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FIRST CIRCUIT COURT
 STATE OF HAWAII
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 JACINTHO and NĀ MOKU AUPUNI O
 KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

HEALOHA CARMICHAEL, LEZLEY
 JACINTHO, and NĀ MOKU AUPUNI O
 KO'OLAU HUI,

Plaintiffs,

vs.

BOARD OF LAND AND NATURAL
 RESOURCES, SUZANNE CASE, in her
 official capacity as Chairperson of the
 Board of Land and Natural Resources, the
 DEPARTMENT OF LAND AND
 NATURAL RESOURCES, ALEXANDER
 & BALDWIN, INC., EAST MAUI
 IRRIGATION CO., LTD., HAWAIIAN
 COMMERCIAL AND SUGAR CO., and
 COUNTY OF MAUI, DEPARTMENT OF
 WATER SUPPLY,

Defendants.

) CIVIL NO. 15-1-0650-04 RAN
) (Environment; Declaratory Judgment)
)
) PLAINTIFFS MOTION FOR PARTIAL
) SUMMARY JUDGMENT;
) MEMORANDUM IN SUPPORT OF
) MOTION; DECLARATION OF COUNSEL;
) DECLARATION OF HEALOHA
) CARMICHAEL; DECLARATION OF
) LEZLEY JACINTHO; DECLARATION OF
) EDWARD WENDT; EXHIBITS A-G;
) NOTICE OF HEARING MOTION AND
) CERTIFICATE OF SERVICE
)
) HEARING
) DATE: *November 24, 2015*
) TIME: *10:30 am*
) JUDGE: RHONDA A. NISHIMURA
)
)
)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rules 7 and 56 of the Hawai'i Rules of Civil Procedure, Plaintiffs Healoha Carmichael, Lezley Jacintho, and Nā Moku Aupuni O Ko`olau Hui hereby move for partial summary judgment as to Counts 1 and 2 of their First Amended Complaint. Plaintiffs ask this Court to find that, as a matter of law, Defendants Board of Land and Natural Resources, Department of Land and Natural Resources, Suzanne Case, in her official capacity as Chairperson of the Board of Land and Natural Resources, Alexander & Baldwin, Inc., and East Maui Irrigation Co., Ltd. violated Counts 1 and 2 and order appropriate declaratory relief¹ at this time. More specifically, this Court should:


- A. Declare that Defendants Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. violated HRS chapter 343.
- B. Declare that the BLNR Defendants violated HRS chapter 343.
- C. Declare that revocable permit numbers 7263, 7264, 7265, and 7266 are null and void.
- D. Declare that Defendants Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. have no legal or statutory authority to continue using the land areas or diverting water covered by revocable permits 7263, 7264, 7265, and 7266.
- E. Declare that BLNR Defendants have no legal or statutory basis to authorize Defendants A&B and EMI's continued use of land areas or diversion of water covered by revocable permits 7263, 7264, 7265, and 7266.

This motion is supported by the attached memorandum in support, declarations, exhibits; the entire record in this matter; and such other evidence and argument as may be presented at the

¹ Plaintiffs do not waive their right to obtain other forms of relief through counts 1-2, but leave that issue to another day.

hearing on this Motion.

DATED: Honolulu, Hawaii, October 21, 2015.



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

HEALOHA CARMICHAEL, LEZLEY)	CIVIL NO. 15-1-0650-04 RAN
JACINTHO, and NĀ MOKU AUPUNI O)	(Environment; Declaratory Judgment)
KO'OLAU HUI,)	
)	MEMORANDUM IN SUPPORT OF
Plaintiffs,)	MOTION FOR PARTIAL SUMMARY
)	JUDGMENT
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, et al.,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Defendants Alexander & Baldwin, Inc. (**A&B**) and East Maui Irrigation Co., Ltd (**EMI**), the Board of Land and Natural Resources (**BLNR**) and the Department of Land and Natural Resources (**DLNR**) flagrantly disregarded laws that protect East Maui public trust land and waters. A&B and EMI failed to prepare -- and the BLNR and DLNR failed to require -- an environmental assessment (**EA**) for the annual renewal of revocable permits that authorize the use of approximately 33,000 acres of state ceded (former crown) lands for to divert up to 450 million gallons a day (**mgd**) of water from East Maui streams to irrigate A&B's commercial sugar operation in Central Maui.

By authorizing the use of this environmentally and culturally significant area of Maui each time it renewed Revocable Permits 7263, 7264, 7265, and 7266 for A&B and EMI's on a month-to-month basis for one-year periods without insisting on A&B and EMI's compliance with the Hawai'i Environmental Policy Act (**HEPA**), Hawai'i Revised Statute (**HRS**) chapter 343, BLNR and DLNR have repeatedly violated the law for at least the last nine years. By their continued diversion of East Maui water without undertaking environmental review, so too have A&B and EMI.

II. UNDISPUTED FACTS

To understand Hawaiian culture is to appreciate that land, culture, and the environment cannot be viewed separately.¹ As described by Kepa Maly in his 2001 report prepared for EMI and entitled *Wai O Ke Ola: He Wahi Mo`olelo No Maui Hikina*:

In Hawaiian culture, natural and cultural resources are one and the same. Native traditions describe the formation (literally the birth) of the Hawaiian Islands and the presence of life on and around them, in the context of genealogical accounts. **All forms of the natural environment—from the heavens and mountain peaks, to the watered valleys, *kula* (flat sloping lands) and lava plains, and to the shore line and ocean depths were believed to be embodiments of Hawaiian gods and deities. . . . It was in this context of kinship, that the ancient Hawaiians addressed their environment and it is the basis of the Hawaiian system of land use.**

Exhibit C1 at 6 (emphases added).

Native Hawaiians have traditionally and customarily engaged in cultural practices in the lands of Hamakua-Ko`olau in the region of Maui Hikina (East Maui), *see* Exhibit C1 at iii, with its rugged shoreline, steep cliffs, and verdant valleys. *See* Exhibit A1 at 6-8, 11-17. Davianna Pomaika`i McGregor, Ph.D describes the Ke`anae-Wailuanui region as a “cultural kipuka,” defined as “places where Hawaiians have maintained a close relationship to the land through their livelihoods and customs - that play a vital role in the survival of Hawaiian culture as a whole.” *Id.* at 17. Cultural kipuka are “essential for the perpetuation of Hawaiian culture” and yet their survival is “continually eroded by an ever increasing lack of water.” *Id.* Consistent with

¹ Hawai‘i’s Supreme Court expressly agreed with the “cultural importance of the land to native Hawaiians” as set forth in the findings of the *OHA v. HCDCH* trial court, which stated that:

The [n]ative Hawaiian [p]eople continue to be a unique and distinct people with their own language, social system, ancestral and national lands, customs, practices and institutions. “The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land.” [(Citing in a footnote to the Apology Resolution.)] Aina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople -- to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable. The natural elements-land, air, water, ocean-are interconnected and interdependent. To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

117 Hawai‘i at 214, 177 P.3d at 924 (original emphasis omitted) (format altered) (brackets in original).
Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawai‘i, 121 Hawai‘i 324, 333-4, 219 P.3d 1111, 1120-1 (2009).

historical accounts, McGregor reports that “[w]etland taro cultivation is the most important single component of the cultural landscape of Ke`anae-Wailuanui.” *Id.* at 7.

According to the website of the East Maui Watershed Partnership (of which EMI and DLNR are partners), the entire East Maui watershed is home to approximately 59 plant species that are listed as threatened or endangered by the United States Forestry and Wildlife Service and 13 native bird species, 12 of which are endemic to Maui. *See* Exhibit C2. The watershed provides critical habitat for over 100 rare and endangered plant species. *See id.*

For over 120 years, A&B and EMI have diverted water from East Maui streams via a complex system of ditches, tunnels, and flumes in part to irrigate the sugar plantation operated by HC&S in Central Maui. In modern times, BLNR designated four license areas (Honopou, Huelo, Ke`anae, and Nahiku) in the Ko`olau Forest Reserve, comprising approximately 33,000 acres of ceded (former Crown) lands from which A&B/EMI can divert up to 450 mgd from over 100 streams annually to support their commercial enterprise in Central Maui. Exhibit A2 at 4; Exhibit C3 at 2, 9. Over its history, the long-term average delivery by EMI to HC&S has been approximately 165 mgd. Exhibit C3 at 13.

These diversions have impacted stream habitats and cultural resources on which Plaintiffs rely. Plaintiffs use these streams as their ancestors traditionally and customarily did. *See* Declaration of Lezley Jacintho (“Jacintho Decl.”) ¶¶ 3-13; Decl. of Edward Wendt (“Wendt Decl.”) ¶¶ 5-11. Decl. of Healoha Carmichael (“Carmichael Decl.”) ¶¶ 4-11. *See also* Exhibit A1 at 6-8, 11-17. According to the Division of Aquatic Resources (**DAR**), the state agency responsible for the protection and management of living aquatic resources in the waters of Hawai`i and commissioned by DLNR to identify viable flow rates for the protection of native aquatic biota, the minimum viable flow levels for those streams should be no less than 64% of their natural median baseflow at all times. Exhibit A13 at ¶¶ 22-24. A&B/EMI’s large-scale diversions, at minimum, have deprived a number of East Maui streams and the stream biota they support of their minimum, annual viable flows. *Id.*; Wendt Decl.; Jacintho Decl.; Carmichael Decl. The lack of streamflow threatens the survival of Hawaiian traditional and customary practices and is particularly oppressive for wetland taro farmers, who require certain minimum volumes and temperatures of water to ensure the health and vitality of their crops. *See* Jacintho Decl. ¶¶ 16-17; Wendt Decl. ¶ 15. The lack of streamflow has also caused the decline of `o`opu,

hihiwai, and `opae populations in the streams as well as fish populations and varieties off the coast, which impacts Plaintiffs' traditional and customary gathering and fishing rights. *See* Carmichael Decl. ¶14; Jacintho Decl. ¶18. *See also* Wendt Decl. ¶14. Moreover, invasive plant species take over those areas below the diversions where water doesn't flow freely and where native species used to thrive. *See* Carmichael Decl. ¶15; Wendt Decl. ¶ 16.

After the last 25-year license to divert water from East Maui expired in 1986, BLNR began to issue month-to-month revocable permits on an annual basis, as a matter of course. Exhibit A2 at 4. *See also* Exhibit C4 at 3. At its regular meeting on May 26, 2000, BLNR approved, as amended, the issuance of four annual revocable permits to A&B and EMI, by adding a condition that the Department of the Attorney General issue an opinion regarding compliance with HRS chapter 343. Exhibit A2 at 4. Specifically:

- Revocable Permit No. S-7263, effective July 1, 2000, authorized A&B to occupy and use 3,381.00 acres, more or less, at TMK (2) 1-1-01:44, Koolau Forest Reserve, Honomanu, Hana, Maui, Hawaii, for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Honomanu License” area, pursuant to the terms and conditions in now expired General Lease No. L-3695.”
- Revocable Permit No. S-7264, effective July 1, 2000, authorized A&B to occupy and use 8,752.690 acres, more or less, at TMK (2) 1-1-01:50, 2-9-14:01, 05, 011, 12 & 17, Koolau Forest Reserve, Huelo, Hana, Maui, Hawaii, for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Huelo License” area, pursuant to the terms and conditions in now expired General Lease No. L-3578.”
- Revocable Permit No. S-7265, effective July 1, 2000, authorized A&B to occupy and use 10,768.00 acres, more or less, at TMK (2) 1-1-02:Por. 02, Koolau Forest Reserve, Keanae, Hana, Maui, Hawaii for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Keanae License” area, pursuant to the terms and conditions in now expired General Lease No. L-3349.”
- Revocable Permit No. S-7266, effective July 1, 2000, authorized EMI to occupy and use 10,111.220 acres, more or less, at TMK (2) 1-2-04:05 & 07, Koolau Forest Reserve, Nahiku, Maui, Hawaii, for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Nahiku License” area, pursuant to the terms and conditions in now expired General Lease No. L-3505.”

Exhibits A3-A to A3-C; G2.

In 2001, A&B and EMI applied for a 30-year lease of the aforementioned East Maui Water license areas and the continued issuance of interim revocable permits on an annual basis pending issuance of a long-term lease. *See* Exhibit A2. Nā Moku initiated a contested case hearing on the issue which consequently prompted BLNR to defer action on the long-term lease application. *See* Exhibit G1 at 5-7. In the interim, however, BLNR reissued the existing revocable permits pending the results of the contested case. *Id.*

On January 24, 2003, BLNR approved A&B and EMI's 30-year lease application -- green lighting their continued diversion of East Maui streams located in the four license areas. *See* Exhibit A5. Nā Moku successfully appealed. Exhibit A6. In its 2003 reversal of BLNR's decision, the First Circuit Court concluded that "the proposal for a 30-year lease of any or all [water in] excess" of the water secured for riparian and native Hawaiian rights, "as a matter of law, does not constitute a minimal or no significant effect on the environment." Exhibit A6 at 5-6.

BLNR represented in 2009 and again in 2014 that, as early as 2003, the revocable permits were no longer in operation -- having suspended the permits and any requests for same indefinitely until it decided to award (or not to award) A&B and EMI's long term lease. *See* Exhibit A5 at 11-12 and A-8 at 7. Contrary to BLNR's statements, however, EMI disclosed under oath during a March 2015 contested case hearing before the CWRM that A&B and EMI's revocable permits for the four license areas have in fact been renewed annually during this period, including as recently as December 12, 2014. *See* Exhibit C4 at 3; Exhibit A10 at 13 (referring to Exhibit A9's Item D-30).

Every December, DLNR reviews its list of current revocable permits issued statewide and determines which ones to recommend to BLNR for the upcoming year. *See* Exhibit A9 at 1. DLNR titles this action the "Annual Renewal of Revocable Permits on the Islands of Hawai'i, Maui, Moloka'i, Kaua'i, and O'ahu." *Id.* *See also* Exhibit A10 at 13. At its December 12, 2014 meeting, BLNR approved the annual renewal of revocable permits 7263, 7264, and 7265 to A&B and revocable permit 7266 to EMI on a month-to-month basis for another one-year period through December 31, 2015, as recommended by the DLNR Land Division. *See* Exhibit A10 at 13 (referring to Exhibit A9's Item D-30). The "character of use" for revocable permits 7263, 7264, 7265, and 7266 is "water". Exhibit A9-3 ("RP Master List 2015") at 3. On or about

December 29, 2014, Administrator Russell Tsuji, agent of DLNR, mailed letters notifying A&B and EMI that their respective revocable permits would be continued on a month-to-month basis for an additional year up to December 31, 2015. Exhibits A11-A to A11-D.

No EA analyzing the impact of either the revocable permits or the diversion of East Maui stream water specifically was prepared prior to the BLNR's grant of revocable permits 7263, 7264, 7265, and 7266. Exhibit B at ¶ 49; Exhibit D at ¶ 49. Nor has the BLNR ever declared that the issuance of revocable permits 7263, 7264, 7265, and 7266 are exempt from the requirements of HRS Chapter 343.

III. APPLICABLE LEGAL STANDARD

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCF Rule 56(b). *Hawai'i Cmty. Fed. Credit Union v. Keka*, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000).

IV. ARGUMENT

Hawai'i Revised Statutes ("HRS") § 343-1 provides:

The legislature finds that the quality of humanity's environment is critical to humanity's wellbeing, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

The Hawai'i Supreme Court has concluded that:

HEPA review is more than a mere formality; instead it should function to provide the agency and any concerned member of the public with the information necessary to evaluate the potential environmental effects of a proposed action . . . so that the public may be allowed an opportunity to comment and the agency will have the necessary

information to understand the potential environmental ramifications of their decisions.

Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 72, 947 P.2d 378, 384 (1997).

An EA must be prepared whenever an applicant requests an approval and proposes any of the nine triggers in HRS § 343-5(a). HRS § 343-5(c); *Sierra Club v. DOT*, 115 Hawai'i 299, 306, 167 P.3d 292, 299 (2007) (“*Superferry*”). One of these triggers is the use of public land, and this section unequivocally states that an EA shall be required for such action. HRS § 343-5(a)(1). Projects which may have a significant effect on the environment require an environmental impact statement (**EIS**). See HRS § 343-5(c).

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.

Superferry, 115 Hawai'i at 306, 167 P.3d at 299 (emphasis added). Thus, completion of the HRS Chapter 343 process is a condition precedent to approval of any request and commencement of the proposed action. See *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai'i 66, 947 P.2d 378 (1997); *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); *Pearl Ridge Estates Comm. Ass'n v. Lear Siegler Inc.*, 65 Haw. 133, 648 P.2d 702 (1982); *Sierra Club v. Office of Planning*, 109 Hawai'i 411, 126 P.3d 1098 (2006).

The statute makes clear that the environment includes “humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” Hawai'i Administrative Rules (“HAR”) § 11-200-2 (definition of “environment”). In 2000, the State Legislature specifically amended the definition of “significant effect” to include “cultural practices” in order to “ensure the continued existence, development and exercise of native Hawaiian culture.” Act 50, 2000 Sess Laws of Hawaii.

In enacting the provision, the legislature found that "there is a need to clarify that the preparation of environmental assessments or environmental impact statements should identify and address effects on Hawaii's culture, and *traditional and customary rights*." It recognized that "the native Hawaiian culture plays a vital role" in the preservation of Hawaii's "aloha spirit" and that "Articles IX and XII of the state constitution, other state law, and the courts of the State impose on government agencies a duty to promote and protect cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups." Most importantly, it observed that

the past failure to require native Hawaiian cultural impact assessments has *resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture*. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.

See also Stand. Comm. Rep. No. 3298 (observing that, "although the Hawaii State Constitution and other state laws mandate the protection and preservation of the traditional and customary rights of native Hawaiians, the failure to require environmental impact statements to disclose the effect of a proposed action on cultural practices has resulted in the loss of important cultural resources. Your Committee believes that this measure will result in a *more thorough consideration of an action's potential adverse impact on Hawaiian culture and tradition, ensuring the culture's protection and preservation*.")

Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 47 n. 28, 7 P.3d 1068, 1084 n. 28 (2000) (emphases in original).

In this case, an EA is required, but none was prepared, thus rendering the revocable permits void.

A. **AN EA IS REQUIRED**

1. **This Action Triggers HRS Chapter 343.**

HRS § 343-5(a)(1) mandates the preparation of an EA for any action proposing the use of State land. *See also Kahana Sunset*, 86 Hawai'i at 70, 947 P.2d at 382. HAR § 11-200-5(C), which implements HRS § 343-5(a)(1), provides in part that the "use of state or county lands includes any use (title, **lease, permit**, easement, licenses, etc.) or **entitlement to those lands**" (emphases added).

In *Kahana Sunset*, the defendant filed an application for a required Special Management Area (SMA) permit to build a 312-unit multi-family residential development. 86

Hawai`i at 68, 947 P.2d at 380. The proposed development would install a new, 36-inch drainage line beneath a public street connecting to an existing 24-inch culvert beneath a public highway. *Id.* at 71, 947 P.2d at 383. As such, there was no dispute that the project constituted a “use of state or county lands.” *Id.* When the Maui Planning Commission granted the defendant’s SMA permit, it determined that an EA was not required, and the circuit court thereafter affirmed the Commission’s decision. *Id.* at 68, 947 P.2d at 380. The Supreme Court, however, concluded that an EA was a necessary condition precedent to the grant of a permit to the developer. *Id.* at 70, 947 P.2d at 383 (“Without an environmental assessment, the agency and the public are not provided with the necessary information to determine the potential environmental significance of a proposed action.”).

A&B and EMI originally proposed both a long-term disposition of the subject license areas and the continued issuance of interim revocable permits on an annual basis, pending issuance of a long-term disposition. *See* Exhibit A2. On December 12, 2014, these revocable permit numbers 7263, 7264, 7265 and 7266 came up for renewal before BLNR. Exhibits A10 at 13 (referring to Exhibit A9’s Item D-30). This proposed “use” of State land gives A&B and EMI the continued ability to take the stream water that is necessary to maintain lo`i kalo and to sustain the habitats and cultural resources on which Plaintiffs’ Native Hawaiian traditional and customary practices rely. This use is, therefore, subject to the requirements of HRS Chapter 343, and an EA is required.

This is consistent with the Court’s reasoning in *Kahana Sunset*:

The purpose of preparing an environmental assessment is to provide the agency and any concerned member of the public with the information necessary to evaluate the potential environmental effects of a proposed action. The public comment and notification provisions of HEPA underscore the legislative intent to provide broad-reaching dissemination of proposed projects so that the public may be allowed an opportunity to comment and the agency will have the necessary information to understand the potential environmental ramifications of their decisions. **A full-scale environmental impact statement is not required unless the initial determination is made that a project will have significant environmental effects. However, in the absence of the preliminary environmental assessment, the legislative intent that potential effects be studied and the public notified is undercut.**

86 Hawai`i at 72, 947 P.2d at 384 (emphasis added).

Indeed, the Hawai`i Supreme Court has already indicated that a similar proposal to use

state land and commit prime natural resources as part of a state-operated irrigation pipeline would dictate the preparation of an EIS because the effects of that use, which moved far less water than what A&B/EMI diverts from East Maui in the instant case, were significant:

We entertain no doubt that the pertinent statutory provisions would mandate the preparation of an EIS if Kaluakoi's application for "rental of space" in the System's facilities were presented to the Board now. A proposal whose approval would facilitate the development of a large resort complex in a previously unpopulated area through the use of the Molokai Irrigation System's pipeline, allow water to be transported from its source to another area, and cause a rise in the salinity of the system's irrigation water would be within the purview of activities covered by Chapter 343. The use of a government pipeline, the implicit commitment of prime natural resources 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.

Molokai Homesteaders Cooperative Association v. Cobb, 63 Haw. 453, 466-67; 629 P.2d 1134, 1144 (1981) (footnote omitted).

Here, the revocable permits granting A&B and EMI the *express* commitment of prime public natural resources, to be transported from an East Maui watershed covering 33,000 acres to irrigate approximately 30,000 acres of sugarcane fields located in Central Maui for Defendants' own commercial gain falls plainly "within the purview of activities covered by Chapter 343." The stream water "committed" to A&B and EMI is otherwise necessary to maintain Plaintiffs' and others' lo'i kalo and to sustain the habitats and the cultural resources on which Plaintiffs' traditional and customary practices rely. *See* Haw. Const. Art. XII, § 7; HRS §§ 1-1, 7-1. There is already a plethora of evidence that EMI's diversions impact, perhaps irrevocably, natural and cultural resources. Plaintiffs here explain ad nauseam that diverted conditions have resulted in negative effects on kalo, the stream life, as well as the muliwai and coastal fisheries; and have also promoted the blockage of streambeds overrun by vegetation and invasive species where fresh water once flowed. *See* Carmichael Decl. ¶¶ 14-15; Jacintho Decl. ¶¶ 16-18; Wendt Decl. ¶16. Additionally, where the streams are stagnant, the water breeds bacteria. *See* Carmichael ¶12; Jacintho Decl. ¶19.

This explicit, uncontroverted commitment of East Maui's precious water resources has persisted, unabated since 1987 – **nearly 30 years**. And as the Circuit Court recognized in 2003, "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.” Exhibit A6 at 6. Consistent with the Court’s earlier rationale, it is clear that the land use at issue has, or at minimum will likely have, a significant effect on the environment, including cultural practices. *See OHA v. HCDCH*, 121 Hawai`i at 333-34, 219 P.3d at 1120-21 (acknowledging the cultural importance of the environment to native Hawaiians). Importantly, the Defendants are collaterally estopped from disagreeing with this conclusion. But even so,

2. This Action is Not Exempt from HRS Chapter 343.

The BLNR and DLNR have not made an exemption determination -- express or otherwise -- as to revocable permit numbers 7263, 7264, 7265, and 7266 at any point since 1987.

And even if they had, an exemption would no doubt pervert what the Circuit Court found manifest in 2003: 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.**” Exhibit A6 at 6 (emphasis added).

In any event, this is not a “minor project” and Defendants are collaterally estopped – by virtue of the 2003 Circuit Court Order – from arguing otherwise. Simple common sense dictates that the diversion of hundreds of millions of gallons of water a day is **not** a “minor” project that will have no significant impact on the environment. Consequently, the action does not qualify under any exemption provided under HAR title 11, chapter 200 – the rules promulgated to further the purpose of HEPA – or under HAR § 11-200-8 specifically as to exempt classes of action. Pursuant to HAR § 11-200-(8)(b), “[a]ll exemptions under the classes in this section are [nonetheless] inapplicable **when the cumulative impact of planned successive actions in the same place, over time, is significant**, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment” (emphasis added). Additionally, “an action shall be determined to have a significant effect on the environment if it [i]nvolves an irrevocable commitment to loss or destruction of any natural or cultural resources[, c]urtails the range of beneficial uses of the environment[, conflicts with the state’s long-term environmental policies or goals[, and s]ubstantially affects . . . cultural practices of the community[.]” HAR § 11-200-12(B).

As the Hawai`i Supreme Court aptly concluded in *Kahana Sunset*, “[i]t is apparent from

the context of the exemptions that the regulations intend to exempt **only very minor projects** from the ambit of HEPA,” 86 Hawai`i at 72, 947 P.2d at 384 (emphasis added), and that exemption determinations “must be consistent with both the letter and the intent contained within the administrative rule exemption[.]” *Id.* at 71, 947 P.2d at 383. *See also Kaleikini v. Thielen*, 124 Hawai`i 1, 33, 237 P.3d 1067, 1099 (2010); Exhibit A6 at 6.

The Court later held in *Superferry*:

Kahana Sunset Owners Ass’n makes clear that not only must the exemption list be developed with regard to the letter and intent of HEPA and its regulations, but so also must individual exemption determinations. The agency must make a preliminary determination that the action to be declared exempt is a “minor project” that will “probably have minimal or no significant effects on the environment.” This conclusion is further supported by OEQC’s Guidebook, which, in a sample exemption memo entitled “Declaration of Exemption,” suggests use of the following statement: “I have considered the potential effects of the above listed project as provided by Chapter 343, HRS and Chapter 11-200, HAR. I declare that this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.”

115 Hawai`i at 316, 167 P.3d at 309.

In the instant case, the BLNR began issuing and/or renewing one-year revocable permits to A&B and EMI to facilitate the massive diversion of water from East to Central Maui for at least 28 years (since 1987) without ever subjecting the diverters’ actions to environmental review. BLNR and DLNR have flouted the rule of law – allowing A&B and EMI to commit – indeed deplete – East Maui’s water resources with impunity for the last three decades. For all intents and purposes, A&B and EMI have received the benefit of a 30-year lease without ever having to meet its legal requirements. Thus, any attempt by any of the Defendants to invoke or rely on an EA exemption is pure artifice.

B. The BLNR Failed to Require that the Applicants Prepare an EA.

The law provides that, whenever an applicant proposes the action contested here, “**the agency** initially receiving and agreeing to process the request for approval **shall require the applicant to prepare an environmental assessment** of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required[.]” HRS § 343-5(e) (emphases added). By applying for the revocable permits from BLNR, A&B and EMI proposed a “use” of State land. As such, BLNR “shall require” that A&B and EMI prepare

an EA. *See id.*²

To date, no EA has been prepared for the grant or issuances of any revocable permits authorizing the use of these lands. Exhibit B at ¶ 49; Exhibit D at ¶ 49. Nevertheless, BLNR approved – as recently as December 12, 2014 – the renewal of A&B’s revocable permit numbers 7263, 7264, and 7265 and EMI’s revocable permit number 7266, thereby authorizing the continued commitment of East Maui’s water resources for A&B and EMI’s commercial enterprise. Exhibits A10 at 13 (referring to Exhibit A9’s Item D-30), A11-A to A11-D. Not only is this contrary to DLNR’s mission statement to “[e]nhance, protect, conserve and manage Hawaii’s unique and limited natural, cultural and historic resources held in public trust[,]” <http://dlnr.hawaii.gov/>, but this is also a patent violation of HRS chapter 343. By authorizing A&B and EMI’s use of this environmentally and culturally significant area of Maui covered by revocable permits 7263, 7264, 7265, and 7266 without insisting on A&B and EMI’s compliance with HRS chapter 343, BLNR and DLNR have brazenly violated the law.

C. A&B and EMI Failed to Comply with HRS Chapter 343

As the applicant proposing the use of State land, A&B and EMI are required to prepare an EA. *See* HRS §§ 343-5(a)(1) and (e).

A&B and EMI originally proposed both a long-term disposition of the subject license areas and the continued issuance of interim revocable permits on an annual basis, pending issuance of a long-term disposition. *See* Exhibit A2. On December 12, 2014, these revocable permit numbers 7263, 7264, 7265 and 7266 came up for renewal before BLNR. Exhibits A10 at 13 (referring to Exhibit A9’s Item D-30). The proposed “use” of State land – the renewal of a revocable permit for the continued commitment of a prime, natural resource for a particular purpose – is an applicant action that requires the preparation of an EA by A&B and EMI. HRS § 343-5(c). The proposed “use” is, therefore, subject to the requirements of HRS Chapter 343. *Id.* Notwithstanding, A&B and EMI have never prepared an EA for the BLNR’s approval of renewed revocable permit numbers 7263, 7264, 7265, and 7266 authorizing their use of these

² In the alternative, by the DLNR’s recommendation to renew A&B and EMI’s revocable permits, BLNR and DLNR proposed an action that would “use” State land. As previously mentioned, no such EA has been prepared. The BLNR and DLNR likewise violated HRS chapter 343 by not preparing an EA. *See* HRS § 343-5(b).

lands. Exhibit B at ¶ 49; Exhibit D at ¶ 49. By failing to do so, A&B and EMI violated HRS chapter 343.

D. The Revocable Permits Must Be Vacated.

The Hawai'i Supreme Court has consistently invalidated approvals where HRS chapter 343 has been violated.

In *Kahana Sunset*, the Hawai'i Supreme Court held “[b]ecause the Commission erred in holding that an environmental assessment was not required, we **vacate the grant of the SMA permit** and remand for further consideration **after the completion** of the required environmental assessment.” *Kahana Sunset*, 86 Hawai'i at 68, 947 P.2d at 380. In *Sierra Club v. Office of Planning*, 109 Hawai'i 411, 126 P.3d 1098, the Land Use Commission's reclassification of land was vacated because no EA had been prepared. Similarly, in *Pearl Ridge Estates Comm Ass'n v. Siegler*, 65 Haw. 133, 648 P.2d 702 (1982), the Hawai'i Supreme Court invalidated the Land Use Commission's reclassification of property from the conservation to the urban district because no EA had been prepared. In *Kepo`o v. Kane*, 106 Hawai'i 270, 292, 103 P.3d 939, 961 (2005), the court held that when an EIS is required, an agency has no legal authority to take any action on the proposal before the final EIS is completed. In that case, the Department of Hawaiian Home Lands entered into a lease when an EIS was required but never completed. The Court held that as a result, the lease was “void at its inception.” *Id.* at 293, 103 P.3d at 962.

Similarly here, the revocable permits issued without the preparation of an EA are void. A declaration that revocable permits 7263, 7264, 7265, and 7266 are null and void is fully consistent with the decisions in *Kepo`o*, *Kahana Sunset*, *Sierra Club*, and *Pearl Ridge*. After all, the revocable permits could not be approved without the prior approval of the applicable final EA – which has never been completed – and were thus “void at [their] inception.” *Kepo`o*, 106 Hawai'i at 293, 103 P.3d at 962. Without these revocable permits, A&B and EMI have no legal authority to continue using the land areas or diverting water covered thereby – and the BLNR and DLNR have no legal basis to authorize A&B and EMI's continued use of East Maui water.

Plaintiffs, therefore, ask that this Court declare that: (1) Defendants A&B and EMI violated HRS chapter 343; (2) BLNR Defendants violated HRS chapter 343; (3) revocable permit numbers 7263, 7264, 7265, and 7266 are null and void; (4) Defendants A&B and EMI have no legal or statutory authority to continue using the land areas or diverting water covered by

revocable permits 7263, 7264, 7265, and 7266; and (5) BLNR Defendants have no legal or statutory basis to authorize Defendants A&B and EMI's continued use of land areas or diversion of water covered by revocable permits 7263, 7264, 7265, and 7266.

V. CONCLUSION

The Defendants failed to comply with statutes, rules and constitutional obligations that ensure the protection and preservation of the environment and Plaintiffs' Native Hawaiian traditional and customary practices. This Court should grant Plaintiff's motion for partial summary judgment and provide appropriate declaratory relief.

DATED: Honolulu, Hawaii, October 21, 2015.



SUMMER L.H. SYLVA
CAMILLE K. KALAMA
DAVID KIMO FRANKEL
Attorneys for Plaintiffs
HEALOHA CARMICHAEL, LEZLEY
JACINTHO and NĀ MOKU AUPUNI O
KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

HEALOHA CARMICHAEL, LEZLEY)	CIVIL NO. 15-1-0650-04 RAN
JACINTHO, and NĀ MOKU AUPUNI O)	(Environment; Declaratory Judgment)
KO'OLAU HUI,)	
)	DECLARATION OF COUNSEL
Plaintiffs,)	
)	
vs.)	
)	
BOARD OF LAND AND NATURAL)	
RESOURCES, SUZANNE CASE, in her)	
official capacity as Interim Chairperson of)	
the Board of Land and Natural Resources,)	
the DEPARTMENT OF LAND AND)	
NATURAL RESOURCES, ALEXANDER)	
& BALDWIN, INC., EAST MAUI)	
IRRIGATION CO., LTD., HAWAIIAN)	
COMMERCIAL AND SUGAR CO., and)	
COUNTY OF MAUI, DEPARTMENT OF)	
WATER SUPPLY,)	
)	
Defendants.)	
)	

DECLARATION OF COUNSEL

I, Summer L.H. Sylva, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I am one of the attorneys representing Plaintiffs Healoha Carmichael, Lezley Jacintho, and Nā Moku Aupuni O Ko`olau Hui (collectively hereinafter "Plaintiffs") in this case.
3. Attached hereto as Exhibit A is a true and accurate copy of copy of Plaintiffs' First Request for Admissions to Defendants Suzanne Case, in her official capacity as Chairperson of the Board of Land and Natural Resources, Board of Land and Natural Resources, and Department of Land and Natural Resources, served on May 22, 2015.

4. Attached hereto as Exhibit B is a true and accurate copy of Defendants Suzanne Case, in her official capacity as Chairperson of the Board of Land and Natural Resources, Board of Land and Natural Resources, and Department of Land and Natural Resources' Response to Plaintiff's First Request for Admissions, served July 6, 2015.

4. Attached hereto as Exhibit C is a true and accurate copy of Plaintiff's First Request for Admissions to Alexander & Baldwin, Inc. and East Maui Irrigation Co. Ltd., served on May 22, 2015.

5. Attached hereto as Exhibit D is a true and accurate copy of Defendants' Alexander & Baldwin, Inc.'s and East Maui Irrigation Co. Ltd.'s Response to Plaintiff's First Request for Admissions, served July 6, 2015.

6. Attached hereto as Exhibit E is a true and accurate copy of Plaintiffs' First Request for Admissions to Defendant County of Maui, Department of Water Supply, served on May 22, 2015.

7. Attached hereto as Exhibit F is a true and accurate copy of County of Maui Department of Water Supply's Response to Plaintiffs' First Request for Admissions to Defendant County of Maui, Department of Water Supply, served June 4, 2105.

8. Attached hereto as Exhibit G is a true and accurate copy of the Stipulation Authenticating Documents between Plaintiffs and Defendants Suzanne Case, in her official capacity as Chairperson of the Board of Land and Natural Resources, Board of Land and Natural Resources, and Department of Land and Natural Resources.

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

DATED: Honolulu Hawai'i, October 21, 2015.


SUMMER L.H. SYLVA

I, Healoha Carmichael, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I am Hawaiian.
3. I grew up in Wailua and Ke'anae in East Maui.
4. I learned traditional and customary gathering practices from my grandmother, 'Awapuhi Carmichael, who learned practices passed down from her Hawaiian elders.
5. Traditionally, my 'ohana gathered 'ōpae, watercress, lū'au, haha, pepeiao, hihiwai, pupulo`i and goldfish in Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Piinaau, Palauhulu, 'Ōhi'a/Waianu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi.
6. Traditionally, my family would also pick 'opihi on the way home from gathering and also catch 'o'opu at Waiolohe and Ching's pond in Palauhulu.
7. My 'ohana also engaged in mālama 'āina and mālama kahawai at Honomanu, Piinaau, Palauhulu, 'Ōhi'a/Waianu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi, and Waiohue by gathering according to the moon, not always going to the same places so we didn't overharvest the stream, and taking care of the ko'a's to keep the population up.
8. Currently, I gather 'ōpae in Piinaau, Palauhulu, 'Ōhi'a/Waianu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi. I gather hihiwai in Waiohue and Kopiliula. We have to go high in the mountains to find the 'ōpae and hihiwai. I practice the traditions my grandmother taught me, including what colors not to wear when gathering, how we should walk on the sides of the river, and how we should be quiet when we carry out these traditions. I was taught to always look up at the mountain to look out for big water.
9. I also fish for moi, aholehole, uouo, and mullet in and around the mouths of Piinaau, Palauhulu, 'Ōhi'a/Waianu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, and Hanawi. I also dive for kole and pick 'opihi. Now, there's not much moi.
10. I gather to feed my family and as recreation.
11. I continue to engage in mālama 'āina and mālama kahawai as my grandmother taught me, following her instruction to gather according to the moon and from different places so we don't overharvest.
12. My family and I enjoy swimming in Ching's Pond at Piinaau. However, in some places the water is dirty and just sits because the diversions obstruct the flow. I got a staph infection four times from swimming in the water.
13. I've noticed the change in water flow. For example, at East Wailuaiki, you can see the ditch, see the water dropping into it, and then look below the ditch only to see the pond is completely dry. At Hanawi, the side above the ditch has water, the side below the ditch has nothing. Mountain Pond at Piinaau is bone dry. So is Kikokiko Spring. Most of the time, you have to wait for it to rain before you see any water in the stream. If you wait a couple days for the rain to clear up, the streams are beautiful. Otherwise they are typically dry.
14. The change in water flow affects the populations of stream animals like 'ōpae, hihiwai, and 'o'opu. It's not at all like what my grandmother described it was like

before time.

15. I've also noticed invasive trees like the African tulip tree growing in where the water has stopped flowing due to the diversions.
16. The impact of the diversions on this environment is tremendous. When you kill a stream and you allow invasive species to take over, that's a sin. The dewatering of the stream is not caring for it. It's not mālama 'āina.
17. I am concerned about the fact that there has never been an environmental assessment or impact statement to analyze what these large-scale diversions have done and will do to this environment. I am also concerned that A&B and EMI continue to get permits to use ceded lands in a way that negatively and significantly impacts my 'ohana and Native Hawaiians in violation of the law.

DATED: Ke'anae, Hawai'i, May 4th, 2015.



HEALOHA CARMICHAEL

4. I am farming this land based on my family history and talking with kupuna about practices their parents traditionally engaged in to farm lo'i long before we continued those customs.
5. I learned how to farm taro from Beatrice Kepani Kekahuna and Lurlyn Scott.
6. My 'ohana has lived in Honopou for many generations.
7. Traditionally, my 'ohana gathered 'ulu, kalo, uala, moi, aholehole, banana, 'o'opu, pūpū, kala, hau, native crayfish, hihiwai, 'opihi, limu, pohole, mango, 'awapuhi, tī leaf, lū'au, guava, watercress, oranges, and medicinal plants in and around Honopou.
8. Traditionally, my 'ohana fished for aholehole, honu, moi, mullet, poopaa, puhi, ulua, lobster, pāpio, 'ō'io, lae, uhu, menpachi, kole, black crab, haukiuki, kupipi, and opihi in or near the mouth of Honopou, Punalau/Kolea, Honomanu, Hanawi, and Makapipi. They also gathered limu in those areas.
9. My 'ohana also engaged in mālama 'āina and mālama kahawai. They were aware of spawning times, they cleaned the 'auwai, gathered only what was needed, gathered and fished with the moon cycle, rebuilt walls, and cleaned Honopou.
10. Currently, my 'ohana and I gather pohole, banana, avocados, 'ulu, mango, orange, puakenikenī, and lū'au in and around Honopou and Honomanu. We also pull kalo if it is not rotten.
11. My family and I fish for pāpio, enenuē, moi, prawns, lobster, haukiuki, 'opihi, and kupipi in or near the mouth of Honopou and Honomanu.
12. I gather and fish to feed my family, teach my kids to feed themselves, and live as our grandparents did.
13. My family engages in mālama 'āina and mālama kahawai by cleaning Honopou and nearby ponds, planting kalo, cleaning, and working together to grow food.
14. We also swim in the ponds, teach our kids how to swim, catch prawns, fish, and play games in and around Honopou.
15. I appreciate the natural beauty of Honopou, including the birds and dragon flies. I love the smells of 'awapuhi and other flowers. I enjoy looking around, taking in the beauty and the greenery, and hearing rushing water while sitting on Lurlyn Scott's deck next to the pond.

16. Water is used to irrigate my lo'i as well as other lo'i. The level of water barely feeds those lo'i. More water is needed as we continue to open more lo'i. The water also feeds homes situated around these lo'i, homes which have been established for generations.

17. The lack of stream flow harms our taro. We have lost taro due to root rot and other diseases.

18. Because the streamflow connects to the ocean, diverted streamflow restricts spawning of different species of fish. Thus, the lack of streamflow also affects our gathering rights as Hawaiians and our ability to feed our 'ohana as was once possible. Native species like 'o'opu cannot travel back up stream due to lack of water, which compromises their reproduction and life cycle. Our families who live in this area cannot gather enough resources from the ocean and streams because there is not enough fish, hihiwai, 'ōpae, and 'o'ōpū living in them. The low stream flow has also caused people to move away to provide better for their family, unable to sustain their families with the limited food resources available as a result of the diversions.

19. Additionally, swimming in the ponds is a form of recreation we all enjoy. It should continue to be enjoyed; not compromised by improper flow which can cause stagnate water that breeds leptospirosis and other bacteria.

20. Spiritually, we are connected to the water here. Water is life. Without water we will not be.

21. It is for these reasons – the long list of harmful impacts resulting from A&B and EMI's large-scale diversions all along our ceded lands – that the lack of an environmental assessment for A&B and EMI's use of these state lands upsets me and my community.

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

DATED: Honopou, Maui, Hawai'i, May 15, 2015.


LEZLEY JACINTHO

5. My family has been in Wailuanui for six generations. I still farm on lands that trace back to the Māhele on my mother's side (Kaiha`a-Waila`ahia-Lu`ukia). I farm the same taro patches, `auwai, and rivers in the same traditional and customary manner. That knowledge was passed on to me through the generations.

6. Traditionally, my family gathered `ōpae, `o`opu, and hihiwai from Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Piinaau, Palauhulu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi.

7. My family also traditionally fished for uhu, u`u, kole, ulua, `uku, kumu, moi, honu, and anae in or near the mouths of Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Piinaau, Palauhulu, `Ōhi`a/Waianu Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi.

8. Traditionally, my family engaged in mālama `āina and mālama kahawai by being careful not to overharvest the stream animals as well as clearing the vegetation or rubbish blocking stream flow in and around Waikamoi, Alo, Wahinepee, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, Nuaailua, Piinaau, Palauhulu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Paakea, Waiaaka, Kapaula, Hanawi, Waiohue, and Makapipi.

9. Currently, I gather `o`opu and hihiwai in Honomanu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Hanawi, Makapipi, and Waiohue. I also fish for moi, enenu, manini, uaouao, ulua, and anae in or near the mouth of Nuaailua, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Hanawi, and Waiohue. Some of the streams my ohana traditionally gathered in have had insufficient to no streamflow and therefore gathering in them today is difficult.

10. I also engage in mālama `āina and mālama kahawai by clearing stream banks of vegetation and rubbish that otherwise block stream flow in and along Honomanu, Piinaau, Palauhulu, Waiokamilo, Kualani, Wailua, Waikani (Wailuanui), West Wailuaiki, East Wailuaiki, Hanawi, and Waiohue.

11. In the same manner that I learned my traditional and customary practices from my kupuna, many Nā Moku members also learned to gather, fish, and farm in and/or alongside streams in the Honomanu, Ke‘anae, and Nahiku license areas and continue to do so today.

12. For me, gathering and fishing from the streams enables me to provide a protein source to my ‘ohana and neighbors, including kupuna, who may be unable to gather and catch their own fish. I also aim to teach the ‘ōpio the traditional practices to mālama streams and gather and fish from the streams and coast lines.

13. Dewatering the streams has prevented my generation from teaching ‘ōpio how to mālama streams and use techniques wisely to gather from streams and fish along coastline near the muliwai.

14. The diminished stream flow has negatively affected the muliwai and the coastal fisheries. Certain volumes of water and enough flow is required to maintain a good kalo crop. As with many other Nā Moku members, much of my kalo could not survive the emptying of these streams, so it has made farming more difficult. Additionally, some of my neighbors have abandoned kalo farming because the streams had stopped flowing.

15. The lack of stream flow has also allowed vegetation along the stream banks to block the stream beds, and has permitted invasive snail species and African tulips to take over the taro crop.

16. Ultimately, the loss of stream water has changed the whole way of life in Wailuanui-Ke‘anae. It takes more time to find the resources to gather, which robs me and other Nā Moku members of time for recreation and time with ‘ohana.

17. Without water, our whole way of life would be lost.

18. Many original members of Nā Moku have died since we first petitioned for the return of water to these streams. It makes me sad and lose hope. They never lived to see the water return to the lo‘i in 2008. I am afraid I will not live to see the return of the water we are now fighting for.

19. I am disappointed and concerned that there has been no environmental review of A&B and EMI’s use of our ceded crown lands. There are environmental impacts that have been obvious for decades that continue today. How these corporations have managed to get permits from the Board of Land and Natural Resources year after year without following the law is outrageous.

20. Corporations last forever. Traditional people do not. Crown lands should be set aside for the benefit of the people.

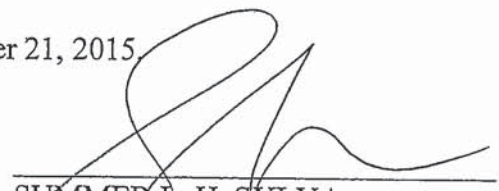
I declare under penalty of perjury that the foregoing is true and correct.

DATED: Wailuanui, Hawai`i, May 19, 2015.


EDWARD WENDT

PLEASE TAKE NOTICE that the foregoing motion will be heard before the **Honorable Rhonda A. Nishimura**, Judge of the above-entitled Court, Circuit Court of the First Circuit, 777 Punchbowl Street, Honolulu, Hawaii 96813, on November 24, 2015, at 10:30 am a.m./p.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, October 21, 2015.

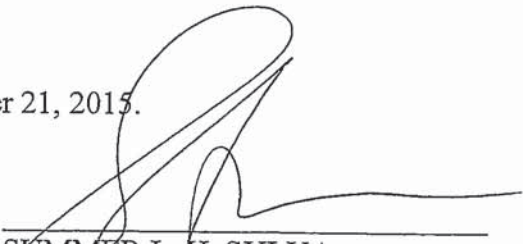


SUMMER L. H. SYLVA
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Attorneys for Plaintiffs
HEALOHA CARMICHAEL, LEZLEY
JACINTHO AND NĀ MOKU AUPUNI O
KO'OLAU HUI

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on this date, by hand delivery to Linda L. Chow and David Schulmeister and by U.S. Mail, postage prepaid, to Caleb P. Rowe.

DATED: Honolulu, Hawaii, October 21, 2015.



SUMMER L. H. SYLVA
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HEALOHA CARMICHAEL, LEZLEY
JACINTHO AND NĀ MOKU AUPUNI O
KO'OLAU HUI

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

Defendant A&B/EMI's Exhibit AB-17

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____