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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing Regarding Water Licenses at Honomanu, Keanae, Nahiku, and Huelo, Maui	DLNR FILE NO. 01-05-MA MOTION TO ESTABLISH SCOPE OF RECONVENED CONTESTED CASE PROCEEDINGS; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF COUNSEL; EXHIBITS "A" – "G"; CERTIFICATE OF SERVICE

MOTION TO ESTABLISH SCOPE OF
RECONVENED CONTESTED CASE PROCEEDINGS

Pursuant to Hawai'i Administrative Rules § 13-1-34(a) and the Circuit Court's December 22, 2014 Order Reversing and Vacating Appellee Board of Land and Natural Resources' Order Denying Appellant's Amended Motion to Reconvene Contested Case Proceedings, Petitioner Nā Moku Aupuni O Ko`olau Hui moves for an order (1) establishing the Board of Land and Natural Resources' scope of its duties with respect to Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd.'s pending application for a 30-year lease and (2) setting a timetable for resolving issues and claims initially raised 13 years ago that are independent of other proceedings.

This motion is based upon the attached memorandum, exhibits, and declaration of counsel.

DATED: Honolulu, Hawaii, January 9, 2015.

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In the Matter of the Contested Case Hearing 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

Pursuant to Hawai'i Administrative Rules (HAR) § 13-1-34(a) and the Circuit Court's December 22, 2014 Order Reversing and Vacating Appellee Board of Land and Natural Resources' Order Denying Appellant's Amended Motion to Reconvene Contested Case Proceedings ("December 22, 2014 Order"), Petitioner Nā Moku Aupuni O Ko`olau Hui ("Nā Moku") moves for an order (1) establishing the Board of Land and Natural Resources' scope of its duties with respect to Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd.'s ("A&B/EMI's") pending application for a 30-year lease and (2) setting a timetable for resolving issues and claims initially raised 13 years ago that are independent of other proceedings.

As the Circuit Court of the First Circuit recognized in its December 22, 2014 order reversing and vacating the BLNR's denial of Nā Moku's motion to reconvene the hearing, "[t]he reconvened proceedings should address and resolve issues for which the Board has sole statutory and constitutional responsibility and that are not duplicative of the issues to be determined by the Commission on Water Resource Management (CWRM) with respect to Appellant Nā Moku's pending petitions to amend interim instream flow standards for 27 East Maui streams." Exhibit A at 3. The Court additionally emphasized: "If there are any components of the reconvened proceedings that are independent of the CWRM proceedings, there is no justifiable reason for the Board not to address those components now." *Id.*

To comply with the law and the Court's order, the BLNR must immediately commence the Hawai'i Revised Statutes (HRS) chapter 343 process and complete an environmental/cultural assessment, analyze the impact of the current diversions of water and of a long term lease on

native Hawaiian traditional and customary practices, and then promptly carry out its duties pursuant to HRS chapter 171 and Hawai'i Admission Act § 5(f).

II. PROCEDURAL BACKGROUND

On May 25, 2001, Nā Moku requested a contested hearing on A&B/EMI's an Application for Long Term Water License with the BLNR, seeking a 30-year lease of water emanating from State lands at the Ko`olau Forest Reserve and Hanawi Natural Area Reserve, Hana and Makawao, Maui (TMKs:1-1- 01:44, 1-1-01:50, 1-1-02:02, 1-2-04:05, 1-2-04:07, 2-9-14:01, 2-9-14:05, 2-9-14:11. 2-9-14:12, and 2-9-14:17). When the BLNR in 2003 attempted to ignore Nā Moku's pending request and unilaterally grant A&B/EMI a 30-year lease of the four East Maui license areas to authorize the collection of surface waters to irrigate the sugar cane fields of HC&S in Central Maui, Nā Moku successfully appealed to the Circuit Court.

As discussed *infra*, the Court expressly prohibited the Board from issuing the 30-year lease without **first** conducting *an EA of the impacts of that proposed transaction relative to the prediversion conditions pursuant to HRS chapter 343.* October 10, 2003 Order Affirming In Part And Reversing In Part State Of Hawai'i 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 ("October 10, 2003 Order") at 6.[1] The Court rejected the BLNR's erroneous conclusion that these leases were somehow exempt from that law because its impacts would be minor, because the diversion of surplus water from 33,000 acres "does not constitute a minimal or no significant effect on the environment." *Id.*

The circuit court further ruled that, although it has no parallel duty to conduct instream flow investigations independent of the CWRM, "if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would **not** be parallel to the CWRM." *Id.* at 5 (emphasis added). The Court stated that 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 "**before** authorizing the diversion." *Id.*

[1] Nā Moku does not attach as exhibits those documents which are part of the administrative record in this proceeding.

(emphasis added). However, the Court cautioned the Board against merely rubber stamping 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. The Court confined its ruling to only the lease being challenged and left the parties to freely argue which law applies to revocable permits. *Id.* The Court remanded the case back to BLNR for further proceedings on whether it may issue revocable permits to the same entity on an annual basis, reserving its ruling to only the thirty year lease being challenged. *Id.*

Upon remand to the BLNR in 2003, Nā Moku and Maui Tomorrow pursued their claims that the BLNR was violating (1) HRS §343-5 as it applied to issuing revocable permits, not just a 30-year license, and (2) HRS §171-55 and 176-58(c) by alternating awards of permits to Alexander and Baldwin (A&B) and East Maui Irrigation Company (EMI) to avoid the maximum one-year limit on such permits under the governing statute. In response, the hearing officer agreed with the Nā Moku and Maui Tomorrow claims that HRS chapter 343 required an environmental assessment ("EA") but only in advance of *a long-term disposition of water*.[2] Thus, there is no debate that the BLNR must do an EA for the proposed long-term water license/lease.

However, when the EA process stalls for over a decade, what could have been a colorable assertion of the need to "temporarily" suspend or stay administrative hearings pending the

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[2] In 2005, the Hearing Officer ruled:

> 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.

Prehearing Order Regarding Petitioners' Motions for Summary Relief, filed March 18, 2005 ("March 18, 2005 Prehearing Order") at 6.

completion of the EA for the long-term disposition of water while continuing the status quo diversion, collapses on itself. The warning of excessive delay is exactly what Nā Moku argued in its 2012 Motion to Reconvene. After (1) A&B/EMI filed their objections to Nā Moku's motion and amended motion, (2) oral argument was held in late September 2012, and (3) BLNR asked for supplemental briefing on Nā Moku's Amended Motion to Reconvene, **BLNR took no action on Nā Moku's motion.** Nā Moku hoped that this inaction was temporary; however, after two years of waiting for BLNR to rule on the motion to reconvene, Nā Moku filed an administrative appeal challenging the BLNR's "decision" to deny the motion.

In December 2014, the Circuit Court reversed and vacated the BLNR's decision denying the motion and explicitly stated: **"If there are any components of the reconvened proceedings that are independent of the CWRM proceedings, there is no justifiable reason for the Board not to address those components now**." Exhibit A at 3 (emphasis added). The Court additionally charged the parties to commence the reconvened proceedings by setting forth their scope and stated that, "[i]f the parties cannot agree on the scope of the reconvened proceedings due to conflicting views on what constitute the Board's duties which are independent and non-duplicative of the CWRM, this Court reserves jurisdiction to address any order issued by the Board with respect to the scope of the reconvened proceedings." *Id.*

Currently, the CWRM is set to hear Nā Moku's related but distinct contested case on the setting of the interim instream flow standards ("IIFS") for 27 streams (a fraction of those under the purview of BLNR in the instant proceedings): Honopou, Hanehoi/Puolua (Huelo), Waiokamilo, Kualani (Hamau), Piinaau, Palauhulu, Wailuanui, Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Ohia (Waianu), Waikani, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Waiaaka, Kapaula, Hanawi, and Makapipi streams. *See* Exhibit B at 5-6; Exhibit C at 2-3; Exhibit D at 4. In its petition for contested case hearing before the CWRM, Nā Moku raised the following specific issues with respect to the aforementioned streams:

1. The IIFS set by the Commission fails to restore sufficient water to the subject streams to adequately protect and promote instream public trust uses of the streams, including Native Hawaiian traditional and customary rights and practices.
2. The Commission has not carried its obligations under the public trust by failing to require Hawaiian Commercial & Sugar (HC&S) and East Maui Irrigation (EMI) to affirmatively prove: (1) their actual need; (2) that there are no feasible

alternative sources of water to accommodate that need; and (3) the amount of water diverted to accommodate such need does not, in fact, harm a public trust purpose or any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial.

3. The Commission must also make specific findings and conclusions as to: (1) the identity and scope of valued cultural, historical, or natural resources in the area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights - will be affected or impaired by the proposed action; and (3) the feasibl[e] action, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist.

Exhibit D at 4. With regard to the IIFS proceeding, the Commission "recognizes" and seeks to "carr[y] out" its "independent legal duties and obligations to determine and protect instream uses (Haw. Rev. Stat. § 174C-71 and the mandate of the Hawaii Supreme Court in In Re Waiahole and Na Wai Eha[.]" Exhibit B at 5-6; *see also* Exhibit C at 2 (explaining that, "[o]n July 16, 2014, the Commission met to discuss a Proposed Procedural Order to conduct a Contested Case Hearing for all twenty-seven (27) streams" and "on August 20, 2014, the Commission voted to authorize, order, delegate, and direct the Hearings Officer to conduct a Contested Case Hearing on Petitions to Amend the Interim Instream Flow Standards for all twenty seven (27) Petitions and streams filed by Native Hawaiian Legal Corporation").

III. THE BLNR MUST ENSURE THAT AN EA IS COMPLETED NOW

All parties agree that an EA is required. *See* March 23, 2007 Findings of Fact, Conclusions of Law, and Decision & Order, *In re Contested Case Hearing Regarding Water Licenses at Honomanu, Keanae, Nahiku and Huelo, Maui*, DLNR File No. 01- 05-MA ("March 23, 2007 Order") at 2. The only dispute is whether the CWRM's contested case process is a necessary prerequisite for the BLNR to conduct the EA, which it is not.

A. An EA Must Be Prepared Immediately.

The preparation and acceptance of an environmental study must occur **before** an agency can approve or implement a project. *See Kepo`o v. Kane,* 106 Hawai`i 270, 292, 103 P.3d 939, 961 (2005); *Citizens for the Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 94, 105, 979 P.2d 1120, 1131 (1999), and *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 126 P.3d 1098 (2006). As the Hawai`i Supreme Court explained the required sequence of steps governing preparation of an EA for proposed harbor improvements:

> [T]he law requires that government give systematic consideration to the environmental, social and economic consequences of proposed development projects *prior to* allowing construction to begin. The law also assures the public the right to participate in planning projects that may affect their community.

Sierra Club v. DOT, 115 Hawai`i 299, 306, 167 P.3d 292, 299 (2007) (emphasis added).

On October 10, 2003, Judge Elizabeth Eden Hifo of the Circuit Court for the First Circuit invalidated the BLNR's decision to issue a long term lease to A&B/EMI. October 10, 2003 Order. In so doing, the Court recognized that the diversion of surplus water from 33,000 acres "does not constitute a minimal or no significant effect on the environment" and ruled that **BLNR cannot issue that lease without first conducting an EA of the impacts of that proposed transaction relative to the pre-diversion conditions pursuant to HRS chapter 343.** *Id.* at 5-6. The Court reserved its ruling to the thirty year lease being challenged and did not address the revocable permits. *Id.*

As this Board has previously conceded, there is no revocable, or "temporary", permit request still pending. *See* First Amended Findings of Fact and Conclusions of Law and Order, filed July 27, 2003 at 11-12 (noting that, as early as 2003, "the Board had already decided to continue the status quo pending resolution of the objections raised to A&B and EMI's application for a **long term license**, and *there was no further request for the issuance of a temporary permit*") (emphases added).[3] As such, the Circuit Court's ruling applies to the "long term license" that is awaiting resolution. Therefore, this Board **must** ensure that an environmental assessment is prepared.

Moreover, an EA must be done immediately. In *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai`i 66, 74, 947 P.2d 378, 286 (1997), the Hawai`i Supreme Court held that the failure to assess environmental impacts pursuant to HRS chapter 343 ***prior to*** a contested case hearing "would effectively shift this burden to concerned members of the public." It concluded that those opposing the granting of a permit are "prejudiced by the improper shifting of the burden of evaluating environmental impacts in the absence of the required environmental assessment." *Id.*

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[3] Additionally, in 2009, the BLNR reiterated that the revocable permits were not under consideration. *See* Order Denying Petitioners' Motion To Enforce March 23, 2007 Findings Of Fact Conclusions Of Law, And Decision And Order, filed March 13, 2009 at 2 ("The interim order was to be in operation until such time as the Board could make decision of **whether to award a long term lease** for the water from state lands in east Maui.") (emphasis added).

Thus, in this instance, a contested case hearing involving potential negative impacts on Nā Moku members' traditional and customary practices and held without prior compliance with HRS chapter 343 improperly shifts the burden of evaluating environmental impacts from those whose proposed actions necessitate an EA to those whose rights may be adversely impacted thereby. The BLNR must insist on the completion of a proper EA/EIS.

B. An EA Addresses Issues *Not Covered by the IIFS Proceedings.*

The IIFS proceedings before CWRM are principally governed by HRS chapter 174C and §174C-71 (related to instream flow standards). CWRM must specifically (a) "set overall water conservation, quality and use policies," Haw. Const., Art. XII, §7; (b) "define beneficial and reasonable uses," *id.*; (c) "protect ground and surface water resources, watersheds and natural stream environments," *id.*; and (d) protect appurtenant water rights and traditional and customary Hawaiian practices dependent on naturally flowing streams. *In Re `Iao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe`e River and Waiehu, `Iao, and Waikapu Streams Contested Case Hearing,* 128 Hawai`i 228, 270; 287 P.3d 129, 171 (2013) ("*Nā Wai Ehā*") (holding that "any Commission decision setting an IIFS would be subject to the provisions of HRS § 174C-63 and HRS §§ 174C-101(c)-(d)").[4]

In contrast, an environmental assessment shall contain, but not be limited to, the following information:

A. Identification of applicant or proposing agency;
B. Identification of approving agency, if applicable;
C. Identification of agencies, citizen groups, and individuals consulted in making the assessment;
D. General description of the action's technical, economic, social, and environmental characteristics;
E. Summary description of the affected environment, including suitable and adequate regional, location and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, or United States Geological Survey topographic maps;
F. Identification and summary of impacts and alternatives considered;
G. Proposed mitigation measures;
H. Agency determination or, for draft environmental assessments only, an anticipated determination;
I. Findings and reasons supporting the agency determination or anticipated determination;

[4] HRS § 174C-63 (1993) provides, "Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." The *Nā Wai Ehā* Court noted that HRS § 174C-101(d) specifically protects against abandonment by stating that appurtenant rights will "not be diminished or extinguished by a failure to apply for or to receive a permit." *Nā Wai Ehā,* 128 Haw.a`i at 242, 287 P.3d at 143.

J. Agencies to be consulted in the preparation of the EIS, if an EIS is to be prepared;
K. List of all permits and approvals (State, federal, county) required; and
L. Written comments and responses to the comments under the early consultation provisions of sections 11-200-9(a)(1), 11-200-9(b)(1), or 11-200-15, and statutorily prescribed public review periods.

HAR §11-200-10. Sections C through E and H through L address information over which the Board has sole statutory and constitutional responsibility and which the CWRM will not be analyzing in its IIFS proceedings.

First, Sections D and E require a description of various characteristics of the lease itself as well as a summary description of the affected environment, which must address the 33,000 acres of license area. The IIFS proceeding, however, only addresses instream flow levels in 27 streams and their corresponding impact on natural and cultural resources as well as protected instream uses.

Second, while the CWRM's duties may overlap with those identified in Sections F and G as to the 27 streams only, as previously noted, the scope of the EA is much more expansive -- identifying and summarizing impacts on and proposed mitigation measures for the dozens of streams as well as the 33,000 acres of ceded (Crown) land within the license area itself. In contrast, the CWRM proceeding addresses the limited issue of instream flow standards and, even then, their impacts on *only* the 27 petitioned streams. Section F also requires identification of alternatives, which necessarily includes the no lease/no diversion alternative[5] – an alternative that the CWRM has no obligation to address.

Third, Sections H and I require an official agency determination as to whether the issuance of a long term lease will have a significant effect on the environment. As the Circuit Court already determined, "the proposal for a 30-year lease of any or all excess water that may exist after there is finally a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, **does not constitute a minimal or no significant effect on the environment**." October 10, 2003 Order at 6 (emphasis added). There

[5] Inasmuch as the Circuit Court has already found that "the proposal for a 30-year lease of any or all excess water that may exist after there finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, **does not constitute a minimal or no significant effect on the environment**," October 10, 2003 Order at 6 (emphasis added), the identification of alternatives should include the no lease/no diversion alternative . *See* HAR §11-200-17(f) (requiring a "rigorous exploration and objective evaluation of the environmental impacts of such alternative actions" **including**, among other things, "**[t]he alternative of no action**") (emphasis added); *see* discussion *infra* at 10-11.

has been no similar agency decision. Only the BLNR, as the potential lessor of 33,000 acres of Crown Lands, and not the CWRM, is charged with making this determination.

Fourth, Section K requires a list of governmental permits and approvals required. The CWRM is under no clear mandate to specify this information in determining whether to amend the IIFS for the 27 streams. *See* HRS § 174C-71.

Fifth, Sections C, J, and L require consultation with affected groups, individuals and agencies. There is no parallel requirement at the IIFS proceeding, except that where parties have appropriate standing, they may petition for a contested case hearing to be heard on their positions on amending the IIFS. *See In re 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai`i 228, 287 P.3d 129, (2012); *In Re Waikamoi*, 128 Hawai`i 497, 291 P.3d 395 (2012).

Finally, a cultural impact assessment is required as part of the chapter 343 process. *See* HRS §343-2 (defining the required disclosure of cultural impacts of any proposed action triggering an EA).[6] Indeed, "[i]n considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action." HAR §11-200-12(A). Further,

> [i]n determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. **In most instances, an action shall be determined to have a significant effect on the environment if it**:
>
> 1. **Involves an irrevocable commitment to loss or destruction of any** natural or **cultural resource**;
> 2. **Curtails the range of beneficial uses of the environment**;
> 3. Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders;

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[6] HRS 343-2 (emphases added) includes the following definitions:

"Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and ***cultural practices of the community and State***, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

. . .

"Significant effect" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or ***cultural practices of the community and State***.

4. **Substantially affects** the economic welfare, social welfare, and **cultural practices of the community** or State;
5. Substantially affects public health;
6. Involves substantial secondary impacts, such as population changes or effects on public facilities;
7. Involves a substantial degradation of environmental quality;
8. Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
9. Substantially affects a rare, threatened, or endangered species, or its habitat;
10. Detrimentally affects air or water quality or ambient noise levels;
11. 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;
12. Substantially affects scenic vistas and viewplanes identified in county or state plans or studies; or,
13. Requires substantial energy consumption.

HAR § 11-200-12(B)(emphases added). As Nā Moku has consistently argued, the issuance of a long term lease and license to divert water will impact cultural practices – as is clear based on the impacts of the diversions for at least the last 13 years.

Although the Water Code recognizes the duty of the CWRM to protect traditional and customary practices in setting IIFS levels, *see* HRS §174C-101(c), the BLNR is also "required under the Hawaii Constitution to preserve and protect customary and traditional practices of native Hawaiians," *Ka Pa`akai o Ka `Āina v. Land Use Comm'n*, 94 Hawai`i 31, 45, 7 P.3d 1068, 1082 (2001), and it "**may not act without *independently* considering the effect of their actions on Hawaiian traditions and practices**." *Id* (emphases added). In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the BLNR

> must -- at a minimum -- make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the ... area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources --including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken . . . to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084.

Furthermore, an environmental impact statement (EIS), which the parties and even the Circuit Court agree might be possible here, *see* March 23, 2007 Order at 2; October 10, 2003 Order ("[T]he proposal for a 30-year lease of any or all excess water that may exist after there

finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, **does not constitute a minimal or no significant effect on the environment**[.]") (emphasis added), has additional requirements that are also not dictated by the outcome of the IIFS proceedings. Among other things, the draft EIS must contain:

(1) "an explanation of the environmental consequences of the proposed action [that] shall fully declare the environmental implications of the proposed action and discuss all relevant and feasible consequences of the action," HAR § 11-200-16;

(2) a "rigorous exploration and objective evaluation of the environmental impacts of such alternative actions" with "[p]articular attention shall be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks" that "shall be sufficiently detailed to allow the comparative evaluation of the environmental benefits, costs, and risks of the proposed action and each reasonable alternative," **including**, among other things, "**[t]he alternative of no action**[.]" HAR § 11-200-17(f) (emphasis added);

(3) a description of the environmental setting, "including a description of the environment in the vicinity of the action, as it exists before commencement of the action, from both a local and regional perspective" with "[s]pecial emphasis [to be] placed on environmental resources that are . . . unique to the region" and consideration of cumulative impacts of this and related actions; HAR § 11-200-17(g);

(4) a statement of the probable impact of the proposed action and the natural or human environment on the project "which shall include consideration .. . . of all consequences on the environment; direct and indirect," HAR § 11-200-17(i);

(5) a description of "all irreversible and irretrievable commitments of resources that would be involved" and "[i]dentification of unavoidable impacts and the extent to which the action makes use of non-renewable resources . . ., or irreversibly curtails the range of potential uses," HAR § 11-200-17(k);

(6) identification of all adverse environmental impacts which cannot be avoided, HAR 11-200-17(l);

(7) mitigation measures proposed, HAR § 11-200-17(m);

(8) a summary of unresolved issues and a discussion of how the issues will be resolved or why they cannot be resolved, HAR § 11-200-17(n); and

(9) reproductions of all substantive comments and responses made during the consultation process, including a list of those who were consulted and had no comment. *See* HAR § 11-200-17(p).

The final EIS additionally requires: (1) the reproduction of all letters containing substantive questions, comments, or recommendations as well as summaries of scoping meetings; (2) a list of persons, organizations, and agencies commenting on the draft EIS; and (3) the responses of the applicant to each question, comment, or recommendation. *See* HAR § 11-200-18.

This information is separate and apart from the CWRM IIFS proceeding.

C. Past Practice Further Supports the Need for an EA Now.

Given A&B/EMI's failure to meet the IIFS which the CWRM previously set in 2008 for eight of the 27 streams, it is even more critical that the BLNR immediately require an independent environmental assessment in these proceedings and not wait on the Commission as it has done for over a decade.

On September 25, 2008, while Nā Moku's motion to enforce the 2007 Interim Order was pending due to the inaction by the appointed BLNR stream monitor, the CWRM decided on amendments to eight of the 27 streams. In that decision, the CWRM imposed an adaptive management strategy (AMS), which allowed its staff to investigate any shortfalls in water needed by taro farmers and to remedy those shortfalls by recommending necessary adjustments. As a part of that decision, the CWRM ordered its staff to report back within a year with an update on the implementation of the amended IIFSs for Wailuanui, Kulani, Waiokamilo, Pi`ina`au, Palauhulu, Hanehoi, Huelo, and Honopou Streams, the status of any staff investigations during the year, and any recommended adjustments to IIFS values established in 2008. *See* Exhibit E at 29-31.

In fact, the CWRM failed to implement its adaptive management strategy (AMS) by the September 2009 benchmark it had established for itself a year earlier. At the September 24, 2009 CWRM meeting, Commission staff reported that **none** of the Honopou Stream flow measurements recorded in the first years of implementation met the 2.0 cfs established a year earlier as the amended IIFS for Station A. *See* Exhibit F at 20.

The monitoring for Wailuanui Stream was similarly deficient, with only one of 9 recorded flow measurements taken during the same annual period satisfying the 3.05 cfs level

established for that stream. *See id.* at 87. Although affected kalo farmers reported difficulties in 2009 achieving sufficient stream flow, and the CWRM staff noted the reports of hardship, *see id.* at 30, it failed to recommend adjustments as contemplated by the AMS in response to kalo farmers' demands for more water than the amounts initially released back into the streams feeding Wailuanui, Ke`anae and Honopou Valleys. *See* Exhibit E at 30-31; Exhibit G at 58. Given these shortcomings, it would clearly be unproductive for the Board to wait on CWRM before initiating an EA immediately here.

Moreover, an IIFS is just that – **interim.** Because the IIFS can change, it is unreasonable to say that the BLNR must wait on an interim standard to address the effects, some of which are by definition irrevocable, on natural and cultural resources. In fact, the BLNR should proactively consider how it will accommodate changes to the IIFS to allow for changes when the permanent IFS are set.

The CWRM's duty to assure protections for taro farmers, gatherers and fishers under these circumstances and pursuant to HRS chapter 343 are not as comprehensive.

IV. THE BLNR MUST COMPLY WITH ITS INDEPENDENT STATUTORY DUTIES AS LESSOR OF STATE LAND AND TRUSTEE OF THE CEDED LANDS TRUST

The following statutory duties are also distinct from the CWRM proceeding and, as such, any initiation of such duties would never be "parallel" to the CWRM's duties in setting the IIFS for the 27 petitioned streams. *See* October 10, 2003 Order.

First, the BLNR is bound to follow all statutes under HRS chapter 171 pertaining to the issuance of leases and permits of state lands, including HRS §§ 171-55 and 171-58.[7] Although the BLNR has coextensive duties with the CWRM to protect appurtenant and traditional and customary water rights, it also has the following independent statutory duties associated with any lease for water resources: (a) provide for withdrawals of water from any lease to "preserve

[7] HRS § 171-55 provides:

> 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.

crops," HRS §171-58(b); and (b) consult with the DHHL on its water needs and reserve sufficient water for its "current and future homestead needs." HRS §171-58(g).[8]

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[8] HRS § 171-58 provides in relevant part:

(a) Except as provided in this section the right to any mineral or surface or ground water shall not be included in any lease, agreement, or sale, this right being reserved to the State; provided that the board may make provisions in the lease, agreement, or sale, for the payment of just compensation to the surface owner for improvements taken as a condition precedent to the exercise by the State of any reserved rights to enter, sever, and remove minerals or to capture, divert, or impound water.

. . .

(c) 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; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

(d) Any lease of water rights shall contain a covenant on the part of the lessee that the lessee shall provide from waters leased from the State under the lease or from any water sources privately owned by the lessee to any farmer or rancher engaged in irrigated pasture operations, crop farming, pen feeding operations, or raising of grain and forage crops, or for those public uses and purposes as may be determined by the board, at the same rental price paid under the lease, plus the proportionate actual costs, as determined by the board, to make these waters available, so much of the waters as are determined by the board to be surplus to the lessee's needs and for that minimum period as the board shall accordingly determine; provided that in lieu of payment for those waters as the State may take for public uses and purposes the board may elect to reduce the rental price under the lease of water rights in proportion to the value of the waters and the proportionate actual costs of making the waters available. Subject to the applicable provisions of section 171-37(3), the board, at any time during the term of the lease of water rights, may withdraw from waters leased from the State and from sources privately owned by the lessee so much water as it may deem necessary to (1) preserve human life and (2) preserve animal life, in that order of priority; and that from waters leased from the State the board, at any time during the term of the lease of water rights, may also withdraw so much water as it may deem necessary to preserve crops; provided that payment for the waters shall be made in the same manner as provided in this section.

(e) Any new lease of water rights shall contain a covenant that requires the lessee and the department of land and natural resources to jointly develop and implement a watershed management plan. The board shall not approve any new lease of water rights without the foregoing covenant or a watershed management plan. The board shall prescribe the minimum content of a watershed management plan; provided that the watershed management plan shall require the prevention of the degradation of surface water and ground water quality to the extent that degradation can be avoided using reasonable management practices.

(f) Upon renewal, any lease of water rights shall contain a covenant that requires the lessee and the department of land and natural resources to jointly develop and implement a watershed management plan. The board shall not renew any lease of water rights without the foregoing covenant or a watershed management plan. The board shall prescribe the minimum content of a watershed management plan; provided that the watershed management plan shall require the prevention of the degradation of surface water and ground water quality to the extent that degradation can be avoided using reasonable management practices.

Second, the BLNR must administer public trust duties under the Hawai`i Admission Act §5(f). Under the Hawai`i Admission Act §5(f), the State of Hawai`i is obligated to manage the resources in the ceded lands trust, under a compact with the U.S. government to administer the lands transferred to it upon statehood, in part, for "the betterment of the conditions of native Hawaiians." More specifically, §5(f) provides:

> The lands granted to the State of Hawaii . . . and public lands retained by the United States . . . and later conveyed to the State . . . , together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, ***for the betterment of the conditions of native Hawaiians***, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes **in such manner as the constitution and laws of said State may provide**, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

(Emphases added).

Unless the BLNR protects the assets of the ceded lands trust, it will be in breach of its duty to its beneficiaries. *See Price v State*, 921 F.2d 950, 956 (9th Cir. 1990) (ruling that while daily management decisions are outside of scope of judicial review, the court has power to determine whether there has been any particular diversion of trust property or income); *Napeahi v Wilson*, 1996 U.S. Dist. LEXIS 21851, ratified by 987 F. Supp. 1288 (DC Haw. 1996) (holding that Plaintiff may seek an injunction to prospectively force the State BLNR to attempt to recover the ceded lands property the State of Hawai`i improperly allowed private hotel to use for no compensation).[9] The BLNR cannot protect the assets of the ceded lands trust without first ensuring compliance with HRS chapter 171.[10]

(g) The department of land and natural resources shall notify the department of Hawaiian home lands of its intent to execute any new lease, or to renew any existing lease of water rights. After consultation with affected beneficiaries, these departments shall jointly develop a reservation of water rights sufficient to support current and future homestead needs. Any lease of water rights or renewal shall be subject to the rights of the department of Hawaiian home lands as provided by section 221 of the Hawaiian Homes Commission Act.

[9] This decision followed a remand in *Napeahi v. Paty,* 921 F.2d 897, 900 (9th Cir. 1990).

[10] In 2005, the hearing officer deferred ruling on Nā Moku's Ceded Lands Trust Motion due to the pendency of a possible ruling on the merits of its claims raised related to the co-extensiveness of the BLNR trust duties under the ceded lands and public trusts, without prejudice subject to possible renewal. *See* March 18, 2005 Prehearing Order at 8-9. Since then, in the Hawai`i Supreme Court ruling denying Nā Moku's request for attorneys' fees, the Court determined that the issue was not raised before the Court and deferred any ruling on the applicability of the ceded

In contrast, the CWRM has no comparable duty to assess the reasonableness of the rental value of the 33,000 acres of ceded trust lands being used to collect and divert surface water for commercial purposes, or to seek fair market compensation for its use. Similarly, the CWRM has no duty to determine whether allowing the long-term collection and diversion of surplus water to a private commercial sugar plantation "will best serve the interests of the State" in the manner contemplated by HRS §171-58(c).

In light of the aforementioned, any analysis pursuant to HRS chapter 171 and Hawai`i Admission Act §5(f) is separate and distinct from any analyses the CWRM will undertake in its IIFS proceedings. Thus, the BLNR has an independent statutory obligation to engage in such analyses without waiting for any IIFS decision made by the CWRM.

V. THE BLNR CANNOT IGNORE ITS DUTY TO PROTECT AGAINST INJURY TO DOWNSTREAM WATER USERS, ESPECIALLY THOSE WITH CONSTITUTIONALLY-PROTECTED RIGHTS

As the Circuit Court made clear in 2003, the BLNR has independent duties to assure the protection against injury to downstream owners. *See* October 10, 2003 at 4 ("[T]here is little dispute that the transfer of water out of the watershed of origin is not absolutely prohibited under the common law of Hawai'i. . . . However, *Robinson[v. Arivoshi*, 65 Haw. 641, 658 P.2d 287 (1982)] allows these transfers **only when it can be demonstrated that to do so would not be injurious to others with rights to water**.") (emphasis added).

The Court further ruled that, while the Board has no parallel duty to conduct instream flow investigations independent of the CWRM, the BLNR 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." *Id.*[11]

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lands trust claims Nā Moku brought before the BLNR. *See Maui Tomorrow v. State, 110 Hawai`i 234, 131 P.3d 517 (2006)*, Thus, Nā Moku intends to renew its motion regarding the ceded lands trust and ask the BLNR to rule on its applicability to the current claims before it.

[11] The Circuit Court additionally concluded:

> 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.

October 10, 2003 Order at 4.

Clearly, the Court's 2003 ruling noted the potentially common issues that arise from the CWRM determinations on amending IIFS by carefully avoiding an order that could be construed to require the BLNR to duplicate the CWRM's determinations.[12] However, this ruling was premised on **timely action** by the CWRM and specified that the BLNR's review and analysis must precede any authority for continued diversion of water by EMI.[13] The ruling suggested the statutory roles and duties the BLNR could appropriately defer to the CWRM to first resolve. However, the Circuit Court never ordered the BLNR's unqualified deferral to the CWRM; rather, it required the BLNR to act timely, and where appropriate, independently of the CWRM in service of the "best interests" of the state.

In this instance, since the CWRM has failed to timely act to assure that the constitutional rights of Nā Moku have been properly identified, assessed for impacts caused by the diversions, and protected accordingly, it follows that ***after a decade of inaction***, the BLNR continues to have independent duties that it should now exercise without further delay. The Circuit Court's December 2014 order affirms that the BLNR cannot indefinitely ignore its duties and roles that are distinct from those of the CWRM. *See Exhibit A.*

VI. CONCLUSION

Based on the foregoing, Nā Moku moves for a Prehearing Order directing that a hearing officer immediately reconvene the contested case hearing now pending in this matter to address the following issues before it:

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[12] The Circuit Court qualified its ruling as follows:

> This Court finds no error in the BLNR conclusion that the BLNR is not required to conduct a parallel investigation. In the process of determining whether there is any surplus water which would be in the best interest of the state to lease for 30 years, the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards, whether as a result of Appellant Nā Moku Aupuni o Ko'olau's filing of 27 petitions to amend interim instream flow standards, or any other request, or pursuant to CWRM's exercise of its statutory obligations to protect riparian rights, native Hawaiian rights, or in the discharge of any of its other obligations.

October 10, 2003 Order at 5.

[13] The Circuit Court further ruled:

> However, if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM. If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.

October 10, 2003 Order at 5.

1. The BLNR must immediately initiate HRS chapter 343 processes to require the timely preparation of an environmental assessment to disclose all the impacts of the diversion of water from the dozens of streams in the four license areas (33,000 acres) in East Maui by EMI/A&B pursuant to all applicable case law, statutes and regulations which govern that process. The final EA should be completed within six months -- *i.e.*, no later than July 7, 2015[14];

2. *Concurrent with the preparation of an EA*, the BLNR must address its obligations pursuant to HRS chapter 171, including:

   (a) Whether more water is required to "preserve crops" pursuant to HRS §171-58(b);

   (b) Whether the BLNR must consult with the DHHL to address its "current and future homestead needs" pursuant to HRS §171-58(g);

   (c) Whether the BLNR must take any prompt action as a trustee of the ceded lands trust, including, but not limited to:

      (i) Assuring that it charge and collect a reasonable fair market rental for the use of 33,000 acres of Crown Lands from which irrigation water is collected;

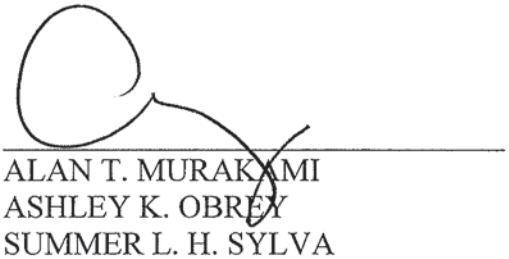
      (ii) Determining whether the practice of subsidizing the rental of those lands to one sugar company constitutes a diversion of trust assets barred under existing case law governing the management and disposition of the ceded lands trust; and

      (iii) In conjunction with its parallel duties under the public trust doctrine, immediately restoring more water to the streams of East Maui "for the betterment of the conditions of native Hawaiians," tied to current residents and occupants of East Maui who require water to continue the traditions and customs of Hawaiians such as gathering limu, ʻōpae, ʻoʻōpū, hihiwai or other food sources, fishing, and growing taro because the CWRM has failed to timely respond to such demands for water in any other proceedings.

[14] An environmental impact statement, which will likely be required, should be completed within a reasonable time thereafter.

3. The BLNR should also immediately declare that the failure of the DLNR to comply with the requirements of HRS §171-58(c) and (g) or ascertain whether the impacts of water diversion from East Maui to Central Maui would detrimentally affect the condition of native Hawaiians before allowing the diversion of water from 33,000 acres of §5(f) trust lands any breach of the trust imposed on surface water under the public trust doctrine would simultaneously constitute a breach of the ceded land trust.

DATED: Honolulu, Hawaii, January 9, 2015.



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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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

DECLARATION OF COUNSEL

I, Ashley K. Obrey, declare under penalty of perjury that:

1. I am one of the attorneys representing Petitioner Nā Moku Aupuni O Ko`olau Hui in these proceedings.

2. The statements that follow are based on my personal knowledge.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Circuit Court's December 22, 2014 Order Reversing and Vacating Appellee Board of Land and Natural Resources' Order Denying Appellant's Amended Motion to Reconvene Contested Case Proceedings.

4. Attached hereto as Exhibit "B" is a true and correct copy of the July 16, 2014 Proposed Procedural Order in Case No. CCH-MA13-01, the related proceeding before the Commission on Water Resource Management ("CWRM") involving the parties to this contested case hearing.

5. Attached hereto as Exhibit "C" is a true and correct copy of Minute Order No. 9, Amended Scope of Hearing, Case Caption, and Hearing Schedule dated September 9, 2014 in

Case No. CCH-MA13-01, the related proceeding before the CWRM involving the parties to this contested case hearing.

6. Attached hereto as Exhibit "D" is a true and correct copy of Minute Order No. 12 (Second Amended Hearing Schedule and Notice of Hearing) dated December 4, 2014 in CWRM Case No. CCH-MA13-01, the related proceeding before the CWRM involving the parties to this contested case hearing.

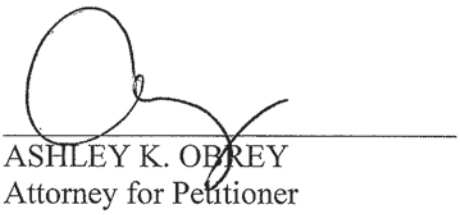
7. Attached hereto as Exhibit "E" is a true and correct copy of pages 1 and 29-32 of the Minutes of the Commission on Water Resource Management Dated 9/24/08-09/25/08, which I obtained from the CWRM website at http://files.hawaii.gov/dlnr/cwrm/minute/2008/mn20080924.pdf.

8. Attached hereto as Exhibit "F" is a true and correct black and white copy of pages 1, 20, 30, and 87 of the September 24, 2009 Staff Briefing on the Update on the Implementation of East Maui Interim Instream Flow Standards, which I obtained from the CWRM website at http://files.hawaii.gov/dlnr/cwrm/activity/iifsmaui1/pt20090924A.pdf.

9. Attached hereto as Exhibit "G" is a true and correct copy of pages 1, 58, and 64 of the Staff Submittal for the CWRM meeting of September 24, 2008 regarding the Petition to Amend the Interim Instream Flow Standards for the Surface Water Hydrologic Units of Honopou (6034), Hanehoi (6037), Piinaau (6053), Waiokamilo (6055), and Wailuanui (6056), Maui which I obtained from the CWRM website at http://files.hawaii.gov/dlnr/cwrm/submittal/2008/sb200809C2.pdf.

I declare under penalty of perjury that the foregoing statements are true and correct, to the best of my knowledge, information, and belief.

DATED: Honolulu, Hawaii, January 9, 2015.



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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on the following parties at their respective addresses by hand delivery or U.S. Mail, postage prepaid on January 9, 2015.

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

Defendant A&B/EMI's Exhibit AB-15

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____