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RESOURCE MANAGEMENT  
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2009 JUN 24 AM 9:05

**STATE OF HAWAII**  
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HRD09/4479

June 16, 2009

Honorable Laura H. Thielen, Chairperson  
Ken C. Kawahara, Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, HI 96809

**RE: Request for comments on Bryan Sarasin, Sr.'s Surface Water Use Permit  
Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated May 27, 2009 and appreciates the opportunity to comment on Bryan Sarasin'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.

FILE ID:	SWUP 2294.6
NO.:	4894

OHA notes that Mr. Sarasin has submitted prima facie evidence that his land has an appurtenant right to water. The burden to come forward with evidence in rebuttal should shift to any objecting party. Unless the evidence submitted by Mr. Sarasin is successfully rebutted, such as by evidence that the appurtenant right has been severed, his appurtenant right and the volume of water associated with it should be determined as required by HRS § 174C-5(15), and his SWUPA should be granted pursuant to HRS § 174C-63.

Even uses pursuant to appurtenant rights, however, must be reasonable-beneficial. OHA does not have enough information to determine whether the 1,035,040 gallons per day Mr. Sarasin claims as an existing use is necessary for economic and efficient utilization. It is not clear, for example, whether the aquaculture ponds need to have that volume of through flow 24 hours per day, and why they cannot be run completely in series. Pending answers to those questions, OHA does not oppose the SWUPA.

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 the opportunity to comment, and for your diligent efforts to protect these 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