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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of the Contested Case Hearing
Regarding Water Licenses at Honomanu,
Keanae, Nahiku and Huelo, Maui

DLNR FILE No. 01-05-MA

PREHEARING ORDER REGARDING
PETITIONERS' MOTIONS FOR
SUMMARY RELIEF

**PREHEARING ORDER REGARDING PETITIONERS'
MOTIONS FOR SUMMARY RELIEF**

Pursuant to Minute Order No. 8 issued on October 28, 2004, the parties were requested to present to the Hearings Officer, by motion, issues that they contend involve no genuine issues of material fact or that are based solely on issues of law. In accordance therewith, Petitioners Na Moku 'Aupuni O Ko'olau Hui, Beatrice Kekahuna and Marjorie Wallett (the "Na Moku Parties") submitted the following motions:

- a. Petitioners Na Moku 'Aupuni O Ko'olau Hui, Beatrice Kekahuna and Marjorie Wallett's Motion For Declaratory Ruling on the State's Affirmative Duty to Determine and Protect Superior Rights Prior to Authorizing Via Permit, A&B's/EMI's Proposed Out of Watershed Transfers ("Affirmative Duty Motion");

- b. Petitioners Na Moku ‘Aupuni O Ko‘olau Hui, Beatrice Kekahuna and Marjorie Wallett’s Motion For Declaratory Order on Breach of Ceded Lands Trust Claim (“Ceded Lands Motion”);
- c. Petitioners Na Moku ‘Aupuni O Ko‘olau Hui, Beatrice Kekahuna and Marjorie Wallett’s Motion For Declaratory Order re Controlled Releases Sought by USGS (“USGS Motion”);
- d. Petitioners’ Motion For Declaratory Order Determining That the Burden of Demonstrating That the Out of Watershed Diversions of East Maui Stream Flows by the System of Ditches Owned and/or Operated by A&B/EMI Are Not Injurious to the Rights of Others Rests Wholly on A&B/EMI and/or the State of Hawaii (“BOP Motion”); and
- e. Petitioners Na Moku ‘Aupuni O Ko‘olau Hui, Beatrice Kekahuna and Marjorie Wallett’s Motion For Declaratory Order Regarding Conflict of Interest Disqualifying Counsel to Independent Fact Finder (“Conflict of Interest Motion”).

In addition, Petitioner Maui Tomorrow filed a single Motion For Summary Relief (the “MT Motion”) and joined in the Na Moku Parties’ motions.

These motions all came on for hearing on January 18, 2005 before the Honorable E. John McConnell, (ret.), Hearings Officer, at Wailuku, Hawai‘i. Applicants Alexander & Baldwin, Inc. (“A&B”) and East Maui Irrigation Company, Limited (“EMI”) (collectively, “Applicants”) appeared by counsel Randall K. Ishikawa, Esq., David Schulmeister, Esq., Elijah Yip, Esq., and Lauren A. Stern, Esq.; the Na Moku Parties appeared by counsel Moses K. N. Haia III, Esq., and Alan T. Murakami, Esq.; Maui Tomorrow by counsel Isaac D. Hall, Esq.; Intervenor Hawaii Farm Bureau Federation (“HFBF”) by counsel Robert H. Thomas, Esq.; Intervenor Maui Land & Pineapple Company, Inc. (“MLP”) by counsel Richard Kiefer, Esq. and David B. Merchant, Esq.; and Intervenor County of Maui, Department of Water Supply (“DWS”) by Deputies Corporation Counsel Jane Lovell, Esq., and Edward S. Kushi, Jr., Esq.

Based upon the written submissions of the parties, the arguments presented at the hearing, the representations of counsel, and the entire record of this proceeding, the Hearings Officer hereby enters the following Order:

A. AFFIRMATIVE DUTY MOTION

1. In their Affirmative Duty Motion, the Na Moku Parties requested declaratory relief that “(1) the current diversions are unauthorized and violate the applicable common law and the public trust; (2) the State, through the BLNR, may not issue any form of permit or authority for continuing these illegal diversions unless and until the State (a) undertakes the analysis required to identify and protect Native Hawaiian rights, appurtenant and riparian rights, and the public trust resources implicated by the diversions and (b) implements protective measures to include requiring A&B/EMI to immediately cease and desist these illegal diversions until the analysis is complete and all superior rights are accommodated with sufficient water.”

2. At its regularly scheduled public meeting on May 24, 2002, the Board of Land and Natural Resources (“BLNR”) decided to place the interim disposition of water in the ditch system operated by Applicants into holdover status pending the outcome of this contested case (the “Holdover Decision”). Pursuant to In re Water Use Permit Applications, 94 Hawai‘i 97, 9 P.3d 409 (2000) (“Waiāhole”), the BLNR, as trustee of the public trust, has authority to preserve *status quo* conditions pending a long-term disposition of public trust resources if doing so is in the interest of the public. Likewise, the BLNR, as trustee of the public trust, has authority to make an interim disposition of public trust resources pending a long-term disposition of such resources if doing so is in interest of the public.

3. To the extent that the Affirmative Duty Motion seeks a declaration that the Holdover Decision is illegal as a matter of law, i.e., without considering whether under all the present facts and circumstances it is consistent with the public interest, it is DENIED.

4. To the extent that the Affirmative Duty Motion seeks a declaration that an interim disposition of water by the BLNR, such as is effectively occurring by reason of the Holdover

Decision, should consider water needs for native Hawaiian traditional and customary (“T&C”) practices, it is GRANTED and an evidentiary hearing shall be held forthwith to determine whether and to what extent the current diversions should be reduced in order to satisfy the constitutionally or legally protected practices of the Na Moku Parties.

B. BOP MOTION

1. In the BOP Motion, the Na Moku Parties requested summary relief that the BLNR: “(1) declare that the burden of demonstrating that the out of watershed diversions of East Maui stream flows by the system of ditches owned and/or operated by Alexander & Baldwin, Inc. (A&B) and its subsidiary, East Maui Irrigation Company Ltd. (EMI) (collectively, “A&B”) are not injurious to the rights of others rests wholly on A&B and, ultimately, the State of Hawaii in approving the diversions, (2) define the burden, (3) declare that A&B’s out of watershed diversions are a continuous, ongoing violation of both the applicable rule of law and this State’s public trust, and (4) declare that unless and until this burden is met, A&B/EMI must return a sufficient amount of stream flow into each and every stream to which the rights asserted by Na Moku, et al. and others attach.”

2. In this contested case, each party who claims an interest in the water resources at issue bears the burden of coming forward to make a prima facie showing identifying the claimed interest and, with reasonable specificity, the quantity of water required to satisfy that interest. Any party who wishes to rebut the showing of any other party will then have the opportunity to do so. The BLNR then has the duty, based on its factual findings and consideration of the public interest, to ensure that any disposition of the State water resources at issue herein duly protects any water needs and interests that fall within a purpose of the public trust.

3. There are genuine issues of material fact concerning whether Applicants' current diversions are a violation of common law and the public trust such as would require Applicants to return an amount of stream flow into the East Maui streams.

4. Accordingly, the BOP Motion is DENIED as to its request for a declaration that the burden of demonstrating that the out of watershed diversions are not injurious to the rights of others rests wholly on A&B and the State; GRANTED as to its request that the BLNR define the burdens of proof applicable to this contested case; DENIED as to its request for a declaration that Applicants' current diversions as a matter of law are a continuous, ongoing violation of common law and the public trust; and DENIED, without prejudice, as to its request that Applicants be ordered to return an amount of stream flow into the East Maui streams.

C. MT MOTION

1. The MT Motion requests summary relief that: (a) an Environmental Assessment ("EA") pursuant to Hawai'i Revised Statutes ("HRS") ch. 343 must be prepared; (b) the contested case proceedings be stayed or continued until the environmental review process under HRS ch. 343 is completed; (c) the BLNR "quantify the amounts of water necessary to protect constitutionally protected water rights, instream flow standards and reservations needed to meet the Department of Hawaiian Homelands' rights" before making a disposition of water; (d) the "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"; (e) the Hearings Office determine the meaning of the conditions in HRS § 171-58(c) for rendering a disposition of water rights by permit for temporary use on a month-to-month basis and how the conditions apply with regard to the interim disposition of water; (f) the State lacks legal authority to issue holdover permits; and (g) that temporary water permits may not be issued in alternating basis between A&B and EMI.

2. This contested case concerns A&B and EMI's application for the sale of a thirty-year lease at public auction of water rights in the Nahiku, Keanae, Huelo, and Honomanu License Areas (the "Long-Term Application" or "Application"). The validity of the Holdover Decision and the interim disposition of water are also issues in this contested case.

3. Prior to rendering a disposition on the Long-Term Application, the BLNR must prepare an EA for the Application pursuant to HRS ch. 343. No exception to the EA requirements of HRS ch. 343 applies to the disposition requested in the Long-Term Application. The contested case insofar as it concerns the Long-Term Application is therefore stayed pending completion of the EA for the Application. However, such stay shall not affect the contested case proceeding insofar as it concerns the Holdover Decision or an interim disposition of water. Accordingly, the MT Motion is GRANTED insofar as it requests (a) a summary ruling that an EA must be prepared for the Long-Term Application and (b) a stay or continuance of the contested case proceedings with respect to the Long-Term Application pending completion of the EA for the Application.

4. The MT Motion is DENIED insofar as it requests a summary ruling that an EA must be prepared prior to any interim disposition of water such as the Holdover Decision and/or a stay or continuance of the contested case proceedings with respect to the Holdover Decision and the interim disposition of water. The Board's trust responsibilities preclude any change in the *status quo* absent a hearing and a determination of the public interest in accordance with Waiahole. Further, the BLNR is without jurisdiction to rule upon the challenge to the Holdover Decision based on the absence of an EA inasmuch as such jurisdiction lies with the Circuit Court.

5. Prior to rendering a disposition on the Long-Term Application, the BLNR must calculate the minimum in-stream flow requirements for each stream that would be affected by such disposition. Accordingly, the MT Motion is GRANTED insofar as it requests a summary ruling that the BLNR must “quantify the amounts of water necessary to protect constitutionally protected water rights, instream flow standards and reservations needed to meet the Department of Hawaiian Homelands’ rights” before making a disposition on the Long-Term Application.

6. Prior to rendering a disposition on the Long-Term Application, the BLNR must perform an appraisal of the water resources that are the subject of the Application. Accordingly, the MT Motion is GRANTED insofar as it requests a summary ruling that the “BLNR is required to prepare an appraisal of the fair market value of the water resources” that are the subject of the Long-Term Application.

7. The Holdover Decision does not constitute issuance of a permit or license within the meaning of HRS § 171-58(c). Thus, any challenge premised on the position that the Holdover Decision alone constituted issuance of a permit or license within the meaning of HRS § 171-58(c) lacks merit. Further the Holdover Decision was procedurally essential to the Board’s proper discharge of its public trust responsibilities. The MT Motion is accordingly DENIED insofar as it requests: that the Hearings Officer determine without hearing the meaning of the conditions in HRS § 171-58(c) for rendering a disposition of water rights by permit for temporary use on a month-to-month basis, and how the conditions apply with regard to the interim disposition of water, or a summary ruling that the State lacks legal authority to issue holdover permits.

D. CONFLICT OF INTEREST MOTION

1. The Conflict of Interest Motion requested declaratory relief that: “(1) allowing the Deputy Attorney General who represented the State Appellees in the appeal to continue to represent the hearings officer in further proceedings on remand creates a conflict of interest and casts suspicion on the integrity of the process, (2) this conflict requires that the Deputy Attorney General who acted as counsel to the State Appeals on appeal withdraw or be dismissed as counsel for the independent fact finder and, (3) either a new deputy attorney general who did not participate in the appeal be assigned or separate counsel be retained to represent the hearings officer in further proceedings on remand.”

2. The Conflict of Interest Motion is DENIED. However, it is noted that, in the event the Department of Land and Natural Resources (“DLNR”) becomes a party to this contested case, it shall be represented by counsel separate from counsel for the BLNR.

E. CEDED LANDS MOTION

1. The Ceded Lands Motion requested declaratory relief that: “(1) the failure of the DLNR to: (a) comply with the requirements of HRS §§ 171-58(c) and (g); or (b) ascertain whether the impacts of water diversion from East Maui to Central Maui would detrimentally affect the condition of native Hawaiians before issuing a revocable and/or “holdover” permit is a breach of the ceded lands trust; and (2) any breach of the trust imposed on surface water under the public trust doctrine would simultaneously constitute a breach of the ceded land trust.”

2. The Hearings Officer notes that Na Moku Parties unsuccessfully advanced arguments in the agency appeal heard in the First Circuit Court of the First Circuit before the Honorable Eden Elizabeth Hifo to the effect that Section 5(f) of the Admissions Act and the Hawaiian Homes Commission Act create obligations on the BLNR that are coextensive with the public trust in natural resources. Those arguments are now pending before the Hawai‘i Supreme

Court. Accordingly, the Hearings Officer is constrained to DENY the Ceded Lands Motion without prejudice to renewal following disposition of the pending appeal.

F. USGS MOTION

1. The USGS Motion requests declaratory relief that: “(1) the Department of Land and Natural Resources [sic] authorization allowing Alexander and Baldwin’s and East Maui Irrigation’s to divert stream flow from various East Maui Streams by its permittee, without regard to the request of the U.S. Geological Survey office for controlled releases of water to enhance the predictive power of its scientific model, is a breach of its duty to manage this water resource consistent with the ceded lands trust and the public trust doctrine, and (2) any continuing diversion under a revocable and/or ‘holder’ permits [sic] should cease until and unless the Board orders the requested controlled releases or the releases are voluntarily made.”

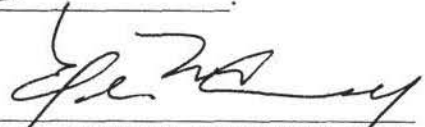
2. The USGS Motion implicates questions of fact that require an evidentiary hearing to resolve. The USGS Motion is therefore DENIED. The factual questions pertinent to the USGS Motion may be addressed in the evidentiary hearing for interim disposition of water resources.

G. The Hearing Officer will schedule the interim hearing required by Paragraph A 4 above as soon as feasible. A scheduling conference will be held via telephone conference within 10 days of a written request by any party served on all other parties

DATED:

Wailuku, Hawai‘i,

14 March 2005


HON. E. JOHN McCONNELL (ret.)
Hearings Officer

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

Defendant A&B/EMI's Exhibit AB-6

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____