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HŌKŪAO & ALANA PELLEGRINO SWUPA 2332-E & 2333.6-N

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)	HŌKŪAO & ALANA PELLEGRINO
Standards, Nā Wai 'Ehā Surface Water)	EXCEPTIONS TO HEARING OFFICER'S
Management Areas of Waihe'e, Waiehu,)	PROPOSED FINDINGS OF FACT.
'Īao and Waikapū Streams, Maui)	CONCLUSIONS OF LAW, AND
)	DECISION & ORDER
)	

HŌKŪAO & ALANA PELLEGRINO EXCEPTIONS TO HEARING'S OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & ORDER

Aloha mai kākou,

Pursuant to Minute Order 12, I, Hōkūao Pellegrino respectfully submit written exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision & Order in Case Number CCH-MA 15-01 filed on November 1, 2017 (the "Proposed Order"). There are three main objections that we will be addressing in the following Exceptions.

1. Regarding Surface Water Use Permit Application – SWUPA 2332-E & 2333.6-N for TMK No. (2) 3-5-012:023.
 2. Regarding Traditional & Customary Rights related to Surface Water Use Permit Application – SWUPA 2332-E & 2333.6-N for TMK No. (2) 3-5-012:023.
 3. Regarding the proposal that no further action is needed on the IIFS below the Waihe'e Ditch diversion based on an apparent misperception of the situation regarding the dumping of Waihe'e River water into Waikapū Stream and impact to Keālia Pond National Wildlife Refuge.
1. In 2009, my family and I filed SWUPA 2332-E and 2333.6-N, for surface water from the North Waikapū Kuleana 'Auwai via the Waikapū Stream for both TMK No. (2) 3-5-012:020 ("Parcel 20") and No. (2) 3-5-012:023 ("Parcel 23"). The matter on hand is in regards to Parcel 23. This 2.134 acre parcel of kuleana land is where my wife (Alana Ka'ōpūiki-Pellegrino) and I along with our children live and operate Noho'ana Farm. Since 2004, we along with my parents (Victor and Walette Pellegrino) have been restoring and cultivating our ancestral lo'i kalo for the purpose of sustaining our family, community and implementing our cultural ag education program which has engaged more than 12,500 preschool through college students and community participants. Since returning to our ancestral land, my family and I have always

had the intention and commitment to restoring and cultivating all of our lo'i kalo. We conducted a detailed survey of our land and have concluded that as specified in SWUPA 2332-E and 2333.6-N that there are a total of 12 lo'i kalo which equates to a total of 1.6 acres of 2.134 acres on Parcel 23. As provided in my testimony during the 2016 CCH, I specified that our lo'i kalo range from as small as 300 sq. ft. to over 8,000 sq. ft. In fact, our largest lo'i on Parcel 23 is 182' x 46' or 8,372 sq. ft. When we began restoring our lo'i in 2004, we were greatly limited in our ability to cultivate beyond 1-2 lo'i kalo at any given time out of 12 that we intended to open due to the low stream flow caused by the WWC South Waikapū Diversion. We felt like we were held hostage from 2004 until the end of 2014 in which an IIFS was implemented for Waikapū Stream. The increase in stream flow, yet still limiting, allowed us to expand our cultivation of lo'i kalo from 1-2 lo'i on 0.2 acres to 4-5 lo'i on 0.5 acres.

The permit granted to Parcel 23 by the proposed decision will greatly impact our current needs and intentions for full restoration of 12 lo'i kalo. For one, the allocated amount via the permit is only 31,700 gpd for 0.2 acres when in our SWUPA 2332-E we specified our existing use as 54,000-62,000gpd. Further, since 2014, we now have 0.5 acres in cultivation and are in the process of restoring all 1.6 acres/12 lo'i kalo when more stream flow exists. This current permitted allocation limits our current state of cultivation and would not allow us to cultivate all 12 lo'i kalo or 1.6 acres as we have specified in both SWUPA 2332-E and SWUPA 2333.6-N as our main purpose and end goal. I would like to request the Hearing Officer to make the appropriate changes in the permitted amount to include our current use of water for 0.5 acres as well as the proper amount for our full build out of 1.6 acres. The allocation for full build out of our 1.6 acres based on the calculation used by the Hearing's Officer for lo'i kalo should be as follows; 240,000 mgd (1.6 acre x 150,000 gad).

2. The second issue on hand is in regards to the proposed decision not to grant a Category 1: Traditional and Customary Rights permit for Parcel 23. I disagree with this conclusion due to the fact that both my wife and I are a Native Hawaiian 'ohana growing kalo on our kuleana land, in an area in which kalo was historically grown by Native Hawaiians, of whom I am related to. I did not need to prove I am genealogically connected to this parcel. In fact I am genealogically connected not only to this parcel but to 3 other kuleana parcels throughout the Waikapū Ahupua'a. Had I known that I needed to disclose in greater detail my ancestral connection to Parcel 23 and others to prove my lineage to the ahupua'a of Waikapū, I would have provided that in my testimony. It is however irrelevant due to the fact that I am Native Hawaiian and engaged in the traditional and customary practice of growing kalo in Nā Wai 'Ehā. Therefore, I would like to request that our permit for Parcel 23 be classified as Category 1: Traditional and Customary Rights.
3. The third and final exception is in regards to a statement in the proposed decision on page 525 about how water has returned to Keālia Pond: "The conditions for the Waihe'e Ditch diversion at high flows was to ensure that such flows would not be captured by the Waihe'e Ditch and that water would reach Kealia (sic) Pond when the stream flooded. As a consequence, water

has returned to Kealia (sic) Pond, which was previously “mud flats,” despite its not flowing continuously in its lowest reaches. (FOF 85, 301, COL 127.)”

The true characteristics of Waikapū Stream and its natural flow in relationship to Keālia Pond National Wildlife Refuge have never been fully understood nor studied. While there may be water observed in the lower reaches of the Waikapū Stream and consistent flow entering Keālia Pond and exiting via the muliwai of Palalau into Mā‘alaea Bay, what is occurring is unnatural and caused by Wailuku Water Co. dumping Waihe‘e Ditch water into Waikapū Stream via a return ditch that parallels the stream 50 feet beyond the intake on Waikapū Stream.

The main source of water for Keālia historically and prior to any sugar plantation stream diversions was Waikapū Stream. Keālia was once Maui’s largest wetland, ancient inland fishpond, included Māhele awardees to those Native Hawaiian families who managed the most famous pa‘akai or salt producing region on Maui. Following the installation of modern sugar plantation era diversions such as the South Waikapū Intake (circa 1900), the only water that would reach Keālia was during high flow events, in which water flowed over the diversions. In 1992 when the 704 acre Keālia Pond National Wildlife Refuge was established, brackish wells provided water and habitat for the endangered ae‘o or Hawaiian stilt (*Himantopus mexicanus knudseni*) and ‘alae ke‘oke‘o or Hawaiian coot (*Fulica americana alai*).

What one observes today at Keālia is a pond that literally full to the brim. The Refuge has ceased operating their wells for over 3 years which related directly to the establishment of the IIFS for Waikapū Stream (2014). Waihe‘e Ditch water being dumped in the Waikapū Stream is the sole reason why water is currently in Keālia. Waihe‘e Ditch was the source of irrigation for HC&S, which leased over 1,000 acres of land from Waikapū Properties (previously Wailuku Agribusiness) for cultivating sugarcane. HC&S began phasing out of sugarcane cultivation on these lands beginning in 2012 and eventually ceased all farming operations by the end of 2016. Beginning in 2015, after the 2.9 mgd IIFS was established on Waikapū Stream and HC&S had substantially phased out of sugarcane production, Wailuku Water Company started dumping the “surplus” water from the Waihe‘e Ditch into Waikapū Stream on a daily basis. Rather than leaving the “surplus” water in its source streams (i.e. Waihe‘e River, Wailuku River, and Waikapū Stream), it was diverted and then dumped, inundating Keālia Pond National Wildlife Refuge. Although never measured, the amount was likely in the millions of gallons in order for it to reach Keālia Pond on a consistent basis as it has.

While water in Keālia Pond is beneficial to promoting habitat for the endangered native aviary, aquatic and mammal species, the sudden and continual surge of water has caused an onset of challenges never faced before. Keālia Pond in a very short period of time expanded from less than 50 acres to over 500 acres of wetlands. The entire Refuge staff which include biologists have been overwhelmed with problems never experienced since their inception, including a vast increase of feral ungulates, rodents and non-native aviary species, many of which prey on the endangered wetland birds, nests and eggs. The large increase of unnatural flow entering

the Refuge has also allowed for invasive plant species to flourish which in turn outcompete native plant species that are critical habitat for the endangered wetland birds.

Keālia Pond needs stream water for the purpose of providing habitat for endangered wetland aviary and mammal species, native aquatic and insect species as well as serving as an important cultural and historic site on Maui. However, the unnatural flow of water that has been occurring via the dumping of other river and stream sources into Waikapū Stream by Wailuku Water Company is unacceptable and is causing detrimental problems to what should be a wetland environment flourishing naturally.

I would like to request that the Hearings Officer address this issue head on by first ordering Wailuku Water Co. to cease all dumping of Waihe'e Ditch water into Waikapū Stream, except as may be helpful to support a study of the downstream flow characteristics of the stream. Secondly, since Waikapū Stream water is not being allocated in any Surface Water Use Permit Applications after users from the South Waikapū Intake, South Kuleana 'Auwai and North Waikapū Kuleana 'Auwai, whatever flow that is in the Waikapū Stream at the point of the Waihe'e Ditch Intake at Waikapū Stream, should not be diverted and allowed to flow naturally and continuously to Keālia Pond. This will provide critical data and a true understanding of the characteristics of the Waikapū Stream in relationship to Keālia Pond National Wildlife Refuge, which has never been comprehensively studied from the first Nā Wai 'Ehā Contested Hearing Case to the one before us currently.

We Reserve the right to respond, either in writing, orally, or both, to any other party's exception that may impact our family's Traditional and Customary Rights and interests.

Dated: Waikapū, Hawai'i, January 5, 2018.

Hökūao Pellegrino

Hökūao Pellegrino
Kuleana Land Owner
Noho'ana – Waikapū Ahupua'a



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CERTIFICATE OF SERVICE

I hereby certify than on January 5, 2018, HŌKŪAO PELLEGRINO PROVIDED EXCEPTIONS TO HEARINGS OFFICER'S PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW, & DECISION AND ORDER; CERTIFICATE OF SERVICE was served on the Commission on Water Resource Management, by US mail and electronic service, and on the parties listed below, by electronic service.

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Kuleana Land Owner

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