

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

Surface Water Use Permit Applications,) Case No.. CCH-MA15-01
Integration of Appurtenant Rights and)
Amendments to the Interim Instream Flow)
Standards, Na Wai Eha Surface Water)
Management Areas of Waihee, Waiehu, Iao)
and Waikapu Streams, Maui)

MINUTE ORDER 1

**Prehearing Conference for the Contested Case Hearing on
Appurtenant Rights and Water-Use Permit Applications**

A prehearing conference will be held on Maui on Tuesday, August 11, 2015, at 9:00 a.m. at the Wailuku Community Center, 395 Waena Place, Wailuku, Hawaii 96793.

The purposes of the prehearing conference are to discuss: 1) which applications for appurtenant rights and water-use permits will be the subject of the contested case hearing; 2) the additional documentation and other evidence that would be needed in addition to those previously submitted in the provisional appurtenant rights determination and water-use permit application processes; and 3) timetables for producing such additional documentation and the scheduling of the contested case hearing.

On December 31, 2014, the Commission on Water Resource Management ("Commission") issued its "Nā Wai `Ehā: Provisional Order On Claims That Particular Parcels Have Appurtenant Rights." The final determinations, including the amount of water accompanying the appurtenant right if so determined, will be addressed with the surface water use permit applications (SWUPA).

Which applicants will participate in the contested case hearing

All applicants will participate in the contested case hearing. There are three basic categories of applications for Surface Water Use Permit Applications ("SWUPAs"): 1) applicants for appurtenant rights whose provisional recognitions are confirmed by the Commission in the contested case hearing; 2) applicants claiming existing uses; and 3) applicants applying for new uses.

According to the State Water Code, appurtenant rights and existing uses have priority in obtaining water-use permits when a Water Management Area is designated. Because the amount of water being applied for under appurtenant rights and existing uses far exceeds the amount of water available for offstream uses from the four Nā Wai `Ehā streams, it is likely that there will be no water available for new-use applicants, even if their requests are "reasonable and beneficial."

Many applicants fit into more than one of the three categories. For example, there are appurtenant rights applicants who are applying for both existing and new uses, and existing-use applicants who have also applied for new uses. Multi-category applicants will have their SWUPAs determined on a category-by-category basis.

The following are the three categories of applications and the SWUPAs under which they fall:

1. SWUPAs from applicants whose appurtenant rights will have been confirmed.
 - a. Includes their applications for both existing and new uses.
2. SWUPAs from applicants with existing uses.
 - a. Applicants applying only for existing uses.
 - b. The existing-use applications from applicants applying for both existing and new uses.
 - c. Applicants whose appurtenant rights claims will not have been confirmed and who had applied only for existing uses.
 - d. The existing-use applications from applicants whose appurtenant rights claims will not have been confirmed and who had applied for both existing and new uses.
3. SWUPAs from applicants for new uses.
 - a. Applicants applying only for new uses.
 - b. The new-use applications from applicants applying for both existing and new uses.
 - c. Applicants whose appurtenant rights claims will not have been confirmed and who had applied only for new uses.
 - d. The new-use applications from applicants whose appurtenant rights claims will not have been confirmed and who had applied for both existing and new uses.

Additional documentation

Final appurtenant rights recognition

The quantity of water that the Commission will recognize as entitled under an appurtenant right is the amount in use at the time when the Land Commission Award ("LCA") was made. Because it is impossible to determine that amount directly, it is sufficient under the law to show current or intended water-use practices that are similar to what was practiced at that time. Thus, applicants must show: 1) the amount of land within the LCA that was using water at the time of the LCA; and 2) the amount of water used on that part of the LCA.

Appurtenant rights applicants may own land from a single LCA or multiple LCAs. The amount of land within the LCA that was using water at the time of the LCA, as well as the amount of water used historically, must be determined for each LCA. Because appurtenant rights trace back to an LCA and not to specific plots within the LCA, present owners who trace back to a common LCA have appurtenant rights in proportion to their share of the original LCA and not to what specific part of the LCA they now own.

For example, if the LCA was four acres and a present owner has title to one acre, that owner has appurtenant rights to one-fourth of the water. If one acre of the four-acre LCA had been in taro cultivation, and wetland taro water requirements (for example) are from 40,000 to 300,000 gallons per acre per day ("gad"), the appurtenant rights for the LCA would be 40,000 to 300,000 gad, and the present owner of one acre of the original 4-acre LCA would have appurtenant rights of 10,000 to 75,000 gad, regardless of which part of the LCA he/she owns.

For the provisional recognition phase, it was only necessary to document certain words that indicated water might have been used on the LCA. For this final recognition phase, applicants must not only document water use but also estimate the amount of water in use at the time of the LCA. On September 27, 2011, the Commission had identified the information and documentation that applicants needed to provide to support their claim to appurtenant rights:

1. Proof of ownership or occupancy.
2. TMK map showing boundaries of all parcels for which an appurtenant right is being claimed.
3. TMK map showing current auwai(s)/ditches, loi, and source of water (i.e., stream or spring).
4. Documents demonstrating that the parcel was used as a residence or for cultivation at the time of the Mahele, including but not limited to:
 - a. Legible copy of the LCA and number.

- b. English translation of the LCA.
 - c. Royal Patent ("RP") and number.
 - d. Name of the original awardee.
5. Kama`aina testimony and/or other Mahele documents.
 6. Other title history in support of the claim.
 7. Map showing sources of water at the time of the Mahele.
 8. 1800's tax records.
 9. Current or historic photos of archeological features of historic uses.
 10. Schematic maps or diagrams showing water flow in, through, and/or out of the parcel.
 11. Current title or deed to the parcel clarifying any terms or conditions regarding water.
 12. List of future crops and the water flow requirements (total and net flow) to supplement information in the application for a SWUPA.
 13. Other relevant information that may assist the Commission in making its determination.

Applicants should review the information and documents they had previously submitted to the Commission, determine whether they are sufficient to quantify their appurtenant rights claims, and provide additional information if they find it necessary to do so. Applicants should then prepare a written statement explaining why they believe they have provided sufficient information in support of their claims. The sufficiency of the information will be an issue for many of the appurtenant rights applicants, which will be one of the subjects to discuss at the prehearing conference.

Commission staff has informed me that the Office of Hawaiian Affairs is putting together a data base that might include the Nā Wai `Ehā area by the end of June 2015. For completed areas--e.g., Punalu`u on O`ahu--see kipukadatabase.com.

Water-use Permit Requirements

Turning to the water-use permit requirements, the amount of water that the Commission awards must by law be in quantities that are "reasonable and beneficial," including only amounts that are "necessary for economic and efficient utilization." For non-appurtenant rights applicants, "necessary" also means having to show that there are no "practical alternatives" to using stream waters. Appurtenant rights applicants must also meet the water-use permit requirements; i.e., it is not automatically the amount that accompanies the appurtenant right, and is limited by the amounts that meet the "necessary" requirements and by insufficient water available to meet all applicants who meet the SWUPA requirements.

Many of the wetland taro applications have used 300,000 gad as the water-use requirement. This, and any other quantity presented as the water requirement, has to be justified. For example, the crop cycle could be broken down into crop phases and their different water requirements--e.g.; lo`i preparation and planting, growth, maturation, and harvest--to explain the average daily water requirement that is being used.

There is much more information that has to be uncovered, analyzed, and compiled by both appurtenant rights and existing use applicants in preparation for the contested case hearing. Applicants should begin these activities now, so that they can identify and discuss what information gaps they have at the prehearing conference.

Timetables for additional documentation and scheduling of the contested case hearing

Finally, there are specific procedures that must be followed in a contested case hearing. For example, the prehearing conference is an activity of the contested case and not a public meeting, and participation is limited to the parties in the contested case. Procedurally, for the evidentiary hearing, all parties: 1) will submit exhibits (documents, maps, etc.) and written testimony in support of their applications; 2) have the opportunity to file responses to other parties' exhibits and written testimonies; and 3) have the opportunity to file rebuttals to any responses to their initial exhibits and written testimonies. All parties will also have the opportunity to present testimony in person at the evidentiary hearing. There are also other procedural issues in conducting contested case hearings. For example, because of the large number of parties participating in the hearing, some parties may want to review only those exhibits and testimonies applicable to their claims, and we must agree on a practical way to provide the large number of exhibits and testimonies to those parties who request them. Time intervals between the various procedural steps will be discussed at the prehearing conference. We will also discuss possible dates for the beginning of the contested case's evidentiary hearing, as well as an estimate of the expected length of the hearing.

DATED: Honolulu, Hawaii June 25, 2015.



LAWRENCE H. MIIKE, Hearings Officer

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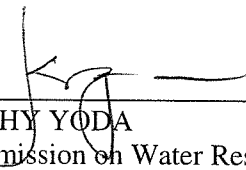
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