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COMMISSION ON WATER
RESOURCE MANAGEMENT
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HRD09/442

June 3, 2009

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

RE: Request for comments on Theodore and Zelie Harders FAM LTD PTNSHP's, Edmund H. Rogers's and Waldemar Frank Rogers's Surface Water Use Permit Application – Existing Use, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMKs: 3-5-004:028, 3-5-004:018; SWIM ID: 2240.

Aloha e Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated May 20, 2009. OHA has reviewed the project and offers the following comments.

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." Hawaii Revised Statutes (HRS) § 10-3(3). As such, we take an active interest in reviewing the seminal designation of this important area as a surface water management area by the Commission on Water Resource Management (CWRM).

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). OHA points out that Nā Wai 'Ehā, the "Four Waters" of West Maui – Waikapū, 'Īao and Waiehu Streams and Waihe'e River – have a long history of Native Hawaiian use. These streams, which once supported extensive kalo cultivation, have been drained almost dry for more than a century by ditches that diverted the water to irrigate sugar plantations. OHA has committed significant resources over the last five years in working with the community on our shared goals to bring back native stream life and restore traditional and customary practices, such as kalo cultivation, that depend on flowing water.

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As such, OHA seeks to ensure sufficient water for Native Hawaiians, who have legal rights to these waters that may not have been previously enforced. OHA points out that the State Water Code in HRS §174C-2(c) directs CWRM to ensure that adequate provision shall be made for the protection of traditional and customary Hawaiian rights. Further, the Constitution of Hawai'i, in Article XII, Section 7, affirms the support for Native Hawaiians' protected rights to traditional and customary practices such as the ones demonstrated in this surface water permit use application. This principle is also embodied in the State Water Code (HRS §174C-3) by defining the protection of traditional and customary Hawaiian rights as a beneficial instream use. Therefore, OHA urges that CWRM consider this applicant to have elevated rights to the use of this water.

Additionally, OHA sees that this applicant is a kalo grower. Native Hawaiians hold kalo, or taro, to be deeply sacred. Hāloanakalaukapalili was the first kalo plant, and he is the elder sibling of the Native Hawaiian people, according to the ancient story of Papahānaumoku and Wākea. Poi, which is made from the corm of kalo, serves as the staple food of the traditional Hawaiian diet. For hundreds of years, Native Hawaiians have grown kalo in paddies (lo'i) fed by the abundant waters flowing through Hawai'i's streams. Today, kalo farming represents one the most cherished traditions of the state's multi-cultural heritage. In recognition of its importance, kalo was recently named the official plant of the State of Hawai'i by the Hawai'i State Legislature.

In addition to the State Constitution, Article XII, Section 7, and the provisions in the State Water Code (HRS §174C-2(c) and HRS §174C-30) – all of which protect traditional and customary Hawaiian rights – we point out that kalo in cultivation by Native Hawaiians is also a protected public trust resource. (*In re Waiāhole Ditch Combined Contested Case, 94 Hawai'i 97, 137 n.34 P.3d 409, 449 n.34 (2000)).* This establishes that their use is beneficial and in the public good. Further, if this beneficiary is cultivating kalo on their own kuleana, they likely have even further considerations afforded to them in the State Water Code under HRS § 174C-101(c), which CWRM must consider in this application.

OHA sees that the applicant is claiming appurtenant rights with attached documentation, which is much appreciated. The Constitution of Hawai'i, in Article XI, Section 7, directs CWRM to establish criteria for water use priorities, while at the same time assuring appurtenant rights. This directive is reflected in the State Water Code in HRS§174C-63, which preserves appurtenant rights. As such, OHA advocates that the appurtenant rights demonstrated in this application be recognized by CWRM.

In an April 11, 2009 press release (*OHA hails recommendations on Nā Wai 'Ehā restoration*), OHA Maui Trustee Boyd Mossman said: "Maui's water future will not be bright unless we mālama the streams we depend on. We hope the state government continues these efforts and this direction so that Hawaiians and all the people of Maui will be well-served."

Thank you for the opportunity to comment. 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