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RESOURCE MANAGEMENT

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**STATE OF HAWAII**  
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HRD09/4346

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 Heinz Jung and Cecilia Chang'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 Heinz Jung and Cecilia Chang's (collectively, Jung/Chang) 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.

FILE ID:	<u>SWUP, 2/12/09</u>
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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, Jung/Chang should not have any priority simply by virtue of the fact that they filed their SWUPA earlier than other existing users.

Assuming that sufficient water is first restored to adequately provide for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights, OHA would have no objection to the continuation of domestic uses such as Jung/Chang's, but has a concern with the "Alternatives Analysis" in their SWUPA.

OHA acknowledges that the 684 gallons per day Jung/Chang claim as an existing use is a modest amount, and appears to be within the Maui County standards for domestic use. However, their SWUPA does not explain why water should be diverted from Nā Wai `Ehā streams for this use, when municipal water would cost no more than Jung/Chang are paying to Wailuku Water Company (WWC) for stream water. The "Alternatives Analysis" (Table 4) in Jung/Chang's SWUPA simply states that "[w]ater for non potable use is not available from the municipal source," but that clearly is not the case. Other residential users without appurtenant rights in the Surface Water Management Area obviously use municipal water for non potable uses such as watering their lawns and gardens. According to an exhibit WWC introduced in the IIFS contested case, Jung/Chang pay WWC \$0.85 per thousand gallons (with a \$20.00 minimum monthly charge) (*see* Exh. D-73), which is no less than the current residential rate for municipal water. Jung/Chang have not met their burden to prove they lack a practicable alternative water source.

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