



of Intervenor's Claims Regarding Protection of Appurtenant Rights (Motion #5).  
-Joinders were filed by Intervenor Hawaii Farm Bureau Federation ("HFBF"), Intervenor Maui Land & Pineapple Company, Inc. ("MLP"), and Intervenor County of Maui, Department of Water Supply ("DWS"). Similarly, Intervenor Na Moku O Ko'olau Hui, Elizabeth Lapenia, Beatrice Kekahuna, and Marjorie Walleth (collectively referred to as "Na Moku"), submitted their Motion to Limit the Scope of this Contested Case to the Issuance of Interim Revocable Permits, Motion for Declaratory Order on Out of Watershed Transfers of Water, and Motion for Declaratory Order on the Need to Prepare an Environmental Assessment, and Intervenor Maui Tomorrow ("MT") submitted a Motion for Summary Relief. Na Moku filed joinders in MT's motion.

These motions all came on for hearing on October 21, 2002 before the Honorable E. John McConnell, (ret.), Hearings Officer, at Wailuku, Hawaii. A&B and EMI appeared by counsel Alan M. Oshima, Esq., Randall K. Ishikawa, Esq., and David Schulmeister, Esq.; Na Moku appeared by counsel Moses K. N. Haia, Esq., MT appeared by counsel Isaac D. Hall, Esq., HFBF appeared by counsel Patrick W. Hanifin, Esq., MLP appeared by counsel Richard Kiefer, Esq., and DWS appeared by counsel Edward S. Kushi, Jr., Esq.

Based upon the written submissions of the parties, the arguments presented at the hearing, the representations of counsel, and the entire record of this proceeding, the Hearings Officer provided to the Board of Land and Natural Resources ("BLNR") Proposed Findings of Fact and Conclusions of Law and Recommended Order. The BLNR heard oral arguments on the proposed findings on November 15, 2002 and having

reviewed the written submissions of the parties, issues the following findings of fact, conclusions of law and order.

**I. SCOPE OF THE HEARING.**

A&B and EMI's Memorandum Regarding the Scope of this Contested Case Hearing (Motion #1), Na Moku's Motion to Limit the Scope of this Contested Case to the Issuance of Interim Revocable Permits, and MT's Motion for Summary Relief all addressed the proper scope of this Contested Case hearing and are addressed collectively as follows:

**A. Findings of Fact.**

1. On May 14, 2001, A&B and EMI filed an Application for Long Term Water License with the State of Hawaii, Board of Land and Natural Resources ("BLNR"), seeking a 30 year lease of water emanating from State lands at Koolau Forest Reserve and Hanawi Natural Area Reserve, Hana and Makawao, Maui, TMK nos. 1-1-01:44, 1-1-01:50, 1-1-02:02, 1-2-04:05, 1-2-04:07, 2-9-14:01, 2-9-14:05, 2-9-14:11, 2-9-14:12, and 2-9-14:17.

2. BLNR's agenda for its May 25, 2001 meeting included, as item D.5., "DISCUSSION ON LONG-TERM DISPOSITIONS OF WATER LICENSES AND ISSUANCE OF INTERIM REVOCABLE PERMITS TO ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LIMITED, FOR THE HONOMANU, KEANAE, HUELO AND NAHIKU LICENSE AREAS, HANA, MAUI, VARIOUS TAX MAP KEYS."

3. On May 23, 2001, Intervenor Na Moku Aupuni O Koolau Hui ("Na Moku") filed a letter with the BLNR stating, in part, as follows:

Petitioners oppose the proposed dispositions of public lands and now request, pursuant to HRS Chapter 91, that they be permitted to

participate as parties in an agency hearing in a contested case to challenge the legality of the proposed disposition of public lands now before the Board of Land and Natural Resources ("Board") as Item D-5 on the agenda for the Board's meeting to be held on May 25, 2001 . . .

4. The Board's Staff Submittal, dated May 25, 2001 and signed by Maui Land Agent Louis Wada, described this item as "Discussion on Long-term Dispositions of Water Licenses and Issuance of Interim Revocable Permits." Under "REMARKS," at p. 3, the Staff Submittal advised the Board that, "The applicants are now requesting for a long-term disposition via public auction on the subject East Maui Water License areas and the continued issuance of interim revocable permits on an annual basis pending issuance of a long-term disposition." The Staff Submittal went on to describe the historical background and stated, "Now that the McBryde water case has been settled, the Land Division has initiated the reopening of the thirty (30) year water license process."

5. At the public meeting held on May 25, 2001, requests for a Contested Case Hearing were made by Na Moku and MT. Carl Christiansen, Esq., Staff Attorney for Native Hawaiian Legal Corporation, presented testimony on behalf of Na Moku and specifically requested a contested case hearing to challenge the legality of a long-term lease.

6. Written requests for a Contested Case Hearing were submitted on behalf of these parties on June 1, 2001. As part of their written request for a contested case, Na Moku and MT stated that the subject matters of their Petitions were:

Long Term dispositions of Water Licenses and Issuance of Interim Revocable Permits to Alexander & Baldwin, Inc., and East Maui Irrigation Company, Limited, For the Honomanu, Ke'anae, Huelo, and Nahiku License areas, Hana, Maui.

7. Na Moku and MT further identified the “specific disagreement” that was the subject of their petitions for a contested case hearing as follows:

The issuance of revocable permits or long term water licenses to allow the continued diversion of stream flow from East Maui streams contained within the Honomanu, Ke’anae, Huelo, and Nahiku License areas is an abridgment and denial of constitutionally protected rights enumerated above at paragraph 8 and held by Petitioners as native Hawaiians and as property owners and/or legal residents within these license areas.

8. On June 22, 2001, the BLNR approved the Staff Submittal that recommended:

1) That the Board authorize the appointment of a hearing Officer to conduct all the hearings relevant to the subject petition for a Contested Case Hearing.

9. On May 24, 2002, the BLNR considered the issue of the continuation of the interim revocable permits to A&B and EMI pending the disposition of the contested case. In the BLNR Staff Submittal, it was noted that at the May 26, 2000 BLNR meeting, “Further discussions on the matter resulted in the following: 1) That the Board and Department work towards a long-term resolution, clarifying all issues that have been raised concerning a long-term disposition.” In the discussion regarding the May 25, 2001 meeting, the Staff Submittal observed that the petitions for contested case filed by Na Moku, et al., and MT, challenged the applications for long- term dispositions and interim revocable permits. Based thereon, the BLNR again “Deferred and granted a holdover of the existing revocable permits on a month-to-month basis pending the results of the contested case.”

**B. Conclusions of Law.**

1. Pursuant to HRS Chapter 92, all parties received sufficient notice that the discussion of A&B and EMI's Application for Long Term Water License was on the BLNR's agenda for its May 25, 2001 meeting, and that the scope of this contested case hearing includes all the objections raised by Na Moku and MT to said Application.

**II. OUT OF WATERSHED TRANSFERS.**

A&B and EMI's Motion for Summary Disposition of Intervenors' Claim that the Out of Watershed Transfer of Water is Prohibited in Any Area Not Designated as a Water Management Area (Motion #2), Na Moku's Motion for Declaratory Order on Out of Watershed Transfers of Water, and MT's Motion for Summary Relief all addressed the issue as to whether the transfer of water outside of the watershed is prohibited as a matter of law and are addressed collectively as follows:

**A. Findings of Fact.**

1. The EMI ditch system in the area that is the subject of the proposed long-term water license or interim revocable permits diverts water originating on land owned by the State of Hawaii and transports it outside of the watershed of origin.

2. The area that is the subject of the proposed long-term water license or interim revocable permits has not been designated as a surface water management area by the Commission on Water Resource Management ("CWRM").

**B. Conclusions of Law.**

1. The Water Code, HRS Chapter 174C, does not prohibit transfers of water outside the watershed of origin in an area that has not been designated as a surface water management area by CWRM.

2. Contrary to the arguments advanced by Na Moku and MT, the transfer of water outside the watershed of origin is not absolutely prohibited by the common law of Hawaii, as clarified by the Supreme Court of Hawaii in Robinson v. Ariyoshi, 65 Hawaii 641 (1982).

3. Upon determination that it would be in the best interest of the State, BLNR may enter into a lease of water emanating from State lands for transfer outside of the watershed of origin provided that such lease is issued in accordance with the procedures set forth in HRS Chapter 171 and provides that all diversions of stream water shall remain subject to the Interim Instream Flow Standards (“IIFS”) set by CWRM, and to any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.

### **III. REQUIREMENT OF AN ENVIRONMENTAL ASSESSMENT OR ENVIRONMENTAL IMPACT STATEMENT.**

A&B and EMI’s Motion for Summary Disposition of Intervenor’s Claim that an Environmental Assessment and an Environmental Impact Statement are Required Prior to Issuance of the Requested Water Lease (Motion #3), Na Moku’s Motion for Declaratory Order on the Need to Prepare an Environmental Assessment, and MT’s Motion for Summary Relief all addressed the issue as to whether an environmental assessment is required prior to the BLNR issuing any water lease and are addressed collectively as follows:

#### **A. Findings of Fact.**

1. A&B and EMI have owned and operated the ditch system that diverts surface water emanating in part from State lands at Koolau Forest Reserve and Hanawi

Natural Area Reserve, Hana and Makawao, Maui, TMK nos. 1-1-01:44, 1-1-01:50, 1-1-02:02, 1-2-04:05, 1-2-04:07, 2-9-14:01, 2-9-14:05, 2-9-14:11, 2-9-14:12, and 2-9-14:17.

2. For over 120 years, the water diverted from these lands has been transported from these lands and lands owned by A&B to Central and Upcountry Maui for agricultural and domestic purposes.

3. During this period, A&B and EMI have obtained the water from State lands pursuant to water leases issued by the State of Hawaii and its predecessors.

4. A&B and EMI's Application for the Sale of Water License filed with the Board of Land and Natural Resources on May 14, 2001 seeks to continue the existing diversions for the same agricultural and domestic uses.

5. Aside from ordinary maintenance and repair of the system, A&B and EMI do not seek and have represented that no changes have been or will be made or are contemplated for the diversion and transmission system, and that any Water License may require the maintenance of the status quo during the term of the lease.

6. Even if a bidder other than A&B or EMI were awarded a Water License as argued by Intervenors, the Board can require that all bidders agree to the maintenance of the status quo during the term of the license. In the event any new use is proposed, the license can provide for termination and reapplication. In the event of any such application an EA or EIS would be required.

**B. Conclusions of Law.**

1. Pursuant to HRS Chapter 343, the Office of Environmental Quality Control ("OEQC") has promulgated rules exempting certain actions or activities from the requirement of preparing an environmental assessment ("EA").



2. The proposed long term disposition of water rights is exempt from the requirement of an EA pursuant to HAR §11-200-8(a)(1) so long as it authorizes the continued operation of existing structures, facilities, equipment or topographical features, and precludes any expansion or change of use beyond that previously existing.

3. Inasmuch as the only action would be a BLNR decision to grant a long term lease, a discrete decision at a particular time and not a series of “planned successive actions,” the “cumulative impact” exception set forth in HAR §11-200-8(b) to the exemption for continuing use is inapplicable.

#### **IV. TRADITIONAL AND CUSTOMARY NATIVE HAWAIIAN PRACTICES AND APPURTENANT RIGHTS.**

##### **A&B and EMI’s Motion for Summary Disposition of Intervenors’ Claims**

Regarding Protection of Traditional and Customary Native Hawaiian practices (Motion #4), Motion for Summary Disposition of Intervenors’ Claims Regarding Protection of Appurtenant Rights (Motion #5), Na Moku’s Motion for Declaratory Order on Out of Watershed Transfers of Water, and MT’s Motion for Summary Relief all addressed the claims of Na Moku and MT that the proposed disposition of water will interfere with traditional and customary native Hawaiian practices and appurtenant rights of taro and kuleana lands and are addressed collectively as follows:

##### **A. Findings of Fact.**

1. On May 24, 2001, the Native Hawaiian Legal Corporation, counsel for Na Moku, filed 27 separate Petitions to Amend Instream Flow Standards (“Petitions”) with CWRM.<sup>1</sup> In those Petitions it was requested that CWRM amend its instream flow

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<sup>1</sup> These Petitions seek to amend instream flow standards for Alo, Haipuaena, Hanawi, Hanehoi and Puolua, Honomanu, Honopou, Kapaula, Kolea (East) and Punalu’u (East), Kopiliula, Kualani, Makapipi (East and West), Pa’akea, Nu’ailua, Palauhulu, Pi’ana’au, Puaka’a, Puohokamoia,

standards to allow proposed diversions in an undetermined amount “sufficient for taro farming and/or gathering.” Additionally, the Petitions requested restoration of “natural streamflow except for the exercise of appurtenant water rights.” The Petitions further state that the anticipated impact on the streams would be “restoration of instream natural habitat and biota, and beneficial appurtenant and gathering uses.”

2. As part of their Petition in this proceeding, Na Moku asserted that the BLNR must determine:

6) Whether the diversion of water from East Maui Streams within the Honomanu, Huelo, Ke’anae, and Nahiku license areas violates Petitioners(‘) constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, the gathering of native stream fauna dependent on the protection of instream flows.

7) Whether appurtenant rights are abridged by the diversion of water from certain East Maui streams within the Honomanu, Huelo, Ke’anae, and Nahiku license areas.

8) Whether the Board of Land and Natural Resources has a legal obligation to determine the extent of constitutionally protected traditional and customary native Hawaiian rights and appurtenant water rights within the Honomanu, Huelo, Ke’anae, and Nahiku license areas before it may allow water to be diverted from streams within these areas.

**B. Conclusions of Law.**

1. The CWRM has exclusive jurisdiction over administration of the Water Code pursuant to HRS §174C-7(a).

2. The Water Code provides for the protection of appurtenant rights, traditional and customary practices of native Hawaiians, and other reasonable and beneficial instream uses.

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Wahinepe’e, Waianu, Waiaka’a, Waikamoi, Waikani, Waiohue, Waiokamilo, West Wailuaiki, East

3. The CWRM must consider these interests along with other public interests in setting interim instream flow standards pursuant to HRS §174C-71.

4. The jurisdictional power to adjudicate claims to appurtenant rights lies with the circuit courts and with the CWRM, but not with the BLNR.

5. The State of Hawaii has a duty to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible pursuant to Article XII, Section 7 of the Hawaii Constitution.

6. In the specific case of determining the minimum instream flow standards necessary to protect, to the extent feasible, traditional and customary practices of native Hawaiians, the CWRM is the appropriate agency to fulfill the State's duty.

7. HAR §13-169-44 sets forth interim instream flow standards for East Maui effective October 8, 1998. The existing IIFS for the East Maui set stream flows at those flowing in the streams on that date.

8. So long as the proposed disposition of water by the BLNR is made subject to the instream flow standards established by the CWRM, the BLNR has no duty to perform its own parallel investigation with regard to the minimum, instream flow standards necessary to protect, to the extent feasible, traditional and customary practices of native Hawaiians.

**V. LEGALITY OF PAST LICENSES ISSUED BY THE BLNR TO A&B AND EMI.**

It was argued by MT in its Motion for Summary Relief that the BLNR should declare its past issuance of temporary water permits on an alternating basis to A&B and EMI to have been illegal, and to refrain from issuing any further temporary permits to

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Wailuaiki, and East and West Wailuanui Streams.

A&B and EMI. The BLNR, however, in its May 24, 2002 meeting, "Deferred and granted a holdover of the existing revocable permits on a month-to-month basis pending the results of the contested case." While the past practice of alternating issuance of temporary permits to A&B and EMI raises legal questions, the BLNR has already decided to continue the status quo pending resolution of the objections raised to A&B and EMI's Application for a long term license. Accordingly, there is no further request for the issuance of a temporary permit pending, and it is not necessary for the Hearings Officer to reach this issue.

#### ORDER

It is the decision and order of the Board of Land and Natural Resources that:

1. The Hearing Officers Findings of Fact and Conclusions of Law on Standing for Contested Case Proceeding and Pre-hearing Orders Nos. 1 and 2 are incorporated herein by reference.
2. Pursuant to HRS Chapter 92, all parties received sufficient notice that the discussion of A&B and EMI's Application for Long Term Water License was on the BLNR's agenda for its May 25, 2001 meeting, and that the scope of this contested case hearing includes all the objections raised by Na Moku and MT to said Application.
3. Upon determination that it would be in the best interest of the State, BLNR may enter into a lease of water emanating from State lands for transfer outside of the watershed of origin provided that such lease is issued in accordance with the procedures set forth in HRS Chapter 171 and provided that all diversions of stream water shall remain subject to the Interim Instream Flow Standards set by CWRM, and to any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.

4. The proposed long term disposition of water rights is exempt from the requirement of an EA pursuant to HAR §11-200-8(a)(1) so long as such disposition authorizes the continued operation of existing structures, facilities, equipment or topographical features, and precludes any expansion or change of use beyond that previously existing. Any expansion or change of use beyond that previously existing, at any time, may require the applicant or user to conduct an EA or EIS at the direction of the BLNR. This exemption does not preclude the department from conducting its own EIS prior to any long term disposition.

5. So long as the proposed disposition of water by the BLNR is made subject to the instream flow standards established by the CWRM, and to the judgments of any court of competent jurisdiction regarding the appurtenant or riparian rights of downstream users, the BLNR has no duty to perform its own parallel investigation with regard to the minimum, instream flow standards necessary to protect appurtenant rights or, to the extent feasible, traditional and customary practices of native Hawaiians.

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JAN 24 2003


DATED: Honolulu, Hawaii, \_\_\_\_\_.

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PETER T. YOUNG, Chairperson

  
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LYNN P. McCRORY

  
\_\_\_\_\_  
KATHRYN W. INOUE

  
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TED K. YAMAMURA

  
\_\_\_\_\_  
TIMOTHY JOHNS

  
\_\_\_\_\_  
GERALD L. DeMELLO

\_\_\_\_\_  
TOBY MARTYN

=====  
Petition Contesting Application for Long Term Disposition of Water Licenses and  
Issuance of Interim Revocable Permits at Honomanu, Keanae, Nahiku, and Huelo, Maui,  
DOCKET NO. 01-05-MA, FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND ORDER



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION  
P.O. Box 621  
HONOLULU, HAWAII 96809

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
CONVEYANCES  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE  
COMMISSION  
LAND  
STATE PARKS


Ref:PB:DH

JAN 24 2003

Contested Case MA-01-05

**MEMORANDUM**

TO: Mr. Isaac Hall, Esq.  
Mr. Patrick W. Hanifin, Esq.  
Mr. Richard Kiefer, Esq.  
Randall H. Endo, Esq.  
Mr. Edward Kushi Jr., Esq.  
Mr. Alan T. Murakami, Esq.  
Moses K. N. Haia, III, Esq.  
Mr. Alan M. Oshima, Esq.  
The Honorable John McConnell

FROM: Dierdre S. Mamiya, Administrator   
Land Division

RE: Board of Land and Natural Resources' First Amended Findings of Fact,  
Conclusions of Law and Order

Please find attached the Board of Land and Natural Resources First Amended Findings of Fact, Conclusions of Law and Order, which was resigned by the Board on January 24, 2003.

Page 12 of the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law and Order, dated January 10, 2003, under the paragraph "ORDER", sentence 3 once read "based upon the foregoing, it is the Hearing Officer's recommendation that the BLNR order that..."

However, the Board of Land and Natural Resources' First Amended Findings of Fact, Conclusions of Law and Order, dated January 24, 2003, under the paragraph "ORDER", sentence 3 now reads as follows "It is the decision and order of the Board of Land and Natural Resources that."

Attachment

Cc: Deputy Attorney General

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**BOARD OF LAND AND NATURAL RESOURCES**

**STATE OF HAWAII**

In the Matter of a Contested ) DLNR File No. MA-01-05  
Case Regarding Water Licenses )  
At Honomanu, Keanae, Nahiku )  
And Huelo, Maui )  
\_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 24, 2003, the First Amended Findings of Fact and Conclusions of Law and Order was duly served upon the following parties as indicated, by means of U.S. Mail, postage prepaid on January 24, 2003, addressed as follows:

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Dated: Honolulu, Hawaii, January 24, 2003

  
Dawn Hegger  
Department of Land & Natural Resources  
State of Hawaii

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