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HRD09/4503

June 22, 2009

Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

RE: Request for comments on U.S Fish and Wildlife Service's Surface Water Use Permit Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMK: 3-8-005:002; SWIM ID: 2352.

Aloha e Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated June 3, 2009 and appreciates the opportunity to comment on U.S Fish and Wildlife Service's ("USFWS") Surface Water Use Permit Application ("SWUPA") for an existing use in the Nā Wai 'Ehā Surface Water Management Area. USFWS seeks an existing use permit for its Kealia Pond National Wildlife Refuge, because it depends on flow from Waikapū Stream to maintain water levels in Kealia Pond, which is habitat for endangered waterbirds including Hawaiian Coot and Hawaiian Stilt.

OHA fully supports the use of Nā Wai 'Ehā water to provide wetlands habitat for waterbirds, and notes that this is a public trust purpose. Because USFWS does not seek to divert water for an offstream use, but rather seeks to have water left in Waikapū Stream so that it may flow along its natural watercourse into Kealia Pond, no water use permit is necessary. *See* HRS § 174C-48. Rather, USFWS's "use" is a beneficial instream use that must be provided for by the Interim Instream Flow Standard ("IIFS"). *See* HRS § 174C-3; HRS 174C-71.

In his Proposed Findings of Fact, Conclusions of Law, and Decision and Order in Nā Wai 'Ehā IIFS contested case, the Hearings Officer has proposed an IIFS for Waikapū Stream that is conditioned, in part, on flow from Waikapū Stream reaching Kealia Pond. The proposed IIFS would be 4 million gallons per day ("MGD") below the lowest diversion (Reservoir 6),

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unless the flow failed to reach Kealia Pond, in which case there would be no IIFS below Reservoir 6. (*See* Proposed FOF, COL, D&O, COL 266.) The proposed IIFS for Waikapū Stream is also conditioned on recruitment of amphidromous species into Waikapū Stream; if flows reach Kealia Pond but surveys find no recruitment into Waikapū Stream, there would likewise be no IIFS below Reservoir 6. (*Id.*) USFWS's SWUPA demonstrates that flow into Kealia Pond is a beneficial instream use regardless of whether it results in recruitment into Waikapū Stream, which should be taken into account in establishing the IIFS for Waikapū Stream.

In sum, OHA fully supports an IIFS for Waikapū Stream that would provide sufficient flow to maintain water levels in Kealia Pond adequate to provide habitat for endangered waterbirds; OHA does not believe that a water use permit is necessary for this use.

Thank you for the opportunity to comment on USFWS's SWUPA. As you know, OHA is a party in the on-going 'Āao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe'e, Waiehu, 'Āao, 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 'Āao, Waihe'e, Waiehu, and Waikapū surface water management areas. In addition, 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." (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 your diligent efforts to protect these irreplaceable 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 'oia'i'o,



Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui
Glynnis L. Nakai