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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NA MOKU AUPUNI O KO'OLAU HUI,

Appellant,

v.

BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as Chairperson of the Board of Land and Natural Resources, ALEXANDER & BALDWIN, INC. and EAST MAUI IRRIGATION, LTD., COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY, MAUI TOMORROW, and HAWAI'I FARM BUREAU FEDERATION,

Appellees.

CIVIL NO. 14-1-0918-04 RAN
(Agency Appeal)

APPELLEES ALEXANDER & BALDWIN, INC.'S, AND EAST MAUI IRRIGATION COMPANY, LTD.'S ANSWERING BRIEF; CERTIFICATE OF SERVICE

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS
(continued)

**Page**

## TABLE OF AUTHORITIES

Page(s)

**CASES**



**STATUTES AND RULES**

# APPELLEES ALEXANDER & BALDWIN, INC.'S, AND EAST MAUI IRRIGATION COMPANY, LTD.'S ANSWERING BRIEF

## I. INTRODUCTION/SUMMARY OF THE ARGUMENT

Appellant Nā Moku Aupuni O Ko'olau ("***Nā Moku***") exploits this appeal as an opportunity to air a litany of grievances against Appellees Board of Land and Natural Resources ("***BLNR***"), Alexander & Baldwin, Inc. ("***A&B***"),[1] East Maui Irrigation, Ltd. ("***EMI***"). Among other things, Nā Moku seeks an order requiring A&B/EMI to prepare the environmental assessment ("***EA***") and/or environmental impact statement ("***EIS***") for their May 14, 2001 application for a long-term water license of State watershed lands in East Maui from which emanate the streams diverted by the EMI ditch system (the "***Application***"). Nā Moku also asks this Court to reverse and vacate the BLNR's decision in 2002 to put the revocable permits issued to A&B/EMI for use of the watershed lands into holdover status pending the final disposition of the contested case on the Application that Nā Moku had requested.

The actual scope of the appeal, however, is narrow. The action appealed herein is the BLNR's declination to act on Nā Moku's Motion to Reconvene Contested Case Proceedings filed on July 5, 2012 ("***Motion to Reconvene***"), which Na Moku deems a denial of the same. The Motion to Reconvene requested that BLNR resume the contested case on the Application, which has been in suspense pending the outcome of the disposition of 27 petitions for

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[1] In 2012, in connection with the separation of Matson Navigation Company, Inc. from Alexander & Baldwin, Inc., Alexander & Baldwin, LLC became the successor-in-interest to the assets of Alexander & Baldwin, Inc. through a series of transactions. For an explanation of the structure of the transactions, see Exhibit 99.1 attached to Amendment No. 4 to Form 10 filed by A & B II, Inc. with the Securities and Exchange Commission on June 8, 2012. *See* <http://www.sec.gov/Archives/edgar/data/1545654/000104746912006546/a2209866zex-99_1.htm> at pages ii (Explanatory Notes), 1-4 (Questions and Answers About the Separation), and 19 (Transaction Structure).

amendment of the interim instream flow standards ("***IIFS***") of certain East Maui streams emanating from the same watershed lands that are the subject of the Application. Hence, the scope of the appeal is limited to: (1) whether this Court has jurisdiction to review the BLNR's inaction on the Motion to Reconvene under the Hawai'i Administrative Procedures Act ("***HAPA***"), Hawai'i Revised Statutes ("***HRS***") chapter 91; and (2) if jurisdiction exists, whether the putative denial of the Motion to Reconvene constitutes an abuse of discretion.

The jurisdictional question is simple and dispositive. There is no Hawai'i law supporting the proposition that an agency's delay in acting on a motion, absent a statutory or regulatory specifying a timeframe for action, is a "preliminary ruling" appealable pursuant to HAPA. Moreover, Nā Moku has not made the requisite showing that it would be deprived of adequate procedural or substantive relief if judicial review were deferred. Procedurally, Nā Moku is assured the opportunity to participate in the contested case when it resumes. Substantively, Nā Moku has not made a particularized showing of harm due to the suspension of the contested case proceedings. Indeed, Nā Moku obtained interim relief from the BLNR in 2007 including the return of a significant amount of flow to one of the streams used by its members. A&B/EMI no longer diverts that stream. Nā Moku fails to demonstrate that circumstances have changed such that the interim relief it received is now inadequate.

Although the lack of jurisdiction alone justifies dismissal of this appeal, even if the Court were to review the merits of the putative denial of the Motion to Reconvene, there are ample reasons why the denial was not an abuse of the BLNR's discretion. Chief among these reasons is the fact that all the parties to the contested case—Nā Moku included—agreed to a process for determining the Application that contemplated an extended timeframe. In fact, Nā Moku joined with Maui Tomorrow Foundation ("***MT***"), a party to the contested case, in requesting that BLNR

stay the contested case pending preparation of the EA/EIS for the Application. The BLNR granted that request. For Nā Moku to now complain about the delay and blame it on others is disingenuous.

Furthermore, the BLNR and the parties to the contested case recognized, and the Circuit Court in a prior administrative appeal in this matter confirmed, that the BLNR may rely on the expertise of its sister agency, the Commission on Water Resources Management ("***CWRM***"), in determining issues that overlap with the proceedings to determine Nā Moku's IIFS petitions. Such issues include the impact of stream flow on stream ecology and native Hawaiian traditional and customary practices. These issues also need to be analyzed as part of the environmental review process for the Application. Accordingly, BLNR is well within its discretion to wait for the outcome of the IIFS proceedings before resuming the contested case. Otherwise, the BLNR would need to waste tremendous agency resources to convene parallel and duplicative proceedings to determine the same issues being taken up in the contested case hearing before CWRM, which is scheduled to begin in January 2015.

The remaining relief requested by Nā Moku in the appeal is extraneous to the Motion to Reconvene and untimely. Nā Moku seeks reversal of the BLNR's 2002 decision to put the revocable permits into holdover status, but fails to mention that approximately a decade ago, it advanced the same argument to the BLNR, who rejected it in an order. Nā Moku never appealed the BLNR's decision on that issue. Nā Moku's present attempt to appeal or seek reconsideration of the BLNR's order is improper.

Nā Moku also seeks an order that BLNR is in violation of HRS chapter 343 by allowing A&B/EMI's diversions to continue pursuant to the holdover of the revocable permits without first having prepared an EA or EIS. However, the limitations period for Nā Moku to enforce

such a violation in an action under chapter 343 expired over a decade ago. To the extent Nā Moku seeks relief pursuant to chapter 343, it should be denied.

Accordingly, the Court should dismiss the appeal or, in the alternative, affirm the putative denial of the Motion to Reconvene.

## II. COUNTERSTATEMENT OF THE CASE

### A. A&B/EMI's Application For a Long-Term Lease

For the past 120 years, EMI, a subsidiary of A&B, has operated a ditch system in East Maui that delivers water for domestic, agricultural, and other uses in Central and Upcountry Maui. In 1938, the Territory of Hawai'i and EMI entered into the East Maui Water Agreement, which provided for the disposition of water licenses at public auction to the highest bidder for lands owned by the State at four license areas identified as Honomanu, Huelo, Keanae, and Nahiku. *See* Supplement to the Certified Record on Appeal ("***SROA***") Doc. 3 at 3-4. At its August 23, 1985 meeting, the BLNR incorporated the four license areas into a single water license and approved the public auction sale of a thirty-year water license for the right to develop, divert, transport, and use Government owned waters from the lands covered by the license. *See id.* at 4. Pending issuance of the thirty-year water license, BLNR issued one-year revocable permits to A&B and EMI, alternating between A&B and EMI as the permittee each year. *See id.*

On May 14, 2001, A&B/EMI filed the Application seeking a 30-year lease of the four license areas from BLNR. Certified Record on Appeal ("***ROA***") Doc. 5, Ex. A thereto. The Application requested that the BLNR continue to issue revocable permits to preserve the *status quo* pending issuance of the long-term lease. *Id.* at 3. The Application also proposed that one of the terms of the lease auction be: "All bidders shall prepare and file with the Office of Environmental Quality Commission an Environmental Impact Statement with respect to the

proposed use. Disposition of the cost of the EIS shall be determined at a future date." *Id.* at 2. A&B/EMI included this provision in the Application to avoid delays in preparation of an EA/EIS due to lack of legislative funding. The BLNR placed the Application on the agenda for its May 25, 2001 meeting as Item D-5. *See* SROA Doc. 5 at 7.

### B. Nā Moku Requests a Contested Case on the Application and Files 27 Petitions to Amend the IIFS For East Maui Streams

In a letter to the BLNR dated May 23, 2001, Nā Moku requested "that they be permitted to participate as parties in an agency hearing in a contested case to challenge the legality of the proposed disposition of public lands now before the [BLNR] as Item D-5 on the agenda for the Board's meeting to be held on May 25, 2001." SROA Doc. 2 at 2. The letter further objected to Hawaiian Commercial & Sugar Company ("***HC&S***") preparing the EA for the Application.[2] *Id.* at 3. Nā Moku maintained that the BLNR should be the one to prepare the EA because the disposition of water proposed in the Application was not an "applicant" proposal governed by HRS § 343-5(c), but an "agency" proposal governed by HRS § 343-5(b). *Id.*

The BLNR voted to defer action on the Application at its May 25, 2001 meeting. SROA Doc. 5. At the hearing, counsel for Nā Moku and MT orally requested a contested case to challenge the Application. SROA Doc. 5 at 8, 12. Nā Moku and MT followed up with written contested case petitions submitted on June 1, 2001. ROA 10, Ex. "12" thereto; SROA Doc. 4. The BLNR ordered a contested case on the Application (the "***Water License CCH***") and appointed retired Circuit Judge John McConnell as the Hearings Officer. *See* SROA Doc. 28 at 5, ¶ 8.

To preserve the *status quo* pending the contested case hearing, the BLNR, at its May 24, 2002 meeting, granted "a holdover of the existing revocable permits on a month-to-month basis

[2] HC&S is a division of A&B.

pending the results of the contest[ed] case hearing" ("***Holdover Decision***"). SROA Doc. 8 at 7.

Separately, on May 24, 2001, Nā Moku filed with CWRM twenty-seven (27) petitions to amend the IIFS for certain East Maui streams ("***East Maui IIFS Petitions***"). *See* SROA Doc. 43 at 2.

### C. The BLNR's Summary Disposition Order and Nā Moku's Appeal

In September 2002, the parties in the contested case on the Application filed motions for summary disposition of various issues. *See* SROA Docs. 9-27. The Hearings Officer issued Proposed Findings of Fact, Conclusions of Law, and Recommended Order, which the BLNR ultimately adopted on 1/24/03 (the "***2003 BLNR Order***"). SROA Doc. 28. Among other things, the BLNR determined that (1) the scope of the Water License CCH included both the Application for a long-term lease and the issuance of interim revocable permits; (2) the proposed long-term disposition of water rights is exempt from the EA requirement pursuant to Hawai'i Administrative Rules ("***HAR***") § 11-200-8(a)(1), and (3) as long as the proposed disposition of water is made subject to the IIFS set by the CWRM, the BLNR has no duty to perform its own parallel investigation with regard to the minimum IIFS necessary to protect traditional and customary practices of native Hawaiians. *See id.* at 8, ¶ I.B.1 and 9, ¶¶ III.B.2 & IV.B.8. Nā Moku and MT appealed the 2003 BLNR Order pursuant to HRS § 91-14(a).

Circuit Judge Eden Elizabeth Hifo issued an order on October 10, 2003 affirming in part and reversing in part the 2003 BLNR Order (the "***Hifo Order***"). The Hifo Order dealt only with issues regarding the long-term disposition of water; it expressly disclaimed making rulings with respect to the revocable permits because the 2003 BLNR Order did not deal with those permits. *See* SROA Doc. 29 at 6.

On the issue of the EA requirement, Judge Hifo reversed the BLNR's determination that an EA was not required with respect to the long-term lease. *See id.* at 5-6. As to whether the

BLNR must conduct a parallel investigation in light of the pending East Maui IIFS Petitions, Judge Hifo affirmed the BLNR's conclusion that it "is not required to conduct a parallel investigation" and "is entitled to rely on and use any determination of the CWRM to establish instream flow standards" pursuant to the East Maui IIFS Petitions or any other action in discharge of CWRM's obligations. *Id.* at 4. If CWRM does not make a determination on the need to amend instream flow standards, the BLNR could conduct its own investigation into those issues. *Id.* If the BLNR believes it lacks 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." *Id.* "In any case," the Court cautioned, "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." *Id.*

**D. Na Moku and MT Challenge the Legality of the Holdover Decision**

On remand, Nā Moku and MT filed motions for summary relief challenging the legality of the Holdover Decision. *See* SROA Doc. 30 at 1-4; SROA Doc. 33 at 20. MT also moved for a summary relief order staying or continuing the contested case proceedings until the environmental review process under HRS chapter 343 is completed. *See* SROA Doc. 33 at 16. Nā Moku joined in that request. SROA Doc. 34.

The Hearings Officer disposed of the motions in the Prehearing Order Regarding Petitioners' Motions For Summary Relief on March 18, 2005 (the "***2005 Summary Relief Order***"). SROA Doc. 38. The 2005 Summary Relief Order held that the BLNR, as trustee of the public trust, has authority to preserve *status quo* conditions as well as 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. SROA Doc. 38 at 3, ¶ A.2. The Hearings Officer thus denied Nā Moku's request for a declaration that the Holdover Decision is illegal as a matter of law, but ordered an evidentiary hearing to be held "to determine whether and to what extent the current diversions should be reduced in order to satisfy the constitutionally or legally protected practices of the Na Moku Parties." *Id.* at 3-4, ¶ A.4.

With regard to the environmental review arguments advanced in MT's motion for summary relief, the Hearings Officer granted MT's and Nā Moku's request for a stay of the Water License CCH insofar as it concerned a long-term lease pending completion of the EA for the Application, but qualified that "such stay shall not affect the contested case proceeding insofar as it concerns the Holdover Decision or an interim disposition of water." *Id.* at 6, ¶ C.3. The Hearings Officer denied MT's and Nā Moku's request for summary relief that an EA must be prepared prior to any interim disposition of water such as that resulting from the Holdover Decision or a stay of the contested case proceedings. *See id.* at 6, ¶ C.4.

**E. The Interim Relief Proceeding**

Pursuant to the 2005 Summary Relief Order, an evidentiary hearing was held to determine whether interim releases of water were required to protect "constitutionally or legally protected rights" pending completion of an EA. The hearing afforded the parties "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." SROA Doc. 39 at 37. The hearing was held from October 10-12 and November 14-15, 2005. *Id.* at 3-4. The parties agreed that the streams at issue in the hearing were: Honopou, Puolua, Hanehoi Streams in the Huelo license area, and Wailuanui, Waiokamilo, and Palauhulu Streams in Ke'anae. *Id.* at 5, ¶ A.1.

On March 23, 2007, the BLNR issued its Findings of Fact, Conclusions of Law and Decision and Order addressing the necessity of interim releases of water (the "***2007 Interim Relief Order***"). SROA Doc. 39. In reviewing the procedural background of the matter and summarizing the arguments previously made by Nā Moku and MT, the BLNR noted: "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***." *Id.* at 2 (emphasis added).

The BLNR then discussed Nā Moku/MT's arguments challenging the continuation of the diversions, noting:

> [Nā Moku/MT] 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 Nā 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[.]"

*Id.* at 37-38 (emphasis added). The BLNR therefore declined to order the immediate cessation of EMI's diversions, holding that such a drastic measure would be contrary to the public interest for the following reasons:

> 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.

*Id.* at 42-43, ¶ C.8.

Based on the evidence received at the interim relief evidentiary hearing, the BLNR granted interim relief requiring A&B/EMI to allow 6 million gallons per day ("***mgd***") to flow in Waiokamilo Stream past its diversions to satisfy the needs of the Wailuanui taro growers. *See id.* at 46. BLNR also ordered the DLNR to establish a stream monitoring program and appoint a stream monitor to inform the BLNR if the interim release was not providing adequate water for a particular party or if it was working an undue hardship on a particular party. *Id.* at 47-48. Shortly after the issuance of the 2007 Interim Relief Order, EMI ceased all diversions from Waiokamilo Stream. *See* ROA Doc. 5 at 6.

Nā Moku/MT did not appeal the 2007 Interim Relief Order. *Id.*

**F. CWRM Acts on the First 8 East Maui IIFS Petitions**

Not long after the BLNR took up the issue of interim relief, CWRM began making progress on the East Maui IIFS Petitions. In December 2006, CWRM authorized staff to initiate and conduct public fact gathering related to the East Maui IIFS Petitions. *See* SROA Doc. 43 at 3. In March 2008, CWRM staff published their instream flow assessment reports for the five hydrologic units corresponding to the eight IIFS petitions that Nā Moku and CWRM had agreed to prioritize (the "***8 Prioritized IIFS Petitions***").[3] *See* SROA Doc. 55, Ex. 2 thereto at 1 (July 26, 2001 letter from Moses K. N. Haia III to Linnel T. Nishioka); SROA Doc. 44 at 5. It thus

[3] The streams covered by the 8 Prioritized IIFS Petitions include all of the streams that were the subject of the interim relief proceeding conducted by the BLNR in 2005. *Compare* SROA Doc. 39 at 5, ¶ A.1 *with* SROA 43 at 1-2.

became clear to HC&S that CWRM planned to decide the 27 East Maui IIFS Petitions in pieces rather than all at once. *See id.* at 5.

This prompted HC&S to file a motion with the CWRM requesting consolidation of all 27 East Maui IIFS Petitions for decision making. SROA Doc. 40. In the motion, HC&S stressed the importance of being able to rely on IIFS amendments for planning purposes: "The more *ad hoc* and changeable IIFS amendments are seen to be, the less likely that significant capital investments will be made in a business that depends on a stable supply of surface water." *Id.* at 4. The CWRM denied the motion at its September 24, 2008 meeting. SROA Doc. 44 at 9.

Immediately after taking action on HC&S's motion to consolidate, CWRM took up its staff's recommended action on the 8 Prioritized IIFS Petitions. *See* SROA Doc. 43 at 60-62; SROA Doc. 44 at 30-31. Discussion of this agenda item lasted for two days, and nearly 60 people testified. After public testimony closed, the Commissioners engaged in extensive deliberations. *See* SROA Doc. 44 at 9-31.

CWRM voted unanimously to amend the IIFS for 8 of the 10 streams covered by the 8 Prioritized IIFS Petitions. SROA Doc. 44 at 31. CWRM also adopted staff's recommendations for adaptive management strategies for the eight streams. *See* SROA Doc. 43 at 63-64; SROA Doc. 44 at 31. The eight streams for which CWRM adopted amended IIFS included all of the streams that were the subject of the 2007 Interim Relief Order. This historic action was the culmination of a process of public fact gathering and multi-agency consultation spanning over seven years. At the conclusion of the meeting, the then-chair of CWRM commented:

> You have been waiting for 20 years for this to happen and there's been a history of staff where it's like what do we do, we didn't have real clear guidance, we didn't have funding and this is a group of people who said we're going to set aside those issues and take action with the best information we have and move forward with people because it's important for the state to make decisions on

these and we can't keep putting them off. They've done a tremendous job over the last few years, so thank you very much.

SROA Doc. 44 at 31-32.

No one, including Nā Moku, requested a contested case on the CWRM's action on the 8 Prioritized IIFS Petitions.

**G. Nā Moku's Motion to Enforce**

On May 29, 2008, Nā Moku filed a motion to enforce the 2007 Interim Relief Order ("***Motion to Enforce***"). SROA Doc. 45. EMI did not oppose this motion, but did take exception to Nā Moku's attempt to distort the underlying facts. *See* SROA Doc. 41 at 15. In light of the amended IIFS for the 8 East Maui Streams, the adaptive management strategies, and in view of the expertise of CWRM in stream flow issues, the BLNR denied the Motion to Enforce and suspended the duties of the DLNR monitor until further order of the BLNR. *See* SROA Doc. 46.

**H. CWRM Acts on the Remaining 19 East Maui IIFS Petitions**

CWRM, at its May 25, 2010 meeting, acted on the remaining 19 East Maui IIFS petitions, amending the IIFS (some on a seasonal basis) for six of the streams covered in those petitions. *See* SROA Doc. 48 at 49-50. Nā Moku orally requested a contested case to challenge the decision at the meeting. *See id.* at 50. Nā Moku subsequently submitted to the CWRM a written petition for contested case. SROA Doc. 49. The written petition requested a contested case for only 13 of the 19 IIFS Petitions that were the subject of the CWRM's May 25, 2010 decision. *Id.* at 2-3. The CWRM denied the petition at its October 18, 2010 meeting. SROA Doc. 50 at 4. Nā Moku appealed the denial (the "***IIFS Appeal***") to the Intermediate Court of Appeals ("***ICA***").

## I. The Motion to Reconvene

While the IIFS Appeal was pending, on July 5, 2012, Nā Moku submitted the Motion to Reconvene that is the subject of this appeal. *See* ROA Doc. 1. The Motion to Reconvene represented to the BLNR that the CWRM "set the last IIFS [for the East Maui streams] on May 25, 2010." *Id.* at 10. Nā Moku briefly mentioned the IIFS Appeal in the Motion to Reconvene, but without expounding on the implications of the appeal, Nā Moku stated: "The Board cannot on the one hand defer the proper permitting process 'pending the results of the contested case,' while simultaneously halting the contested case process [in the BLNR matter] indefinitely. The Board must either continue the contested case proceedings or complete the necessary studies and begin the permitting process." *Id.* at 11. Nā Moku made no attempt to reconcile its argument with the fact that a ruling in favor of Nā Moku in the appeal—which Nā Moku ultimately obtained—would delay the final disposition of the East Maui IIFS Petitions, as that would vacate the May 25, 2010 decision and require CWRM to hold a contested case hearing as Nā Moku had requested.

The Motion to Reconvene did not argue for immediate cessation of all diversions. Rather, the Motion to Reconvene moved the BLNR "[1] to reconvene the contested case proceedings . . . relating to the issuance of a license or permit to [A&B and EMI] to utilize any of the 4 water license areas in East Maui managed by the BLNR and/or [2] to demand that the Board initiate the required environmental review process for the diversion of water from the 4 water license areas." *See* ROA Doc. 1 at 1. The Motion to Reconvene did not identify any particularized and imminent harms that would result if the BLNR were to continue to hold the contested case proceeding in abeyance.

On August 14, 2012—eight days before memoranda in opposition to the Motion to Reconvene were due pursuant to the BLNR's scheduling order and without obtaining leave from

BLNR—Nā Moku filed an amendment to the Motion to Reconvene. *See* ROA Doc. 2; ROA Doc. 3. The amendment deleted the second item of relief in the Motion to Reconvene regarding initiation of the environmental review process and substituted it with a request for "an order halting any and all diversions with the exception of those reasonably used for domestic purposes as there is no legal authority to issue the contested revocable permits before an environmental assessment is conducted and because there is no legal basis to continue the 'holdover' permit." ROA Doc. 3 at 1. A&B/EMI objected to the unauthorized amendment. *See* ROA Doc. 4.

A&B/EMI's memorandum in opposition to the amended Motion to Reconvene did not object to Nā Moku's request that BLNR prepare the EA/EIS, but pointed out that it was Nā Moku who objected to EMI preparing the environmental review documents. *See* ROA Doc. 5 at 7. Nā Moku has remained silent on this point in its briefing on the Motion to Reconvene and in this appeal.

The BLNR held oral argument on the Motion to Reconvene on September 28, 2012. *See* ROA Doc. 2.

**J. The ICA's Decision in the IIFS Appeal and the Contested Case on Remand**

The ICA decided the IIFS Appeal in a memorandum opinion issued on November 30, 2012. *In re Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula & Hanawi Streams*, 2012 WL 5990241 (Haw. Ct. App. Nov. 30, 2012). The ICA vacated the CWRM's denial of Nā Moku's contested case petition and "remanded to the Commission with instructions to grant Nā Moku's Petition for Hearing and to conduct a contested case hearing pursuant to HRS chapter 91 and in accordance with state law."

On remand, the CWRM authorized its chairperson to appoint a Hearings Officer for the contested case hearing on the East Maui IIFS Petitions (the "***East Maui IIFS CCH***"). SROA

Doc. 51 at 15. Chairperson William Aila appointed Dr. Lawrence Miike as the Hearings Officer. The parties to the East Maui IIFS CCH include all of the parties to the Water License CCH.

The original scope of the East Maui IIFS CCH was limited to the 13 streams listed in Nā Moku's contested case petition. In April 2014, Hearings Officer Miike disclosed his inclination to expand the scope to encompass all 27 streams as opposed to just those covered in the 13 petitions for which Nā Moku had requested a contested case. *See* SROA Doc. 55 at 6. The parties were given the opportunity to brief the proposed expansion.

HC&S opposed the proposed expansion because it would require reopening the 14 IIFS proceedings that had already been concluded without further requests or proposals for amendment nor a contested case hearing ever having been requested or ordered. HC&S expressed concern that the expansion would unnecessarily prolong the process of obtaining a final decision on the East Maui IIFS petitions and undermine the relative certainty that had been achieved. *See* SROA Doc. 55 at 12-14. Despite the fact that Nā Moku had requested a contested case for only 13 of the 27 East Maui IIFS Petitions, not including the 8 Prioritized IIFS Petitions encompassing the streams that were the subject of the interim relief proceeding, Nā Moku supported the proposed expansion, arguing that it was needed to afford its members with long withheld relief. *See* SROA Doc. 56 at 2.

Over HC&S's objections, CWRM expanded the scope of the East Maui IIFS CCH to include all 27 IIFS Petitions at its August 20, 2014 meeting.[4] The East Maui IIFS CCH is scheduled to begin in January 2015.

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[4] A&B/EMI request the Court to take judicial notice that CWRM, at its August 20, 2014 meeting, voted in favor of expanding the scope of the East Maui IIFS CCH to include all 27 East Maui IIFS Petitions. The agenda for the August 20, 2014 meeting and the staff submittal recommending the expansion were not available at the time that the Certified Record on Appeal and Supplement to the Certified Record on Appeal were filed herein, but they are available

### K. Counsel for Nā Moku Sends Letters to BLNR Threatening Litigation

On January 13, 2014, Native Hawaiian Legal Corporation ("***NHLC***"), as counsel for Nā Moku, sent a letter to the BLNR (the "***1/13/14 NHLC Letter***") reiterating Nā Moku's demand that the Water License CCH be reconvened and that all diversions stop until an EA is prepared. *See* ROA Doc. 17. The 1/13/14 NHLC Letter alluded to a change in law that, according to NHLC, negates "Nā Moku's prior objection to the applicant funding the EA process ... and now places the burden on the applicant for the EA." *Id.* at 1. The change in law to which Nā Moku referred is Act 312 of 2012, which amended HRS § 343-5 to provide that, with respect to "applicant actions" that require agency approval, the agency shall require the applicant to prepare the EA; section 343-5 previously provided that the agency would prepare the EA. *See* Act 312 (2012), 26th Leg., Reg. Sess.. Nā Moku thus concluded that "it should not be – ***and should never have been*** – a bar to conducting the EA ...." *Id.* (emphasis added). However, Nā Moku did not reconcile that statement with the position stated in its May 23, 2001 letter to BLNR that "the proposed dispositions are not 'applicant' proposals ..., but are instead agency proposals governed by HRS § 343-5(b)." SROA Doc. 2 at 3 (emphasis in original). Nor did Nā Moku expressly withdraw its objection to A&B/EMI preparing the EA. In closing, the letter threatened to pursue legal remedies if the BLNR did not take action on the Motion to Reconvene within sixty (60) days. ROA Doc. 17 at 3.

On March 18, 2014, NHLC sent another letter to the BLNR stating that it deemed BLNR's inaction on the Motion to Reconvene as a denial of the same. ROA Doc. 18.

On April 14, 2014, NHLC filed the Notice of Appeal in this case.

On April 25, 2014, BLNR sent a letter to NHLC stating that "the Board does not plan to

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online at <http://files.hawaii.gov/dlnr/cwrm/agenda/2014/ag20140820.pdf> (agenda) and <http://files.hawaii.gov/dlnr/cwrm/submittal/2014/sb201408F1.pdf> (staff submittal).

*reconvene* the contested case hearing on the water licenses until after [CWRM] has had the opportunity to address its own contested case on the Interim Instream Flow Standards for East Maui Streams." ROA Doc. 19.

## III. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the BLNR's delay in acting on the Motion to Reconvene is subject to judicial review under HRS § 91-14(a) as a "preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief" where Nā Moku is guaranteed continued participation in the contested case when it eventually resumes, and Nā Moku fails to identify any particularized harm resulting from the delay?

2. Whether Nā Moku's challenge to the Holdover Decision in this appeal should be dismissed as untimely?

3. Whether Nā Moku is time-barred from challenging the BLNR's action in rendering the Holdover Decision without first conducting environmental review?

4. Whether the BLNR acted within its discretion to wait for the outcome of the East Maui IIFS CCH before resuming the Water License CCH?

## IV. ARGUMENT

### A. The Court Lacks Jurisdiction Over This Appeal.

#### 1. There is no authority for Nā Moku's argument that an agency's delay in acting on a motion constitutes an appealable "preliminary ruling."

HAPA is the jurisdictional basis for this appeal. HRS § 91-14(a) grants a right of judicial review to a person aggrieved by one of the following categories of orders: (1) "a final decision and order in a contested case", or (2) "a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief ...." Nā Moku contends that the BLNR's inaction on its Motion to Reconvene fits within the second

category. *See* Opening Brief at 13 ("BLNR's inaction constitutes an effective denial such that deferral of review pending entry of a subsequent final decision would deprive Nā Moku of adequate relief.").

This argument is based on purely on naked assertion. The disposition of the Motion to Reconvene is not an appealable "preliminary ruling" within the meaning of § 91-14(a). Nā Moku cites no Hawai'i authority—and there is none—for the proposition that an agency's delay in acting on a motion constitutes an appealable "preliminary ruling."

The only Hawai'i case that Nā Moku cites in support of jurisdiction under HAPA, *Kilakila 'O Haleakala v. Bd. of Land & Natural Resources*, 131 Hawai'i 193, 317 P.3d 27 (2013), is inapposite. The issue in *Kilakala* was whether BLNR's failure to grant or deny a contested case petition constituted an appealable ***final decision and order***, not a preliminary ruling. In *Kilakila*, the appellant petitioned the DLNR for a contested case hearing on the application of the University of Hawai'i ("***UH***") for a conservation district use permit ("***CDUP***") to build facilities near the summit of Haleakala. The BLNR granted the CDUP without granting or denying appellant's contested case petition. The BLNR subsequently granted the petition, but did not stay or revoke the CDUP it had granted to UH. The appellants filed an administrative appeal pursuant to HAPA. The Circuit Court dismissed the appeal for lack of jurisdiction, and the ICA affirmed. The Hawai'i Supreme Court reversed based on *Public Access Shoreline Hawaii v. Hawaii County Planning Commission (PASH)*, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("***PASH***"), and *Kaleikini v. Thielen*, 124 Hawai'i 1, 237 P3d 1067 (2010), in which it held that the formal denial of a request for a contested case hearing is an appealable "final order." The Court reasoned that the BLNR's failure to grant or deny the appellant's request for a contested

case hearing was effectively a denial of the request akin to the appealable final orders in *PASH* and *Kaleikini*. *See Kilakala*, 131 Hawai'i at 203, 317 P.3d at 37.

*Kilakala* is also distinguishable because the BLNR in that case went forward with the very action for which the appellant requested a contested case (*i.e.*, the granting of the CDUP). As such, the appellant was deprived of the opportunity to participate in the decision making process corresponding to the proposed action. In the instant case, the BLNR has not yet acted on the Application. Before the BLNR takes action on the Application, it will resume the Water License CCH, and at that time, Nā Moku will have an opportunity to participate.[5]

**2. Deferring review of the BLNR's disposition of the Motion to Reconvene would not "deprive appellant of adequate relief."**

Not only does the BLNR's inaction on the Motion to Reconvene fail to qualify as a "preliminary ruling," but it does not "deprive appellant of adequate relief." To the extent Nā Moku claims deprivation of procedural relief, as noted above, Nā Moku has not lost its opportunity to participate in the decision making process with respect to the Application.

To the extent Nā Moku claims deprivation of substantive relief, Nā Moku has not made any particularized showing of harm. The Motion to Reconvene contains only generalized allegations of the harm that purportedly result from continued suspension of the Water License CCH.

Notably, the BLNR provided interim relief to Nā Moku in 2007, including the return of 6 mgd to Waiokamilo Stream. *See* SROA Doc. 39 at 46. This led to EMI eventually ceasing all diversions of Waiokamilo Stream. ROA Doc. 5 at 6. Nā Moku has made no effort to explain what circumstances have changed, if any, that render such interim relief inadequate.

[5] To the extent the contested case concerns the Holdover Decision, Nā Moku previously challenged the legality of the Holdover Decision to the BLNR without success but did not appeal the BLNR's rulings. *See infra* Section IV.B.

In any event, even assuming *arguendo* that Nā Moku were to identify the specific harm it will purportedly sustain from continued suspension of the Water License CCH, judicial review of the BLNR's disposition of the Motion to Reconvene is not certain to provide Nā Moku with relief from such harms. Even if the Motion to Reconvene were granted, all that would guarantee is that the contested case proceeding will resume. It is speculative to determine at this juncture that Nā Moku is entitled to additional relief in the contested case hearing.

**B. Nā Moku's Challenged to the Holdover Decision is Untimely.**

Nā Moku challenges the Holdover Decision in the appeal and seeks a declaratory judgment that the BLNR, in allowing EMI's diversions to continue, is in violation of its duties pursuant to Article XII, § 7 of the Hawai'i Constitution, the public trust, and the Hawai'i Admission Act.[6] Nā Moku is time-barred from seeking such relief.

The BLNR rendered the Holdover Decision at its May 24, 2002 meeting. SROA Doc. 8 at 7. Nā Moku and MT filed various motions for summary relief, one of which challenged the legality of the Holdover Decision. Hearings Officer McConnell denied the motion in the 2005 Summary Relief Order issued on March 18, 2005 and concluded that preserving the *status quo* is in the public interest. *See* SROA Doc. 38 at 3, ¶¶ A.2-A.3 and 42-43, ¶ C.8.

In the 2007 Interim Relief Order issued on March 23, 2007, the BLNR again affirmed the legality of the Holdover Decision and declined to order the immediate cessation of EMI's diversions, finding that such a drastic measure would violate the public trust and be contrary to the public interest. *See* SROA Doc. 39 at 37-38 and 42-43, ¶ C.8. Nā Moku did not file an

[6] To the extent Nā Moku seeks these declarations with respect to the long-term lease, the BLNR has not rendered a final decision on the Application, so there is no action for this Court to review. It is also noteworthy that the Motion to Reconvene did not originally request reversal of the Holdover Decision and immediate cessation of all diversions. Nā Moku added that item of relief in an improper, last-minute amendment of the Motion to Reconvene. *See* ROA Doc. 3.

administrative appeal of this order within thirty (30) days of the order as required by HRS § 91-14(b).

Hence, Nā Moku's challenge to the Holdover Decision in this appeal is a stale request for reconsideration of the 2005 Summary Relief Order and/or 2007 Interim Relief Order that should be denied.

### C. Nā Moku is Time-Barred From Asserting a Claim Based on the Absence of an EA/EIS in Connection With the Holdover Decision.

#### 1. The limitations period for challenging the Holdover Decision under HRS chapter 343 has long expired.

Nā Moku is time-barred from seeking a declaration that the BLNR violated HRS § 343-5 by failing to require preparation and acceptance of, at minimum, an EA before allowing A&B/EMI to continue diverting the East Maui streams, and an order requiring BLNR to prepare an EA/EIS and to reconvene the CCH after doing so. HRS § 343-7(a) provides:

> Any judicial proceeding, the subject of which is the ***lack of assessment required under section 343-5***, shall be initiated within ***one hundred twenty days of the agency's decision to carry out or approve the action***, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within ***one hundred twenty days after the proposed action is started.***

(Emphasis added). Compliance with the time limits in HRS § 343-7 is mandatory and jurisdictional. *See Waianae Coast Neighborhood Bd. v. Hawaiian Elec. Co.*, 64 Haw. 126, 128, 637 P.2d 776, 778 (1981).

The Holdover Decision was rendered on May 24, 2002. Nā Moku did not file a lawsuit alleging violation of HRS chapter 343 within 120 days after May 24, 2002 or any time thereafter. Nā Moku is therefore time-barred from challenging the Holdover Decision under chapter 343.

Nā Moku may not bypass the limitations period by way of a request for a declaratory relief. Declaratory relief is unavailable where a statute provides a special form of remedy for a

specific type of case. *Punohu v. Sunn*, 66 Haw. 485, 487, 666 P.2d 1133, 1134 (1983). Because HRS chapter 343 specifically provides a remedy for violations of the EA/EIS requirement, Nā Moku may not recast its stale chapter 343 arguments as claims for declaratory relief.

**2. Appellant did not appeal the BLNR's determination that an EA does not need to be prepared prior to an interim disposition of water.**

Nā Moku's current request for an order to stop the existing diversions pending preparation of an EA is untimely for the additional reason that Nā Moku squandered its opportunity to appeal the BLNR's previous rulings on that issue. In 2004, MT filed a motion requesting, *inter alia*, a summary ruling that an EA must be prepared prior to an interim disposition of water such as the Holdover Decision. SROA Doc. 33 at 16. Nā Moku joined in MT's motion for summary relief. SROA Doc. 34. The 2005 Summary Relief Order denied the request. SROA Doc. 38 at 6, ¶ C.4. In the 2007 Interim Relief Order, the BLNR recited the determination in the 2005 Summary Relief Order that the Holdover Decision is not *per se* illegal, again affirmed the legality of the Holdover Decision, and concluded that immediate cessation of EMI's diversions would be contrary to the public interest. *See* SROA Doc. 39 at 2, 37-38 and 42-43, ¶ C.8. As such, the 2007 Interim Relief Order incorporated the findings and conclusions in the 2005 Summary Relief Order regarding the Holdover Decision, including the determination that the failure to prepare an EA in connection with the Holdover Decision was not unlawful. Nā Moku had the opportunity to appeal the 2007 Interim Relief Order pursuant to HAPA, but did not do so. Accordingly, Nā Moku's current challenge to the lack of an EA in connection with the Holdover Decision is untimely.

### D. The BLNR Did Not Abuse Its Discretion in Waiting For the Outcome of the East Maui IIFS CCH Before Resuming the Water License CCH.

The BLNR is not required by statute or rule to complete a contested case within a specific timeframe.[7] The BLNR therefore has discretion to set its own timetable for completing the contested case proceeding.[8] As demonstrated below, the BLNR is properly exercising its discretion to wait for the outcome of the East Maui IIFS CCH before resuming the Water License CCH.

#### 1. The BLNR is entitled to rely on the expertise of CWRM.

The Water License CCH is currently suspended because the environmental review process for the Application is not complete. A primary cause of delay in the environmental review process is the pendency of the East Maui IIFS CCH. There is a significant overlap between the issues implicated by the East Maui IIFS Petitions and the environmental review required for the Application, including, without limitation, the impacts of varying flow levels in East Maui streams on stream ecology, native Hawaiian traditional and customary practices, offstream uses, aesthetics, and water quality.

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[7] Nā Moku cites HAR § 13-1-38(b) out of context. That rule requires the BLNR to render findings of fact and conclusions of law in a contested case "within a reasonable time after the parties have had an opportunity to file objections and exceptions, if applicable, to filed briefs and to present oral arguments as may have been permitted." This rule applies ***after*** the contested case hearing is held. *See* HAR § 13-1-38(a) (setting procedure for party submissions to the BLNR "[a]fter all evidence has been taken"). The rule does not specify ***when*** the contested case hearing must be held or the ***timeframe*** in which the contested case must be completed.

[8] To be clear, A&B/EMI does not favor unnecessary delay of the Water License CCH. As the applicant for a long-term lease, A&B/EMI is negatively impacted by the uncertainty caused by delay. Indeed, in the interest of increasing certainty, HC&S argued to CWRM that it should consolidate the 27 East Maui IIFS petitions for decision making, and more recently, HC&S opposed expanding the scope of the East Maui IIFS CCH because that would entail reopening CWRM's decisions on IIFS petitions for which no contested case had been requested, thus destroying any relative certainty to be gained from those decisions. *See* SROA Doc. 40; SROA Doc. 55; SROA Doc. 56.

In accordance with the approach outlined by Judge Hifo, the BLNR is not required to duplicate the CWRM's efforts in the contested case for the East Maui IIFS Petitions. In the prior administrative appeal, Judge Hifo held that "the BLNR is not required to conduct a parallel investigation," and that "the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards," including the CWRM's disposition of the East Maui IIFS Petitions filed by Nā Moku. SROA Doc. 4 at 5. 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." *Id.* However, "[i]f 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." *Id.* (emphasis added).

Here, the CWRM is actively making progress toward final determination of the East Maui IIFS Petitions. But for Nā Moku's demand for a contested case for 13 of the 27 East Maui IIFS Petitions, the CWRM would have rendered its final determination of all 27 IIFS petitions by now. In any event, the contested case hearing on all 27 petitions is now scheduled to begin in January 2015. Given their imminence, it is well within the BLNR's discretion to wait for the outcome of those proceedings before resuming the Water License CCH.

**2. In recognition of the interplay between the determination of IIFS for East Maui Streams and environmental review for the Application, the parties consented to the current process of deciding the Application.**

Not only is the BLNR's approach to determining the Application sanctioned by Judge Hifo, but it has been consented to by all the parties in the Water License CCH, including Nā Moku. As the BLNR observed in the 2007 Interim Relief Decision: "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***." SROA Doc. 39 at 2 (emphasis added).

Despite all the criticism Nā Moku levies upon BLNR for not reconvening the contested case proceedings, Nā Moku has never suggested that the BLNR should take an approach different from that outlined in the Hifo Order. In 2004, Nā Moku joined in MT's request for summary relief as follows: "These proceedings should be stayed or continued until the required EA is prepared by BLNR." SROA Doc. 20 at 4; SROA Doc. 21 (Nā Moku's joinder). The 2005 Summary Relief Order granted the request. SROA Doc. 38 at 6, ¶ C.3.

Nā Moku still holds this position. The relief Nā Moku requests in the Opening Brief coincides with the sequence of events that must occur before the Water License CCH should resume. Nā Moku seeks an order requiring "Appellees A&B/EMI to complete an EA, or, alternative, an EIS, pursuant to HRS Chapter 343 ...." Opening Brief at 33. Nā Moku also seeks an order requiring "Appellee BLNR, ***upon preparation, filing, and acceptance of an EA or EIS pursuant to HRS Chapter 343***, to reconvene the contested case proceedings on the water licenses ...." *Id.* (emphasis added). In other words, Nā Moku agrees that environmental review should be conducted ***before*** the contested case proceedings resume.

As a practical matter, then, the Water License CCH should not resume until the East Maui IIFS CCH is completed and there is a final disposition of the East Maui IIFS Petitions. That is because environmental review relating to the Application is intertwined with the IIFS-process for the East Maui streams. Environmental review under HRS chapter 343 involves identifying and analyzing the environmental consequences of the proposed action. *See Sierra Club v. Haw. Tourism Auth.*, 100 Hawai'i 242, 272, 59 P.3d 877, 907 (2002) (noting that "under chapter 343, the agency must consider the potential environmental consequences of its actions

and allow public participation in the review process"); *see also* HAR §§ 11-200-12 (significance criteria), -10 (EA content requirements), -16 (EIS content requirements). Whether and to what extent environmental impacts would result from a grant of the Application depends on the IIFS that CWRM ultimately adopts for the East Maui streams, as that will determine how much water must remain in those streams. The amount of water that must remain in the stream to comply with the IIFS has implications for a wide array of matters that the EA/EIS for the Application must address, including, *inter alia*, impacts on biological resources such as native flora and fauna and their corresponding habitat, availability of water for native Hawaiian traditional customs and practices, water quality, economic impacts, cumulative impacts, and secondary effects.

Therefore, the BLNR did not abuse its discretion in denying the Motion to Reconvene. The BLNR is following the process to which all the parties, including Nā Moku, agreed. The length of the process should come as no surprise to Nā Moku given the complexity of the exercise to set IIFS for 27 streams.

**3. Any delay in resuming the Water License CCH is at least partially due to Nā Moku's intractable positions.**

Nā Moku is disingenuous in complaining of delay inasmuch as it contributed to the delay through its intractable positions in this case and the East Maui IIFS CCH. As noted above, environmental review should precede the contested case hearing in the instant matter. A&B/EMI originally proposed that the bidder on the long-term lease should prepare the EA. Since A&B/EMI submitted the Application for the long-term lease, that meant that A&B/EMI would prepare the EA. Nā Moku vigorously objected to the proposal. In a letter to the BLNR dated May 23, 2001, Nā Moku argued that the proposed disposition of State lands are not "applicant" proposals governed by HRS § 343-5(c), but "agency" proposals governed by HRS § 343-5(b). SROA Doc. 2 at 3. Thus, Nā Moku argued, the environmental review documents had to be

prepared by the BLNR rather than the bidders of the lease. *Id.* Nā Moku emphasized that this was "an important distinction" because requiring bidders to prepare the environmental review documents "would be highly prejudicial to the Public Land Trust and its beneficiaries by effectively eliminating all prospective bidders other than Alexander & Baldwin and its subsidiaries." *Id.* at 3 n.1. Nā Moku cautioned BLNR against giving A&B/EMI "an improper level of control over a process that must be neutral as to all prospective bidders and others concerned with the public resources at issue here." *Id.*

Nā Moku never formally withdrew its objection. In fact, A&B/EMI's reference to the objection in its memorandum in opposition to the Motion to Reconvene elicited no response from Nā Moku. *See* ROA Doc. 2, 7; ROA Doc. 10. Likewise, Nā Moku's Opening Brief in this appeal makes no mention of Nā Moku's prior objection even while Nā Moku seeks an order requiring A&B/EMI to prepare the EA/EIS for the Application.

Nor has Nā Moku attempted to reconcile its previous position that the disposition of State lands proposed in the Application is an "agency" proposal governed by HRS § 343-5(b) with its position in its January 13, 2014 letter to the BLNR that "the law changed and now places the burden on the applicant for the EA" to fund the EA process. ROA Doc. 17 at 1. The change in the law to which Nā Moku refers applies to "applicant" proposals. *See* HRS § 343-5(e). Unsurprisingly, the Opening Brief omits any mention of the foregoing discussion in the January 13, 2014 letter. Nā Moku's suggestion that A&B/EMI and/or the BLNR has improperly delayed the environmental review process is completely belied by Nā Moku's own self-contradictory positions as to who should conduct the environmental review for the Application.[9]

[9] Appellant further insinuates that because an EA has not been prepared, A&B/EMI have somehow been able to ignore the cultural impacts of the diversion of East Maui streams. To the contrary, in 2001, in conjunction with the Application, EMI commissioned a study by Kumu

Nā Moku further delayed these proceedings by advocating for the expansion of the scope of the East Maui IIFS CCH to include 27 IIFS petitions as opposed to the 13 petitions for which it had requested a contested case. In support of the expansion, Nā Moku recited its general stock arguments regarding protection of traditional and customary rights, but made no attempt to demonstrate actual need for additional relief with respect to the streams for which it had chosen to forego a contested case. Nā Moku did not identify specific changes in the circumstances that justified expansion despite its prior decision to forego requesting a contested case on (1) CWRM's determination of the 8 Prioritized IIFS Petitions (which encompass the streams that were subject of the 2007 Interim Relief Order) and (2) six of the remaining 19 petitions. Nā Moku has not demonstrated any need for the expansion other than its opportunistic desire to "take another bite at the apple" at the IIFS petitions it had previously deemed non-controversial.

The expansion will transform the determination of the East Maui IIFS Petitions into a far more complicated exercise than it originally was set out to be. The expansion enlarges the inventory of issues at stake, increases the amount of work required of the parties and CWRM staff, and augments the risk that the decision CWRM ultimate renders will generate further appeals. In short, by supporting the expansion, Nā Moku has protracted the process of obtaining resolution of the East Maui IIFS Petitions, and, in turn, the Application. Therefore, Nā Moku should be estopped from complaining about delays engendered by its own actions.

**4. Requiring the immediate resumption of the contested case would be an administrative burden and a waste of scarce public resources.**

The East Maui IIFS CCH is poised to begin in a few months. Given the overlap in issues between that proceeding and the Water License CCH, the BLNR is well within its discretion to

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Pono Associates entitled *Wai o ke ola: He wahi mo'olelo no Maui Hikina, Oral history interviews with families of Hamakua Poko, Hamakua Loa and Ko'olau, East Maui.* *See* SROA Doc. 43 (CWRM Staff Submittal for 9/24/08 CWRM Meeting, Item C-2) at 8.

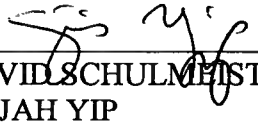
wait for CWRM to complete its work before embarking on its own analysis of similar, if not identical, issues. If the Court were to order the Water License CCH to go forward immediately, BLNR would essentially be required to duplicate the effort of its sister agency. Such an undertaking would not only be burdensome and expensive for all concerned. The interest of conserving scarce public resources counsels against requiring the BLNR to adopt such an unnecessarily duplicative approach to deciding the Application. *See Amor Family Broad. Group v. FCC*, 918 F.2d 960, 963 (D.C. Cir. 1990) (holding that agency did not abuse its discretion to adopt a procedural approach to accepting applications consistent with the public interest in conserving agency resources).

## V. CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal for lack of jurisdiction. To the extent the appeal seeks relief pertaining to the legality of the Holdover Decision and the lack of environmental review in connection with the Holdover Decision, the Court should hold that Nā Moku is time-barred from pursuing such relief. If the Court reaches the merits of the BLNR's denial of the Motion to Reconvene, it should affirm because the denial was a proper exercise of the BLNR's discretion.

DATED: Honolulu, Hawaii, September 30, 2014.

CADES SCHUTTE LLP



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

| | |
|---|---|
| NA MOKU AUPUNI O KO'OLAU HUI,<br><br>Appellant,<br><br>v.<br><br>BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, WILLIAM AILA, JR. in his official capacity as Chairperson of the Board of Land and Natural Resources, ALEXANDER & BALDWIN, INC. and EAST MAUI IRRIGATION, LTD., COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY, MAUI TOMORROW, and HAWAI'I FARM BUREAU FEDERATION,<br><br>Appellees. | CIVIL NO. 14-1-0918-04 RAN<br>(Agency Appeal)<br><br>CERTIFICATE OF SERVICE |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing ANSWERING BRIEF was duly served on the following parties at their respective addresses by hand delivery or U.S. mail:

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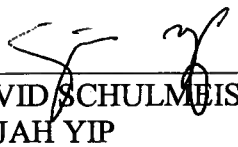

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