



Native Hawaiian LEGAL CORPORATION

1164 Bishop Street, Suite 1205 • Honolulu, Hawai'i 96813
Phone (808) 521-2302 • Fax (808) 537-4268 • www.nativehawaiianlegalcorp.org



Testimony to the BOARD OF LAND AND NATURAL RESOURCES

Relating to Agenda Item D-3

Denial of Petition for Contested Case Hearing filed by the Native Hawaiian Legal Corporation on behalf of Nā Moku Aupuni O Ko'olau Hui on December 13, 2024 Regarding Agenda Item D-9, Approved as Amended on December 13, 2024: *Issuance of Revocable Permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC for the Development, Diversion, and Use of Surface Ater for Diversified Agriculture, Currently Existing Historical Industrial and Non-Agricultural Uses, Reservoir, Fires Protection, Hydroelectric, and County of Maui Department of Water Supply and Kula Agricultural Park Purposes on the Island of Maui; Tax Map Keys: (2) 1-1-001:044 and 050, 1-1-002:002(por.), 1-2-004:005 & 007, 2-0-014:001, 005, 011, 012 & 017.*

July 11, 2025

9:00 a.m.

DLNR Boardroom

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

The Native Hawaiian Legal Corporation, on behalf of Nā Moku Aupuni O Ko'olau Hui, **opposes** the Board's denial of Nā Moku's request for contested case hearing on the issuance of the 2025 revocable permit to Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC (collectively, "A&B") for the development, diversion, and use of surface water from Maui Hikina in 2025.

The Board denied Nā Moku's contested case hearing request on December 13, 2024 and issued a revocable permit to A&B for 2025. Nā Moku perfected its request by submitting its written petition on December 19, 2024. *See* Hawai'i Administrative Rules § 13-1-29. The matter has been on appeal with the environmental court since January 2025. The Board's untimely review of Nā Moku's written petition serves only to confuse the process and contribute to the delay of the contested case hearing proceedings to which Nā Moku is entitled.

I. The Environmental Court Has Already Determined That Nā Moku is Entitled to a Contested Case Hearing on Revocable Permits Authorizing the Development, Diversion, and Use of Water from East Maui Streams

As Nā Moku explained in its written petition, the Board's hands are tied by the doctrine of res judicata. Based on a recent decision by the environmental court, the Board is precluded from asserting that Nā Moku does not have a right to a contested case hearing over revocable permits authorizing the development, diversion, and use of water from east Maui streams.

In January 2024, the environmental court held that Nā Moku was entitled to a contested case hearing before the Board related to the approval of a revocable permit to A&B. *See Nā Moku Aupuni O Ko'olau Hui v. Bd. of Land and Nat. Res., et al.*, Civ. No. 16-1-0052-01 (JPC). *See* Submittal at 21-27. In that case, Nā Moku challenged the Board's December 11, 2015 decision re-affirming the holdover status of the RPs for calendar year 2016. More specifically, it alleged that Board 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. The court concluded that, in challenging the Board's 2015 decision to continue the diversion of water from east Maui streams, "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[ty] interest for purposes of a due process analysis in determining whether a hearing was required . . . and independently finds it was a violation not to allow a contested case hearing." Submittal at 24.

The doctrine of res judicata, which precludes the relitigation of the same claims between the same parties, is applicable to the Board's decision on Nā Moku's December 13, 2024 request and December 19, 2024 written petition.¹ In the 2016 agency appeal, (1) there was a final judgment on the merits, (2) the parties were the same as the parties here, and (3) the court also addressed Nā Moku's right to a contested case hearing to address the issuance of revocable permits to A&B for the diversion of water from east Maui. *See Bremer*, 104 Hawai'i at 54, 85

¹ The party asserting res judicata has the burden of establishing that (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question. *Bremer v. Weeks*, 104 Hawai'i 43, 54, 85 P.3d 150, 161 (2004). According to the Hawai'i Supreme Court:

The purpose of the doctrine of res judicata is to prevent a multiplicity of suits and to provide a limit to litigation. It serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. The res judicata doctrine thus furthers the interests of litigants, the judicial system and society by bringing an end to litigation where matters have already been tried and decided on the merits. It is a rule of fundamental and substantial justice, of public policy and private peace.

E. Sav. Bank, FSB v. Esteban, 129 Hawai'i 154, 159, 296 P.3d 1062, 1067 (2013).

P.3d at 161; *Nā Moku Aupuni O Ko‘olau Hui v. Bd. of Land and Nat. Res.*, Civ. No. 16-1-0052-01. None of the parties – including this Board – appealed from the final judgment in that case.

Based on the above, the Board cannot assert that Nā Moku is not entitled to a contested case hearing over the 2025 permits.

II. A Contested Case Hearing is Required

A. Nā Moku Has Standing

Notwithstanding the fact that *res judicata* applies, Nā Moku has still demonstrated that it has standing to participate in a contested case hearing.

As Nā Moku stated in its written petition:

Nā Moku is an organization comprised of descendants of the Ke‘anae-Wailuanui Ahupua‘a (land division) within the Ko‘olau District who can trace their genealogical lineage to the original settlers (*i.e.*, ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778). . . . Its members include Native Hawaiians who engage in traditional and customary practices on a number of streams in East Maui. Nā Moku’s interests are directly affected by the issuance of another revocable permit authorizing more water to be diverted in 2025. Nā Moku’s members are *kalo* farmers, fishers, and gatherers who depend on the streams covered by the permit for growing taro and feeding their families. Nā Moku’s members have seen streams run dry for long periods as a result of A&B[]’s diversions. Approval of the permits for 2025 will adversely impact members’ ability to continue to engage in and perpetuate their traditional practices that depend on free-flowing streams: gathering aquatic life, fishing, growing *kalo*, and transmitting traditional knowledge to future generations.

Its members’ traditional and customary practices – which are also acknowledged in the final environmental impact statement (with which this Board is very familiar) – are the constitutional property interests it seeks to protect.² See, e.g., *In re Petition to Amend Interim Instream Flow Standards for Waikamoi*, 128 Hawai‘i 497, 291 P.3d 395 (App. 2012) (“Nā Moku demonstrated . . . that its members were native Hawaiians with traditional and customary rights, appurtenant water rights, and/or riparian rights to waters from the streams for, among other things, the cultivation of taro. Article XII, § 7 of the Hawai‘i Constitution protects such

² The basis of Nā Moku’s request for contested case hearing has always been to protect its members’ traditional and customary practices connected to east Maui streams. See *Maui Tomorrow v. State*, 110 Hawai‘i 234, 240-41, 131 P.3d 517, 523-24 (2006) (“Court concludes that its analysis of traditional and customary native Hawaiian practices and appurtenant rights and the public trust obligations . . . dovetails into the issue of out of watershed transfers.”); see also CWRM’s 2018 FOFs, COLs, & D&O.

rights, and Nā Moku's members demonstrated injury because their ability to exercise these rights has been adversely affected by the streamflow within the ahupua'a."). The December 13, 2024 staff submittal acknowledged Nā Moku's particularized interest in east Maui water issues by its inclusion of Nā Moku in the regular RP stakeholder meetings, which are a condition of the RP. Nā Moku cited to its practices in its testimony and written petition; however, it has not had the opportunity to provide additional specific evidence to the Board as a result of the denial of Nā Moku's hearing request.³ See Submittal at 4-5.

1. Nā Moku's Actual or Threatened Injury is Traceable to Challenged Action

Staff agrees that there is an actual or threatened injury here, but asserts that the Board's decision could not impact Nā Moku's traditional and customary Native Hawaiian practices because its members' injuries have been redressed by CWRM's 2018 decision setting interim instream flow standards ("IIFS"). See Submittal at 6.

This argument ignores the fact that the Board has the authority to limit (or not) the amount of water diverted from streams. It exercised that power in December 2024. To say that only "CWRM . . . may address aspects of water use regarding a stream" is inaccurate.

The argument also ignores CWRM's explicit conclusion that **more water in streams** is better for the aquatic life that Nā Moku members depend on for cultural and subsistence practices. In its 2018 IIFS decision and order, CWRM stated that "[t]here is universal agreement that more water and better connectivity in streams is a good thing for native habitat restoration." The 2018 decision and order was premised on the fact that 64% of baseflow restores 90% of habitat. Based on this premise, **more** baseflow would result in **more** habitat and **more** fish. Clearly, Nā Moku members' interests are affected when more water is taken out of streams.

Moreover, interim instream flow standards are also just that – interim and temporary. Relying exclusively on IIFSES to protect all traditional and customary practices related to east Maui streams for the foreseeable future is unrealistic and inconsistent with the constitutional protections of the public trust and Native Hawaiian practices.

³ See *Perry v. Planning Commission of Hawaii County*, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980) ("Modern judicial pleading has been characterized as simplified notice pleading. Its function is to give opposing parties fair notice of what the claim is and the grounds upon which it rests. That the same, if not more lenient standard, also governs administrative pleadings is indisputable.") (cleaned up); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 409, 652 P.2d 1143, 1147 (1982) ("The administrative tribunal or agency has been created in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes.").

2. A favorable decision at a contested case hearing would address Nā Moku's claimed injury

The Board has the ability to address Nā Moku's concerns at a contested case hearing because of its explicit duty to protect public trust resources and Native Hawaiian traditional and customary practices.

Staff's assertion that a favorable decision at a contested case hearing would not address Nā Moku's injuries because "only CWRM . . . may address aspects of water use regarding a stream" ignores the distinct and independent kuleana of the Board and CWRM, which this Board should understand. While CWRM has the authority to set the minimum flow of water in streams, the Board has the authority to determine how much, if any, water will be allowed to be diverted offstream once the IIFs are met. **The Board is not required to give A&B any water above the IIFs.** Thus, if this Board had not issued the 2025 RP, A&B would not have been authorized to divert up to 30 millions of gallons of water every day from east Maui; instead, that water would remain in the streams to further support Nā Moku members' kalo farming, gathering of 'ōpae, 'o'opu, hīhīwai, and fishing practices.

The Hawai'i Supreme Court has recognized "BLNR's role as a public trustee of the State's water resources" in approving the continuation of these very same RP(s)." *Carmichael*, 150 Hawai'i at 567, 506 P.3d at 231. As a trustee, the Board is required "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). As explicitly stated in a binding circuit court decision involving the same east Maui streams:

[G]iven 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.

. . . . **BLNR may not merely rubber-stamp every CWRM determination.**

Maui Tomorrow, 110 Hawai'i at 240-41, 131 P.3d at 523-24 (emphasis added).

Thus, the Board is indeed obligated to review these issues. A favorable decision at a contested case hearing would address the concerns Nā Moku has raised.

B. A Contested Case Hearing is Required by Constitutional Due Process

Nā Moku has demonstrated its right to a contested case hearing.

First, Native Hawaiian rights are property interests protected by the due process clause of Article I, § 5 of the Hawai'i Constitution. *See Flores v. Bd. Of Land and Nat. Res.*, 143 Hawai'i 114, 125-26, 424 P.3d 469, 480-81 (2018) (citing *Mauna Kea Anaina Hou v. Bd of Land & Natural Res.*, 136 Hawai'i 376, 390-91, 363 P.3d 224, 238-39 (2015) (recognizing "the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, [and] the risk of an erroneous deprivation" and holding that "due process requires that the parties be given a meaningful opportunity to be heard"). When an agency decision impacts these rights, practitioners are entitled to a contested case hearing under HRS chapter 91.

Second, a risk of erroneous deprivation exists. As discussed above, Nā Moku's participation in CWRM's IIFS 2015 proceedings does not affect its right to participate in a contested case hearing on 2025 RP before Board. Nor does its participation in various sunshine meetings before CWRM and the Board or other stakeholder meetings⁴, which do not allow parties to put forth evidence, cross examine witnesses, or develop a complete record that would give the Board an opportunity to thoroughly analyze the impacts and make specific findings of fact to support its decision. *See Mauna Kea*, 136 Hawai'i at 391, 363 P.3d at 239 ("A contested case hearing affords parties extensive procedural protections . . . includ[ing] the opportunity to issue subpoenas for witnesses to testify under oath or produce documents, to cross-examine witnesses under oath, and to present evidence by submitting documents and testimony under oath in support of their positions."). According to the Hawai'i Supreme Court,

[t]hese procedures are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made. Yet that purpose is frustrated if, as was the case here, the decisionmaker rules on the merits before the factual record is even developed. Such a process does not satisfy the appearance of justice, since it suggests that the taking of evidence is an afterthought and that proceedings were merely "mov[ing] in predestined grooves."

Id. (brackets in original).⁵ Unlike in *Flores*, Nā Moku has never participated in a contested case hearing on the "development, diversion, or use" of all 36 east Maui streams that A&B has

⁴ Staff's statement that its "recollection is that Petitioner's representatives generally expressed satisfaction with the efforts made by the Permittee to protect Petitioner's interests" at the stakeholder meetings is without basis. Until recently, the stakeholder meetings were merely a one-way presentation by EMI and Mahi Pono about the latter's farm progress and attempts to comply with the IIFS. The meetings served only to share out information and allow people to ask questions. In depth discussions were also not possible for Nā Moku because there was active litigation involving these parties throughout that time period, limiting what Nā Moku's attorneys could say to A&B/EMI/Mahi Pono without their attorneys present. While Nā Moku may have conveyed gratitude to meeting participants for providing information, Nā Moku or its representatives have **never** expressed satisfaction with the efforts made by A&B/EMI/Mahi Pono to protect Nā Moku's interests.

⁵ Contrary to staff's assertions, the protections of due process do not require petitioners like Nā Moku to "raise any specific facts or injury that would indicate a contested case would further serve due process than what was already provided at the meeting." Submittal at 10. There was no opportunity to develop the factual record.

historically diverted from state land.⁶ And as discussed below, this Board has not met its duty under Article XII, Section 7 of the Hawai'i Constitution and *Ka Pa'akai Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d. 1068 (2000) to protect Native Hawaiian traditional and customary practices.

Finally, the burden on the Board to hold a contested case hearing cannot override due process protections in this instance. *See* Submittal at 11. Every year, A&B seeks a new permit. And every year, the Board approves it without addressing community concerns. The potential burden of convening a contested case hearing every year is a problem of its own making.⁷

III. The Board Must Complete a Ka Pa'akai Analysis

The Board did not consider traditional and customary practices when it made its decision to deny Nā Moku's contested case hearing request and approve the 2025 revocable permit. And it cannot point to CWRM's 2018 decision to fulfill its constitutional duties to protect the same. *See* Submittal at 10-11.

In *Ka Pa'akai*, the Hawai'i Supreme Court overruled the Land Use Commission's decision to reclassify approximately 1,000 acres of land in Ka'ūpūlehu, Kona, from conservation to urban for a luxury development without considering the cultural and traditional use of the property, holding that the constitution "places an affirmative duty on the State and its agencies" to protect traditional and customary rights. This means that the State is obligated to act to further the constitutional mandate. It must do so independently; it may not delegate its kuleana to another agency or the project proponent. Nor may it treat the process as a simple box-checking exercise. The goal is to truly understand impacts in order to ensure protection of cultural resources and practices.

Significantly, *Ka Pa'akai* applies to agencies whenever they act. *See Flores-Case 'Ohana v. University of Hawai'i*, 153 Hawai'i 76, 82, 526 P.3d 601, 607 (2023) (holding that *Ka Pa'akai* applies to rulemaking) ("We reiterate that agencies 'may not act without independently considering the effect of their actions on Hawaiian traditions and practices.'")(emphasis in original). There is no justification that would absolve the Board of this kuleana.

⁶ The submittal inaccurately describes Nā Moku's legal history with BLNR and CWRM. *See* Submittal at 3, 9-10. In 2001, the Board granted Nā Moku's request for contested case hearing on a long term lease of east Maui water. No contested case hearing was held on the revocable permits. Although a full evidentiary hearing was held on a motion for interim relief, the Board refused to convene the contested case hearing.

⁷ For decades, the Board has allowed decisions related to east Maui to be made without meaningful and careful consideration. Through the wholesale approval of east Maui revocable permits, it has perpetuated a scenario where the status quo means draining the streams dry, ultimately subverting the public trust doctrine by prioritizing commercial uses over those protected public trust uses. *See* Haw. Const. Art. XI, § 1 & Art. XII, § 7; *Kauai Springs, Inc*, 133 Hawai'i at 172, 324 P.3d at 982 ("The purpose of the state water resource public trust is to protect certain uses.").

IV. The Board Must Grant Nā Moku's Petition

Nā Moku has not had a meaningful opportunity to be heard in a meaningful manner. *See Mauna Kea*, 136 Hawai'i at 389, 363 P.3d at 237 ("The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner"). Nā Moku asked for a contested case hearing regarding A&B's use of public trust water resources 25 years ago. That hearing has never taken place.⁸ Meanwhile, A&B (and, more recently, Mahi Pono) has had continuous use of the public's water.

As trustee of the public trust resources of this state, the Board must employ a high level of scrutiny whenever its actions impact public trust resources. *See In Re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000)(mandating that trustees "must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."). The Hawai'i Supreme Court has already pointed out issues with the Board's process of approving these annual revocable permits "without scrutiny". *Carmichael v. Bd. of Land and Nat. Res.* 150 Hawai'i 547, 566-67, 506 P.3d 211, 230-31 (2022). A contested case hearing – which is required by law – would allow the Board to review all the facts and reach a well-reasoned decision about the commercial use of a public trust resource instead of guessing as it has year after year.

Accordingly, NHLC and Nā Moku **oppose** the Board's denial of Nā Moku's request for contested case hearing on the issuance of the 2025 revocable permit to A&B for the development, diversion, and use of surface water from Maui Hikina in 2025. Nā Moku's petition for contested case hearing should be **granted**.

Mahalo,



Ashley K. Obrey, Senior Staff Attorney
For Nā Moku Aupuni O Ko'olau Hui

⁸ As the environmental court recently recognized, "[w]hen we are dealing with one-year permits, this delay is a real problem[.] A clear issue exists where the permit "cannot stand" for lack of a contested case hearing. . . . Yet, . . . BLNR issues defected 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." Submittal at 24.