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BOARD OF LAND AND NATURAL RESOURCES MEETING Relating to Agenda Item D-6

Update Regarding the Disposition of Water License for Water Use
from East Maui on the Island of Maui

October 13, 2023

9:00 a.m.

DLNR Boardroom

Aloha e Chair Chang and members of the Board of Land and Natural Resources:

The Native Hawaiian Legal Corporation, on behalf of Nā Moku Aupuni O Ko'olau Hui, offers the following comments on Agenda Item D-6 and the BLNR's consideration of a future water license for East Maui.

In Hawai'i, water has always been considered a public trust resource to be managed for the benefit of present and future generations. Traditionally, stream and spring water was treated as a community resource that belonged to everyone; it was respected and shared in such a way to address Native Hawaiians' social, ecological, and spiritual needs. This traditional view is enshrined in our constitution and statutes, which mandate that this fundamental resource be managed and used to fulfill specific public trust purposes – the maintenance of waters in their natural state, domestic water use, the exercise of Native Hawaiian traditional and customary rights, and the Department of Hawaiian Home Land's reservations of water. *See Kauai Springs, Inc v. Planning Comm'n of the County of Kaua'i*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014). Laws related to disposition of water from state lands also obligate BLNR – as trustee of the public trust resources of this state – to employ a high level of scrutiny whenever its actions impact public trust resources. *See In Re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) (mandating that trustees “must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.”).

East Maui communities' longstanding litigation dealing with mismanagement of water resources and BLNR's trust duties requires that a critical eye be given to any action that could skew the process toward private interests and away from public trust purposes. *See, e.g., Carmichael v. Bd. of Land and Nat. Resources*, 150 Hawai'i 547, 506 P.3d 211 (2022). Passive management of our state's scarce and commercially coveted water resources is irresponsible, and taking action without ensuring public trust purposes are properly protected at the outset invites future abuses.

That said, when considering the disposition of a future water license for water use from East Maui, at minimum, BLNR must:

- Ensure that all the modifications to stream diversions ordered by the Commission on Water Resource Management in 2018 and 2022 have been completed prior to making a long-term disposition to ensure that Alexander & Baldwin, Inc. ("A&B") and East Maui Irrigation Co. Ltd. ("EMI") are motivated to complete these modifications in a timely manner;
- Require modifications to address system losses and, ultimately, gross waste of water, including, but not limited to, lining reservoirs and ditches; and
- Require A&B and EMI to explore alternate sources of water (*i.e.*, groundwater) and utilize those sources to offset the amount of water diverted from streams.

To further these goals and protect public trust purposes, BLNR must also impose clear conditions in the license itself, and the community should have the opportunity to request and comment on proposed conditions prior to the execution of any future agreement.

Mahalo for the opportunity to provide comments on this important issue.



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For Nā Moku Aupuni O Ko'olau Hui