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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

FRIENDS OF MAHA'ULEPU, INC.,)	
)	No. 1:15-cv-00205-LMK-KJM
Plaintiff,)	
)	STATEMENT OF INTEREST OF
v.)	THE UNITED STATES AND
)	COMMENT ON PROPOSED
HAWAII DAIRY FARMS, LLC;)	CONSENT DECREE
ULUPONO INITIATIVE, LLC;)	
MAHAULEPU FARM, LLC;)	
)	
Defendants.)	
_____)	

The United States hereby notifies the Court that it has reviewed the proposed consent decree in this action and does not object to its entry by this Court.

On April 11, 2017, the Citizen Suit Coordinator for the Department of Justice received a copy of the proposed consent decree in the above-referenced

case for review pursuant to Clean Water Act, 33 U.S.C. § 1365(c)(3). This provision provides, in relevant part:

No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

See also 40 C.F.R. § 135.5 (service on Citizen Suit Coordinator in the U.S. Department of Justice). A settlement that does not undergo this federal review process is at risk of being void.¹

In its review, the United States seeks to ensure that a proposed consent judgment complies with the requirements of the relevant statute and is consistent with its purposes. See Local 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) (a consent decree should conform with and further

¹ For purposes of the United States’ right of review, the term “consent judgment” in the Clean Water Act citizen suit provision has a broad meaning, and encompasses all instruments entered with the consent of the parties that have the effect of resolving any portion of the case. For example, the United States views a document stipulating to dismissal of a case or any part thereof would be within the scope of this language. Such documents and any associated instruments (even if not submitted to the Court) must be submitted to the United States for review, notwithstanding any provisions purporting to maintain the confidentiality of such materials. The Department monitors citizen suit litigation to review compliance with this requirement.

the objectives of the law upon which the complaint was based). For example, if the defendant has been out of compliance with statutory or permit requirements, the proposed consent judgment should require the defendant to come into prompt compliance and should include a civil penalty, enforceable remedies, injunctive relief, and/or a supplemental environmental project payment sufficient to deter future violations, or combinations of the above.

In this case, Friends of Maha'ulepu, Inc. ("Plaintiff") alleged violations of sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1342, for the unlawful discharge of pollutants and violations of stormwater permit requirements on a proposed dairy-farm site owned by Maha'ulepu Farm, LLC, and leased to Hawai'i Dairy Farms, LLC, and Ulupono Initiative, LLC (the latter being the managing member of Hawai'i Dairy Farms, LLC) (together "Defendants") in Maha'ulepu on the island of Kaua'i. The proposed consent decree outlines a number of measures in the form of injunctive relief to prevent further discharges.²

The proposed consent decree further provides that Defendant shall make a payment of \$125,000 to the Makauwahi Cave Reserve for a project to manage

² The proposed consent decree does not extend to attorneys' fees; should the parties subsequently reach agreement on that question, the United States requests that they provide the United States with supplemental notice and an opportunity to review.

stream banks and wetlands on Waiopili Stream, reforest adjacent uplands, and increase efforts to manage and monitor endangered species on adjacent properties.

Where a consent judgment provides for the payment of sums to a third party for a SEP, the United States asks the third party to confirm in writing that it is a section 501(c)(3) tax-exempt entity and that it (1) has read the proposed consent judgment; (2) will spend any monies it receives under the proposed judgment for the purposes specified in the judgment; (3) will not use any money received under the proposed consent judgment for political lobbying activities; and (4) will submit to the Court, the United States, and the parties a letter describing how the SEP funds were spent.

In a letter dated May 5, 2017, Makauwahi Cave Reserve provided the United States with confirmation that the funds received would be used solely for purposes described in the consent decree. Makauwahi Cave Reserve also confirmed that it does not fund political lobbying activities prohibited by section 501(c)(3) of the IRS Code; a copy of that letter is attached as Exhibit 1. The Department of Justice believes that this letter will help ensure that the funds will be used in a manner that furthers the environmental purposes of the Act, and that is consistent with the law and the public interest.

Given these representations, the United States has no objection to the entry of the proposed consent decree. We accordingly notify the Court of that fact.

The United States affirms for the record that it is not bound by this settlement. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he was not a party); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc., 484 U.S. 49, 60 (1987) (explaining that citizen suits are intended to “supplement rather than supplant governmental action”); Sierra Club v. Electronic Controls Design, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (explaining that the United States is not bound by citizen suit settlements, and may “bring its own enforcement action at any time”); 131 Cong. Rec. S15,633 (June 13, 1985) (statement of Senator Chafee, on Clean Water Act section 505(c)(3), confirming that the United States is not bound by settlements when it is not a party). The United States also notes that, if the parties subsequently propose to modify any final consent judgment entered in this case, the parties should so notify the United States, and provide a copy of the proposed modifications, forty-five days before the Court enters any such modifications. See 33 U.S.C. §1365(c)(3).

We appreciate the attention of the Court. Please contact the undersigned at (202) 616-9473 if you have any questions.

Respectfully submitted,

Dated: May 26, 2017

/s/ Christine W. Ennis
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CERTIFICATE OF SERVICE

On this 26th day of May, 2017, the Statement of Interest of the United States and Comment on the Proposed Consent Decree was served on counsel of record by electronic filing:

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Dated the 26th of May, 2017.

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