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HRD09/4269

May 18, 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 Maui County Department of Water Supply Surface Water Use Permit Application – existing uses 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 23, 2009 and appreciates the opportunity to comment on the Maui County Department of Water Supply's (DWS) Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

OHA does not object to DWS's SWUPA in general, but offers the following comments and concerns:

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,

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DWS should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

With respect to DWS's SWUPA in particular, OHA notes that DWS requests an existing use permit in the amount of 1.784 mgd, which it reports in its cover letter is the "highest monthly average withdrawal in the last ten years." In its application, however, it appears that DWS's existing use is actually 1.365 mgd, which is the daily average use for the year preceding the designation of Nā Wai `Ehā as a Surface Water Management Area. An existing use permit must not be for more than the actual amount of the existing use, and should not be based on the highest short-term use ever recorded. The Commission's practice of measuring permitted uses on a 12-month moving average assures that, if DWS is granted an existing use permit for its actual use of 1.365 mgd, it will be able to accommodate high-usage periods such as single month in the last decade when it recorded the maximum use of 1.784 mgd, because such high use periods will be offset by low-use periods such as December 2007, when usage averaged only 728,000 gpd.

OHA commends DWS for increasing its conservation efforts and successfully reducing water demand by about 500,000 gallons per day. OHA notes that the latest draft of the Maui County Water Use and Development Plan, in the Report Review Draft of the Central District Final Candidate Strategies Report, indicates that there is still substantially more benefit to be realized from increased conservation efforts, and that more aggressive Demand Side Management (DSM) strategies and increased use of reclaimed water for non potable use "represent viable options to meet mid-term (2012-2019) water demands[.]" *Id.*, p. 65.

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. 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 'oia'i'o,

Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui