 in advance of the 04/30/2009 deadline.
- 10/15/2009** Commission heard exceptions to Proposed D&O in CCH-MA06-01.

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<sup>1</sup> See HRS § 174C-59.  
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- 06/10/2010** Commission entered Final Findings of Fact, Conclusions of Law, and Decision & Order (“Final D&O”) in CCH-MA06-01.
- 07/12/2010** Appeals and cross-appeals taken from Final D&O in CCH-MA06-01.
- 08/15/2012** Hawai‘i Supreme Court vacated and remanded Final D&O in CCH-MA06-01.
- 2012-2014** Proceedings conducted regarding provisional recognition of appurtenant rights in Nā Wai ‘Ehā, designated as CCH-MA13-02.
- 04/17/2014** Commission entered Order adopting Parties’ mediated agreement regarding Nā Wai ‘Ehā IIFS in CCH-MA06-01 on remand.
- 12/31/2014** Commission entered Nā Wai ‘Ehā Provisional Order on Claims that Particular Parcels Have Appurtenant Rights, in CCH-MA13-02.
- 01/28/2015** Commission determined a contested case hearing was required for determination of surface water use permits in Nā Wai ‘Ehā, designated as CCH-MA15-01.
- 06/17/2016** Following HC&S announcement of cessation of sugar cultivation, Commission approved consolidation of Petition to upwardly amend the IIFS for Nā Wai ‘Ehā streams with CCH-MA15-01.
- 2016** Contested Case Hearing held on Maui in CCH-MA15-01.
- 11/01/2017** Hearing Officer filed Proposed FOF, COL, and D&O (“Proposed D&O”) in CCH-MA15-01.
- 01/05/2018** Parties filed exceptions to Hearing Officer’s Proposed D&O in CCH-MA15-01; HC&S waived exceptions.

**B. The HC&S-MP Joint Motion**

A&B entities and Mahi Pono entered into a Purchase and Sale Agreement (“PSA”) as of December 17, 2018, pursuant to which Mahi Pono would purchase A&B land on Maui and other property and assets including A&B’s “West Maui Water Interests.” *See*, PSA (available at <https://www.sec.gov/Archives/edgar/data/1545654/000119312518354682/d664171dex101.htm>), p. 3, ¶ 1.11. The closing date was December 20, 2018 and, according to the PSA, “[a]s soon as practicable after Closing, Buyer and Seller shall jointly (a) apply to substitute Buyer for Seller in State Water Use Permit Application No, 2206, and (b) notify the State Commission on Water

Resource Management (“CWRM”) of the transfer of Water Use Permit No. 691 to Buyer.”<sup>2</sup> *Id.*, ¶ 9.13 (emphasis added).

HC&S and Mahi Pono filed the Joint Motion almost five months later, on May 14, 2019. The declarations attached to the Joint motion established that “HC&S had been cultivating sugarcane on the approximately 3,650 acres referred to as the Waihee-Hopoi Fields until 2016, when sugarcane cultivation ceased,” J. Schreck Decl., ¶ 3, and that Mahi Pono plans “a full range of agricultural operations and related land uses (e.g., cattle, coffee, tropical fruit orchards, citrus and other leafy vegetable crops, etc.)” on the land it purchased from A&B, G. Nakama Decl., ¶ 5. Nothing in the Joint Motion indicated that Mahi Pono expected to reopen the contested case, or would seek to delay the hearing.

OHA filed its response on June 21, 2019 and indicated that, with the understanding that MP would be bound by the record created by HC&S, OHA took no position on the Joint Motion but, “[t]o the extent OHA’s assumption is incorrect, OHA reserves the right to respond further.”

Mahi Pono’s July 5, 2019 “Omnibus Reply” made clear that OHA’s understanding was, indeed, incorrect. Notwithstanding its acknowledgment that “[a]ll Responses expressed a desire to resolve this proceeding as soon as possible,” *id.* at 2, Mahi Pono proposed *postponing* the hearing for three months to allow unidentified parties to try to reach an unspecified stipulation which, according to Mahi Pono, “will avoid re-opening this proceeding, and will allow this contested case to reach a resolution in a timely fashion without protracted litigation,” *id.* at 2. Mahi Pono has had since December 2018 to discuss settlement, and has yet to approach OHA.

### III. ARGUMENT

Based on Mahi Pono’s Omnibus Reply, OHA opposes the Joint Motion. After fifteen years of litigation, OHA’s beneficiaries in Nā Wai ‘Ehā are finally close to achieving a historic,

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<sup>2</sup> WUP No. 691 is an interim permit with an allocation of 0.1 mgd from ‘Īao Tunnel. 11/1/17 Proposed D&O, FOF 480.r.2.a. (citations omitted). Such a transfer is authorized by HRS § 174C-59.

just, and comprehensive water allocation after generations of deprivation. All that remains is for the Commission to judiciously consider the exceptions to the Proposed D&O and issue a final decision. For Mahi Pono to now threaten the communities of Nā Wai ‘Ehā with yet more “protracted litigation” unless Mahi Pono is able to extract a favorable but unspecified “stipulation” raises doubts about whether Mahi Pono can live up to its name.

Certainly Mahi Pono, as the new owner of the Waihee-Hopoi Fields formerly cultivated by HC&S, is the party most interested in SWUPA 2206. That does not mean, however, that Mahi Pono it is any more entitled to reopen and relitigate the contested case hearing than HC&S is. Mahi Pono has not identified any reason for reopening the contested case, any issue that needs to be relitigated, or what concession it is seeking to extract by stipulation. All of the information necessary to decide SWUPA 2206, with one exception, is already in the record. As Mahi Pono itself argues, the declarations attached to the Joint Motion are undisputed (Omnibus Reply, p. 2); they establish that Mahi Pono wants to engage in diversified agriculture on 3,630 acres known as the Waihee-Hopoi Fields (*see supra*, p. 4). The Proposed D&O already established and applied water duties of 2,500 gad or less for of the agricultural uses Mahi Pono contemplates,<sup>3</sup> and establishes that Well No. 7 can supply a minimum of 3 mgd (which will increase as more acreage is planted).<sup>4</sup> The rest is just arithmetic.

The one significant fact that is not currently in the record is that the Kuihelani Solar project will soon be constructed on 500 acres of the Waihee-Hopoi Fields, in TMK Nos. (2) 3-8-005-002 and (2) 3-8-006-003. While that fact is clearly material to Mahi Pono’s water needs, it is a matter of public record and has been widely reported. *See, e.g.*, PUC Decision and Order

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<sup>3</sup> *See, e.g.*, 11/1/17 Proposed D&O pp. 381, COLs 261.q.3 (cattle feed and pasture) and 261.q.1. & 2 (macadamia nuts, fruit trees, organic garden); 444, COLs 300.r.Parcel 14,1. (fruit trees, ornamental plants), 300.r.Parcel 18-existing,1. (bananas and papayas), 300.r.Parcel 18-new,1. (feed/forage pasture); 452, COLs 306.r (cattle, row crops).

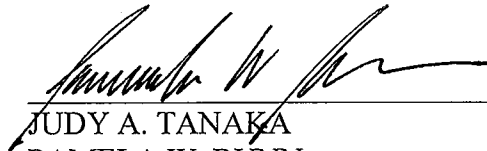
<sup>4</sup> *See, e.g., Id.*, pp. 514, COL 358.v.2.; 516, COL 358.w.1.; 517, COL 358.x.3.  
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No. 36235 at 8<sup>5</sup>; Maui's largest solar project OK'd by PUC, The Maui News, March 30, 2019.<sup>6</sup>

Therefore, the Commission can take judicial notice pursuant to HAR § 13-167-59(i), so there is no need to reopen the contested case to receive evidence that 500 acres of the Waihe'e Hopoi Fields will not be cultivated and therefore will not require water.

Based on the foregoing, OHA respectfully requests that the Commission (1) deny the continuance of the hearing on the Joint Motion, and (2) deny the Joint Motion. Once SWUPA 2206 is issued, HC&S can transfer it to Mahi Pono pursuant to HRS § 174C-59 and, in the meantime, OHA's beneficiaries in Nā Wai 'Ehā will not be threatened with more "protracted litigation."

DATED: Honolulu, Hawai'i, July 10, 2019.



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<sup>5</sup> Available at <https://dms.puc.hawaii.gov/dms/DocumentViewer?pid=A1001001A19C27A83010D00185>.

<sup>6</sup> Available at <https://www.mauinews.com/news/local-news/2019/03/mauis-largest-solar-project-okd-by-puc/>

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Management Areas of Waihee, Waiehu, Iao )  
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CERTIFICATE OF SERVICE

On February 17, 2017, I caused true and correct copies of the foregoing documents to be served on the following parties by electronic service. Service on those Parties who have not agreed to electronic service is via the Commission website pursuant to Minute Order #4.

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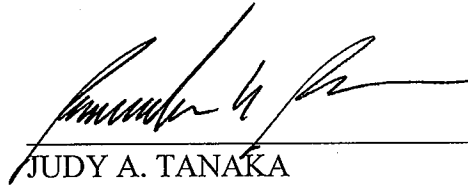
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