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DOUGLAS S. CHIN #6465
Attorney General of Hawaii

WILLIAM J. WYNHOFF #2558
LINDA L.W. CHOW #4756
Deputy Attorneys General
465 S. King Street, Room 300
Honolulu, Hawaii 96813
Tel. (808)587-2992
Fax (808) 587-2999

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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F. OTAKE
CLERK

Attorneys for Defendants Board of Land and Natural Resources,
Suzanne Case, in her official capacity as Chairperson of the
Board of Land and Natural Resources, and
the Department of Land and Natural Resources

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY
JACINTHO, and NĀ MOKU AUPUNI O
KO'OLAU HUI,

Plaintiffs,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, SUZANNE CASE, in her
official capacity as Chairperson of the Board
of Land and Natural Resources, the
DEPARTMENT OF LAND AND NATURAL
RESOURCES, ALEXANDER & BALDWIN,
INC., EAST MAUI IRRIGATION, LTD.,
HAWAIIAN COMMERCIAL AND SUGAR
CO., and COUNTY OF MAUI,
DEPARTMENT OF WATER SUPPLY,

Defendants.

) Civ. No. 15-1-0650-04 RAN
) (Environment; Declaratory Judgment)
)
) DEFENDANTS BOARD OF LAND AND
) NATURAL RESOURCES, SUZANNE
) CASE, AND DEPARTMENT OF LAND
) AND NATURAL RESOURCES' REPLY
) MEMORANDUM IN SUPPORT OF
) DEFENDANT COUNTY OF MAUI,
) DEPARTMENT OF WATER SUPPLY'S
) APPLICATION FOR LEAVE TO TAKE
) INTERLOCUTORY APPEAL OF THE
) ORDER GRANTING PLAINTIFFS'
) MOTION FOR PARTIAL SUMMARY
) JUDGMENT, FILED OCTOBER 21, 2015
) AND MOTION FOR STAY OF
) PROCEEDINGS AND/OR ENFORCEMENT
) OF THE ORDER PENDING APPEAL FILED
) JANUARY 13, 2016; CERTIFICATE OF
) SERVICE
)
) HEARING:
) Date : February 1, 2016
) Time : 9:30 a.m.
) Judge: Honorable Rhonda A. Nishimura
)

DEFENDANTS BOARD OF LAND AND NATURAL RESOURCES, SUZANNE CASE, AND
DEPARTMENT OF LAND AND NATURAL RESOURCES' REPLY MEMORANDUM IN
SUPPORT OF DEFENDANT COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY'S
APPLICATION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL OF THE ORDER
GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED
OCTOBER 21, 2015 AND MOTION FOR STAY OF PROCEEDINGS AND/OR
ENFORCEMENT OF THE ORDER PENDING APPEAL FILED JANUARY 13, 2016

Defendant County of Maui, Department of Water Supply (Defendant County) has applied for leave to take interlocutory appeal of the Order Granting Plaintiffs' Motion for Partial Summary Judgment (Order) pursuant to Hawaii Revised Statutes § 641-1(b) because the pivotal issue of the validity of the revocable permits that allow the diversion of water from east Maui to central Maui is at the heart of the Order and the entire case, an interlocutory appeal is appropriate.

A. Interlocutory Appeal is Advisable for the Speedy Termination of this Case

Hawaii Revised Statutes (HRS) § 641-1(b) allows for interlocutory appeals is allowed where a circuit court thinks it is advisable for the speedy termination of litigation before it. An immediate appeal of the Order could obviate the need for any further proceedings in this case. If Defendants prevail in the appeal and the revocable permits are determined to be valid and not requiring compliance with HRS chapter 343, then the case is done. No injunctive or other relief would be required and no further trial would be necessary.

B. The Flow of Water from East Maui Will Be Severely Impacted

Plaintiff asserts that the alarm raised by Defendant County of Maui, Department of Water Supply (Defendant County) is disingenuous and that, according to County spokesperson Rod Antone, Upcountry water availability will not be affected. With no disrespect to Mr. Antone, the flow of water from east Maui is not within the control of Defendant County. The Order has situated the parties such that the flow of water from east Maui will be severely impacted, making the provision of water to Defendant County unlikely.

The consequence of the Order that declared the revocable permits invalid, if not stayed, is that Defendants Alexander & Baldwin, Inc., East Maui Irrigation, Ltd., and Hawaiian Commercial and Sugar Co. (collectively Defendants A&B) would have no authority to continue to divert water that arises on state land from the lands within the revocable permit areas. Even if Defendants A&B were able to continue to operate the EMI ditch on state lands, Defendants A&B would have to segregate from comingled water¹ the water that arises on state lands from water that arises on EMI lands at each diversion point. That would seem to be an almost insurmountable task.

Plaintiffs also make contradictory statements in its Memorandum in Opposition with regards to the ability of Defendants A&B to continue to provide water to Defendant County. Plaintiffs state that even if “all the diversions of all streams within the areas covered by revocable permit numbers 7263, 7264, 7265, and 7266 were ordered to be shut down, one third of the water currently flowing through the EMI ditch would continue to flow.” *Memorandum in Opposition* at 5. Looking at the map that Plaintiffs attached as Exhibit H to their opposition, the East Maui Irrigation, Ltd., ditch system (EMI ditch), represented by the lines that run generally east to west, are situated largely on state land (depicted in yellow). Many of the diversions, labeled as intakes on the map and depicted by red squares along the EMI ditch, are also located on state land. If all of the diversions located on state lands are ordered to be shut down, there would be few places for the water to enter the EMI ditch, regardless of its source. The 40 million gallons of water on average that the Plaintiffs say would remain in the EMI ditch system is available only on paper as it would have few ways to enter the ditch system. If the diversions

¹ Comingled water refers to the water in a watercourse, i.e. a stream, which is made up of water contributed from both private lands and state lands through which the watercourse runs.

are shut down, there will be a significant decrease in the amount of water in the EMI ditch. If water is to flow in the EMI ditch, diversions must remain open. Plaintiffs cannot have it both ways.

DATED: Honolulu, Hawaii, January 28, 2016.



LINDA L.W. CHOW
Deputy Attorney General
Attorney for Defendants BOARD OF LAND
AND NATURAL RESOURCES, SUZANNE
CASE, in her official capacity as Chairperson of
the Board of the Board of Land and Natural
Resources, and the DEPARTMENT OF LAND
AND NATURAL RESOURCES

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEALOHA CARMICHAEL, LEZLEY) Civ. No. 15-1-0650-04 RAN
JACINTHO, and NĀ MOKU AUPUNI O) (Environment; Declaratory Judgment)
KO'OLAU HUI,)
) CERTIFICATE OF SERVICE
)
 Plaintiffs,)
 vs.)
)
 BOARD OF LAND AND NATURAL)
 RESOURCES, et al.,)
)
 Defendants.)
)
 _____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing document was duly served upon the following parties via U.S. mail, First Class, postage prepaid, and electronic mail:

David K. Frankel, Esq. (david.frankel@nhlchi.org)
Camille K. Kalama, Esq. (camille.kalama@nhlchi.org)
Summer L. Sylva, Esq. (summer.sylva@nhlchi.org)
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813

Attorneys for Plaintiffs Healoha Carmichael, Lezley Jacintho and Nā Moku Aupuni O Ko'olau Hui


David Schulmeister, Esq. (dschulmeister@cades.com)
Elijah Yip, Esq. (eyip@cades.com)
1000 Bishop Street, 10th Floor
Honolulu, Hawai'i 96813

Attorneys for Defendants Alexander & Baldwin, Inc., East Maui Irrigation Company, Ltd. and Hawaiian Commercial and Sugar Co.

Patrick Wong, Esq. (pat.wong@co.maui.hi.us)
Caleb Rowe, Esq. (caleb.rowe@co.maui.hi.us)
Dept. of Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawai'i 96793

Attorneys for County of Maui, Department of Water Supply

DATED: Honolulu, Hawaii, January 28, 2016.



Linda L.W. Chow
Deputy Attorney General
Attorney for Defendants
BOARD OF LAND AND NATURAL
RESOURCES, DEPARTMENT OF
LAND AND NATURAL
RESOURCES, and SUZANNE CASE