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STATE OF HAWAII
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HRD09/4493

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 Milla Puliatch's Surface Water Use Permit Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMK: 3-2-006:010; SWIM ID: 2187.

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 Milla Puliatch'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.


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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 Milla Puliatch's SWUPA, OHA notes that it appears to be duplicative of the SWUPA filed by Gordon Apo as Landowner and Les Nakama as Lessee, SWIM No. 2316 ("Apo SWUPA"). The Apo SWUPA claims an existing use of 62,000 gallons per day to irrigate 0.73 acres of kalo on TMK Nos. (2) 3-2-6: 10 and (2) 3-2-6: 11, which total 1.40 acres. Milla Puliatch claims an existing use of 8,640 gallons per day to irrigate 1.25 acres of kalo on TMK No. (2) 3-2-6:10, which she claims has a total acreage of 1.75 acres (but which the map attached to her SWUPA indicates is 1.34 acres). OHA suggests that Les Nakama, who leases the kalo land and actually cultivates the kalo, is more familiar with both the acreage planted in kalo and the volume of water used to grow kalo on that acreage in the year preceding designation. Milla Puliatch's estimate of the use during that period, which amounts to less than 7,000 gpd, would clearly have been insufficient to grow wetland kalo.

Thank you for the opportunity to comment on the Milla Puliatch'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
Milla Puliatch