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May 25, 2001

Hand Delivery

Chairperson Gilbert S. Coloma-Agaran
and Members of the
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 Chairperson Coloma-Agaran and Members of the Board of Land and Natural Resources:

This letter is written on behalf of the Coalition to Protect East Maui Water and Maui Tomorrow whose members would be adversely affected by the dispositions proposed today. The Coalition and Maui Tomorrow join in the legal arguments contained in the letter of the Native Hawaiian Legal Corporation to the Board on this subject matter and also request to intervene as parties in contested case proceedings on both the short and long term dispositions proposed on the legal issues presented.

A. History of the Dewatering of East Maui

The extent of the dewatering of streams that has taken place in East Maui is larger than anywhere else in the Hawaiian islands by far. The factual setting that the Hawaii Supreme Court found so troubling in the Waiahole case on Oahu involved a much smaller amount of water compared to what is being diverted in East Maui. The amount being diverted in Waiahole was around 22 mgd whereas in East Maui the irrigation system has the capacity to divert 445 mgd and diverts on average 160 mgd. Many more streams are being dewatered and many of them in as many as four to six different places as they flow down the mountains to the sea.

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The extent of environmental degradation is severe. The social injustice is manifest. And, from the beginning to the present, these diversions have almost always been in violation of the law.

There may be as many as fifty streams or tributaries in these four License Areas. Hawaiian communities relied and rely on these streams for taro growing and gathering. Appurtenant and riparian water rights were and are well-established over many years before the plantations were built.

The ditch system which EMI built was constructed without regard to the appurtenant and riparian water rights of those below and without regard to social effects. Healthy taro could no longer be grown. The growth of taro for employment and sustenance could no longer be relied upon. The loss of jobs which occurred in East Maui is a social impact which has never been addressed adequately.

Objections to the dewatering have been placed on the record for over ten years. The Department and Board have ignored these objections. The Waiahole decision has now been decided. It is time to restore these streams and to honor appurtenant and riparian water rights before allowing any further diversions.

B. Failure to Comply with Chapter 343

1. Even the Short Term Disposition Requires an EA at Least

Even where there is purportedly "no change"; under our environmental regulations, an EA is required where, as here, there may be a significant effect. See HAR § 11-200-8(b). There is no basis for an exemption and we are not aware of the entry of any exemption notice.

It is hard to imagine how the staff of DLNR believes that the decision not to stop dewatering streams is a decision which has no environmental implications. It is equally difficult to comprehend that a decision to continue to violate Hawaiian water rights, to breach trust responsibilities and to do nothing actual or affirmative to protect in-stream values has no environmental impacts.

The Board has a Constitutional and trust responsibility to protect streams and life dependent upon stream waters. Because the Board's failure to act to protect streams causes environmental harm, an EA, at least, is required before any Board action today. Should the Board act (even on the short term disposition) without that required EA, its action will be illegal and void.

2. DLNR Must Prepare An EIS for the Long Term Disposition

DLNR admits that an EIS must be prepared before the Board may approve any long term disposition of these water resources. It is the Board, however, and not the bidders which must prepare this EIS.

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

There is no authority for permitting the transfer of water beyond the watersheds of origin in non-designated areas.

D. Ignoring the Mandates of the Waiahole Decision

It must be assumed at this juncture that each Board member is fully aware of his or her trust responsibilities as announced by the Hawaii Supreme Court in the Waiahole decision. It could not be plainer that approving the long or short term dispositions proposed today would violate the mandates of the Waiahole decision.

E. The Intent to Lease All of the Water in A Single Lease Violates the Law

The decision of the staff of DLNR, BLNR and ultimately the Board to lease all of the License Areas in a single lease essentially prohibits anyone from bidding on these water resources except for A&B or EMI and hence violates the law.

F. The Accounting Issues

Neither DLNR nor BLNR have yet prepared a proper appraisal of the value of the water resources to be disposed of on a short or long term basis and these disposition, if approved, would constitute trust breaches.

G. Violations of the Water Code

Before approving either the proposed short or long term dispositions, the Board has constitutional and trust responsibilities to protect in stream values and appurtenant and riparian water rights. The Board has done nothing to protect these in stream resources or appurtenant and riparian resources and, therefore, if it acts today, it will violate the Water Code.

H. Intervention is Allowed

Intervention is permitted with regard to these proposed Board actions to dispose of these water resources on short and long term bases no matter whether they are characterized as "licenses" or not.

I. Notice of Intent to Sue for Breach of Trust

Sixty days notice is hereby provided of the intent to sue pursuant to HRS Chapter 673.

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J. Recusal of Board Member William Kennison

Board member William Kennison represents the ILWU whose workers are employed by the HC&S Sugar Plantation which will receive the water disposed of by the Board on a short and long term basis. He therefore has a conflict of interest and must recuse himself. It is also inappropriate to conduct this meeting in the ILWU meeting hall for this reason as well.

K. Additional Claims, if Necessary

The Coalition and Maui Tomorrow reserve the right to add additional claims as necessary when they file their written Petition to Intervene.

Thank you for the opportunity to comment on this Agenda item.

Very truly yours



Isaac Hall

cc: Maui Tomorrow
Coalition to Protect Maui Water

MT/emw.letagaran

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

Defendant A&B/EMI's Exhibit AB-4

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____