

PHONE (808) 594-1888



RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT
FAX (808) 594-1865
2009 MAY 29 AM 10:08

STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

HRD09/4351

May 26, 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 Hawaiian Commercial & Sugar Company's Surface Water Use Permit Application (Īao-Waikapū Fields) – 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 Hawaiian Commercial & Sugar Company's (HC&S) Surface Water Use Permit Application (SWUPA) for an existing use on its Īao-Waikapū Fields 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) (*Waiāhole*) (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, HC&S should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

FILE ID:	SWUP.22056
DOC ID:	3826 ✓

HC&S has fallen woefully short of meeting its burden to demonstrate that its existing use of diverted Nā Wai `Ehā water on its `Āo-Waikapū Fields is reasonable-beneficial.¹ Meeting that burden would require HC&S to, “[a]t a very minimum, prove [its] own actual water needs,” *Waiāhole 94 Hawai`i* at 161, 9 P.3d at 473, which HC&S has pointedly failed to do both in its SWUPA and in the IIFS contested case. The 10.59 million gallons per day (mgd) HC&S seeks for these fields is far more than its actual water needs, and far more even than its profligate existing use (which, according to HC&S, was 8.97 mgd for the year preceding designation – see HC&S SWUPA, Table 1). As explained below, HC&S’s actual water requirement for optimal irrigation of its `Āo-Waikapū Fields is no more than 6.1 mgd, which is 5,026 gallons per day (gad) for each of the 1,209 acres that currently comprise the `Āo-Waikapū Fields. Any amount in excess of 6.1 mgd is not necessary for economic and efficient utilization and therefore is not, by definition, reasonable-beneficial.

HC&S claims that it applies water to meet “the specific needs of each of its fields,” “based on the daily needs of each field,” which it determines “based upon where it is in the crop cycle and real time measurements designed to monitor the soil moisture of each field on a daily basis.” HC&S `Āo-Waikapū SWUPA, Attachment, p. 6. According to HC&S, it does this in “each field on a day-to-day basis employing a computerized water balance model” that tracks evaporation, rainfall, and other parameters to calculate the water needs of the crop. *Id.*, pp. 6-7. However, although HC&S clearly has in its database records of the actual water needs of its past crops in the `Āo-Waikapū Fields as calculated by its water balance program, it has never disclosed that information and does not provide it now. Instead, as in the IIFS contested case, HC&S talks only about its water use, which appears to be unrelated to, and significantly greater than, its actual need.

Given HC&S’s failure to identify its actual water needs, it was Petitioners Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc. (collectively, the Community Groups), OHA, and the County of Maui Department of Water Supply (DWS) who jointly retained Dr. Ali Fares to calculate the amount of water necessary to satisfy the optimal irrigation requirements on HC&S’s West Maui Fields. Dr. Fares used a computerized water balance program similar to HC&S’s and, based on site-specific rainfall and evaporation data for a period of over fifty years, calculated that, for optimal irrigation, the actual need of the `Āo-Waikapū Fields (excluding Field 920) is 5,026 gad and the actual need of the Waihe`e-Hopoi Fields is 5,674 gad. See Exh. A-80.

The `Āo-Waikapū Fields need less water than the Waihe`e-Hopoi Fields because, as HC&S previously explained to the Commission (see Exh. A-141, pp. 21-22), there are differences in temperature, wind, relative humidity, evaporation, and soil type. Although the actual water needs of the `Āo-Waikapū Fields are admittedly less than those of the Waihe`e-Hopoi Fields, HC&S explained in the IIFS contested case hearing that it used more water on the `Āo-Waikapū fields because, notwithstanding its claim that it irrigates based on the actual needs of the crop as calculated by its water balance model, “[w]e basically irrigate with what is available” and there is more water available to the `Āo-Waikapū Fields due to the delivery infrastructure. (Tr. 1/30/08 (Volner), p. 97, l. 22 to p. 98, l. 12.) Even though it applies more water to the `Āo-Waikapū Fields, however, HC&S concedes that the excess water does *not*

¹ The deficiencies in HC&S’s attempt to show reasonable-beneficial use are set forth in more detail in Section VI of Petitioners Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc.’s Closing Brief and Proposed Findings of Fact F-1 through F-202 of Petitioners Hui o Nā Wai `Ehā and Maui Tomorrow Foundation, Inc.’s Proposed Findings of Fact, both of which were joined by OHA and filed in the IIFS contested case, and are incorporated herein by reference.

result in a yield higher than the Waihe`e-Hopoi Fields (*Id.*, p. 99, ll. 10-16); rather, the excess water is simply squandered.

In addition to failing to prove its actual water requirement for the `Iao-Waikapū Fields, which is 5,026 gad, HC&S has inflated the acreage of those fields. At the time of the IIFS contested case hearing, the `Iao-Waikapū Fields comprised 1,080 acres that HC&S leases (the leased fields), plus Field 920, which is owned by HC&S (but was previously cultivated by Wailuku Water Company's predecessor) who cultivated approximately 250 acres of that field. (*See* Community Groups' Proposed Finding of Fact F-7.) HC&S recognized for some time that Field 920 is a "marginal" field (Tr. 1/31/08 (Holaday) p. 68, l. 20 to p. 69, l. 6), and, by May 2005, had a plan for soil remediation work on Field 920 because the field "is very sandy and has a low yield history" (Exh. D-56, p. 2). Despite HC&S's acknowledgement that, in its unremediated state, Field 920 was one that it would consider leaving fallow if water availability was an issue (Tr. 1/30/08 (Volner), p. 159, l. 24 to p. 160, l. 3), and that "Waiale [Field 920] could be taken out [of production] without harming HC&S very much" (Tr. 1/31/08 (Holaday), p. 73, ll. 17-18), HC&S continued to use that field without remediation through 2007 (Exh. C-76, pp. HCS 09001, 09002), and poured an average of 11,220 gad on it from 2004 through 2006 (*see* Community Groups' Proposed Findings of Fact, F-87.)

Following the harvest of the last of the standing crop in early 2008, HC&S discontinued cultivation of Field 920 to undertake soil remediation and it has not been put back into cultivation. (*See* SWUPA, p. 6; Tr. 1/30/08 (Volner) p. 106, ll. 5-21.)² To replace Field 920, in December 2007 HC&S reached a verbal agreement to cultivate Field 767, an additional 129-acre field owned by the owners of the leased fields; only 40 acres of Field 767 were added to the lease because "development plans are in progress" for the remaining 89 acres. *See* Hearings Officer's

Proposed Findings of Fact 310, 311. When the suggestion was made that HC&S was attempting to increase its water use to new fields in anticipation of the surface water designation, HC&S responded that it "felt it would be prudent [to cultivate Field 767], as we are not cultivating Field 920." Tr. 1/30/08 (Volner), p. 213, l. 18 to p. 214, l. 5. Now, HC&S is claiming an existing use on *both* fields.³ Given HC&S's acknowledgements that Field 920 is a "marginal" field (Tr. 1/31/08 (Holaday) p. 68, l. 20 to p. 69, l. 6), with "a low yield history" (Exh. D-56, p. 2) that it would consider leaving fallow if water availability was an issue (Tr. 1/30/08 (Volner), p. 159, l. 24 to p. 160, l. 3), and that "Waiale [Field 920] could be taken out [of production] without harming HC&S very much" (Tr. 1/31/08 (Holaday), p. 73, ll. 17-18), and given further that HC&S is using Field 767 as a substitute for Field 920, no use of Nā Wai `Ehā water should be permitted on Field 920, at least until HC&S can demonstrate that it has been successfully remediated. Both as of the date of designation and currently, only 1,209 acres of the `Iao-Waikapū Fields are cultivated: 1,080 acres of the leased fields plus, at least for the present, the 129 acres of Field 767. Given the irrigation requirement of 5,026 gad, HC&S's reasonable-beneficial use on these fields is no more than 6.1 mgd.

² It is not clear that Field 920 will ever be put back into cultivation; it is slated for development as part of A&B's proposed 800-acre, 4,500-unit, residential development at Waiale. (Exh. C-48; Exh. A-204, p. 3; Tr. 1/30/08 (Volner), p. 161, ll. 17-24; Tr. 1/31/08 (Holaday), p. 69, ll. 19-22.)

³ As of April 30, 2008, Field 920 was not in cultivation, so it was not an existing use on the date of designation. HRS § 174C-50(b). The bulk of the crop on that field was harvested in June 2007, and the remaining 78 acres was removed in early 2008. *See* Tr. 1/30/08 (Volner) p. 106, ll. 5-21

Laura Thielen and Ken Kawahara
May 26, 2009
Page 4

Finally, HC&S made no attempt to show that it has no practicable alternative water source for the `Āo-Waikapū Fields. It states that several alternatives that are available for the Waihe`e-Hopoi Fields are not available for the `Āo-Waikapū Fields, but does not consider other alternatives, such as drilling a well. (SWUPA, pp. 9-10.)

For the foregoing reasons, OHA objects to HC&S's SWUPA for an existing use on the `Āo-Waikapū Fields.

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."⁴ (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.

‘O wau iho nō me ka ‘ōia‘i‘o,



Clyde W. Nāmu‘o
Administrator

C: OHA CRC Maui

Garret Hew
P.O. Box 266
Pu‘unēnē, HI 96784

⁴ OHA is a party in the on-going `Āo Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe`e, Waiehu, `Āo, and Waikapū Streams Contested Case Hearing (Case No. CCH-MA06-01) ("IIFS contested case") and has numerous beneficiaries who have property interests in, and/or use surface water from, the `Āo, Waihe`e, Waiehu, and Waikapū surface water management areas.