



June 22, 2009

VIA HAND DELIVERY

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

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COMMISSION ON
RESOURCE MANAGEMENT
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Re: Comments and Objections on Surface Water Use Permit Applications (Existing Uses) for Nā Wai 'Ehā Surface Water Management Areas, Maui

Dear Chair Thielen and Deputy Director Kawahara:

On behalf of Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc. (together, the "Community Groups"),¹ we respectfully submit the following comments and objections in response to the correspondence from the Commission dated May 27, 2009, regarding ten Surface Water Use Permit Applications ("WUPAs") for existing uses of water from Nā Wai 'Ehā's surface water management areas:

A. General Comments.

1. Action on the WUPAs must await pending IIFS proceedings.

Initially, as the Commission is well aware, proceedings on the Interim Instream Flow Standards ("IIFS") for Nā Wai 'Ehā streams are ongoing, with the Commission's Hearings Officer's April 9, 2009 Proposed Findings of Fact, Conclusions of Law, and Decision and Order pending the Commission's final decision. The Hawai'i Supreme Court has made clear that the

¹ Hui o Nā Wai 'Ehā and Maui Tomorrow are parties with established standing in ongoing proceedings on the waters of Nā Wai 'Ehā, or Waihe'e River and Waiehu, 'Āao, & Waikapū Streams. Hui o Nā Wai 'Ehā is a community-based organization that was formed to promote the conservation and appropriate management of Hawai'i's natural and cultural resources and the practices that depend on them, including traditional and customary Native Hawaiian practices. Maui Tomorrow, a community based-organization with over 1,000 supporters, is dedicated to protecting Maui's natural areas and prime open space for recreational use and aesthetic value, promoting the concept of ecologically sound development, and preserving the opportunity for rural lifestyles on Maui. Hui members and Maui Tomorrow supporters rely on, routinely use, or seek to use surface water from the Waihe'e, Waiehu, 'Āao, and Waikapū surface water management areas and their nearshore marine waters for fishing, swimming, agriculture, aquaculture, research, photography, educational programs, aesthetic enjoyment, traditional and customary Native Hawaiian practices, and other recreational, scientific, cultural, educational and religious activities.

Commission must set instream flow standards "first," "as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values." In re Waiāhole Ditch Combined Contested Case Hr'g, 94 Haw. 97, 148, 156, 9 P.3d 409, 460, 468 (2000) ("Waiāhole I"). Existing offstream uses of Nā Wai 'Ehā water already drain the streams dry and, thus, are not only "potentially," but actually, detrimental to public instream uses and values. Moreover, existing uses are not "grandfathered" under the Code, and "the Commission's duty to establish proper instream flow standards continues notwithstanding existing diversions." Id. at 149-50, 9 P.3d at 461-62. Until the Commission establishes proper IIFS, it cannot determine whether any water will be available for the various existing and new use WUPAs. See Haw. Rev. Stat. §§ 174C-50(h), -54 (provisions for managing "competing" uses that exceed the available quantity of water). Thus, pursuant to its legal obligations under the public trust and Code, the Commission should withhold any action on the WUPAs until it completes the pending IIFS proceeding.

2. Applicants claiming appurtenant rights must provide prima facie evidence of those rights.

The Hawai'i Constitution and the Code expressly protect appurtenant rights. Haw. Const., art. XI, § 7; Haw. Rev. Stat. § 174C-63 (nothing in the Code "shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time"); Haw. Rev. Stat. § 174C-101(d). Under the Code, a permit for water based on an appurtenant right "shall be issued upon application." Haw. Rev. Stat. § 174C-63. The exercise of appurtenant rights are also a "public trust purpose," Waiāhole I, 94 Haw. at 137 & n.34, 9 P.3d at 449 & n.34, which the Commission has the affirmative duty to take "into account in the planning and allocation of water resources, and to protect . . . whenever feasible," id. at 141, 9 P.3d at 453. Further, the Commission is mandated to "determine appurtenant water rights, including quantification of the amount of water entitled to by that right, which determination shall be valid for purposes of [the Code]." Haw. Rev. Stat. § 174C-5(15).

The Commission, however, cannot fulfill its duty to consider and protect appurtenant rights in balancing the various WUPAs, much less issue WUPAs to applicants with appurtenant rights, without prima facie evidence showing that the applicant's land was entitled to water at the time of the Māhele, such as the Land Commission Awards, Royal Patents, Native Register, and foreign and native testimonies. See McBryde Sugar Co. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973) ("It is the general law of this jurisdiction that when land allotted by the Māhele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing.").

Applicants claiming appurtenant rights, including DLNR, Division of State Parks (SWIM ID # 2304),² fail to provide any documentation establishing their claimed appurtenant rights, and should therefore be required to supplement their applications with prima facie evidence of their rights before the Commission considers their claims. Absent such a showing,

² For the application of Renee Molina (SWIM ID # 2144), prima facie evidence establishing the kuleana rights that attach to TMK No. 3-3-002:009 can be found in the application of Lawrence Miyahira (SWIM ID # 2258).

applicants should be held to the standard burden of proof for WUPAs, including the obligation to show that their uses could not feasibly use alternative sources besides Nā Wai 'Ehā streams.

3. The existing use WUPAs should be resolved together with the new use WUPAs.

While the Commission is initially processing existing use WUPAs before new use WUPAs, it remains unclear whether it intends to decide allocations for existing uses before considering any new uses. If so, this would contravene the principle that existing uses are not "grandfathered," and that all applicants, and the Commission in turn, must justify any offstream use "not only standing alone, but also in relation to other public and private uses and the particular source of water in question." Waiāhole I, 94 Haw. at 161, 9 P.3d at 473. In particular, the Commission should not approve any existing use to the detriment of new uses of users with superior claims, such as appurtenant rights. We urge the Commission to consider and resolve the existing and new use WUPAs on a global, consolidated basis, to ensure maximum reasonable-beneficial use as the constitutional public trust doctrine requires.

B. Specific Objection: Nobriga's Ranch ("NR").

The Community Groups object to NR's WUPA and request a hearing pursuant to Haw. Rev. Stat. § 174C-53(a) because the WUPA fails to provide the Commission with the information it needs to analyze the asserted existing use and ultimately does not show reasonable-beneficial use. Initially, NR provides no details on its operations other than ambiguously referring to irrigating "pasture grass" via "multiple sprinklers" run on a "visual" basis. NR alone bears the burden to provide basic information about the proposed use of the public's stream water resources before the Commission can even begin to assess NR's WUPA "with a level of openness, diligence, and foresight commensurate with the high priority [public] rights command under the laws of our state." Waiahole I, 94 Haw. at 143, 9 P.3d at 455.

Moreover, whether NR actually has an existing use is suspect, given that neither NR nor Wailuku Water Company ("WWC") provided any indication of NR's existence to the Commission during the IIFS contested case proceedings. To the contrary, WWC identified Maui Cattle Company ("MCC") as the existing water user for TMK No. 3-6-001:018, and Alex Franco testified on behalf of MCC in January 2008. NR was never mentioned in any of WWC's filings. See, e.g., Exh. D-96. (WCC's complete list of customers). Table 1 of NR's WUPA appears to report the amount that MCC was using from the period May 2007 to December 2007. Compare Exh. C-70. NR cannot claim MCC's uses as its own.

Even if MCC's past water usage could validly be considered NR's existing use, it is not reasonable-beneficial. Mr. Franco admitted under oath that MCC's use of irrigated pasture in Ma'alaea was "experimental" and not a standard practice. (Tr. 1/14/08, p. 188, ll. 23-25.) The experiment involved using "irrigation cannons" and smaller "K-lines" (1.5 inch pipes interspersed with sprinkler heads) to spray water into the air over dry pasture in arid Ma'alaea, even during the hot summer months, "20 hours a day," including in "broad daylight" and at "[h]igh noon." (Id. p. 177, ll. 1-8; p. 178, ll. 20-23; p. 188, l. 8; p. 196, ll. 12-18; p. 198, ll. 17-22.) See Exhs. A-96; C-22 (photographs of spraying). According to Mr. Franco, this use is "sustainable" only so far as WWC continued to sell Nā Wai 'Ehā surface water to MCC at a

dumping price of \$0.20 per thousand gallons; if the price were to increase, this use "wouldn't work." (Tr. 1/14/08, p. 189, ll. 7-17; Exh. D-79, § 2.) The unbridled spraying of scarce Nā Wai 'Ehā stream water over arid land during the hottest time of day constitutes waste and is not "necessary for economic and efficient utilization" and reasonable-beneficial. HRS § 174C-3.

NR's WUPA, like Mr. Franco's testimony, also fails to provide any analysis of alternative water sources. Instead, it simply recites the one-line, stock responses common to all of WWC's customers and does not begin to show why the use of nearby groundwater wells or recycled water available in Ma'alaea, for example, would not be feasible to conserve scarce Nā Wai 'Ehā water. It also fails to consider mitigation, such as reduced or no irrigation. Applicants must "demonstrate the absence of practicable mitigating measures, including the use of alternative water sources," in order to establish the "propriety of draining water from public streams to satisfy th[eir] needs." Waiāhole I, 94 Haw. at 161-62, 9 P.3d at 473-74. Conclusory statements, with no supporting data or analysis, are not sufficient to meet NR's legal burden of proof.

The Commission should note that this "irrigated pasture" use is the only use from WWC's Reservoir No. 9, which WWC keeps full and sometimes overflowing down Pōhakea Gulch instead of running a line from the previous reservoir, Reservoir No. 94. Thus, this use results not only in consumption of the reported amounts, but also the waste of water from Reservoir No. 9. Particularly given that this land is slated to be developed, this use amounts to nothing but a way for WWC to waste and bank water and avoid returning it to Nā Wai 'Ehā streams.

Likewise, NR fails to show how its use is "consistent with the public interest," Haw. Rev. Stat. § 174C-49(a)(4), "not only standing alone, but also in relation to other public and private uses and the particular source of water in question," id. at 161, 9 P.3d at 473. Diverting water from Nā Wai 'Ehā streams and depriving public instream values for wasteful, experimental irrigation is decidedly not in the public interest. Accordingly, NR's WUPA must be rejected in its entirety.

Thank you for this opportunity to comment. We appreciate your consideration of these comments and objections and your efforts to protect irreplaceable public trust resources for present and future generations.

Very truly yours,



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