



NATIVE HAWAIIAN LEGAL CORPORATION

1164 Bishop Street, Suite 1205 • Honolulu, Hawaii 96813 • Phone (808) 521-2302 • Fax (808) 537-4268

YEARS
OF SERVICE
TO THE
COMMUNITY
1974-2000

May 23, 2001

Chair Gilbert S. Coloma-Agaran
and Members
Board of Land and Natural Resources
Department of Land and Natural Resources
State of Hawaii
1151 Punchbowl Street
Honolulu, Hawaii 96813

Re: Request for Hearing in a Contested Case Pursuant to HRS Chapter 91 with regard to "Discussion on Long-term Dispositions of Water Licenses and Issuance of Interim Revocable Permits to Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, for the Honomanu, Keanae, Huelo and Nahiku License Areas, Hana, Maui, Various Tax Map Keys," Agenda Item "D-5" for the Meeting of the Board of Land and Natural Resources, May 25, 2001

Dear Chair Coloma-Agaran and Members:

This letter is submitted on behalf of Na Moku Aupuni O Ko'olau Hui ("Na Moku"), a Native Hawaiian non-profit organization whose members are Native Hawaiian and who reside in the ahupua'a of Ke'anae-Wailua Nui and who would thus be affected by the proposed disposition of the Honomanu, Keanae, and Nahiku License areas, and three individual Native Hawaiians, Beatrice Kepani Kekahuna, Marjorie Walleet, and Elizabeth Lapenia (who would be affected by the proposed disposition of the Huelo License area). Na Moku and these three individuals will be referred to as "Petitioners" herein. Certain members of Na Moku and other Petitioners are native Hawaiians who are beneficiaries of the Hawaiian Homes Commission Act and of the land trust established by § 5(f) of the Hawaii Admission Act.

Services made possible with major funding from the Office of Hawaiian Affairs.

Niolo. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct.

TRIAL EXHIBIT AB-3

Petitioners oppose the proposed dispositions of public lands and now request, pursuant to HRS Chapter 91, 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 Board of Land and Natural Resources ("Board") as Item D-5 on the agenda for the Board's meeting to be held on May 25, 2001. ("Discussion on Long-term Dispositions of Water Licenses and Issuance of Interim Revocable Permits to Alexander & Baldwin, Inc. and East Maui Irrigation Company, Limited, for the Honomanu, Keanae, Huelo and Nahiku License Areas, Hana, Maui, Various Tax Map Keys"). Petitioners object to the dewatering of streams in East Maui under the purported authority of existing revocable permits and seek the restoration of natural stream flows and the protection of their constitutionally protected appurtenant and other water rights. Petitioners also object to the inadequate rent that is proposed.

Petitioners' claims, and in particular the facts that establish their standing to contest the proposed dispositions, will be more fully set forth in a petition to be submitted separately in accordance with HAR § 13-1-29. Their legal objections to the proposed dispositions are briefly set forth in Paragraphs A through G, below. Their request for the recusal of Board Member William Kennison is set forth in Paragraph H. Their Notice of Intent to Sue by bringing an action under HRS Chapter 673 is set forth in Paragraph I. Finally, Paragraph J requests information about the remedies available to them in the event the Board denies their petition to be parties in an agency hearing in a contested case with regard to the proposed dispositions.

A. Failure to Comply with Chapter 343

The Staff Submittal for Agenda Item D-5 ("Staff Submittal") states that upon the renewal of existing Revocable Permits "the use does not differ from its previous use, therefore, pursuant to Section 11-200-8(a)(1), of the Environmental Impact Statement Rules, Exempt Classes of Action, the applicant is exempt from the preparation of an environmental assessment." The Staff Submittal is silent as to the applicability of Chapter 343 to the proposed long-term disposition of the water rights at issue here.

The proposed disposition fails to comply with the requirements of Chapter 343. Neither the proposed issuance of

revocable permits or the eventual long-term disposition are in fact properly "exempt" from the requirements of Chapter 343, and both an environmental assessment and an environmental impact statement must be prepared and circulated for public review and comment before any disposition of these water resources.

Furthermore, even if the proposed dispositions were otherwise exempt from Chapter 343, it should be noted that the Staff Submittal states that the "Character of Use" of the proposed disposition is the "[r]ight, privilege, and authority for the development, diversion, and use of water purposes. [sic]" (emphasis added). The use of the highlighted words is significant because it authorizes additional development and/or diversion of water within the area of the water licenses, and thus does not merely maintain the status quo as the Staff Submittal supposes.

It should be noted that the proposed dispositions are not "applicant" proposals (as the above-quoted passage from the Staff Submittal suggests, and which would be governed by HRS § 343-5(c)), but are instead agency proposals governed by HRS § 343-5(b). Accordingly, the disclosure documents required by Chapter 343 must be prepared by the Board itself, not by individual bidders as the May 14, 2001, letter from Alexander & Baldwin, Inc. to the Board proposes.¹

B. Failure to Obtain Water Use Permits for Out-of-Watershed Transfers

HRS § 174C-49(c) provides that "[t]he common law of the State to the contrary notwithstanding, the [Commission on Water Resources Management] shall allow the holder of a use permit to transport and use surface or ground water beyond overlying land or outside the watershed from which it is taken" under certain circumstances. The Staff Submittal does not suggest, however, that such a use permit has been obtained to authorize the transport and use of any of the water affected by the proposed

¹ This is an important distinction. Chapter 171 nowhere authorizes the Board to impose such a requirement on bidders for public lands, and the effect of such a requirement 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. It would also allow Alexander & Baldwin 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.

permits/licenses outside of the watersheds of origin. Until such permits are obtained, these out-of-watershed transfers are unlawful.²

C. Inapplicability of § 171-55; Violation of § 171-58(c)

The Staff Submittal alleges that the proposed disposition by revocable permit is authorized by HRS §§ 171-13, -55, and -58. The Legislature of the State of Hawaii, in its 2000 session, rejected an effort by the Board to amend HRS § 171-58(g) to grant the Board the authority to dispose of water rights by direct negotiation, instead of by public auction, and to extend month-to-month permits for periods in excess of one year, thus eliminating the one-year limitation on such permits now imposed by § 171-58(c). See House Bill 2575 (2000) and Senate Bill 2916 (2000). Even if § 171-55 might otherwise authorize the Board's existing practice of using endlessly-renewed revocable permits as a de facto substitute for disposition by lease at public auction (a proposition we would deny), because the one-year limit imposed by § 171-58(c) was not removed by the Legislature, the existing revocable permits cannot now be renewed for yet another one-year period. Nothing in § 171-55 (assuming that § 171-55 applies at all to the disposition of water rights) purports to limit the effect of the time limitation imposed by § 171-58(c). Nor can this statutory limitation be evaded by the transparent fiction of alternating the identity of the permit holder between Alexander & Baldwin, Inc., and East Maui Irrigation Company, Limited, as the Staff Submittal proposes. In fact, the two entities act as alter egos of each other with regard to the water rights at issue here.

Although we have not seen the text of the proposed Revocable Permit, previous versions have included a provision requiring one year's notice prior to the termination of the permit. Such a requirement, if included, would further demonstrate that the proposed Revocable Permit is in fact a lease with a term of not less than one year, not a disposition that can be made by a month-to-month revocable permit issued under either HRS §§ 171-55 or -58.

² A prerequisite to the issuance of such permits is the designation of the relevant watersheds as water management areas pursuant to HRS § 174C-41.

D. Failure to Comply with HRS § 171-58(g)

HRS § 171-58(g) requires that the Department of Hawaiian Homes Lands and affected beneficiaries of the Hawaiian Homes Commission Act be consulted before any execution or renewal of a conveyance of water rights and requires that DHHL and DLNR "shall jointly develop a reservation of water rights sufficient to support current and future homestead needs." The Staff Submittal gives no suggestion that the proposal complies with these requirements.

E. Violation of § 5(f) of the Hawaii Admission Act

The Staff Submittal notes that the lands at issue here are "Section 5(b) lands of the Hawaii Admission Act." As such, they are subject to the provisions of § 5(f) of the Admission Act which states that:

The lands granted to the State of Hawaii by subsection(b) of this section . . . , together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by [the State of Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

The disposition of such lands for the private benefit of for-profit corporations is conspicuously absent from the list of approved uses to which such trust lands may be put, and such use only becomes legal upon payment to the trust of rent set at fair-market rates. The proposed renewal of existing revocable permits at the rates set forth in the Staff Submittal (monthly rents of \$1698.32 + \$6588.40 + \$3476.72 + \$1426.88, or a total annual rental of \$158283.84) is grossly inadequate for a disposition that would allow Alexander & Baldwin to control some

33000 acres of public lands and a substantial portion of all of the available water resources on the Island of Maui.

The appraisals upon which the Board is asked to rely conclude that the existing rental rates should be continued in effect "[d]ue to the decline of the pineapple and sugar industries and the State's slowly emerging economic recovery[.]" The Board will in breach of its trust duties if it relies on such an appraisal. First of all, the appraisals do not show that the existing rates bear any reasonable relation to economic reality; in particular, they fail to address the cost of alternative sources of water to Alexander & Baldwin or any other prospective permittee/lessee. Furthermore, the appraiser's reliance on the dismal economic status of the sugar and pineapple industries fails to address the possibility that alternative uses might be found for much or all of the water at issue. The U.S. Court of Appeals for the Ninth Circuit recently held that a public agency's acts in an "arbitrary and capricious" manner when it disposes of public lands based on an appraisal that fails to consider alternative uses to which the lands could be put, Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1180-87(9th Cir. 2000), and the appraisals now before the Board are similarly defective.

The conduct of the State of Hawaii, and of the members of the Board of Land and Natural Resources as its designated agents in managing the public lands at issue here, "is measured by the same strict standards applicable to private trustees." Pele Defense Fund v. Paty, 73 Haw. 578, 604-05 n.18(1992) (quoting Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 339 (1982)). The duties of a trustee include the "duty to exercise reasonable care and skill" in the administration of the trust. Restatement (2nd) of Trusts § 174. In this regard, "[t]he trustee's ignorance of the terms of the trust will not protect him from liability. He does not use proper care unless he acquaints himself with the terms of the trust and the nature and circumstances of the trust property." Id., § 174, comment c (emphasis added). As part of the exercise of their duty of care, and in light of the abundance of case law setting forth the standards of conduct expected of trustees, Petitioners strongly urge Members of the Board to consult with counsel as to the scope of their responsibilities with regard to the legal issues raised herein before acting to approve the proposed dispositions in whole or in part.

F. Violation of Article XII, § 7, Constitution of the State of Hawaii, and Other Statutes

The Staff Submittal states that the proposed dispositions remain subject to the right of the State "to withdraw water from these revocable permits" for the purpose of protecting "Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under Section 221 of the Hawaiian Homes Commission Act, as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of Section 171-58(d), Hawaii Revised Statutes." Unfortunately, however, the Staff Submittal fails to show that Board has made, or will make, the findings of fact necessary to show that these interests, including but by no means limited to rights protected under Article XII, § 7, of the State Constitution, will in fact be protected by the permittee/lessee's actions under the proposed dispositions. In fact, existing withdrawals by Alexander & Baldwin do not adequately protect such interests, and the Board's apparent willingness to allow the continuation of such diversions (and even to allow them to be expanded) without investigation is an abdication of responsibility that improperly delegates its duty to protect these rights and interests to its proposed permittee/lessee. Just such an attempted delegation was rejected by the Hawaii Supreme Court in Ka Pa'akai O Ka'aina v. Land Use Commission, 94 Hawai'i 31, 50-52(2000), and a similar failure by the Board itself to make required factual findings was rejected by that Court in Trustees of the Office of Hawaiian Affairs v. Board of Land and Natural Resources, 87 Hawai'i 471 (1998) (Table).

G. Additional Claims

The identification of legal issues set forth herein is not intended to be an exhaustive listing of the legal defects to the actions to the Board, and Petitioners reserve the right to raise additional issues in the event their request for a hearing in a contested case regarding the proposed dispositions is granted.

H. Recusal of Board Member William Kennison

As the Board's webpage notes, "Any member having any interest, direct or indirect, in any matter before the board must disqualify him/herself from voting on or participating in the discussion of the matter." Id. (emphasis added)
<<http://www.state.hi.us/dlnr/Board.html>> (visited

05/17/2001). Because the participation of such a person would also create "an appearance of impropriety," it would violate the procedural due process rights of the present Petitioners. Sussel v. City and County of Honolulu Civil Service Commission, 71 Haw. 101 (1989).³

The Board's webpage identifies Board Member William Kennison's affiliation as "ILWU." Members of the ILWU are employed by Alexander & Baldwin in the cultivation of sugar; water derived from the water licenses at issue in this proceeding is used by Alexander & Baldwin to irrigate this sugar, and the ILWU thus has, at least, an "indirect" interest in the continued availability of water from these licenses for that purpose. Accordingly, Mr. Kennison's participation in the Board's consideration of these permits and licenses would create "an appearance of impropriety," Sussel, and he must be disqualified from any participation in the voting or discussion of the Board's action as to these revocable permits and water licenses.

I. Notice of Intent to Sue for Breach of Trust; Request for Information Regarding Administrative Remedies for Claims Asserted under HRS Chapter 673

As noted above, Petitioners contend that the Board's failure to obtain fair market rents for private use of assets of the Public Land Trust constitutes a breach of the State's duty as trustee of these assets that will cause, and has caused, financial injury to the Public Land Trust and the Native Hawaiian Public Trust as identified in HRS § 673-1(a)(2), and through the action of Article XII, § 1 of the Constitution of

³Compare the very different standard applicable to a finding of a violation of HRS Chapter 84, the State ethics law, by a member of a board or commission alleged to have a conflict of interest with regard to a matter before the body of which he is a member. Tangen v. State Ethics Commission, 57 Haw. 87 (1976) (holding that a member of State Land Use Commission, an employee of the ILWU, did not violate ethics law by failing to disqualify himself from participating in the Commission's consideration of a land use reclassification that affecting the employment of members of the ILWU because the matter was not one "directly affecting a business or matter in which . . . [h]e has a substantial financial interest"). The Tangen Court accorded particular importance to the requirement of the ethics statute that the commission member's interest be "direct". Id., 57 Haw. at 92.

the State of Hawaii and § 213(i) of the Hawaiian Homes Commission Act, to the Hawaiian Home Lands Trust as identified in HRS § 673-1(a)(1). HRS Chapter 673 provides that beneficiaries of these trusts can bring an action against the State of Hawaii under certain circumstances to recover money damages for injuries suffered by these trusts. HRS § 673-1 through -4. HRS § 673-3 requires that a prospective plaintiff in an action under Chapter 673 must first give written notice not less than 60 days prior to the initiation of such an action and must have exhausted any administrative remedies available to him or her.

This letter is intended to give written notice, pursuant to HRS § 673-3, that Petitioners, or some of them, will file an action against the State and other relevant defendants pursuant to HRS Chapter 673 to seek money damages and other appropriate remedies against the State and its agencies and officials with regard to the matters set forth above that are redressable in such an action.

Petitioners are not aware of any administrative remedies that are available to them with regard to the injuries compensable under Chapter 673 of which they now complain. The Board has a duty to advise Petitioners and others with which it does business, including especially those who, like Petitioners, are beneficiaries of the trusts identified in HRS § 673-1-(a), of the nature of the administrative remedies available to them. See Hawaii Blind Vendors Ass'n v. Department of Human Services, 71 Haw. 367, 374 (1990); Simpson v. Department of Land and Natural Resources, 8 Haw. App. 16, 26 (1990). Accordingly, Petitioners ask that the Board advise them of all remedies, administrative or judicial, which are available to allow them to seek redress for the injuries they allege under HRS Chapter 673.

J. Request for Notice of Alternative Remedies in the Event the Board Denies Petitioners' Request to Challenge the Proposed Dispositions in an Administrative Hearing Pursuant to HRS Chapter 91

Again relying on Hawaii Blind Vendors and Simpson, Petitioners ask that the Board advise them of any and all remedies, administrative or judicial, that would be available to them to allow them to challenge the proposed disposition of water rights under §§ 171-55 and -58 in the event the Board denies Petitioners' request to be parties in an agency hearing in a contested case on this issue pursuant to HRS Chapter 91.

May 23, 2001, p. ()

We thank you for this opportunity to bring this petition
before the Board.

Very Truly yours,

A handwritten signature in black ink, appearing to read "Alan T. Murakami", with a long horizontal flourish extending to the right.

Alan T. Murakami
Carl C. Christensen
Moses K. N. Haia III
Malia K. H. Akutagawa

Attorneys for Na Moku Aupuni
O Ko'olau Hui, et al.

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

Defendant A&B/EMI's Exhibit AB-3

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____