(2)

ALAN M. OSHIMA 1828-0
RANDALL K. ISHIKAWA 4116-0
Oshima Chun Fong & Chung
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
Telephone: (808) 528-4200
Facsimile: (808) 531-8466

GINO L. GABRIO 3191-0
DAVID SCHULMEISTER 2781-0
Cades Schutte Fleming & Wright
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
Telephone: (808) 521-9200
Facsimile: (808) 521-9210

Attorneys for Applicant Alexander & Baldwin, Inc.
and East Maui Irrigation Company, Limited

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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

Appellant,

vs.

STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; 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)

APPELLEES ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION, LTD.'S ANSWERING BRIEF TO APPELLANT MAUI TOMORROW, FORMALLY KNOWN AS MAUI TOMORROW FOUNDATION, INC., AND ITS SUPPORTERS' OPENING BRIEF FILED ON MAY 5, 2003; CERTIFICATE OF SERVICE

Date: July 23, 2003
Time: 10:00 a.m.
Judge: Hon. Eden Elizabeth Hifo

NA MOKU AUPUNI O KO'OLAU HUI, BEATRICE KEKAHUNA, MARJORIE WALLETT, AND ELIZABETH LAPENIA, MAUI TOMORROW, Appellants, vs. STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; 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. 03-1-0292-02 (Agency Appeal)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

304

Other Authorities

Rules

ALAN M. OSHIMA 1828-0
RANDALL K. ISHIKAWA 4116-0
Oshima Chun Fong & Chung
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
Telephone: (808) 528-4200
Facsimile: (808) 531-8466

GINO L. GABRIO 3191-0
DAVID SCHULMEISTER 2781-0
Cades Schutte Fleming & Wright
1000 Bishop Street, 10th Floor
Honolulu, Hawaii 96813
Telephone: (808) 521-9200
Facsimile: (808) 521-9210

Attorneys for Applicant Alexander & Baldwin, Inc.
and East Maui Irrigation Company, Limited

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

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

Appellant,

vs.

STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; 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)

APPELLEES ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION, LTD.'S ANSWERING BRIEF TO APPELLANT MAUI TOMORROW, FORMALLY KNOWN AS MAUI TOMORROW FOUNDATION, INC., AND ITS SUPPORTERS' OPENING BRIEF FILED ON MAY 5, 2003; CERTIFICATE OF SERVICE

Date: July 23, 2003
Time: 10:00 a.m.
Judge: Hon. Eden Elizabeth Hifo

306

NA MOKU AUPUNI O KO'OLAU HUI, BEATRICE KEKAHUNA, MARJORIE WALLETT, AND ELIZABETH LAPENIA, MAUI TOMORROW, Appellants, vs. STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; 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. 03-1-0292-02 (Agency Appeal)

APPELLEES ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION, LTD.'S ANSWERING BRIEF TO APPELLANT MAUI TOMORROW, FORMALLY KNOWN AS MAUI TOMORROW FOUNDATION, INC., AND ITS SUPPORTERS' OPENING BRIEF FILED ON MAY 5, 2003

Appellees Alexander & Baldwin, Inc. ("A&B") and East Maui Irrigation, Ltd. ("EMI"), by and through its attorneys, submits this Answering Brief in response to the Opening Brief filed by Appellant Maui Tomorrow, formally known as Maui Tomorrow Foundation, Inc., and its Supporters ("MT"), filed May 5, 2003 ("MT's Opening Brief").

I. COUNTERSTATEMENT OF THE CASE

EMI, a subsidiary of A&B, operates a ditch system in East Maui that for the past 120 years has delivered water for domestic, agricultural, and other uses in Central and

Upcountry Maui. Record on Appeal[1] ("ROA"), Index #1 at 3-4 (ROA, 1:3-4). In 1939, the Territory of Hawai`i and EMI entered into the East Maui Water Agreement, which established four license areas identified as Honomanu, Huelo, Keanae, and Nahiku, and provided for the disposition of these licenses at public auction to the highest bidder. Id. Since the original lease term for these four license areas expired, the State of Hawai`i, through the Board of Land and Natural Resources ("BLNR") and the Department of Land and Natural Resources ("DLNR"), has issued to A&B and EMI year-to-year revocable permits pursuant to Hawai`i Revised Statutes ("HRS") § 171-58(c). (ROA, 1:4).

On May 14, 2001, A&B and EMI filed an Application for Long Term Water License ("Application") with the BLNR pursuant to HRS § 171-58(c), seeking a 30 year lease of water emanating from State lands at Ko`olau Forest Reserve and Hanawi Natural Area Reserve, Hana, and Makawao, Maui. (ROA, 69:Exhibit 1). A&B and EMI also requested that pending issuance of the long-term lease, the State of Hawai`i issue revocable permits to preserve the status quo. Id. The BLNR held a public hearing on May 25, 2001, during which Na Moku Aupuni o Koolau Hui, Beatrice Kekahuna, Marjorie Wallett, and Elizabeth Lapenia (collectively referred to as "Na Moku Appellants") and MT requested a contested case to challenge A&B and EMI's application for the "issuance of revocable permits or long term water licenses." (ROA, 2). On June 22, 2001, the BLNR granted Na Moku Appellants and MT's requests for a contested case hearing and authorized appointment of a hearings officer

[1] Record on Appeal references refer to Certified Record on Appeal; Certificate of Custodian; Certificate of Service filed March 4, 2003 and First Amended Supplement to Certified Record on Appeal; Certificate of Custodian; Certificate of Service filed June 5, 2003. References are to Index# and page number as designated therein.

"to conduct all the hearings relevant to the subject petition for a Contested Case Hearing." (BLNR's Staff Submittal dated June 22, 2001, Item D-10).

It should further be noted that during the pendency of the application, the status of the interim disposition was ruled by the BLNR on May 24, 2002 to be a "holdover" pending the disposition of the contested case. (BLNR's Minutes dated May 24, 2002).

After initial proceedings in which the County of Maui, Department of Water Supply ("DWS"), Maui Land & Pineapple Co., Inc. ("MLP"), Hawaii Farm Bureau Federation ("HFBF"), Na Moku Appellants, and MT were granted intervenor status with respect to the pending application, the Hearings Officer issued Pre-Hearing Order No. 2 and invited the parties to file dispositive motions that would be based on matters of law or undisputed facts. (ROA, 55). Based on written submissions of the parties and oral argument presented on October 21, 2002, the BLNR Hearing Officer issued Proposed Findings of Fact, Conclusions of Law, and Recommended Order on November 8, 2002. (ROA, 127). The BLNR heard oral arguments on the Hearing Officer's recommended order on November 15, 2002, issued its Findings of Fact and Conclusions of Law and Order on January 10, 2003 (ROA, 129), and on January 24, 2003, issued its First Amended Findings of Fact and Conclusions of Law and Order (ROA, 130) (collectively, Decision and Order"), adopting the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommended Order. (ROA, 127).

On February 7, 2003, Na Moku Appellants and MT filed the instant appeal of the agency ruling. (Notice of Appeal to Circuit Court; Exhibits "A" & "B"; Statement of the Case; Appellants Designation of Record on Appeal; Order to Certify and Transmit the Record on Appeal filed on February 7, 2003, filed by Na Moku Appellants and Notice of

Appeal to Circuit Court; Statement of the Case; Appellants Designation of Record on Appeal; Order to Certify and Transmit the Record on Appeal filed on February 7, 2003, filed by MT)

II. COUNTERSTATEMENT OF STANDARD OF REVIEW

Review of the decisions of administrative agencies is governed by HRS Chapter 91 [the Hawai'i Administrative Procedures Act]. HRS § 91-14(g) (1993) states that:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedure; or
> (4) Affected by other error of law; or
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"Findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record." In re Water Use Permit Applications, 94 Haw. 97, 119, 9 P.3d 409, 431 (2000) ("Waiahole") (citations omitted).

"Conclusions of law are freely reviewable to determine if the agency decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction, or affected by other error of law." Id.

Mixed questions of fact and law are reviewable as follows:

> A [conclusion of law] that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. [T]he court should not substitute its own judgment for that of the agency.

Id. (internal citations omitted).

"Clearly erroneous" has been defined by the Hawai`i Supreme Court as:

> (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made. . . . '[S]ubstantial evidence' [is] credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Id. (citations omitted).

Finally, when reviewing decisions of an administrative agency, the appellate courts have shown great deference to the expertise of the administrative agency:

> In order to preserve the function of the administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

Application of Puhi Sewer & Water Co., Inc., 83 Haw. 132, 137, 925 P.2d 302, 307 (1996) (quoting Application of Kaanapali Water Corp., 5 Haw. App. 71, 77-78, 678 P.2d 584, 589 (1984). Further, where an administrative agency's findings indicate that the agency has complied with statutory provisions regarding the consideration and

311

observance of statutory policies and criteria governing its decision and its findings are supported by substantial evidence, the agency's decision will not be overturned. Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 751 P.2d 1031 (1988). It has been stated that the "[j]udicial review of an agency decision is confined to the record of the agency proceedings." Id. at 236, 751 P.2d at 1037.

III. COUNTERSTATEMENT OF QUESTIONS ON APPEAL

A. As a matter of fact, were A&B and EMI's application for long term disposition of water licenses and MT's legal objections thereto before the BLNR and properly the subject of the contested case requested by MT?

B. As a matter of law, does the Water Code, common law, or the application of the public trust prohibit transfer of water outside of the watershed of origin in an area that has not been designated as a surface Water Management Area ("WMA") by the Commission on Water Resource Management ("CWRM")?

C. As a matter of law, is the proposed long-term lease exempt from the requirement of an Environmental Assessment ("EA")?

D. As a matter of law, would the BLNR violate the public trust by authorizing a long term disposition of water subject to interim instream flow standards enacted by CWRM?

E. As a mixed matter of fact and law, has the BLNR illegally allowed the process for issuance of the long term disposition of water to move forward upon conclusion of the contested case?

IV. ARGUMENT

A. THE APPLICATION FOR LONG-TERM WATER LICENSES AND ISSUANCE OF REVOCABLE PERMITS WERE PROPERLY BEFORE THE BLNR AND WERE EXPRESSLY MADE THE SUBJECT OF THE CONTESTED CASE HEARING REQUESTED BY NA MOKU APPELLANTS AND MT

MT contends that the issue of long-term water licenses was not properly noticed under Chapter 92, and thus its procedural and substantive due process rights

312

were violated by the BLNR when it addressed A&B and EMI's application for a long-term lease in the contested case proceeding[2].

Preliminarily, A&B and EMI would like to point out that MT turns due process analysis on its head when it contends that BLNR deprived it of procedural due process by 1) granting its request for a contested case hearing, and 2) subsequently allowing its full participation therein. In effect, MT complains that it was afforded **too much** rather than **too little** procedural due process. It has cited no legal authority, however, for the novel proposition that being granted a contested case hearing, and being allowed to participate therein, somehow constitutes a deprivation of procedural due process. It is obvious that BLNR was deliberately being conservative when BLNR granted Na Moku Appellants and MT's broadly and redundantly worded requests for the maximum amount of procedural due process possible. Having merely been granted the full measure of procedural due process that they had themselves requested, Na Moku Appellants and MT should be estopped from now contending that the contested case proceedings were improperly ordered or otherwise deprived them of due process of law.

As a matter of fact, the issue of the long-term lease was an agenda item and there was a sufficient nexus between the agenda item listed by the BLNR and the decision of the BLNR to satisfy all applicable due process requirements.

---

[2] MT apparently advocates the proposition that the BLNR must hold a contested case hearing even for revocable permits that may not exceed one year in duration. The Court should take judicial notice that the BLNR granted the request for contested case hearing on June 21, 2001 and the proceeding has not yet been concluded. Such a rule would clearly be impracticable and would unreasonably hamper BLNR's ability to conduct its affairs.

1. THE LONG TERM DISPOSITION WAS LISTED ON THE MAY 25, 2001 PUBLIC MEETING AGENDA

HRS § 92-7 provides that agency meeting notices "shall contain an agenda which lists all of the items to be considered at the forthcoming meeting." The issue of the long-term dispositions of water licenses was listed as an agenda item in clear satisfaction of the requirements of HRS § 92-7 as more fully discussed in Part IV.A.2. below.

2. EVEN IF AMBIGUOUS, THERE WAS A SUFFICIENT NEXUS BETWEEN THE AGENDA ITEM FOR THE MAY 25, 2001 MEETING AND THE BLNR'S DECISION ADDRESSING THE LEGAL OBJECTIONS RAISED BY NA MOKU APPELLANTS AND MT TO THE LONG TERM DISPOSITION REQUESTED BY A&B AND EMI TO SATISFY CHAPTER 92

Even assuming, *arguendo*, that the listing was ambiguous, there was nonetheless a sufficient nexus between the agenda listing and the BLNR's decision to satisfy Chapter 92 ("the Sunshine Law"). The sufficiency of an agenda listing has been interpreted in a recent Opinion of the Attorney General, Office of Information Practices, OIP Opinion Letter No. 02-09 (9/24/02) ("OIP Opinion") as follows:

> So long as there is a sufficient nexus between what was noticed and what the discussion resulted in, there would be no violation of the Sunshine Law. This however, must be determined on a case by case inquiry.
>
> . . .
>
> Agendas are posted so that members of the public may be able to prepare meaningful testimony on items before a board. Discussion of an item not properly agendized would prevent the public from preparing meaningful testimony. Therefore, the OIP advised there must be a sufficient nexus between what is on the agenda and the direction the discussion at the meeting ultimately takes to allow the public to present meaningful testimony. In other words, the discussion at the meeting should not stray beyond the items

listed on the agenda. The minutes of the meeting should show this nexus between what is on the agenda and what is discussed at the meeting.

As such, the Agenda for the May 25, 2001 BLNR meeting listed the following item:

> DISCUSSION ON LONG-TERM DISPOSITIONS OF WATER LICENSES AND ISSUANCE OF INTERIM REVOCABLE PERMITS TO [A&B] AND [EMI] FOR THE HONOMANU, KEANAE, HUELO AND NAHIKU LICENSE AREAS, HANA, MAUI, VARIOUS TAX MAP KEYS.

(ROA, 1A).

First, there is an obvious nexus between the listed agenda item and the discussions and actions of the BLNR in granting the contested case hearing requested by Na Moku Appellants and MT and deferring decision on the Application pending the completion of the contested case proceeding. As noted in the OIP Opinion, the purpose of the notice requirements set forth in HRS Chapter 92 are to allow the public to meaningfully participate at the proceeding. In this case, in its Petition for a Contested Case Hearing filed June 1, 2001, MT states that the subject matter of their petition as:

> 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

(ROA, 3:1).

The Petition further states that the "specific disagreement, denial or grievance" deals with, "The issuance of revocable permits or **long-term licenses**." (Emphasis added). (ROA, 3:3). The outline of basic facts section of the Petition further states that, "The issuance of water permits or **long term licenses** that would allow the

continued diversion of water from East Maui streams found with the Honomanu, Ke`anae and Nahiku license areas is violative of these rights." (Emphasis added). (ROA, 3:4)

The BLNR's Staff Submittal dated May 25, 2001 described the issue pending before the BLNR as "Long-term Dispositions of Water Licenses and Issuance of Interim Revocable Permits." (ROA, 1:1). Under "REMARKS" the Staff Submittal told the BLNR that "[t]he 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." (ROA, 1:3).

The Staff Submittal went on to describe the historical background and stated "[n]ow that the McBryde water case has been settled, the Land Division has initiated the reopening of the thirty (30) year water license process." (ROA, 1:4).

Second, the further step recommended by the OIP Opinion is that the minutes of the meeting reflect the nexus between the agenda item and discussion. In this case, the BLNR Minutes, dated May 25, 2001, do in fact establish such a nexus. The BLNR Minutes, dated May 25, 2001, cite to statements made at the meeting by Mr. Hall in which he "indicated that they join in the petition to intervene and **request for a contested case petition** proceeding on legal issues on the proposed short-term and long-term disposition." (Emphasis added). (ROA, 2:12). Ms. Lucienne deNaie, Vice-Chairperson of MT, stated "Her main concerns were . . . the possibility of awarding a 30-year lease when a program for the 1-year permits haven't been figured out. . ." Id. Finally, it is noted that the BLNR **did not** adopt the recommendations contained in the Staff Submittal or of its Deputy Attorney General, and instead, "Member Inouye made a

motion to defer this item, and grant a holdover permit on a month-to-month basis, **pending the results of the contested case hearing.**" Emphasis added. (ROA, 2:13).

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

> 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**[.] (Emphasis added).

(BLNR's Staff Submittal dated June 22, 2001, Item D-10).

On May 24, 2002, the BLNR reissued interim revocable permits to A&B and EMI pending the disposition of the contested case. In its Minutes dated May 24, 2002, the BLNR "Unanimously approved to defer and grant a holdover of the existing revocable permit on a month-to-month basis pending the results of the contest [sic] case hearing" (BLNR's Minutes dated May 24, 2002).

Given these factors, it is clear that the BLNR agenda provided MT with sufficient notice that the long-term disposition was being discussed at the May 25, 2001 meeting and that there was a sufficient nexus between the agenda item and issues discussed. Indeed, the letters submitted by Na Moku Appellants and MT clearly establish that they understood the items being discussed, and that they explicitly sought to make those items the subject of the subsequently conducted contested case proceeding. Accordingly, the following conclusion reached by the BLNR should be upheld:

> 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.

(ROA, 130:12).

3. MT WAS GIVEN SUFFICIENT NOTICE AND OPPORTUNITY TO FULLY AND FAIRLY LITIGATE ITS LEGAL OBJECTIONS TO OPPOSITION TO THE ISSUANCE OF A LONG TERM DISPOSITION, AND WAS THUS NOT DEPRIVED OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS OF LAW

The Hawai`i Supreme Court has stated that "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). More specifically, HRS Chapter 92 requires that the BLNR give public notice of any meeting, including a list of agenda items to be considered. HRS § 92-7(a).

With regard to substantive due process, the Hawai`i Supreme Court has stated that:

> . . . due process includes a substantive component that guards against arbitrary and capricious government action, even when the government takes that action pursuant to a facially constitutional law. To establish an 'as applied' violation of substantive due process, an aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.

Application of Herrick, 82 Haw. 329, 349, 922 P.2d 942, 962 (1996) (quoting Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995)).

As noted in Part IV.A.2. above, MT was clearly given notice and an opportunity to be heard. Indeed, its full participation in a contested case hearing granted at its request and conducted solely to allow it to present all of its legal objections to BLNR's consideration of A&B and EMI's Application clearly exceeded the minimum requirements of procedural due process. MT has made no showing, moreover, that the

BLNR's actions were arbitrary and capricious. Accordingly, MT has failed to establish any violation by BLNR of either substantive or procedural due process of law.

B. NEITHER THE WATER CODE, THE COMMON LAW NOR THE PUBLIC TRUST DOCTRINE ABSOLUTELY PROHIBIT THE TRANSFER OF WATER OUTSIDE THE WATERSHED OF ORIGIN IN AN AREA THAT HAS NOT BEEN DESIGNATED AS A WMA

MT contends that out of watershed transfers are prohibited as a matter of law except in designated WMA pursuant to permits for such transfers issued by CWRM.

While A&B and EMI concede that flow quantities specified in the existing and any later amended Interim Instream Flow Standards ("IIFS") established by CWRM pursuant to the Water Code generally cannot be diminished due to out of watershed transfers, the BLNR was correct in its conclusion that there is no absolute prohibition on out of watershed transfers in any area that is not designated as a WMA.

The Water Code at HRS § 174C-5(2), establishes the CWRM and directs it to "designate water management areas for regulation where . . . after public hearing and published notice, [it] finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water." HRS § 174C-45 sets forth the criteria for surface WMA designation:

In designating an area for water use regulation, the CWRM shall consider the following:

> (1) Whether regulation is necessary to preserve the diminishing surface water supply for future needs, as evidenced by excessively declining surface water levels, not related to rainfall variations, or increasing or proposed

> diversions of surface waters to levels which may detrimentally affect existing instream uses or prior existing off stream uses;
>
> (2) Whether the diversions of stream waters are reducing the capacity of the stream to assimilate pollutants to an extent which adversely affects public health or existing instream uses; or
>
> (3) Serious disputes respecting the use of surface water resources are occurring.

Even where the CWRM has found that the surface water in an area is threatened and requires regulation, permits for withdrawal of water from the watershed are nonetheless allowed under HRS § 174C-49(c):

> The common law of the State to the contrary notwithstanding, the commission shall allow the holder of a use permit to transport and use surface or ground water beyond the overlying land or outside of the watershed from which it is taken if the commission determines that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties.

The foregoing language affirmatively authorizes out of watershed transfers in WMA pursuant to permit. It does not address out of watershed transfers in any area that has not been designated as a WMA. Importantly, however, the Water Code is structured to permit the continuation of water uses pre-existing in an area that is newly designated as a WMA where the existing use is "reasonable and beneficial and is allowable under the common law of the State." HRS § 174C-50. Existing uses that involve the transfer of water out of the watershed of origin, of which there were many on July 1, 1987, the date of the Water Code's enactment, are not handled differently from any other existing use. Thus, the Water Code does not prohibit the out of watershed transfer of water in any area that is not a designated WMA. In fact, the Water Code

clearly acknowledges that out of watershed transfers existed as of July 1, 1987, and provides a mechanism for them to be permitted in the event that they are subsequently placed within a WMA, provided that a permit is applied for within one year of the effective date of the designation of the WMA. HRS §§ 174C-41 and 174C-50; Hawai`i Administrative Rules ("HAR") § 13-171-15.

MT's contention that Hawai`i common law prohibits out of watershed transfers is also incorrect. The Hawai`i Supreme Court, in McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973) ("McBryde"), did not hold that out of watershed transfers were **prohibited**. The Court held, rather, that a party could not rely upon **appurtenant or riparian usufructory rights in water** to establish an **absolute** right to transfer the claimed water out of the watershed within which it arose. (Emphasis added). This was clarified by the Court when it answered the certified questions posed to it by the United States Court of Appeals for the Ninth Circuit in Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982):

> But we did not **actually enjoin or explicitly prohibit** the diversion of water from the watershed. Rather, we sought only to establish that these private usufructory interests were not so broad as to include any inherent enforceable right to transmit water beyond the lands to which such private interests appertained.
>
> **We did not say that such transfers are prohibited as a matter of law**, for *McBryde* did not discuss and therefore cannot be understood to be conclusive of the circumstances under which a private party or the State could obtain injunctive relief against unsanctioned transfers.

Id. at 648, 658 P.2d at 295 (Emphasis added).

Importantly, A&B and EMI's application is not based upon any claimed private appurtenant or riparian usufructory interests in the water that is sought to be

licensed from the State of Hawai`i. Instead, the application seeks to license from the State the right to use waters arising on State owned, i.e., "public" rather than "private," lands. McBryde did not purport to limit what the State could do with waters arising on public lands. To the contrary, McBryde sought to greatly expand the State's power to regulate the use of all waters in the State, particularly waters arising on private land. McBryde, therefore, cannot be read to prohibit the BLNR from exercising its sovereign prerogative to lease its lands to A&B and EMI and license the use of waters arising thereon outside of the watersheds upon which they arose.

MT's suggestion that application of the public trust prohibits out of watershed transfers is also incorrect. While the BLNR must be mindful of the public trust doctrine as it has been developed and applied to the State's stewardship of its water resources subsequently to McBryde, the Hawai`i Supreme Court has nonetheless made it clear that the public trust does not necessarily prohibit out of watershed transfers. Thus, in Waiahole, the Court stated:

> The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private purposes, including agriculture, *see generally* Haw. Const. art. XI, § 3. Therefore, apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.

Id. 94 Haw. at 141 (footnotes omitted). Importantly, with regard to the diversion of waters to central and leeward Oahu that would otherwise have flowed into windward streams, the Waiahole Court noted that the balance of competing interests had been materially altered by the fact that Oahu Sugar had closed down its operations. "Here, the close of sugar operations in Central Oahu has provided the Commission a unique

and valuable opportunity to restore previously diverted streams while rethinking the future of Oahu's water uses." Id. at 149. Had sugar operations not been closed down, the public interest in maintaining those operations would have clearly altered the balance of competing interests in the use of water from windward streams. Even with the close of sugar operations in Central Oahu, moreover, the Waiahole Court did not conclude that the public trust mandated the return of all windward water to the windward streams.

Finally, as noted by both A&B and EMI and MT in the contested case proceedings, and as more fully explained in Part D, below, any transfer of water out of the watershed of origin must also be in compliance with IIFS enacted by CWRM. The adherence by the BLNR to the IIFS, as the same may be amended from time to time, insures that the public trust interests in the streams, as administered by the CWRM, will be protected.

C. THE PROPOSED LONG-TERM LEASE IS EXEMPT FROM THE REQUIREMENT OF AN EA

MT initially asserts that A&B and EMI are somehow estopped from not performing an EA based upon the fact that their application indicated that an Environmental Impact Statement ("EIS") should be performed by the applicant. MT then argues that the BLNR's determination that the proposed long-term disposition of water rights is exempt from the requirement of an EA is erroneous as a matter of law as the proposed disposition is not a continuation of the status quo and the BLNR failed to consult with other agencies having expertise in the matter. Further, MT has attempted to connect the requirement of an EA in a Ninth Circuit case involving the Federal Energy

Regulatory Commission's ("FERC") enforcement of its own rules as precedent for requiring that the BLNR perform an EA in this case.

A&B and EMI respond by noting that the Application is subject to the BLNR's approval and decision making process and that its finding that an EA is not required by rule is proper. A&B and EMI further assert that the BLNR correctly found as a matter of law that the proposed disposition of water rights sought is exempt from the requirement of an EA as the proposed long-term disposition does not involve a change in use and that the BLNR was not required to consult with other agencies in its application of the exemption. A&B and EMI additionally observe that the federal case law authority cited is based on a different regulation from that enacted by the State of Hawai`i, and thus, the same is inapplicable in this case.

1. AN EA IS NOT REQUIRED BY VIRTUE OF A&B AND EMI'S INCLUSION OF SUCH IN THEIR APPLICATION FOR LONG TERM WATER LEASE

In Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 219-220, n. 19, 664 P.2d 745, 752 (1983), the Intermediate Court of Appeals held that "A party is free to 'plead inconsistent claims or defenses within a single action'" but cannot "repudiat[e] a theory of action that has been accepted and acted upon by the court or that has otherwise detrimentally affected the opposing party." (internal brackets omitted). In Roxas v. Marcos, 89 Haw. 91, 124, 969 P.2d 1209, 1242 (1998), the Supreme Court clarified that application of judicial estoppel provides that a party is not permitted to take

324

a position contrary to one it previously took if it had full knowledge of the facts and the court accepted its initial position and acted on it and another party will be prejudiced by its action[3].

While no authority has been cited by MT for the application of judicial estoppel in administrative actions, A&B and EMI contend that in the event that this reviewing court finds the doctrine to be applicable, the doctrine cannot be applied here against A&B and EMI. While A&B and EMI proposed that each bidder submit an EIS, they did not argue that an EIS is legally required. In any event, BLNR rejected their proposal, concluding that because the proposed "use does not differ from its previous use, therefore pursuant to Section 11-200-8(a)(1), . . . *the applicant is exempt* from the preparation of an environmental assessment"). (ROA, 1:3). A party is not estopped from accepting a ruling of the court adverse to his initial position and drawing the implications of that ruling. Nelson v. University of Hawai`i, 2002 WL 31104432 (Haw. No, 22236 Sept. 23, 2002) slip op. at 13.

In addition to the fact that the proposal set forth in the Application is not binding, it is noted that MT did not detrimentally rely on the same. A&B and EMI note that the applicability of the EA requirement was subject of three (3) separate motions raised by A&B and EMI (ROA, 58), Na Moku Appellants (ROA, 64), and MT (ROA, 69). Based thereon, MT cannot now claim to have relied upon the statements set forth in the Application to their prejudice.

---

[3] If judicial estoppel does apply to agency proceedings, then MT is estopped from arguing, as it has in this appeal, that it should not have been granted the contested case hearing that it clearly requested in order to advance its legal objections to BLNR's consideration of the Application. Since BLNR acted favorably on MT's petition for a contested case proceeding, and the other parties incurred significant time and expense participating therein, MT is estopped from now contending that its own petition should not have been granted.

2. THE PROPOSED DISPOSITION IS EXEMPT FROM THE REQUIREMENT OF AN EA PURSUANT TO HAR § 11-200-8

HRS § 343-5 states that:

> (a) Except as otherwise provided, an environmental assessment shall be required for actions which:
>
> (1) Propose the use of state or county lands . . . .

HRS § 343-6(a) adds:

> After consultation with the affected agencies, the council shall adopt, amend, or repeal necessary rules for the purpose of this chapter in accordance with chapter 91 including, but not limited to, rules which shall:
>
> . . . .
>
> (7) Establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, are declared exempt from the preparation of an assessment.

HAR § 11-200-8, which is part of the administrative rules adopted by the Environmental Council pursuant to HRS § 343-6 and effective December 6, 1985, states in relevant part:

> (a) Chapter 343, HRS, states that a list of classes of action shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. . . . The following list represents exempt classes of action:
>
> (1) **Operations, repairs, or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing.** (Emphasis added).

In this case, the disposition clearly fits into the first exemption. The disposition of water would authorize continued "operations" of "existing structures, facilities, equipment and topographical features" – the ditch system – that have been in use for over a century, "involving . . . no expansion or change of use beyond that previously existing." Accordingly, the BLNR was correct in concluding that the continued operation of the EMI ditch system is exempt from the requirements of an EA pursuant to the provisions of HAR § 11-200-8(a)(1).

3. THE BLNR WAS NOT REQUIRED BY RULE TO SEEK THE ADVICE OF OTHER OUTSIDE AGENCIES BEFORE DETERMINING THAT THE PROPOSED DISPOSITION WAS EXEMPT FROM THE REQUIREMENT TO PERFORM AN EA

HRS § 343-6(a)(7) imposes the duty on the Council for Environmental Quality Control ("OEQC") "after consultation with the affected agencies," to "[p]rescribe procedures whereby specific types of actions, because they will probably have minimal or no significant effect on the environment, are declared exempt from the preparation of an assessment." The OEQC, pursuant to this enabling statute, enacted HAR § 11-200-8. The OEQC further provided that agencies can draft their own lists of "specific types of actions that fall within the exempt classes." HAR § 11-200-8(d). When engaging in this additional rulemaking process, the rulemaking agencies need to comply with the consultation requirements set forth in HRS § 346(a) and HAR § 11-200-8(a). There is no requirement stated that the agency must consult with other agencies when **applying** an already promulgated rule. Applying the consultation requirement at the project level would defeat the purpose of HRS § 343-6(a)(8) which is to streamline the process by exempting certain types of action from environmental review.

In this case, HAR § 11-200-8, has already been enacted. No further consultation is required by the BLNR when applying this existing OEQC rule. Moreover, once BLNR granted the Petition for Contested Case Hearing submitted by Na Moku Appellants and MT, it would have been improper for the hearing officer to have sought the comments of other agencies. HRS Chapter 91, HAR Title 13, Chapter 1, Subchapter 5.

4. THE FEDERAL CASE LAW AUTHORITIES CITED ARE INAPPLICABLE TO THIS CASE

MT argues for the first time on appeal that the BLNR should not apply the HAR § 11-200-8 exemption based upon the reasoning of Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984) ("Confederated Tribes"). In that case the court held that FERC was required under the Federal Power Act -- due to its specific requirements regarding the relicensing of hydroelectric power plants -- the National Environmental Policy Act ("NEPA") to prepare an EIS prior to relicensing a hydropower dam to a public utility district.

Confederated Tribes is distinguishable from the case at bar principally because, while there is general federal decisional law under the NEPA holding that, "[w]here a proposed federal action would not change the status quo an EIS is not necessary," Upper Snake River Chapter of Trout Unlimited v. Hodel, 921 F.2d 232, 235 (9th Cir. 1990), there is no federal regulatory counterpart to the HAR § 11-200-8 exemption for an action that continues an existing use. Notwithstanding the general decisional law, the Ninth Circuit found language in the Federal Power Act establishing specific considerations pertaining to the relicensing of hydropower dams that prompted the court to hold that an EIS should be prepared under those circumstances. Had the

court been presented instead with an explicit federal legislative exemption for the continuation of an existing use, such as HAR § 11-200-8, the outcome would likely have been different.

It should also be noted that the Ninth Circuit has since limited the import of Confederated Tribes. In American Rivers v. FERC, 187 F.3d 1007, 1019 (9th Cir. 1999) (quoting U.S. Dept. of Interior v. FERC, 952 F.2d 538, 546 (D.C. Cir. 1992) the court stated that Confederated Tribes:

> simply endorses the unstartling principles that an agency must establish a record to support its decisions and that a reviewing court, without substituting its own judgment, must be certain that the agency has considered all factors required by the statute.

Id.

Based upon the foregoing, A&B and EMI respectfully submit that the BLNR was correct in its ruling that the proposed disposition was exempt from the requirements of an EA.

5. A&B AND EMI JOIN IN THE ARGUMENTS ADVANCED BY THE HAWAII FARM BUREAU FEDERATION IN THEIR ANSWERING BRIEF FILED JUNE 16, 2003

A&B and EMI join in the arguments advanced by Appellee Hawaii Farm Bureau Federation in their Answering Brief filed June 16, 2003 in support of BLNR's ruling that the proposed disposition is exempt from the requirement to perform an EA pursuant to HAR § 11-200-8.

D. THE BLNR WOULD NOT BE IN VIOLATION OF THE PUBLIC TRUST IF IT WERE TO AUTHORIZETHE ISSUANCE OF A LONG-TERM DISPOSITION SUBJECT TO IIFS

MT argues that the BLNR erred as a matter of law when it "permitted" the long-term disposition of water without instream flow standards being in place.

Preliminarily, A&B and EMI submit that MT has mischaracterized the extent of the Decision and Order. BLNR made findings and conclusions on discrete legal objections raised by MT and Na Moku Appellants to BLNR's consideration of the Application. BLNR did not, within the scope of the Decision and Order, take the affirmative step of **granting** the Application. BLNR has correctly ruled, however, that it is not obligated to make its own determination of appropriate instream flow standards prior to acting upon the Application -- so long as any disposition remains subject to the IIFS established by CWRM, which is the only appropriate State agency to make such determinations.

Article XI, section 7 of the Hawai`i Constitution states:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality, and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

HRS § 174C-7(a) states that CWRM has exclusive jurisdiction over implementation and administration of the Water Code:

> There is established within the department a commission on water resource management consisting of six members

which shall have **exclusive jurisdiction and final authority in all matters relating to implementation and administration of the state water code**, except as otherwise specifically provided in this chapter. (Emphasis added).

HRS § 174C-2 adds in relevant part:

(c) The state water code shall be liberally interpreted to obtain maximum beneficial use of the waters of the State for purposes such as domestic uses, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses. However, **adequate provision shall be made for the protection of traditional and customary rights,** the protection and procreation of fish and wildlife, the maintenance of proper ecological balance and scenic beauty, and the preservation and enhancement of waters of the State for municipal uses, public recreation, public water supply, agriculture, and navigation. Such uses are declared to be in the public interest. (Emphasis added).

HRS § 174C-71 states that CWRM shall:

(1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in the waters of the State;

(C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately **fishery, wildlife,** recreational, aesthetic, scenic, **or other beneficial instream uses in the stream** in light of existing and potential water developments including the economic impact of restriction of such use. (Emphasis added).

In this case, CWRM adopted IIFS for East Maui on June 15, 1988. HAR § 13-169-44. In those standards, CWRM restricted any new or change in stream diversions by preserving the status quo. Stream flows were set pursuant to HAR § 13-169-44(2)(F) at amounts flowing within the stream and restricted new or expanded

diversions. As such, the IIFS exist and are presumed to provide for protection of instream values.

While this practice of preserving the status quo pending further investigation was challenged in Waiahole supra., the Hawai`i Supreme Court did not strike down the same and held that CWRM had the ability and the obligation to amend its IIFS as appropriate. It is noted that Na Moku Appellants, have already availed themselves of this procedural remedy as noted in their Petitions 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, Puohokamoa, Wahinepe`e, Waianu, Waiaka`a, Waikamoi, Waikani, Waiohue, Waiokamilo, West Wailuaiki, East Wailuaiki, and East and West Wailuanui Streams with CWRM on May 24, 2001 ("Petitions to Amend IIFS"). (ROA, 68:Exhibits 1-27).

A&B and EMI are not asserting that the public trust need not be considered in this matter. Rather, A&B & EMI simply contend that the public trust values are protected by the IIFS set and amended by CWRM as provided by the Hawai`i Constitution and Water Code.

E. THE BLNR HAS NOT ILLEGALLY AUTHORIZED THE PROCESS FOR ISSUANCE OF A LONG-TERM DISPOSITION TO MOVE FORWARD UPON CONCLUSION OF THE CONTESTED CASE

MT asserts that the BLNR erred in concluding the contested case without an appraisal of the fair market value of the lease having taken place.

A&B and EMI assert that the contested case hearing was properly concluded as to all issues pending before it and that further action required to issue the long-term disposition should be handled in administrative proceedings held before the

BLNR. In particular, A&B and EMI contend that the issue of the appraisal and auction pursuant to HRS §§ 171-58(c) and 171-17 do not require a public hearing prior to decision-making by the BLNR. As no public hearing is required, there is no requirement that a contested case hearing on the matter be held. Further, if MT is correct that there are matters still pending before the BLNR as part of the contested case proceeding, their appeal should be dismissed as untimely pursuant to HRS § 91-14.

The Hawai`i Supreme Court in Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994), held that "If the state or rule governing the activity in question does not **mandate** a hearing prior to the agency's decision-making, the actions of the administrative agency are not 'required by law' and do not amount to 'a final decision or order in a contested case' from which a direct appeal to the circuit court is possible."

In this case, HRS § 171-58(c) does not state that a hearing is required:

> Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; . . .

HRS §§ 171-13, 171-14, 171-16 relating to the auctions likewise do not contain a hearing requirement. Finally, the procedure for setting an upset price in the auction of public lands is set forth in HRS § 171-17 and the same does not provide for a hearing.

As the applicable statutes do not require that a hearing be held on the appraisal and auction prior to the disposition of water rights, the BLNR was correct in ruling that the long-term disposition process move forward and that the contested case was concluded.

V. CONCLUSION

Based upon the foregoing, A&B and EMI request that this court affirm the BLNR's First Amended Findings of Fact and Conclusions of Law and Order filed January 24, 2003.

DATED: Honolulu, Hawaii, June 16, 2003.

ALAN M. OSHIMA
RANDALL K. ISHIKAWA

GINO L. GABRIO
DAVID SCHULMEISTER

Attorneys for Applicant Alexander & Baldwin, Inc. and East Maui Irrigation Company, Ltd.