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

HRD09/4501

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 Fong Construction Company, Inc.'s Surface Water Use Permit Application – Existing Uses, Nā Wai ‘Ehā Surface Water Management Areas, Maui; TMKs 3-2-014:001, 3-3-003:003, 3-6-003:001 and 3-5-011:049; SWIM ID: 2354.

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 Fong Construction Company, Inc.'s (“Fong”) 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 Fong's SWUPA in particular, OHA objects to the SWUPA and requests a hearing. Fong claims an existing use of 4,000 gallons per day of Nā Wai 'Ehā water which it applies with a water truck for dust control. Fong's SWUPA fails to justify its use in light of the public trust, fails to prove Fong's actual water need, and fails to demonstrate the absence of practicable alternatives. In sum, Fong has failed to show that its use is reasonable-beneficial.

Although Fong claims that it would be cost prohibitive to install a distribution line from the Kahului Wastewater Treatment Plant to WWC's Ditch System (SWUPA, Table 4), it obviously would not be necessary to pipe reclaimed water to WWC's Ditch System in order to use treated wastewater for dust control, because Fong has a water truck. Fong has apparently never considered, let alone demonstrated the impracticability of, filling its water truck at the Kahului Wastewater Treatment Plant instead of at WWC's standpipe.

Thank you for the opportunity to comment on Fong'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, 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.

'O wau iho nō me ka 'oia 'i'o,



Clyde W. Nāmu'o
Administrator

C: OHA CRC Maui
Roderick Fong