

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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BOARD OF LAND AND NATURAL RESOURCES,
DEPARTMENT OF LAND AND NATURAL RESOURCES,
and SUZANNE CASE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NĀ MOKU AUPUNI O KO'OLAU HUI,	)	CIVIL NO. 16-1-0052-01 JHC
	)	(Environmental Court)
Appellant,)	
	)	ORDER GRANTING (1) APPELLEES
vs.	)	BOARD OF LAND AND NATURAL
	)	RESOURCES, DEPARTMENT OF LAND
BOARD OF LAND AND NATURAL	)	AND NATURAL RESOURCES, AND
RESOURCES, DEPARTMENT OF LAND	)	SUZANNE CASE'S MOTION TO STAY
AND NATURAL RESOURCES, SUZANNE	)	PROCEEDINGS PENDING FINAL
CASE, in her official capacity as Chairperson of	)	RESOLUTION OF THE <i>CARMICHAEL</i>
the Board of Land and Natural Resources,	)	APPEAL, FILED JULY 21, 2016; (2)
ALEXANDER & BALDWIN, INC., EAST	)	APPELLEE COUNTY OF MAUI'S
MAUI IRRIGATION CO., LTD., COUNTY OF	)	JOINDER IN APPELLEES BOARD OF
MAUI DEPARTMENT OF WATER SUPPLY,	)	LAND AND NATURAL RESOURCES,
HAWAII FARM BUREAU, and MAUI	)	DEPARTMENT OF LAND AND
TOMORROW,	)	NATURAL RESOURCES, AND
	)	SUZANNE CASE'S MOTION TO STAY
Appellees.	)	PROCEEDINGS PENDING FINAL
	)	RESOLUTION OF THE <i>CARMICHAEL</i>
	)	APPEAL, FILED JULY 27, 2016;
	)	AND (3) ALEXANDER & BALDWIN,
	)	INC. AND EAST MAUI IRRIGATION,
	)	LTD.'S JOINDER IN APPELLEES

) BOARD OF LAND AND NATURAL
) RESOURCES, DEPARTMENT OF LAND
) AND NATURAL RESOURCES, AND
) SUZANNE CASE'S MOTION TO STAY
) PROCEEDINGS PENDING FINAL
) RESOLUTION OF THE CARMICHAEL
) APPEAL, FILED AUGUST 2, 2016
)
) Hearing:
) Date: August 11, 2016
) Time: 1:30 p.m.
) Judge: Hon. Jeannette H. Castagnetti

ORDER GRANTING (1) APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE *CARMICHAEL* APPEAL, FILED JULY 21, 2016; (2) APPELLEE COUNTY OF MAUI'S JOINDER IN APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE *CARMICHAEL* APPEAL, FILED JULY 27, 2016; AND (3) ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION, LTD.'S JOINDER IN APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE CARMICHAEL APPEAL, FILED AUGUST 2, 2016

On July 21, 2016, Appellees Board of Land and Natural Resources ("Board"), Department of Land and Natural Resources, and Suzanne Case (collectively, "State Appellees") filed their Motion to Stay Proceedings Pending Final Resolution of the *Carmichael* Appeal ("Motion"). On July 27, 2016, Appellee County of Maui filed a Joinder in Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne Case's Motion to Stay Proceedings Pending Final Resolution of the *Carmichael* Appeal. On August 2, 2016, Appellees Alexander & Baldwin, Inc. ("A&B") and East Maui Irrigation Co., Ltd. ("EMI") (collectively, "A&B Appellees") filed their Joinder in Appellees Board of Land and Natural

Resources, Department of Land and Natural Resources, and Suzanne Case's Motion to Stay Proceedings Pending Final Resolution of the Carmichael Appeal. On August 3, 2016, Appellant Nā Moku Aupuni O Ko'olau Hui ("Appellant") filed its Memorandum in Opposition to Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne Case's Motion to Stay Proceedings Pending Final Resolution of the *Carmichael* Appeal Filed on July 21, 2016. On August 8, 2016, the State Appellees filed their Reply Memorandum in Support of Their Motion to Stay Proceedings Pending Final Resolution of the *Carmichael* Appeal.

The Court heard the Motion on August 11, 2016. David Kimo Frankel and Camille K. Kalama appeared on behalf of Appellant. David D. Day and Linda L.W. Chow appeared on behalf of the State Appellees. David Schulmeister appeared on behalf of the A&B Appellees. Caleb Rowe appeared on behalf of the County of Maui.

The Court, having reviewed the Motion, memoranda, declarations, exhibits, and related filings and pleadings, and having heard the argument of counsel, grants the Motion for the following reasons:

The Hawai'i Supreme Court has said that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Blake v. Cnty. of Kaua'i Planning Comm'n*, 131 Hawai'i 123, 137–38, 315 P.3d 749, 763–64 (2013) (as amended, Jan. 8, 2014) (citing *City & Cnty. of Honolulu v. Ing*, 100 Hawai'i 182, 193 n.16, 58 P.3d 1229, 1240 n.16 (2002) (quoting *Air Line Pilots Ass'n v. Miller*, 523 U.S.

866, 880, 118 S. Ct. 1761 (1998))). “A stay may be appropriate where proceeding with litigation will result in unnecessary duplication of effort, such as where the issues to be decided are inextricably intertwined with or affected by the resolution of other pending matters.” *Id.*, 131 Hawai‘i at 138, 315 P.3d at 764 (citing *Chronicle Pub. Co. v. Nat’l Broad. Co.*, 294 F.2d 744, 748–49 (9th Cir. 1961) (concluding it was not an abuse of discretion to grant a stay where, “[to] a large extent the problems are intertwined with or may likely be affected by the matters which are now pending” in other proceedings, and noting that “the avoidance of unnecessary duplication of effort in such matters as these is a valid consideration”); *Eggleston v. Pierce Cnty.*, 99 F. Supp. 2d 1280, 1282 (W.D. Wash. 2000) (staying proceedings in the interest of comity and judicial efficiency, where the plaintiff’s federal claims were “inextricably intertwined” with state court appellate proceedings); *cf. D.L. Unified Sch. Dist. No. 497*, 392 F.2d 1223 (10th Cir. 2004) (holding that the district court should have stayed proceedings on one claim even though it lacked jurisdiction to resolve the remaining claims because of a pending state court proceeding); *Certain Underwriters at Lloyd’s London v. Boeing Co.*, 385 Ill. App. 3d 23, 895 N.E.2d 940 (2008) (affirming the trial court’s order staying a complaint until the completion of an underlying international arbitration); *Pardee v. Consumer Portfolio Servs., Inc.*, 344 F. Supp. 2d 823 (D.R.I. 2004) (noting that the action was not ripe for adjudication, but was stayed until the out-of-state cases were resolved).

HRS § 91-14(c) also permits the Court to order a stay of enforcement of an agency decision or confirmation of any fine as a judgment where certain criteria have been met: (1) there is a likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court; (2) irreparable damage to the subject person will result if

a stay is not ordered; (3) no irreparable damage to the public will result from the stay order; and (4) public interest will be served by the stay order.

The language in HRS § 91-14(c) authorizing the court to issue a stay is permissive while the standard for issuing a stay set forth in *Blake* is clear and compelling under the circumstances; *i.e.*, the ultimate issue in the *Carmichael* appeal and the instant matter are inextricably intertwined.

First, there are factual bases common to both matters: (a) the Board authorized A&B and EMI's use of approximately 33,000 acres and millions of gallons of water on a holdover basis pending resolution of the contested-case hearing arising from A&B's 30-year lease request; (b) there has been no preparation of an environmental assessment or environmental impact statement regarding the use of the land and water; and (c) the Board does not know how many streams, how many diversions, or how much water is diverted within the area covered by the revocable permits.

Second, and more important, the issues surrounding the revocable permits and the determination of their validity in the *Carmichael* appeal will invariably affect this matter. If Judge Nishimura's determination that the revocable permits are invalid is upheld, it would affect the outcome of this matter in ways implicated by Appellant's allegations here. Appellant alleges that if all diversion of streams located on public lands covered by the revocable permits were stopped, the EMI ditch system would still transport, on average, at least 30 million gallons of diverted East Maui surface water each day. Appellant alleges that A&B and EMI currently lack any legal authority to use the 33,000 acres of state land covered by the revocable permits or to divert water from any of the streams flowing across those lands. Appellant alleges that the Board

erred in voting on December 11, 2015, to reaffirm the holdover status of the revocable permits, allowing A&B and EMI to use 33,000 acres of state land and to divert hundreds of millions of gallons of water per day from the streams located in areas covered by the revocable permits. *See* Statement of the Case ¶¶ 51, 57, 59.

Third, the determination of the validity of the revocable permits in *Carmichael* would address the relief sought by Appellant—among others, a reversal of the December 11, 2015 decision reaffirming the holdovers status of the authorization in areas covered by the revocable permits, and a modification of the Board’s ruling by declaring that A&B and EMI have no legal authority to use land and water in areas covered by the revocable permits.

Thus, the Court is not persuaded by Appellant’s assertion that this case and the *Carmichael* appeal do not overlap. Rather, the matters are inextricably intertwined and a stay of this matter is warranted under the circumstances.

With respect to Appellant’s argument that waiting for a resolution of the *Carmichael* matter would result in the continued, unfettered diversion of water by A&B and EMI for years without judicial review, the *Carmichael* matter has been in the Hawai‘i Intermediate Court of Appeals since February 2016, and the waters have been diverted for over the past fifteen years. Permitting the appellate process to run its course, considering the intertwined nature of *Carmichael* and this matter (i.e., the validity of the revocable permits), would uphold the aim of avoiding unnecessary duplication of effort. The final and ultimate determination of the validity of the revocable permits would definitely establish or revoke Appellees’ ability to divert resources under the authority of the revocable permits.

For all of these reasons,

IT IS HEREBY ORDERED that the Motion is granted. The joinders filed by the A&B Appellees and the County of Maui are also granted. All proceedings in this matter are stayed pending the entry of final judgment on appeal in the matter of *Carmichael, et al. v. Board of Land and Natural Resources, et al.*, Civ. No. 15-1-0650-04 RAN, currently docketed as CAAP-16-0000071.

DATED: Honolulu, Hawai'i, DEC 13 2016

JEANNETTE H. CASTAGNETTI



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to be "DK Frankel", written over a horizontal line.

DAVID KIMO FRANKEL
CAMILLE K. KALAMA
Attorneys for Appellant
NĀ MOKU AUPUNI O KO'OLAU HUI

A handwritten signature in black ink, appearing to be "DS Schulmeister", written over a horizontal line.

DAVID SCHULMEISTER
Attorney for Appellees
ALEXANDER & BALDWIN, INC. and
EAST MAUI IRRIGATION CO., LTD.



CALEB ROWE
Attorney for Appellee
COUNTY OF MAUI

Nā Moku Aupuni O Ko'olau Hui v. Board of Land and Natural Resources, et al., Civil No. 16-1-0052-01 JHC (Environment Court); ORDER GRANTING (1) APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE *CARMICHAEL* APPEAL, FILED JULY 21, 2016; (2) APPELLEE COUNTY OF MAUI'S JOINDER IN APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE *CARMICHAEL* APPEAL, FILED JULY 27, 2016; AND (3) ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION, LTD.'S JOINDER IN APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE CASE'S MOTION TO STAY PROCEEDINGS PENDING FINAL RESOLUTION OF THE *CARMICHAEL* APPEAL, FILED AUGUST 2, 2016

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

Defendant A&B/EMI's Exhibit AB-24

FOR IDENTIFICATION _____

RECEIVED IN EVIDENCE _____

CLERK _____