EARTHJUSTICE

MEMORANDUM

Date: April 19, 2019

To: Governor's Office, Hawai'i Legislators, and any interested fellow citizens

From: Isaac Moriwake, Esq., Earthjustice

Re: Legal response to the Governor's letter dated April 18, 2019 and the Administrative Director's memorandum dated April 15, 2019 regarding HB 1326, HD 2, relating to water rights

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The following discussion responds to Governor Ige's letter and Administrative Director Fuchigami's attached memorandum, dated April 18 and 15, 2019, respectively. In summary: the Ige administration's support of HB 1326, HD 2: (1) rests on a false premise concerning the legal effect of the circuit court order in the *Carmichael* case involving Alexander & Baldwin ("A&B"); (2) lacks any justification based on the terms of the order itself; and (3) runs afoul of the constitutional public trust doctrine and principles of good governance.

The Administration's Position Rests Entirely on a False Legal Premise.

The Ige administration's position and the supporting memorandum from Administrative Director are legally mistaken. Indeed, this entire affair is a house of cards built on the false legal premise that somehow the state circuit court's *Carmichael* order "likely applies to all pending lease applicants" (Mem. at 4). Not so, for several obvious reasons:

- First, it is well-established law that such "unpublished decisions of trial courts have no precedential value." *Chun v. Bd. of Trustees of the Employees' Ret. System*, 92 Hawai'i 432, 446 (2000).

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- Second and related to the previous, the decision only applies to the specific parties in the case—i.e., A&B. *See, e.g., King v. Order of United Travelers of Am.*, 333 U.S. 153, 160-61 (1948) (observing that a state lower court decision "is binding solely upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case" in state or federal court).

- Finally, the decision is on appeal, so it is not legally final. *See State v. Von Geldern*, 64 Haw. 210, 214 (1981) (recognizing that the judgment of the trial court "was not final since [the] appeal was still pending").

These elementary-level legal points should be not be novel or esoteric to the Ige administration and those it is relying on for legal advice. Rather, it appears more likely that the administration and its attorneys general simply prefer to ignore this law, or misinterpret it to suit other, non-legal purposes.

The *Carmichael* Order Does Not Support the Adminstration's Alarmist Position.

Moreover, actual review of the terms of *Carmichael* order (as opposed to false, unsupported claims about what it says and means) makes even clearer that it applies narrowly and does not prohibit the land board from continuing to issue revocable permits to small farmers and ranchers, as the administration has hyperbolically claimed. (See the relevant page of the order attached hereto as Exhibit "A.") The order observes that A&B's "holdover" status (which is a made-up scheme that the land board afforded only to A&B) continued for 13 years and specifically rules that "***A&B's*** continuous uninterrupted use of these public lands on a holdover basis for the last 13 years is not the 'temporary' use that HRS Chapter 171 envisions." *Id.* at 4, ¶ 6 (emphasis added).[1] The order further explains that "[o]therwise, holdover tenants

[1] In this context, those familiar with the long history of injustice and mismanagement by the state in its dispositions of water from state lands in Hawai'i can only find the administration's statement that "it is clear that the law cannot be applied in a discriminatory

could arguably allowed to occupy public lands almost *in perpetuity* for continuous, multiple one-year periods." *Id.* (emphasis added). Nowhere does the order purport to impose any bright-line restriction or time limit on revocable permits (as opposed to A&B's makeshift holdover). Rather, the order simply states that endless holdovers practically "in perpetuity" are "inconsistent with the public interest and the legislative intent." *Id.*

Earthjustice, Sierra Club, and others have sought to convey to the Ige administration that it should exercise leadership and chart a proactive and practical path forward, especially for smaller water users whom no one opposes—instead of threatening to cut off those users based on an extremist overreaction to and misrepresentation of a limited, non-precedential trial court order. Thus, the Ige administration, if it were focused on finding solutions, rather than exacerbating problems, could continue to issue permits to such minor users, in recognition of the public interest in such an accommodation, and subject to certain conditions also in the public interest: e.g., that the users are making diligent progress toward longer-term applications and approvals and will not harm the resource. This path forward would comply with the specific terms of the *Carmichael* order (again setting aside that the order does not apply to other parties), insofar as it would not allow the current situation to continue "in perpetuity." It would also be entirely consistent with the statute and the public interest. *See* Haw. Rev. Stat § 171-58(c) (allowing the issuance of permits "under those conditions which will best serve the interests of the State").

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fashion" (Ltr. at 2) more than a little ironic. Indeed, the very problem that precipitated the court's ruling in *Carmichael* and the subsequent repeated debacles around legislative "fixes" was *the state's blatant discriminatory application of the law in favor of A&B.*

The Administration's Proposed False "Solution" Does "the Wrong Thing, the Wrong Way, for the Wrong Reasons."

Ironically, the false "solution" that the Ige administration proposes—i.e., a blanket bailout or free pass under HB 1326 without any conditions or principled direction—is actually the path that is legally suspect, since it would completely abdicate the state's public trust duties over water resources in favor of private commercial interests, in violation of the constitutional public trust doctrine. *See In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 130-31 (2000) (emphasizing the "doctrine's basic premise, that the state has certain powers and duties which it cannot legislatively abdicate"). This attempt by the administration to further interfere with the ongoing judicial process in the *Carmichael* case involving A&B, and to pressure the legislature to fix a problem that the administration and its attorneys created and have the full ability and responsibility to untangle, is also a failure of leadership and good governance. It does nothing to facilitate a genuine, sustainable solution and in fact has the opposite impact because, in the timeless words of Dr. Martin Luther King, Jr., "there can be no peace without justice."

In short, the Governor's position based on Director Fuchigami's memo is the wrong decision, done the wrong way, for the wrong reasons.