

PHONE (808) 594-1888



RECEIVED
COMMISSION ON WATER
RESOURCE MANAGEMENT
FAX (808) 594-1885

2009 JUN -5 AM 9:10

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

HRD09/4340

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 David Niehaus 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 David Niehaus Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

Initially, 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

FILE ID:	SWP2163.G
DOC ID:	3942

Laura Thielen and Ken Kawahara
May 18, 2009
Page 2

are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, Mr. Niehaus should not have any priority simply by virtue of the fact that he filed his SWUPA earlier than other existing users.

With respect to Mr. Niehaus's SWUPA in particular, OHA notes that Mr. Niehaus claims to be the operator of Everett Ditch, which delivers water from Waikapū Stream to his property. Mr. Niehaus has included with his SWUPA measurements taken by the USGS on April 29 and 30, 2008, which show that on those dates, Everett Ditch was diverting 0.56 cubic feet per second (cfs) (or 0.36 million gallons per day (mgd)) and 0.21 cfs (0.14 mgd), respectively. This substantial diversion is irreconcilable with the testimony by Wailuku Water Company (WWC) in the IIFS contested case hearing (CCH-MA-06-01) that Everett Ditch is no longer in operation. *See, e.g.*, Written Direct Testimony of Clayton Suzuki dated September 12, 2007, p. 2, l. 17; Tr. 1/15/08 (Chumbley), p. 33, ll. 10-12. The Hearings Officer, adopting a finding of fact proposed by WWC, found that the intake to Everett Ditch "is presently sealed." Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order dated April 9, 2009, FOF 162. This discrepancy needs to be resolved.

In addition, if Mr. Niehaus is using only 48,000 gallons per day of the water diverted by Everett Ditch, OHA requests clarification regarding where the balance of the diverted 140,000 gpd to 360,000 mgd (as measured April 29 and 30, 2008) is going. OHA also requests clarification of Mr. Niehaus's claimed existing use of 20,000 gpd of potable water (*see* SWUPA, Table 2).

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