



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**COMMISSION ON WATER RESOURCE MANAGEMENT**

APPLICATION FOR SURFACE WATER USE PERMIT  
 FOR EXISTING USE IN THE NA WAI EHA, MAUI, SURFACE WATER  
 MANAGEMENT AREAS

**FORM SWUPA-E (NA WAI EHA, MAUI)**

For Official Use Only:  
**RECEIVED**  
**COMMISSION ON WATER**  
**RESOURCE MANAGEMENT**  
 2009 APR 30 AM 10:35  
 Event ID: 2342

WUP 117

For detailed instructions on filling out this application, refer to the attached instructions.

**APPLICANT INFORMATION:** Note: In accordance with §174C-51(1)(B), HRS, in the event a lessee, licensee, developer, or any other person with a terminable interest or estate in the land, which is the water source of the permitted water, applies for a water permit, the landowner shall also be stated as a joint applicant for the water permit.

1. APPLICANT'S NAME Paul and Jennifer Higashino		Applicant's Contact	2. SOURCE LANDOWNER'S NAME Wailuku Water Company LLC		Source Landowner's Contact Avery Chumbley
Applicant's Mailing Address, or Principal Place of Business P.O. Box 239 Wailuku, HI 96793			Source Landowner's Mailing Address, or Principal Place of Business 255 East Waiko Road Wailuku, HI 96793		
Applicant's Phone	Applicant's Fax	Applicant's E-mail	Source Landowner's Phone	Source Landowner's	Source Landowner's E-mail

**EXISTING SOURCE INFORMATION**

The following must be attached before this application is accepted as complete:

- Portion of 7.5-Minute Series USGS topographic map (scale 1:24,000) labeled with stream and diversion locations and quad map name.
- Property Tax Map Key (TMK), showing stream or diversion location, and location of water use referenced to established property boundaries.
- Photograph(s) of the surface water diversion works and end use.

3. SURFACE WATER HYDROLOGIC UNIT AND CODE:  Waihee/8022  Waiehu/8023  Iao/6024  Waikapu/6001

4. DIVERSION LOCATION: Choose the appropriate category and enter information in either 4a or 4b.

4a. TMK OF STREAM DIVERSION LOCATION: 

3	-	2	-	014	:	001
Zone		Sector		Plat		Parcel

4b. TMK OF DITCH DIVERSION LOCATION: 

3	-	2	-	017	:	018
Zone		Sector		Plat		Parcel

5. STREAM DIVERSION: How is water diverted from the stream to your property? Check all that apply.  
 Pipe  Pump  Ditch/auwai  Other Describe:  
 is the diverted water returned to the stream or ditch?  Yes.  No. If yes, how much water is returned? See attachment

6. FLOW MEASUREMENT INFORMATION:  
 Does the stream diversion have a flowmeter with totalizer or other device to measure diverted amounts?  
 Yes. Enter the installation date:  
 Describe the device and enter measured amounts in Table 1.  
 No. Explain how you are measuring flow to justify amounts shown in Table 1 in the space below  
 See attachment

**EXISTING USER INFORMATION**

7. APPURTENANT RIGHT: Do you claim an appurtenant right for your water use?  Yes  No  
 if yes, has the appurtenant right been established by the courts or the Commission?  Yes  No

8. END USER INFORMATION: Are you an end user on an existing water system?  Yes  No  
 If yes, who is the operator of the water system? Wailuku Water Company LLC

9. REGISTRATION AND DECLARATION OF WATER USE: Do you have a Registration and Declaration of Water Use with the Commission?  
 Yes. List the file reference name(s): Higashino, P & P 12/21/89  
 No

10. STREAM DIVERSION WORKS PERMIT (SDWP):  
 Have you ever been issued a SDWP by the Commission?  
 Yes. List the permit number(s):  
 No

NOTE: Signing below indicates that the signatories understand and affirm that the information provided on this application is accurate and true to the best of their knowledge. Furthermore, the signatories understand that: 1) if necessary, further information may be required before the application is considered complete; 2) if a water use permit is granted by the Commission, this permit will be subject, but not limited, to any existing legal uses, changes in sustainable yields and instream flow standards, Hawaiian Home Lands uses, and any other conditions imposed by the Commission; and 3) the applicant is responsible for paying the required public notice fees associated with this application.

11. APPLICANT   Signature Jennifer Higashino Print Date 4/28/09	12. SOURCE LANDOWNER  Signature  Print  Date
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FILE ID: SWUP 2342  
 DOC ID: 3359

**SURFACE WATER USE PERMIT APPLICATION  
EXISTING USE (NA WAI EHA, MAUI)**

**TABLE 1: 12-MONTH AVERAGE DAILY USE**  
**Measured or Calculated Use of Water at the Source: (Check one)  Stream  Ditch  Auwai**  
**As of the Effective Date of Designation, April 30, 2008**

MONTH / YEAR	AVERAGE DAILY USE FOR THE MONTH IN GALLONS PER DAY (GPD)	Check one item per box				OTHER Please describe
		METERED	ESTIMATED	ACTIVE BUT UNKNOWN	INACTIVE	
May 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
June 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
July 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
August 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
September 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
October 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
November 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
December 2007	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
January 2008	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
February 2008	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
March 2008	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
April 2008	692,700	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<b>SUM OF AVERAGE DAILY USE FOR THE MONTH</b>	8,312,400	<b>GPD</b>				
<b>AVERAGE DAILY USE (Average of the above)</b>	692,700	<b>GPD</b>				

**SURFACE WATER USE PERMIT APPLICATION  
EXISTING USE (NA WAI EHA, MAUI)**

**TABLE 2: LAND USE CONSISTENCY/EFFICIENCY**  
(Attach additional copies of Table 2 if necessary)

LAND USE CONSISTENCY					EFFICIENCY OF USE				
1. PURPOSE / WATER USE CATEGORY	2. USE TMK ATTACH THE FOLLOWING: • Property tax map, showing use location in reference to established property boundaries • Photograph of the area of use	3. STATE LAND USE DISTRICT	4. COUP REQ'D Enter either: Yes and Date approved, or Yes and not acquired, or No	5. COUNTY ZONING CODE	6. SMAP REQ'D Enter either: Yes and Date approved, or Yes and not acquired, or No	7. REQUESTED QUANTITY OF USE Gallons per Day (GPD)	8. SUB-METERED? (Yes or No)	9. UNITS OR NET ACREAGE	10. APPLICANT'S JUSTIFICATION FOR REQUESTED QUANTITY OF USE FOR ITEM 7. If applicable, attach sheets to show how this number was calculated. For irrigation uses, fill in Table 3.
<b>Uses that require potable (drinking) water</b>									
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
<b>TOTAL POTABLE USE</b>						<b>0</b>		<b>GPD</b>	
<b>Uses that do not require potable water</b>									
AGRCP	3 - 2 - 16 : 17 Zone      Sector      Plat      Parcel	Ag	No	Ag	No	691,200	No	2.5	see attached
DOM	3 - 2 - 16 : 17 Zone      Sector      Plat      Parcel	Ag	No	Ag	No	1,500	No	0.5	see attached
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
	____ - ____ - ____ : ____ Zone      Sector      Plat      Parcel								
<b>TOTAL NON-POTABLE USE</b>						<b>692,700</b>		<b>GPD</b>	
<b>TOTAL USE REQUESTED (Sum of Total Potable Use and Total Non-Potable Use above) =</b>						<b>692,700</b>		<b>GPD</b>	
If total use requested is not equal to the total monthly average in Table 1, please explain. N/A									
In accordance with §174C-51(5), please explain if there are any limitations (legal, contractual, etc.) on the use(s) of water described above. Not that we are aware of.									

**SURFACE WATER USE PERMIT APPLICATION  
EXISTING USE (NA WAI EHA, MAUI)**

**TABLE 3: IRRIGATION INFORMATION**

List all crops as separate line items and include landscape and golf course irrigation, grown in the 12 months prior to April 30, 2008. Attach additional copies of Table 3 if necessary.

1. USE TAX MAP KEY (TMK) Attach map outlining area and photo.	2. CROP	3. TOTAL ACREAGE	4. NET IRRIGATED ACREAGE	5. BEGIN ROWTH PERIOD (Month)	6. END GROWTH PERIOD (Month)	7. IRRIGATION SYSTEM (Refer to instructions.)	8. IRRIGATION PRACTICE (Refer to instructions.)														
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3	-	2	-	16	:	17															
<small>Zone</small>		<small>Sector</small>		<small>Plat</small>		<small>Parcel</small>															
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3	-	2	-	16	:	17															
<small>Zone</small>		<small>Sector</small>		<small>Plat</small>		<small>Parcel</small>															
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**SURFACE WATER USE PERMIT APPLICATION  
EXISTING USE (NA WAI EHA, MAUI)**

**TABLE 4: ALTERNATIVES ANALYSIS**

	<b>Potable Alternatives</b> Attach additional sheets if necessary.	<b>Non-Potable Alternatives</b> Attach additional sheets if necessary.
Municipal sources	N/A	See attachment
Wastewater reuse	N/A	See attachment
Ditch system	N/A	See attachment
Desalinization	N/A	See attachment
Ground water	N/A	See attachment
Other (specify)	N/A	N/A

**PUBLIC INTEREST**

§174C-2(c) states that: *The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, adequate 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. Such objectives are declared to be in the public interest.*

Explain below how the uses in your application are consistent with the public interest as described above. Attach additional sheets if necessary.

See attachment

## ATTACHMENT A

### Attachments

Appended hereto as Attachment B is a copy of the 7.5 minute-series USGS topographic map with Waihe`e River and relevant diversions labeled, as well as another map with North Waiehu Stream and the North Waiehu Ditch Diversion labeled. Attachment C is a TMK map showing the location of our property as well as the locations of our `auwai diversion and existing uses. Attachment D contains true and correct copies of photos of our `auwai intake and existing uses; these photos accurately depict the conditions at the time they were taken.

### Box 2: Source Landowner

Not applicable pursuant to HRS § 174C-51(1)(B), because applicants do not have a terminable interest in the land, which is the source of the permitted water. According to the Water Commission's records, which have not been verified, Wailuku Water Company, LLC claims to be the source landowner.

### Box 5: Stream Diversion

We use water from the kuleana `auwai that runs along Malaihi Road. The `auwai receives water from Waihe`e Ditch, after Waihe`e Ditch receives water from Waihe`e River and North Waiehu Stream. Water is diverted from Waihe`e River at the Waihe`e diversion (see attached USGS topo map) into the Waihe`e Ditch. Water is diverted from North Waiehu Stream (TMK No. 3-2-014:001; see attached USGS topo map) into the North Waiehu Ditch, then into Waihe`e Ditch. Water from the Waihe`e Ditch flows into a pipe and weir, then into an open ditch. The water continues makai in that ditch and pipes and used to flow along the `Iao side of Malaihi Road. Although that kuleana `auwai was capped along the lower portion of Malaihi Road, water continues to emerge from the same ditch in its lower reaches and flows toward our family property (TMK No. 3-2-016:018), which is adjacent to our parcel (TMK No. 3-2-016:017). We divert some water via pipes and ditches for our lo`i kalo and bananas. See Attachment D. Any unused water flows through our lo`i and is returned to Waiehu Stream on our property (TMK No. 3-2-016:017). We do note, however, that the intake for our parcel from the kuleana ditch is on Waiehu Aina, LLC's property (3-2-017: 018).

**Box 6:** See explanation for Table 2 Box 10, below.

### Box 7: Appurtenant Rights

Our property had appurtenant rights because it was in kalo at the time of the Māhele. Our property includes five different LCA Awards (LCA Nos: 3440; 5454:2; 3275; 3274:1; and 3528) and one poalima. Its location along the stream and our family history of this land, including the fact that it is next to our grandparent's kuleana, lead us to believe that this land was in kalo during ancient times. Unfortunately, however, we believe that the water rights were reserved when we purchased the property from Wailuku Agribusiness in 2000. As a result, it appears our property's appurtenant rights may be extinguished, although we reserve the right to claim appurtenant rights in the future based on further information.

**Table 2, Box 10: Justification for Requested Quantity**

Our existing water use is not gauged. So, we estimated it by using water duties and the “bucket method.” We used a stopwatch to measure the amount of time it took the water flowing out of pipe for our lo`i to fill a five-gallon bucket. We did multiple trials and the average amount of time was 0.6 seconds to fill a five-gallon bucket, which amounts to 691,200 gallons per day for our two acre lo`i.

We estimated our existing domestic water use, including watering our non-commercial garden (principally, bananas), by applying the 2002 State of Hawai`i Water System Standard for Maui County of 3000 gallons per acre per day to our 0.5 acres of bananas for a total of 1,500 gallons per day.

Based on this information, we believe that our existing water use for wetland kalo cultivation and non-commercial gardening approximates 692,700 gallons per day.

**Table 4: Alternatives Analysis**

Our exercise of our traditional and customary right as Native Hawaiians to cultivate traditional agricultural crops on our land is constitutionally protected, and by definition should not be required to use alternative, non-traditional sources. We are also an existing riparian use, which is constitutionally protected. See Haw. Const. art. XI, § 7 (preserving appurtenant rights and existing riparian uses).

Even if we did not have protected rights to water from Waiehu Stream, there is no potentially available alternative source that is economically practicable. We grow wetland kalo and have a small non-commercial garden, including bananas, for subsistence purposes. The food we grow feeds our `ohana and is shared with neighbors and community members. As shown below, each potentially available alternative water source imposes a cost on exercising our protected rights and existing riparian use.

**Municipal Sources.** Although we purchased this land in 2000, our grandparents leased it to grow kalo since the 1960s, and we spent summers here with them working the lo`i. As long as we can remember we have always used the `auwai water for our agricultural needs. Requiring us to pay for municipal water instead would impose an unfair and impracticable cost on this use.

**Wastewater reuse.** As a small user engaged in traditional agriculture and non-commercial gardening, we do not have the means to hookup to and use reclaimed water. The closest wastewater treatment plant is in Kahului.

**Ditch system.** We are currently using water from an existing `auwai. As a small user engaged in traditional uses and non-commercial gardening, the cost of taking water from or constructing another ditch is not practicable. First, other ditch systems in Nā Wai `Ehā do not consistently have enough water to support additional users. Second, we lack the property, access, permissions and funding necessary to permit and construct an additional ditch diversion.

**Desalinization.** Desalinization of brackish water is not a practicable alternative because we are not aware of any such plant having been built on Maui. According to the County’s estimates, a plant is expected to be built in 2013 at the earliest.

**Ground Water.** Even if we were able to secure the permits necessary to drill a well and pump ground water for our uses, installing and operating such a well to provide flowing water would be extremely burdensome. As a small user with a garden to feed our family, we do not have the means to install and maintain such infrastructure.

#### **Table 4: Public Interest**

##### **Our Existing Use is Consistent with the Public Interest**

“As a general matter, water use for diversified agriculture on land zoned for agriculture is consistent with the public interest.” In re Waiāhole Ditch Combined Contested Case, 94 Hawai’i 97, 162, 9 P.3d 409, 474 (2000) (“Waiāhole I”). Further, HRS § 174C-2(c) provides that the protection of traditional and customary Hawaiian rights, agriculture, and the maintenance of proper ecological balance and scenic beauty are “in the public interest.” We are Native Hawaiians engaged in traditional agricultural practices, and our bananas and lo`i kalo help to maintain ecological balance and scenic beauty. As such, our existing use of stream water is consistent with the public interest.

##### **Our Existing Use is a Protected Public Trust Purpose**

Kalo cultivation by Native Hawaiians is a protected public trust purposes. Waiāhole I, 94 Haw. at 137, 9 P.3d at 449; see also Haw. Const. art. XII, § 7 (protecting traditional and customary Native Hawaiian rights); HRS § 174C-101(c) (specifically protecting the right to cultivate kalo on one’s own kuleana). In addition, because much of the water we use will be returned to Waiehu stream, our use supports other public trust purposes such as: (1) the maintenance of waters in their natural state; (2) resource protection; (3) water for domestic purposes; and (4) the protection of traditional and customary Native Hawaiian rights.

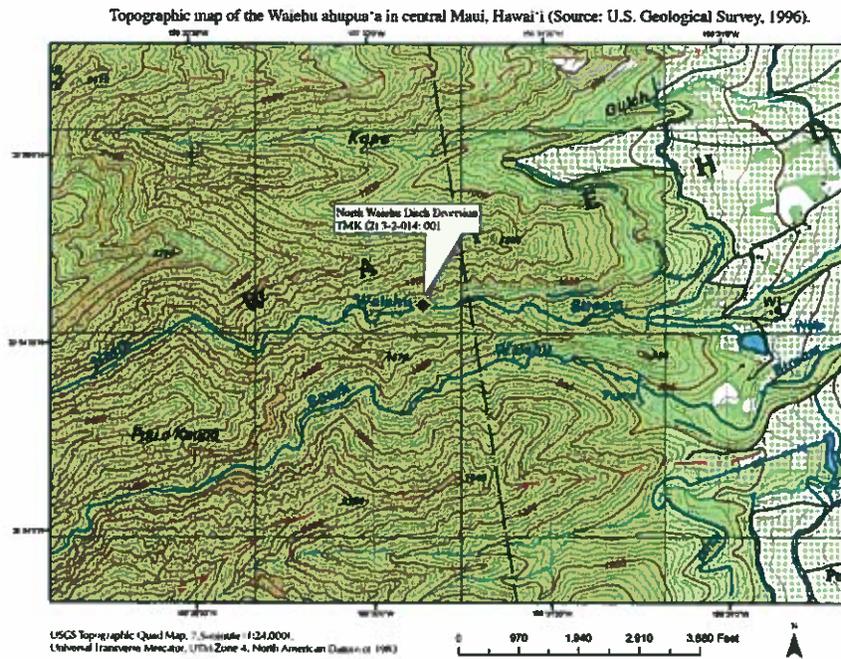
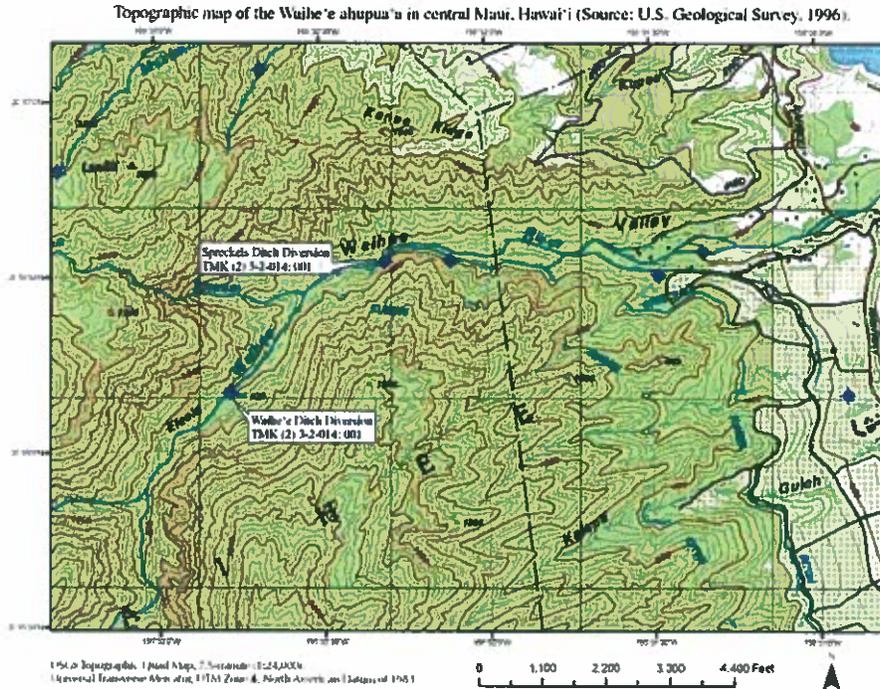
##### **Our Existing Use Supports Beneficial Instream Uses**

Because we return water to the stream, our existing use also supports beneficial instream uses such as: (1) the maintenance of fish and wildlife habitats; (2) outdoor recreational activities; (3) maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; (4) aesthetic values such as waterfalls and scenic waterways; (5) maintenance of water quality; (6) the conveyance of irrigation and domestic water supplies to downstream points of diversion; and (7) the protection of traditional and customary Native Hawaiian rights. See HRS § 174C-3.

**Our Existing Use is a “Reasonable-Beneficial Use”**

“Reasonable-beneficial use” 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 both reasonable and consistent with the state and county land use plans and public interest.” HRS § 174C-3. As indicated above, our use of stream water is consistent with state and county land use plans and the public interest. It is also “economic and efficient” because we only the amount we need. If we stopped receiving stream water, our cultivation of kalo and other crops would be impossible. Moreover, we have taken steps to make our water use more efficient; for example, portions of our ditch are piped. Therefore, the amount of water we have requested is for a “reasonable-beneficial use.”

**ATTACHMENT B: USGS MAPS**



These are true and correct copies of USGS Wailuku Quad maps, depicting the relevant streams and diversion points.



**ATTACHMENT D: PICTURES**

The photos below demonstrate how kuleana water gets to our land. The top photo shows our property's intake from the North Waiehu Kuleana `Auwai. The bottom photo shows how water gets to our lo`i.



The photos below are of some of our end uses, including our lo'i kalo and bananas.



The photo below shows water from lo`i returning to Waiehu Stream.

