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STATE OF HAWAII
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HRD09/4498

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 Roger Yamaoka and Kevin Yamaoka's Surface Water Use Permit Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMKs: 2-3-004:038, 2-3-004:039 and 3-3-003:003; SWIM ID: 2339.

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 Roger Yamaoka and Kevin Yamaoka's Surface Water Use Permit Application ("SWUPA") for an existing use in the Nā Wai 'Ehā Surface Water Management Area.

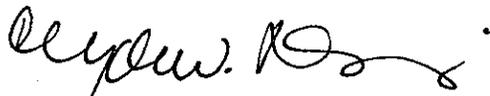
As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai 'Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional 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. Therefore, the SWUPAs for existing uses of Nā Wai 'Ehā stream water should not be considered until the IIFS are established.

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OHA notes that the Yamaokas claim an appurtenant right for their water use, and suggests that they be given the opportunity to supplement their SWUPA to provide prima facie evidence of the existence of that right. The Commission is required to “determine appurtenant water rights, including quantification of the amount of water entitled to by that right” (HRS § 174C-5(15)), and to issue, “upon application,” a permit for water use based on an existing appurtenant right (HRS § 174C-63). Without evidence of the existence of a claimed appurtenant right, the Commission is unable to properly fulfill these mandates. However, the SWUPA form did not request such evidence, so applicants such as the Yamaokas who claim appurtenant rights should be permitted to supplement their applications.

Thank you for the opportunity to comment on the Yamaoka’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 ‘ōia‘i‘o,



Clyde W. Nāmu‘o
Administrator

C: OHA CRC Maui
Roger Yamaoka