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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

IN RE WAIĀHOLE DITCH CONTESTED)	CASE NO. WUP-0A94-2953-03
CASE HEARING AND WATER USE)	
PERMIT APPLICATION FOR UWAU)	SUPPLEMENTAL OBJECTION OF
THE TUNNEL EXTENSION)	OFFICE OF HAWAIIAN
(WELL NO. 2953-03))	AFFAIRS TO THE
)	APPLICATION FOR A WATER
)	USE PERMIT BY DOLE
)	FOOD COMPANY, INC.;
)	<u>CERTIFICATE OF SERVICE</u>
)	

SUPPLEMENTAL OBJECTION OF THE OFFICE OF HAWAIIAN AFFAIRS
TO THE APPLICATION FOR A WATER USE PERMIT BY
DOLE FOOD COMPANY, INC.

I. INTRODUCTION

The Office of Hawaiian Affairs (hereinafter "OHA") submits this amended objection to the water use permit application ("application") filed by the Dole Food Company, Inc. (hereinafter "Dole") on October 5, 1994 to withdraw and transport water from the Waipahu-Waiawa Ground Water Management Area on O'ahu through the Uwau Tunnel Extension, Well No. 2953-03, of the Waiāhole Ditch System. This amendment is filed as a supplement to OHA's timely objection filed on or before February 3, 1995.

OHA's specific procedural and substantive objections are set forth below.

II. DISCUSSION

A. OHA Has Standing To Object To The Application.

OHA has legal standing to object to the application for the waters flowing in the Waiāhole Ditch system which are from the Waipahu-Waiawa aquifer. The Commission is required to consider, "those objections filed by a person who has some property interest in any land within the hydrologic unit from which the water sought by the applicant is to be drawn or who will be directly and immediately affected by the water use proposed in the application." Hawaii Revised Statute (HRS) § 174C-53(b); Hawaii Administrative Rules (HAR) § 13-171-19(e).

OHA is an autonomous government agency created in HRS Chapter 10 pursuant to the mandate in Hawaii's Constitution (Constitution), Article XII, § 4-6. It is a self-governing corporate body, governed by its nine trustees, who are elected for four-year terms by persons of Hawaiian ancestry. OHA is given the duty to serve "as principal public agency in this State" to develop and coordinate programs related to native Hawaiians and Hawaiians, HRS § 10-3(3), and "to coordinate federal, state and county activities relating to native Hawaiians and Hawaiians." HRS § 10-6(4). OHA's responsibilities include the duty to take action for the betterment of conditions of native Hawaiians and Hawaiians, HRS § 10-3, and "to formulate policy relating to the affairs of native Hawaiians and

Hawaiians," pursuant to Article XII, § 6 of the Constitution. Further, OHA has a statutory responsibility to "[a]ssess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and [to conduct] advocacy efforts for native Hawaiians and Hawaiians." HRS § 10-3(4). OHA thus has a special responsibility to participate in decisions made by a state agency, such as the Commission, when such decisions affect resources and lands that are owned by, generate revenues, or impact interests of Native Hawaiians.

OHA, as trustee over Ceded Lands has an obligation to Native Hawaiian beneficiaries of this special land trust. Ceded Lands are located in the hydrologic units at issue. Thus, OHA has an interest in land within the hydrologic units from which the water is being sought. A portion of the waters flowing in the Waiāhole Ditch system originates on and passes through, over, and under Ceded Lands. Waters flowing in the Waiāhole Ditch in the Uwau extension are part of the Waipahu-Waiawa aquifer recently designated as such under HRS § 174C-41. Ceded Lands are located in the hydrologic units at issue. Some of the Ceded Land parcels relevant to the Waiāhole Ditch contested case proceeding include parcels identified as TMK Nos. 1-4-8-2-10, 1-4-8-2-12, 1-4-8-7-11, 1-4-8-11-1, 1-4-8-12-20, 1-5-2-2-1, and 1-5-2-5-21. Parcels within the subject hydrologic area include, but are not limited to, TMK Nos., 1-9-1-14-8, 1-9-1-16-25, 1-9-4-12-1, 1-9-4-12-2, 1-9-4-12-2, 1-9-4-12-3, 1-9-4-12-3, 1-9-4-12-11, 1-9-4-17-1, 1-9-7-22-1, 1-9-7-24-6, 1-9-7-25-10, 1-9-7-92-1, 1-9-7-92-2, and

1-9-9-12-47. OHA receives 20 percent of the revenues generated by Ceded Lands and, thus, has a direct and quantifiable interest in the proper management of these lands and the waters associated with these lands.

OHA will be directly and immediately affected by the proposed water uses described in Dole's application. OHA is actively involved in the ongoing legal proceedings before the Commission concerning the long-term allocation of water associated with the Waiāhole Ditch system. OHA has a reservation request and a petition to amend the interim instream flow standards involving Waiāhole Ditch system water pending before the Commission and OHA has sought to intervene in the Waiāhole Ditch combined contested case proceedings. Thus, OHA's interests will be affected. Further, as advocates for Native Hawaiians who live and work in Windward O'ahu, who depend on streamflows to irrigate taro and other crops, who are involved in aquaculture, mariculture (ocean farming), fishing, gathering and who are engaging in other traditional and customary practices, OHA's interests will be affected. Similarly, as advocates for Native Hawaiians who live and work in Leeward and Central O'ahu and who will benefit from stream and estuarine restoration and water reservations serving the public land trust, OHA's interests will be affected. Thus, the Commission must consider OHA's objections to Dole's application.

B. Dole Has Failed To Provide Sufficient Factual Information In Its Application To Adequately Assess The Impacts of the Proposed Water Uses.

Dole's application would impact the existing sustainable yield of the Waipahu-Waiawa aquifer. In its application Dole states that there will be no impact on the sustainable yield of the Waipahu-Waiawa aquifer. (See Dole's application item number 14(a)). This is inconsistent with the information contained in the record. For example, the datasheet on the Waipahu-Waiawa aquifer system issued by the Commission states that the sustainable yield of the aquifer is 119 mgd. See Exhibit A for datasheet issued on October 19, 1994 by the Water Commission, attached hereto and incorporated herein. The datasheet describes the existing water use allocations of the Waipahu-Waiawa aquifer as 116.333 mgd, 98% of the estimated sustainable yield. This would leave an estimated amount of 2.667 mgd available for additional allocations.

Dole has submitted a water use permit for 2.7 mgd from the Waipahu-Waiawa aquifer and Bishop Estate has requested 4.2 mgd. Dole's request alone, would exceed the amount of water available in the aquifer. The combined requests from Dole and Bishop Estate of 6.9 mgd total more than two and one-half times the amount of water the Commission has determined is available within the aquifer. Thus, if Dole's water use permit is granted, the sustainable yield of the Waipahu-Waiawa aquifer would be affected.

Moreover, the existing water use allocations, which almost equal the estimated sustainable yield of the aquifer, appear not to take into account additional reservations for conservation, preservation and current and future water needs of Native Hawaiians on Hawaiian Home Lands, Ceded Lands, and those engaging in traditional and customary practices. See, HRS §§ 174C-101, 7-1, 1-1, and Article XI, §7 and XII, §7 of the Constitution. Until the Commission assures that adequate water is available for the reservations and petitions to amend streamflow standards required in order for the Commission to fulfill its responsibilities under the Water Code, no additional water use permits should be issued. Any granting of additional withdrawals and allocations of water would directly and immediately denigrate the Commission's ability to reserve additional water for conservation, preservation and current and future needs of Native Hawaiians on Hawaiian Home Lands, Ceded Lands, and those engaging in traditional and customary practices recognized in HRS §§ 174C-101, 7-1, 1-1, and protected by Article XII, § 7 of the Constitution.

C. Dole Has Failed To Satisfy The Criteria Required For The Issuance Of A Water Use Permit As Set Forth In HRS § 174C-49(a).

In order to obtain a water use permit, Dole must satisfy seven criteria pursuant to HRS § 174C-49(a). The applicant must demonstrate that the water use:

- (1) Can be accommodated with the available water source;
- (2) Is a reasonable-beneficial use as defined in § 174C-3;

- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act.

As discussed below, Dole has failed to meet these seven criteria and therefore should not be issued a water use permit by the Commission.

1. Dole cannot show that its proposed water uses can be accommodated with the available water source.

As discussed above, the Commission has determined that the Waipahu-Waiawa aquifer has approximately 2 mgd available for allocation. See, Exhibit A. Therefore, Dole's request for 2.7 mgd cannot be accommodated with the available water source. Dole has failed to meet its burden and the application should be denied.

2. Dole cannot show that its proposed water uses are "reasonable and beneficial," and consistent with the public interest.

The proposed uses are not "reasonable and beneficial" as required by HRS § 174C-49(a)(2). "Reasonable and beneficial" is defined as the "use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is not wasteful and is both reasonable and consistent with the state and county land use plans and the public interest." HRS § 174C-3. Since the presently approved water use permits in the Waipahu-Waiawa aquifer system currently

approach the estimated sustainable yield, the approval of Dole's application would likely exceed that sustainable yield, and threaten the quality and quantity of water within the aquifer. Dole proposes to use the groundwater from the Waipahu-Waiawa Water Management Area for diversified agriculture, landscaping and golf course irrigation. The application fails to show how the proposed uses qualify as "reasonable and beneficial." Further, the application presents no basis upon which to make such a determination.

The proposed uses are not reasonable and beneficial because the water taken from the Waipahu-Waiawa Groundwater Management Area would controvert the declared public policy of the Water Code. Section 174C-2(c), states in pertinent part:

[A]dequate provision shall be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture and navigation.
(Emphasis added).

In light of the extent of water allocations under existing permits and the overriding need to accommodate the current and future water requirements of Native Hawaiians on Ceded Lands and Hawaiian Home Lands, and those engaging in traditional and customary practices, Dole's request is contrary to the public interest.

Further, Dole's application fails to raise, let alone address, other critical factors pertaining to whether its

proposed uses are reasonable and beneficial in light of the public interest. HRS §§ 174C-2(c), 174C-3. Those factors include: (1) whether alternative water sources are used by or available to Dole for supplying water for the proposed uses, (2) the monetary costs of developing, operating and maintaining these alternative water sources and uses, (3) the monetary costs of developing, operating and maintaining the present water sources and uses, and (4) the extent of the environmental impacts from past, current and proposed extraction, transmission and end-uses of water from the Waiāhole Ditch water system.

Due to the apparent availability of other water sources to Dole in the Leeward area, there is a heavy burden upon Dole to identify, assess and evaluate the relative merits of alternative water source options in terms not only of economic convenience but also in terms of the policies concerning the public interest expressed in the Water Code. The Commission should promote long term agricultural use as well as the efficient recycling and reuse of water. Uses of Waiāhole Ditch water for landscaping and golf course irrigation, under present circumstances, could be considered wasteful. Dole's vaguely defined proposed water uses must be deemed not to satisfy the "reasonable and beneficial" standard.

3. Dole cannot show that its proposed water uses will not interfere with any existing legal uses, including but not limited to, traditional and customary water rights and appurtenant water rights.

Dole has failed to demonstrate that its proposed water use will not interfere with any existing legal uses. Because issuances of permits for new and existing uses would cause the total uses of granted permits from the Waipahu-Waiawa aquifer system to exceed its estimated sustainable yield, all existing legal uses of groundwater in Waipahu-Waiawa aquifer system would be affected.

In addition, Dole has failed to show that its proposed uses will not interfere with uses of water that are embodied in water use declarations pending before the Commission. With respect to identifying all existing uses, including other legally recognized uses such as appurtenant rights, the Water Code required "all users of water" to file declarations of their water uses and further required the Commission to verify and certify declared uses as "reasonable and beneficial." HRS §§ 174C-26, 27.

Section 174C-27(a) provides:

When a declaration has been filed in accordance with this section and the commission has determined that the use declared is a reasonable, beneficial use, the commission shall issue a certificate describing the use. The certificate shall be deemed to constitute a description of the use declared. With respect to certificates for water use, the confirmed usage shall be recognized by the commission in resolving claims relating to existing water rights and

uses including appurtenant rights, riparian and correlative use.

The legislative history in pertinent part provides:

The section on certificates of use is intended to afford protection to constitutionally recognized interests under Article XII, Section 7 of Hawaii's Constitution that are not in designated areas ... Certificates of use shall be subject to appurtenant rights, existing riparian uses and existing correlative uses.

Haw. H. R. Conf. Comm. Rep. No. 119, 14th Leg., Reg. Sess. (1987) (relating to a bill for an act relating to the State Water Code).

The certification process would have provided qualified water users who filed declarations five years ago significant recognition that their water use was a "reasonable and beneficial" existing use at the time of Water Code enactment. The Commission's failure to act in certifying declarants water uses adds an additional burden on Dole, which must demonstrate that its proposed water uses will not interfere with the declarants' existing legal uses as set forth in their declarations¹. Those declarations include water necessary for the exercise of traditional and customary practices, appurtenant and riparian water rights and uses.

Finally, independent from the declarations related to traditional and customary practices, appurtenant water rights and riparian rights and uses, the Commission has a duty to incorporate and protect adequate supplies of water to assure the continued viability of traditional and customary, appurtenant and

¹ The Commission has on file approximately 7,300 declarations filed by approximately 2,500 individuals and entities.

riparian water rights and uses. The Commission thus must require Dole to show that its water use does not adversely affect any existing legal use of water, including traditional and customary, appurtenant and riparian water rights and uses.

4. Dole cannot show that its proposed water uses will not interfere with the rights of the department of Hawaiian Home Lands as provided in section 221 of the Hawaiian Homes Commission Act.

Currently, the Department of Hawaiian Home Lands (DHHL) has existing reserved uses in the Waipahu-Waiawa aquifer system. The Commission granted DHHL's reservation of 1.724 mgd for water uses in Papakolea, Nanakuli, and Waianae-Lualualei Hawaiian homestead areas. HAR § 13-171-61. As discussed above, because the water use requested by Dole will impact the sustainable yield of the Waipahu-Waiawa aquifer, all existing legal uses of water would be compromised. Thus, Dole has failed to show how its proposed water uses will not interfere with the rights of DHHL.

D. Dole's Application Is Improper Because It Is For Both New And Existing Uses.

Although Dole's application indicates that it wishes to register an existing use of the Waipahu-Waiawa aquifer, analysis of the application indicates that Dole is really requesting registration of existing and new uses. Pursuant to HRS 174C-50(c), "an application for a permit to continue an existing use must be made within a period of one year from the effective date of designation." Dole failed to apply for a required water use permit under the Water Code between July 1, 1987 the effective date of the Water Code and date of this application. Because

Dole failed to follow procedural requirements for registering its existing use, all uses must be treated as new.

The Water Code allows existing water users an extension of time to apply for registration of that existing use "[i]f the Commission determines that there is just cause for the failure to file ... However, the Commission may not allow a late filing more than five years after the effective date of rules implementing this chapter." HRS 174C-50(c). Eight years has passed without any prior water use application from Dole. Therefore, since the Commission has not allowed or extended the filing date for existing uses past five years from the effective date of the rules implementing the code, HRS § 174C-50(c), Dole must meet all the requirements for a new water use permit for all of its water uses. This is especially important in light of the Commission's policy to consider, and accommodate where appropriate, applications for existing uses in a water management area before considering new uses.

E. Dole Improperly Assumes It "Owns" The 2.7 mgd Of Groundwater Flowing Through The Uwau Extension Tunnel Of The Waiāhole Ditch.

Dole's belief that it "owns" the 2.7 mgd of groundwater flowing in the Uwau Extension Tunnel of the Waiāhole Ditch (See Dole's application item number 16) is contrary to the common law, Constitution and the Water Code of the State of Hawaii.

The Hawaii Supreme Court has clearly rejected the notion of treating water as if it were real property that can be owned.¹ McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330

(1973); Reppun v. Board of Water Supply, 65 Haw. 641, 658 P.2d 57 (1982). The court has declared that water is held in trust by the State for the people of Hawaii for their common good, and acknowledged that the State is the owner of the water. McBryde, 54 Haw. at 187; Reppun 65 Haw. at 539 - 548.

Further, Article XI, § 7 of the Constitution provides, "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people," and the Water Code provides, "the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have their water protected for their use." HRS § 174C-2. (emphasis added). Thus, both the Constitution and the Water Code recognize water is to be held in trust for the people of the State.

Therefore, given that the common law, Constitution and Water Code acknowledge that water cannot be owned and the State is trustee over the waters for the common good of the people, Dole's claims of water ownership is without merit. Moreover, Dole, through these claims, refuses to acknowledge that the water in the State is part of the public trust.

F. Dole's Application Must Be Denied Because State Water Policy Determinations Need To Be Made Prior To Any Allocations Of Water From The Waiāhole Ditch System.

The Water Code requires development of a water plan to guide allocation decisions. HRS § 174C-31. No such plan has been officially adopted statewide. Ruling affirmatively on

Dole's application would be tantamount to the Commission making *ad hoc* policy determinations unguided by a formally adopted, statutorily required water plan. Currently, there are numerous applications, petitions and other requests for allocations of water from the Waiāhole Ditch system. The State has not formulated a plan for water uses to guide allocation decisions despite the Water Code's requirement for development of such a plan. HRS § 174C-31. Until the Commission provides assurances that adequate water is available for the reservations and instream flow standards required in order for the Commission to fulfill its responsibilities under the Water Code, no additional water use permits should be issued. Any grant of additional allocations of water would impair the Commission's ability to provide adequate water for conservation and preservation purposes. In particular, it would affect the supply of water (current and future) available to Native Hawaiians on Hawaiian Home Lands, and on Ceded Lands, and of others engaging in traditional and customary practices recognized in HRS §§ 174C-101, 7-1, 1-1, and protected by Article XII, § 7 of the Constitution.

Due to the lack of a water plan and the Commission's failure to fulfill its planning functions, competing requests for water are relegated to contested case hearings. Setting policy in such an adversarial forum is unnecessary and does not lead to consistent and sound decisions.

III. CONCLUSION.

For the foregoing reasons OHA submits that Dole's application should be denied.

DATED: Honolulu, Hawaii April 13, 1995



JON VAN DYKE
ELIZABETH PA MARTIN
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Attorneys for the
Office of Hawaiian Affairs

He huewai ola ke kanaka na Kāne.
(Man is Kāne's living water gourd.
Water is life and Kāne is the keeper
of water.)

Ola i ka wai a ka 'opua.
(There is life in the water from the clouds.)

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PERMIT APPLICATION FOR UWAU)	<u>CERTIFICATE OF SERVICE</u>
TUNNEL EXTENSION)	
(WELL NO. 2953-03))	
)	
)	

CERTIFICATE OF SERVICE

I, ELIZABETH PA MARTIN, hereby certify that a true copy
of the foregoing document was duly served upon the following at
his last known address in the manner indicated below:

	<u>Mail</u>	<u>Hand Delivery</u>	<u>Facsimile</u>
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DATED: Honolulu, Hawaii April 13, 1995



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EXHIBIT A

October 19, 1994

WATER USE PERMIT DETAILED INFORMATION

Source Information

AQUIFER: Waipahu-Waiawa System, Pearl Harbor Sector, Oahu
Sustainable Yield: 119 mgd
Existing Water Use Permits: 116.333* mgd
Available Allocation: 2.667 mgd
Total of other pending complete applications: 0 mgd

* Includes 1.724 mgd reserved for DHHL use and 3.825 mgd allocated to BWS by action on July 28, 1993.

WELL: Waipahu Wells III (Well No. 2400-09)
Location: Waipahu, Oahu, TMK:9-4-5:74
Year Drilled: 1994
Casing Diameter: 15.25 in.
Elevations (msl= 0 ft.)
Water Level: 299 ft.
Ground: 318 ft.
Bottom of Solid Casing: -358 ft.
Bottom of Perforated: NA ft.
Bottom of Open Hole: -458 ft.

Total Depth: -776 ft.
Grouted Annulus Depth: -358 ft.

Pump Capacity 1,000 gpm

PROPOSED WELLS: Waipahu Wells III (Well Nos. 2400-10 to 13)
Location: Waipahu, Oahu, TMK:9-4-5:74
Year Drilled: NA
Casing Diameter: 16 in.
Elevations (msl= 0 ft.)
Water Level: NA ft.
Ground: 325 ft.
Bottom of Solid Casing: NA ft.
Bottom of Perforated: NA ft.
Bottom of Open Hole: -140 ft.

Total Depth: -465 ft.
Grouted Annulus Depth: -40 ft.

Pump Capacity 1,000 gpm

Use Information

Quantity Requested: 143,500 gallons per day.
Proposed Type of Water Use: Municipal
Place of Water Use: Princess Kahanu Estates, Oahu, HI at TMK: 8-7-7:4
Reported Water Usage: NA gpd

Waipahu-Waiawa Aquifer System
Current 12-Month Moving Average Withdrawal: 90.495 mgd
(76% of SY)