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order affirming blnr fofcol

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MAUI TOMORROW, formally known as
MAUI TOMORROW FOUNDATION,
INC., and its supporters,

Appellant,

vs.

STATE OF HAWAII; BOARD OF LAND
AND NATURAL RESOURCES of the
State of Hawaii; DEPARTMENT OF
LAND AND NATURAL RESOURCES of
the State of Hawaii; PETER T. YOUNG, in
his official capacity as Chairperson of the
Board of Land and Natural Resources and
the Director of the Department of Land and
Natural Resources; ALEXANDER &
BALDWIN, INC.; EAST MAUI
IRRIGATION CO.; MAUI LAND &
PINEAPPLE CO., INC.; COUNTY OF
MAUI, DEPARTMENT OF WATER
SUPPLY; HAWAII FARM BUREAU
FEDERATION,

Appellees.

) Civil No. 03-1-0289-02
) (Agency Appeal)

) ORDER AFFIRMING IN PART AND
) REVERSING IN PART STATE OF HAWAII
) BOARD OF LAND AND NATURAL
) RESOURCES' FINDINGS OF FACT AND
) CONCLUSIONS OF LAW AND ORDER,
) DATED JANUARY 10, 2003; AMENDED
) JANUARY 24, 2003 REGARDING
) PETITION CONTESTING APPLICATION
) FOR LONG TERM DISPOSITION OF
) WATER LICENSES AND ISSUANCE OF
) INTERIM REVOCABLE PERMITS AT
) HONOMANU, KEANAE, NAHIKU, AND
) HUELO, MAUI

) ORAL ARGUMENT
) DATE: September 17, 2003
) TIME: 1:30 p.m.

) JUDGE: Honorable Eden E. Hifo
)

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NA MOKU AUPUNI O KO'OLAU HUI;)	Civil No. 03-1-0292-02
BEATRICE KEKAHUNA; MARJORIE)	(Agency Appeal)
WALLET; ELIZABETH LAPENIA;)	
MAUI TOMORROW,)	
)	
Appellants,)	
)	
vs.)	
)	
STATE OF HAWAII; BOARD OF LAND)	
AND NATURAL RESOURCES of the)	
State of Hawaii; DEPARTMENT OF)	
LAND AND NATURAL RESOURCES of)	
the State of Hawaii; PETER T. YOUNG, in)	
his official capacity as Chairperson of the)	
Board of Land and Natural Resources and)	
the Director of the Department of Land and)	
Natural Resources; ALEXANDER &)	
BALDWIN, INC.; EAST MAUI)	
IRRIGATION CO.; MAUI LAND &)	
PINEAPPLE CO., INC.; COUNTY OF)	
MAUI, DEPARTMENT OF WATER)	
SUPPLY; HAWAII FARM BUREAU)	
FEDERATION,)	
)	
Appellees.)	

ORDER AFFIRMING IN PART AND REVERSING IN PART
STATE OF HAWAII BOARD OF LAND AND NATURAL RESOURCES' FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND ORDER, DATED JANUARY 10, 2003;
AMENDED JANUARY 24, 2003 REGARDING PETITION CONTESTING APPLICATION
FOR LONG TERM DISPOSITION OF WATER LICENSES AND ISSUANCE OF INTERIM
REVOCABLE PERMITS AT HONOMANU, KEANAE, NAHIKU, AND HUELO, MAUI

On September 17, 2003, this Court heard oral arguments on this administrative agency appeal of Appellee State Of Hawaii Board Of Land And Natural Resources' Findings Of Fact And Conclusions Of Law And Order, Dated January 10, 2003; Amended January 24, 2003, Regarding Petition Contesting Application For Long Term Disposition Of Water Licenses And Issuance Of Interim Revocable Permits At Honomanu, Keanae, Nahiku, And Huelo, Maui (hereafter, "BLNR decision"). The following counsel appeared for and presented oral argument on behalf of the indicated parties: Alan T. Murakami and Moses K.N. Haia, III for Appellant Na

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Moku Aupuni O Ko'olau Hui, Isaac Davis Hall for Appellant Maui Tomorrow, Alan M. Oshima, Randall K. Ishikawa, and David Schulmeister for Appellee Alexander & Baldwin and East Maui Irrigation Company, Linda L.W. Chow for Appellee Board of Land and Natural Resources, State of Hawai'i, Chris Parsons for Appellee Hawai'i Farm Bureau, Jane Lovell for Appellee County of Maui, Richard J. Kiefer for Appellee Maui Land & Pineapple.

This Court finds that the following issues presented in this HRS chapter 91 appeal are exclusively legal in nature. The facts as presented are not disputed. Accordingly, this Court may review the legal issues under a *de novo* standard of review.

Scope of Agenda

Pursuant to HRS § 92-7(d), an agency cannot change the agenda for its meeting, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled. The same statute requires that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. *Id.* Items of reasonably major importance not decided at a scheduled meeting can be considered only at a meeting continued to a reasonable day and time. *Id.*

It is undisputed that in this instance, the relevant agenda item of the Board Of Land And Natural Resources (hereafter, "BLNR") was to consider action on the then-pending revocable permits covering the four water areas of Huelo, Honopou, Keanae, and Nahiku. It is undisputed that there was no change to this agenda. However, this Court finds that there was a specific petition for intervention filed by the Appellants which sought to address both the revocable permits, which were on the agenda, and the long-term 30-year water lease, which was on the agenda only for discussion purposes.

Therefore, this Court concludes that there was no error of law, despite the operation of HRS §92-7(d), in entertaining those petitions for intervention, having hearings, and coming to conclusions as contained in the BLNR decision. The claim related to this point of legal error is hereby rejected, and the BLNR decision on this issue is AFFIRMED.

Out of Watershed Transfers, Traditional and Customary Practices, and the Public Trust

Transfers of Water. The Court initially concludes that the Water Code, HRS chapter 174C, does not prohibit the transfer of water outside the watershed of origin in an area that the

Commission on Water Resources Management has not designated a water management area pursuant to HRS §174C-48. There is no dispute that the area of East Maui that is the subject of the water lease is not a water management area.

Furthermore, there is little dispute that the transfer of water out of the watershed of origin is not absolutely prohibited under the common law of Hawai'i. Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982) ("Robinson"). However, Robinson allows these transfers only when it can be demonstrated that to do so would not be injurious to others with rights to water.

In addition Conclusion of Law No. 3 of the First Amended Findings of Fact and Conclusions of Law (at page 7) acknowledges that, upon a determination that it would be in the best interest of the state, the BLNR may enter into a lease of water emanating from State lands for transfer outside of the watershed of origin, provided that the lease is issued in accordance with the procedures set forth in HRS chapter 171 and a provision that all diversions of stream water shall remain subject to the interim in-stream flow standards set by the CWRM and any judgment of a court of competent jurisdiction establishing appurtenant or riparian rights in favor of downstream users.

This conclusion of law means that the BLNR could meet and decide whether it is in the best interest of the state to lease whatever is excess without knowing what is "excess." Accordingly, this Court concludes that this conclusion of law is fatally flawed, and is inconsistent with the common law and with the suggestion that one could ever determine the best interest of the state absent data on what is "excess."

Native Rights and the Public Trust. This Court concludes that its analysis of tradition and customary native Hawaiian practices and appurtenant rights and the public trust obligations emanating from the Hawai'i Constitution and case decisions construing it dovetails into the issue of out of watershed transfers. Accordingly, this court also concludes that it was erroneous for the BLNR to conclude that it could begin the process to put out to lease the water that could affect these rights without first making a determination as to whether it would be in the state's best interest in light of the lack of knowledge or information of what the CWRM will ultimately determine in the future, notwithstanding Appellees' argument that the CWRM has exclusive jurisdiction over determining what amount of water must flow through the streams which all agencies have a duty to protect.

This Court finds no error in the BLNR conclusion that the BLNR is not required to conduct a parallel investigation. In the process of determining whether there is any surplus water which would be in the best interest of the state to lease for 30 years, the BLNR is entitled to rely on and use any determination of the CWRM to establish instream flow standards, whether as a result of Appellant Na Moku Aupuni O Ko`olau's filing of 27 petitions to amend interim instream flow standards, or any other request, or pursuant to CWRM's exercise of its statutory obligations to protect riparian rights, native Hawaiian rights, or in the discharge of any of its other obligations. However, if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM. If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.

In any case, given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the BLNR is obligated to make a truly independent investigation as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams.

This ruling does not necessarily mean that every CWRM decision may be collaterally attacked. However, at any BLNR contested case hearing, any party may challenge a CWRM decision if its methodology is wrong or some other error is committed, whether or not it has been collaterally attacked on appeal. This Court simply affirms that the BLNR may not merely rubber-stamp every CWRM determination.

Therefore, this Court REVERSES Paragraph 3 and 5 of the Order contained in the BLNR decision and any related conclusion of law.

Environmental Impact Assessment

It is undisputed that pursuant to HRS chapter 343, certain rules were promulgated by the agency having the authority to implement that chapter. It is undisputed that those rules included HAR 11-200-8(a)(1), which creates an exception to doing an environmental assessment so long as the proposed action authorizes the continued operation of existing structures, facilities, equipment, or topographical features and precludes any expansion or change of use beyond that

previously existing operation. However, any contrary statutory requirement trumps an otherwise valid rule. A rule cannot supercede a statute. Under HRS § 343-6(7), a rule can authorize an exemption to a requirement for an environmental assessment only where there is minimal or no significant effect on the environment. This Court finds 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.

As to the cases cited to the Court, the Court finds that Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission, 746 F.2d 466, 475-477 (9th Cir. 1984), which held that the relicensing of a power plant needed to be analyzed as if it were the original licensing of the plant, is persuasive, as appellants argued, and would require an environmental assessment (EA), and perhaps an environmental impact statement (EIS), depending upon the result of the EA, for a long-term lease which constitutes the first long-term lease of this water since at least 1985.

Furthermore, the Court concludes that a supplemental reason for reversing on this point is that HAR 11-200-8(a) requires the agency purporting to invoke the exception to consult with other agencies. At a minimum, it must consult with the CWRM. The undisputed record is that the BLNR performed no consultations with other agencies. Accordingly, even if the rule were applicable, which it is not, the BLNR would not have met its requirements.

Therefore, this Court REVERSES Paragraph 4 of the Order contained in the BLNR decision and any related conclusion of law.

Continued Contested Case and Revocable Permits

The Order appealed from does not deal with the revocable permits and, as such, this Court does not issue any rulings with respect to these revocable permits.

The Court understands, and the parties agree, that the contested case proceedings appealed from, are ongoing, so that the Court's declining to rule on this issue is without prejudice to the ability of the parties to raise whatever issues they wish with regard to the revocable permits at any ongoing contested case hearing or in any other forum.

Dated: OCT 10 2003, Honolulu, Hawaii.

EDEN ELIZABETH HIFO



Judge of the Above-Entitled Court

APPROVED AS TO FORM:

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ORDER AFFIRMING IN PART AND REVERSING IN PART STATE OF HAWAII BOARD OF LAND AND
NATURAL RESOURCES' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER, DATED
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