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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing) DLNR FILE NO. 01-05-MA
Regarding Water Licenses at Honomanu,)
Keanae, Nahiku, and Huelo, Maui) AMENDED MOTION TO RECONVENE
) CONTESTED CASE PROCEEDINGS;
) AMENDED MEMORANDUM IN
) SUPPORT OF MOTION; DECLARATION
) OF COUNSEL; CERTIFICATE OF
) SERVICE

AMENDED MOTION TO RECONVENE CONTESTED CASE PROCEEDINGS

Pursuant to HAR §13-1-34(a), Petitioners NA MOKU AUPUNI O KO'OLAUI HUI and BEATRICE KEKAHUNA hereby move to reconvene the contested case proceedings before the Board of Land and Natural Resources relating to the issuance of a license or permit to ALEXANDER AND BALDWIN, INC. (A&B) and EAST MAUI IRRIGATION COMPANY, LIMITED (EMI) to utilize any of the 4 water license areas in East Maui managed by the BLNR and/or to demand that the Board initiate the required environmental review process for the diversion of water from the 4 water license areas. and to issue an order halting any and all diversions with the exception of those reasonably used for domestic purposes as there is no legal authority to issue the contested revocable permits before an environmental assessment is conducted and because there is no legal basis to continue the "holdover" permit.

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This motion is based upon the attached amended memorandum in support and declaration of counsel.

DATED: Honolulu, Hawaii, August 14, 2012.

A handwritten signature in black ink, appearing to read "Camille K. Kalama". The signature is written in a cursive style with a large, looping initial "C".

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those reasonably used for domestic purposes as there is no legal authority to issue the contested revocable permits before an environmental assessment is conducted no legal basis for the “holdover” permit.

II. PROCEDURAL BACKGROUND

A. Creation of the Diversion System

In 1876, upon authority granted by the Hawaiian Kingdom, A&B commenced construction of the system of ditches and tunnels that diverts water from East Maui streams to irrigate the sugar fields it owns in Central Maui. The Kingdom of Hawai`i specifically intended to protect its subjects by requiring that the construction and operation of this ditch system not injure rights of downstream users of this water. Currently, East Maui Irrigation ("EMI"), a subsidiary of Alexander & Baldwin (“A&B”), 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.

B. Establishment of Water License Areas

Nearly sixty years into these diversions, in 1939, the Territory of Hawai`i and EMI entered into the East Maui Water Agreement. The agreement established four (4) license areas identified as Honomanu, Huelo, Keanae, and Nahiku, encompassing 33,000 acres of former Crown Lands. It provided for the disposition of these four (4) water licenses at public auction to the highest bidder. The original lease term for these four areas was set at 21 years and at five-year intervals. The last of these licenses expired on the following dates:

- Keanae - June 30, 1972,
- Nahiku - June 30, 1977,
- Huelo - June 30, 1982, and
- Honomanu - June 30, 1986.

Subsequently, the State of Hawai`i, through the Board, began an issuing to A&B and EMI, in alternating years, year to year revocable permits until 2001, purportedly pursuant to HRS 171-58(c). Rev. Permit S-7263, attached as Exhibit “1-A”; , Rev. Permit S-7264, attached as Exhibit “1-B”; Rev. Permit S-7265, attached as Exhibit “1-C”; Rev. Permit S-7266, attached as Exhibit “1-D”.

C. Attempted 30-Year Water License

1. Approval by BLNR

At its August 23, 1985 meeting and under Agenda Item F-5, the Board approved the public auction sale of a thirty (30) -year water license to A&B/EMI. However, based upon legal concerns addressed in *McBryde Sugar Co. v. Robinson* 54 Haw. 174 (1973) (“McBryde”) the lease was not issued.

In May 2001, Nā Moku, et al. filed petitions to initiate the following two administrative actions to challenge the long-standing diversions of East Maui streams by Alexander and Baldwin (A&B) and East Maui Irrigation Company (EMI): (a) before the CWRM to amend the Interim Instream Flow Standards (IIFS) for 27 East Maui streams in an effort to restore flows to those streams under the Water Code’s Stream Protection Program; and (b) before the Board to initiate contested case hearings to challenge the proposals to grant authority to divert water from all streams flowing over the approximately 33,000 acres of ceded lands in Huelo, Honomanu, Ke‘anae, and Nahiku, to HC&S sugar fields in Central Maui.

In the midst of the latter process, on January 24, 2003, the Board initially granted a 30-year lease for all four water license areas to A&B/EMI to use these license areas to collect and divert water from East Maui streams on these ceded (former Crown) lands. See, attached Exhibit “2”, First Amended Findings of Fact, Conclusions of Law and Order, dated January 24, 2003 (hereafter, “2003 BLNR Decision and Order”). The Board concluded that it was exempt from any environmental assessment requirement under HRS chapter 343 because the diversion is a continuation of an existing practice. *Id.* at 13. The Board at that time also believed it could lease its lands for water diversion, without conducting its own parallel investigation regarding the minimum, instream flow standards necessary to protect appurtenant rights or traditional and customary practices of native Hawaiians:

... provided that such lease is issued in accordance with the procedures set forth in HRS Chapter 171 and provided that all diversions of stream water shall remain subject to the Interim Instream Flow Standards set by CWRM, and to any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.”

Id. In its May 24, 2002 meeting, the Board “[d]eferred and granted a holdover of the existing revocable permits on a month-to-month basis pending the results of the contested case.” *Id.* Acknowledging that “the past practice of alternating issuance of temporary permits to A&B and

EMI raises legal questions,” the Board summarily “decided to continue the status quo pending resolution of the objections raised to A&B and EMI’s Application for a long term license.” *Id.* Accordingly, it concluded that “there is no further request for the issuance of a temporary permit pending, and it is not necessary for the Hearings Officer to reach this issue.” *Id.*

2. Invalidation by Circuit Court Judge Eden Hifo

After an appeal to the Circuit Court, on October 10, 2003, Judge Eden Hifo invalidated that Board decision. See, attached Exhibit “3”, Order Affirming in Part and Reversing in Part State of Hawaii Board of Land and Natural Resources’ Findings of Fact and Conclusions of Law and Order, Dated January 10, 2003, Amended January 24, 2003, Regarding Petition Contesting Application for Long Term Disposition of Water Licenses and Issuance of Interim Revocable Permits at Honomanu, Keanae, Nahiku, and Huelo, Maui, filed October 10, 2003.

In doing so, she ruled that the Board cannot issue that lease without first conducting an environmental assessment of the impacts of that proposed transaction relative to the prediversion conditions pursuant to HRS chapter 343. *Id.* She remanded the case back to the Board for further proceedings on whether it may issue revocable permits to the same entity on an annual basis, reserving her ruling to only the thirty year lease being challenged. *Id.*

She further ruled that, while it has no parallel duty to conduct instream flow investigations independent of the CWRM, the Board may defer its decisions pending the outcome of a CWRM decision on outstanding petitions to amend the IIFS for streams in East Maui. However, she cautioned that the Board should not merely rubberstamp the outcome of any CWRM proceeding:

... [r]ather, the BLNR is obligated to make a truly independent investigation as to whether it’s in the state’s best interest to authorize the diversion of water from East Maui streams.

This ruling does not necessarily mean that every CWRM decision may be collaterally attacked. However, at any BLNR contested case hearing, any party may challenge a CWRM decision if its methodology is wrong or some other error is committed, whether or not it has been collaterally attacked on appeal. This Court simply affirms that the BLNR may not merely rubber-stamp every CWRM determination.

Id.

After extensive hearings on the subsequent remand, on March 23, 2007, the Board ordered interim, but incomplete, relief to Nā Moku, et al. which resulted in just the partial restoration of one stream – Waiokamilo – for taro irrigation. See attached as Exhibit “4” Findings of Fact and Conclusions of Law and Order, Dated March 23, 2007 (hereafter, “2007 BLNR

Interim Order”). In that order, the BLNR also ordered monitoring of flow and water temperature, and the appointment of a stream monitor to oversee that monitoring and to resolve conflicts over water use that might arise as a result of its order. *Id.*

Despite that order, the stream monitor failed to implement key provisions of the interim order and failed to address concerns related to the impact of A&B/EMI’s diversions on traditional taro cultivation and on the habitats of flora and fauna associated with Hawaiian traditional and customary practices. *See*, attached as Exhibit “5”, Memorandum in Support of Petitioners’ Motion to Enforce March 23, 2007 Findings of Fact, Conclusions of Law, and Decision and Order, filed May 29, 2008 at 11-13; *see also* Exhibit “6”, attached as Exh. “E” to Petitioner’s Motion to Enforce.

3. CWRM Action on 8 streams

On September 25, 2008, over 7 years after Nā Moku filed their petitions to amend the IIFS, the Commission on Water Resources Management (CWRM) belatedly amended the IIFS affecting 8 of 27 streams for which Nā Moku, et al. sought restoration. These streams are the most prominent sources of irrigation water used to cultivate taro in lō`ī in Honopou, Wailuanui and Ke`anae valleys. This CWRM action, reflected in Table 1 below, resulted in additional flow back into Wailuanui and Honopou Streams. It also approved a number of adaptive management strategies, general and unit specific in nature, which would guide the staff and the public in the implementation, monitoring, and evaluation of the newly established standards.

Table 1. Interim IFS values approved by the Commission on September 25, 2009 for the first five petitioned east Maui surface water hydrologic units.
[cfs = cubic feet per second; mgd = million gallons per day]

<u>Hydrologic Unit</u>	<u>Interim IFS Site</u>	<u>Decision</u>
Honopou (6034)	Honopou Site A	2.00 cfs (1.29 mgd)
	Honopou Site B	0.72 cfs (0.47 mgd)
Hanehoi (6037)	Huelo Site A	0.89 cfs (0.57 mgd)
	Hanehoi Site B	0.63 cfs (0.41 mgd)
	Hanehoi Site C	1.15 cfs (0.74 mgd)
Piinaau (6053)	Piinaau Site A	Status quo
	Palauhulu Site B	5.50 cfs (3.56 mgd)
Waiokamilo (6055)	Waiokamilo Site A	4.9 cfs (3.17 mgd)

	Kualani Site B	Status quo
Wailuanui (6056)	Wailuanui Site A	3.05 cfs (1.97 mgd)

CWRM Staff Submittal, dated December 16, 2009, attached hereto as Exhibit “7”.

D. Nā Moku’s attempt to enforce the 2007 BLNR Interim Order

Suffering from 2 years of inaction by the BLNR-appointed monitor, and slow implementation of the IIFS set by the CWRM, especially for Honopou Stream, Nā Moku, et al. filed a motion to enforce the 2007 BLNR Interim Order. Petitioners’ Motion to Enforce March 23, 2007 Findings of Fact, Conclusions of Law, and Decision and Order, filed May 29, 2008. In view of the CWRM action on amending the IIFS for these streams, the Board denied the motion. *See Order Denying Petitioners’ Motion To Enforce March 23, 2007 Order*, filed March 13, 2009, attached hereto as Exhibit “8”. In doing so, the Board suspended further action by the stream monitor, as well as the contested case hearing, pending a report from its Land Division administrator to report on the CWRM decision to amend interim instream flow standards for 27 East Maui streams.

E. CWRM Action on Remaining 19 Streams

In December 2009, the CWRM staff was at odds with the independent recommendations of the DLNR’s Division of Aquatic Resources (DAR).¹ The DAR recommended “actions that support restoration of native species habitat, migratory pathways for upstream recruiting individuals and downstream drifting larvae, and overall pollution structure for eight native fish and macroinvertebrate species inhabiting East Maui streams.” Letter from D. Polhemus to CWRM, dated December 15, 2009 at 1, attached as Exhibit “9”. Specifically, while it determined that the return of 100% of the diverted water “would be the most desirable IIFS for protection and management of native stream animals,” the DAR was ready to accommodate some continued diversion to meet commercial water needs of people offstream by recommending partial restoration to just 8² of the 19 streams the CWRM was considering at the

¹ Initially, the CWRM staff recommended that only one of the 19 streams considered in the second phase of CWRM deliberations be partially restored. The CWRM decided to reject that recommendation and urged its staff to come up with another proposal that would more closely address the protection of instream uses prescribed by the Water Code. Subsequently, the staff amended its recommendation by adopting, in large part, the DAR position and rejecting the HC&S proposal to establish season-based IIFS to accommodate commercial water uses during dry season months (April through October).

² The DAR counted 8 streams covered in their initial recommendations, treating Pu’aaka’a Stream as a tributary of Kopili’ula Stream.

time. *Id.* at 2. In doing so, the DAR proposed to restore sufficient water flow so that 90% of the stream habitat could be restored in those 8 streams with 64% of the base flow restored to those streams, as established with prior USGS studies. *Id.* The DAR calculated that its recommendation would restore 45.8 of native species Habitat Units out of a 67.3 km of Habitat Units then impacted by EMI stream diversions. *Id.* at 4.

On May 25, 2010, in its second action meeting on Nā Moku, et al.'s petition, the Commission on Water Resources Management (CWRM) separately and independently disposed of petitions to amend interim instream flow standards (IIFS) for the remaining 19 of the 27 streams along the East Maui coast, for which Nā Moku, et al. petitioned for restoration, on which it had yet to act. The restored flows Nā Moku, et al., sought are necessary to support their members' rights to pursue traditional and customary practices related to fishing along coastlines into which those streams discharge fresh water, and gathering 'o'opu, 'ōpae, and hīhīwai from those streams. As the CWRM staff determined:

The maintenance and restoration of stream habitat would benefit from continuous streamflow. Streams in east Maui are recognized as important habitats for native Hawaiian stream animals. The dry reaches that are often found immediately downstream from the diversions can inhibit species migration. With a few exceptions, the diversions capture almost all base flow and an unknown amount of total streamflow in each stream, decreasing flow downstream of the diversion and sometimes causing streams to go dry. This prevents the upstream migration of native stream animals, restricts surviving adult animals to the disconnected deep pools, and causes postlarvae recruits to be stranded at the stream mouth.

See, attached Exhibit 7 at 10. Accordingly, it rejected any recommendation to adopt a season-based approach³ to amending IIFS in favor of an annual IIFS "that would restore streamflow to its natural streamflow pattern for the full year that is characteristic of east Maui streams."

The annual interim IFS approach would also help to restore the natural life cycle of the native stream biota in east Maui. Native amphidromous species respond to the natural flow regime in which increased streamflow triggers spawning, recruitment, upstream and downstream migration. In the drier periods, these animals can only exist in shallow pools without major growth and reproduction. According to the Division of Aquatic Resources (DAR), management actions that mimic natural flow patterns with both high and low flows are likely to sustain suitable instream habitats and amphidromous animal populations (see PR-2009-19 Revised, Section 20.0). DAR has calculated the minimum

³ Specifically, the CWRM staff found that the evidence revealed a "lack of a seasonal flow pattern" in the pertinent streams, noting that this pattern "is not of a well-defined seasonal trend, but one that varies throughout the year." Exhibit 13, *infra*. In contrast, the staff found that "rainfall *in central Maui* where a majority of the end water use is located, exhibit a strong seasonal pattern of wet winters and dry summers." *Id.* (emphasis added).

flow to maintain minimum viable habitat for stream animals (Hmin) in the wet season and minimum flows to maintain minimum connectivity for animals to survive in suitable habitats (Cmin). Under the annual approach, an annual interim IFS may adapt the Hmin flow rates for the full year, which could support long-term growth and reproduction of native stream animals year-round.

CWRM Staff Submittal, dated May 25, 2010 at 9, attached hereto as Exhibit “10”. Noting that HC&S had operated for 26 years at 85% of its claimed need for water, the CWRM staff recommended that the IIFS for only 5 of the 9 streams⁴ originally targeted for partial restoration by the DAR be restored to levels sufficient to support minimum habitat recovery throughout the year. *Id.* at 18-20. The CWRM staff recommended omitting 3 streams (Puohokamoa, Haipuaena, and Kopiliula) because they were allegedly streams used to convey already diverted stream water from other streams to lower elevation diversion ditches. *Id.* at 20. It further recommended eliminating Puaka`a Stream because only a short (300 meter) stretch of stream bed would benefit from restoration, relative to the costs of modifying the applicable stream diversion structures. Additionally, the CWRM staff included Makapipi Stream on its list of recommendations for restoration, ‘because the Nahiku community relies heavily on the stream for cultural practices, recreation, and other instream uses.’ *Id.* at 19-20. Finally, for the remaining nine streams – Alo, Wahinepe`e, Punalau, Honomanu, Nua`ailua, Ohia, Pa`akea, Waia`aka, and Kapa`ula Streams, the CWRM staff did not recommend flow restoration because it would not result in significant biological return from additional flow. *Id.*

However, despite its own staff’s recognition of these points and recommendations, on May 25, 2010, the CWRM voted to accommodate HC&S, without regard for the effect on the long-term health of instream habitats for ‘o`opu, ‘ōpae, and hīhīwai in the 19 streams. Specifically, against the recommendation of DLNR’s Division of Aquatic Resources, which the CWRM staff had partially adopted, the CWRM decided to allow for amendments to the IIFS that differed during the wet and dry seasons. This seasonal approach allows almost *no* water to remain in these streams during the dry season, when EMI would be allowed to take virtually all the water in the streams for its diversions. The CWRM adopted the following:

- 1) A conditional interim IFS of 0.93 cubic feet per second (cfs), equivalent to 0.6 million gallons per day (mgd) for Makapipi Stream;
- 2) An annual interim IFS of 0.1 cfs (0.06 mgd) for Hanawi Stream immediately below the diversion to provide connectivity for stream biota;

⁴ See, note 2.

- 3) Seasonal interim IFS for Waikamoi (includes Alo), West Wailuaiki, East Wailuaiki, and Waiohue Streams; and
- 4) Establishing measurable interim IFS of status quo conditions for the remaining streams

See Exhibit 10, Table 1.

Despite its legal obligations to do so, the CWRM acted without properly applying the law protecting public trust purposes which include traditional and customary practices by setting streamflows that first protect these purposes. Following the Commission's decision and prior to the close of the Commission meeting, NHLC requested, on behalf of its clients, a contested case hearing. On October 18, 2011, the CWRM denied that request. See Minutes of the October 18, 2011 CWRM Meeting, attached hereto as Exhibit "11". Nā Moku, et al., appealed the denial to the Intermediate Court of Appeals ("ICA"). The ICA, after initially dismissing the case for lack of a final appealable decision by the CWRM, now has the case again on remand from the Supreme Court. See Amended Order Accepting Application for Writ of Certiorari, Vacating ICA Order Dismissing Appeal for Lack of Jurisdiction, and Remanding Appeal to ICA, filed January 11, 2012, attached hereto as Exhibit "12". The pending appeal addresses only the issue of whether Nā Moku, et. al. has a right to a contested case hearing on the CWRM's decision to amend the IIFS for the remaining 19 streams.

In the two years since the CWRM voted on the remaining Interim Instream Flow Standards, thereby acting to set standards for all 27 petitioned streams, the Board has taken no action in this contested case hearing.

III. ARGUMENT

A. A&B, HC&S, and EMI do not have any proper authority to divert water from East Maui Streams

The Board has authority to issue leases, licenses, or permits for the use of public lands pursuant to Hawai'i Revised Statutes ("HRS") § 171-13.⁵ Any such dispositions of public land must be made at public auction, pursuant to HRS § 171-14. With regard to permits, HRS § 171-55 provides:

⁵ HRS § 171-13 (Disposition of Public Lands), provides in part:

Except as otherwise provided by law and subject to the other provisions of this chapter, the board may:
(1) Dispose of public land in fee simple, by lease, lease with option to purchase, license, or permit[.]

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

In this case, the Board issued year to year permits for one year periods for the last time in 2001. As stated previously, on May 24, 2002 the Board “[d]eferred and granted a holdover of the existing revocable permits on a month-to-month basis pending the results of the contested case.” Exhibit 2 at 12. Based upon HRS § 171-55, the Board’s continuance of the permit on a month-to-month basis is permitted for one year periods.

The only other possible basis for a holdover permit is found in HRS § 171-40 (Expired leases, holdover), which provides in part:

Upon expiration of the lease term, if the leased land is not otherwise disposed of, the board of land and natural resources may allow the lessee to continue to hold the land for a period not exceeding one year upon such rent, terms, and conditions as the board may prescribe.... Upon expiration of the one-year extension, if the board has not yet decided upon the re-lease of the land or reservation for other purposes, the board may issue a temporary permit to the lessee, subject to section 171-55 and the rent and such other terms as the board may prescribe.

The above statute also imposes a one year limit after which the Board must then issue temporary permits. Thus, the Board’s action in 2002 to continue the permit on a month to month basis expired at the very latest in 2003.

Even if the Board could lawfully continue the permit on a holdover basis while the CWRM worked to set Interim Instream Flow Standards for the 27 subject streams, the Commission set the last IIFS on May 25, 2010. *See* Exhibits 10 & 11. Although petitioners requested a contested case on the May 2010 decision, the Commission denied the request and that denial is on appeal before the Intermediate Court of Appeals. The Board’s ability and duty

to act to ensure that public trust resources are being properly managed because the 2003 ruling acknowledged the Board’s independent duty to ensure that public trust purposes are protected. *See* Exhibit 3 at 5. The Board cannot on the one hand defer the proper permitting process “pending the results of the contested case,” while simultaneously halting the contested case process indefinitely. The Board must either continue the contested case proceedings or complete the necessary studies and begin the permitting process.

B. HRS Chapter 343 Requires the BLNR to Do an Environmental Assessment Before Proceeding

Judge Hifo’s 2003 ruling in this matter was not appealed. It is therefore controlling precedent on the issue of whether the Board must first conduct an environmental assessment (“EA”) before committing the state to a 30-year lease of the 4 license areas. The fact that the Board claims that the diversions are continuing under a legally unauthorized “holdover” permit does not change the requirement for an environmental assessment under HRS chapter 343. Exhibit 2 at 11-12. The use of State land is the same whether it is under a multi-year lease or holdover permit not authorized by rule or statute. Under HRS § 343-5,⁶ the Board must first do an EA before continuing to authorize the “use of state ... lands” under any form of authorization. Before this triggering event occurs, the responsible public agency must perform an EA. *Hawai`i*

⁶ HRS §343-5 provides:

(a) ... an environmental assessment shall be required for actions that:

(1) Propose the use of state ... lands ...;

(2) Propose any use within any land classified as a conservation district by the state land use commission under chapter 205; ...

(b) Whenever an agency proposes an action in subsection (a), ... the agency shall prepare an environmental assessment for such action at the earliest practicable time to determine whether an environmental impact statement shall be required.

(c) Whenever an applicant proposes an action specified by subsection (a) that requires approval of an agency ..., the agency initially receiving and agreeing to process the request for approval shall prepare an environmental assessment of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required.

...

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action.

Sierra Club v. Department of Transportation, 100 Hawai'i 242, 266-67, 59 P.3d 877, 901-02 (2002) (Nakayama, J., concurring) (“The main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken”); HRS § 343-5(c) (providing that an EA, once triggered, be done “at the earliest practicable time” and is a “condition precedent to the approval of the request and commencement of the proposed action”);

In this instance, this Board must conduct an EA before issuing any permit. To permit the continued diversion of water without any proper authorization is a dereliction of its trust duties. Accordingly, in spite of the CWRM actions amending IIFS for 27 East Maui streams, the BLNR should independently require the preparation of an EA as part of the preliminary action it takes before authorizing continued diversion of this water which is compromising the ability of native Hawaiian cultural practitioners, like Nā Moku, et al., to gather, fish and farm in the tradition of their ancestors.

Moreover, the BLNR may not simply rubber-stamp the deficient CWRM decisions to amend interim instream flow standards, especially for Honopou, on which it acted on September 25, 2008, and the 19 streams, on which it acted on May 25, 2010. These decisions are wholly insufficient to comply with the rigorous standards protecting Hawaiian tradition and custom articulated above. *See also Ka Pa`akai v. State Land Use Commission*, 94 Haw. 31, 47; 7 P.3d 1068, 1084 (2000).

IV. CONCLUSION

Given the nature of the March 23, 2007 Order and the BLNR's independent duty to assure that there is no harm to downstream users of stream water, it is incumbent on the BLNR to reconvene contested case hearings in order to properly determine the effect of allowing diversions from the streams that flow through the four East Maui license areas – Huelo, Honomanū, Ke`anae, and Nāhiku. Its trust duty to protect these streams and assure the opportunities for the exercise of traditional and customary practices – gathering, fishing, taro growing – demand no less. It cannot authorize further diversions, even with the actions of the CWRM, because it owes an independent duty to protect the streams as well as to native Hawaiians to reasonably protect their traditional and customary practices and it cannot continue this practice without doing an environmental assessment under HRS chapter 343.

Therefore, Nā Moku, et al. moves to reconvene the contested case proceedings regarding the authorization of ALEXANDER AND BALDWIN, INC. (A&B) and EAST MAUI IRRIGATION COMPANY, LIMITED (EMI) to utilize any of the 4 water license areas in East Maui managed by the BLNR, and to issue an order halting any and all diversions with the exception of those reasonably used for domestic purposes as there is no legal authority to issue the contested revocable permits before until and unless this board complies with its obligations under HRS chapter 343 and *Ka Pa`akai v. Land Use Commission*, 94 Haw. 31; 7 P.3d 1068 (2000) and because there is no legal basis for the “holdover” permit.

DATED: Honolulu, Hawaii, August 14, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties in the manner indicated to their last known address:

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DATED: Honolulu, Hawai'i, August 14, 2012.


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

Defendant A&B/EMI's Exhibit AB-8

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____