

Testimony on the Petition filed by Nā Moku for a Contested Case Hearing,
Item D-3 on the July 11, 2025 BLNR Agenda

Chair Chang and members of the BLNR,

Your staff and attorneys have tangled themselves up like a pretzel in coming up with a rationale to deny the request for a contested case hearing.

BLNR Can Provide Meaningful Relief.

Your staff and attorneys' claim that you are powerless to provide any relief (including lowering the amount of water that can be taken from east Maui streams). That position is absurd.

In your December 2024 decision, you limited the amount of water that can be taken from east Maui streams. You also have the power to lower that amount. If you did, the streams and Nā Moku would benefit. In 2018, CWRM required that 64% of median base flow remain in five streams. CWRM recognized that doing so would allow for the recovery of 90% of natural habitat – not all of it. (CWRM FOF 567). Thus, even more habitat would be restored if more than 64% of baseflow were left in these streams. Indeed, CWRM itself noted: “There is universal agreement that more water and better connectivity in streams is a good thing for native habitat restoration.” If BLNR authorized A&B to take far less water from east Maui streams (and complemented CWRM's actions), more water would remain in our streams and A&B would have an incentive to reduce system losses.

In recent years, BLNR has capped the amount of water that A&B can take from east Maui streams. If you set this cap low enough, it would serve to (a) prevent the harm to our streams from being exacerbated; (b) encourage A&B to expeditiously modify the diversion structures that CWRM ordered years ago; (c) create an incentive for A&B to reduce system losses; and (d) keep more water in east Maui streams.

The supreme court recognized “BLNR's role as a public trustee of the State's water resources” in approving the continuation of this revocable permit. *Carmichael v. BLNR*, 150 Hawai'i 547, 567, 506 P.3d 211, 231 (2022). As a trustee, BLNR is required to “to assure that the waters of our land are put to reasonable and beneficial uses.” *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982); *Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 174, 324 P.3d 951, 984 (2014). Neither *Robinson* nor *Kauai Springs* involved CWRM. These trust obligations are imposed on all agencies, not just CWRM. Just as the Kaua'i Planning Commission needed to ensure that the applicant implemented mitigation measures, *Kauai Springs*, 133 Hawai'i at 175 and 180, 324 P.3d at 985 and 990, so too does BLNR. Just as the Kaua'i Planning Commission was obligated to require that a commercial applicant demonstrate the absence of alternative water sources, *id.* at 174, 324 P.3d at 984, so too is BLNR. Just as the Kaua'i Planning Commission was required to “**preserve the rights of present and future generations in waters of the state,**” *id.* at 173, 324 P.3d at 983, so too is BLNR.

HRS § 171-55 explicitly gives BLNR the power to impose conditions that “will serve the best

interests of the State.” [C]an it be said that there is no public interest in a free-flowing stream for its own sake?” *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982). These best interests include minimizing adverse impacts on coastal ecosystems, HRS § 205A-2(b)(4)(A), minimizing disruption or degradation of coastal water ecosystems, HRS § 205A-2(c)(4)(D), and exercising a conservation ethic to reduce waste, HRS §§ 205A-2(c)(4)(A). Thus, BLNR possesses the authority to incorporate important conditions that could leave more water in streams. HRS §§ 171-55, 171-3(a), and 26-15(b) give BLNR the authority to impose conditions that protect streams.

In 2003, Judge Hifo concluded that BLNR was required to determine whether letting A&B take water from streams was in the state’s best interest “notwithstanding Appellees’ argument that the CWRM has exclusive jurisdiction over determining what amount of water must flow through the streams which all agencies have a duty to protect.” Exhibit A at 4. In a decision binding on BLNR with respect to the same east Maui streams, Judge Hifo held,

given the provisions of the Hawai‘i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the BLNR is obligated to make a truly independent investigation as to whether it’s in the state’s best interest to authorize the diversion of water from East Maui streams.

This ruling does not necessarily mean that every CWRM decision may be collaterally attacked. However, at any BLNR contested case hearing, any party may challenge a CWRM decision if its methodology is wrong or some other error is committed, whether or not it has been collaterally attacked on appeal. This Court simply affirms that the BLNR may not merely rubber-stamp every CWRM determination.

Id. at 5. BLNR never appealed Judge Hifo’s ruling.

CWRM recognized that “authorizing **how much water** will be allowed to be diverted offstream once the instream flow standards are met is the purview of the Board of Land and Natural Resources.” BLNR is **not** required to give A&B all the water above the instream flow standards. Or any of it.

CWRM encouraged BLNR to “require improvements in the water delivery systems to minimize leakage and waste[.]” BLNR has the authority and responsibility to ensure that water taken from east Maui streams is not lost and that it was used in a reasonable and beneficial manner. If BLNR took measures to stop A&B from wasting millions of gallons of water daily, more water could remain in our streams. “The value of diverting water, only to lose the water due to avoidable or unreasonable circumstances is unlikely to outweigh the value of retaining the water for instream uses.” *In re ‘Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 257, 287 P.3d 129, 158 (2012). If BLNR took measures to stop the waste of water, more water could remain in our streams.

You have recognized your authority to protect stream flow. In 2007, you ordered A&B to allow 6 mgd to flow in Waiokamilo Stream. Exhibit B at 46. In 2016, you added a condition to the revocable permits: “Honomanu Stream shall be designated as a stream from which no water

diversion shall be permitted.” Exhibit C at 12. BLNR is estopped from arguing that it lacks the power to take measures that keep water in streams.

Inaccurate Historical Background

The history provided by your staff – who were not here back then and clearly have not read the files – is inaccurate. It provides erroneous post hoc rationalizations for inaction taken years ago.

In 2001, you granted Nā Moku’s request for a contested case hearing on a long-term lease of this water. The supreme court wrote:

On June 22, 2001, the BLNR granted Na Moku's and Maui Tomorrow's requests. The following entities were granted standing to participate in the contested case proceedings: A & B/EMI; Maui Tomorrow; Na Moku; the County of Maui, Department of Water Supply; Maui Land & Pineapple Co., Inc. [hereinafter, MLP], which intervened to protect its use of water for farming operations; and Hawaii Farm Bureau Federation [hereinafter, HFBF], a not-for-profit organization, which intervened to represent the interests of Maui small and family farmers who are end users of a portion of the water from the A&B/EMI irrigation system.

Maui Tomorrow v. BLNR, 110 Hawai‘i 234, 237, 131 P.3d 517, 520 (2006). The circuit court reversed much of BLNR’s decision. Exhibit A.

A contested case was **not** held on the revocable permits as the staff submittal suggests on pages 3 and 9. A full evidentiary hearing was held **on a motion for interim relief**. Exhibit B at 1-5. Nā Moku’s contested case hearing on the revocable permits and on the issuance of a lease was never held because BLNR refused to convene it despite a court order. Exhibit D; Exhibit E.

Finally, in January 2016, Nā Moku appealed BLNR’s December 2015 decision approving the revocable permits for 2016. In 2024, the Environmental Court held that “Nā Moku Was Improperly Denied Its Right to a Contested Case Hearing.” Exhibit F at 6.¹ The court found that “it was a violation not to allow a contested case hearing.” “In short, BLNR improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku’s request for a contested case hearing, failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A.”

Cases

For far too long, this board, your staff and attorneys have labored to exclude the public from meaningful participation in decisionmaking. Your track record is dismal.

The Hawai‘i Supreme Court has described BLNR’s approval of these permits “without scrutiny” as “particularly troubling,” *Carmichael v. BLNR*, 150 Hawai‘i 547, 566-67, 506 P.3d 211, 230-31 (2022). It pointed out that “[b]oth the County of Maui and the Sierra Club credibly discredited the BLNR’s key factual claim to support its petition.” *BLNR v. Crabtree*, 154 Hawai‘i 113, 116,

¹ No appeal was filed.

547 P.3d 446, 449 (2024). “BLNR made frivolous claims.” *Id.* at 117, 547 P.3d at 450. “[T]he statements made in the BLNR’s petition were so ‘manifestly and palpably without merit, so as to indicate bad faith.’” *Id.* at 119, 547 P.3d at 452.

You have repeatedly and improperly denied requests for a contested case hearing. *Kaleikini v. Thielen*, 124 Hawai‘i 1, 237 P.3d 1067 (2010) (BLNR chair refused to hold contested case hearing required before approving the removal of burials); *Kilakila ‘O Haleakalā v. Bd of Land & Natural Res.*, 131 Hawai‘i 193, 317 P.3d 27 (2013) (BLNR approved conservation district use permit before holding a required contested case hearing); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 363 P.3d 224 (2015) (ditto); *Ralston v. BLNR*, CAAP-22-0000402 (June 10, 2025) (BLNR improperly denied a request for a contested case hearing on a hotel’s request for a revocable permit to make exclusive use of a portion of public trust land).

‘Nuff already. Grant the petition. Let a contested case hearing take place. Gather the facts. Let someone who is neutral and smart develop a recommended decision.

Aloha,

/s/ David Kimo Frankel

EXHIBIT A

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1ST CIRCUIT COURT
STATE OF HAWAII
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order affirming blnr fofcol

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MAUI TOMORROW, formally known as
MAUI TOMORROW FOUNDATION,
INC., and its supporters,

Appellant,

vs.

STATE OF HAWAII; BOARD OF LAND
AND NATURAL RESOURCES of the
State of Hawaii; DEPARTMENT OF
LAND AND NATURAL RESOURCES of
the State of Hawaii; PETER T. YOUNG, in
his official capacity as Chairperson of the
Board of Land and Natural Resources and
the Director of the Department of Land and
Natural Resources; ALEXANDER &
BALDWIN, INC.; EAST MAUI
IRRIGATION CO.; MAUI LAND &
PINEAPPLE CO., INC.; COUNTY OF
MAUI, DEPARTMENT OF WATER
SUPPLY; HAWAII FARM BUREAU
FEDERATION,

Appellees.

) Civil No. 03-1-0289-02
) (Agency Appeal)
)
)

) ORDER AFFIRMING IN PART AND
) REVERSING IN PART STATE OF HAWAII
) BOARD OF LAND AND NATURAL
) RESOURCES' FINDINGS OF FACT AND
) CONCLUSIONS OF LAW AND ORDER,
) DATED JANUARY 10, 2003; AMENDED
) JANUARY 24, 2003 REGARDING
) PETITION CONTESTING APPLICATION
) FOR LONG TERM DISPOSITION OF
) WATER LICENSES AND ISSUANCE OF
) INTERIM REVOCABLE PERMITS AT
) HONOMANU, KEANAE, NAHIKU, AND
) HUELO, MAUI

) ORAL ARGUMENT
) DATE: September 17, 2003
) TIME: 1:30 p.m.
)

) JUDGE: Honorable Eden E. Hifo
)

NA MOKU AUPUNI O KO'OLAU HUI;	)	Civil No. 03-1-0292-02
BEATRICE KEKAHUNA; MARJORIE	)	(Agency Appeal)
WALLET; ELIZABETH LAPENIA;)	
MAUI TOMORROW,)	
)	
Appellants,)	
)	
vs.)	
)	
STATE OF HAWAII; BOARD OF LAND)	
AND NATURAL RESOURCES of the)	
State of Hawaii; DEPARTMENT OF)	
LAND AND NATURAL RESOURCES of)	
the State of Hawaii; PETER T. YOUNG, in)	
his official capacity as Chairperson of the)	
Board of Land and Natural Resources and)	
the Director of the Department of Land and)	
Natural Resources; ALEXANDER &)	
BALDWIN, INC.; EAST MAUI)	
IRRIGATION CO.; MAUI LAND &)	
PINEAPPLE CO., INC.; COUNTY OF)	
MAUI, DEPARTMENT OF WATER)	
SUPPLY; HAWAII FARM BUREAU)	
FEDERATION,)	
)	
Appellees.)	

ORDER AFFIRMING IN PART AND REVERSING IN PART
STATE OF HAWAII BOARD OF LAND AND NATURAL RESOURCES' FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND ORDER, DATED JANUARY 10, 2003;
AMENDED JANUARY 24, 2003 REGARDING PETITION CONTESTING APPLICATION
FOR LONG TERM DISPOSITION OF WATER LICENSES AND ISSUANCE OF INTERIM
REVOCABLE PERMITS AT HONOMANU, KEANAE, NAHIKU, AND HUELO, MAUI

On September 17, 2003, this Court heard oral arguments on this administrative agency appeal of Appellee State Of Hawaii Board Of Land And Natural Resources' Findings Of Fact And Conclusions Of Law And Order, Dated January 10, 2003; Amended January 24, 2003, Regarding Petition Contesting Application For Long Term Disposition Of Water Licenses And Issuance Of Interim Revocable Permits At Honomanu, Keanae, Nahiku, And Huelo, Maui (hereafter, "BLNR decision"). The following counsel appeared for and presented oral argument on behalf of the indicated parties: Alan T. Murakami and Moses K.N. Haia, III for Appellant Na

Moku Aupuni O Ko'olau Hui, Isaac Davis Hall for Appellant Maui Tomorrow, Alan M. Oshima, Randall K. Ishikawa, and David Schulmeister for Appellee Alexander & Baldwin and East Maui Irrigation Company, Linda L.W. Chow for Appellee Board of Land and Natural Resources, State of Hawai'i, Chris Parsons for Appellee Hawai'i Farm Bureau, Jane Lovell for Appellee County of Maui, Richard J. Kiefer for Appellee Maui Land & Pineapple.

This Court finds that the following issues presented in this HRS chapter 91 appeal are exclusively legal in nature. The facts as presented are not disputed. Accordingly, this Court may review the legal issues under a *de novo* standard of review.

Scope of Agenda

Pursuant to HRS § 92-7(d), an agency cannot change the agenda for its meeting, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled. The same statute requires that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. *Id.* Items of reasonably major importance not decided at a scheduled meeting can be considered only at a meeting continued to a reasonable day and time. *Id.*

It is undisputed that in this instance, the relevant agenda item of the Board Of Land And Natural Resources (hereafter, "BLNR") was to consider action on the then-pending revocable permits covering the four water areas of Huelo, Honopou, Keanae, and Nahiku. It is undisputed that there was no change to this agenda. However, this Court finds that there was a specific petition for intervention filed by the Appellants which sought to address both the revocable permits, which were on the agenda, and the long-term 30-year water lease, which was on the agenda only for discussion purposes.

Therefore, this Court concludes that there was no error of law, despite the operation of HRS §92-7(d), in entertaining those petitions for intervention, having hearings, and coming to conclusions as contained in the BLNR decision. The claim related to this point of legal error is hereby rejected, and the BLNR decision on this issue is AFFIRMED.

Out of Watershed Transfers, Traditional and Customary Practices, and the Public Trust

Transfers of Water. The Court initially concludes that the Water Code, HRS chapter 174C, does not prohibit the transfer of water outside the watershed of origin in an area that the

Commission on Water Resources Management has not designated a water management area pursuant to HRS §174C-48. There is no dispute that the area of East Maui that is the subject of the water lease is not a water management area.

Furthermore, there is little dispute that the transfer of water out of the watershed of origin is not absolutely prohibited under the common law of Hawai'i. Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) ("Robinson"). However, Robinson allows these transfers only when it can be demonstrated that to do so would not be injurious to others with rights to water.

In addition Conclusion of Law No. 3 of the First Amended Findings of Fact and Conclusions of Law (at page 7) acknowledges that, upon a determination that it would be in the best interest of the state, the BLNR may enter into a lease of water emanating from State lands for transfer outside of the watershed of origin, provided that the lease is issued in accordance with the procedures set forth in HRS chapter 171 and a provision that all diversions of stream water shall remain subject to the interim in-stream flow standards set by the CWRM and any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.

This conclusion of law means that the BLNR could meet and decide whether it is in the best interest of the state to lease whatever is excess without knowing what is "excess." Accordingly, this Court concludes that this conclusion of law is fatally flawed, and is inconsistent with the common law and with the suggestion that one could ever determine the best interest of the state absent data on what is "excess."

Native Rights and the Public Trust. This Court concludes that its analysis of tradition and customary native Hawaiian practices and appurtenant rights and the public trust obligations emanating from the Hawai'i Constitution and case decisions construing it dovetails into the issue of out of watershed transfers. Accordingly, this court also concludes that it was erroneous for the BLNR to conclude that it could begin the process to put out to lease the water that could affect these rights without first making a determination as to whether it would be in the state's best interest in light of the lack of knowledge or information of what the CWRM will ultimately determine in the future, notwithstanding Appellees' argument that the CWRM has exclusive jurisdiction over determining what amount of water must flow through the streams which all agencies have a duty to protect.

This Court finds no error in the BLNR conclusion that the BLNR is not required to conduct a parallel investigation. In the process of determining whether there is any surplus water which would be in the best interest of the state to lease for 30 years, the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards, whether as a result of Appellant Na Moku Aupuni O Ko'olau's filing of 27 petitions to amend interim instream flow standards, or any other request, or pursuant to CWRM's exercise of its statutory obligations to protect riparian rights, native Hawaiian rights, or in the discharge of any of its other obligations. However, if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM. If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.

In any case, given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the BLNR is obligated to make a truly independent investigation as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams.

This ruling does not necessarily mean that every CWRM decision may be collaterally attacked. However, at any BLNR contested case hearing, any party may challenge a CWRM decision if its methodology is wrong or some other error is committed, whether or not it has been collaterally attacked on appeal. This Court simply affirms that the BLNR may not merely rubber-stamp every CWRM determination.

Therefore, this Court REVERSES Paragraph 3 and 5 of the Order contained in the BLNR decision and any related conclusion of law.

Environmental Impact Assessment

It is undisputed that pursuant to HRS chapter 343, certain rules were promulgated by the agency having the authority to implement that chapter. It is undisputed that those rules included HAR 11-200-8(a)(1), which creates an exception to doing an environmental assessment so long as the proposed action authorizes the continued operation of existing structures, facilities, equipment, or topographical features and precludes any expansion or change of use beyond that

previously existing operation. However, any contrary statutory requirement trumps an otherwise valid rule. A rule cannot supercede a statute. Under HRS § 343-6(7), a rule can authorize an exemption to a requirement for an environmental assessment only where there is minimal or no significant effect on the environment. This Court finds that the proposal for a 30-year lease of any or all excess water that may exist after there finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, does not constitute a minimal or no significant effect on the environment.

As to the cases cited to the Court, the Court finds that Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission, 746 F.2d 466, 475-477 (9th Cir. 1984), which held that the relicensing of a power plant needed to be analyzed as if it were the original licensing of the plant, is persuasive, as appellants argued, and would require an environmental assessment (EA), and perhaps an environmental impact statement (EIS), depending upon the result of the EA, for a long-term lease which constitutes the first long-term lease of this water since at least 1985.

Furthermore, the Court concludes that a supplemental reason for reversing on this point is that HAR 11-200-8(a) requires the agency purporting to invoke the exception to consult with other agencies. At a minimum, it must consult with the CWRM. The undisputed record is that the BLNR performed no consultations with other agencies. Accordingly, even if the rule were applicable, which it is not, the BLNR would not have met its requirements.

Therefore, this Court REVERSES Paragraph 4 of the Order contained in the BLNR decision and any related conclusion of law.

Continued Contested Case and Revocable Permits

The Order appealed from does not deal with the revocable permits and, as such, this Court does not issue any rulings with respect to these revocable permits.

The Court understands, and the parties agree, that the contested case proceedings appealed from, are ongoing, so that the Court's declining to rule on this issue is without prejudice to the ability of the parties to raise whatever issues they wish with regard to the revocable permits at any ongoing contested case hearing or in any other forum.

Dated: OCT 10 2003, Honolulu, Hawaii.

EDEN ELIZABETH HIFO

Judge of the Above-Entitled Court

APPROVED AS TO FORM:

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Deputy Attorney General
Attorney for Appellees
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ORDER AFFIRMING IN PART AND REVERSING IN PART STATE OF HAWAII BOARD OF LAND AND
NATURAL RESOURCES' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER, DATED
JANUARY 10, 2003; AMENDED JANUARY 24, 2003 REGARDING PETITION CONTESTING
APPLICATION FOR LONG TERM DISPOSITION OF WATER LICENSES AND ISSUANCE OF INTERIM
REVOCABLE PERMITS AT HONOMANU, KEANAE, NAHIKU, AND HUELO, MAUI

Civil No. 03-1-0289-02 (Agency Appeal); Na Moku O Ko'olau Hui, et al. v. State of Hawaii, et al.

Exhibit B

RECEIVED -
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535

REC'D MAR 23 P 1:40

In the Matter of the Contested) DLNR File No. 01-05-MA
Case Hearing Regarding Water)
Licenses at Honomanu, Keanae,) FINDINGS OF FACT, CONCLUSIONS
Nahiku and Huelo, Maui,) OF LAW, AND DECISION AND ORDER
)
)

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER

The subject of this contested case is a long term lease of water from the State for the areas of Honomanu, Keanae, Nahiku and Huelo in East Maui. The purpose of this hearing was to determine whether current diversions should be decreased to provide interim relief in the form of increased water in the streams for the protection of the constitutional or legally protected rights of the parties. This decision is not intended to be a foreshadowing of this Board's final decision in this case. Any relief granted hereunder is intended for interim relief only and is based solely on the evidence introduced in this hearing.

PROCEDURAL BACKGROUND

In a Prehearing Order Regarding Petitioners' Motions For Summary Relief (Filed Mar. 18, 2005) ("Summary Relief Order"), the Hearings Officer denied Petitioners' motions for summary relief to the extent they sought a declaratory ruling that the

decision of the Board of Land and Natural Resources ("Board") to put the interim disposition of water in the ditch system of Applicant East Maui Irrigation Company, Limited ("EMI") in "holdover" status pending the outcome of this contested case (the "Holdover Decision") was *per se* invalid. See Summary Relief Order at §§ A.2-3, C.7. The Summary Relief Order stated that "the BLNR, as trustee of the public trust, has authority to make an interim disposition of public trust resources pending a long-term disposition of such resources if doing so is in the interest of the public[,] and "the Holdover Decision was procedurally essential to the Board's proper discharge of its public trust responsibilities." Id. Given that the Holdover Decision was determined not *per se* illegal, the Hearings Officer ruled that an interim evidentiary hearing would be held upon the request of any party to determine if there was any factual or legal basis to support Petitioners' claims that interim releases of water were required in order for the Board to fulfill its public trust duties to protect "constitutionally or legally protected rights" pending the completion of an environmental assessment ("EA") and determination of amendments to interim instream flow standards ("IIFS"). See id. at §§ A.4, G. All parties now concede that an EA (and potentially an environmental impact statement ("EIS")) must be prepared, amended IIFS must be determined and that this process is likely to take years.

On March 14, 2005, Petitioner Na Moku Aupuni O Ko'olau Hui ("Na Moku") requested that the Hearings Officer set a conference to schedule an evidentiary hearing on its request for interim reductions in EMI's stream diversions. On March 15, 2005, Na Moku withdrew its March 14, 2005 request to schedule an evidentiary hearing on its request for interim relief. However, by letter of June 22, 2005, Na Moku renewed its request to schedule an evidentiary hearing on its request for interim relief. In accordance with Na Moku's letter of June 22, 2005, the Hearings Officer scheduled an evidentiary hearing concerning interim relief to determine the issue of "whether and to what extent current stream diversions should be reduced pending a final disposition of this proceeding in order to protect the constitutional or legally protected rights of the parties to interim relief." Minute Order No. 10 at 1.

In preparation for the evidentiary hearing, the Hearings Officer received submissions of written testimony and exhibits from Applicants Alexander and Baldwin, Inc. ("A&B") and EMI (collectively, "EMI"); Petitioners Na Moku, Beatrice Kekahuna ("Kekahuna"), and Maui Tomorrow ("MT") (collectively, "Petitioners"); and Intervenors Maui Pineapple Company, Limited ("MLP"), Maui County Department of Water Supply ("DWS" or "Maui County"), and Hawaii Farm Bureau Federation ("HFB"). The evidentiary hearing was held before the Hearings Officer on Maui

on October 10-12 and November 14-15, 2005 (the "Evidentiary Hearing"). The Evidentiary Hearing included a site visit on October 10, 2005, to the properties of Kekahuna, Shupp, and Caveny, and EMI diversions on Honopou Stream, Puolua Stream, and Hanehoi Stream; and a site visit on October 12, 2005, to locations relating to Na Moku's claims, including the Lākini lo'i, the lookout on Hana Highway overlooking Wailuanui valley, Dams 1, 2, and 3, on Waiokamilo Stream, and Wailuanui valley. At the Evidentiary Hearing, EMI appeared by counsel David Schulmeister, Esq. and Elijah Yip, Esq.; Na Moku and Kekahuna appeared by counsel Alan Murakami and Moses K. N. Haia, III, Esq.; MT appeared by counsel Isaac D. Hall, Esq.; Maui County appeared by counsel Jane E. Lovell, Esq.; MLP appeared by counsel David Merchant, Esq.; and HFB appeared by counsel Sat Freedman, Esq.

Based upon the evidence, exhibits, oral testimony, and written submissions presented by the parties, the arguments and representations of counsel, and the entire record of this proceeding, the Board hereby makes and enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. Procedural Matters

1. At an early pre-hearing conference the parties agreed the streams in issue in the Evidentiary Hearing concerning

interim relief are Honopou, Puolua, and Hanehoi Streams in the Huelo license area, and Wailuanui, Waiokamilo, and Palauhulu Streams in Ke'anae. Minute Order No. 10 at 1.

2. On August 3, 2005, Na Moku submitted to EMI requests for production of documents relating to statements in the written testimonies of Garret Hew, G. Stephen Holaday, and Lee Jakeway filed in the Board as part of the Evidentiary Hearing. Letter from Alan Murakami to David Schulmeister and Randall K. Ishikawa dated 8/3/05.

3. In a letter dated August 8, 2005, EMI responded to Na Moku's discovery request by stating that EMI was not necessarily opposed to an agreed scope of discovery provided that it was reasonable and reciprocal. EMI proposed a meeting to discuss discovery. EMI attached to its August 8 letter interrogatories and requests for production of documents to Na Moku requesting specific information regarding which of its members are lacking in water, the locations that are lacking in water, the stream that each such member claims an entitlement to water from, and the locations of the 'auwai that each such member expects to use to transport any released water, among other matters. Letter from David Schulmeister to Alan T. Murakami and Moses K.N. Haia, III dated 8/8/05.

4. Na Moku objected to answering the interrogatories and request for production of documents submitted to it by EMI.

5. Na Moku filed Petitioners' Motion For Discovery on August 31, 2005. The Motion sought an order from the Hearings Officer that EMI provide the discovery requested by Na Moku in its August 8, 2005, letter.

6. On September 15, 2005, a pre-hearing conference was held before the Hearings Officer regarding, *inter alia*, Na Moku's Motion for Discovery. An agreement between EMI and Na Moku as to the latter's discovery requests rendered the motion moot. As to EMI's discovery requests, however, Na Moku objected to them at the pre-hearing conference. The Hearings Officer ordered Na Moku to provide responses to, *inter alia*, EMI's interrogatories.

7. At the September 15, 2005 pre-hearing conference, the Hearings Officer set the order in which the parties would present evidence at the Evidentiary Hearing. EMI offered to be the first to present evidence. However, Petitioners requested that they be allowed to present evidence first. The Hearings Officer granted Petitioners' request.

8. Na Moku responded to EMI's interrogatories by objecting that the requested information is irrelevant and that it is not Na Moku's burden to prove those matters. Exhibit A-41.

9. The preparation of an EA for EMI's application for a long-term lease from the Board has not been completed. The record contains no evidence that it has begun.

10. Some 27 applications for the determination of IIFS for the streams at issue in the Evidentiary Hearing are currently pending before the Commission on Water Resource Management ("CWRM").

11. No Petitioner asserted a claim of insufficient water for taro growing purposes from Wailuanui and Palauhulu Streams.

12. Any finding of fact improperly designated as a conclusion of law should be deemed or construed as a conclusion of law.

B. The EMI Ditch System

13. EMI, a subsidiary of A&B, operates a system of diversions, intakes, ditches and tunnels that collect and transport water from the Huelo, Honomanu, Ke'anae, and Nahiku license areas in East Maui to sugarcane fields in Central Maui owned by Hawaiian Commercial and Sugar Company ("HC&S"), as well as to MLP for the irrigation of pineapple and Maui County for the domestic water needs of upcountry Maui and the irrigation needs of small farms in Kula. Declaration of Garret Hew dated July 29, 2005 ("Hew Decl.") at ¶¶ 1, 3; Exhibit A-1.

14. The Lowrie Ditch in the EMI system was completed in 1900. Exhibit MT-13 at 115.

15. The Koolau Ditch was completed in 1904. Exhibit MT-13 at 116.

16. The New Haiku Ditch was completed in 1914. Transcript of Evidentiary Hearing ("Tr.") 11/14/05 at 77:19-20.

17. The Kauhikoa Ditch was completed in 1915. Tr. 11/14/05 at 77:21.

18. The Wailoa Ditch was completed in 1923. Tr. 11/14/05 at 77:21-23.

19. Since completion of Wailoa Ditch in 1923, the EMI system has been operated in essentially the same way, and there have been no major changes to the system. Tr. 11/14/05 at 78:25-79:6.

20. The Huelo license area is 8,752.690 acres and is covered by Revocable Permit No. S-7264. Hew Decl. at ¶ 4; Exhibit A-2.

21. The Honomanu license area is 3,381 acres and is covered by Revocable Permit No. S-7263. Hew Decl. at ¶ 5; Exhibit A-3.

22. The Ke'anae license area is 10,768 acres and is covered by Revocable Permit No. S-7265. Hew Decl. at ¶ 6; Exhibit A-4.

23. The Nahiku license area is 10,111.220 acres and is covered by Revocable Permit No. S-7266. Hew Decl. at ¶ 7; Exhibit A-5.

24. In the aggregate, on an annual basis, the water collected and transported by EMI arising on the land covered by these four licenses averages 70 % of the total water collected and transported by EMI, although this percentage can vary considerably during the course of any given year. Hew Decl. at ¶ 8; Tr. 11/15/05 at 97:23-98:7.

25. The delivery capacity of the EMI system is 450 million gallons per day ("mgd") and its average delivery is 165 mgd. Hew Decl. at ¶ 10.

C. Water Needs of EMI and HC&S

26. HC&S is the larger of Hawaii's two remaining sugar plantations, growing 77% of the state's 2004 raw cane sugar crop, generating gross revenues in the State of Hawaii of \$112,000,000 and an operating profit of \$4,800,000. HC&S generally employs approximately 800 full-time workers on Maui, and EMI employs another 17 workers. Declaration of G. Stephen Holaday ("Holaday Decl.") at ¶¶ 3, 6.

27. HC&S' plantation consists of approximately 43,300 acres of land. HC&S cultivates sugar on approximately 37,000 acres. Of these 37,000 acres, approximately 30,000 acres are irrigated by EMI delivered water. Of these, approximately 5,000 acres are irrigated solely by EMI water and approximately 25,000 acres are irrigated with a combination of EMI water and groundwater pumped by HC&S when EMI ditch flows are inadequate

to meet the irrigation needs of the fields. Hew Decl. at ¶ 13; Holaday Decl. at ¶ 3; Declaration of Lee Jakeway ("Jakeway Decl.") at ¶ 3.

28. Most of the water delivered to HC&S by EMI is used for irrigation of the approximately 30,000 acres of sugar fields that can receive EMI water but some is used for factory purposes. The average aggregate amount of EMI water that is used for factory purposes ranges from 3 to 8 mgd. Jakeway Decl. at ¶¶ 4-5.

29. The irrigation needs of the approximately 30,000 acres of HC&S' sugar fields that receive EMI water is determined by the daily evapotranspiration rate, which is defined as the loss of water from the soil both by evaporation and by transpiration from the plants growing thereon, and varies during the year depending upon climatic conditions, solar insolation, temperatures, humidity, and wind speed. In order to maintain sugar yields, the sum of available rainfall plus irrigation water applied to the fields must approach this figure as much of the time as possible. Jakeway Decl. at ¶ 6.

30. The amount of irrigation water that is needed for the approximately 30,000 acres that receive EMI water varies with the weather but averages from a low of 134 mgd during the winter months to a high of 268 mgd during the peak usage months from May to October. For operating years 2002-2004, the average

breakdown was 71% surface water and 29% pump water. Jakeway Decl. at ¶ 9.

31. HC&S conserves water by using a "drip" irrigation system that distributes water to the roots through small holes in plastic tubes. All but a small area of the cultivated cane land farmed by HC&S is drip irrigated. Holaday Decl. at ¶ 4; Jakeway Decl. at ¶ 11.

32. Because HC&S does not have the capacity to irrigate all of its fields simultaneously, the irrigation water that is available is applied in "rounds" to different fields in accordance with priorities that are assigned to them by the farm managers. Jakeway Decl. at ¶ 12.

33. HC&S meets its power needs principally by burning bagasse from its sugar cane grinding operations and with hydro power generated from turbines that run on EMI delivered water. HC&S is also under contract with Maui Electric Company ("MECO") to supply, at specified rates, 12 megawatts (MW) of power from 7:00 a.m. to 9:00 p.m. daily except Sunday and 8 MW at all other times, subject to events of force majeure. The contract provides for monetary penalties in the event these requirements are not met. The 30 MW total capacity of HC&S' steam-powered system combined with HC&S' internal power consumption and obligations to supply power to MECO is a limiting condition on HC&S' ability to pump groundwater during dry periods when the

hydro units may not be operating. Holaday Decl. at ¶ 6; Jakeway Decl. at ¶ 15.

34. During periods of heavy rainfall, water overflows EMI's stream diversions and remains in the streams. In addition, EMI operates gates that control the maximum amount of flow that is diverted to prevent the system from exceeding its capacity or delivering water in excess of what the HC&S system of ditches and reservoirs needs and can handle. Substantially all of the water that is taken into its system and transported by EMI is delivered to Maui County, MPC or HC&S. All the water delivered to HC&S is used by HC&S for irrigation and factory operations. EMI and HC&S does not discharge water, once taken into the system, into the ocean. Hew Decl. at ¶ 14.

35. The HC&S irrigation system is designed to operate to the maximum extent possible on the gravity flow of water from higher to lower elevations. This minimizes pumping, which consumes electric power. To accomplish this, HC&S attempts to divert the maximum possible amount of water is taken into the HC&S system at the Wailoa ditch, which has a capacity of 195 mgd. Taking in the maximum amount of water at this point maximizes HC&S' flexibility to distribute water by gravity flow to the fields with the highest irrigation priority at any given time, as well as to maximize the use of HC&S' hydro power generation capacity. Hew Decl. at ¶ 15.

36. Surface water flows from East Maui can fluctuate from day to day and at times cannot be relied upon at times to meet what HC&S asserts are its irrigation requirements. Hew Decl. at ¶ 16.

37. If the water currently collected by EMI from State lands were to become wholly unavailable to EMI, it would not be economic for HC&S to continue to cultivate on Maui. In turn, it would be uneconomic to operate EMI in the manner in which it has historically been operated inasmuch as the economic value to A&B of operating EMI is derived from its contribution to the profitability of HC&S' sugar cultivation. It would also be uneconomic to renew HC&S' contracts with MECO because the prime economic justification for those contracts is the cost effective generation of power from renewable energy made possible by the bagasse and hydro power that are byproducts of HC&S' sugar operation. Holaday Decl. at ¶ 7. It is obvious, given the fact that most of the diverted water goes to the irrigation of sugar, that relatively small reductions in sugar acreage could make available considerable water for downstream users. The parties have offered no evidence of the effects of relatively small reductions in sugar cultivation.

D. Maui County's Water System and Water Needs

38. The County of Maui Department of Water Supply ("DWS") consists of five separate water systems. Written Testimony of

County of Maui Department of Water Supply ("DWS Written Testimony") at ¶¶ 1-2.

a. The largest surface water treatment facility ("WTF") on Maui is the Kamole Weir WTF in Haliimaile, which relies on flows from the Wailoa Ditch. Treated water from that facility goes to 6,440 water service connections and can supply water to almost the entire Upcountry region (9,523 water service connections) if necessary. Kamole Weir WTF supplements the water supplied to this area by the Haiku and Kuapakalua wells and is the primary source in the event of pump failure. The Kamole Weir WTF is also the primary source of water for nearly all of Upcountry Maui during times of drought. Kamole Weir WTF's average daily production is 2.5 mgd. The facility can process approximately 8 mgd at maximum capacity. DWS plans to add 2.3 mgd capacity to the Kamole WTF in 2015. DWS Written Testimony at ¶ 3.

b. Upcountry Maui, the second largest water system in Maui, relies on water from East Maui streams and ditches for its public water supply. The Upcountry system includes the communities of Kula, Pukalani, Makawao, and Haiku. The population served by this system consists of approximately 30,891 people. The Upcountry system serves Kamehameha Schools Maui campus, Hawaiian Homelands at Waiohuli/Keokea, as well as many businesses, churches, health care and government

facilities. Treated surface water is the primary source of water for Upcountry Maui. For places in Upcountry Maui that are primarily served by well water, the surface water system is the backup in the event the well should go out of service. DWS Written Testimony at ¶ 2.

c. The water source for the Piiholo WTF is the Waikamoi Forest, delivered through EMI's Piiholo intake system. This WTF, located in the Makawao Forest Reserve adjacent to and east of the 50 million gallon Piiholo Reservoir, serves the Lower Kula Service Area. Piiholo WTF's average daily production is 3.0 mgd. DWS Written Testimony at ¶ 4.

d. The Olinda/Upper Kula WTF also relies on water from the Waikamoi Forest, delivered through the Waikamoi Flume intake system. Water treated in this facility is stored in the 30 million gallon Waikamoi Reservoirs and the 100 million gallon Kahakapao Reservoirs. The area served by this treatment facility is Upper Kula, Ulupalakua, and Kanaio. These reservoirs will also supply the non-potable agricultural line that will provide untreated surface water to farmers in Upper Kula, which is currently under construction. The average daily production at the Olinda/Upper Kula WTF is presently 1.3 mgd. This treatment plant is slated to add 0.7 mgd capacity in 2006. DWS Written Testimony at ¶ 5.

39. EMI supplies an average of about 8.2 mgd to the DWS (including water supplied directly to the Kula Agricultural Park). Hew Decl. at ¶ 10.

40. Maui County's access points to the EMI system for water that it takes, treats and delivers as potable water to its customers in Makawao, Kula and Nahiku are at the Waikamoi upper flume (near the Olinda WTF), the Waikamoi lower flume (near the Piiholo WTF) and the western end of the Wailoa Ditch (near the Kamole WTF). In addition, non-potable water is taken by DWS from HC&S' Hamakua Ditch for delivery to the Kula Agricultural Park. Hew Decl. at ¶ 12; Tr. 11/15/05 at 103:12-23, 106:23-107:3.

41. EMI, Maui County, and HC&S entered into an agreement dated December 31, 1973 (the "1973 Agreement") whereby EMI agreed to collect and deliver water to Maui County. The term of the 1973 Agreement was 20 years. Exhibit F-1.

a. The 1973 Agreement provided that EMI would collect and deliver up to 6,000 gallons per day ("gpd") to serve the community of Nahiku and collect and deliver water to the Waikamoi area. Water collected by EMI within the Waikamoi area would be discharged into the Waikamoi, Olinda and Piiholo Reservoirs. DWS Written Testimony at ¶ 6; Exhibit F-1.

b. Under the 1973 Agreement, EMI agreed to make available to Maui County up to 12 million gallons of water it

collected from the Wailoa Ditch per 24-hour period. Maui County had the option of receiving an additional 4 million gallons of water from this source after giving one year's written notice to EMI. DWS Written Testimony at ¶ 7; Exhibit F-1.

42. The 1973 Agreement expired in 1993, but was extended on several occasions. The last extension expired on April 30, 2000. Since that time, EMI has been delivering water to the County pursuant to a document entitled "Memorandum of Understanding Concerning Settlement of Water and Related Issues" ("MOU") executed on April 13, 2000. Hew Decl. at ¶ 11; DWS Written Testimony at ¶ 9; Exhibits F-2 to F-9.

43. That MOU provides that Maui County may receive 12 mgd from the Wailoa Ditch, with an option of an additional 4 mgd, as in the 1973 agreement. However, it provides that during periods of low flow, Maui County will have a minimum allotment of 8.2 mgd. The MOU also provides that HC&S will have a minimum flow of 8.2 mgd, or 9.4 mgd if fire flow should be required. If these minimum amounts cannot be delivered, then Maui County and HC&S are to receive prorated shares. DWS Written Testimony at ¶ 9; Exhibit F-9.

44. Maui County depends heavily on water received through EMI's ditch system. Upcountry Maui has a high demand for water. If Upcountry Maui's main source of water supply were curtailed, the deficit could not be made up by other portions of DWS's

water system because the Upcountry system is separate and distinct from the water systems serving other regions of Maui. Cutting off Upcountry Maui's main public water supply completely would result in a public health crisis and economic catastrophe. Even relatively small cutbacks in the amount of water delivered to the County for use in Upcountry Maui would severely impact homes, businesses, schools, churches, farms, health care facilities, and others who rely on this water supply for their basic needs. DWS Written Testimony at ¶ 10.

45. The community of Nahiku is also dependent on EMI ditch water for its public water supply. EMI collects and delivers up to 20,000 gallons of water per 24-hour period to serve the Nahiku community. DWS Written Testimony at ¶ 11.

E. MLP's Water Needs

46. MLP is America's largest grower, processor and shipper of Hawaiian pineapple. MLP currently cultivates approximately 6,000 acres of pineapple on Maui, over 2,800 of which are in East Maui in proximity to the EMI system. MLP has entered into negotiations for long-term leases of approximately 400 additional acres of agricultural lands in the Haliimaile, East Maui area, which will be converted to use for pineapple cultivation. Hew Decl. at ¶ 12; Nohara Testimony at ¶¶ 4, 5.

47. Taking into consideration the water needs of pineapple, the number of MLP's pineapple fields that lie fallow

at any given time, MLP's conservation practices, and rainfall, MLP currently requires approximately 3.5 mgd of irrigation water from the EMI system for its East Maui fields. From 2004 through 2009, MLP estimates that it will require 4.5 mgd of water in East Maui. From 2009 to 2016, MLP estimates that it will require approximately 4.4 mgd of water in East Maui. Nohara Testimony at ¶¶ 8-13.

48. Under the License and Water Transmission Agreement effective January 1, 1990 and a series of modifications and extensions to that agreement (collectively, "MLP/EMI Agreement"), EMI transports and MLP withdraws two "classes" of water from the EMI system. Nohara Testimony at ¶ 16; Exhibits E-2 to E-6.

a. The first class is water pumped into the EMI system by MLP from water sources outside of the watersheds of Huelo/Ke'anae Stream ("MLP Base Water"). This water represents the majority of MLP's usage. Nohara Testimony at ¶¶ 17, 19-23; Exhibit E-7.

b. The second class is water that MLP is contractually permitted to withdraw, for a fee, when flow in the EMI system exceeds 100 mgd ("MLP High-Flow Water"). MLP High-Flow water is collected by EMI from the license areas in question in this contested case. Because of the fee structure for transporting such water, MLP's use of MLP High-Flow Water

has been limited exclusively to periods when the flow in the EMI system exceeds 200 mgd, which generally correlates to periods of wet weather when EMI's diversions likely are not as problematic to other users of the diverted streams. Nohara Testimony at ¶¶ 17, 24-26.

49. A reduction in the amount of water that EMI may divert from the Huelo/Ke'anae Streams would negatively impact MLP's pineapple business by: (a) lowering overall EMI system flow, which would reduce the instances when EMI system flows are above 200 mgd, thereby increasing the cost of transporting MLP Base Water; (b) threatening the economic viability of the EMI system, which, if abandoned by EMI, would cease the delivery of MLP Base Water and/or MLP High-Flow Water to MLP, and thus deprive MLP of the only feasible source of water for its East Maui pineapple fields. Nohara Testimony at ¶¶ 27-32.

F. HFB's Water Needs

50. HFB is a statewide organization of approximately 2,200 member families, in ten bureaus in every county of the state, including the island of Maui. Maui County Farm Bureau's members include the sugarcane and pineapple plantations along with farmers and ranchers on the island. Among HFB's purposes is to advocate for the adoption of State and County governmental policies that will give farmers manageable water rate price structures and assure them of reliable water sources and

adequate supply for their farms. Direct Testimony of Warren Watanabe ("Watanabe Testimony") at ¶¶ 2, 4.

51. The Farms are dependent on water from East Maui. Water is critical to the success of competitive and diverse agriculture. Watanabe Testimony at ¶¶ 7-9, 13; Tr. 11/14/05 139:19-25.

52. Presently, farmers in Upcountry Maui are billed for their water usage through Maui County. Watanabe Testimony at ¶ 15.

G. Water Requirements For Taro Cultivation

53. Taro has been successfully grown with the application of a gross amount of water ranging from 15,000-40,000 gad. Exhibit A-8 (Leslie J. Watson, The Legal Importance of the Water Requirements of Taro Colocasia Esculenta in Hawaii, Proceedings of the Second International Symposium on Tropical Root and Tuber Crops at 150 (1970)).

54. A&B/EMI presented evidence of controlled and published studies that suggest that water flow of 50,000 gad is adequate to supply a taro farmer with optimal yield for taro plus flexibility to manage the irrigation of his or her taro fields based on controlled and published studies done by Dr. de la Pena. Tr. 10/12/05 at 87:15-88:13.

55. The consumptive use of water is defined as the amount of water that is evaporated and transpired by the plant, and is

measured by calculating the difference between the inflow and outflow of water. Tr. 10/12/05 at 42:3-14, 45:10-13.

56. In his study, De la Pena did not, in fact, measure water outflow. Tr. 10/12/05, 36:2 to 36:24. De la Pena, in his study, assumed the consumptive water use of taro to be 5,000 to 10,000 gad to arrive at the further assumption of an outflow rate of 20,000 to 25,000 gallons and has no evidence to confirm this outflow rate. Tr. 10/12/05, 37:5 to 37:22.

57. Apart from the gross amount of water required to cultivate taro, water temperature is important because of pythium rot that can damage the taro. Pythium rot can be controlled, however, provided that an adequate amount of water is flowed through a lo'i to keep the soil temperature below 85°F because flowing water insulates the soil from heat, delivers oxygen to the taro plant, and prevents pythium rot from forming. de la Peña Decl. ¶ 6; Tr. 10/12/05 at 20:18-21:25, 22:10-23:8, 52:14-53:20, 66:7-68:7.

58. In the De la Pena and Melchor study, there is no discussion of water temperature and no collection of data of either the initial starting temperature of the incoming water and the temperature of the outflow. Tr. 10/12/05, 51:16 to 52:13.

59. The Board does not find the evidence presented by Dr. De la Pena to be dispositive on the issue of water necessary to grow healthy wetland taro.

60. Mr. Paul Reppun testified that in his expert opinion he believed 100,000 to 300,000 gad is the amount of water needed to grow wetland taro. Direct Testimony of Paul Reppun; Tr. 10/11/05, 131 to 180.

61. Extremely high flow requirements are from taro patches lower in the valley, where most of the water used by farmers would already have been used higher up in the valley. Direct Testimony of Paul Reppun; Tr. 10/11/05, 131 to 180.

62. No evidence was presented regarding significant use of the water for farming prior to its use by the Na Moku members in Wailuanui Valley or by Beatrice Kekahuna.

63. The Board finds that insufficient evidence was presented upon which it can determine the water requirements of the taro farmers and that it must on more informal evidence to determine the amount of water required by the taro farmers.

H. Water Needs of Beatrice Pualani Kepani Kekahuna
("Kekahuna")

64. Petitioner Kekahuna's lo'i are located on TMK No. (2) 2-9-01-14 and -16. Petitioners' Direct Testimony of Beatrice Pualani Kepani Kekahuna ("Kekahuna Direct Testimony") at 2;

Declaration of Garret Hew dated 8/22/05 ("Hew Rebuttal Decl.") at ¶ 5.

65. The 'auwai on Kekahuna's property takes water from Honopou Stream. Kekahuna Direct Testimony at 2.

66. At the time of the site visit, Kekahuna did not have any taro planted but efforts were under way to clear an area of approximately 1 acre to be planted. Hew Rebuttal Decl. at ¶ 9; Exhibit A-10; Exhibit B-9.

67. On March 9, 2004, EMI installed a 4" pipe in addition to two already existing 4" pipes bypassing Haiku Ditch on Honopou Stream above Kekahuna's 'auwai. Hew Rebuttal Decl. at ¶ 12; Exhibit A-30 (attached email of 2/26/04 at 4).

68. The three 4" pipes bypassing Haiku Ditch on Honopou Stream, including the additional 4" pipe installed on March 9, 2004, allow water to flow over the Haiku Ditch even during times of low flow. Tr. 11/14/05 at 84:5-23.

69. On March 11, 2004, the flow rate of water coming through the three 4" pipes at Haiku Ditch on Honopou Stream was measured at 361,224 gpd; the amount of water flowing through the additional 4" pipe was measured at approximately 112,000 gpd. Hew Rebuttal Decl. at ¶ 13; Exhibits A-11 and A-12.

70. Between March 15, 2004 and May 20, 2005, the flow rate at Kekahuna's 'auwai was measured at least on a weekly basis by EMI, and it invariably exceeded 235,000 gpd with the exception

of September 10, 2004, when the flow rate was measured at 219,000 gpd. The flow rate measurements exceeded 235,000 gpd even during times of low rainfall. The temperature of the water measured over the 14-month period never rose above 25° C (77° F), and has been as low as 18° C (64.4° F). Hew Rebuttal Decl. at ¶¶ 15, 18; Exhibit A-13.

71. The flow rate of 235,000 gpd at Kekahuna's 'auwai can supply Kekahuna's one acre of lo'i with 235,000 gad. The amount of available water thus exceeds the amount Kekahuna needs to irrigate all of the lo'i she presently has plans to cultivate based on the water requirement of 50,000 gad.

72. A gate is installed at the entrance to Kekahuna's 'auwai to enable control of the amount of flow entering the 'auwai. The gate normally is left partially closed. If 235,000 gpd or more were allowed to enter Kekahuna's 'auwai unrestricted by the gate, the 'auwai would not have the capacity to carry such flow, and water would overrun the banks of the 'auwai and flood portions of Kekahuna's property. Hew Rebuttal Decl. at ¶ 16; Vaught Rebuttal Decl. at ¶ 3.

I. Water Needs of Na Moku's Members

73. Na Moku is a Hawaii non-profit corporation. Exhibit B-1.

74. Na Moku's membership includes individual taro farmers in Wailuanui valley who seek interim relief from the Board in the instant proceeding.

75. Native Hawaiian Legal Corporation ("NHLC") represents Na Moku.

76. Na Moku claims to be authorized to request interim relief on behalf of its members and proffered documents purportedly executed by a number of its members for *in camera* review. After the Hearings Officer determined that copies would have to be made available for review and cross examination by the other parties prior to being received in evidence, Na Moku declined to offer them into evidence. They were accordingly not received into evidence in this proceeding, but were marked and filed under seal. The documents are identical Special Limited Powers of Attorney executed by various landowners in Wailuanui, East Maui. They give the Native Hawaiian Legal Corporation power to act on behalf of the signatories in this proceeding but contain no other relevant information.

77. The only person actually cultivating taro in Wailuanui valley who testified was Na Moku's president, Edward Wendt ("Wendt"). Wendt does not own any land in Wailuanui valley, but testified that he has permission to cultivate taro in a portion of the Lakini taro patches which are located above the Hana Highway, and on the lots identified by Wendt on Exhibit A-45-1

that are highlighted in yellow (TMK Nos. (2) 1-1-4:24, 31, 44). Tr. 10/12/05 at 176:20-177:25. Wendt did not claim that the Lakini taro patches need more water, but testified that there was insufficient water in Waiokamilo Stream to reopen and plant more areas below the highway that historically were cultivated by Na Moku members and their ancestors.

78. A system of irrigation diversion structures and ditches located in and around Waiokamilo, Kualani and Wailuanui Streams supplies irrigation water to the Ke'anae-Wailuanui area. The system is located completely below EMI's ditch system and is not controlled by EMI. Hew Rebuttal Decl. at ¶ 27; Exhibit A-25.

79. Much of the water used to irrigate taro in the Ke'anae-Wailuanui area originates in Akeke Spring located below EMI's lowest diversion on Waiokamilo Stream and above Dam 3, the uppermost diversion structure in the taro irrigation system. Dam 3 directs the flow of Waiokamilo Stream to the east around a porous pool that would otherwise receive the bulk of the stream flow and would reduce downstream flow. Below Dam 3 is Dam 2, which diverts a portion of the stream flow via an 'auwai to Kualani Stream, from where it ultimately flows to Dam 1, into the 'auwai supplying the Lakini and Wailuanui taro lo'i. Hew Rebuttal Decl. at ¶¶ 28, 29; Tr. 11/14/05 at 99:2-100:19; Exhibits A-25 and A-29.

80. The vast majority of the lo'i in Wailuanui valley take water from Waiokamilo Stream either directly or indirectly, after it has been diverted by Dam 2 to Kualani Stream. Tr. 10/12/05 at 192:1-4; 139:8-140:19.

81. EMI does not divert Kualani Stream. Tr. 11/14/05 at 101:9-12.

82. The Wailuanui lo'i that, according to Wendt, Na Moku desires to open are serviced by water diverted from Kualani Stream that flows through the Lakini patches and then under the Hana Highway into a concrete diversion box that diverts the water into an 'auwai that carries the water to the central portion of Wailuanui valley. These lo'i are not served by the uppermost 'auwai, which also branches out from the concrete diversion box below the highway, but is currently overgrown with vegetation and closed. Tr. 10/12/05 at 186:18-24, 187:14-188:9; Tr. 11/15/05 at 69:7-70:2.

83. On July 26, 2005, EMI measured the flow rate of Waiokamilo Stream at between 3,570,000 and 3,850,000 gpd at the gauging station immediately mauka of Dam 2. The flow rates of Waiokamilo Stream recorded on July 26, 2005 are comparable to the flow rates recorded by EMI in 1986. A conservative estimate of the water available year round in Waiokamilo Stream above Dam 2, including during times of low rainfall, is 3,000,000 gpd. Hew Rebuttal Decl. at ¶ 39; Exhibit A-37.

84. According to evidence proffered by EMI, there are approximately 17 acres of lo'i in Wailuanui valley, including the Lakini taro patches above the Hana Highway, currently in taro cultivation that utilize water from Waiokamilo Stream. Tr. 11/15/05 at 59:19-60:21, 61:17-62:15, 64:8-19; Exhibits A-52, A-53, A-54. Na Moku did not challenge this evidence or offer any evidence of its own on this issue. Accordingly, EMI's proffered evidence of the area currently in cultivation is accepted for purposes of this hearing.

85. Even after the Koolau Ditch was completed in 1904 and well into the 1930's, there was much more taro cultivation in the Wailuanui-Ke'anae area than there is today. Petitioners' Direct Expert Testimony of Davianna Pomaikai McGregor, Ph.D. ("McGregor Direct Testimony") at 9; Tr. 10/11/05 at 112:23-113:8, 118:20-119:9; Exhibit B-123 at Figure 16.

86. Approximately 30 to 50 acres of lo'i were also cultivated in the 'ili of Kupa'u up until the 1950's. The 'ili of Kupa'u is above Lakini and below Akeke Springs and shares the same stream source as Wailuanui valley, which is Waiokamilo Stream. Exhibit B-123 at 64.

87. Accordingly, Waiokamilo Stream apparently provided sufficient water to sustain 50-100 acres of taro in Wailuanui-Ke'anae for many years after EMI began diverting Waiokamilo

Stream in 1904. McGregor Direct Testimony at 9; Tr. 10/11/05 at 112:23-113:8, 118:20-119:9; Exhibit B-123 at 64 and Figure 16.

88. Beginning in the 1880's and continuing through the 1920's, many taro patches in Wailuanui below the Hana Highway were converted into rice paddies. By 1895, there was a sizable area in Wailuanui devoted to rice cultivation. The conversion of taro lands into rice preceded the completion of the Koolau Ditch, which diverts Waiokamilo Stream, in 1904, and thus does not appear to have been caused by the diversion of water into the Koolau Ditch. Tr. 10/11/05 at 77:20-78:10, 99:5-100:4, 102:21-104:3; Exhibit B-123 at 112 and Figure 9.

89. The conversion of taro lands into rice is also attributable to socioeconomic factors such as the extraction of young men from the Ke'anae-Wailuanui area due to World War II; the decline in available labor; the progressive effect of taking taro fields that are configured in an interlinking fashion out of service; and a decline in the market for taro. Tr. 10/11/05 at 105:18-106:7, 121:15-122:20; Exhibit B-123 at 112-13.

90. Contrary to the position advanced by Na Moku, the historical evidence indicates that the decline in taro production in Wailuanui valley over the last century is not attributable to any shortage of water caused by the diversion of water by EMI. Tr. 10/11/05 at 124:2-4.

91. Through the testimony of NHLC paralegal Teri Gomes ("Gomes"), Na Moku sought to establish that there are a number of property owners in Wailuanui valley that have appurtenant rights to water based upon taro cultivation at the time of the Mahele. However, none of these owners came forward to testify.

92. Based on title research and inferences that she drew, Gomes estimated that approximately 51 acres of Wailuanui valley were in taro cultivation at the time of the Mahele. Gomes Direct Testimony at 5. No credible evidence was offered, however, to the effect that there is a present desire on the part of the owners of these parcels or their tenants or licensees to resume taro cultivation on all 51 of these acres.

93. Gomes did not identify which of these 51 acres historically took water from Waiokamilo Stream, rather than Wailuanui Stream.

94. Even if it were to be assumed that all 51 acres identified by Gomes had appurtenant rights to water from Waiokamilo Stream, at the 50,000 gad water requirement for taro, this would require 2,550,000 gpd to be available in Waiokamilo Stream.

95. The minimum flow rate in Waiokamilo Stream, notwithstanding EMI's diversions of surface water into the Koolau Ditch, is 3,000,000 gpd.

96. There should be sufficient water available in Waiokamilo Stream below EMI's diversions to support the 17 acres of lo'i in Wailuanui currently in cultivation that depend on water from Waiokamilo Stream.

97. The observed result is that the flow through of water from Waiokamilo Stream through Lakini is not sufficient to regularly and dependably irrigate all the fields that Na Moku members and their ancestors were able to irrigate below the Hana Highway prior to the A&B/EMI diversions which dried up the Hamau/Kulani water sources. Tr. 11/15/05, 194:2 to 195:9. This diminished water supply can only provide a portion of the lo'i with irrigation water from the two points of overflow below Lakini that currently flow under the Hana Highway, forcing farmers to sacrifice some lo'i so others can obtain sufficient irrigation water flow to grow their taro. Id. at 192:17-20.

J. Water Needs of Ernest Shupp ("Shupp")

98. Petitioner Shupp is a tenant on property owned by George Keala, Mary Keala, and Elizabeth Lapenia, designated as TMK No. (2) 2-9-08:14 (the "Shupp Property"). The parcel is approximately one acre in size. Shupp has from time to time cultivated taro on the Shupp Property pursuant to a caretaker agreement with the landowners. Intervenor's Direct Written Testimony of Ernest Shupp ("Shupp Direct Testimony") at 1-2; Exhibit MT-20.

99. Shupp alleges that he has grown, or intends to grow, taro on the Shupp Property. Shupp Direct Testimony at 2-4.

100. On the date of the Site Visit to the Shupp Property, no taro was planted and the diversion structure at the entrance to his 'auwai was in disrepair.

101. Shupp has not actively cultivated taro since 2003. Tr. 10/10/05 at 56:18-20.

102. The 'auwai on the Shupp Property takes water from Puolua Stream. Shupp Direct Testimony at 3.

103. The entrance to the 'auwai on the Shupp Property from Puolua Stream is approximately 60 feet from two pipes that pass water over Haiku Ditch at Puolua Stream. Tr. 10/10/05 at 43:18-43:1.

104. Further upstream, at the Lowrie Ditch diversion of Puolua Stream, there are two approximately 4.5" pipes connected by a "Y" junction to an 8" pipe that pass water over the diversion and into the stream. Tr. 10/10/05 at 15:1-6; Tr. 11/15/05 at 122:12-21; Exhibit A-30 (attached email of 2/26/04 at 2).

105. On March 26, 2004, EMI replaced the 8" pipe at the "Y" junction at the Lowrie Ditch diversion of Puolua Stream to allow water to pass over the Lowrie Ditch and into the stream. The repair allows approximately 100,000 gpd to flow past the diversions so as to be available to flow into Shupp's 'auwai.

Declaration of Garret Hew dated 12/9/04 at ¶ 3 (submitted in support of Alexander & Baldwin, Inc.'s and East Maui Irrigation Company, Ltd.'s Memorandum in Opposition to Maui Tomorrow's Motions For Summary Relief Filed on November 17, 2004, AND Na Moku Aupuni O Ko'olau Hui, Beatrice Kekahuna and Marjorie Wallett's Various Motions For Declaratory Order Filed on November 17, 2004) ("Hew Decl. of 12/9/04"); Tr. 11/15/05 at 122:12-21; Exhibit A-30 (attached email of 2/26/04 at 2).

106. Regular clearing of debris from the pipe passing water over the Lowrie Ditch at Puolua Stream is important to maintaining regular flow in the stream. If the pipe is not periodically cleaned out, it can become blocked with debris and prevent water from crossing over the Lowrie Ditch and into Puolua Stream. Tr. 11/14/05 at 86:24-14, 87:15-18.

107. The flow rate of Puolua Stream just below the Haiku Ditch was measured at 262,000 gpd during a site visit to Shupp's property conducted on March 11, 2004. Hew Rebuttal Decl. at ¶ 51; Exhibit A-12.

108. The flow rate of 262,000 gpd at Puolua Stream can supply Shupp with 262,000 gad for Shupp's lo'i. The amount of available water thus exceeds the amount Shupp needs to irrigate all of his lo'i based on the water requirement of 50,000 gad.

109. Inasmuch as Shupp has neither reconstructed the diversion structure at the entrance to his 'auwai nor attempted

to cultivate taro in his lo'i following EMI's March 26, 2004 repair of the pipe that passes water over the Lowrie Ditch at Puolua Stream, his testimony that there is presently insufficient water in Puolua Stream to irrigate his lo'i is not credible.

K. Water Needs of Neola Caveny ("Caveny")

110. Petitioner Caveny is the owner of Lot 1 of TMK No. (2) 2-9-11:14 (the "Caveny Property"). Intervenor's Direct Written Testimony of Neola Caveny ("Caveny Written Testimony") at 1; Exhibit MT-14.

111. Caveny acquired the Caveny Property in April or May of 2001 after having previously become familiar with the area, and having observed that Hanehoi Stream where it abuts the property was generally dry except when it rains. Tr. 10/11/05 at 22-25.

112. Caveny testified that she installed a water catchment system after she acquired the property. Caveny Written Testimony at 4-5. She submitted no evidence that she has ever used water from Hanehoi stream.

113. Caveny operates a commercial farm raising flowers on her property. Caveny Written Testimony at 5; Tr. 10/11/05 at 10:12-14; Exhibit MT-18.

114. Caveny requests that a minimum flow of 750,000 gpd be restored to Hanehoi Stream near her property. Tr. 10/11/05 at 18:11-23.

115. Caveny admits that she does not need 750,000 gpd for farming purposes. The objective of her request is to restore what she contends to be the natural flow of Hanehoi Stream. Tr. 10/11/05 at 50:3-13.

II. DISCUSSION

The Circuit Court has stated that a determination of how much water is in "excess" of what is needed for instream and legally protected offstream uses before the State can lease the excess water. Under the court's determination, the Board may not enter into a long term lease, and indeed this proceeding may not go forward on the merits, until the interim instream flow standard ("IIFS") have been amended for streams in East Maui, an environmental assessment (and potentially an environmental impact statement) has been prepared, there has been full compliance with HRS Section 171-58, and the public and private interests have been determined. Only then would it be appropriate for the Board to balance all interests pursuant to its public trust obligations and make a decision regarding any long term lease of water.

The Na Moku's parties' frustration with the CWRM's failure to act on its 27 petitions to amend IIFS may be understandable. The Circuit Court's October 10, 2003 Order in this proceeding, although acknowledging that the Board is not required to conduct a parallel investigation to that of the

CWRM, holds that if there is no CWRM determination then the Board must proceed on its own or, if it lacks the requisite expertise, wait on CWRM or make its own application to the CWRM. There is no certainty, however, that an application by the Board will necessarily result in the required determination of IIFS.

The parties apparently recognize that obtaining the information necessary for the Board to make any decision on the long term disposition of the water requires the participation of various agencies and experts, the collection and analysis of data, and considerable time. It is in this context, that the Hearing Officer issued Minute Order No. 10 in order to give the parties an interim opportunity to address the issue of whether "current stream diversions should be reduced pending a final disposition of this proceeding." In short, the parties were afforded an opportunity to address what, if any, specific flow changes should be made in order to afford the parties interim relief, if necessary, pending a final determination of the public interest and the various parties' rights.

Na Moku and MT complain that the requirement (for purposes of this interim hearing only), that they identify their interest and with some reasonable specificity the amount of water claimed "stands the burden of proof on its head." They argue that their rights are superior, that they have no burden to prove anything and that the remaining parties have no legally

protected interest. The Board disagrees. This argument's only logical conclusion would be the complete elimination of the diversions in question. That would unquestionably violate the public trust. Apparently recognizing this, the Na Moku and MT parties have not asked that the natural flow of the streams be returned. Rather, they ask for "releases sufficient to meet the taro cultivation and gathering requirements of these parties" (Na Moku Proposed Findings of Fact and Conclusions of Law at p. 24).

MT is somewhat more definitive. Its counsel, for example, asks for the immediate release of five million gad presently diverted from Wailuanui and Waiokamilo Streams, that sufficient releases be made with regard to Honopou Stream to "meet the irrigation water needs of the Honopou taro lo'i of Mrs. Kekahuna and her family without requiring Mrs. Kekahuna and her family to divert more than half of Honopou Stream flow at that point." A similar request is made on behalf of Ms. Caveny notwithstanding her testimony that she desires the return of the natural flow of the stream. In the latter case the amount is somehow quantified by Ms. Caveny's counsel at 750,000 gallons per day. (MT's Proposed Findings of Fact, Conclusions of Law and Order at pp. 45-47) These requests for increased stream flows for the most part were not supported by evidence introduced during the hearing.

Factually, the credible evidence establishes that current streams flows should be sufficient to meet the existing needs of Kekahuna and MT parties for the irrigation and successful farming of wetland taro. The Board wishes to emphasize that the findings made herein that Kekahuna and MT parties presently generally enjoy sufficient stream flow to meet their current needs with respect to taro cultivation are valid only to the extent EMI's flow measurements are accurate. Such findings were necessary because no other evidence quantifying stream flows was offered. The evidence presented by Na Moku suggests that Na Moku's members do not have sufficient flows for successful farming of wetland taro.

In making this decision, the Board is not making a determination regarding the amount of water necessary to successfully cultivate taro. That the amount of water currently in the streams is generally sufficient for the cultivation of taro for Kekahuna and MT parties or that the amount of water in the streams is insufficient for Na Moku's members may or may not be the case when the merits of this matter are finally reached. For this reason, the Board accepts and recommends Na Moku's suggestion that a monitor be appointed by the Board to oversee and verify all future flow measurements. In addition, based on the allegations that there is insufficient water flowing from Waiokamilo Stream through Lakini into Wailuanui, the current

diversion will be decreased in order to provide more water to the lo'i in lower Wailuanui valley, subject to adjustment based on further monitoring.

The Board also wishes to emphasize that regardless of whether current flows meet wetland taro requirements, they should also be sufficient to protect the gathering rights of Native Hawaiians. This latter issue could not be determined on this record because of a lack of quantitative evidence.

III. CONCLUSIONS OF LAW

A. The Parties' Burdens

1. For purposes of this interim proceeding, each party who claims an interest in the water resources at issue bears the burden of coming forward to make a prima facie showing identifying the claimed interest and, with reasonable specificity, the quantity of water required to satisfy that interest. Any party who wishes to rebut the showing of any other party will then have the opportunity to do so. The Board then has the duty, based on its factual findings and consideration of the public interest, to ensure that any disposition of the State water resources at issue herein duly protects any water needs and interests that fall within a purpose of the public trust. Minute Order No. 10 at 1. The ultimate burden of persuasion, however, rests on the State and

A&B/EMI to show that the continued diversion will not harm previously established rights.

B. Public Trust Duties and Purposes

2. As a trustee of the public trust in water, the State must balance public and private water uses on a case-by-case basis. In re Water Use Permit Applications, 94 Hawaii 97, 142, 9 P.3d 409, 454 (2000) ("Waiāhole").

3. The State has a public trust duty to "duly consider the significant public interest in continuing reasonable and beneficial existing offstream uses." Waiāhole, at 150, 9 P.3d at 462.

4. Water served to the public for domestic uses is not only consistent with, but is the highest and best use of public resources. Waiāhole, 94 Haw. at 137, 9 P.3d at 449.

5. The use of water for private commercial gain is not a purpose of the public trust in water. Waiāhole, 94 Haw. at 138, 9 P.3d at 450.

6. Public trust principles require that adequate provision be made for the protection of traditional and customary Hawaiian rights, the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation,

public water supply, agriculture, and navigation. Waiāhole, 94 Haw. at 145, 9 P.3d at 457.

7. The precautionary principle provides that the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the State's duty to protect such purposes wherever feasible. Waiāhole, 94 Haw. at 155, 9 P.3d at 467.

C. Immediate Cessation of Diversions

8. The immediate cessation of EMI's diversions would be contrary to the public interest inasmuch as:

a. It would greatly diminish or cut off Maui County DWS's water service to the Upcountry Maui and Nahiku communities, thereby resulting in public health and economic crises.

b. It would render MLP's East Maui pineapple business economically unviable because MLP would lose its only feasible source of water for its East Maui pineapple fields.

c. It would render HC&S and EMI economically unviable because HC&S depends on water delivered by EMI's ditch system, and EMI's economic value is derived from its contribution to the profitability of HC&S' sugar cultivation. Rendering HC&S and EMI economically unviable would result in the loss of over 800 jobs in Maui and the termination of the larger of the two remaining sugar companies in the State of Hawaii.

d. It would reduce Maui Electric Company's ("MECO") ability to provide electricity service to its customers, as HC&S is contractually obligated to supply to MECO on a daily basis a portion of the electricity it generates by burning bagasse and with hydro power generated from the turbines that run on EMI delivered water.

D. Kekahuna

9. Since the evidence presented at the Evidentiary Hearing establishes that Kekahuna has adequate water available to her in Honopou Stream for her taro growing needs, the public trust does not require an interim release of more water into Honopou Stream to satisfy Kekahuna's current taro growing needs.

10. Kekahuna would like to open more taro lo'i in the future and may require additional water for these additional fields.

E. Na Moku

11. In accordance with the burden of each party to come forward to make a prima facie showing identifying the party's claimed interest and, with reasonable specificity, the quantity of water required to satisfy that interest, Na Moku was required, at minimum, to identify who among its membership is requesting an interim release of water and the amount of land in Wailuanui currently or imminently used for taro cultivation by such members. Minute Order No. 10 at 1.

12. Na Moku has consistently maintained that neither it nor its members have the burden of proving anything in this contested case. Even if this were assumed, *arguendo*, to be correct, this did not justify Na Moku's refusal to divulge, in response to discovery requested by EMI, facts concerning its request for interim relief within its knowledge and control or the knowledge and control of its members.

13. What evidence was presented at the Evidentiary Hearing suggests that taro farmers in the lower Wailuanui valley have inadequate water in the lower valley that is available to them for their present taro growing needs. The precautionary principle requires an interim release of water into Waiokamilo Stream, subject to adjustment based on further monitoring.

F. Shupp

14. Since the evidence presented at the Evidentiary Hearing establishes that Shupp has adequate water available to him in Puolua Stream for his taro growing needs, the public trust does not require an interim release of more water into Puolua Stream to satisfy Shupp's taro growing needs.

G. Caveny

15. Under Hawaii law, a riparian owner is not assured the natural flow of the stream abutting his or her property without substantial diminution and in its natural shape and size. Instead, under the "reasonable use" theory of riparian rights

adopted by the Hawaii Supreme Court, a riparian owner may maintain an action for a diversion which diminishes the quantity or flow of a natural watercourse by demonstrating actual harm to his or her reasonable use of those waters. Reppun v. Board of Water Supply, 65 Haw. 531, 553, 656 P.2d 57, 72.

16. Caveny did not establish a "reasonable use" of water from Hanehoi Stream with any degree of specificity.

17. To the extent Caveny seeks the restoration of natural streamflow in Hanehoi Stream, she has not established any basis for interim releases in advance of the completion of the pending EA and IIFS determinations.

H. Miscellaneous

18. Petitioners had the opportunity to but did not request an interim release of water into Wailuanui and Palauhulu Streams. Therefore, no basis has been established for concluding that it would be a breach of the Board's public trust duties not to order an interim release of more water into those streams.

19. Any conclusion of law improperly designated as a finding of fact should be deemed or construed as a finding of fact.

IV. ORDER

The Board will take the following actions to move this matter toward a conclusion. These recommendations are:

1. That the Board determine the status of pending petitions at the CWRM and if necessary file an appropriate petition with the CWRM for determination of the petitions for amendment of the IIFS for the diverted streams which are the subject of this action.

2. That if necessary the Board direct the Department of Land and Natural Resources to itself take all administrative steps necessary to assist the CWRM in the amendment of the IIFS, prepare an EA in accordance with HRS Chapter 343, and discharge its public trust and HRS Chapter 171 responsibilities.

3. That A&B/EMI be immediately ordered to:

a. Establish monthly inspections of all its diversions for the purpose of ensuring that by-pass facilities are clear of debris and otherwise are in good working order.

b. Establish a program to promptly effect any repairs to such by-pass facilities which may appear necessary.

c. In recognition of the precautionary principle and the need to take proactive measures to protect public trust purposes, A&B/EMI shall decrease current diversions on Waiokamilo Stream such that the water flow can be measured below Dam #3 at the rate of 6,000,000 gpd based on a monthly moving average on an annual basis. The DLNR monitor will make appropriate investigations to determine that this amount will meet the needs of the Na Moku members while not exceeding

current or foreseeable requirements of the Na Moku members. A&B/EMI may request through the DLNR monitor to adjust this amount if it can show that it cannot meet the required amount of flow below Dam #3 without A&B/EMI having to increase diversions from alternate sources.

d. In the event Kekahuna increases the amount of acreage that she has in cultivation as taro lo'i, A&B/EMI may be required to decrease diversions to allow Kekahuna sufficient water to irrigate her additional taro lo'i. The amount of water to be left in the stream for use by Kekahuna will be set either by the parties with or without the assistance of the DLNR monitor or by the Board if no agreement can be reached.

4. All parties shall be responsible for keeping in good condition and repair its own system used to transport water from its stream diversion to its end use. Measurements to determine the sufficiency of water shall be made at the point of stream diversion and not at the point of end use.

5. That the Board direct the Department to immediately establish a program to monitor stream flows upstream and downstream of each diversion.

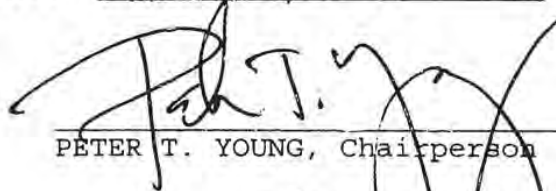
6. That the Board direct the Department to appoint an appropriate monitor, presumably but not necessarily an official of the Department, to ensure compliance with its order and to investigate and resolve if possible all complaints regarding


stream flows by any of the parties to this proceeding. In this regard it is recommended that the monitor appointed pursuant to this sub paragraph be available in the field upon written notice to all affected parties. The monitor will make recommendations to the Board for action by the Board for disputes which cannot be resolved by the monitor.

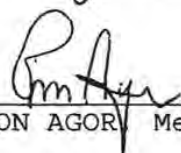
7. The monitor will also be responsible for verifying if the Board's understanding of the facts in this case, as set forth above, are correct.

8. That the monitor appointed pursuant to subparagraph (d) above periodically record the temperature of the streams in question and make recommendations for further decreases of diversions should it appear such action is necessary to control pythium rot.

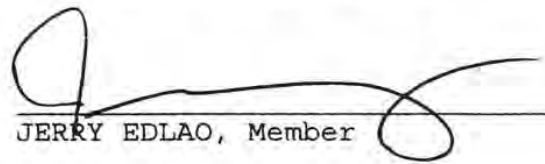
DATED: Honolulu, Hawaii, March 23, 2007.


PETER T. YOUNG, Chairperson


TIMOTHY JOHNS, Member


RON AGOR, Member


TARYN R. SCHUMAN, Member


JERRY EDLAO, Member

SAM M. GON, III, Member


ROBERT PECHECO, Member

In the Matter of the Contested Case Hearing Regarding Water
Licenses at Honomanu, Keanae, Nahiku and Huelo, Maui, DLNR File
No. 01-05-MA, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND ORDER

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested	)	DLNR File No. MA-01-05
Case Regarding Water Licenses)	
At Honomanu, Keanae, Nahiku)	
And Huelo, Maui)	
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER were duly served on the following parties, via first class U.S. mail, postage prepaid on this 23rd day of March 2007:

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Wailuku, HI 96793

Robert H. Thomas, Esq.
Damon Key Leong Kupchak Hastert
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Pauahi Tower, Suite 1600
Honolulu, HI 96813

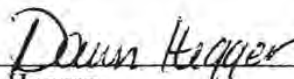
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Kahului, HI 96732

DATED: Honolulu, Hawaii, March 23, 2007



Dawn Hegger
Department of Land & Natural Resources
State of Hawaii

Exhibit C

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND OF NATURAL RESOURCES**

DATE: FRIDAY, DECEMBER 09, 2016
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chair Suzanne Case called the meeting of the Board of Land and Natural Resources to order at 9:12 a.m. The following were in attendance:

MEMBERS

Suzanne Case
Thomas Oi
Stanley Roehrig
Sam "Olu" Gon

James Gomes
Chris Yuen
Keone Downing

STAFF

Russell Tsuji-LAND
Barry Cheung-LAND
Curt Cottrell-PARKS

David Smith/DOFAW
Ed Underwood/DOBOR
Maria Carnevale/PMNM

OTHERS

Linda Chow /Deputy AG
Summer Sylva/D-11
David Schulmeister/D-11
Micah Mnikat-DOA/D-11
Dale Sandelin/D-11
Heidi Watanabe/D-11
Justin Texeira/D-11
Bryan Miyamoto/D-11
Adriane Raff/ D-11
Zack Williams/D-11
Mikiala Pua'a-Freitas/D-11
Tiare Lawrence/D-11
Tyler Greenhill/D-11
Daniel Anthony/D-11
Laura Grey/D-11
Trent Furtado/D-11
Dylan Lee Davis/D-11
Hoolea Kaleo/D-11

Camille Kalama/D-11
Rick Volner Jr./D-11
Garrett Hew/D-11
Alex Franco/D-11
Kayla Broe/D-11
Brendan Balthazar/D-11
Tom Blachford Rodriguez/D-11
Wayne Tanaka/D-11
Mary Ann Kahukoa/D-11
Lilian Kong/D-11
Albert Perez/D-11
Kupa'a Luahuleo/D-11
Jeff Kim/D-11
Margret Matsuda/D-11
Kayla Broe/D-11
Cameron Sato/D-11
Keolanui Kalama/D-11
Keali'i/D-11

as amended
APPROVED BY THE BOARD
AT ITS MEETING HELD ON
MAR 10 2017

Senator Gill Riviere/D-11
Noe Lopes/D-11
Ed Wendt/D-11
Dave Arakawa/D-11
Alan Okamoto/D-6
Gill Riviere/C-1
Pete Manaut/C-1
Ross Smith/DOT-AIR
David Hafner/M-1
Athleen Clark/F-2

Asami Kobayashi/D-11
David Frankel/D-11
Pomaikai Kala/D-11
Aaron Armstrong/D-11
Stephanie Pascual/D-21
Mike Cutbirth/C-1
Kent Fonoimoana/C-2
Greg Kugle/J-4
John Mesina/M-2

Chair Case announced that items G1 and J2 were withdrawn and told everyone that items D3 and D4 would be heard after lunch.

**ITEM G-1 Request for adoption of amendments to Hawaii Administrative Rules
Chapter 13-16. (Rules Relating To Conveyances)**

Withdrawn

ITEM J-2 Request Approval to Initiate Rule-Making Proceeding, Including Public Hearing, to Amend Title 13, Hawai'i Administrative Rules (HAR) Sections 13-230-4 Penalties and prosecution, 13-230-8 Definitions, 13-230-25 Particular categories, 13-231-3 Use permits; issuance, 13-231-6 Revocation of use permit, 13-231-13 Joint and several liability; non-transferability of use permits, 13-231-15 Boat owner required to report change of ownership, address, and other changes, 13-231-26 Use of a vessel as a place of principal habitation, 13-231-28 Staying aboard vessels moored at Ala Wai or Keehi small boat harbor, 13-231-29 Vessel used as a vacation site, 13-231-45 Marine inspections, 13-231-56 Definitions, gross receipts, 13-231-70 Water taxi operations, 13-232-8 Marine toilets - restrictions, 13-232-10 Backflow prevention device required on connections to water line - use of water operated de-watering device prohibited, 13-232-30 Fire signal for vessels in small boat harbors, 13-232-57 Dogs, cats or other domestic pets, 13-232-58 Sleeping or camping prohibited, 13-232-60 Serving, sale, and consumption of liquor in state boat harbors and boat launching facilities, 13-233-13 Operation, parking, or storage of bicycles or play vehicles, 13-233-29 Eligibility for parking permits; fee per vehicle, 13-235-5 Owners required to report change in ownership, address and other changes, 13-235-9 Restrictions on anchoring or mooring outside of a designated offshore mooring area, 13-242-1 Duty to render aid and give information, 13-242-3 Immediate notice of accident; when required, 13-242-4 Written boating accident report; when required, 13-243-4 Mufflers, 13-244-15.5 Operation of power driven vessels, 13-244-19 Authorization required to hold regatta, marine parade, boat race or exhibition, 13-244-29 Makapu'u ocean waters, 13-244-37 Zone A, Zone B, Ingress/Egress Zones, and Ingress/Egress Corridors, 13-245-9 Diver's flag, 13-251-57 Waikiki ocean waters, 13-253-1.3

Gross receipts, 13-255-1 Purpose and scope, 13-255-6 Waikīkī beach uses and activities; restrictions, 13-256-3 Commercial use permit or catamaran registration certificate requirements, 13-256-5 Commercial use permits; public auction, 13-256-7 Business transfer fee, 13-256-8 Owner required to report change in ownership, address and other changes, 13-256-12 Gross receipts, 13-256-16 Thrill craft operations; general provisions, 13-256-17 Recreational thrill craft operations, 13-256-21 Ultralight float equipped aircraft, 13-256-22 Tow-in surfing, 13-256-56 Wailua River restricted area, 13-256-63 Sharks Cove, Three Tables and Waimea Bay ocean waters, 13-256-73.5 Large snorkel tour permit restrictions, 13-256-74 Kailua Ocean Waters Restricted Zones, 13-256-88 Maunalua Bay waters, 13-256-91 Waikīkī Ocean Waters Restricted Zones, 13-256-112 Maui Humpback whale protected waters, 13-256-128 Baldwin Park-Paia Bay Restricted Area, 13-256-162 Makaiwa Bay Swimming Zones; and to amend Title 13, HAR to add new Sections 13-232-57.1 Feeding of wildlife or feral animals prohibited, 13-232-57.2 Animal abandonment and creating or contributing to colonies prohibited; and to repeal HAR Sections 13-230-21 Definitions, 13-240-5 Definitions, 13-243-5 Recognition of marine examination decals, 13-245-2 Definitions, 13-250-5 Definitions, 13-254-1 Definitions, 13-255-5 Definitions, 13-256-35 Owner required to report change in ownership, address and other changes.

The rules can be reviewed online at: <http://ltgov.hawaii.gov/the-office/administrative-rules/> or <http://dlnr.hawaii.gov/dobor/draft-rules/> or can be reviewed in person at any small boat harbor from 8:00 am to 3:30 pm, Monday through Friday, except holidays. Location and contact information for DOBOR offices is available online at: <http://dlnr.hawaii.gov/dobor/contact/>

Written testimony was submitted by James E. Coon, Misty Christo, Katie D. Lisnik, and Peter J. Wolf.

Withdrawn

ITEM A-1 Approval of September 9, 2016 Minutes

Member Gon recused from voting on this item, he was not present.

Member Yuen and Member Roehrig had amendments.

Unanimously approved as amended (Gomes, Oi)

ITEM A-3 Approval of October 14, 2016 Minutes

Member Yuen had corrections.

Unanimously approved as amended (Gon, Gomes)

ITEM D-11 Holdover of Revocable Permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) to Alexander and Baldwin, Inc., and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) to East Maui Irrigation Company, Limited, for Water Use on the Island of Maui.

Pursuant to Section 92-5(a) (4), Hawai'i Revised Statutes, the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Written testimony was submitted by Lawrence Carnicelli, Scott E. Enright, James A. Jones, Mary Lacques, Darren Strand, Heidi Watanabe, Melanie Abecassis, Ellen Abrams, Galuta Aga, Jennifer Noelani Ahia, Hii Aiona, Jeff Akinaka, Nancy Aleck, Terez Amato, Lauren Ampolos, Lynn Anderson, Damina Antioco, Jhianna Aweau, Gaylene L Barron, Barbara Barry, Elif Beall, John Bickel, Mike Biechler, Hannah Blue, Denise Boisvert, Nathan Leo Braulick, John Bruce, Andrea Buckman, Alan B. Burdick, Cara Burklin, Paulo Burns, Ka'ala Fay K. Camara, Ana Castillo, Wailea Collins, Jason Coughlin, Kamana'opono Crabbe, Nicole Carbonell, Will Caron, Thomas Craig, Lauren Carter, Sylvia Cenzano, Kevin K.J. Chang, Jade Chihara, Randy Ching, Gabrielle Constantino, Joyclynn Costa, James Crowe, Chris Cruikshank, Nakota Kai Crumbo, Sheri-Ann Daniels, Christine Davis, Mark Deakos, Kimberly DeCambra, Anthony Kawika Deluze, David Deragisch, Michael de Ycaza, Kelcy Durbin, Carin Enovijas, Deborah Eudene, Cadence Feeley, Arianna Feinberg, Florence Fines, Lloyd Fischel, John Fitzpatrick, Kailea Frederick, Pono Fried, John Gelert, Kyra Glover, Laura Gray, Malachy Grange, Tulsi Greenlee, Debra Greene, Gregory S.P. Gushiken, Isaac Davis Hall, Julie Hamilton, Michelle Hamilton-Golis, Hana Highway Regulation Authority, Reyna Ramolete Hayashi, Jennifer Henderson, Jocelyn Hueu, Kuponu Hueu, Angela Huntemer, Robert G. Hollingsworth, Jacqui, Choon James, J. Umiokalani Jensen, Jessie, Gabe Johnson, Jeannine Johnson, Kim Jorgensen, Kale Kaalekahi, Kyle Kagimoto, Kamanu Kaikala, Claudia Kalaola, Judith L.S. Kapohakimohewa, Jennifer Karaca, Tamara Paltin, Justin Kekoa Kekiwi, Keolalani Koaloha, Joesph Kohn, Lilian Kong, Lawrence Koss, Jana-Nicole Laborte, Mary Law, Erika Lechunga Disalvo, Penny Levin, Naomi Levit, Christina Lizzi, Carol Lem, Joesph Kualii Lindsey Camara, Leilani Lindsey-Ka'apuni, James Long, Amanda Lorenz, Nancy Lorenz, Kupa'a Luat-Hu'e'u, Brandon Luke, Kaponu Makahanaloa-Antunez, Sunnie Makua, Ihilani Marchello, Martha Martin, Marty Martins, Shannon Matson, Melia Mattos, Sarah McCallie, Ashlie McGuire, Amy McKee, Beth McLachlin, Chris Mentzel, Madeleine Migenes, Micah Miller, J. Mitchell, Shelley Muneoka, Brian Murphy, Catherine Nall, Joanne Nall, Matthew Nall, Leonard Nakoa, Toby Neal, Debra K Norenberg, Tracen Oania, Bill Oldham, Marla Owen, Mary Ann Pahukoa, Tamara Paltin, Rebecca Pomaikai Paresa, Lucas Park, Albert Perez, Amy Perruso, Paula Phillips, Ann Pitcaithley, Caitlin Pomerantz, Megan Powers, Margaret Primacio, Adriane Raff Corwin, Aimee Rice, Anne Rice, Kate Righter, Joe Ritter, Ciera-Jean Rodrigues, David Rose, Shannon Rudolph, Jordan Rudias, Simon Russell, Molly Sanborn, Heidi Sarkozy, Sunny Savage, Rosalie Schreiber, Mark Sheehan, Kaylene Kauwila Sheldon, Karen Shishido, Shane Sinenci,

Steve Sipman, Teri Skillman, Jette Slater, Safia Slater, Steve Slater, Preston Smith, Jody Soltau, Chris and Becky Speere, Mele Stokesberry, Ananda Stone, Rebecca Sydney, Team `Aina, Nicholina Tompkins, Stacey Torigoe, Val Toro, Kat Tracy, Annjulie Vai, Catherine Velasquez, Susan Vickery, George Vierra, Ross Villiger, Jessica Waiau, Colleen Wallace, Reese Walleit, Bobbie Ward, Edward Wendt, Shannon Wianecki, Moana Wetecha, Evern Williams, Jim Williams, Mary Wishpering Wind, Nathan Yuen, and Majorie Ziegler.

Chair Case said there was a petition that was filed yesterday afternoon for a contested case proceeding. She asked the petitioner and the applicant to present testimony only on the request for a contested case.

Member Gomes recused because he manages Ulupalakua Ranch which gets water under these revocable permits, they also have a pasture lease on A&B land. Member Roehrig commented that there was some very important testimony that was received by the Native Hawaiian Legal Corporation just today. Chair Case confirmed, that was the petition. Member Roehrig requested that they get this stuff earlier than the day of the hearing; it's impossible for him to digest all of this information the day of.

Camille Kalama introduced herself and Summer Sylva attorneys for Healoha Carmichael, Lezley Jacintho, Sanford Kekahuna, Lurlyn Scott and Nā Moku Aupuni O Ko'olau Hui. They couldn't be present because they are on Maui (where they feel the meeting should be held). Their clients are part of an ongoing contested case before the Board which contrary to the staff submittal, the permits that are being held over here are part of that contested case hearing as well as the long term lease application. They have moved to a contested case to cover their bases.

Kalama understood that the Board has not had time to read their testimony; what they are here today on the request by A&B for another holdover. They read over the staff submittal, on page #3 it states that Judge Nishimura's order, which invalidated the 4 permits as well as the practice of holding them over for 13 years. Her order has been stayed with respect of the County of Maui, so there is no threat at this time that the County of Maui's water supply will be shut off. Kalama was explicit in saying that the Board and A & B had not shown at the time of that order, that there was a stay as far as them. She also explicitly said that A & B was welcome to file a stay before her so that her order could be stayed pending appeal. Until this time A & B has not moved for a stay of enforcement of that order. Kalama told the Board they should be asking them why.

Kalama went on that another misstatement in the staff submittal was that the permits have been going on a valid holdover since 2001, but that directly contradicts Judge Nishimura's order.

At this time Kalama orally requested a contested case on behalf of their clients. They have submitted their written petition. In their testimony they make clear the legal barriers to granting the request of A&B. Kalama told the Board that if they grant the request to A&B they will fail to protect traditional and customary practices.

Kalama expressed that A&B is asking for water to maintain the integrity of the ditch system, they don't tell exactly how much water it takes to maintain the integrity of the ditch system. By granting them these permits, the Board is continuing to allow them access while excluding others.

Kalama asked that if the Board does approve this, then approve it with certain conditions. The holdovers have been open ended with no restrictions. In the event that the Board does grant this that the Board explicitly bar A&B from obstructing Native Hawaiians to engage in their traditional and customary practices. They also ask that A&B give their clients the keys or combination to the locks that block them from accessing the 33,000 acres of public trust lands. They ask that the Board have A&B clean up these lands. They also ask that the Board ask for basic information for diversion and ask them how much water it is that they actually need. Kalama referred to the December 2015 BLNR meeting.

On behalf of their clients Kalama said that they ask that the Board fulfill their trust duties, get the information that they need, proceed cautiously and follow the process.

Chair Case asked if the Board members had questions to limit their questions to the contested case request, not to the substance of the agenda item.

Member Yuen said he was trying to understand what this potential conflict between the desires of taro growers and the request that divisions is still an issue. He said he read through all the written proceedings at the water commission and it appeared to him that in July of 2016 the water commission ordered the full restoration of all streams that feed taro growing areas identified by Kalama's clients or Maui tomorrow.

Kalama said that was not correct, the commission did not order full restoration of the taro streams. A&B has said they would restore the 7 streams that are relied on for taro. They are in the process of obtaining permits to abandon diversions on those streams. It is not an order by the water commission. The water commission's interim order was to take the hearing officer's recommended decision for restoring 18 million gallons per day to the various streams. Kalama said no, it was not complete and A&B has not restored all of its streams at this point. She reminded the Board that it wasn't only the taro growers that were involved here, it was also their other clients that rely on the streams and the watersheds for gathering practices.

Member Yuen said he was trying to focus on the taro issue, he had the July 2016 order. He started at the bottom of page 3 and read; the commission orders that the streams that are no longer being diverted shall remain undiverted unless and until further ordered by the commission. Member Yuen listed the streams in order of the streams being undiverted. The order then listed 5 more streams and read that the commission understands the urgency to restore stream flow to the streams and provide connectivity mauka to makai as soon as possible. Balance to this urgency is a need for A&B to follow all applicable laws in connection with the restoration. It went on to say that the commission orders that A&B coordinate its efforts to permanently abandon or remove all diversions structures on the all identified streams with commissions and staff. Basically it was saying that there are permitting requirements that need to go through to remove all diversions from those streams. To member Yuen it seemed to him that the water commission has already ordered the full restoration of all taro streams and there are just some permitting requirements that need to happen.

Kalama said that what the order says they are saying you've restored these streams for now and do that unless further authorized.

To Member Yuen he said it sounded to him like they won in the water commission and on the taro streams, but he wasn't seeing what the issue was. Any order can be reversed but as of right now the water commission has ordered that all of the streams be restored; pending a few permits that had to be obtained.

Kalama said the commission's authority is to set the flow standards; the Board is the one that has the authority to permit the use of water. The commission's interim order is to preserve what's happening right now so they can proceed with the remainder of the hearing but in that hearing the commission's authority is just to set the minimum flows. It is not able to regulate the water use.

Member Yuen said this Board could only authorize the amount of flow authorized by the water commission. If the water commission authorizes no diversion of a stream, then there would be no diversion no matter what the Board feels like doing.

Kalama said that the standards allow the water commission to only set the minimum flows. If A&B were to appeal an order saying go ahead and restore it. Everything will need to be restored without a finding that the minimum flow is all the flow then that decision is going to be overturned.

Sylva commented that that specific order is interim in nature pending the water commission contested case hearing. This Board has taken the position before to refrain from acting on matters implemented by that contested case hearing until it concludes. She asked that the Board take the same precautions here.

Chair Case wanted to focus on the contested case issue. She said that what they were trying to determine was if the petitioner has a right to a contested case.

Rick Volner Jr. the General Manager of Hawaiian Commercial & Sugar Company introduced David Schulmeister their counsel.

Schulmeister said would defer to the AG if this has a right to a contested case hearing. He did note that the comment from Kalama that if this does go to a contested case, it should go as a part of the original contested case, he would concur if it gets to that point.

Member Roehrig asked who should be the parties to the contested case. Schulmeister said if it's granted it would be the petitioners and anyone who feels like they have standing, also the County of Maui.

Chair Case made a motion to go into Executive Session pursuant to Section 92-5(a) (4), Hawai'i Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Gon seconded.

09:50 AM EXECUTIVE SECESSION
10:16 AM RECONVENE

Member Yuen made a motion to deny the request the request for a contested case hearing on the grounds that it's not available as a matter of law and more specifically that to have a contested case hearing before making this decision on a 1 year holdover of a revocable permit would frustrate the legislative intent of Act 126. Member Roehrig seconded.

All were in favor.

Chair Case called up the applicant, A&B.

Rick Volner Jr. the General Manager of Hawaiian Commercial & Sugar Company introduced himself again and read his written testimony requesting a holdover of these RP's.

Chair Case asked if their water use was decreased, where was that water going.
Volner said the water was staying in the East Maui Watershed, they are not diverting.

Member Gon asked if there were any numbers of water flow to account for proper maintenance of the ditch system.
Volner explained that it was hard to determine how much was needed for the maintenance, they tend to focus more on the end use.

Member Gon asked if the current flow was 20 million gallons per day.
Volner said it could be verified with the Water Commission but in the last 2 months, they average between 15 and 20 million gallons of water per day.

Member Downing asked where the excess water was going.
Volner said it stayed in the watershed, in the streams, it's not diverted.

Member Yuen asked what streams were in what general areas of the diversions.

Volner introduced Garrett Hew, President of East Maui Irrigation who was an expert on the water system.

Hew explained that they have 4 license areas. In the Nahiku area and in the Keanae area they have stopped all diversions. All of the water in those 2 license areas is going back into the stream. They are currently only diverting water from the Honomanu and Huelo area right now. They control the flows with various gates within their ditch system.

Member Yuen said to him according to the Water Commission interim order, almost all the streams in the Nahiku and Keanae license areas were ordered to be restored. He asked if they planned on maintaining the system in that area.
Hew said yes, they plan on maintaining that system to have it as an option.

Member Yuen asked Volner to explain how access into the watershed was controlled now and what the basis was for doing that.
Volner deferred to Hew.

Hew explained that right now they have several access points going into the watershed from the main government road. They are controlled by locked gates at the Hana Highway because of this area is in the highway area. Maintaining access assures them that no one will go in that area to vandalize or tamper with the water.

Member Yuen asked what if people want to gather native plants or catch opae.
Hew said they would just have to go to their office to get a permit, it wasn't a problem with them.

Member Downing asked if the diversions have gone dry.
Hew said yes, for the most part.

Member Yuen asked what the conditions were now. Are the streams now flowing to the sea.
Hew said most of the streams are flowing to the ocean, during the dry periods, they dry up so the only source of water there is ground water coming out of the ground.

Member Yuen asked if they were currently diverting Honomanu.
Hew said no.

Member Yuen asked if they were diverting Puaohokamoa stream.
Hew said they were diverting that at the top level only.
Member Yuen asked about Haipuaena.
Hew said Haipuaena was not being diverted.

Member Roehrig asked for the streams that they are not diverting, how does the streams that they are no longer diverting, how does the flow approximate 64% that's mentioned in the hearing officer's order.
Hew thought they exceeded that 64% on numerous occasions.

Member Gon asked who was monitoring the flow of the streams were diversions have ended and natural flow has restored.
Hew said the Commission Staff have been monitoring.

Member Gon asked if there was any biological monitoring.
Hew wasn't sure.

The following testified in support of this item: Micah Mnikat on behalf of the Department of Agriculture (DOA), Alex Franco with Maui Cattle Co., Dale Sandelin with Hawaii Cattlemen's Cattle, Darren Strand with Maui County Farm Bureau (brought a petition of signatures) Kayla Broe on behalf of the Maui water supply, Heidi Watanabe, Brendan Balthazar, Justin Texeira (108 signatures in support from residence of Maui), Tom Blachford Rodriguez (submitted testimony on behalf of Kelly Delacruz), Bryan Miyamoto on behalf of the Farm Bureau.

The following testified in opposition of this item: Wayne Tanaka on behalf of the Office of Hawaiian Affairs (OHA), Adriane Raff with the Sierra Club Maui, Mary Ann Kahukoa, Zack Williams, Lilian Kong, Mikiala Pua'a-Freitas, Albert Perez with Maui Tomorrow Foundation,

Tiare Lawrence, Kupa'a Luahuleo, Tyler Greenhill, Jeff Kim, Daniel Anthony, Margret Matsuda, and Laura Grey.

The following testified offering comments on this item: Kayla Broe on behalf of the Maui water supply, Trent Furtado, and Cameron Sato.

01:08 PM RECESS
01:32 PM RECONVENE

Chair Case announced at this time items D2, D3, D4 and D22 would also be withdrawn.

Public testimony continued.

The following testified in opposition Dylan Lee Davis, Keolanui Kalama, Hoolea Kaleo, Keali'i, Senator Gill Riviere, Asami Kobayashi, Noe Lopes, David Frankel, Ed Wendt (testimony was read on his behalf), and Pomaikai Kala.

Dave Arakawa with the Land Use Research Foundation of Hawaii testified in support.

Aaron Armstrong offered comments on behalf of farmers on Maui.

There was no further public testimony, Chair Case closed public testimony.

Member Yuen called the applicant back up. Member Yuen said they testified earlier that water was not being diverted from Honomanu, but a testifier showed a video of what she said was a diversion.

Counsel for A&B said he didn't see the video, but he knew they weren't diverting Honomanu.

Member Roehrig questioned the diversion structures in the stream. A&B counsel said they did have diversion structures in the stream, but to get the water back into the stream, they have a gate made out of steel about 36' wide by 3-5 ft. high. When that gate is open, there is connectivity throughout the whole stream. He wasn't sure if it was deep enough for the fish to swim, it depended on the flow in the stream at that time.

Volner added that the Water commission has indicated that they will require some form of fish passage as well.

Member Oi felt like a lot of problems could be solved if the taro farmers had enough water going to their farms and had enough water to expand their farms.

Member Roehrig suggested a committee that could settle these issues.

Member Gon asked what the status was of the EIS.

Meredith Ching with A&B testified that they are planning on getting it out in January; they are working on a draft that is being reviewed. The study was taking a long time.

Member Yuen commented that he wanted to wait before the Board made any serious decisions on this matter before; wait for the IIFS to be concluded, but here we are. He felt it was important to recognize that a lot of this has been investigated at great length at the Water Commission, so the Board received the hearing officer's recommended findings of fact that, Member Yuen said he also passed around the exceptions to those filed by Na Moku, Maui Tomorrow and HC&S also, Minute Order No. 18 and the July 2016 Water Commission Order. Member Yuen wanted to incorporate these documents as part of the record of this proceeding. He went on to detail that the July 2016 order requires the full restoration of all of the taro streams. He emphasized this because every news story frames this as a conflict between taro growing and A&B. That was true with some points in the past, but with this July 2016 order, there is no longer that conflict. Member Yuen felt like many of the interests that were being expressed had been dealt with in CWRM's orders.

Member Yuen made a motion to approve with conditions (motion below in bold); Chair Case suggested that if A&B gets close to the cap number, they come back and give a report.

Member Roehrig suggested a committee; Chair Case suggested an open line of communication and suggested two people exchange numbers; she wanted to be sure the Board wasn't inadvertently delegating authority here.

Member Gon commented given the lack of information given on his questions on flow, he took that into account on his vote. If conditions were imposed on this RP that limited diversions, that seemed to be a positive thing to him. To him it's not a matter of the real needs of agriculture and domestic water use, but it was the lack of information to properly assess all of the public trust kuleana that this board is charged to maintain. To Member Gon, if the Board decided to deny the holdover today, it would not really affect the ditch maintenance, nor upcountry water use, nor protected agriculture uses currently supplied by the ditch. In order to encourage the acceleration of the legal, environmental, cultural, public trust considerations, he felt he needed to vote against this until enough information is associated with the proposal for the holdover that supports the public trust requirements adequately in his mind.

Member Downing agreed with most of what Member Gon said.

He said these diversions/ditches can be redone at a time when it's needed.

A&B didn't give any data on how much they were going to use, when they were going to use it and what they are going to use it for. For him, it should be a common belief that's good for all. He would be voting no.

Chair Case said she appreciated both of those comments. To her they really point out the aspect of looking at this from a procedural perspective because there are big pieces of information that are in process. Chair Case said she was supporting this motion and felt it was consistent with the legislative intent of Act 126.

Member Gon felt this shouldn't be viewed as black and white, it's a complex issue.

Member Downing was not in favor.

Member Gon was not in favor.

5:2 vote.
Item approved.

The Board amended the staff submittal by adding the following conditions in the recommendations section: (3) To require the holdover of the revocable permits to incorporate the July 18, 2016 order of the Commission on Water Resource Management (CWRM). There shall be no diversion from the streams listed in the CWRM order, and the timing for stopping the diversions shall be in accordance with the aforesaid CWRM order; (4) There shall be no waste of water. All diverted water shall be put to beneficial agricultural use or municipal use; (5) Honomanu Stream shall also be designated as a stream from which no water diversion shall be permitted; (6) A maximum of 80 million gallons per day (mgd) on average shall be permitted for diversions to central Maui. The permittees can apply for the diversion of additional water if necessary during the term of the permits; (7) The permittees shall remove (from the no-diversion streams) the dry areas of streams that are created by erosion caused by a diversion, as mentioned on pages 10-11 of the DAR report, as part of the restoration of streams; and (8) The permittees and taro farmers shall each designate a point-of-contact for their respective groups who will exchange phone numbers and communicate concerns from their group to the point-of-contact for the other group.

Approved as Amended (Yuen, Roehrig)

3:08 PM RECESS
3:18 PM RECONVENE

ITEM D-6 Consent to Lease of Lands and Declaration of Easements under Governor's Executive Order No. 4224 to County of Hawaii, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-4-001:177, 184, 185 & 186.

Russell Tsuji-LAND conveyed item D-6.

Member Gon asked counsel if they were okay with the staff recommendations.
Alan Okamoto said his clients were okay with the recommendations.

Member Roehrig disclosed that Alan Okamoto has done estate planning for his family.

Unanimously approved as submitted (Gon, Gomes)

ITEM D-1 Cancellation of Governor's Executive Order No. 1715 and Re-Set Aside to the County of Kaua'i for Public Purposes; Issuance of Management Right of Entry to County of Kaua'i, Kapa'a, Kawaihau (Puna), Kaua'i, Tax Map Key: (4) 4-5-015: 005.

Member Gon asked if OHA or anyone else made comments on this.
Tsuji didn't see any.

Unanimously approved as submitted (Gomes, Oi)

ITEM D-16 Consent to Assign Applicant's 1/3 undivided interest in Certificate of Occupation No. 90-A, Carinthia Judd, Assignor, to William H.K. Judd and Raymond M. Judd, Assignees, Wai'ōma'o, Pūkele, Pālolo, O'ahu, Tax Map Key: (1) 3-4-003:009.

Counsel was present for questions.

Unanimously approved as submitted (Gon, Oi)

The Board began discussion on item M-11, but Member Yuen asked to defer this item until later. He had lots of questions.

The Board later returned to this item.

ITEM D-15 After-the-Fact Issuance of Right-of-Entry Permit to Hawai'i Explosives & Pyrotechnics, Inc. for Aerial Fireworks Display at Duke Kahanamoku Beach on December 5, 2016, Waikiki, Honolulu, O'ahu, Tax Map Key: (1) 2-3-037:021 (Portion).

Tsuji-LAND requested to amend the submittal to delete the \$250 late fee

The Board amended the staff submittal to delete the \$250 late fee.

Unanimously approved as amended (Oi, Gomes)

ITEM D-21 Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. from December 30, 2016 to January 1, 2017 for Aerial Fireworks Display on Encumbered State lands off Ko Olina Beach on New Year's Eve 2017, Honouliuli, Ewa, Oahu, Tax Map Key: (1) 9-1-057:seaward (see Exhibit A-1 and A-2 for location).

Member Downing asked why they were only being charged for 1 site if they are using 3 sites. Also, they are sending 3 and 4 inch shells and 5 and 6 inch shells.

Stephanie Pascual with Hawaii Explosives said that since this has been turned in, they have eliminated one site.

Chair Case asked if they were amending the sites and doubling the fee. Pascual confirmed.

Member Downing thanked them for firing inland.

The Board amended the staff submittal to delete the third firing site, and imposed an additional \$500 exclusionary zone rent.

Unanimously approved as amended (Gon, Oi)

ITEM C-1 Petition for Contested Case Hearing from Keep the North Shore Country Regarding Board Action of November 10, 2016, Agenda Item C-1, *Request for Approval of Incidental Take License and Habitat Conservation Plan for Na Pua Makani Wind Energy Project on the Island of Oahu, Hawai'i.*

Pursuant to Section 92-5(a) (4), Hawai'i Revised Statutes, the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Written testimony was submitted by Michael Cutbirth, John P. Manaut, and Tetra Tech.

David Smith Administrator for the Division of Forestry and Wildlife-DOFAW gave the background on item C-1.

Gill Rivere President of Keep the North Shore Country highlighted his petition. Mike Cutbirth manager of Na Pua Makani said they submitted written testimony and a memorandum. Cutbirth detailed why they felt Keep the North Shore Country was not entitled to a contested case hearing.

Pete Manaut Counsel for Na Pua Makani disclosed that they submitted an extensive legal letter that set forth their position on the fact that there is no right to a contested case hearing under chapter 195D.

Member Gon made a motion to go into Executive Session pursuant to Section 92-5(a) (4), Hawai'i Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Gomes seconded.

4:00 PM EXECUTIVE SECESSION
4:32 PM RECONVENE

Member Yuen made a motion to approve the request, determine that the petitioner has standing, and delegate the chair authority to appoint a hearings officer. Member Gomes seconded.

Chair Case said that if a contested case was required, it did not make sense to her because there was ample opportunity to engage in the public process that went on for two years with many stages and public meetings. It bothers her because she didn't think having a contested case on this matter meets the need that was absent in the process.

Member Gon stated that when a habitat conservation plan is put together it has to pass the Fish and Wildlife Service and the DLNR. The suggestion that the habitat conservation plan is fatally flawed or inadequate researched its problematic in his mind.

Member Gomes said he agreed with Member Gon.

Chair Case, Member Gomes and Member Gon were in opposition.
4:3 vote.

Approved as submitted (Yuen, Gomes)

ITEM C-2 Request for Approval of Incidental Take License and Final Habitat Conservation Plan for Na Pua Makani Wind Energy Project by Applicants Na Pua Makani Power Partners, LLC and the former Champlin Hawaii Wind Holdings, LLC; Tax Map Key Nos. (1) 5-6-06:018 and (1) 5-6-08:006, Koolauloa District, Island of O‘ahu, Hawai‘i.

Chair Case stated that since item C-1 was approved, item C-2 would be withdrawn.

Kent Fonoimoana questioned how it was that his contested case was denied but this was approved.

Chair Case told him to leave his contact info. Since his item was not on the agenda today, the Board would not be discussing it.

Withdrawn

4:36 PM Member Roehrig left.

ITEM D-12 After-the-Fact Consent to the Transfer of Grant of Easement recorded in Liber 9925, page 408 from Standard Oil Company of California, Assignor, to Chevron U.S.A. Inc., Assignee; Aiea, O‘ahu, Tax Map Key: (1) 9-9-003:061.

Consent to the Real Property Interest Assignment and Assumption Agreement (Recordable Rights of Way) and (Unrecordable Rights of Way) regarding Grant of Non-Exclusive Easement S-5931, Grant of Easement No. S-4692, Grant of Non-Exclusive Easement S-5638, and Grant of Easement recorded in Liber 9925, page 408; Chevron U.S.A. Inc., Assignor, to IES Downstream, LLC, Assignee; Honolulu, Kalaeloa, and Aiea, O‘ahu, Tax Map Key: (1) 1-2-025:011; 9-1-031:seaward of 002, (1) 1-1-003:239, and 9-9-003:061. (1) 1-1-003:239.

Nothing to add, no public testimony.

Unanimously approved as submitted (Gon, Oi)

ITEM D-13 Consent to Assignment of Duke Kahanamoku Beach Concession Contract, Hilton Hawaiian Village LLC, Assignor, to Hilton Hawaiian Village Lessee LLC, Assignee, Waikiki, Honolulu, O‘ahu, Tax Map Key: (1) 2-3-037:021.

Tsuji-LAND explained that this would be a sister entity, Hilton would still be the operator. He said the Board has the right to an assignment, they just can't unilaterally assign.

Member Downing asked if there was any effect on us.

Tsuji said no, the rent would stay the same.

Unanimously approved as submitted (Downing, Gon)

Chair Case asked if there were any further questions on the LAND items.

ITEM D-14 After-the-Fact Issuance of Right-of-Entry Permit to Waikīkī Beach Activities, Ltd. for Beach Activities Purposes on December 5, 2016, Waikīkī, Honolulu, O'ahu, Tax Map Key: (1) 2-3-037:Portion of 021.

Member Downing asked if it was that hard to be on time.

Barry Cheung-LAND said normally it would come on time, but since there is only 1 November meeting and 1 December.

Unanimously approved as amended (Gon, Oi)

ITEM D-5 Approve a 3-Year Term Extension of General Lease No. S-3698, Bank of Hawai'i, Lessee, Pursuant to Act 207, Session Laws of Hawai'i 2011; Lot 7, Waiākea House Lots Extension, Waiākea, South Hilo, Hawai'i, Tax Map Key: (3) 2-2-049:022.

Member Downing asked if there should be a reopening rent.

Tsuji-LAND thought they were previously advised that there wouldn't be an immediate reopening, there would be an evaluation.

Member Downing proposed amending the staff submittal to add the appraisal.

The Board amended the staff submittal to clarify that the rent for the extended term shall be determined by an independent appraisal.

Unanimously approved as amended (Gon, Oi)

The Board had no questions on any of the other LAND items.

ITEM D-7 Cancellation of General Lease No. S-5569, Mark Allen and Jonaliza Allen, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-4-049:001.

ITEM D-8 Set-Aside to the County of Hawai'i, Department of Public Works for a portion of Manawale'a Street, identified as Lot 37 of the Villages of La'i'opua, Phase 1 (File Plan 2128), and Construction Rights-of-Entry onto Tax Map Keys: (3) 7-4-021: Portion of 020.

Written testimony was submitted by Neil Kuyper.

- ITEM D-9** Set-Aside to the County of Hawai‘i, Department of Public Works for a portion of Manawale‘a Street, identified as Lot 37 of the Villages of La‘i‘opua, Phase 1 (File Plan 2128), and Construction Rights-of-Entry onto Tax Map Keys: (3) 7-4-021: Portion of 020.
- ITEM D-10** Issuance of License Agreements by the Board of Land and Natural Resources to the Department of Defense for Installation, Operation and Maintenance of Civil Defense Warning Sirens on Land under the Direct Management of the Department of Land and Natural Resources, Statewide, at the following Tax Map Key Nos: (1) 1-5-041:006, (1) 8-2-001:001, (1) 4-6-005:009, (1) 5-6-001:024, (1) 5-3-011:009, (1) 4-1-015:016, (1) 2-3-037:012, (2) 2-1-006:030, (2) 1-3-005:009, (2) 1-4-007:009, (3) 6-6-002:005, (3) 1-3-007:026, and (3) 8-9-004:008.
- ITEM D-14** After-the-Fact Issuance of Right-of-Entry Permit to Waikikī Beach Activities, Ltd. for Beach Activities Purposes on December 5, 2016, Waikikī, Honolulu, O‘ahu, Tax Map Key: (1) 2-3-037:Portion of 021.
- ITEM D-17** Amend prior Board Action of August 26, 2016, agenda item D-11 for the Annual Renewal of Revocable Permits on the Island of O‘ahu.
- The purpose of this amendment is to correct the rents for the following two permits: Revocable Permit No. S-7056 to Kapolei People’s, Inc. identified by Tax Map Key: (1) 9-1-016:120 and Revocable Permit No. S-7560 to Mount Wilson FM Broadcasters, Inc. identified as Tax Map Key: (1) 3-6-004:026.
- ITEM D-18** Amend Prior Board Action of November 10, 2016, Item D-13; Set Aside of Various Properties on Island of O‘ahu to the Department of Agriculture for Agriculture Purposes Pursuant to Act 90, SLH 2003. (See Exhibit A for List of Properties).
- The Amendment is to Add State Parcels (1) 4-1-008:054 and 059 for the Proposed Set Aside.
- ITEM D-19** Request to Close Portions of the Kawainui Canal and Unencumbered State Lands from December 14, 2016 to January 3, 2017 (inclusive); Issuance of Right-of-Entry Permit to United States Secret Services to Support Any Appropriate Activity Related to the Security of the Protectee(s) in United State Secret Services Charge; Kailua, Koolauoko, O‘ahu; Tax Map Key (1) 4-3-022:Seaward and Portions of 002, (1) 4-3-083:Seaward of 003, 004, 008 to 010.
- ITEM D-20** Grant of Term, Non-Exclusive Easement to Martha K. Bush for Pier Purposes; Termination of Revocable Permit No. S-6546; Kaneohe, Ko‘olaupoko, O‘ahu, Tax Map Key: (1) 4-5-058:121.

ITEM D-21 Issuance of Right-of-Entry Permit to Hawai'i Explosives & Pyrotechnics, Inc. from December 30, 2016 to January 1, 2017 for Aerial Fireworks Display on Encumbered State lands off Ko 'Ōlina Beach on New Year's Eve 2017, Honouliuli, 'Ewa, O'ahu, Tax Map Key: (1) 9-1-057:seaward.

The Board approved items D5, D7, D8, D9, D10, D14, and D17-D21.

Unanimously approved as submitted (Downing, Gon)

4:49PM Member Oi left.

The Board went back to discussions on item M-11.

ITEM M-11 Issuance of a Direct Fixed-Base Facility Lease to Trinity Investments LLC, Kahului Airport, Tax Map Key: (2) 3-8-01: Portion of 19.

Ross Smith Property Manager with the Department of Transportation Airports-DOT-AIR explained that there was a requirement at the FAA grant assurances that for fixed based operators at the airport they shall be subject to the same rates, rentals and other charges are uniformly applicable to all other fixed based operators making the same or similar use of such airport use. That's why they're saying in this case the only way they can follow that particular rule is if they use their schedule of rates and charges. He added that their attorney general told them to make sure they are compliant with this because the FAA will come down very hard.

Member Yuen asked what other types of leases were subject to this.

Smith said air carriers that come in within a time frame. It does not apply to necessarily all other rentals.

It doesn't necessarily apply to a flight school.

Member Yuen felt like this appeared to be setting up a conflict between the State Statute that says to only approve direct leases in the case that it encourages competition and the federal grant assurances.

Smith confirmed there was come tension between the two. He said they were warned that they need to be aware of the FAA conditions because there could be repercussions.

Member Gon asked if there was any way to make a negotiation with the FAA.

Smith said that the FAA is not normally receptive to local jurisdiction. All it would take for the FAA to react to this was for one of the two lessees to complain to the FAA.

Chair Case asked if anyone else wanted that space.

Smith said they have been trying to lease this for a long time.

Chair Case said their job is to encourage competition and there was none.

Unanimously approved as submitted (Gon, Downing)

ITEM M-17 Issuance of a Direct Fixed-Base Facility Lease to Keahole Enterprises LLC, Kona International Airport at Keāhole, Tax Map Key: (3) 7-3-43: Portion of 003.

Smith explained that this was the same request as the previous only a different location and a different tenant request.

Member Yuen asked if there was no other interest.

Unanimously approved as submitted (Case, Gon)

ITEM M-18 Issuance of a Revocable Permit for Cargo and Maintenance Operations, Hawaiian Airlines, Inc., Līhu‘e Airport, Tax Map Key: (4) 3-5-01: Portion of 8.

Ross Smith made a request to withdrawn item M-18.

Withdrawn

ITEM M-9 Issuance of a Direct Lease to Aviation Academy Hawai‘i LLC, Honolulu International Airport, Tax Map Key: (1) 1-1-76: 3.

Ross Smith detailed that this was a case where they did attempt to auction, but they got no responses. They now have a tenant who is being forced to move out of an existing location and would like to rent the space that they had tried to auction but had no takers.

Member Yuen was concerned that the upset was much higher than what was being presented as the direct lease, then that would be a good reason why no one would bid on it. Smith apologized for not having that info.

Member Yuen asked if this could be postponed.
Smith thought it was okay to wait.

Member Yuen said he would like to defer the item if he couldn't get a figure on the number.

Withdrawn

ITEM M-3 Issuance of a Revocable Permit to the U.S. Department of Agriculture, Animal and Plant Health Inspection Services, PPQ, for an Employee Breakroom, Honolulu International Airport, Tax Map Key: (1) 1-1-003: 053 (Portion).

ITEM M-4 Issuance of a Revocable Permit to U.S. Army Hawai‘i Replacement for a Reception and Service Desk, Honolulu International Airport, Tax Map Key: (1) 1-1-003: 057 (Portion).

- ITEM M-5** Issuance of a Revocable Permit to Index Builders, Inc., for a Field Office and Staging Area for Construction Materials and Equipment, Honolulu International Airport, Tax Map Keys: (1) 1-1-003: 65 (Portion) and (1) 1-1-003: 001 (Portion).
- ITEM M-6** Issuance of a Revocable Permit for Drive-Thru Passenger Check-In, Hawaiian Airlines, Inc., Inter-Island Terminal, Honolulu International Airport, Tax Map Key: (1) 1-1-003: 073 (Portion).
- ITEM M-7** Issuance of a Revocable Permit for a T-Hangar for Aircraft Storage, John G. Manganaro II, Honolulu International Airport, Tax Map Key: (1) 1-1-76: Portion of 20.
- ITEM M-8** Issuance of a Revocable Permit for a Tour Service Desk and Office Space, Galaxy Tour Incorporated, Honolulu International Airport, Tax Map Key: (1) 1-1-003: 195 (Portion).
- ITEM M-10** Issuance of a Revocable Permit for Aircraft Parking, Eduardo S. Acuna, Kalaeloa Airport, Tax Map Key: (1) 9-1-13: Portion of 32.
- ITEM M-12** Issuance of a Revocable Permit for a Fixed-Base Operation (Area/Space Nos. 004-107, 004-109 and Bldg. Rooms Nos. 242-100, 243-100), Bradley Pacific Aviation, Inc., Kahului Airport, Tax Map Key: (2) 3-8-01: Portion of 19.
- ITEM M-14** Issuance of a Heliport Lease by Notice of Public Auction (Space No. 820-101B), Hilo International Airport, Tax Map Key: (3) 2-1-12: Portion of 90.
- ITEM M-15** Issuance of a Heliport Lease by Notice of Public Auction (Space No. 820-101C), Hilo International Airport, Tax Map Key: (3) 2-1-12: Portion of 90.
- ITEM M-16** Issuance of a Revocable Permit for Storage of Trailers, Kuwaye Trucking, Inc., Hilo International Airport, Tax Map Key: (3) 2-1-12: Portion of 90.

The Board approved items M3, M4, M5, M7, M8, M10, M12, M14, M15 and M16.

No questions, no public testimony.

Unanimously approved as submitted (Gon, Yuen)

- ITEM J-4** Request Approval of the Division of Boating and Ocean Recreation Sublease Rent Participation Policy.

Written testimony was submitted by Rick Gaffney.

Ed Underwood presented item J-4.
They modeled their guidelines on Land Division's.

Greg Kugle representing GKM Inc. read Tina Prettyman's Testimony.

Kugle said that his opinion was that what they were being asked to adopt was really a rule and should go through chapter 91 rule making. Doing that would address the fact that no one else knew about this.

Kugle asked that the Board deny this and suggested it be looked at for rule making.

Chair Case asked Underwood asked if this was intended to be a guideline for prospected leases, did he think he could apply this to leases already in affect or going forward.

Underwood said both; the GKM lease now already has a sublease participation policy and does state that the Board can assess additional participation with a sublease if they come in with subleases. Their recently appraised reopening was based just on the land value. Their current sublease rents total just about \$600,000. DOBOR also asked them to provide what they are generating in the boat haul out, the boat storage buildings and they have not provided any of that information. Underwood said that all DOBOR is asking is to partake in sublease rents now that they are able establish their business and amortize a lot of their money. DOBOR didn't have a guideline to calculate a number, they looked at the way OHA and Land Division did theirs as a guideline.

Member Yuen said he had lots of questions but felt it would be better to defer this so the rest of the Board members can have an opportunity to weigh in on this.

Chair Case was fine on deferring this so that the other lessees have a chance to submit testimony and digest this.

Member Downing said he wanted more time to see how this was going to fit and be fair.

Member Yuen's questions were; when does this kick in and do all DOBOR leases have a clause in them that says that the state can participate.

Underwood said he would have to go back and look, a lot of these were inherited from DOT but all of the new leases will be including a sublease participation policy.

Unanimously moved to defer (Yuen, Downing)

ITEM M-1 Request Approval to Execute a Right of Entry Agreement with Verizon Wireless for the Placement of a Cellular Base Station to be Constructed at Adjacent to the Birkhimer Tunnel State Emergency Operations Center Located at the Diamond Head State Monument Tax Map Key (1) 3-1-042-006.

David Hafner a telecommunications manager with the Hawaii Emergency Management Agency which is a division with the State of Hawaii Department of Defense-DOD presented item M-1. Hafner noted that there would be foliage at the base of the system. The project is needed to ensure critical communications for State and Federal management activities.

Chair Case made a motion to go into Executive Session pursuant to Section 92-5(a) (4), Hawai'i Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Gon seconded.

5:30 PM EXECUTIVE SECESSION

5:45 PM RECONVENE

Chair Case announced that this item was going to have to be withdrawn; she didn't think it was a sufficient submittal to act on.

Hafner commented that this was the second time he's been here and the AG's office has called for a withdrawal 3 days before his appearance. On the first appearance they modified the submittal to satisfy their conditions but received no comments. He was frustrated as a public employee and private citizen because he has not clue how to go forward.

Member Gon said the Board outline solution orientated outline.

Hafner asked what the problems were.

AG Linda Chow said that this was in a conservation district and you need a permit or some kind of approval from OCCL. There is an issue with the 343 compliance, in one section it says that a preliminary environmental assessment was performed by Verizon Wireless, and then in another section, DOD asks the Board to make an exemption declaration; so those two are inconsistent. The exemption declaration they asked the Board to make was not a proper exemption declaration. They are also asking for a 5 year right of entry, right of entries are temporary uses that are usually not as permission to build a building.

Chair Case suggested DOD work with State Parks. She said she understood that DLNR AGs did communicate with DOD AGs. She apologized to Hafner that he had to be there so late. It can't be approved until it's done right.

Curt Cottrell said that the EO and set aside is joint, they already have an EO and Set Aside so its odd that they would ask for some form of approval. The CDUP element and 343 should be addressed yes.

AG Chow explained that anytime you do a disposition of land, you have to get prior approval of the Land Board.

Cottrell asked what the approval would be if he did that. AG Chow said if PARKS was doing it would be fine, but it's Version.

Chair Case asked PARKS if they would be willing to work with Hafner and the AGs. PARKS and AG Chow agreed.

Member Yuen asked Cottrell if there was a CDUP for PARK itself.

Cottrell said they did a master plan EIS, but didn't know offhand. That happened before he became administrator.

Member Yuen apologized to Hafner.

AG Chow told Hafner that when she spoke with DOD's AG, Mike Vincent he was saying that Verizon might look into a mobile trailer instead and hooking it to an existing antenna. Hafner said that's what is done now.

Unanimously moved to withdraw (Yuen, Gon)

ITEM M-2 Consent to Lease of Lands under Governor's Executive Order No. 3504 to Hina Mauka, Kaneohe, O'ahu, Tax Map Key: (1) 4-5-023:02 (Portion).

John Mesina with the Department of Health-DOH conveyed item M-2.

No changes no public testimony.

Unanimously approved as submitted (Yuen, Gon)

ITEM J-1 Authorize the Revocation of Revocable Permit ("RP") No. 33 (formerly Referred to as RP No. S-5867), Executed July 21, 2016, to Wilson Keahi for Boat Storage, Public Boat Trailer Parking and Other Activities at Mala Wharf and Surrounding Areas, 'Alamihi, Lāhainā, Maui, Hawai'i, Identified by Tax Map Key: (2) 4-5-005: portion of 001.

ITEM J-3 Issuance of a Revocable Permit ("RP") to Alvin T. Pelayo, A&K Ventures LLC, for Purposes of Landscaping, Maintenance, Storage of Small Boats and Trailers and Other Activities at Mala Wharf and Surrounding Areas, 'Alamihi, Lāhainā, Maui, Hawai'i, Identified by Tax Map Key: (2) 4-5-005: Parcel 19.

Ed Underwood-DOBOR presented items J-1 and J-3.

No changes, no public testimony.

Unanimously approved as submitted (Gon, Yuen)

ITEM F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Conservation and Management Permit to Mr. Xie, for Access to State Waters to Conduct Conservation and Management Search Activities.

Maria Carnevale State Co-manager for Papahānaumokuākea Marine National Monument-PMNM detailed item F-1.

Carnevale asked for an amendment to allow anchoring. The MMB did endorse the anchoring.

Member Yuen commented that there should be a way to allow this without coming to the Board.

AG Chow said it's been a month or more, if it had been done earlier then it might fall under an emergency.

Member Yuen wanted to be sure that if someone was able to hire a private boat to do a search on an emergency basis then it could be done without coming to the Board.

Carnevale said that it would be a case by case basis. This issue was a response of what already took place. This was what DLNR and the Feds agreed on.

Member Yuen made a motion to approve F-1. Member Gon seconded.

Unanimously approved as submitted (Yuen, Gon)

ITEM F-3 BLNR Briefing: Papahānaumokuākea Marine National Monument Memorandum of Agreement.

Carnevale gave a brief briefing on the memorandum of agreement-MOU that PMNM has amongst the agencies. She gave the history of how PMNM was designated. Carnevale explained the management Board, and the committees that are part of PMNM. She detailed ways the monument is protected.

Carnevale next explained the monument agreement.

Chair Case said she asked for this briefing because hopefully the Governor will be signing this amendment as will OHA. The basic purpose is to incorporate OHA into it.

NON ACTON ITEM

ITEM F-2 Request for Authorization and Approval to Issue a Temporary (3-month) Papahānaumokuākea Marine National Monument Conservation and Management Permit to the Monument Co-Trustee Representatives of the U.S. Department of the Interior, U.S. Fish and Wildlife Service; and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration; for Access to State Waters to Conduct Conservation and Management Activities on the same terms as the 2016 Permit (PMNM-2016-001).

Carnevale-PMNM reviewed item F-2.

Athleen Clark the Superintendent for PMNM explained that they do have an education program where they work with the Bishop Museum and have an education outreach program. All the

information to the schools are available online. This permit report is written not targeted at school children, but they do have it available.

Unanimously approved as submitted (Gon, Downing)

ITEM E-1 **Consent to Assign General Lease No. SP-0134, Bank of Hawai'i, a Hawai'i corporation, as Successor Trustee under that certain unrecorded John H.R. Plews Trust dated March 2, 2015, hereafter called Assignor, to Wendy Jeanne Wichman, unmarried, hereafter called Assignee, situate Lots 35 and 36, Koke'e Campsite Lots, Waimea (Kona), Kaua'i, Hawai'i, Tax Map Key: (4) 1-4-004:016.**

ITEM E-2 **Amendment of General Lease No. SP0157, Charles R. Wichman and Jeanne R. Wichman, Co-Trustees of the Wichman Trust, Lessee, Waimea Canyon State Park, Lot 34, Koke'e Camp Site Lots, Waimea (Kona) Kaua'i, Hawai'i, Tax Map Key: (4) 1-4-004:017. The Purpose of the Amendment is to Correct the Termination Date to Read December 31, 2028; Consent to Assign General Lease No. SP-0157, Charles R. Wichman and Jeanne R. Wichman, Co-Trustees of the Wichman Trust, Assignors, to Charles Rice Wichman, Jr. and Jonathan Goodale Wichman, Assignees, Waimea Canyon State Park, Lot 34, Koke'e Camp Site Lots, Waimea (Kona), Kaua'i, Hawai'i, Tax Map Key: (4) 1-4-004:017.**

Curt Cottrell Administrator for State Parks-PARKS presented items E-1 and E-2.

Chair Case disclosed that she was personally acquainted with the Wichmans.

Unanimously approved as submitted (Yuen, Downing)

ITEM E-3 **Issuance of a General Lease to Ke'ehi Memorial Organization for the Operation, Maintenance and Administration Purposes of Ke'ehi Lagoon Memorial (aka Pacific War Memorial), situated at Ke'ehi Lagoon, Honolulu, O'ahu, Tax Map Key : (1) 1-1-03:004.**

Cottrell-PARKS handed out testimony in support by Gill Tam, President of Ke'ehi Memorial Organization and detailed the submittal.

Chair Case commended PARKS for the great job they did.

Unanimously approved as submitted (Gon, Downing)

ITEM E-4 **Delegation of Authority to the Chairperson of the Board of Land and Natural Resources to Approve Documents and Enter into an Agreement Pertaining to the Grant-In-Aid of \$200,00 to the 501(c)(3) Nonprofit Organization, Pacific Historic Parks, on the Island of O'ahu.**

No changes, no public testimony.

Unanimously approved as submitted (Yuen, Downing)

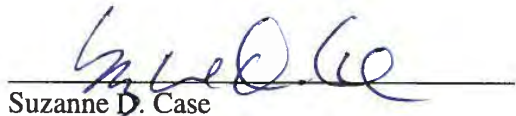
There being no further business, Chair Case adjourned the meeting at 6:43 p.m. Recording(s) of the meeting and all written testimonies submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ku'ulei Moses', written in a cursive style.

Ku'ulei Moses
Land Board Secretary

Approved for submittal:

A handwritten signature in blue ink, appearing to read 'Suzanne D. Case', written in a cursive style.

Suzanne D. Case
Chairperson
Department of Land and Natural Resources

Exhibit D

NATIVE HAWAIIAN LEGAL CORPORATION
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FIRST CIRCUIT COURT
STATE OF HAWAII
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NĀ MOKU AUPUNI O KO'OLAUI HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NĀ MOKU AUPUNI O KO'OLAUI HUI,	)	Civil No. 14-1-0918-04 RAN
	)	(Agency Appeal)
Appellant,)	
	)	ORDER REVERSING AND VACATING
vs.	)	APPELLEE BOARD OF LAND AND
	)	NATURAL RESOURCES' ORDER
BOARD OF LAND AND NATURAL	)	DENYING APPELLANT'S AMENDED
RESOURCES, the DEPARTMENT OF	)	MOTION TO RECONVENE CONTESTED
LAND AND NATURAL RESOURCES,	)	CASE PROCEEDINGS
WILLIAM AILA, JR. in his official)	
capacity as Chairperson of the Board of)	
Land and Natural Resources,)	
ALEXANDER & BALDWIN, INC., EAST)	
MAUI IRRIGATION, LTD., COUNTY OF)	
MAUI, DEPARTMENT OF WATER)	
SUPPLY, MAUI TOMORROW, AND)	
HAWAII FARM BUREAU)	
FEDERATION,)	
)	
Appellees.)	

**ORDER REVERSING AND VACATING APPELLEE BOARD OF LAND AND
NATURAL RESOURCES' ORDER DENYING APPELLANT'S
AMENDED MOTION TO RECONVENE CONTESTED CASE PROCEEDINGS**

On November 14, 2014, the Honorable Rhonda A. Nishimura heard oral argument on the instant appeal by Appellant Nā Moku Aupuni O Ko'olau Hui, filed herein on April 14, 2014. Ashley K. Obrey and Alan T. Murakami appeared for Appellant Nā Moku Aupuni O Ko'olau Hui (Appellant Nā Moku), Linda L.W. Chow appeared for Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and William Aila, Jr., in his official capacity as Chairperson of the Board of Land and Natural Resources (collectively "Board"), David Schulmeister and Elijah Yip appeared for Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. (collectively "A&B"), and Caleb P. Rowe and Kristin Tarnstrom appeared for the County of Maui, Department of Water Supply ("County"). The Court, having reviewed Appellant Nā Moku's Opening Brief, filed herein on August 21, 2014, Appellee Maui Tomorrow Foundation, Inc.'s Joinder to Nā Moku's Opening Brief, filed herein on August 28, 2014, Appellees Board, A&B, and County's respective Answering Briefs, filed herein on September 30, 2014, Appellee Maui Tomorrow's Reply Brief, filed herein on October 10, 2014, Appellant Nā Moku's Consolidated Reply Brief, filed herein on October 14, 2014, the memoranda attached thereto and the files and records herein, and for good cause shown, hereby finds good cause to grant this appeal.

Appellant Nā Moku brings this appeal to challenge the Board's decision to deny Appellant Nā Moku's Amended Motion to Reconvene the Contested Case Proceedings in *In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Keanae, Nahiku, and Huelo*, Maui, DLNR File No. 01-05-MA, pursuant to HRS § 91-14 and Rule 72 of the Hawai'i Rules of Civil Procedure and Articles XI §§ 1 and 7 and Article XII § 7 of the Constitution of the State of Hawai'i.

This Court REVERSES AND VACATES the Board's preliminary decision to deny Appellant Nā Moku's Amended Motion to Reconvene the Contested Case Proceedings and ORDERS the Board to reconvene the hearing subject to certain conditions. The reconvened proceedings should address and resolve issues for which the Board has sole statutory and constitutional responsibility and that are not duplicative of the issues to be determined by the Commission on Water Resource Management (CWRM) with respect to Appellant Nā Moku's pending petitions to amend interim instream flow standards for 27 East Maui streams. If there are any components of the reconvened proceedings that are independent of the CWRM proceedings, there is no justifiable reason for the Board not to address those components now.

If the parties cannot agree on the scope of the reconvened proceedings due to conflicting views on what constitute the Board's duties which are independent and non-duplicative of the CWRM, this Court reserves jurisdiction to address any order issued by the Board with respect to the scope of the reconvened proceedings. Appellant Nā Moku may contest that preliminary ruling to this Court without resort to filing a new Rule 72 appeal by filing an appropriate post-ruling motion with this Court.

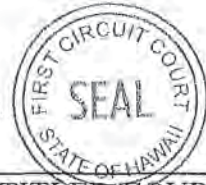
~~Additionally, if members of Appellant Nā Moku are suffering from immediate injury with respect to particular streams, it is up to Appellant Nā Moku to request adjustments to existing diversions from any particular stream where any particular taro farmer needs increased stream flow to farm taro, gather 'ōpae, or maintain any other traditional and customary practice as interim relief from the Board. Appellee A&B has indicated to the Court in oral argument that it is willing to cooperate and possibly make such adjustments.~~

15/RAN

Therefore, this Court reverses and vacates the Board's decision denying Appellant Nā Moku's Amended Motion to Reconvene the Contested Case Proceedings and orders the Board to reconvene the contested case proceedings.

DATED: Honolulu, Hawai'i, DEC 19 2014.

RHONDA A. NISHIMURA



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

LINDA L.W. CHOW
Deputy Attorney General
Attorney for Board of Land and Natural Resources,
the Department of Land and Natural Resources, and
William Aila, Jr. in his official capacity as Chairperson
of the Board of Land and Natural Resources

DAVID SCHULMEISTER
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East Maui Irrigation, Ltd.

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NĀ MOKU AUPUNI O KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

NĀ MOKU AUPUNI O KO'OLAU HUI,	)	Civil No. 14-1-0918-04 RAN
	)	(Agency Appeal)
Appellant,)	
	)	CERTIFICATE OF SERVICE
vs.)	
	)	[RE: ORDER REVERSING AND
BOARD OF LAND AND NATURAL	)	VACATING APPELLEE BOARD OF LAND
RESOURCES, the DEPARTMENT OF	)	AND NATURAL RESOURCES' ORDER
LAND AND NATURAL RESOURCES,	)	DENYING APPELLANT'S AMENDED
WILLIAM AILA, JR. in his official	)	MOTION TO RECONVENE CONTESTED
capacity as Chairperson of the Board of	)	CASE PROCEEDINGS, Filed December 22,
Land and Natural Resources,	)	2014]
ALEXANDER & BALDWIN, INC., EAST)	
MAUI IRRIGATION, LTD., COUNTY OF)	
MAUI, DEPARTMENT OF WATER)	
SUPPLY, MAUI TOMORROW, and)	
HAWAI'I FARM BUREAU)	
FEDERATION,)	
)	
Appellees.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the ORDER REVERSING AND
VACATING APPELLEE BOARD OF LAND AND NATURAL RESOURCES' ORDER
DENYING APPELLANT'S AMENDED MOTION TO RECONVENE CONTESTED CASE

PROCEEDINGS, Filed December 22, 2014, was served on the following parties at their respective addresses by hand delivery or U.S. Mail, postage pre-paid on January 8, 2015.

By Hand Delivery

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Deputy Attorney General
Department of the Attorney General
State of Hawai'i
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Honolulu, Hawai'i 96813
Attorney for STATE OF HAWAI'I,
BOARD OF LAND AND NATURAL
RESOURCES and DEPARTMENT
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RESOURCES

Elijah Yip
David Schulmeister
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1000 Bishop Street, 10th Floor
Honolulu, Hawai'i 96813
Attorneys for ALEXANDER &
BALDWIN, INC., EAST MAUI
IRRIGATION COMPANY, LTD.

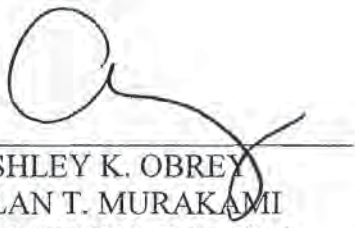
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BUREAU FEDERATION

DATED: Honolulu, Hawai'i, January 8, 2015.

By U.S. Mail

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DEPARTMENT OF WATER
SUPPLY



ASHLEY K. OBREY
ALAN T. MURAKAMI
CAMILLE K. KALAMA
SUMMER L.H. SYLVA
Attorneys for Appellant
NĀ MOKU AUPUNI O KO'OLAU HUI

Civil No. 19-1-0019-01 (JPC)

Defendant A&B/EMI's Exhibit AB-12

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____

Exhibit E

In the Matter of Contested Case Regarding) DLNR File No.: 01-05-MA
Water Licenses at Honomanu, Keanae,)
Nahiku, and Huelo, Maui)
)
)
)

On January 9, 2015, Petitioner Nā Moku Aupuni O Koʻolau Hui (Nā Moku) filed a Motion to Establish Scope of Reconvened Contested Case Proceedings (Petitioner’s Motion). Alexander & Baldwin, Inc. and East Maui Irrigation Company, Ltd. (collectively A&B) filed a Memorandum in Opposition to Petitioner’s Motion to Establish Scope of Reconvened Contested Case Proceedings on March 27, 2015. Petitioners filed a Supplemental Memorandum in Support of Motion to Establish Scope of Reconvened Contested Case Proceedings on March 27, 2015. A&B filed a Response to Petitioners’ Supplemental Memorandum in Support of Motion to Establish Scope of Reconvened Contested Case Proceedings on April 10, 2015. Nā Moku filed a Reply in Support of Petitioner’s Motion to Establish Scope of Reconvened Contested Case Proceedings on April 10, 2015.

¹ *Carmichael, et al., v. Board of Land and Natural Resources, et al.*, Civ. No. 15-1-0650-04 RAN.

On June 15, 2015, the parties submitted a status report to the Board regarding the initiation of discussions between the parties. Nā Moku re-confirmed the withdrawal of its objection to A&B preparing the environmental review documents in connection with its application for a lease. The parties also agreed on a framework for initiating work on the environmental review process. The parties were still in discussion regarding the disposition of the 2015 lawsuit. Nā Moku was to request the BLNR to defer action on Petitioner's Motion while the parties continue discussions on beginning the environmental review process prior to the Commission on Water Resource Management's (CWRM) final decision on the petitions to amend interim instream flow standards (IIFS) in east Maui. No further filings were received from the parties.


Petitioner's Motion argued that the contested case should be reconvened for the Board to require the timely preparation of an environmental assessment to disclose the impacts of the diversion of water from the four license areas (Honomanu, Keanae, Huelo and Nahiku) pursuant to revocable permits S-7263 (Honomanu), S-7264 (Huelo), S-7265 (Keanae) and S-7266 (Nahiku). Petitioner's Motion also urged to Board to reconvene the contested case in order for the Board to address its obligations pursuant to Hawaii Revised Statutes chapter 171.

During oral argument it became apparent that the key issue was the commencement of the environmental review process. Based on the records in this case and the argument presented to the Board, the Board orders A&B to commence the environmental review process in support of A&B's application for a lease of water from the license areas of Honomanu, Keanae, Huelo and Nahiku. The Board will defer decision making on Petitioner's Motion at this time.

Within sixty (60) days of this order A&B must provide to the Board a scope of work for the preparation of an environmental assessment or an environmental impact statement. The scope of work should distinguish those portions that can be undertaken prior to CWRM's final

decision on the petitions to amend IIFS in east Maui from those that require a decision from the CWRM prior to completion.² The scope of work should address, at a minimum, the content requirements contained in Hawaii Administrative Rules § 11-200-10 for an environmental assessments or § 11-200-17 for an environmental impact statement. Accompanying the scope of work should be a tentative schedule for commencement and completion of the various portions of the scope of work.

SO ORDERED this 14th day of April, 2016.


SUZANNE D. CASE³
Presiding Officer
Board of Land and Natural Resources

² The Board notes that on January 5, 2016 A&B announced that it would be transitioning out of farming sugar and would instead pursue a diversified agricultural model for its HC&S plantation on Maui. To the degree that the decision to transition away from sugar cane cultivation affects the ability of or timing for A&B to complete portions of the environmental review documents that should be noted in the scope of work.

³ The Board members have delegated authority to Suzanne Case to sign this Order on behalf of the Board.

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of Contested Case Regarding) DLNR File No.: 01-05-MA
Water Licenses at Honomanu, Keanae,)
Nahiku, and Huelo, Maui)
)
)
)
)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the following document:

1. ORDER FOR A & B TO COMMENCE THE ENVIRONMENTAL REVIEW PROCESS AND DEFERRING DECISION ON PETITIONERS' MOTION TO ESTABLISH SCOPE OF RECONVENED CONTESTED CASE PROCEEDINGS

was duly served upon the following parties as indicated, by means of State Messenger or U.S. Mail, postage prepaid on April 14, 2016, addressed as follows:

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2087 Wells Street
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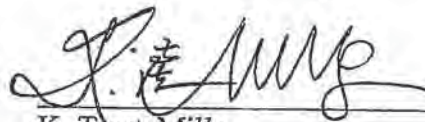
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Linda L.W. Chow, Esq.
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Department of the Attorney General
Kekuanao'a Building
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Honolulu, Hawai'i 96813

Dated: Honolulu, Hawai'i,

April 14, 2016



K. Tiger Mills
Department of Land & Natural Resources
State of Hawai'i

Exhibit F

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ASHLEY K. OBREY 9199
Attorney for Appellant
NĀ MOKU AUPUNI O KO'OLAU HUI

Electronically Filed
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NĀ MOKU AUPUNI O KO'OLAU HUI,)	Civil No. 16-1-0052-01 JPC
	)	(Environmental Court)
Appellant,)	
	)	DLNR File No. 01-05-MA
vs.)	
	)	ORDER GRANTING IN PART AND
BOARD OF LAND AND NATURAL	)	DENYING IN PART APPELLANT NĀ MOKU
RESOURCES, DEPARTMENT OF LAND	)	AUPUNI O KO'OLAU HUI'S MOTION FOR
AND NATURAL RESOURCES, DAWN	)	RULING AND REQUEST FOR
N.S. CHANG, in her official capacity	)	ALTERNATIVE RELIEF
as Chairperson of the Board of Land and)	
Natural Resources, ALEXANDER &)	
BALDWIN, INC., EAST MAUI)	
IRRIGATION CO., LTD., COUNTY OF)	
MAUI DEPARTMENT OF WATER	)	HEARING:
SUPPLY, HAWAII FARM BUREAU	)	Date: November 6, 2023
FEDERATION, and MAUI TOMORROW,	)	Time: 1:30 p.m.
	)	Judge: Honorable Jeffrey P. Crabtree
Appellees.)	
)	

**ORDER GRANTING IN PART AND DENYING IN PART APPELLANT
NĀ MOKU AUPUNI O KO'OLAU HUI'S MOTION FOR
RULING AND REQUEST FOR ALTERNATIVE RELIEF**

This case arises from Appellee Board of Land and Natural Resources' ("BLNR's") approvals of four revocable permits which authorized the diversion of over 100 million gallons of water a day out of East Maui streams and the use of 33,000 acres of state ceded lands. The water was diverted for various uses—some public uses but mostly for private agriculture (sugar cane until sugar cane was phased out).

In 2001, the RPs were placed in “holdover” status by BLNR, whereby the permits were essentially rolled over from year to year rather than undergoing any meaningful review. After the BLNR made its decision to continue the permits in 2014 for the 2015 calendar year, Appellant Nā Moku Aupuni O Ko‘olau Hui (“Nā Moku”) filed an original action in the circuit court, alleging that the renewal of A&B/EMI’s RPs constituted applicant action proposing the use of State land and required the preparation of an environmental assessment under Hawai‘i Revised Statutes (“HRS”) Chapter 343. *See Carmichael v. Bd. of Land and Nat. Resources*, 150 Hawai‘i 547, 555-57, 506 P.3d 211, 220-21 (2022).

The instant case challenged the BLNR’s December 11, 2015 decision re-affirming the holdover status of the RPs for calendar year 2016. More specifically, it alleged that BLNR violated legal requirements by (1) improperly holding over the permits and maintaining the status quo without meaningful annual review under HRS chapter 343, HRS chapter 205A, and Article XII §7 of the Hawai‘i State Constitution and *Ka Pa ‘akai Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 45, 7 P.3d. 1068, 1082 (2000), among other things, and (2) failing to conduct the contested case hearing requested by Nā Moku.

After this appeal was filed, the circuit court in *Carmichael* ruled that BLNR’s holdover of the permits in 2014 violated HRS chapter 171. That ruling was appealed, and the instant case was “stayed pending the entry of final judgment on appeal in [*Carmichael*].” Dkt. 56

On March 3, 2022, the Hawai‘i Supreme Court issued a decision in *Carmichael*. Judgment on appeal was entered on March 20, 2023.

On October 13, 2023, Nā Moku filed its Motion for Ruling and Request for Alternative Relief, Dkt. 71, asking this court to:

- (1) Reverse BLNR’s December 11, 2015 decision reaffirming the holdover status of the RPs for calendar year 2016;
- (2) Determine that A&B had no right to take any water;
- (3) Enter an order in this case that caps the amount of water that can be taken from the East Maui streams at 31.5 MGD until a contested case hearing is held at which Nā Moku is allowed to participate. In other words, Nā Moku asks the court to take the diversion cap it ordered in *Sierra Club v. BLNR*, 1 CCV-22- 0001506) and order it in this case also; and
- (4) Allow Nā Moku to intervene in a contested case hearing the court already ordered in *Sierra Club v. BLNR*, 1 CCV-22-0001506 (which presumably will help set stream diversion limits for calendar year 2024).

On October 26, 2023, Appellee County of Maui Department of Water Supply filed its statement of no position. Dkt. 82. On October 27, 2023, BLNR and A&B/EMI filed their respective memoranda in opposition to the motion. Dkts. 84 & 89. On November 1, 2023, Nā Moku filed its reply brief.

The hearing on the motion was held on November 6, 2023. Present at the hearing were Ashley K. Obrey for Nā Moku, Deputy Attorney General Miranda Steed for BLNR, Trisha Akagi and Mallory Martin for A&B/EMI, and Bradley Sova (via Zoom) for County of Maui Dept of Water Supply

I. The Mootness Issue

BLNR and A&B/EMI argue this entire case is moot because of the *Carmichael* decision. Due to time constraints, the court will not summarize all the arguments in the briefing on this motion. The main argument is that *Carmichael*'s invalidation of BLNR's 2014 continuation of the hold-over RPs applies to all hold-over RPs, including BLNR's 2015 continuation for calendar year 2016 (the focus of this case). It is not contested that the RPs for the instant case are invalid under the reasoning of *Carmichael*. However, additional grounds were argued in this case which were not argued in *Carmichael*. Despite these distinctions, BLNR and A&B/EMI argue that since holdover RPs are invalid, this entire case is moot because no exception to the mootness doctrine applies. The court respectfully disagrees and hereby holds that not all of Nā Moku's arguments back in 2016 are moot simply because one ground for relief (the holdover RPs) was decided in *Carmichael*. The court's reasons are as argued by Nā Moku— essentially that other bases for relief were not decided in *Carmichael* and these issues are capable of repetition while evading review, and therefore the public interest exception applies. *See* Dkt. 91 at 4-6. If the trial court too willingly finds cases moot, it is much more difficult for an appellate court to issue whatever decisions and guidance it thinks is appropriate.

II. Nā Moku's Request for Reversal of BLNR's December 11, 2015 Decision Reaffirming the Holdover Status of the RPs for Calendar Year 2016

This request is GRANTED for the following reasons which go beyond *Carmichael*, together with reasons stated in other parts of this ruling:

A. Nā Moku Was Improperly Denied Its Right to a Contested Case Hearing

Back in 2016, Nā Moku argued it was improperly denied the right to a contested case hearing. The court first notes Judge Castagnetti ordered a contested case hearing back in 2016. *See* Dkt. 91, Exh. A. This court agrees for reasons including those stated in Nā Moku’s Reply Brief—that is that Nā Moku’s members asserted traditional and customary Native Hawaiian rights and practices, protected by Article XII, Section 7 of the Hawai‘i Constitution, which constitutes a proper interest for purposes of a due process analysis in determining whether a hearing was required, *see* Dkt. 91 at 2-3—and independently finds it was a violation not to allow a contested case hearing. Further to the mootness issue, this court has seen BLNR’s deny multiple requests for contested case hearings, so this issue is clearly capable of repetition. Review has also been evaded because BLNR has not been able to promptly hold a contested case hearing when ordered to. When we are dealing with one-year permits, this delay is a real problem, and it is now apparent to the court that what it once saw as moot is not moot. A clear issue exists where the permit “cannot stand” for lack of a contested case hearing. *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai‘i 376, 363 P.3d 224 (2015)). Yet, BLNR argues the court exceeds its authority by stepping into the breach created when BLNR issues defective permits for lack of a contested case hearing, and then it takes BLNR substantial time to hold a contested case hearing, and by then the next year’s permits are due or overdue. The phrase that comes to mind is “justice delayed is justice denied,” and not “justice delayed is moot.” Bottom line: the denial of Nā Moku’s request for a contested case hearing was a breach as claimed back in 2016, and it should be recognized in this case even if a contested case hearing for the calendar year 2016 can no longer be held.

B. BLNR Failed to Make Findings

Back in 2016, Nā Moku argued BLNR violated the Hawai‘i State Constitution and HRS § 171-55. The basis was BLNR’s failure to make findings of fact or conclusions of law that the continuing diversions were in the best interests of the state due to BLNR’s lack of any meaningful review by allowing the permits to keep holding-over. The court agrees and so rules for the reasons stated in Nā Moku’s Reply Brief—that is, that “BLNR should have determined—but did not—that the RPs were ‘in the best interests of the State’ before continuing them in 2014.” Dkt. 91 at 3 (citing *Carmichael*, 150 Hawai‘i at 566, 506 P.3d at 230; *see also id.* at 564, 506 P.3d at 228 (“Because the BLNR did not make factual findings or enter conclusions of law

positing that the permits served the State’s best interests, the BLNR failed to demonstrate that it properly exercised the discretion vested in it by the constitution and the statute.”)). This issue was a breach as claimed and it should be recognized in this case despite BLNR’s claim that it is moot because it no longer issues permits without meaningful review.

C. BLNR Violated the Public Trust Doctrine

Back in 2016, Nā Moku argued BLNR violated the public trust doctrine when it re-affirmed the holdover status of the RPs. The gist of this argument was that private commercial use of public trust assets like stream water is not necessarily a protected use of trust assets. The court agrees and so rules for the reasons stated in Nā Moku’s Reply Brief—that is, that BLNR failed to “take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process[,]” as well as ignored the public trust doctrine mandates that BLNR “assure that the waters of our land are put to reasonable and beneficial uses” and “preserve the rights of present and future generations in the waters of the state.” Dkt. 91 at 3-4 (citing *Kauai Springs v. Planning Comm’n*, 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014); *Carmichael*, 150 Hawai‘i at 566 n.33, 506 P.3d at 230 n.33 (noting that “private commercial use” is not “a protected public trust purpose.”)). This was a breach as claimed, and it should be recognized in this case. Further to the mootness argument, this issue not only could clearly arise in the future, it is currently arising regularly in the context of balancing the constitutional/public trust doctrine of Mahi Pono’s diversified farming operations on Maui, which also implicate Article XI, Section 3 of the Hawai‘i Constitution (conserve and protect agricultural lands and promote diversified agriculture). Time will tell if the issue is capable of repetition while evading review, but it is certainly possible.

D. BLNR Failed to Identify Native Hawaiian Traditional and Customary Practices

Back in 2016, Nā Moku argued BLNR breached its duty under Article XII, § 7 of the Hawai‘i Constitution and case law by making no effort to identify native Hawaiian practices impaired by the continuation of the RPs. The court agrees and finds and concludes that BLNR did not do so. Further to the mootness argument, this issue clearly can arise again and can evade review, such as if a Native Hawaiian rights organization is denied standing, but a decision on appeal will come too late to allow the relief sought. The importance of recognizing Native

Hawaiian rights to stream water should not be diluted by calling the issue moot. This was a breach as claimed and it should be recognized in this case.

E. BLNR Violated HRS Chapter 205A

Back in 2016, Nā Moku argued BLNR breached its duties under HRS chapter 205A by not considering the values set by the Legislature in chapter 205A. It is clear that BLNR has an affirmative duty to consider these issues and simply did not do so when it affirmed the hold-over status of the RPs for calendar year 2016 without meaningful review. This was a breach as claimed and it should be recognized in this case.

In short, BLNR improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku's request for a contested case hearing, failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A.

III. Nā Moku's Requests for Alternate Relief

A. Nā Moku's Request for Ruling that A&B/EMI "Had No Right to Take the Water"

The court denies this request for a potentially dispositive ruling without prejudice. It is correct to say BLNR improperly authorized A&B to take water from the streams. But to the court that is not the same thing as saying A&B had no right to take the water. When A&B/EMI took the water, it was "authorized" by law to take the water because of BLNR's permits. A finding that BLNR erred does not automatically mean A&B/EMI acted illegally. Nā Moku cites no persuasive legal authority that A&B/EMI as a matter of law had no right to take the water.

B. Nā Moku's Request for a Diversion Cap of 31.5 MGD

This request is denied. The court concludes that its equitable powers under HRS § 604A-2(b) do not give it the discretion to graft onto this case the 31.5 MGD cap ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506. For the court's reasons, *see* A&B/EMI's memorandum in opposition to Nā Moku's motion. *See* Dkt. 89 at 12-16 (sections 2, 3, and 4).

C. Nā Moku's Request to Intervene in Upcoming Contested Case Hearing Ordered by this Court in *Sierra Club v. BLNR*, 1CCV-22-0001506.

The court denies this request. The contested case hearing ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506 is an entirely different proceeding covering multiple issues that were not part of the allegations in this case back in 2016. The court is not aware whether the request is ripe, *e.g.*, (a) whether Nā Moku has requested its own contested case hearing to accompany the

contested case hearing Sierra Club obtained, or (b) whether Nā Moku asked to intervene in Sierra Club's contested case hearing. The court concludes its equitable powers under HRS § 604A-2(b) do not give the court discretion to order intervention in an entirely different case under these circumstances.

Dated: Honolulu, Hawai'i, January 2, 2024 2023.

/s/ Jeffrey P. Crabtree



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Miranda C. Steed
MIRANDA C. STEED, ESQ.
Deputy Attorney General
Attorney for BOARD OF LAND AND
NATURAL RESOURCES, DEPARTMENT
OF LAND AND NATURAL RESOURCES, and
DAWN N.S. CHANG, in her official capacity as
Chairperson of the Board of Land and Natural Resources

/s/ Trisha H.S.T. Akagi
TRISHA H.S.T. AKAGI, ESQ.
MALLORY T. MARTIN, ESQ.
Attorneys for ALEXANDER & BALDWIN, INC. and
EAST MAUI IRRIGATION CO., LTD

/s/ Mariana Löwy-Gerstmar
MARIANA LÖWY-GERSTMAR, ESQ.
Deputy Corporation Counsel
Attorney for COUNTY OF MAUI
DEPARTMENT OF WATER SUPPLY

Nā Moku Aupuni O Ko'olau Hui v. Board of Land and Natural Resources; Civil No. 16-1-0052-01 JPC; Order Granting In Part and Denying In Part Appellant Nā Moku Aupuni O Ko'olau Hui's Motion for Ruling and Request for Alternative Relief