

ORIGINAL

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

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KO'OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY JACINTHO, and NĀ MOKU AUPUNI O KO'OLAU HUI,	)	CIVIL NO.15-1-0650-04 VLC
	)	(Environment; Declaratory Judgment)
	)	
Plaintiffs,	)	FIRST AMENDED COMPLAINT;
	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
BOARD OF LAND AND NATURAL RESOURCES, CARTY CHANG, in his official capacity as Interim Chairperson of the Board of Land and Natural Resources, the DEPARTMENT OF LAND AND NATURAL RESOURCES, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION CO., LTD., HAWAIIAN COMMERCIAL AND SUGAR CO., and COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY,	)	
	)	
Defendants.	)	
	)	

## **FIRST AMENDED COMPLAINT**

### **INTRODUCTION**

Alexander & Baldwin, Inc. and East Maui Irrigation Co., Ltd failed to prepare -- and the Board of Land and Natural Resources failed to require -- an environmental assessment for the issuance of renewed revocable permits that authorize the use of approximately 33,000 acres of state ceded (former crown) lands to divert an average of 165 million gallons a day of water from East Maui streams to irrigate a commercial sugar operation in Central Maui.

By authorizing the use of this environmentally and culturally significant area of Maui without complying with Hawai`i Revised Statute (“HRS”) chapter 343, the BLNR violated the law. By their continued diversion of East Maui water without undertaking environmental review, so did Alexander & Baldwin and East Maui Irrigation.

### **JURISDICTION**

1. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 603-21.5, 603-21.9, 661-1, HRS Chapters 632, and 343, and Hawai`i State Constitution Article XI sections 1 and 9 and Article XII section 7.

### **PARTIES**

2. Plaintiff Healoha Carmichael (“Carmichael”) is a Native Hawaiian gatherer and fisher who lives in Ke`anae and grew up in Wailua/Keanae, East Maui. She engages in her traditional and customary subsistence practices to feed her family and for recreation. These traditions were passed to Carmichael from her grandmother, and she wishes to continue these practices in the manner she was taught.

3. Plaintiff Lezley Jacintho (“Jacintho”) is a Native Hawaiian farmer, gatherer, and fisher. She grows kalo in Honopou on approximately two acres of land irrigated by Honopou stream. Jacintho engages in her traditional and customary subsistence practices to feed her family, teach her kids to feed themselves, and live as her grandparents did.

4. Plaintiff Nā Moku Aupuni O Ko`olau Hui (“Nā Moku”) is a Native Hawaiian nonprofit organization that represents East Maui taro farmers and practitioners of Native Hawaiian traditional and customary practices in the East Maui area.

5. Plaintiffs depend upon healthy streams to provide them food and the resources upon which their traditional and customary subsistence practices rely.

6. Plaintiffs’ traditions and customs of growing kalo, gathering from East Maui streams, and fishing along the coastline have suffered as a result of Alexander & Baldwin and East Maui Irrigation diversion of water in this area.

7. Defendant Alexander & Baldwin, Inc. (“A&B”) is a private profit-making corporation which is engaged in real estate development in Hawaii and abroad, as well as sugar cultivation in Central Maui.

8. East Maui Irrigation Co., Ltd. (“EMI”) is a subsidiary of A&B, which transports the diverted water from East Maui streams to Central Maui for A&B to operate its Hawaii Commercial & Sugar Company’s sugar plantation.

9. Hawaiian Commercial & Sugar Company (“HC&S”) is a division of A&B, which operates the commercial sugar plantations in East Maui that are irrigated with water diverted by EMI.

10. Defendant Board of Land and Natural Resources (“BLNR”) heads the Department of Land and Natural Resources pursuant to HRS § 26-15 and is an agency of the State of Hawai`i.

11. Defendant Carty Chang is the Interim Chairperson of the BLNR and is named in his official capacity.

12. Defendant Department of Land and Natural Resources (“DLNR”) is an agency of the State of Hawai`i that is charged by law to responsibly manage and administer the approximately 33,000 acres of ceded lands that are the subject of the proposed lease and permits at issue in the underlying administrative proceeding.

13. According to DLNR’s own website, its mission is to “[e]nhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors.”

14. Defendants BLNR, Chang, and DLNR (“BLNR Defendants”) have made decisions authorizing the four revocable permits without requiring an environmental assessment.

15. Defendant County of Maui, Department of Water Supply supplies Upcountry Maui domestic and pastoral water customers with surface water diverted from East Maui streams and transported using Defendant EMI’s ditch system. Defendant County of Maui, Department of Water Supply is only named as an interested party.

16. Plaintiffs’ claims for relief arose from acts and/or omissions which occurred in the City and County of Honolulu, State of Hawai`i.

## FACTUAL ALLEGATIONS

17. As described by Kepa Maly in his 2001 report entitled Wai O Ke Ola: He Wahi Mo'olelo No Maui Hikina:

**In Hawaiian culture, natural and cultural resources are one and the same.** Native traditions describe the formation (literally the birth) of the Hawaiian Islands and the presence of life on and around them, in the context of genealogical accounts. **All forms of the natural environment—from the heavens and mountain peaks, to the watered valleys, *kula* (flat sloping lands) and lava plains, and to the shore line and ocean depths were believed to be embodiments of Hawaiian gods and deities.** One Hawaiian genealogical account, records that Wākea (the expanse of the sky—father) and Papahānau moku (Papa—Earthmother who gave birth to the islands)—also called Haumeanuihānauwāwā (Great Haumea—Womanearth born time and time again)—and various gods and creative forces of nature, gave birth to the islands. Maui, the second largest of the islands, was the secondborn of these island children. As the Hawaiian genealogical account continues, we find that these same godbeings or creative forces of nature (parents of the islands), were also the parents of Hāloanakalaukapalili (long stalk quaking and trembling leaf). This Hāloa was born as a “shapeless mass” and buried outside the door of his parents house, and from his grave grew the *kalo* (taro). And when the next child was born to these godparents, he too was called Hāloa (the long stalk or breath of life), and he is credited as being the progenitor of the Hawaiian race. **It was in this context of kinship, that the ancient Hawaiians addressed their environment and it is the basis of the Hawaiian system of land use.**

(Emphases added).

18. Native Hawaiians have traditionally and customarily engaged in cultural practices in the Hamakua-Ko'olau region of Maui, with its rugged shoreline and steep cliffs and valleys.

19. Davianna Pomaika'i McGregor, Ph.D describes the Ke'anae-Wailuanui region as a “cultural kipuka,” defined as “places where Hawaiians have maintained a close relationship to the land through their livelihoods and customs - that play a vital role in the survival of Hawaiian culture as a whole.” Cultural kipuka are “essential for the perpetuation of Hawaiian culture” and yet their survival is “continually eroded by an ever increasing lack of water.” Consistent with

historical accounts, McGregor reports that “[w]etland taro cultivation is the most important single component of the cultural landscape of Ke`anae-Wailuanui.”

20. The entire East Maui watershed is home to: (1) over 200 streams; (2) approximately 59 plant species that are listed as threatened or endangered by the United States Forestry and Wildlife Service; and (3) 13 native bird species, 12 of which are endemic to Maui. Approximately 60,000 acres within the watershed provides critical habitat for over 100 rare and endangered plant species.

21. For over 100 years, Defendants A&B and EMI have diverted water from East Maui streams via a complex system of ditches, tunnels, and flumes in part to irrigate the sugar plantation operated by HC&S in Central Maui.

22. In modern times, Defendant BLNR designated four license areas (Honopou, Huelo, Ke`anae, and Nahiku) in the Ko`olau Forest Reserve, comprising approximately 33,000 acres of ceded (former Crown) lands from which A&B/EMI has diverted and continues to divert on average 126 mgd from over 200 streams annually to support their commercial enterprise in Central Maui. Over its history, the long-term average delivery by EMI to HC&S has been approximately 165 mgd.

23. These diversions have impacted, historically and currently, stream habitats and cultural resources on which Plaintiffs rely to pursue rights they and their ancestors have traditionally and customarily exercised for subsistence and cultural purposes.

a. A&B/EMI’s large-scale diversions, at minimum, have deprived a number of East Maui streams and the stream biota they support of the minimum, annual viable flow of  $H_{\min}$  ( $H_{90}$ ) or 64% endorsed by the Division of Aquatic Resources (“DAR”), the

state agency responsible for the protection and management of living aquatic resources in the waters of Hawaii and commissioned by Defendant DLNR to identify viable flow rates for the protection of native aquatic biota.

b. The lack of streamflow threatens the survival of Hawaiian traditional and customary practices and is particularly oppressive for wetland taro farmers, who require certain minimum volumes and temperatures of water to ensure the health and vitality of their crops.

c. The lack of streamflow has also caused the decline in population of `o`opu, hihiwai, and `opae in the streams as well as changes in fish population off the coast, which impacts Plaintiffs' traditional and customary gathering and fishing rights.

d. Invasive plant species take over those areas below the diversions where water doesn't flow freely and where native species used to thrive.

24. After the last 25-year license to divert water from East Maui expired in 1986, Defendant BLNR began to issue month-to-month revocable permits on an annual basis, as a matter of course.

25. At its regular meeting on May 26, 2000, Defendant BLNR approved, as amended, the issuance of four annual revocable permits to Defendants A&B and EMI on a month-to-month basis, by adding a condition that the Department of the Attorney General issue an opinion regarding compliance with HRS chapter 343.

a. Revocable Permit No. S-7263, effective July 1, 2000, authorized A&B to occupy and use 3,381.00 acres, more or less, at TMK (2) 1-1-01:44, Koolau Forest Reserve, Honomanu, Hana, Maui, Hawaii, for the “[r]ight, privilege, and authority for the

development, diversion, and use of water from the “Honomanu License” area, pursuant to the terms and conditions in now expired General Lease No. L-3695.”

b. Revocable Permit No. S-7264, effective July 1, 2000, authorized A&B to occupy and use 8,752.690 acres, more or less, at TMK (2) 1-1-01:50, 2-9-14:01, 05, 011, 12 & 17, Koolau Forest Reserve, Huelo, Hana, Maui, Hawaii, for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Huelo License” area, pursuant to the terms and conditions in now expired General Lease No. L-3578.”

c. Revocable Permit No. S-7265, effective July 1, 2000, authorized A&B to occupy and use 10,768.00 acres, more or less, at TMK (2) 1-1-02:Por. 02, Koolau Forest Reserve, Keanae, Hana, Maui, Hawaii for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Keanae License” area, pursuant to the terms and conditions in now expired General Lease No. L-3349.”

d. Revocable Permit No. S-7266, effective July 1, 2000, authorized EMI to occupy and use 10,111.220 acres, more or less, at TMK (2) 1-2-04:05 & 07, Koolau Forest Reserve, Nahiku, Maui, Hawaii, for the “[r]ight, privilege, and authority for the development, diversion, and use of water from the “Nahiku License” area, pursuant to the terms and conditions in now expired General Lease No. L-3505.”

26. In 2001, Defendants A&B and EMI applied for a 30-year lease of the aforementioned East Maui Water license areas and the continued issuance of interim revocable permits on an annual basis pending issuance of a long-term lease.

27. As a result of a contested case hearing on the issue involving Nā Moku, in 2002, Defendant BLNR deferred action on the long-term lease application and instead authorized the



continued reissuance of the existing month-to-month revocable permits based on a holdover status pending the results of the contested case.

28. On January 24, 2003, Defendant BLNR approved a 30-year lease allowing Defendants A&B and EMI to continue diverting water from East Maui streams located in the four license areas comprising approximately 33,000 acres of former Crown Lands, subject to any future amendment necessary to enforce any administrative action taken by the Commission on Water Resource Management to amend the interim instream flow standards for 27 streams in the license area.

29. In a 2003 appeal of that decision by Nā Moku, the First Circuit Court concluded 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.”

30. Defendant BLNR represented in 2009 and again in 2014 that, as early as 2003, the revocable permits were not in operation until its decision on whether to award a long term lease, and there were no further requests for the issuance of such permits.

31. Contrary to Defendant BLNR’s statements, Defendant EMI disclosed under oath in March 2015 that A&B and EMI’s revocable permits for the four license areas have in fact been renewed and reissued as a matter of course since 1987.

32. Every December, Defendant DLNR’s Land Division reviews its list of current revocable permits issued statewide and determines which ones to recommend to Defendant BLNR for the upcoming year.

33. At its December 12, 2014 meeting, Defendant BLNR approved the renewal of revocable permits 7263, 7264, and 7265 to Defendant A&B and revocable permit 7266 to Defendant EMI on a month-to-month basis for another one-year period through December 31, 2015, as recommended by the DLNR Land Division.

34. The “character of use” for revocable permits 7263, 7264, 7265, and 7266 is “water”.

35. On or about December 29, 2014, Administrator Russell Tsuji, agent of Defendant DLNR, mailed letters notifying A&B and EMI that their respective revocable permits were renewed for an additional year up to December 31, 2015.

36. No environmental assessment analyzing the impact of the revocable permits -- and the diversion of East Maui stream water -- has ever been completed since Defendant BLNR began issuing them in 1987.

37. The BLNR has not made a preliminary determination that the renewal of revocable permits 7263, 7264, 7265, and 7266 is a “minor project” that will “probably have minimal or no significant effects on the environment.”

38. The BLNR has not made a declaration that the renewal of revocable permits 7263, 7264, 7265, and 7266 are exempt from the requirements of HRS Chapter 343.

### **COUNT I**

(BLNR Defendants Violated HRS Chapter 343)

39. Plaintiffs hereby re-allege and incorporate by reference all the above allegations.

40. HRS § 343-1 provides:

The legislature finds that the quality of humanity’s environment is critical to humanity’s wellbeing, that humanity’s activities have broad and profound effects upon the interrelations of all components of the environment, and that an

environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

41. “Environment” means “humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” HRS § 343-2.

42. HRS § 343-5(a)(1) requires an environmental assessment (“EA”) for “actions” which “[p]ropose the use of state or county lands.” HRS § 343-5(a)(1) (emphasis added).

43. An “action” means “any program or project to be initiated by any agency or applicant.” HRS § 343-2. An “agency” means “any department, office, board, or commission of the state or county government which is a part of the executive branch of that government.” *Id.* An “applicant” is “any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action.” *Id.*

44. Hawai`i Administrative Rules (HAR) § 11-200-5(C), which implements HRS § 343-5(a)(1), provides in part that the “use of state or county lands includes any use (**title**, lease, permit, easement, licenses, etc.) or **entitlement to those lands**” (emphases added).

45. Defendants A&B and EMI originally proposed both a long-term disposition of the subject license areas and the continued issuance of interim revocable permits on an annual basis, pending issuance of a long-term disposition.

46. The proposed “use” of State land -- the renewal of a revocable permit -- is an applicant action that requires the preparation of an EA by Defendants A&B and EMI. HRS § 343-5(c).

47. On December 12, 2014, Defendant BLNR approved the renewal of Defendant A&B’s revocable permit numbers 7263, 7264, and 7265 and Defendant EMI’s revocable permit number 7266.

48. Whenever an applicant proposes such an action, “**the agency** initially receiving and agreeing to process the request for approval **shall require the applicant to prepare an environmental assessment** of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required[.]” HRS § 343-5(e) (emphases added).

49. This proposed “use” of State land would give A&B and EMI the continued ability to take the stream water that is necessary to maintain lo`i kalo and to sustain the habitats of the cultural resources on which Plaintiffs’ Native Hawaiian traditional and customary practices rely. This use is, therefore, subject to the requirements of HRS Chapter 343.

50. No EA has been prepared for BLNR’s approval of renewed revocable permit numbers 7263, 7264, 7265, and 7266 or any previous revocable permits authorizing use of these lands.

51. The BLNR Defendants have not made an exemption determination as to

revocable permit numbers 7263, 7264, 7265, and 7266.

52. The action does not qualify under any exemption pursuant to HAR § 11-200-(8)(a) and nor can it as the cumulative impact of the diversion of East Maui water is significant. *See* HAR § 11-200-(8)(b).

53. The BLNR Defendants violated HRS chapter 343 by failing to require that Defendants A&B and EMI prepare an EA.

54. In the alternative, by recommending the renewal of Defendant A&B and EMI's revocable permits, BLNR Defendants proposed an action that would "use" State land.

55. By failing to prepare an EA, BLNR Defendants violated HRS chapter 343.

**COUNT II**  
(A&B/EMI Violated HRS Chapter 343)

56. Plaintiffs hereby re-allege and incorporate by reference all the above allegations.

57. Defendants A&B and EMI originally proposed both a long-term disposition of the subject license areas and the continued issuance of interim revocable permits on an annual basis, pending issuance of a long-term disposition.

58. The proposed "use" of State land -- the renewal of a revocable permit -- is an applicant action that requires the preparation of an EA by Defendants A&B and EMI. HRS § 343-5(c).

59. This action would give Defendants A&B and EMI the continued ability to take the stream water that is necessary to maintain lo'i kalo and to sustain the habitats of the cultural resources on which Plaintiffs' Native Hawaiian traditional and customary practices rely. The proposed "use" is, therefore, subject to the requirements of HRS Chapter 343.

60. Defendants A&B and EMI have not prepared an EA for the BLNR's approval of

renewed revocable permit numbers 7263, 7264, 7265, and 7266 or any previous revocable permits authorizing use of these lands.

61. By failing to prepare an EA, Defendants A&B and EMI violated HRS chapter 343.

**PRAYER FOR RELIEF**

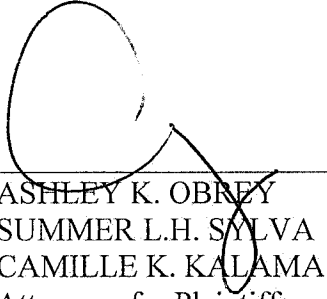
Wherefore, Plaintiffs pray for relief as follows:

- A. Declare that Defendants Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. violated HRS chapter 343.
- B. Declare that the BLNR Defendants violated HRS chapter 343.
- C. Declare that the renewal of revocable permit numbers 7263, 7264, 7265, and 7266 may have a significant impact on the environment.
- D. Declare that revocable permit numbers 7263, 7264, 7265, and 7266 are void, provided that up to 8.4 mgd of water may still be diverted and delivered to the County of Maui, Department of Water Supply for the public health, safety, and welfare of existing customers served by East Maui surface water diversions.
- E. Order Defendants Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. to complete an environmental assessment.
- F. In the alternative, order the BLNR Defendants to complete an environmental assessment.
- G. Enjoin Defendants Alexander & Baldwin, Inc. and East Maui Irrigation, Ltd. from diverting water from the aforementioned license areas until full compliance with HRS chapter 343 and approval of all necessary permits, provided that up to 8.4 mgd of

water may still be diverted and delivered to the County of Maui, Department of Water Supply for the public health, safety, and welfare of existing customers served by East Maui surface water diversions.

- H. Enjoin the BLNR Defendants from issuing any future permits authorizing use of the land at-issue and the water thereupon until after compliance with HRS chapter 343.
- H. Grant Plaintiffs their attorneys' fees and costs, including attorneys' fees pursuant to the private attorney general doctrine discussed in *Sierra Club v. DOT*, 120 Hawai'i 181, 218-30, 202 P.3d 1226, 1263-75 and/or HRS § 607-25.
- I. Provide for such other and further relief as the Court shall deem just and proper.

DATED: Honolulu, Hawaii, April 20, 2015.



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CERTIFICATE OF SERVICE

I hereby certify on the date indicated below, a true and correct copy of the foregoing document was duly served by hand delivery or U.S. Mail postage prepaid upon the following parties at their address listed below:

	HAND DELIVERY	U.S. MAIL
Linda L. Chow Deputy Attorney General 465 S. King Street, Room 300 Honolulu, Hawaii 96813 Attorney for the Board of Land and Natural Resources, Carty Chang, in his official capacity as Interim Chairperson of the Board of Land and Natural Resources, and the Department of Land and Natural Resources	<input checked="" type="checkbox"/>	<input type="checkbox"/>
David Schulmeister Cades Schutte 1000 Bishop Street, 12 <sup>th</sup> Floor Honolulu, Hawaii 96813 Attorney for East Maui Irrigation Co., Ltd., Alexander & Baldwin, Inc. and Hawaiian Commercial and Sugar Co.	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Caleb P. Rowe Department of the Corporation Counsel County of Maui 200 S. High Street Wailuku, Hawaii 96793 Attorney for County of Maui, Department of Water Supply	<input type="checkbox"/>	<input checked="" type="checkbox"/>

DATED: Honolulu, Hawai'i, April 20, 2015.

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