

Hawaii

New Ruling In Maui Water Case Still Doesn't Resolve Old Dispute

The state appellate court has asked a lower court to answer key questions.



By Chad Blair    Stewart Yerton    / June 18, 2019

 Reading time: 6 minutes.



A complicated disagreement over water rights in East Maui that has stretched over the last two decades will take even longer to resolve.

It has pitted some Native Hawaiians and environmental groups against a major Hawaii company, and prompted the Hawaii Legislature to intervene directly in 2016.

Hawaii's Intermediate Court of Appeals on Tuesday sent back to the state's 1st Circuit Court the case of Carmichael vs. BLNR and Alexander & Baldwin.

The case focuses on four month-to-month water rights permits the state Department of Land and Natural Resources granted to A&B in July 2000. BLNR has repeatedly renewed the permits over the past two decades, and the plaintiffs alleged that in doing so BLNR had violated the law concerning

temporary permits. The plaintiffs also said state law required an environmental review of the water diversion system.

The lower court initially agreed with the plaintiffs. But a three-member panel on Tuesday ruled the lower court needs to address two factual issues concerning the permits. The ICA also rejected an argument that state laws on environmental review apply at this point.



A complicated water rights case on Maui has been sent back to a lower court with questions.

Both the state Attorney General's office and the Board of Land and Natural Resources say the opinion provides clarity in the matter.

Krishna F. Jayaram, special assistant to the attorney general, said the ruling affirmed the authority of the BLNR to issue permits "for the temporary occupancy of state lands on a month-to-month basis, not to exceed one year, but to continue the permit for additional one-year periods where the use will be temporary" as long as the use occurs "under conditions and rent which will serve the best interests of the state."

But an attorney for the plaintiff characterized the ICA's ruling as a punt and said it highlights the BLNR's "utter failure to resolve a contested case that

has spanned 18 years.”

Summer L.H. Sylva, staff attorney for the Native Hawaiian Legal Corp., also scoffed at the ICA’s determination that the state’s environmental laws “do not protect 33,000 acres of state lands and dozens of East Maui streams diverted for commercial profit.”

Sylva said the ICA opinion “holds no water and no justice” and said the Carmichael case should be taken up by the Hawaii Supreme Court.

Darren Pai, a spokesman for A&B, said, “We are conducting our review of the decision and can’t comment until we complete our analysis.”

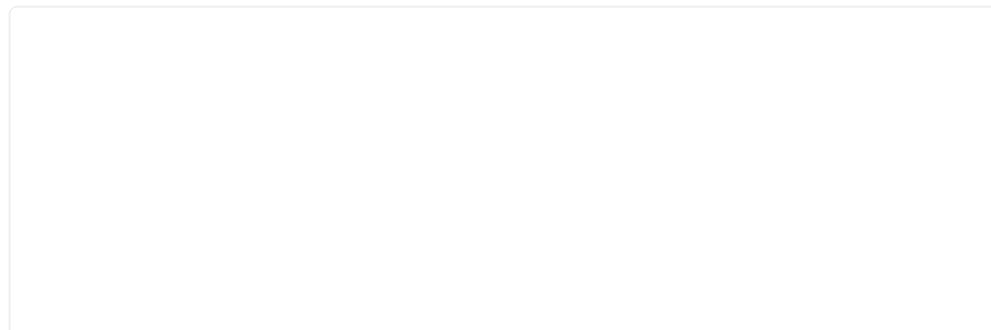
No Environment Assessment

Both the ICA judges and NHLC described the water rights dispute as “lengthy and complex.”

In January 2016, Circuit Court Judge Rhonda Nishimura ruled in favor of plaintiffs Healoha Carmichael, Lezley Jacintho and Na Moku Aupuni O Koolau. The year before they had sued land developer A&B, its subsidiaries East Maui Irrigation Co. and Hawaiian Commercial and Sugar Co., and the BLNR, its chair, Suzanne Case, and the County of Maui Department of Water Supply.

As the ICA ruling noted, for more than a century A&B and EMI diverted watered from streams in East Maui to sugar plantation operations.

A tweet from the governor:





Governor David Ige

@GovHawaii

We're committed to completing long-term water leases as required by law and will be working with applicants to make clear what the process is. ow.ly/oUKr50uAOoG #HIGov #CapitolConnection

4 8:01 AM - Jun 17, 2019

[See Governor David Ige's other Tweets](#)

In 2000 the Department of Land and Natural Resources issued four revocable month-to-month permits that permitted the companies to continue diverting water. The most recent permits were granted in December 2014.

The plaintiffs objected to what they said amounted to long-term water leases. They argued that the state violated Chapter 343 Hawaii Revised Statutes because the defendants did not prepare a required environmental assessment, which should have been triggered by the permit renewal.

Nishimura's 2016 decision prompted the Hawaii Legislature [to pass a bill](#) that same year allowing A&B and several other entities — small land owners, farmers and ranchers, and two utility companies — to retain water rights use on Maui, Kauai and Hawaii Island through 2019.

Legislation to extend the water use for another seven years passed the state House of Representatives [earlier this year](#) but failed to attract sufficient support in the state Senate.

States Has Permit Authority

In the view of the AG, Tuesday's ICA ruling "expressly vacated" the Circuit's Court's summary judgment in 2016.

"In light of this ICA decision, it is the position of the Department of the Attorney General that the Board of Land and Natural Resources has the authority to continue revocable permits on a month-to-month basis for additional one-year periods subject to meeting the requirements of HRS section 171-55," said Jayaram.

Summary judgment allows a court to fast-track a decision when there are no factual issues for the lower court to sort out. In such cases, the court can simply apply the law to the known, undisputed facts.

The problem with the lower court's decision, the appellate court said Tuesday, was that there were factual issues that the lower court still needed to sort out. One question was whether the continual holdover status of the permits meant that the permits were actually permanent, even though they were called temporary. The other question was whether allowing temporary permits to be held over for nearly two decades was in the state's best interest.

Case, who is also chair of the Department of Land and Natural Resources, issued a statement Tuesday.

"DLNR is committed to moving the water lease applications forward, working collaboratively with water users, and can now submit requests to the BLNR to continue the water RPs while this process is pending," she said. "This may take the immediate pressure off our farmers and utilities as long as they can meet the requirements of the statute. Many would have had a hard time completing the water lease process by the December 2019 expiration of their water permits."

Memorandum Opinion, Hawaii Intermediate Court of Appeals, June 18, 2019:

To print the document, click the "Original Document" link to open the original PDF. At this time it is not possible to print the document with annotations.

A note to our readers

While asking for your support is something we don't like to do, the simple fact is that our reporters, our journalism, and our impact rely on it. Since lifting our paywall and becoming a nonprofit in mid-2016, our local newsroom has benefitted from a stream of charitable support from people who want our type of journalism to survive. People like you who understand that our work is essential to a better-informed community. If you value the work of our journalists, show us with your tax-deductible support.

YES, I'LL DONATE TODAY

About the Authors



Chad Blair [🐦](#) [✉](#) [📡](#)

Chad Blair is the politics and opinion editor for Civil Beat. You can reach him by email at cblair@civilbeat.org or follow him on Twitter at [@chadblairCB](https://twitter.com/chadblairCB).

[Use the RSS feed to subscribe to Chad Blair's posts today](#)



Stewart Yerton [🐦](#) [✉](#) [📡](#)

Stewart Yerton is the senior business writer for Honolulu Civil Beat. You can reach him at syerton@civilbeat.org.

[Use the RSS feed to subscribe to Stewart Yerton's posts today](#)

Comments

Aloha, Civil Beat readers. We appreciate your thoughtful comments. But in order to make commenting an engaging experience for as many readers as possible, a few rules: Please limit the number of times you comment per story so everyone has a chance to participate without feeling like they are in the middle of an argument between just a few people. Language and words are important so please avoid snark and put-downs. **DO NOT WRITE IN ALL CAPS**; that comes across as yelling, don't you think? Not every comment may get posted. We may suspend commenters who overstep at our sole discretion.

No links, please.

Click on Sign In To Comment. Your old account should still work. If you don't already have an account you need to create one.

Need help? Email membership@civilbeat.org.

Sign in to comment

All Comments 1

Viewing Options ▾

mdhunt 1 hour ago

After a long battle over the "Water Theft Legislation" of 2019 and a clear public demand for environmental, economic, and social justice - DLNR CONTINUES to abdicate their legal responsibilities and genuflects to this "monthly renewal" end-run. Please help me understand WHY and what is at the core of this failure.

Is it simply A&B's greed and corrupting influen\$e in Hawaii's Government ??

Is it is time to sue the EPA for allowing Hawaii to continue failing to comply with the CWA (Clean Water Act) ?

Respect 🙏 Reply ↩

Share ↔ Report 🚩

THIS IS YOUR WAKE UP CALL.

Sign up for our FREE morning newsletter and face each day more informed.

And don't worry, we hate spam too! You can unsubscribe any time.