

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

2 STATE OF HAWAII

3 _____)
4 NA MOKU AUPUNI O KOOLAU HUI,)
5 Appellant,)
6 vs.)
7 BOARD OF LAND AND NATURAL)
8 RESOURCES et al,)
9 Appellees.)
_____)

Civil No.
14-1-0918

10 TRANSCRIPT OF PROCEEDINGS

11 before the Honorable Rhonda A. Nishimura, Judge, Tenth
12 Division, presiding, on November 14, 2014.

13 Oral Argument (Agency Appeal)

14
15 APPEARANCES:

16 ASHLEY K. OBREY, ESQ. For the Appellant
17 ALAN T. MURAKAMI, ESQ. Na Moku Aupuni O Koolau
18 CAMILLE K. KALAMA, ESQ. Hui
19 LINDA L.W. CHOW, ESQ. For State of Hawaii Board
of Land & Natural Resources
20 DAVID SCHULMEISTER, ESQ. For Alexander & Baldwin, Inc.
21 ELIJAH YIP, ESQ. East Maui Irrigation Company,
Ltd.
22 CALEB ROWE, ESQ. For County of Maui
23 KRISTIN K. TARNSTROM, ESQ.

24 REPORTED BY
Sharon Hulihee, RPR, CSR 306
25 Official Court Reporter
State of Hawaii

Official Court Reporters
First Circuit Court
State of Hawaii

1 THE BAILIFF: Calling calendar number two,
2 Civil number 14-1-0918 Na Moku Aupuni O Koolau Hui versus
3 Board of Land et al, for oral argument. Appearances
4 please.

5 MS. OBREY: Good morning, your honor. Ashley
6 Obrey, Alan Murakami and Camille Kalama on behalf of
7 appellant Na Moku.

8 MS. CHOW: Good morning, your honor. Linda
9 Chow on behalf of the defendant or appellee -- appellee
10 Board of Land and Natural Resources and State of Hawaii.

11 MR. SCHULMEISTER: Good morning, your honor.
12 David Schulmeister and Elijah Yip for appellees Alexander
13 & Baldwin Inc. and East Maui Irrigation Company Limited.

14 MR. ROWE: Good morning. Caleb Rowe and
15 Kristin Tarnstrom on behalf of the Maui County Board of
16 Water Supply.

17 THE COURT: Thank you.

18 As everyone can see, we're surrounded by
19 stuff. But as I mentioned to all of you, half an hour
20 each, so half an hour for appellant, and so if you wish to
21 save some time for rebuttal, let my law clerk know to give
22 you a time warning. And the defense side, you have half
23 an hour also collectively, so I'm not sure how you wish to
24 divide it amongst yourselves. I'm assuming you have a
25 game plan?

1 MS. CHOW: Yes, we do.

2 THE COURT: They already do have a game plan.

3 So, appellants, are you ready to proceed with
4 your opening argument?

5 MS. OBREY: We are ready to proceed, your
6 honor.

7 THE COURT: Go ahead.

8 MS. OBREY: Okay. And five minutes for
9 rebuttal. Thank you.

10 THE COURT: So initially at the outset, when
11 I look at your notice of appeal, and correct me if I'm
12 wrong, you are appealing under Chapter 91, the order
13 denying your motion to reconvene contested case
14 proceedings. Correct?

15 MS. OBREY: Correct.

16 THE COURT: So that's in your appeal. Now,
17 when I compare that with your reply brief, and bear with
18 me, in your reply brief, and this is on page 15,
19 subsection IV, the conclusion, you are requesting of the
20 court reversal of said motion and you're also asking the
21 court to have A&B/EMI to complete, at a minimum, an EA,
22 meaning environmental assessment; two, BLNR, upon
23 preparation, filing and acceptance of an EA or EIS, to
24 reconvene the contested case proceedings on the water
25 licenses; and, three, reverse and vacate the May 24, 2014

1 order granting A&B/EMI holdover permits pending the
2 outcome of the CCH.

3 Now, when I look at your conclusion and the
4 relief that you're requesting in your reply brief, I'm
5 trying to reconcile it with what the appeal is before the
6 court. Are you expanding it?

7 MS. OBREY: I think -- you know, we kind of
8 asked for the universe, I think, in the reply in a perfect
9 world.

10 THE COURT: I'm glad you admit to asking for
11 the universe. Don't confuse me. 'Cause I thought it was
12 a very -- limited to the motion, amended motion to
13 reconvene.

14 MS. OBREY: It is. And I think what it is
15 that we're asking the court to do if -- assuming you agree
16 with our point that it was improper to deny the motion to
17 reconvene, we would ask the court to send this case back
18 with instructions. Because there's been -- if you look at
19 the history of the proceedings, there's been quite a bit
20 of failure to comply with certain things and we just want
21 to ensure that all the processes are followed as we go
22 forward.

23 THE COURT: You understand also under
24 91-14(g) the court is constrained and limited under agency
25 appeal under Chapter 91. The court can, and this is the

1 only thing that the court can, affirm the decision or
2 remand the case with instructions for further proceedings
3 or it may reverse or modify the decision and order. So
4 that's the only thing that the court can do.

5 MS. OBREY: Then reverse and remand would be
6 the --

7 THE COURT: Okay. When you say reverse and
8 remand, remand is very specific because usually it
9 presupposes or presumes that a contested case proceeding
10 or hearing has already been held. And usually when I
11 remand instructions to the hearings officer, for example,
12 like due process, if the appellant was denied the ability
13 to call a particular witness, to introduce certain
14 evidence, due process, then I would remand for the
15 hearings officer to reopen the contested case proceeding
16 such that the appellant can call a particular witness,
17 introduce certain evidence or documents that they were
18 precluded from at the contested. So when you say remand,
19 in looking at -- you're asking for the universe, so it
20 doesn't sort of comport with a remand type of situation.

21 MS. OBREY: But to remand with instruction
22 about --

23 THE COURT: To reconvene --

24 MS. OBREY: Okay.

25 THE COURT: Because that's the only order

1 that you're asking the court to -- you're saying that
2 there was an improper denial.

3 MS. OBREY: Right. But to remand back to the
4 board, correct.

5 THE COURT: To reconvene.

6 MS. OBREY: Okay.

7 THE COURT: Yeah?

8 MS. OBREY: Okay.

9 THE COURT: 'Cause I think that's what you're
10 asking for. Secondly, yeah, so now we go past that
11 regarding does the court have subject matter jurisdiction
12 over the universe. Of course the answer is no. Yeah?

13 Now the other thing is whether or not the
14 order itself that you're appealing constitutes a
15 preliminary ruling. Okay.

16 MS. OBREY: Correct.

17 THE COURT: And then we also look at the
18 standing issue.

19 MS. OBREY: Okay.

20 THE COURT: Okay. Go ahead.

21 MS. OBREY: Okay. So --

22 THE COURT: We're ready.

23 MS. OBREY: As you know, we're here because
24 an agency refuses to do its job at the expense of our
25 clients and public trust resources. BLNR has halted a

1 13-year-old contested case hearing and handed A&B and East
2 Maui Irrigation control over 33,000 acres of crown land
3 and the water thereupon.

4 Na Moku, our client, is an organization of
5 Native Hawaiian farmers, fishermen and gatherers who rely
6 on these streams for their practices and they challenged
7 A&B and EMI's application for a long-term lease way back
8 in 2001.

9 THE COURT: And I believe they had gone
10 through the process --

11 MS. OBREY: Right.

12 THE COURT: -- in terms of Judge Hifo's
13 order, correct?

14 MS. OBREY: Correct. There has been -- there
15 was some movement towards closer to the beginning of the
16 proceedings and there's been a stall since 2007, not much
17 going on.

18 THE COURT: In other words, before issuance
19 of any kind of 30-year long-term lease, an EA, possibly an
20 EIS, needs to be done. I think that was the guts of Judge
21 Hifo's order.

22 MS. OBREY: Yes.

23 THE COURT: And I think it was affirmed.

24 MS. OBREY: Correct, yes, that is correct.

25 So with respect to your question about

1 jurisdiction, your honor, we say that the court has
2 jurisdiction pursuant to 91-14(a).

3 THE COURT: In other words, is this
4 particular kind of order a preliminary ruling?

5 MS. OBREY: Yes, it is, your honor.

6 First, BLNR's inaction here, a failure to
7 rule on Na Moku's motion to reconvene for two years is a
8 decision for the purpose of an agency appeal, which the
9 BLNR actually admits if you look at their answering brief.
10 Page 18, footnote five, among a few other pages, but the
11 quote is "for the purposes of this appeal, the motion is
12 deemed denied either by the effective denial of the motion
13 alleged by appellant or by the letter denying the motion."

14 THE COURT: So you understand there's a
15 distinction between this case and the *Kilakila* case which
16 the court is very familiar with --

17 MS. OBREY: Um-hum.

18 THE COURT: -- correct? And it was in terms
19 of the -- their right to have a contested proceedings. So
20 in that situation, you know, you had standing, and for
21 *Kilakila* in terms of the preliminary ruling, in terms of
22 you couldn't get adequate relief.

23 MS. OBREY: Um-hum.

24 THE COURT: Now in this particular case it's
25 not as if you're being deprived of your ability to be a

1 participant in the contested proceeding. This is in terms
2 of the motion to reconvene.

3 MS. OBREY: But I'd have to respectfully
4 disagree with you saying that --

5 THE COURT: Characterization.

6 MS. OBREY: Right. Because Na Moku doesn't
7 have the ability to do anything if there is no -- if there
8 are no hearings being held. Since 2007, the hearings have
9 been suspended and we can't put in any evidence, we can't,
10 you know, get any rulings about anything. We couldn't
11 even get a ruling on the motion to reconvene. And so any
12 relief that could have come out of a contested case
13 hearing which would be the goal, it's -- there's none.
14 There's been no finality and there's no decisions being
15 made.

16 THE COURT: Well, I believe, is it -- and
17 there's a lot of acronyms being thrown around here, like
18 IIFS --

19 MS. OBREY: Um-hum.

20 THE COURT: -- and I believe, like I think
21 the -- there is an agreement, and I believe Na Moku also
22 asked to expand to 27 streams because initially it was
23 only 13 streams, but then it was expanded to 27 streams in
24 terms of interim stream flow. Correct?

25 MS. OBREY: Um-hum, um-hum.

1 THE COURT: So that is taking place --

2 MS. OBREY: Correct.

3 THE COURT: -- yeah? And is there a
4 particular time period that you anticipate its completion?

5 MS. OBREY: As far as I understand, there's
6 been a new schedule set. And I wasn't there at the
7 hearing yesterday but I know the hearings will begin in
8 March and so it will be -- you know, it will happen.
9 However, we still would say that the BLNR does have an
10 independent duty to do --

11 THE COURT: In terms of parallel
12 investigation, in terms of -- because, see, when I look at
13 Judge Hifo's order, there is a certain type of caveat like
14 if, and in terms of who has the particular expertise, like
15 if one board or one agency does not adhere or meet its
16 particular obligation, and I guess it has to do with all
17 the IIFS, and in terms of the traditional cultural
18 Hawaiian gathering rights and everything else that, in
19 looking at Judge Hifo's order, then the board usually step
20 in and do it because otherwise it would be violative of
21 your duty. I think you cited to particular articles in
22 the constitution and there's section five, the public
23 trust and everything else in terms of the board's own
24 independent duty. Correct?

25 MS. OBREY: Um-hum. Correct.

1 THE COURT: So are we saying that -- and
2 correct me if I'm wrong, with respect to what's taking
3 place, are we at the juncture where you're saying that the
4 board needs to step in and do their own independent
5 investigation because it's not being done?

6 MS. OBREY: I think we are at that point even
7 years ago that they should have been doing their own
8 investigation, aside -- the Water Commission hasn't set
9 the IIFS all these years. The proceedings have been going
10 on for the same amount of time. And, frankly, what
11 happens in the BLNR is quite different than what's going
12 to happen at the CWRM. For one to two --

13 THE COURT: In other words, the acronym is
14 CWRM.

15 MS. OBREY: Water Commission, sorry. Yes,
16 you're right, sorry, the Commission on Water Resource
17 Management. So the two entities have very different
18 responsibilities and duties, right.

19 THE COURT: But there's some overlap with
20 respect to certain information --

21 MS. OBREY: Certain things, yes.

22 THE COURT: -- that's important.

23 MS. OBREY: They need to -- both -- both will
24 be addressing traditional and customary practices. Both
25 will be addressing the pertinent rights and that sort of

1 thing. However --

2 THE COURT: Slow down.

3 MS. OBREY: However --

4 THE COURT: I know you understand you have 30
5 minutes but we need a good record.

6 MS. OBREY: However, one thing to point out
7 to the court is the IIFS proceedings addresses 27 streams.
8 Now, within the 33,000 acres there are well over a hundred
9 streams that --

10 THE COURT: But we're not dealing with the
11 hundred streams. It's only what's before the CWRM with
12 respect to the 27 streams for IIFS.

13 MS. OBREY: In -- correct, for IIFS. But in
14 the BLNR proceedings, it's BLNR's duty to address the
15 whole thing.

16 THE COURT: The 30,000 acres of ceded land?

17 MS. OBREY: Right. So there's, you know,
18 it's a different scope for one.

19 THE COURT: I tried to read everything.

20 MS. OBREY: Yes. See, you understand, right?
21 So different -- a different scope, there are different
22 duties that BLNR has under different statutes, as you
23 said, Chapter 171. You know, they have to deal with the
24 --

25 THE COURT: Then you have your Chapter 343

1 regarding EA/EIS.

2 MS. OBREY: Correct.

3 THE COURT: The public trust doctrine.

4 MS. OBREY: Correct. And EA, for one,
5 doesn't -- it doesn't rely, need to rely on the IIFS in
6 the sense that IIFS are in the interim, they can change.
7 The environmental assessment is going to talk about the
8 impacts in general. And additionally, I mean, yeah, like
9 you said, Judge Hifo ordered it in this proceedings having
10 to do with the 33,000 acres, multiple streams --

11 THE COURT: Unfortunately, you know, both
12 sides presumed, or I don't want to take it lightly but
13 there would be a timeliness --

14 MS. OBREY: Right, to the BLNR proceedings.
15 Right. There's -- the BLNR's own rules talks about the
16 final decision coming within a reasonable time. So there
17 was reason to expect that there would be some decision at
18 some point. And then it came to 2012 and nothing's really
19 changed and it was time to pin the BLNR down and so we
20 filed a motion to reconvene that then sat for two years
21 and nothing happened.

22 THE COURT: From 2012?

23 MS. OBREY: Correct. So -- you're correct,
24 your honor. So --

25 THE COURT: And then just to put things in

1 context, under 91-14, in particular, subsection (a), "any
2 person aggrieved by a final decision and order in a
3 contested case or by a preliminary ruling of the nature
4 that deferral of review pending entry of a subsequent
5 final decision would deprive appellant of adequate relief
6 is entitled to judicial review."

7 So you're hinging your argument that this
8 constitute a preliminary ruling of the nature indicated in
9 91-14(a).

10 MS. OBREY: Correct. Yeah, you're right. I
11 wanted to get there actually.

12 The denial of the motion to reconvene
13 deprives Na Moku adequate relief because every day for
14 well over a decade EMI has been diverting without any
15 legal authority millions of gallons of water a day from
16 the streams in the licensed area that --

17 THE COURT: Under a, quote, unquote, holdover
18 status.

19 MS. OBREY: Correct, under a holdover status
20 which I think you recognized that there's nothing in the
21 law that allows for that to happen.

22 THE COURT: In terms of no legal basis.

23 MS. OBREY: Correct. So each day that EMI is
24 taking water from the stream is another day that Na Moku
25 members are being impacted.

1 In addition, BLNR hasn't complied with the
2 court order to complete the EA. That was nine years
3 before we filed the motion to reconvene but that was a lot
4 -- a lot longer from now.

5 THE COURT: There's a lot of corollary
6 proceedings within the span of, what, over a decade?

7 MS. OBREY: Yeah, um-hum. Nor have they
8 engaged in the requisite *Ka Pa'akai* analysis to engage in
9 traditional customary practices --

10 THE COURT: You need to spell that for the
11 court reporter so she doesn't --

12 MS. OBREY: Sure.

13 THE COURT: -- come and ask me later on.

14 MS. OBREY: Sure. It's K-a, and space,
15 Pa'akai is P-a-okina-a-k-a-i.

16 And for the last seven years BLNR has refused
17 to restart the proceedings to address these impacts or
18 even to make a final decision just to, you know, finish
19 this up once and for all.

20 THE COURT: Are they waiting for a logical
21 sequence of events as stated in their answering briefs?

22 MS. OBREY: That is what they say. However,
23 I think that's putting the cart before the horse because
24 shouldn't we be addressing whether the EMI even has a
25 right to the water in the first place before we even talk

1 about how much water they should be required to put back
2 in the streams. I mean, it's sort of --

3 THE COURT: The cart and the horse or the
4 horse and the cart.

5 MS. OBREY: Yeah, I don't know which one but
6 -- but, ultimately, after 13 years Na Moku can't afford to
7 wait until the proceeding is complete before requesting
8 relief. This was -- this was their opportunity to try to
9 get things going again. They were denied.

10 THE COURT: What do you hope in terms of to
11 reconvene the contested case proceedings?

12 MS. OBREY: Ultimately our goal is finality
13 one way or the other.

14 THE COURT: Well, the contested proceedings,
15 what is the scope of that in terms of -- because, you
16 know, you filed the amended motion to reconvene.

17 MS. OBREY: Right.

18 THE COURT: Yeah? So the issues to be
19 decided on during the -- within the scope of the contested
20 proceedings is what? Because you're asking for -- you
21 know, you're being deprived of adequate relief contained
22 within the contested proceedings because you filed a
23 motion to reconvene so you can get it started.

24 MS. OBREY: Right. In the motion to
25 reconvene we did ask about the EA, again mentioning the

1 2003 order so that's something that we wanted to see.

2 THE COURT: In connection with the holdover
3 permits?

4 MS. OBREY: In connection --

5 THE COURT: Because, you know, there's no
6 dispute that you need an EA/EIS for the license.

7 MS. OBREY: Right, for the license.

8 THE COURT: And I think BLNR does recognize
9 that.

10 MS. OBREY: Right. And then -- and with
11 *Kahana Sunset* saying that, you know, an EA should be done
12 prior to the start of a contested case hearing so as not
13 to unduly burden members of the public. Well, here,
14 that's Na Moku. And without the EA it's im -- well, not
15 impossible, but it's certainly over burdensome where it's
16 not their burden to have to present evidence about the
17 impacts.

18 THE COURT: And I think there were some
19 subissues regarding whose burden is it to prepare the EA,
20 and I think it went back and forth and there was new
21 legislation.

22 MS. OBREY: Right. Yeah. So now there's new
23 legislation that I think maybe that -- that resolves that
24 issue for everyone.

25 THE COURT: In terms of the applicant versus

1 BLNR?

2 MS. OBREY: Correct. So, you know, going --
3 I mean, just -- so we would like to get back in, we would
4 like the impacts on our clients to be analyzed, we want
5 the EA to be done. And then if BLNR decides they want to
6 issue the lease to EMI, well, then at least there's a
7 decision and then we can move on from that. But we want
8 to get back into the proceedings so we can address Na
9 Moku's right.

10 THE COURT: See, you brought up a good point
11 in terms of the impact upon your clients. Wouldn't the
12 impact upon your clients depend upon the CWRM's decision
13 regarding the IIFS?

14 MS. OBREY: Both proceedings will have
15 impacts on our clients, that's certainly true.

16 THE COURT: So isn't there particular
17 expertise or particular fact-gathering analysis taking
18 place under the CWRM for the IIFS?

19 MS. OBREY: As to -- as to those 27 streams,
20 perhaps that will happen. But, again --

21 THE COURT: So would it make sense for the
22 BLNR to undertake their own investigation when it's
23 already being done for those 27 streams?

24 MS. OBREY: Well, our case law says that the
25 agencies have independent trust duties to take care of,

1 you know, to analyze impacts on our public trust
2 resources, Native Hawaiian traditional and customary
3 practices. We have the *Waiahole* decision, *Ka Pa'akai* as I
4 mentioned, and the recent *In re Au* decision. And, you
5 know, there -- that needs -- I mean, that doesn't go away
6 because there's another proceeding occurring at the Water
7 Commission. They're two separate entities with different
8 duties.

9 THE COURT: Would there be duplicative
10 efforts or investigation being done by both CWRM and BLNR
11 if BLNR is ordered to undertake this kind of
12 investigation?

13 MS. OBREY: I mean, there's going to be some
14 overlap but ultimately even the Circuit Court in 2003 said
15 that BLNR should not be rubber stamping what the Water
16 Commission does and so, you know, everything supports the
17 fact that BLNR should be doing its homework basically in
18 addition to what the Water Commission is doing.

19 And, you know, we see -- the Water Commission
20 has taken this long. If you even look back to May 2010
21 when the IIFS's were set the first time, albeit
22 incorrectly because we appealed and all of that, but there
23 was no action by BLNR after that. So if their argument is
24 true that, yes, you know, we need to wait for the IIFS's
25 to be set so we can go forward, well, what action took

1 place then? Nothing. So --

2 THE COURT: Would there be anything like,
3 assuming hypothetical, assuming arguendo, that the court
4 grants your appeal and say, okay, in terms of the motion
5 to reconvene contested case proceeding, would there --
6 anything that prevents BLNR to then say, well, we need to
7 wait until CWRM finishes their investigation and comes out
8 with the IIFS for the 27 streams, any kind of impact
9 statements or anything that deals with the traditional
10 Hawaiian cultural rights?

11 MS. OBREY: Well, they do need to --

12 THE COURT: Regarding timing.

13 MS. OBREY: They need to complete the EA
14 immediately so that is going to affect timing. That's
15 clear under *Superferry*, that's clear under *Citizens for*
16 *the Protection of the North Kohala Coastline* and *Kahana*
17 *Sunset*. And --

18 THE COURT: And would the EA also take into
19 consideration what CWRM may come up with regarding the
20 IIFS?

21 MS. OBREY: I guess it could depending on
22 timing, but it's not dependent on what CWRM does. Its --
23 its own -- I mean, they need to analyze impacts also. You
24 know, one thing I failed to mention earlier is
25 environmental assessments, they analyze alternatives, and

1 maybe there's a different alternative for this water and
2 for this land, and that's something that's definitely not
3 happening at the Water Commission because the Water
4 Commission is assuming that at the end of the day EMI is
5 getting water. It's a foregone conclusion EMI is getting
6 water, but we don't even know here if they have a right to
7 it in the first place because they've been diverting water
8 for the last however many years without -- without any
9 legal authority.

10 THE COURT: Okay. Anything else 'cause I
11 think you saved some time for rebuttal?

12 MS. OBREY: I think -- no, I think I'll save
13 my time for rebuttal. Yeah. Thank you.

14 THE COURT: All right. Who wishes to take
15 the lead first?

16 MS. CHOW: I don't wish it but I will do it.

17 THE COURT: All right. Go ahead.

18 MS. CHOW: So I'm going to sort of do the
19 lead-in for our side. County of Maui will talk briefly
20 and then Mr. Schulmeister, I think, will do the last part
21 of the wrap-up. I don't anticipate my section taking very
22 long and so I think we'll be within our time limit.

23 There are really two main issues in this
24 appeal. The first as the court has adequately pointed out
25 is whether or not this court actually has jurisdiction.

1 THE COURT: And that's subject matter
2 jurisdiction?

3 MS. CHOW: Subject matter jurisdiction based
4 on 91-14.

5 And then the second question is really
6 whether the board was correct in denying the motion to
7 reconvene, okay, assuming as Ms. -- Ashley Aubrey -- Obrey
8 points out, assuming that the board did deny the motion to
9 reconvene either effectively or actually through the
10 letter.

11 So on the question of jurisdiction, the point
12 that Na Moku has never answered is what is their standing.
13 So as part of 91-14, as this court pointed out, you must
14 both be a person aggrieved and have a ruling that is
15 subject to appeal. Na Moku has not pointed out how they
16 have -- how they are personally aggrieved.

17 THE COURT: In other words, how they have
18 standing? In other words, are they a person aggrieved
19 under 91-14?

20 MS. CHOW: Correct. And to show that --

21 THE COURT: And I believe there's certain
22 case law that speaks to an injury in fact.

23 MS. CHOW: Exactly. And the injury in fact
24 show that they must have suffered an actual or threatened
25 injury.

1 THE COURT: Isn't it much more liberal with
2 respect to Native Hawaiian rights for standing purposes?

3 MS. CHOW: And that may be the case but they
4 have made no allegations in this case different than what
5 has been raised and answered by the board previously.
6 They don't show that the injury that they may face is
7 traceable to the agency's decision. As you have aptly
8 pointed out, the agency decision was only not to deny the
9 motion to reconvene the contested case, not that they
10 would get any sort of substantive relief or, you know,
11 what the substantive relief or substantive decision of the
12 board may be pursuant to a contested case but merely that
13 whether a contested case, further contested case should be
14 held.

15 Lastly, a favorable decision here would not
16 likely provide relief for the injury. Again, the relief
17 that could be granted by this court is either to affirm
18 the decision of the board or --

19 THE COURT: In terms of denying the motion to
20 reconvene?

21 MS. CHOW: Exactly, or reversing the board
22 decision and sending it, remanding it back to the board to
23 hold a contested case hearing. And that's a limitation of
24 it. Whether or not that would address any injury that is
25 being alleged, actual injury being alleged by Na Moku,

1 it's -- there's not a direct connection there so it's not
2 --

3 THE COURT: So in terms of a motion to
4 reconvene, isn't part of their injury that they're
5 claiming in terms of the time that's passing regarding the
6 diversion of the water over these how many years?

7 MS. CHOW: Yes. And, you know, that -- that
8 question was addressed by the board in its 2007 decision.
9 Although the factual history of this case is very
10 confusing, the board did hold an evidentiary hearing for
11 the purpose of determining whether or not diversions
12 needed to be restricted or stopped in order to provide
13 relief for Na Moku and the appellants for their
14 traditional and customary Native Hawaiian rights. The
15 evidence that was produced, you know, as found in the
16 findings of fact was the testimony of one taro farmer, Ed
17 Went, that was presented during the hearing. Based on
18 that testimony the board ordered that diversion of
19 Waiokamilo stream be reduced in order to allow a certain
20 amount of stream flow to remain in the stream.

21 The -- and the board also indicated that if
22 circumstances change, that, you know, they could come back
23 and they could relook at this.

24 THE COURT: Revisit the issue and possibly
25 make adjustments?

1 MS. CHOW: Yes. But Na Moku hasn't indicated
2 -- did not indicate in their motion to reconvene that any
3 conditions have changed or that there are any
4 circumstances that would warrant relooking at that issue.
5 And so the board had nothing on which to base its decision
6 to grant the motion to reconvene.

7 THE COURT: In terms of alleged injury?

8 MS. CHOW: In terms of an alleged injury.

9 And in terms of whether or not there was a
10 basis to even grant the motion to reconvene.

11 And as pointed out by this court, this -- the
12 ruling of the board also needed to be a preliminary ruling
13 that is subject to appeal under 91-14. Hawaii case law
14 has applied this provision where the agency decision has
15 ended a party's participation in the proceedings. That
16 was seen in *PASH*, the *HGEA* case, and the *Gealon* case.

17 The board's denial in this case for the
18 motion to reconvene did not end Na Moku's participation in
19 the contested case. The board's decision does not affect
20 Na Moku's ability to obtain relief through participation
21 either in future contested case hearings before the board
22 or for their participation in a contested case hearing
23 pending before the Water Commission. Na Moku has failed
24 to satisfy the requirement or to show that they have met
25 the requirements of 91-14.

1 THE COURT: Well, let me ask this, going to
2 the issue: What is the reason for BLNR not to proceed
3 with holding a contested case proceeding?

4 MS. CHOW: Because a lot of what the board
5 needs to consider is both being considered by the Water
6 Commission in their contested case proceeding and it's --
7 and it's sort of dependent on their decision.

8 THE COURT: So are you saying that they're
9 waiting for CWRM to issue certain decisions or something
10 involving the IIFS involving -- pertaining to the 27
11 streams and you're waiting for that to be completed and to
12 use it as part of the contested case proceedings or
13 information that you need?

14 MS. CHOW: Correct. And so if you go back to
15 Judge Hifo's ruling, she identified that the board cannot
16 make a decision to lease water that is in excess of what
17 is needed to remain in the streams until we know -- until
18 the board knows what is excess. And --

19 THE COURT: And you're saying the board does
20 not have expertise but you have to rely upon CWRM?

21 MS. CHOW: The board does not have the
22 expertise to determine how much water is required to
23 remain in the stream as part of the interim in-stream flow
24 standards. Although the board in its decision made --
25 made its decision subject to the amendment of the IIFS and

1 the amount that could be diverted would be reduced in
2 accordance with that, the court said that was improper and
3 that the determination of how much water needed to be kept
4 in the streams had to be made first.

5 THE COURT: And you're saying for that kind
6 of determination the board does not have the expertise?

7 MS. CHOW: We do -- the board does not have
8 the hydrological expertise necessary to make those
9 decisions. It is cooperating in making those decisions as
10 required by Judge Hifo's order. The Division of Aquatic
11 Resources, which is part of the BLNR, is participating in
12 the contested case and will be presenting evidence and
13 testimony in the contested case and he's being -- they're
14 being called on behalf of the hearing officer actually.

15 THE COURT: In terms of the scope of any
16 environmental assessment, would the environmental
17 assessment also include the information that you would be
18 waiting upon from the CWRM?

19 MS. CHOW: Yes. And again it goes back to
20 the issue of how much water can be subject to a water
21 lease. And that's not to say that the board will
22 necessarily decide that any water that is not required to
23 be kept in the streams can be diverted. That would be the
24 second part of the contested case that they need to do.
25 Once they -- once they find out from the Water Commission

1 how much water has to stay in the streams, then they can
2 decide what is the appropriate disposition of the water
3 that is not required to stay in the streams, and that
4 decision could be that it should remain in the streams.
5 That decision could be that all of the water not required
6 to be kept in the stream can be leased to HC&S, or EMI, or
7 it could be a combination of that.

8 THE COURT: Is there any part of the
9 contested case proceedings that can commence independent
10 upon what's being done at CWRM?

11 MS. CHOW: I'm trying to think of that.
12 There are no issues that readily come to mind.

13 THE COURT: Are all issues inextricably
14 interrelated with what's being done at CWRM or can it be
15 done independent of?

16 MS. CHOW: I believe that it is inextricably
17 intertwined with what is being done and --

18 THE COURT: Everything, all the issues in the
19 contested case proceeding should it be reconvened?

20 MS. CHOW: Should the contested case hearing
21 be reconvened?

22 THE COURT: Correct. Are there any
23 components that can be done independent of what's being
24 done at CWRM?

25 MS. CHOW: The components identified by Na

1 Moku I don't think can be done, and I cannot think of any
2 components that can be done or should be done prior to the
3 Water Commission making its determination.

4 THE COURT: You're the lead-up batter?

5 MS. CHOW: Yes.

6 THE COURT: Who's next?

7 MS. CHOW: County of Maui.

8 THE COURT: County of Maui. You're up.

9 MR. ROWE: Good morning, your honor. I'm
10 just going to speak really, really briefly. As you saw in
11 our motion --

12 THE COURT: I always hear this "really,
13 really briefly" to my chagrin.

14 MR. ROWE: I'll try to be honest about it.

15 THE COURT: I've also heard that before.

16 MR. ROWE: Okay. Under HRS 91-14(a), as
17 we've been discussing, there needs to be a preliminary
18 ruling in order -- or a final decision in order for there
19 to be an administrative appeal.

20 THE COURT: Does this particular order fall
21 within that discreet category of a preliminary ruling?

22 MR. ROWE: We do not believe so. And we
23 agree with the arguments that the State has been making to
24 that effect. Like they said, the Na Moku is still a party
25 to any decision that might be coming down.

1 The Na Moku in their opening brief did
2 mention the *Kilakila O Haleakala* decision, and I will
3 leave my comments in that that case is very
4 distinguishable from here. In the present case there's
5 been no final determination of any water rights as opposed
6 to in the *Kilakila* decision there was a constructive
7 denial because there was ultimately a final decision that
8 came after that that then kind of quashed anything that
9 would have been going on in that other decision. In this
10 current case there has been no final decision on any
11 rights for either Na Moku or for EMI or the County.

12 THE COURT: Regarding water rights, regarding
13 the stream capacity, regarding the EA/EIS, regarding the
14 legality of the holdover permits, no determination?

15 MR. ROWE: Correct. That's our position.

16 THE COURT: Okay. Was that brief?

17 MR. ROWE: Yeah. I hope so.

18 THE COURT: Who's up next?

19 MR. SCHULMEISTER: That would be me, David
20 Schulmeister for Alexander & Baldwin and East Maui
21 Irrigation.

22 One of the difficulties that I have with the
23 appeal is just understanding, envisioning exactly what it
24 is that they're really asking for. And I think the court
25 had asked some questions right at the outset that were

1 also focussed on that when you look at the conclusion of
2 the reply brief and compare that to the appeal. And, I
3 mean, it sounds -- on the one hand they're saying, well,
4 we want to reconvene, but then we have this huge amount of
5 arguments that relate to all these different things, many
6 of which have actually been dealt with in the past.

7 THE COURT: In one form or another during the
8 past several years.

9 MR. SCHULMEISTER: Yeah. And the one that
10 really, I think, is the most important and is the easiest
11 to kind of -- and we have this timeline that's been
12 extended for 12 or 13 years, but in 2007 which is, you
13 know, roughly halfway through that, we have a fairly
14 significant ruling with findings of fact and conclusions
15 of law that has been referred to as the March 23rd, 2007
16 order. And, I mean, that's a very useful order to look at
17 and there's about two or three parts of it that I think
18 are very helpful in terms of, you know, getting a higher
19 level of perspective on this.

20 To me, the most significant passage is on the
21 second page, and we've quoted it in the brief where --
22 'cause this is after Judge Hifo had already issued her
23 order reversing the earlier ruling and basically has set,
24 you know, what we could call the law of the case that an
25 environmental assessment would have to be done in

1 connection with the long-term lease. So I'm just quoting
2 now on page two. It says, "All parties now concede that
3 an EA and potentially an environmental impact statement
4 must be prepared, amended IIFS must be determined, and
5 that this process is likely to take years."

6 So that's in 2007. Now -- so basically --
7 and then what this 2007 order also --

8 THE COURT: When she says years, we're
9 looking at seven years now --

10 MR. SCHULMEISTER: That's right.

11 THE COURT: -- from the 2007 order.

12 MR. SCHULMEISTER: Well, but then if you --
13 and you have to look at what happened after that because
14 --

15 THE COURT: And I see where in terms of
16 initially there was some determination on the IIFS but 13
17 streams. And was it 13 or eight streams?

18 MR. SCHULMEISTER: No, initially it was eight
19 and that --

20 THE COURT: Eight streams, yeah?

21 MR. SCHULMEISTER: And that was in 2008, so
22 not that long after the March 23rd order. So basically --
23 so what happened was the March 23rd order was issued, and
24 I think it's very important to keep in mind that an issue
25 that was clearly, squarely argued and addressed in there

1 was, you know, will the -- will the status -- what's going
2 to happen with the status quo while we're waiting for all
3 this. That was dealt with and the board came out -- and
4 basically it was argued that, well, these diversions are
5 illegal, you know, the holdover status has no basis in
6 law, you know, I mean, and the board came out with a
7 ruling, finding of fact/conclusion of law as well.

8 THE COURT: In other words, it was addressed,
9 there was no appeal.

10 MR. SCHULMEISTER: And there was no appeal.
11 And basically what was -- what was determined was it
12 wouldn't be in the public interest to just suddenly shut
13 down this thing because you had the County of Maui's water
14 system that was dependent upon it, you had -- this
15 plantation was operating, all these jobs, you had -- there
16 were a lot of things going on. But the board says, but we
17 hear you, Na Moku, about -- in the meantime, I mean, do
18 you need relief? So what we're going to do is we're going
19 to have a hearing that gives you an opportunity to come in
20 and ask, you know, if we need to make any adjustments.
21 We're not going to make you wait until the end to get you
22 relief. And so that hearing was held. And if you --

23 THE COURT: And I believe during the course
24 of time there may have been one or more applicants
25 regarding the taro in terms of the amount of water that

1 was needed.

2 MR. SCHULMEISTER: Yeah, I mean --

3 THE COURT: And adjustments were made.

4 MR. SCHULMEISTER: Well -- that's right. I
5 mean, most of the Na Moku members who raised taro were
6 right in Wailuanui Valley which is there's two streams
7 that affect their ability there. The main one's
8 Waiokamilo. Ever since this 2007 decision EMI has not
9 diverted Waiokamilo stream at all. So, I mean, over and
10 over we hear the refrain that we have to wait all these
11 years for relief. Well, in fact, in 2007 EMI completely
12 stopped diverting the main stream where all these taro
13 growers live. And then in 2008 -- and I think it's
14 important to keep in mind that this was pursuant to the
15 March 23rd, 2007 decision which also recounted who had
16 come forward, what evidence they put on. And like in the
17 case of Wailuanui stream, which is the other stream, they
18 didn't put on any evidence asking for water there.
19 But in 2008 the Water Commission also restored water
20 there. So -- so you have Wailuanui partially restored,
21 Waiokamilo completely restored, and the other stream was
22 Honopou, and that -- that exhausts all of the streams
23 where they came forward saying something specific, saying
24 we need something for taro. Honopou was -- the diversion
25 was reduced in 2008 by the Water Commission and

1 they didn't appeal that either. So it's very hard to
2 understand what it is exactly they're asking for. The
3 issue about whether or not the diversions had to stop
4 pending these longer term studies was dealt with, was
5 decided in 2007, and was not appealed.

6 And then the other issue was whether or not
7 in the meantime, because of the constitutional obligations
8 or public trust doctrine or any other reason, that efforts
9 had to be made to address conditions on the ground.
10 They've had that opportunity, and they still have that
11 opportunity, and it was missing from the motion to
12 reconvene. It makes it difficult to really understand
13 what is the object here, is they didn't come in and say,
14 oh, well, on Palauhulu stream or Honopou stream or Huelo
15 stream we need an adjustment. They didn't come in with
16 anything like that. Instead, all of those streams were
17 actually dealt with in the 2008 IIFS and they didn't
18 appeal it so naturally everyone thinks, okay, we have
19 dealt with those conditions, so now we have to move
20 forward with this program that everyone agreed to in 2007
21 that the sequence was, first we get the IIFS because, as
22 Judge Hifo said, how do you know -- how are you going to
23 measure the impacts if you don't know how much water has
24 to be left in the stream, who's going to decide that.
25 See, everyone was on board with that in 2007.

1 And so now here we are. CWRM is going to
2 address that again the third time next year. I mean, I
3 would understand their position a lot better and what they
4 were asking for if they had come in and said, well, we all
5 -- we understand all that but, look, we have a problem on
6 this stream here and someone's getting hurt and this is
7 what it is, this is what we need you to do. They haven't
8 done that. I mean, instead, this seems like most of their
9 argument is built around trying to rewind the tape to the
10 arguments that were made in 2007 and say, no, actually all
11 of the diversions have to stop right now, all of them.
12 Shut down the County of Maui, shut down everybody because
13 that was illegal, that was wrong. But they didn't appeal
14 it in 2007. So it's like -- it's almost like they're
15 saying -- they're making that argument. But then, again,
16 when you ask them, what are they asking for, well, we just
17 want to go back and restart the process. It's very
18 confusing.

19 I would submit that -- I would just join in
20 the State's position on jurisdiction and the lack of
21 standing because there's no injury in fact. And I would
22 say in answer to your question, is there anything that
23 could be done pending, I would say -- I would say yes.
24 What you could do is we could have another interim relief
25 hearing like we did in 2007 if they actually came forward

1 with somebody who said they had a problem.

2 THE COURT: In terms of an injury in fact.

3 MR. SCHULMEISTER: That's right, and then we
4 could deal with it.

5 THE COURT: As to a particular stream?

6 MR. SCHULMEISTER: Absolutely. And then we
7 could deal with it. I think the board could do that. And
8 we would try to meet with them and solve it without even
9 having to go that far. But we haven't been presented.
10 Instead, it's the big picture, it's all or nothing.

11 THE COURT: The universe?

12 MR. SCHULMEISTER: Exactly.

13 THE COURT: All right, clean-up batter. That
14 was it?

15 MS. CHOW: Yes.

16 THE COURT: Okay. Rebuttal time.

17 MS. OBREY: I first wanted to address
18 *Kilakila* briefly just to say that I recognize -- I mean,
19 maybe the phases of where we're at is different than in
20 *Kilakila*. However, it's similar in the sense that for all
21 intents and purposes, the rights have been determined in
22 that there is a diversion and we have been denied the
23 right to continue in the -- in the proceedings to address
24 Na Moku's rights, and so in that sense it's -- that's how
25 we found it applicable. Basically the board went on to

1 address the merits in the sense that EMI does have control
2 over the water as if it were granted the lease because it
3 has -- it has all the privileges of the lease for the last
4 --

5 THE COURT: What kind of relief are you
6 requesting in your contested case proceedings that have
7 not already been dealt with and there have been no appeal?

8 MS. OBREY: We, I mean, we want to address
9 our -- well, we want the EA which still needs to be done.

10 THE COURT: The EA for what?

11 MS. OBREY: For the impact of the diversion
12 on all the streams. There are over -- over 20 -- so
13 there's the 27 streams in the Water Commission but
14 hundreds of streams within the 33,000 acres and it says
15 for a 30-year license. It's a different proceeding.

16 THE COURT: Okay. But we understand that for
17 the 30-year license an EA has to be done, but I believe
18 that process is on hold pending the CWRM because in terms
19 of part of the 30,000 acres of ceded lands does encompass
20 the 27 streams in which CWRM is making a determination as
21 to the IIFS, so that will be part of any overall EA for
22 any kind of long-term 30-year lease.

23 MS. OBREY: But our position is that -- and
24 the law requires that the EA be done at the earliest
25 practicable time, and that was ordered in 2003, and I

1 would say it's been way past the earliest practicable
2 time.

3 THE COURT: I guess the gist of it is that
4 what is meant by practicable?

5 MS. OBREY: Well, I mean --

6 THE COURT: I mean, as you say, cart before
7 the horse, horse before the cart.

8 MS. OBREY: I mean, I just -- I look at this
9 --

10 THE COURT: Because I know what I plan to do.
11 You want to hear it?

12 MS. OBREY: I'd like to finish what I have to
13 say, if possible --

14 THE COURT: Okay.

15 MS. OBREY: -- before you say what it is you
16 want to --

17 THE COURT: See if I change or not change my
18 mind because, you know, you may be on positive footing.

19 MS. OBREY: Yeah. What do you want me to do?

20 THE COURT: You want to wait? Why don't you
21 wait and see what I say? All right? And if you wish, you
22 know, do more persuasive advocacy to change my mind, in
23 case my mind needs to be changed, then you can. But if
24 it's in your favor you might not want to say anything.
25 Right?

1 MS. OBREY: I'm very confused.

2 THE COURT: It's up to you. If you want to
3 make your complete record, go ahead 'cause you do still
4 have some time.

5 MS. OBREY: Okay. Well, yeah, I think, I'm
6 --

7 THE COURT: I see Mr. Murakami says take the
8 time, take the time.

9 MS. OBREY: Yeah, yeah. In terms of
10 standing, I just wanted to address real quickly that's
11 been decided back when Na Moku's petition for contested
12 case hearing was granted in 2001, not to mention the ICA
13 *In Re Waikamoi* said that we have standing. They're
14 estopped from making that argument. And just -- I don't
15 know, I'm not really believing that that's what we're
16 talking about at this juncture 13 years later.

17 I disagree with the idea that this denial has
18 not kept Na Moku out of participation in the proceedings.
19 Without a hearing convening, Na Moku cannot participate.
20 I mean, there's nothing -- there's nothing -- no way for
21 them to voice their concerns without --

22 THE COURT: Having a contested hearing.

23 MS. OBREY: -- having a contested case
24 hearing.

25 BLNR's duties are different from the

1 Commission's as I mentioned before. Some things that
2 probably could be addressed in addition to what Mr.
3 Schulmeister said is, I mean, we talk about lease rents
4 before the BLNR, there's ceded lands at play, the EA still
5 needs to be done. You know, there are separate things
6 separate and apart from what the Water Commission does.

7 THE COURT: Separate and apart, distinct and
8 no overlap.

9 MS. OBREY: And distinct. Correct, there
10 are. And at minimum those things should start
11 immediately.

12 The motion to reconvene did mention the need
13 for an EA so there is --

14 THE COURT: And the thing is that, you know,
15 what's not being addressed is the scope of the EA because
16 you're looking at the scope of the EA, you know, what's to
17 be addressed. Is it part of what's been taking place
18 parallel -- is it part of what's been taking place at the
19 CWRM with respect to the IIFS and is it -- and is part of
20 the EA something that the BLNR is supposed to be doing
21 independent of CWRM? So there might be different
22 components of the EA.

23 MS. OBREY: Correct. And one thing that I
24 did want to point out. And there have been studies done,
25 and I apologize, I can't tell you for sure whether or not

1 it's in our current record, but the Division of Aquatic
2 Resources has done studies about how much water is
3 necessary to get -- put back in streams for 90 percent
4 restoration of the habitat and there is that information
5 that exists that the BLNR could access to do the EA now
6 without the Water Commission.

7 THE COURT: Does that encompass the 33,000 or
8 is it just part of?

9 MS. OBREY: Well, it's part of. But it's the
10 same -- I mean, it would address the same things that the
11 Water Commission would address. I mean, at least it's
12 something to work off of, so they can't say there's
13 nothing to work off of without the Water Commission.

14 THE COURT: It's a source?

15 MS. OBREY: Correct. Not to mention the 2008
16 and 2010 Water Commission decisions before where there was
17 some analysis. Whether or not we agree with all of it,
18 there's --

19 THE COURT: Slow down.

20 MS. OBREY: -- there's something.

21 As I said, the holdover status has been in
22 existence for over half the life of this lease term
23 applied for. For all intents and purposes EMI has this
24 long-term lease and Na Moku hasn't been able to get back
25 in the proceedings to do anything about it. And so

1 basically we're asking this court to require the BLNR to
2 take action and address the EA which again was in the
3 motion to reconvene, so this court can at least make a
4 mention of that in its ruling and to do the *Ka Pa'akai*
5 analysis. And ultimately we're saying that you shouldn't
6 allow the BLNR to allow EMI to have absolute control over
7 this land and this water without Na Moku being able to get
8 back in.

9 THE COURT: Without complying with their
10 independent duty?

11 MS. OBREY: Yeah. That is correct.

12 THE COURT: All right.

13 MS. OBREY: Thank you.

14 THE COURT: I'm ready.

15 MS. OBREY: Thank you.

16 THE COURT: Okay. I'm not going to give you
17 the universe, first of all. But in terms of your amended
18 motion to reconvene, I'm going to grant your motion but
19 these are the conditions.

20 In terms of reconvening the contested case
21 proceedings, it's not to be duplicative of what's been
22 taking place by CWRM with respect to the IIFS since that's
23 already taken place and I don't see it as reinventing the
24 wheel or duplicating efforts. But if there are components
25 of the contested case proceedings that is independent of

1 and not interrelated with what's been taking place at
2 CWRM, there doesn't seem to be any justifiable reason for
3 the BLNR to undertake those components of the contested
4 case proceedings now.

5 And if there is any type of -- as I think A &
6 B had indicated, they are not -- they don't see any reason
7 why, if there are particular applicants or clients of Na
8 Moku in terms of an injury with respect to different
9 streams that, you know, there is a particular injury that
10 they are suffering right now with respect to particular
11 streams, if that kind of interim relief can be addressed,
12 it sounds as if they're willing to cooperate and to look
13 into that and possibly make, you know, any kind of
14 adjustments. But, you know, it's up to Na Moku to come
15 forward with, let's say, for example, as to this
16 particular stream, this particular taro farmer needs a
17 particular amount of gallons or something in order to
18 undertake, you know, taro or anything of that nature, or I
19 think was it opai, or I think some of the things, subjects
20 that were in your briefs, that if that is something that
21 they can come forward with BLNR, or saying that we need
22 this kind of adjustments or relief, at least on an interim
23 level, it sounds from the appellees that they're willing
24 to address that. So it doesn't preclude from -- the
25 parties from engaging in any further discussions to

1 possibly address any interim relief. Yeah?
2 So that's separate and apart from the motion to reconvene
3 the contested case proceedings. If there are components
4 of the contested case proceeding the BLNR can undertake
5 independent of, that would be the board -- that would be
6 the courts.

7 So you understand in terms of what kind of
8 order you need to draft?

9 MS. OBREY: I think -- I guess I do have a
10 question. Our position is the EA is separate and apart
11 from --

12 THE COURT: Well, and that comes into --
13 because in case there's a dispute, like for example Na
14 Moku saying, well, that's independent and apart from, and
15 the board says, no, it's not, in terms of who's the
16 arbiter, correct?

17 MS. OBREY: Go back to -- I mean, we would
18 like to ask you since that was part of the motion --

19 THE COURT: To reserve jurisdiction --

20 MS. OBREY: Okay.

21 THE COURT: -- in terms of the scope of --
22 because if BLNR say, no, we're not going to proceed with
23 that part of a contested case proceeding, this component,
24 'cause we feel that it's something that CWRM is already
25 doing, it will be duplicative, etcetera, etcetera, whereas

1 Na Moku is saying, no, it's not, it's something that's
2 within the BLNR's expertise, it can be done separate and
3 apart from any other particular agency who has expertise.
4 Yeah?

5 So my thoughts in terms of -- because we're
6 still in Chapter 91, yeah, and this is going to be
7 remanded, right, within the scope of the court's order.

8 I'm just trying to think in terms of whether
9 or not there will be any kind of particular motion being
10 filed by Na Moku 'cause I'm assuming Na Moku would be the
11 disputing party if the board is saying, we're going to
12 proceed with the contested case proceedings and this would
13 be the scope. And I'm assuming that Na Moku, and perhaps,
14 I'm not sure if an order will be generated, because in
15 order for -- to get to me there needs to be some kind of
16 order under a preliminary ruling basis. So I'm sort of
17 thinking out loud regarding the procedural aspect
18 subsequent to the remand. Does that I think make sense
19 procedurally?

20 MS. OBREY: Yeah, I think so.

21 THE COURT: Does that answer your question?

22 MS. OBREY: I think that works for now.

23 THE COURT: For now?

24 MS. OBREY: Yeah. Thank you.

25 THE COURT: All right. Anything else?

1 MR. MURAKAMI: Just a question though, your
2 honor.

3 THE COURT: Yes, Mr. Murakami. Is the court
4 recognizing you?

5 MR. MURAKAMI: I have a question.

6 THE COURT: Okay.

7 MR. MURAKAMI: Not an argument.

8 THE COURT: Okay.

9 MR. MURAKAMI: But as to the last point you
10 made, I wasn't quite clear whether you want us to put in a
11 provision that allows us by your reservation of
12 jurisdiction to come back on issues that are in dispute.

13 THE COURT: I'm reserving jurisdiction under
14 the guise of preliminary ruling should the board issue a
15 particular order with respect to the scope of the
16 contested case proceedings that they can -- that they feel
17 that they don't have an independent, separate and apart
18 duty and that it would not be duplicative of CWRM.

19 MR. MURAKAMI: Which would be --

20 THE COURT: So the court is contemplating
21 possibly the board issuing some kind of order. Yeah? So
22 I'm not sure whether it's going to be a motion in terms of
23 the scope of the contested case proceedings or something
24 that both sides may agree or disagree 'cause I'm assuming
25 that some kind of order will be issuing -- will be issuing

1 regarding the scope of the contested case proceeding with
2 respect to the BLNR commencing.

3 MR. MURAKAMI: I understand. So you're
4 basically holding open the possibility of another
5 preliminary ruling?

6 THE COURT: Ruling. Exactly.

7 MR. MURAKAMI: Okay.

8 THE COURT: Does that answer your question?

9 MR. MURAKAMI: Yes, I believe so.

10 THE COURT: All right. Court stands in
11 recess.

12 THE BAILIFF: All rise. Court is in recess.
13 (Thereupon, proceedings adjourned.)

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STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU)
_____)

I, Sharon Hulihee, RPR, CSR 306, an Official Court Reporter for the First Circuit Court, State of Hawaii, hereby certify that the foregoing comprises a full, true and correct transcription of my stenographic notes taken in the above-entitled cause.

Dated this 24th day of November, 2014.

OFFICIAL COURT REPORTER


/s/Sharon Hulihee
SHARON HULIHEE, RPR, CSR 306

Official Court Reporters
First Circuit Court
State of Hawaii