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

HRD09/4504

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 Waikapū Properties LLC's Surface Water Use Permit Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMKs: 3-6-004:003 and 3-6-003:001; SWIM ID: 2356.**

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 Waikapū Properties LLC's ("WP") Surface Water Use Permit Application ("SWUPA") for an existing use in the Nā Wai 'Ehā 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) (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.

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Therefore, the SWUPAs for existing uses of Nā Wai 'Ehā stream water should not be considered until the IIFS are established.

With respect to WP's SWUPA in particular, OHA notes that WP claims to have appurtenant rights to water, but has submitted no documentation of the existence of said rights. WP's SWUPA should be supplemented to include prima facie evidence of the existence of its claimed appurtenant rights, so that the Commission can determine the applicability of HRS § 174C-63. If WP can establish that its land has appurtenant rights to water, its failure to demonstrate the lack of any practicable alternative water source can be overlooked. However, even if can establish the existence of its claimed appurtenant rights, WP must still prove that its use is reasonable-beneficial. Because it has not even attempted to show that its claimed existing use of 516,714 gallons per day ("gpd") is necessary for efficient and economic utilization, and it clearly is not, OHA objects to WP's SWUPA and requests a hearing.

WP admits that its SWUPA is duplicative of a SWUPA submitted by HC&S for the same field, Field 735, which is now planted in sugar cane. (See HC&S SWUPA for 'Īao-Waikapū Fields filed April 22, 2009, tables entitled "Table 3 Irrigation Information – 'Īao-Waikapū" and "'Īao-Waikapū Fields.") Although WP suggests in its SWUPA that an average of 516,714 gpd was used for coffee crop irrigation on 61.1 acres in the year proceeding designation (SWUPA, Tables 1-3), it also acknowledges that no coffee has yet been planted in Field 735 (see caption to photograph of Field 735); the 516,714 gpd used on Field 735 from May 2007 through April 2008 was for sugar cane. That use amounts to 8,457 gad, which substantially exceeds even the 7,098 gpd that HC&S claims to require to irrigate sugar cane on the 'Īao-Waikapū Fields (which include Field 735). (See HC&S 'Īao-Waikapū SWUPA, Attachment, p. 5.) To irrigate coffee, 8,457 gpd is profligate overuse.

During the IIFS contested case, Mr. Atherton, as a representative of WP (and other entities) testified that his coffee plantation on Molokai went with no irrigation at all for two years, and up to 2,739 gpd for another two years. (Tr. 2/21/08 (Atherton), p. 158, ll. 3-9.) Now, the plantation is "actually in the black" and "[t]he last few years have been good." (*Id.*, p. 119, ll. 4-10; p. 122, ll. 5-13.) Based on Mr. Atherton's testimony, the Hearings Officer concluded that the reasonable use for WP's proposed coffee farm in Waikapū is 2,730 gpd (Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order, COL 64), less than a third of what WP claims as its "existing use."

In sum, even assuming that WP can establish that it has appurtenant rights to water (which it should supplement its SWUPA to do), it has failed to demonstrate, or even attempt to demonstrate, that the 8,457 gpd it claims as its "existing use" for irrigation of coffee is reasonable-beneficial.

Thank you for the opportunity to comment on WP's SWUPA. As you know, OHA is a party in the on-going 'Īao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe'e, Waiehu, 'Īao,

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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 ‘Īao, 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](mailto:granta@oha.org).

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o  
Administrator

C: OHA CRC Maui  
Michael W. Atherton  
Avery B. Chumbley