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Maui Tomorrow

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding Water Licenses, at Honomanu, Keanae, Nahiku, and Huelo, Maui	DLNR FILE NO. 01-05-MA INTERVENOR MAUI TOMORROW'S MOTION FOR SUMMARY RELIEF; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF ISAAC HALL; EXHIBIT "1"; CERTIFI CATE OF SERVICE

mt/emw/motion3

INTERVENOR MAUI TOMORROWS' MOTION FOR SUMMARY RELIEF

Intervenor Maui Tomorrow, through counsel, hereby files its Motion for Summary Relief based upon Prehearing Order No. 8 of the Hearing Officer. In paragraph 1 of that Order, the Hearing Officer permits parties to file and serve Motions dealing with issues which the parties contend can be disposed of based upon matters of Record or on undisputed facts (including any Motions concerning the scope of the issues to be decided).

TRIAL EXHIBIT AB-5

This Motion is based upon the Record and file to date, the attached Memorandum, the Declaration of Isaac Hall, Exhibit "1", and such evidence as may be adduced at the hearing on this Motion.

DATED: Wailuku, Maui, Hawaii _____

_____

Isaac Hall
Attorney for Intervenor
Maui Tomorrow

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding Water Licenses, at Honomanu, Keanae, Nahiku, and Huelo, Maui	)	DLNR FILE NO. 01-05-MA MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The Hawaii Supreme Court issued a landmark decision In the Matter of the Water Use Permit Application, 94 Haw. 97, 1 P. 3d 409 (2000) (the "Waiahole case"). This case clearly sets out the law and establishes the basis for deciding a number of issues in this case summarily without the necessity of contested case evidentiary hearings. Intervenor Maui Tomorrow respectfully requests that the Hearing Officer consider and grant summary relief on the issues addressed below.

II. STATEMENT OF THE UNDISPUTED FACTS

A. History of Dispositions of State Surface Water in East Maui

In 1939, the Territory of Hawaii and East Maui Irrigation ("EMI") entered into the East Maui Water Agreement. The Agreement established four license areas identified as Honomanu, Huelo, Keanae, and Nahiku and provided for the disposition of these four water licenses at public auction to the highest bidder. This case is the continuation of a contested case in which a Record on Appeal has already been partially developed before the agency. Unless otherwise noted, references to the Record refer to this already compiled Record on Appeal or Record. Record Item 1.

This Agreement granted the Territory and EMI joint use of a water diversion system and perpetual easements that allow each party access over,

upon, and through the other's property to assure the operation and maintenance of the system. See Record Item 1.

Appellee EMI, a subsidiary of Appellee Alexander and Baldwin ("A&B"), now operates this system consisting of at least four parallel levels of water ditches that run from east to west across the East Maui mountain range intersecting streams within the area and diverting stream flow to Central Maui. Record Items 1, 38 and 41.

The system is capable of delivering 445 million gallons of water per day ("mgd") to end users and the current average daily water delivery is 160 mgd. Record Items 38 and 41.

While some of this water is delivered to domestic and other uses, the vast majority irrigates sugar cane in fields in Central Maui owned by Hawaiian Commercial and Sugar Company ("HC&S"), another A&B subsidiary. Record Items 38 and 41.

The original lease term for these four license areas was set at 21 years and at five years intervals. The Keanae license expired on June 30, 1972, Nahiku on June 30, 1977, Huelo on June 30, 1982, and Honomanu on June 30, 1986. Record Item 1.

Since the expiration of these licenses, the State of Hawaii, through the BLNR and DLNR, has issued to A&B and EMI year to year revocable permits, purportedly pursuant to HRS § 171-58(c). Record Item 1.

The vast majority of the primary ditch in this diversion system, the Wailoa Ditch, has been constructed and is located upon state land. See Exhibit "1" attached hereto. This means that much of the water being diverted through the licenses which are now the subject of this litigation is being diverted through ditches on state land, through licenses issued annually by the state.

B. Proceedings Before the Board of Land and Natural Resources

HRS § 171-58(c) restricts the disposition of temporary water rights to a maximum term of one year, so the state has attempted to avoid this restriction by alternating permits between A&B and EMI each year. Record Item 1.

By letter dated May 14, 2001, A&B and EMI filed an application with the BLNR for the sale of a 30 year lease for the right, privilege and authority to enter and go upon public lands in East Maui for the purpose of developing diverting, transporting and using water related to such land. The application also requested that the State of Hawaii continue to issue A&B and EMI yearly revocable permits until the State of Hawaii issued the long-term lease. Record Item 69, Exhibit "1".

BLNR commenced a meeting on May 25, 2001. Agenda Item D.5. for that meeting was identified as "DISCUSSION ON LONG-TERM DISPOSITIONS OF WATER LISENCES 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." Record Item 69, Exhibit "2".

Based upon the BLNR staff submittal for this Agenda item and by letter dated May 23, 2001, Appellant Maui Tomorrow requested a contested case to challenge the legality of the proposed disposition of public lands before the Board as Item D-5 on the Agenda.

During the receipt of testimony on this item and prior to any action or vote taken by BLNR on this item, counsel for Appellant Maui Tomorrow verbally requested a contested case hearing to challenge the legality of the proposed disposition of the revocable permits and/or subsequently a long-term lease. Record Item 2.

BLNR deferred action on the issuance of the four interim revocable permits pending the results of the contested case. Record Item 2.

Pursuant to Hawaii Administrative Rules ("HAR") Subsection 13-1-29, Appellant Maui Tomorrow filed its written petition for a contested case on June 1, 2001. Record Item 3.

Appellants Na Moku and the Coalition to Protect East Maui Water also filed their written petitions on June 1, 2001. Record Items 3 and 4.

Appellant Maui Tomorrow's petition raised all of the following issues relevant to the proposed issuance of interim revocable permits:

> (1) Whether these out of watershed transfers of water in a nondesignated water management area and/or without a permit issued by the Commission on Water Resources Management permitted such use are prohibited.
>
> (2) Whether the members of the Board of Land and Natural Resources violate their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands in Honomanu, Huelo, Ke'anae, and Nahiku without a proper appraisal and at less than their independently appraised fair-market value.
>
> (3) Whether the Board of Land and Natural Resources has complied with the requirements set forth in HRS § 171-58(c).
>
> (4) Whether the Department of Land and Natural Resources has complied with the requirements set forth in HRS § 171-58(g).
>
> (5) Whether the Board of Land and Natural Resources must comply with the requirements of HRS Chapter § 343-5(b) and prepare and circulate for public review and comment an Environmental Assessment and an Environmental Impact Statement prior to any disposition of water from streams within the Honomanu, Huelo, Ke'anae, and Nahiku License Areas. Record Item 3.

BLNR granted Appellants' Na Moku, et al. and Maui Tomorrow's requests for a contested case hearing by notice dated March 12, 2002. Record Item 23.

Petitions to Intervene in this contested case were filed by the County of Maui, Department of Water Supply (hereafter, "DWS"), the Hawaii Farm Bureau Federation (hereafter, "HFBF"), Warren Watanabe, Maui Land & Pineapple Company, Inc., and Maui Pineapple Company, Ltd. Record Items 27, 29 and 30.

A hearing on standing to participate in this contested case was commenced on April 15, 2002. Record Item 38.

The Coalition to Protect East Maui Water withdrew its request to intervene and is not a party. Record Item 38.

Standing to participate in this contested case was granted to Appellants Na Moku, et al., Maui Tomorrow, Applicants/Appellees Alexander & Baldwin and East Maui Irrigation (hereafter "Applicants") and to Appellees Maui Land & Pineapple, the HFBF, and the DWS. Record Item 47.

Since the position of Appellee Maui Land & Pineapple was determined to be substantially the same as Maui Pineapple Co. and the position of Appellee HFBF's was determined to be substantially the same as Warren Watanabe, Maui Pineapple Co. and Warren Watanabe are not parties to this contested case. Record Item 47.

By Pre-Hearing Order No. 28 the parties were instructed to "file and serve motions the filing party contends can be disposed of based on matters of Record or on undisputed facts (including any motions concerning the scope of the issues to be decided)..." Record Item 55.

C. Standing and Harm to Supporters of Maui Tomorrow

Ms. Neola Caveny is a supporter of Maui Tomorrow. She lives in Huelo, Maui. She owns property designated as TMK No. (II) 2-9-11:14. Hanehoi Stream runs through the property owned by Ms. Caveny. Ms. Caveny thereby possesses riparian water rights. There is an inadequate amount of water in Hanehoi Stream to meet Ms. Caveny's needs because this stream is diverted by EMI. Hanehoi Stream lies within the Huelo License Area. Ms. Caveny needs the water in Hanehoi Stream for agricultural and domestic purposes. She has a flower farm and needs the water for her flower farm. She considers herself a farmer and needs the water from Hanehoi Stream for farming. Record Items 38 and 41.

Ms. Caveny has also hiked many of the streams between Nahiku and Huelo for the last 30 years. She hikes these streams every two weeks. She is familiar with them. She has enjoyed their natural beauty. She uses them for recreation purposes. She has witnessed their use by others for fishing. As a

Maui Tomorrow supporter, she supports a minimum stream flow in each of the diverted streams which would be sufficient to support stream life. Record Items 38 and 41.

Mr. Leonard W. Keith is a supporter of Maui Tomorrow who has riparian water rights in the streams being diverted by EMI. Mr. Keith resides in Huelo, Maui. He owns properties designated as TMK Nos. (II) 2-9-7:22 and 74. Waipioiki Stream runs through or abuts his property. He thereby possesses riparian water rights. Waipioiki Stream lies within the Huelo License Area. Because of an EMI diversion, he has an insufficient amount of water in his stream to meet his needs. He needs water from Waipioiki Stream for domestic and agricultural purposes. There is no County water system in this area of Huelo. Record Items 38 and 41.

Nikhilanada is a supporter of Maui Tomorrow who has riparian water rights in the streams being diverted by EMI. Nikhilanada resides in Huelo, Maui. He owns property designated as TMK No. (II) 2-9-5:46. Mokupapa Stream runs through or abuts the property he owns. He thereby possesses riparian water rights in this stream. Mokupapa Stream lies within the Huelo License Area. An insufficient amount of water runs in this stream due to an EMI diversion. He would use water from Mokupapa Stream for domestic and agricultural purposes. There is no County water system in this area of Huelo. Record Items 38 and 41.

In its May 25, 2001 letter, Maui Tomorrow also objected because there was no right to transfer surface water outside of its watershed of origin without a water use permit in a designated area. This is supported by a March 25, 1996 letter written by Rae M. Loui on behalf of the Commission of Water Resource Management. Record Items 38, 41 and 69, Exhibit "5".

Ms. Lucienne DeNaie testified as an officer of Maui Tomorrow in favor of establishing a minimum stream flow in each of these streams before deciding the amounts of water that could be diverted by EMI. She stated that this was Maui Tomorrow's position because Maui Tomorrow believed that this was

required by the State Water Code and that Maui Tomorrow wanted to enforce the State Water Code to make sure that in-stream values were protected in these streams as well as riparian and appurtenant water rights. Record Items 38 and 41.

Appellant Maui Tomorrow and its supporters have educational, cultural, recreational, aesthetic, scientific and environmental interests and water rights that have been directly and indirectly adversely affected by the Decision of BLNR to lease the state waters here. Record Items 38 and 41.

Appellant Maui Tomorrow has been harmed by Appellees' refusal to require the preparation of an EA prior to processing and approving the lease because Maui Tomorrow and its supporters possess environmental, recreational and aesthetic interests which will be directly and indirectly adversely affected by this project and these types of harms could have been avoided if an EA had been prepared. Record Items 38 and 41.

The failure of the Appellees to comply with Chapter 343 makes the environmental analysis of the impacts of the project so inadequate that decision-makers did not have the full consideration and analysis necessary to assure that their decisions were not arbitrary and capricious. Accordingly, the action taken by the decision-makers, including but not limited to the Appellees, to authorize the long-term lease, in any fashion, without an EA, was uninformed and adversely affects the Appellants whose protectable interests, within the scope of the law, have been described above. Record Items 38 and 41.

The failure to prepare an EA creates a risk that serious environmental impacts will be and have been overlooked. Record Items 38 and 41.

The failure to prepare an EA has adversely affected Appellants' public participation rights in that Appellants have been and will be further frustrated in its ability to participate in the debate and decision-making over whether to approve and to implement this project because the necessary data, study and

environmental analysis which would have been provided in an EA, and which has not been otherwise provided, has not been available and because the burden of coming forward with information about environmental impacts was illegally shifted to the Appellants which adversely affected the Appellants' ability to participate in the contested case below. Record Items 38 and 41.

III. MAUI TOMORROW IS ENTITLED TO SUMMARY RELIEF

A. This Proceeding Must Be Stayed Or Continued Until An Environmental Assessment Is Prepared

An Environmental Assessment ("EA") is required as a matter of law prior to any further action on this matter. This proceeding may be characterized as an "agency action" pursuant to HRS § 343-5(b) whereby an agency, BLNR, is proposing the agency action of disposing of the surface water resources arising in the East Maui watershed. This proceeding may also be characterized as an "applicant action" pursuant to HRS § 343-5(c) whereby applicants, A&B and EMI, have filed an application with an agency, BLNR, requesting BLNR's approval, for permission for a month to month permit to divert water resources arising on state lands in the East Maui watershed to Central Maui, pursuant to HRS § 171-58(c).

"Land" is defined as "all interests therein and natural resources including water ..." in HRS § 171-1. For the purpose of HRS § 343, publicly owned water would be defined as state land. BLNR and A&B and EMI are therefore proposing the use of state land within the meaning of HRS § 343-5(a)(1). This is a "triggering event" for the requirement that an EA be prepared.

The BLNR Staff Report prepared for the May 25, 2001 meeting, Record Item 1, contains an analysis of Chapter 343 requirements on page 3. The Staff Report suggests that the proposed diversion of water from East Maui to Central Maui is exempt from the EA requirement because "The use does not differ from its previous use", pursuant to § 11-200-8(a)(1) of the EIS Rules. The Minutes

of the BLNR meeting, however, make it clear that BLNR made no determination on the EA issue. The EA issue was not even addressed. BLNR did not enter any written exemption determination as required by law.

These proceedings should be stayed or continued until the required EA is prepared by BLNR. HRS § 171-58(c) grants DLNR the authority to dispose of water either by lease at public auction or by permit for temporary use on a month to month basis, as follows:

> Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month to month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law ...

It is clear that even the month to month disposition is considered a "permit" or approval. The State's EIS regulations, in HAR § 11-200-5(c), define the use of state lands to include:

> ... any use (title, lease, permit, easement, **licenses,** etc.) or entitlement to those lands. (Emphasis added.)

Because of the specific reference to a license, this is the type of use of state land, that triggers the requirement for the preparation of an EA as a matter of law.

As an "agency action", the agency action would be the disposition of state-owned water resources. As an "applicant action", the action would be the request for approval or the application for a permit on a month to month basis to transfer state-owned waters to Central Maui. In both cases, the "triggering event" would be the proposed use of "state lands" which, by definition, includes state-owned waters. It may even be necessary to prepare a federal/state EA because of the expenditure of federal/state and county funds on a component of this project.

1. <u>An EA is Required to Satisfy the Purposes of HRS 343</u>

BLNR reviews the issue of BLNR's compliance with Chapter 343 in terms of the issuance of a temporary license by BLNR of 33,012.91 acres, more or

less, in East Maui of the "right, privilege and authority to enter and go upon the above-described areas for the purpose of developing, diverting, transporting and using government-owned waters", as requested by A&B and EMI in their May 14, 2001 letter.

Under Article XI, §§ 1, 2 and 7, of the Hawaii Constitution, the state, including all of its agencies, including BLNR, have the Constitutional duties to, *inter alia*, hold all public natural resources, including water resources, in trust for the benefit of all of the people of Hawaii, to manage these water resources for the benefit of present and future generations and to conserve these water resources for the benefit of Hawaii's people.

A proposed permit by a public agency of public trust water resources on open to all members of the public is an "agency action", pursuant to Chapter 343. Chapter 343 divides proposed actions into "agency actions", meaning programs or projects initiated by an agency or an "applicant action", meaning an action initiated through the filing of an application through which approval of an agency is mandated. See HRS §§ 343-2 and 343-5(b) and (c).

The disposition of public lands and waters is covered by HRS Chapter 171. The disposition by BLNR of water rights is covered by HRS § 171-58.

Over 50 streams flow within the 33,000 acres that are the subject of the proposed long-term short-term dispositions. Hundreds of millions of gallons of water per day flow in these streams.

The Hawaii Supreme Court made it clear in Molokai Homesteaders Cooperative Assn. v. Cobb, 63 Haw. 453, 629, P.2d 1134 (1981) that the approval by BLNR of a proposal committing prime natural resources for a particular purpose, having substantial social and economic consequences, dictates the preparation of an EIS. The Court cited like rulings in Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978); Stempel v. Department of Water Resources, 82 Wash. 2d 109, 119, 508 P.2d 166, 172 (1973); Environmental Defense Fund, Inc. v. Coastside County Water District, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

2. The Ongoing Diversion of Water in the Ditch System

of EMI Cannot Constitute a Continuing Operation for Which an Exemption is Available as a Matter of Law

Exemptions are only available for specific types of actions which will probably have minimal or no significant effects on the environment. HRS § 343-6(7); HAR § 11-200-8(a). If a proposed exemption does not satisfy this purpose, the Applicant is not entitled to an exemption. A license for the water resources in fifty (50) streams flowing within 33,000 acres of land simply cannot be automatically said to have minimal or no significant effects on the environment.

Chapter 343 does not apply to actions completely approved or completely constructed prior to the effective date of Chapter 343. Molokai Homesteaders Coop. Assn. v. Cobb, 63 Haw. 453, 629 P.2d 1134 (1981). NEPA, the federal counterpart of Chapter 343, does not apply to actions commenced prior to the effective date of NEPA when no more than routine managerial actions are regularly carried out from then on without change. Upper Snake River v. Hodel, 921 F.2d 232 (9th Cir. 1990).

This is not so, however, when a government agency continues to exercise authority over the action by issuing successive permits. When an agency continues to have discretion over a proposed action, it continues to have the ability to shape that action to avoid and prevent adverse environmental effects. As such, compliance with environmental statutes and regulations will be required in these instances through the preparation of an EA or an EIS.

By their application, A&B and EMI seek the right, privilege, and authority for the **development, diversion** and use of water arising on state land. Such language authorizes additional development and/or diversion of water within the area of the water licenses, and thus does not merely maintain the status quo. For the past 120 years, A&B and EMI have, armed with this right, privilege, and authority, developed and, based on this history, will continue to develop, their capacity to collect and divert additional amounts of water in the subject areas. As such, the proposed use does not meet the

definition of a previously existing use and, therefore, does not qualify for exemption pursuant to HAR § 11-200-8(a)(1).

The United States Supreme Court has stated that NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-8, 103 S.Ct. 2246, 2252, 76 L.Ed. 2d 437 (1983).

The purpose of an EIS is to apprise agency decision-makers of the disruptive environmental effects that will flow from their decisions at a time when they retain a maximum range of options. Conner v. Burford, 848 S.2d 1441, 1446 (9th Cir. 1988).

The rationale for not requiring an EA or an EIS for a non-discretionary action is because there are no viable options or alternatives available to the decision-maker.

A federal agency controlling a spillway which was causing the draw down of Reelfoot Lake in Tennessee, exposing 50% percent of the Lake's bed, which had been continuing since 1941, was still required to comply with NEPA as an ongoing project because the agency continued to exercise decisional control over the spillway and had the ability to fashion options mitigating environmental impacts in Bunch v. Hodel, 793 F.2d 129 (6th Cir. 1986). The same result was reached for the same reason in City and Cty. of Denver, Etc. v. Bergland, 695 F.2d 465 (10th Cir. 1982). In that case, the court held that when there is continuing federal involvement in an ongoing project which preexisted NEPA, NEPA may still apply. This was so, because further federal approval was required from the federal agency involved.

These cases apply with equal force here. There have been successive permits granted to A&B and EMI to develop and divert the water resources involved and BLNR still maintains discretionary decisional authority over the disposition of these water resources. The disposition of these water resources

are not routine managerial actions regularly carried on from the outset without change, as was found in the Upper Snake River, *supra*, case. Instead, as in Bunch, *supra*, and in City and Cty. of Denver, *supra*, BLNR has always maintained discretionary authority over these diversions and, therefore, the exemption for ongoing activities does not apply.

There are additional situations within which ongoing activities will not be exempt. One instance is when an agency has "affirmative duties" under a statute to protect and preserve resources in the area. In Oregon Natural Desert Assn. v. Green, 952 F.Supp. 1133 (D. Or. 1997), the court held that the proposed action was not properly construed as ongoing livestock grazing activities because the agency involved had affirmative duties to manage rivers in the area. Because it had this affirmative obligation, the exemption for ongoing activities was inapplicable and compliance with NEPA was required.

The same result was reached in Westlands Water Dist. v. U.S. Dept. of Interior, 850 F.Supp. 1388 (E.D. Cal. 1994). The court held that the exemption for ongoing activities was inapplicable because of the passage of a new law and because some of the water involved was to be allocated from agricultural uses to environmental uses. The Oregon Natural Desert Court cited with approval the decision in Confederated Tribes and Bands v. F.E.R.C., 746 F.2d 466 (9th Cir. 1984) in which case the court held that the **relicensing** of an existing hydroelectric dam requires consideration of environmental factors because of the potential for the alteration to the environmental status quo.

These last two cases also constitute precedent here as well. BLNR has an affirmative obligation, by virtue of the Public Trust Doctrine and by virtue of provisions in the Hawaii Constitution requiring it to protect and preserve water resources in the State of Hawaii for Hawaii's people. The Board cannot dispose of water resources without taking into consideration these "affirmative duties." Because it has this legal obligation to take into consideration these "affirmative duties", what might otherwise be construed as an ongoing activity qualifying for an exemption, no longer qualifies.

Likewise, because of the new laws that have come into effect during what might be construed as an ongoing activity, the exemption is not applicable either. The Water Code was enacted. The Waiahole decision was decided. Because of these significant changes in the law, alone, the exemption proposed is not applicable.

3. The Proposed Action Has Not Been Described Properly

A&B previously submitted the Declaration of Garrett Hew dated September 23, 2002 in which he declared, *inter alia*, that EMI and A&B have operated a ditch system that diverts surface water emanating from the state lands sought to be leased, that these waters have been transported to Central and Upcountry Maui for agricultural and domestic purposes, that these state waters have been obtained through water leases from the state and its predecessors and that through its application, A&B and EMI seek to continue the existing diversions for the same agricultural and domestic uses and that no changes have been reneged or are contemplated for the diversion or transmission system. This Declaration does not describe the proposed action; it describes EMI's private diversion system.

The proposed action was a temporary license of public trust water resources and not EMI's private operation of its own ditch system. It was irrelevant, as a matter of law, how EMI was proposing to operate its ditch system. Since this was not the proposed action, the manner in which it proposed to operate its private ditch system could not constitute the proposed action or the basis for an exemption.

4. No Exemption Is Applicable

An exemption has not been formally requested of BLNR. And a written exemption determination or notice has not been entered by BLNR. See definition of "exemption notice" in HAR § 11-200-2 of the EIS Rules. Because there has been a suggestion that an exemption may be applicable, this argument will be addressed below. HAR § 11-200-8 of the EIS Rules contains

"exempt classes of action". One such class of actions is HAR § 11-200-8(a)(1) which are:

> Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing.

This exemption is plainly inapplicable for the following three major reasons. First, the subject matter of this exemption is primarily repairs or maintenance of structures, facilities and equipment. It has nothing to do with diversions of large amounts of water from one side of an island to another that are illegal in this context. It is doubtful that the intent of this "class of exempt action" was to encompass the action being considered here. This is especially true since the environmental impacts of these diversions have never been addressed. This is also true because the Hawaii Supreme Court has already ruled or acknowledged on two occasions that transfers of water from one side of an island to another does require the preparation of an EIS. Molokai Homesteaders Coop Ass'n v. Cobb, 63 Haw. 453, 629 P.2d 1134 (1981); Life of the Land v. Ariyoshi, 59 Haw. 156, 577 P.2d 1116 (1978).

Second, the EIS Rules contain a provision that recognizes that all of the exemptions are inapplicable in two situations. These two situations apply here. HAR § 11-200-8(b) states as follows:

> All exemptions under the classes in this section are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.

BLNR, A&B and EMI will readily admit that this is a planned successive action in the same place, over time. BLNR's notion that the proposed disposition "**merely** involve[s] the continuation of a pre-existing use" grossly ignores the significant cumulative impact[1] these diversions have heaped on the affected

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[1] "Cumulative impact" is defined as:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person

environment and community for "the past 120 years." Exempting this action would unjustifiably permit that impact to grow in consequence. HRS Chapter 343 was clearly not designed to sanction such a result.[2] In addition, there can be little doubt that the cumulative impacts of the de-watering of almost all of the East Maui streams over numerous years has had a significant impact on these streams and the East Maui environment. On this basis alone, the suggested exemption is inapplicable.

Third, the suggested exemption is also inapplicable because the proposed action has a significant impact on a particularly sensitive environment. The EIS regulations contain a definition of "environmentally sensitive areas" in HAR § 11-200-12(b)(11), stating the an action shall be determined to have a significant effect on the environment if it:

> Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters.

The de-watering of East Maui streams affects the following "environmentally sensitive areas": fresh water, estuaries and coastal waters. Instream environments have been identified in our State Water Code as particularly sensitive environments. Because of the impact of these extensive

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undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

HAR 11-200-2.

[2] HRS 343-1, Findings and purpose provides:

> The legislature finds that the quality of humanity's environment is critical to humanity's well-being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.
>
> It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

diversions on these particularly sensitive environments, the suggested exemption is inapplicable.

BLNR has illegally presumed that the illegal diversions of streams will continue, that the streams will continue to be illegally dewatered and that rightful possessors of riparian and appurtenant water rights will continue to be deprived of their rights.

There has been and will continue to be a "significant effect" on Maui Tomorrow and its supporters, and the environment, from these diversions.

Given the significance of the cumulative impact "in the same place, over time" from these diversions, HAR § 11-200-8(b) applies and renders any exemption under HAR § 11-200-8(a) inapplicable. Accordingly, BLNR is required to prepare an environmental assessment for the subject diversions pursuant to HRS § 343-5(a).

Fourth, and finally, it has been suggested that the diversions have been taking place based on month to month permits since the 1970's. There have been dramatic changes in the Hawaii Constitution, the Hawaii statutes and the Hawaii caselaw since then. In particular, the Waiahole case, was decided in 2000 clearly enunciating the public trust doctrine with respect to water rights as well as the absolute need to protect instream values prior to allowing surface water diversions. This new law recognizing the duty to protect instream values trumps any exemption in favor of the status quo.

In conclusion, from a procedural perspective, no exemption has been formally presented to BLNR. BLNR has not made any exemption determination. Based upon the foregoing, an EA is clearly required in this situation unless some exemption is applicable. No exemption is applicable and, therefore, it is requested that the Hearing Officer order that an EA be prepared and that these proceedings be stayed or continued until the environmental process is concluded.

B. The Public Trust Requires, As A Pre-Condition To Any Disposition, That Amounts Be Reserved For Minimum Flows In East Maui Streams

1. It is Now Necessary to Calculate Actual Minimum Stream Flows

State law has long required the establishment of minimum stream flows in all of Hawaii's streams. For too many years, CWRM has declared, without any studies, that the minimum stream flow in East Maui streams is the amount of water flowing in those streams, after the A&B and EMI diversions.

This is the situation that the Hawaii Supreme Court found unacceptable on the windward side of Oahu. The Hawaii Supreme Court found that the duty to protect instream flows was an "integral part" of the regulatory scheme established by the State Water Code. HRS § 174C-71. The Court found that the public trust doctrine as it applied to water resources and the State Water Code made it absolutely necessary to determine minimum stream flows, on a scientific basis, prior to permitting out of watershed diversions. See § III.D. of the opinion.

2. Federal, State and County Funds are Now Being Spent to Calculate Minimum Stream Flows

BLNR has recognized, to some degree, the responsibilities imposed by the Waiahole decision, in East Maui. The federal United States Geological Survey ("USGS"), the state CWRM and the Maui County Board of Water Supply ("BWS") have entered into a three way agreement to monitor and report on the status of selected streams in Northeast Maui. The objectives of this 2.5 year study are to:

> (1) Assess the effects of existing surface-water diversions on flow characteristics for perennial streams in northeast Maui.
> (2) Characterize the effects of diversions on instream temperature variations, and
> (3) Estimate the effects that stream flow restoration (full or partial) will have on habitat availability for native stream flora (fish, shrimp, and snails) in Northeast Maui.

This matter was placed upon the Agenda of BLNR on June 13, 2002.

3. Amounts Necessary for Actual Minimum Stream Flows Must be Reserved From Dispositions

In the Waiahole decision, the Hawaii Supreme Court made it clear that if actual data was available on amounts of water necessary to support instream values, this data must be used. From the foregoing, it is apparent that this data is being collected using federal, state and county monies.

4. These Reservations Can Be Calculated in Studies Prepared Through the EA/EIS Process

The permits which have been issued in the past to A&B and EMI have been subject to the sixth condition listed on page 6 of the Staff Report, Record Item 2, which states that the state reserves the rights to withdraw water from the revocable permits to meet the following requirements as the State in its sole discretion may determine:

> Constitutionally protected water rights, instream flow standards, reservations needed to meet the DHHL rights under Section 221 of

the Hawaiian Home 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.

It has been clear, and it is undisputed, that during the period of time that the state has relied upon the revocable permits that it has done nothing to protect constitutionally protected water rights, instream flow standards or the reservations needed to meet the Department of Hawaiian Homelands. The Waiahole decision dictates that these constitutionally protected water rights must be satisfied first, before determining any amounts that may be diverted.

Intervenor Maui Tomorrow requests that this Hearing Officer rule on a summary basis that BLNR must first quantify the amounts necessary to protect constitutionally protected water rights, instream flow standards and reservations needed to meet the Department of Hawaiian Homelands' rights. Once these amounts are quantified, BLNR then can quantify any "surplus amount" that may be available for diversion or transfer out of the watershed, if this becomes a water management area and subject to other applicable laws. Intervenor Maui Tomorrow suggests that the best manner in which to first determine those amounts necessary to be reserved for constitutionally protected water rights, instream values and Hawaiian Homelands' rights is the EA/EIS process.

C. The State Has A Fiduciary/Trust Responsibility To Prepare An Independent Appraisal Of The Value Of The Water Resources Proposed To Be Disposed

These state-owned surface water resources are public trust resources. The state has fiduciary duties to the public and native Hawaiians to obtain fair market value for their disposition. BLNR has violated these public trust and fiduciary duties to the public and native Hawaiians by failing to obtain an objective and independent appraisal of the fair market value of the water resources disposed of.

BLNR apparently is admitting that it needs an independent appraisal. The second item on its Agenda for June 13, 2002, is the following:

> Presentation by an Appraisal Expert on the Identification of Recognized Valuation Methods of Water and Preliminary Findings on the Appropriate Valuation Method for the East Maui Water License Areas

DLNR and the Applicant admit that water rights granted through a temporary license on a month to month basis are a "disposition". HRS § 171-58(c) provides DLNR with the authority to dispose of water rights "by permit for temporary use on a month to month basis". HRS § 171-33 requires DLNR to undertake certain "planning" prior to any intended "disposition". HRS § 171-33(5) provides:

> Determined the upset price or lease rental, **based upon the fair market value of the land** employed to the specific use or uses for which the disposition is being made, with due consideration for all of the terms and conditions of the disposition. (Emphasis added.)

Chapter 171 includes "water" within the definition of "land". As such, state law requires DLNR to determine the fair market value of the water it intends to dispose prior to the intended disposition, even by temporary permit.

Intervenor Maui Tomorrow requests that the Hearing Officer issue a ruling on a summary basis, especially under these circumstances, that BLNR is required to prepare an objective and independent appraisal of the fair market value of the water resources to be disposed of in these proceedings.

D. <u>The Tests Set Out in HRS 178-58 Must Be Satisfied</u>

HRS § 171-58 (c) establishes certain tests for disposition of water rights by permit for temporary use on a month to month basis. Such a disposition may occur on the following three conditions:

1. "Under those conditions which will best serve the interests of the state",
2. "Subject to a maximum term of one year", and
3. "Other restrictions under the law".

The Hearing Officer must determine what these three (3) conditions mean and must determine how to apply these three (3) conditions with regard to the temporary use permits which are now the subject of this contested case hearing.

Intervenor Maui Tomorrow posits that Judge Hifo in the Circuit Court appeal has already ruled that the required determination that the dispositions must "best serve the interest of the state" requires, at a minimum, an application of the public trust doctrine as it has been interpreted in Waiahole and its progeny.

E. The State Lacks The Legal Authority To Issue Holdover Permits

The Legislature has enacted a statute regarding the management and disposition of public lands in Chapter 171. In its definition of "land", the Legislature has included "water". See HRS § 171-1. Part II of Chapter 171 discusses dispositions, generally. The subject matter of the disposition of "water" is covered exclusively in HRS § 171-58. By HRS § 171-58(c) water may be disposed of in one of two fashions. First, water may be disposed of "by lease at public auction" as provided in Chapter 171. Second, water may be disposed of "by permit for temporary use on a month to month basis" on the three conditions discussed above.

The Legislature of the State of Hawaii has not provided for any other manners of disposing of water rights except for by lease at public auction or by permit for temporary use on a month to month basis.

DLNR has no statutory authority to dispose of water rights on a holdover basis. HRS § 171-58(c) does not create any power or authority in DLNR to dispose of water through a "holdover permit" or on any other basis. Intervenor Maui Tomorrow and the Intervenors represented by the Native Hawaiian Legal Corporation have objected to this form of disposition by DLNR. DLNR cannot point to any statutory authority found in Chapter 171 giving it the authority to dispose of water by "holdover permits".

Administrative agencies are created by the Legislature and the Legislature determines the bounds of the agencies authority. Morgan v. Planning Department, County of Kauai, 104 Haw. 173, 184, 86 P.3d 982, 993 (2004) "An administrative agency can only wield powers expressly and implicitly granted to it by statute." See also TIG Ins. Co. v. Kauhane, 101 Haw. 311, 327, 67 P.3d 810, 826 (App. 203). All cited with approval in Pauls Electrical Service v. Bifetel, 104 Haw. 386, _____ P.3d _____ (2004).

F. The Annual Substitutions Of A&B And EMI Are Illegal

HRS § 171-58(c) grants BLNR the authority to dispose of water either by lease at public auction or by permit for temporary use on a month-to-month basis, as follows:

> Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month to month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law ...

BLNR is only permitted to grant water permits for temporary use on a month-to-month basis for "**a maximum term of one year**".

Since 1985, the BLNR Staff Report, Record Item 2, indicates that the state-owned water resources in East Maui have been issued based upon temporary permits either to A&B or EMI. The Staff Report states, on page 4:

> ... the issuance of these water permits for the four (4) "license" areas are alternated annually between A&B, Inc. and East Maui Irrigation Company, Limited. These water permits have commenced on July 1 and expire on June 30 of the following year.

The application of A&B and EMI, Record Item 69, admits in the first sentence that EMI is the "subsidiary" of A&B. As A&B's subsidiary, EMI cannot qualify for the temporary permit on successive years. HRS § 171-58(c) plainly limits the issuance of temporary permits to the same entity for a maximum term of one year. The alternation of A&B and EMI, its subsidiary, is a sham in direct contravention of the limitation imposed by the Legislature. This sham is made all the more obvious because the use does not change one

iota from year to year. The use to which the water is put by A&B is identical to the use to which the water is put by EMI.

Intervenor Maui Tomorrow requests that the Hearing Officer rule on a summary basis that the temporary permits may not be alternated by A&B and EMI and that if the last temporary permit was issued to A&B that any temporary permit must be issued to some entity other than EMI, and vice versa.

G. Joinder in Motions Filed By NHLC

Intervenor Maui Tomorrow hereby joins in the Motions for Summary Relief filed by the Native Hawaiian Legal Corporation on behalf of its clients. When necessary, if the Motion has been filed to further the purposes of Native Hawaiians, the Motions should be read to further the purposes of members of the public.

IV. CONCLUSION/RELIEF REQUESTED

Based upon the foregoing, Intervenor Maui Tomorrow respectfully requests that the Hearing Officer issue the following rulings on a summary basis:

A. That an EA is now required and that these proceedings are stayed or continued until an EA is prepared by BLNR;

B. That the public trust requires, as a precondition to any disposition, that amounts be reserved for minimum flows in East Maui streams;

C. That the state has a fiduciary/trust responsibility to prepare an independent appraisal of the value of the water resources proposed to be disposed;

D. That the tests set out in HRS 178-58(c) must be satisfied prior to authorizing any short term disposition;

E. That the BLNR lacks the authority to issue holdover permits; and

F. That BLNR is prohibited from alternating the temporary permit between A&B and its subsidiary EMI.

DATED: Wailuku, Maui, Hawaii _____

_____

Isaac Hall
Attorney for Intervenor
Maui Tomorrow

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding Water Licenses, at Honomanu, Keanae, Nahiku, and Huelo, Maui	)))))	DLNR FILE NO. 01-05-MA DECLARATION OF ISAAC HALL

DECLARATION OF ISAAC HALL

1. My name is Isaac Hall; I am an attorney licensed to practice law in the State of Hawaii; I am counsel for Intervenor Maui Tomorrow in this case.

2. This Declaration is made upon my personal knowledge and I am competent to testify about the matters contained herein.

3. Exhibit "1" is a true and correct copy of a map showing the location of the Wailoa Ditch System upon state lands, for the most part.

I declare under penalty of law that the foregoing is true and correct.

Executed on _____.

_____
Isaac Hall

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s) was duly served upon the party listed below by:

METHOD DATE

[] Hand

[] Facsimile

[] Delivery in Open Court

[X] Mailing through the United States Postal Service, postage prepaid

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DATED: Wailuku, Maui, Hawaii _____

_____

Isaac Hall
Attorney for Intervenor
Maui Tomorrow

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

Defendant A&B/EMI's Exhibit AB-5

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____