CAAP-16-0000071

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

HEALOHA CARMICHAEL, LEZLEY JACINTHO, and NĀ MOKU AUPUNI O KO`OLAU HUI, Plaintiffs-Appellees/ Cross-Appellees/Cross-Appellants, 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, Defendants-Appellees/Cross-Appellees/Cross-Appellants, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION CO., LTD., HAWAIIAN COMMERCIAL AND SUGAR CO., Defendants-Appellants/Cross-Appellees, and COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY, Defendant-Appellee/Cross-Appellant/Cross-Appellee	CIVIL NO. 15-1-0650-04 RAN (Environment; Declaratory Judgment) PLAINTIFFS-APPELLEES/CROSS-APPELLEES/ CROSS-APPELLANTS' OPENING BRIEF; APPENDIX A& B; STATEMENT OF RELATED CASES

TRIAL EXHIBIT AB-20

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I. INTRODUCTION

"The BLNR [board of land and natural resources] is constitutionally mandated to conserve and protect Hawai`i's natural resources." *Pila`a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai`i 247, 250, 320 P.3d 912, 915 (2014); Haw. Const art. XI §§ 1 and 2. HRS chapter 343 ensures that "environmental concerns are given appropriate consideration in decision making." HRS § 343-1.

Ignoring these requirements, in December 2014, BLNR voted to renew four revocable permits authorizing Alexander & Baldwin, Inc. and East Maui Irrigation Co., Ltd (collectively, "**A&B**") to use approximately 33,000 acres of state land and to divert of up to 450 million gallons of water a day from East Maui streams to irrigate A&B's commercial sugar operation in Central Maui without first ensuring completion of an environmental assessment (**EA**).

II. STATEMENT OF THE CASE

In May 2000, BLNR authorized A&B to use approximately 33,000 acres of state land and to divert millions of gallons of water every day from the streams flowing through those areas pursuant to revocable permits 7263, 7264, 7265, and 7266. JEFS #42 RA: 243-78, 383, 446, 453 and 468.[1] No EA analyzing the impact of the diversion of East Maui streams was prepared prior to the BLNR's grant of these revocable permits. *Id.* at 395-96 ¶¶ 48-49 and at 477 ¶¶ 48-49.

In May 2001, A&B requested a thirty year lease of the lands covered by revocable permits 7263, 7264, 7265, and 7266, *id.* at 235, and the "temporary continuation of the year-to-year revocable permit . . . pending issuance of the lease." *Id.* at 237.

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[1] A&B also delivers approximately 8.6 million gallons of water per day to the County of Maui, Department of Water Supply. JEFS #46 RA:410. The plaintiffs have not challenged that use. *See e.g.,* JEFS #42 RA:73-74 ¶G; JEFS #46 RA:52; JEFS #87 TRANS:15-18.

At the request of Nā Moku Aupuni O Ko'olau Hui (Nā Moku) and others in 2001, a contested case hearing commenced on the disposition of these lands and waters. *Id.* at 284-94, 624.

Instead of granting A&B's thirty year lease request for use of those lands and waters pursuant to HRS § 171-58(c) – and instead of voting to continue the revocable permits for another year pursuant to HRS § 171-55 – the BLNR granted what it called a holdover permit on a month to month basis. *Id.* at 624.

In 2002, BLNR granted a "holdover of the existing revocable permit." *Id.* at 286.

In 2003, the BLNR granted a thirty year lease to A&B, a decision which the circuit court promptly reversed because of the failure to prepare an EA. *Id.* at 289-310.

In 2007, the BLNR issued an order regarding A&B's ongoing stream diversions in which it acknowledged, "All parties now concede that an EA (and potentially an environmental impact statement ('EIS') must be prepared[.]" *Id.* at 911. It also directed the department of land and natural resources (**DLNR**) "to take all administrative steps necessary to . . . prepare an EA in accordance with HRS Chapter 343." *Id.* at 955. No EA or EIS was commenced in response.

Between 2005 and 2013, the BLNR annually voted to continue the revocable permits for an additional year. *Id.* at 385-88, 463, 469-473, 660; JEFS #44 RA:793 -815. BLNR misled Nā Moku into believing that there had been no further issuance of these permits. JEFS #42 RA:300, 318 ("there was no further request for issuance of a temporary permit").

In December 2014, DLNR submitted a recommendation to BLNR titled "Annual Renewal of Revocable Permits on the Islands of Hawaii, Maui, Molokai, Kauai and Oahu." JEFS #42 RA:320. DLNR recommended that BLNR: "Approve the continuation of the revocable permits listed in Exhibit 3 on a month-to-month basis for another one-year period through

December 31, 2015." *Id.* at 321. The BLNR adopted the DLNR's recommendation and voted to approve the continuation of the revocable permits for another year. *Id.* at 346. No EA, EIS, or exemption determination had been prepared before the BLNR took action on this proposed use of state land for a specific term. *Id.* at 86-88 ¶¶ 19, 26, 31 and at 108 (admitting to paragraph 51 of the first amended complaint, found at *id.* at 71-72) and at 112-13 ¶¶ 22, 23, 24, 26, 27.

A&B's use of these lands and waters has caused significant harm to stream life. JEFS #42 RA: 210, 217, 363-366. The diversions cause a loss of habitat, create barriers to migration, and entrain stream species. *Id.* at 363. Specifically, diversions have caused 67.3 kilometers of habitat loss across 19 streams. *Id.* at 365. Nearly 100% of aquatic organisms are entrained by the diversion grates. *Id.* at 367.

A&B's diversions also cause significant harm to cultural traditions. *Id.* at 157-166 and 208-217. Plaintiff Healoha Carmichael engages in traditional and customary practices in East Maui. *Id.* at 157. She gathers ʻōpae from over a dozen East Maui streams; gathers hīhīwai from two of them; fishes for moi, āholehole, uouo, and mullet at the mouths of over a dozen East Maui streams; and swims in them. *Id.* She has observed the devastating impact resulting from the de-watering of these streams. *Id.* at 157-58. Plaintiff Lezley Jacintho grows taro, gathers food, fishes, swims, and enjoys the natural beauty in other East Maui streams. *Id.* at 161-63. The lack of stream flow: harms the taro she grows; hampers her ability to gather food like the ʻoʻopu; and spoils the quality of the water in which she swims. *Id.* at 162. Edward Wendt, the president of Plaintiff Nā Moku, is unable to gather ʻoʻopu and hīhīwai from some of the streams his ancestors gathered from because of insufficient streamflow. *Id.* at 164. Taro farmers have abandoned taro farming because of inadequate streamflow. *Id.* at 164 and 207-8.

The plaintiffs filed their complaint on April 10, 2015 and their first amended complaint

on April 20, 2015. JEFS #42 RA:20-34 and 60-75. On January 8, 2016, the circuit court filed its Order Granting Plaintiffs' Motion for Partial Summary Judgment, filed October 21, 2015, JEFS #46 RA:292-295, and its Order Denying Defendants Alexander & Baldwin, Inc. East Maui Irrigation Co., Ltd. and Hawai'i Commercial and Sugar, Co.'s Combined Motion for (1) Partial Summary Judgment and (2) Consolidation and Stay of Proceedings Filed November 6, 2015, *id.* at 311-313. On February 2, 2016, the circuit court denied A&B's motion for rehearing and reconsideration of the January 8 orders. *Id.* at 996-98. On February 5, 2016, the circuit court filed its Order Granting Defendant County Of Maui, Department Of Water Supply's Application For Leave To Take Interlocutory Appeal Of The Order Granting Plaintiffs' Motion For Partial Summary Judgment Filed October 21 , 2015 And Motion For Stay Of Proceedings And/Or Enforcement Of The Order Pending Appeal Filed January 19, 2016. A&B Defendants filed their notice of appeal on February 5, 2016. *Id.* at 1028 *et.seq.* Plaintiffs filed their notice of cross appeal on February 16, 2016. *Id.* at 1123 *et. seq.*

III. STATEMENT OF POINT OF ERROR

In its January 8, 2016 Order Granting Plaintiffs' Motion for Partial Summary Judgment, filed October 21, 2015, the circuit court erred in paragraph 5 when it wrote: "The BLNR's December 2014 decision to continue the Revocable Permits does not constitute an 'action' subject to the EA requirements of Chapter 343." JEFS #46 RA:295.[2] Plaintiffs explained why HRS chapter 343 applies at JEFS #42 RA:140-152, JEFS #46 RA:47-51 and 223-228.

[2] The circuit court, however, did not err in paragraph 7. This cross-appeal was filed in an abundance of caution. It may not be necessary given that the plaintiffs are only challenging a wrong reason in a ruling in their favor and "where the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." *Reyes v. Kuboyama*, 76 Hawai'i 137, 140, 870 P.2d 1281, 1284 (1994).

IV. STANDARD OF REVIEW

An appellate court reviews the grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. *Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai'i 150, 170, 231 P.3d 423, 443 (2010).

> [W]here the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling. *Brooks v. Minn*, 73 Haw. 566, 576-77, 836 P.2d 1081, 1087 (1992); *Shea v. City and County of Honolulu*, 67 Haw. 499, 507, 692 P.2d 1158, 1165 (1985); *Agsalud v. Lee*, 66 Haw. 425, 430, 664 P.2d 734, 738 (1983). This court may affirm a grant of summary judgment on any ground appearing in the record, even if the circuit court did not rely on it. *Waianae Model Neighborhood Area Ass'n v. City and County of Honolulu*, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973); *McCarthy v. Yempuku*, 5 Haw. App. 45, 52, 678 P.2d 11, 16 (1984).

Reyes, 76 Hawai'i at 140, 870 P.2d at 1284.

The court "must ensure that the agency has taken a 'hard look' at environmental factors." *Sierra Club v. DOT*, 115 Hawai'i 299, 342, 167 P.3d 292, 335 (2007). Furthermore, when public trust resources are involved, Hawai'i courts take a "close look" to ensure compliance with public trust principles and "will not act merely as a rubber stamp for agency or legislative action." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000) ("*Waiāhole*"). Finally, *Kepo'o v. Kane*, 106 Hawai'i 270, 281, 103 P.3d 939, 950 (2005), the department that issued a decision concerning its management of land argued that the court erred in failing to defer to the agency's determination regarding HRS chapter 343 (eighth argument). The Supreme Court, however, gave the agency no deference. *Id.* at 287 n.27, 103 P.3d at 956 n. 27.

V. ARGUMENT

The Hawai'i Supreme Court has explained:

> 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.

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

In 2000, the State Legislature specifically amended HRS chapter 343 to ensure that impacts to "cultural practices" are considered. 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, at a minimum, because A&B's proposed use of state land is the trigger for HRS chapter 343. The characterization of the action as merely a continuation of

the status quo is neither dispositive nor accurate.

A. A&B'S use of state land triggers HRS chapter 343.

HRS § 343-5(a)(1) mandates the preparation of an EA for any action proposing the use of State land. *'Ohana Pale Ke Ao v. Bd. of Agric.*, 118 Hawai'i 247, 254, 188 P.3d 761, 768 (ICA 2008)("The foregoing statute unequivocally requires preparation of an EA for any 'action' that proposes the use of state land."); *Sierra Club v. Office of Planning*, 109 Hawai`i 411, 126 P.3d 1098 (2006) (proposal that would involve the use of state lands for water transmission lines requires preparation of an EA prior to decisionmaking); *Kahana Sunset,* 86 Hawai`i at 71, 947 P.2d at 383 (1997) (installation of a drainage line beneath a government road triggers the need for an EA prior to decisionmaking). 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).

The defendants do not dispute that an EA (at a minimum) is required for the lease of these lands – as Judge Hifo has already ruled, JEFS #42 RA:308-9, 911; JEFS #44 RA:656 n.1, and as all parties conceded in 2007, *id.* at 911. So too, does a decision to approve the renewal of revocable permits for these same lands and waters. The fact that one proposed use lasts thirty decades, and the other adds an additional year to the previous thirteen, does not make one an "action" and the other a "non-action."

The "action" is the use of approximately 33,000 acres of state land and diversion of up to 450 million gallons of water a day from East Maui streams. *See e.g.* JEFS #42 RA:224-241, 243-278, 335, 348-354, 446, 453. The proposal is: (a) DLNR's December 2014 recommendation that the BLNR approve the continuation of the four revocable permits authorizing this use. JEFS #42

RA:320-21; and/or (b) A&B's request in 2001[3] for the continuation of the year-to-year revocable permits until issuance of a lease. JEFS #42 RA:237; *see also id.* at 463.[4] Whether this action is an agency action (the first scenario), or an applicant action (the second scenario), an EA (at a minimum) was required.

B. The characterization of the action as a continuation of the status quo is neither dispositive nor accurate.

The defendants have attempted to minimize the import of the BLNR decision and characterize the BLNR's action as a meaningless continuation of the status quo not triggering HRS chapter 343. They are wrong. First, certain continuing actions require EAs. Second, the vote to renew the revocable permits changed the legal status quo. Third, federal law in analogous cases holds that an EA is required.

1. Continuing actions require compliance with HRS chapter 343.

The Environmental Council has made clear that HRS chapter 343 requires an EA for certain continuing activities. The Environmental Council is statutorily charged with implementing HRS chapter 343:

> The Environmental Council is charged, pursuant to HRS § 343-6 (1993), quoted *infra,* with the task of promulgating rules to further the purpose of HEPA. In fulfilling its statutory responsibility, the Environmental Council promulgated HAR title 11, chapter 200 that sets forth the "system of environmental review at the state and county levels" which "provide[s] agencies and persons with procedures, specifications of contents of environmental assessments and environmental impact statements, and criteria and definitions of statewide application." HAR § 11-200-1.

Unite Here! 123 Hawai`i at 175, 231 P.3d at 448. The *Unite Here!* court held that the rules promulgated by the Environmental Council are "within the 'implied powers that are reasonably

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[3] A&B's request for continuing issuance of revocable permits pending issuance of the lease has never been withdrawn.

[4] The statute of limitations, however, runs from 120 days of the agency's "decision to carry out or approve the action." HRS § 343-7(a). Plaintiffs are challenging the decision made in December 2014.

necessary to carry out the powers expressly granted.'" *Id.* at 176, 231 P.3d at 449. The purpose of HRS chapter 343 is furthered by the Council's rules.

HAR § 11-200-8 includes discrete categories of actions that are exempt from HRS chapter 343. HAR § 11-200-8 specifically exempts certain ***status quo*** classes of action from the need to prepare an EA: the operation of ***existing*** facilities and ***continuing*** administrative activities. HAR § 11-200-8(A)(1) and (10). If the operation of ***existing*** facilities and ***continuing*** administrative activities were **not** "actions", then an express exemption from HRS chapter 343 would have been unnecessary. Instead, the Environmental Council's rules explicitly contemplated treating ***continuing*** activities as "actions." This ***status quo*** exemption, however, does not apply if the cumulative impact may be significant, or when the action affects "a particularly sensitive environment" – as is the undisputed fact here. HAR §11-200-8(B).

Thus, characterizing A&B's use of state lands and waters as a continuation of its existing activities is not dispositive of the applicability of HRS chapter 343.

In this case, A&B's use, in a particularly sensitive environment, has been devastating. JEFS #42 RA: 157-166; 208-217, 363, 366. The proposed use has a significant impact on cultural traditions and stream life. *Id.* Judge Hifo concluded that the diversion of these streams "from 33,000 acres of state land, as a matter of law, does not constitute a minimal or no significant effect on the environment." JEFS #42 RA:308-9. Even if the BLNR's December 2014 decision could be characterized as a continuation of an existing activity, its effect is so significant that an EA is required. [5]

[5] Nor could the BLNR's December 2014 decision allowing A&B to use these lands and waters be exempt from the requirements of HRS chapter 343. An exemption from the requirements of HRS chapter 343 requires an explicit exemption determination made by the agency. HAR § 11-200-8(E). There is no evidence that BLNR or DLNR rendered an exemption determination prior to the BLNR's December 2014 decision to renew the revocable permits.

2. The BLNR's decision was significant and altered the legal status quo.

Nor can the BLNR's vote to renew the revocable permits be dismissed as a mere continuation of the status quo. Without the BLNR's vote, revocable permits 7263, 7264, 7265, and 7266 would have expired on December 31, 2014 by operation of law. 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.[6]

On January 1, 2015, A&B would then have had no legal authority to use 33,000 acres of state land in East Maui and divert hundreds of millions of gallons of water every day from more than one hundred public streams. Thus, the BLNR's December 2014 vote had significant consequences regarding A&B's daily diversion of millions of gallons of water from 33,000 acres

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[6] In 1967, the legislature amended the last sentence of RLH § 103A-52, the previous codification of HRS § 171-55. The language adopted in 1967 reads: "Such permit on a month on month basis may continue for a period **not to exceed one year from the date of its issuance**; provided that the board may allow such permit to continue on a month to month basis for additional one year periods." 1967 Session Laws of Haw Act 234. The Committee on Lands that drafted this legislation explained that this section of the law was amended:

> to require that at the end of each year during the continuance of a permit, the board **must** give its approval before a permit may be continued. It is intended that permit on a month to month basis shall be for a duration of one year **unless extended by the board. At the end of each year**, if the permit on a month to month basis is extended for another year, the **board approval must be had.** Certain language clarity was necessary inasmuch as existing law does not expressly state that **a periodic annual review is required** but may be construed to mean that only one initial review is necessary after the first one year period.

1967 House Journal 670 (SCR 522) (emphasis added). The 1967 legislature specifically prohibited the BLNR Defendants from granting a temporary, month-to-month permit that lasts indefinitely. Although section 103A-52 have been modified slightly and recodified as HRS § 171-55, the legislature has not amended this provision in any way to alter the clear legislative intent behind it.

of public land.

DLNR's submittal was titled "Annual Renewal of Revocable Permits on the Islands of Hawaii, Maui, Molokai, Kauai and Oahu." JEFS #42 RA:320. DLNR recommended that BLNR: "Approve the continuation of the revocable permits listed in Exhibit 3 on a month-to-month basis for another one-year period through December 31, 2015." *Id.* at 321. The BLNR approved the DLNR's recommendation. *Id.* at 346. The vote approved the renewal of revocable permits. As such the vote was ***a change to the legal status quo***. The December 2014 decision to approve the revocable permits was not a mere continuation of an ongoing operation. It was an explicit, discretionary action made pursuant to a statutory mandate compelling the board to affirmatively review and decide whether to allow the permit to continue on a month-to-month basis for an additional one year period.

When DLNR recommended to the BLNR that it renew revocable permits for an additional year – pursuant to A&B's standing 2001 request – that recommendation was no different from proposals to enter into a lease, *Kepo'o v. Watson*, 87 Hawai'i 91, 952 P.2d 379 (1998), reclassify land, *Sierra Club v. Office of Planning*, grant a permit, *Kahana Sunset*, or authorize a previously approved project, *Unite Here!*. The absence of an EA undermines the legislative intent to study potential effects and to notify the public – particularly where BLNR has allowed the use of 33,000 acres of public trust ceded land and the diversion of hundreds of millions of gallons per day every year for over a decade. *Kahana Sunset,* 86 Hawai'i at 72, 947 P.2d at 384.

3. Analogous federal law requires an EA for renewal decisions.

Federal law does not govern this case, but federal decisions applying the National

Environmental Policy Act (NEPA) may be instructive.[7] On occasion, our courts have looked at NEPA decisions for guidance. *Price v. Obayashi State Corp.*, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996).

Federal law requires preparation of an EA or an EIS for relicensing and renewals. *See Commonwealth v. United States NRC,* 708 F.3d 63, 67 (1st Cir. 2013) ("Relicensing requires the preparation of an EIS."); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004) ("one-year renewals of the special-use permits were not allowable categorical exclusions and require the issuance of an EA or an EIS"); *La. ex rel. Guste v. Lee*, 853 F.2d 1219, 1222-23 (5th Cir. 1988) ("Clearly the Corps should have prepared an EIS if the Corps determined that the renewal of the shell dredging permits might affect the quality of the human environment."); *Shearwater v. Ashe*, 2015 U.S. Dist. LEXIS 106277, at *10 (N.D. Cal. Aug. 11, 2015)("permit renewal decisions are affirmative agency actions triggering procedural obligations under NEPA").

The appellate courts have focused on the legal consequence of the pending expiration of a license or a lease. The status quo is the *de jure* conditions without the renewal -- not the existing circumstances on the ground. In *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 784 (9th Cir. 2006), the Ninth Circuit Court observed:

> Without the affirmative re-extension of the 1988 leases, Calpine would have retained no rights at all to the leased property and would not have been able to go forward with the Fourmile Hill Plant. The status quo before the 1998 extensions was that Calpine owned rights to produce geothermal steam valid through May 31, 1998, after which Calpine owned nothing. Instead of preserving the status quo, the lease extensions gave Calpine an extra five years to develop the land and the possibility of obtaining a future lease extension of up to forty years.

Id. The Court held that "[u]nder NEPA and our case law, the agencies were required to complete

[7] "HRS Chapter 343 is wider in scope than the federal or the typical state analogue[.]" *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 465, 629 P.2d 1134, 1143 (1981).

an environmental impact statement before extending the leases." *Id.* As in *Pitt River*, A&B would have "retained no rights at all" to the state land and or stream water from these lands without a continuation of the revocable permits.

Similarly, in *Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission*, 746 F.2d 466 (9th Cir. 1984), the case Judge Hifo cited in her order, the Court focused on the agency's legal obligations. The Federal Energy Regulatory Commission (FERC) re-licensed a hydropower plant and dam to continue to operate. The dam had been operating for five decades. *Id.* at 475. The Court held: "Simply because the same resource had been committed in the past does not make relicensing a phase in a continuous activity." *Id.* at 476. The Ninth Circuit Court of Appeals looked to the purposes of the relicensing statue and the commitment of water resources. *Id.* at 476. "FERC still retains several options that it must consider in an EIS. FERC can relicense to Chelan, relicense to another licensee, or issue a non-power license." *Id.*

> Relicensing is substantially equivalent to issuing an original license and one would assume that the FERC regulations governing the preparation of an EIS generally apply. *See* 18 C.F.R. §§ 2.80, 2.81 (1981).
>
> Relicensing, then, is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo. *See Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852 (9th Cir. 1979); *Port of Astoria v. Hodel*, 595 F.2d 467, 477-478 (9th Cir. 1979). Simply because the same resource had been committed in the past does not make relicensing a phase in a continuous activity.

Id. As in *Confederated Tribes*, the BLNR's decision is an important one. The legislature expressly intended that the BLNR make a decision annually as to whether revocable permits should be extended. 1967 House Journal 670 (SCR 522). Further, the BLNR is obligated to act as a trustee does, with "openness, diligence and foresight." *Waiāhole*, 94 Hawai`i at 143, 9 P.3d at 455; BLNR must "take the initiative in considering, protecting, and advancing public rights in

the resources **at every stage of the planning and decisionmaking process.** Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact[.]" *Id.* (citations omitted); *see also* HRS §§ 205A-2(b)(2)(A)[8], 205A-2(c)(4)(D)[9], 205A-4[10], 205A-5(b)[11] and 344-3(1).[12] Given these mandates, the BLNR – like the FERC – must consider whether the renewal of the permits serves the public interest; it needs an EA at minimum to make an informed decision.

In *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985), the defendants argued that continued dredging would not alter the status quo given fifty years of continued dredging. *Id.* at 1085-86. The Fifth Circuit Court of Appeals disagreed, explaining:

> The renewal of these permits will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago. The fact that much damage to the benthic life occurred years ago does not automatically render the effect of the continued dredging insignificant. Such a conclusion would ignore the realities that even a badly

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[8] "**Protect**, preserve, and, where desirable, **restore** those **natural** and manmade historic and prehistoric resources in the coastal zone management area that are **significant in Hawaiian** and American history and **culture**."

[9] "**Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions**, channelization, and similar land and water uses, recognizing competing water needs."

[10] "(a) In implementing the objectives of the coastal zone management program, the agencies shall give **full consideration to ecological, cultural, historic, esthetic, recreational, scenic,** and open space **values**, and coastal hazards, as well as to needs for economic development. (b) The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority."

[11] "All agencies shall enforce the objectives and policies of this chapter and any rules adopted pursuant to this chapter."

[12] "It shall be the policy of the State, through its programs, authorities, and resources to:

> (1) Conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii."

> damaged body of water may restore itself to ecological health if a disruptive activity is halted and that continued dredging may expand the areas of damage. In deciding this case on remand, the trial court should compare the projected ecological status of the affected areas if the dredging is continued for another five years with their projected condition if the dredging is halted now.

Id. Similarly here, the fact that A&B's diversions have caused massive damage to free flowing streams and the aquatic life dependent on them does not render the effect of continued diversions insignificant.

The analysis provided by these federal courts suggests that focusing on whether an agency's decision alters the legal status quo is critical in determining whether the "continuation" of an action requires an environmental analysis – particularly if the action exacerbates damage that has already been caused. The BLNR's vote to approve the continuation of the revocable permits that would have otherwise terminated on December 31, 2014 necessarily changed the legal status quo as of January 1, 2015, and authorized the continued diversion of public trust streams to the detriment of aquatic life and cultural traditions.

VI. CONCLUSION

Ignoring its legal duties, BLNR and DLNR have facilitated the diversion of hundreds of millions of gallons of water per day from the East Maui streams that plaintiffs Healoha Carmichael, Lezley Jacintho and Nā Moku rely upon to exercise their traditional and customary practices. The state legislature recognized 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.

Ka Pa'akai, 94 Hawai'i at 47 n. 28, 7 P.3d at 1084 n. 28 (emphases in original). The plain reading, the legislative intent, and the Environmental Council's implementation of HRS chapter

343 all demonstrate that the BLNR and DLNR should have ensured completion of an EA **prior** to the BLNR's vote in December 2014 to continue A&B's revocable permits for yet another year. The circuit court's analysis in paragraph 5 of its order is flawed and must be corrected.

DATED: Honolulu, Hawai`i, May 4, 2016.

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

Defendant A&B/EMI's Exhibit AB-20

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____