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COMMISSION ON WATER  
RESOURCE MANAGEMENT  
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HRD09/4341

May 22, 2009

Honorable Laura H. Thielen, Chairperson  
Ken C. Kawahara, Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, HI 96809

**RE: Request for comments on Robert Hanusa's Surface Water Use Permit Application – Existing Use, Nā Wai `Ehā Surface Water Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Robert Hanusa's Surface Water Use Permit Application (SWUPA) for an existing use in Nā Wai `Ehā's Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, Mr. Hanusa should not have any priority simply by virtue of the fact that he filed his SWUPA earlier than other existing users.

Mr. Hanusa would, however, have priority over other existing users by virtue of the appurtenant right he claims. Unfortunately, there is no information included in Mr. Hanusa's SWUPA from which his

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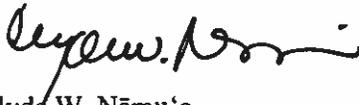
claim to an appurtenant right can be evaluated. His SWUPA should be supplemented to include prima facie evidence of the existence of an appurtenant right, so that the Commission can determine the applicability of HRS § 174C-63.

Even assuming Mr. Hanusa has an appurtenant right to water, however, his use must be reasonable-beneficial. OHA notes that the 905 gallons per day (gpd) that Mr. Hanusa estimates as his existing use, over 0.25 acres, amounts to approximately 3,600 gallons per acre per day (gad). OHA notes that the Maui County Department of Water Supply planning guideline for domestic use for single family and duplex residences is 3,000 gad or 600 gpd per unit.

OHA also observes that the "Alternatives Analysis" (Table 4) in Mr. Hanusa's SWUPA is neither accurate nor helpful, and is thus inadequate. He simply deems municipal water "too expensive" and all other alternative sources "not available." However, according to an exhibit Wailuku Water Company (WWC) introduced in the IIFS contested case, Mr. Hanusa pays WWC \$0.85 per thousand gallons (with a \$20.00 minimum monthly charge) for stream water (*see* Exh. D-70), which is no less than the current residential rate for municipal water. If Mr. Hanusa's land indeed has an appurtenant right, he should not be required to pay WWC for water delivery, nor should he be required to demonstrate the lack of practicable alternative sources, so the inadequacy of his alternatives analysis would be irrelevant. OHA therefore reiterates that Mr. Hanusa's SWUPA should be supplemented to include prima facie evidence of his appurtenant right.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians." (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at [granta@oha.org](mailto:granta@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Administrator

C: OHA CRC Maui