



# NATIVE HAWAIIAN LEGAL CORPORATION

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January 13, 2014

William `Aila  
Board of Land and Natural Resources  
Kalanimoku Building  
1151 Punchbowl Street  
Honolulu, O`ahu, Hawai'i 96813

RE: In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Keanae, Nahiku, and Huelo, Maui, DLNR FILE NO. 01-05-MA

Dear Chair `Aila:

In August 2012, Petitioners Nā Moku Aupuni O Ko`olau Hui and Beatrice Kekahuna filed a motion 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 (EMI) to utilize any of the four 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 that water. Sixteen months later, the Board has failed to rule on this motion. The Board's inexplicable inaction and refusal to take prompt and appropriate remedial action to resolve the issues and controversies raised in this latest stage of these unduly protracted proceeding is without precedent or legal justification.

By way of history, the last license to divert water from East Maui expired in 1986. The last one-year revocable permit expired in 2001. For the last 12 years, A&B and EMI have diverted water out of East Maui with no valid permit. These contested case proceedings began in 2002. In 2003, the Circuit Court instructed the Board to comply with its obligations under HRS § 343 before issuing any permits. The Board last took action in this contested case in 2009 when it denied Nā Moku, et al.'s Motion to Enforce the Board's 2007 Interim Order.

The Board cannot rely on the pending contested case hearing before the Commission on Water Resources Management to avoid the requirements addressed by Petitioners. First, the initiation of an Environmental Assessment does not depend on the CWRM's actions. Further, the Board's counsel suggested that the lack of resources was the reason for the delay in initiating the EA. However, despite Nā Moku's prior objection to the applicant funding the EA process, the law changed and now places the burden on the applicant for the EA. Therefore, it should not be -- and should never have been -- a bar to conducting the EA that Judge Hifo confirmed is required prior to issuing permits for the diversions. This delay in assessing the environmental

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

and cultural impacts of diversion cannot legally continue while the water continues to be diverted.

Second, Petitioners made a reasonable request to reconvene proceedings that started over a decade ago. The CWRM's pending contested case related to interim instream flow standards for 19 streams that are covered by the four water licenses, which the Intermediate Court of Appeals recently mandated, is not a basis to continue the delay. Whether the CWRM will agree with Nā Moku that the IIFS levels it set on May 25, 2010 -- over *three years ago* -- should be adjusted, will not affect the legal obligation of the BLNR to conduct an environmental assessment (EA) under HRS §343-5 without further delay, and the diversions must stop until it, or, more likely, an environmental impact statement, is completed. That requirement must be independently implemented *prior to the continued diversion of water from the 33,000 acres of former Crown Lands* that make up the collective license areas. The BLNR must immediately comply with HRS chapter 343 and any administrative action by the CWRM will also proceed in parallel without any relation to the action by this board. Although the diverters will have to comply with new levels, the leases/license should not be affected.

The most egregious aspect of this delay is the likelihood that after 12 years of formal intervention by Nā Moku, the BLNR has succeeded in avoiding governing state statutes that would have required it to stop any diversions *until* the proper cultural and environmental assessment is completed, as Judge Hifo ultimately ordered in 2003, when read in conjunction with the *Superferry* decision of the Hawai'i Supreme Court. *Sierra Club v. Department of Transp.*, 167 P.3d 292, 115 Hawaii 299 (2007) (noting that “[t]he main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken”), *citing* HRS § 343-1 (1993). In this instance, a comprehensive environmental impact statement (EIS) most likely must be prepared for such a major diversion of water from one side of an island to another. *Molokai Homesteaders Cooperative Association v Cobb*, 63 Haw. 453, 467; 629 P.2d 1134, 1144 (1981) (concluding that “the commitment of prime natural resources [water] to a particular purpose, perhaps irrevocably, and the substantial social and economic consequences of the governmental approval of the proposal would dictate the preparation of an EIS.”). Hence, this delay in completing a proper EA serves no practical purpose.

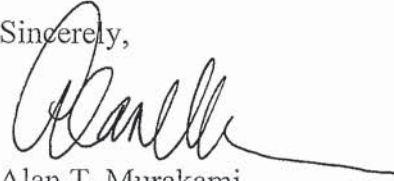
The Board's brazen inaction leaves Nā Moku in legal limbo. The current diversions of water developed on State lands are illegal and violate Petitioners' rights to water and as beneficiaries of the Hawaiian homelands trust as well as the native Hawaiian public trust. Each day these diversions continue without the legal authority required, the State of Hawaii breaches its constitutional and trust duties to our clients. Our clients require and are entitled to a sufficient stream flow to grow the taro and gather the food and plant items which they and their family rely upon for daily sustenance. Time is clearly of the essence.

Consequently, the Board's failure to act over the last year while implicitly deciding to allow continued diversions constitutes an effective denial of Petitioners' motion. *See Kilakila O Haleakala v. Board of Land and Natural Resources*, 2013 Haw. LEXIS 402, \*28 (2013) (“[T]he absence of a formal denial is not dispositive of the issue. [T]he failure to either grant or deny KOH's requests for a contested case hearing became an effective denial when BLNR proceeded

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to render a final decision by voting to grant the permit to UH[.]” If the Board fails to take prompt and appropriate remedial action within the next sixty (60) days, we will have no choice but to pursue any and all legal remedies in court.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alan T. Murakami', with a long horizontal flourish extending to the right.

Alan T. Murakami  
Camille K. Kalama  
Ashley K. Obrey

cc: Linda Chow, Esq.  
David Schulmeister, Esq.

Isaac Hall, Esq.  
Robert H. Thomas, Esq.  
Deputy Corporation Counsel, Maui County  
Greg Garneau, Esq.  
Nā Moku Aupuni o Ko`olau Hui

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

**Defendant A&B/EMI's Exhibit AB-9**

FOR IDENTIFICATION \_\_\_\_\_

RECEIVED IN EVIDENCE \_\_\_\_\_

CLERK \_\_\_\_\_