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**STATE OF HAWAII**  
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HRD09/4494  
HRD09/4497

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 Rodney Akau, John Duarte, Endurance Investors, LLC, and Association of II Wai Hui, LP's Surface Water Use Permit Application and Towne Realty of Hawaii, Inc./Wailuku Kuakahi, LLC's Surface Water Use Permit Application – Existing Uses, Nā Wai 'Ehā Surface Water Management Areas, Maui; TMKs: 3-5-002:002 and 3-3-003:003; SWIM IDs: 2349 and 2350, respectively.**

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 the Surface Water Use Permit Applications ("SWUPAs") submitted by Rodney Akau, John Duarte, Endurance Investors, LLC, and Association of II Wai Hui, LP's (collectively, "Endurance") and Towne Realty of Hawaii, Inc./Wailuku Kuakahi, LLC ("Towne") for existing uses 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

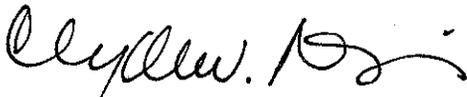
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previous diversions and allocations, even those made with due regard to their effect on trust purposes,” and that, in setting the IIFS, “*the Commission may reclaim instream values to the inevitable displacement of existing offstream uses*” (emphasis 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.

With respect to these SWUPAs in particular, OHA notes that Endurance and Towne are adjacent landowners who have jointly submitted a Draft Environmental Impact Statement to the State of Hawai‘i Land Use Commission. (See Draft Environmental Impact Statement dated January, 2009 for Proposed Pu‘unani Subdivision (“DEIS”).) According to the DEIS, they propose to develop TMKs (2) 3-5-002:002 and 003 into the Pu‘unani Subdivision, which would include 133 rural residential lots, 145 single-family residential lots, and 476 multi-family units on approximately 208 acres of land, with site construction estimated to start in 2012. (*Id.*) The existing agricultural uses that Endurance and Towne claim, therefore, are clearly interim uses, and any existing use permits granted for these claimed existing uses should include appropriate restrictions acknowledging the temporary nature of the existing uses.

Thank you for the opportunity to comment on Endurance’s and Towne’s SWUPAs. 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](mailto:granta@oha.org).

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o  
Administrator

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