



NATIVE HAWAIIAN LEGAL CORPORATION

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MEMORANDUM

DATE: April 21, 2019

TO: All Members of the Hawai'i State Legislature

FROM: THE NATIVE HAWAIIAN LEGAL CORPORATION,
Attorneys for Healoha Carmichael, Lezley Jacintho, and Nā Moku Aupuni O
Ko'olau Hui, Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants in
Carmichael, et al. v. BLNR, et al., Civ. No. 15-1-0650-04 RAN, CAAP-16-0000071

RE: Letter from Governor David Y. Ige dated April 18, 2019 and Memorandum from
Ford N. Fuchigami dated April 15, 2019 Regarding H.B. No. 1326, H.D. 2, Relating
to Water Rights

Dear Members of the Hawai'i State Legislature:

On Thursday, we witnessed the Executive Branch use its power and influence to misstate the law and champion a manufactured water crisis that has no basis in fact. The Governor, in his official capacity, urged you to cement for Alexander & Baldwin its 150-years of injustice on Kānaka Maoli by perpetuating indefinitely its primacy over our state waters in Maui. Regrettably, in a misguided attempt to paint Alexander & Baldwin the victim of laws applied in a discriminatory fashion, the Governor tore open the wounds of Maoli communities in East Maui who have suffered from Alexander & Baldwin's well-documented history of transgressions, and who were denied equal application of the law generation after generation six times over. The injustice they endured matters too. Or at least it should.

For decades and to no avail, these largely invisible, isolated, politically powerless communities – survived by a small cluster of mahi'ai kalo (taro farmers) themselves descendants of the mahi'ai who farmed when lo'i blanketed valley after valley – exhausted every legal avenue available to them to right the wrongs. But none was a match for a company that had amassed its money, power, and influence without equal on the backs of their loss and suffering. As they placed their faith and fate in our legal system, Alexander & Baldwin continued to drain their streams dry, sever their mauka-to-makai flows, destroy their historic ahupua'a systems, devastate their lo'i kalo, debilitate their fisheries, and fracture their intrinsic ties to 'āina with impunity. For these reasons, any appeal to move our state forward without so much as acknowledging this tragic history or examining the state's own culpability in it lays bare a profound ambivalence for the rule of law and for the trusted institutions and procedures that serve the interests of justice. An essential part of the social contract, the benefits of social order, is our agreement as citizens to respect and obey laws; to count on those in power to enforce them. When our system of government works as intended, it ensures that no one, no entity, has so much power that they can act above the law or pervert the course of justice.

To be absolutely clear and unequivocal, the passage of HB 1326, HD2 would immunize one permittee, and one permittee only, from a circuit court ruling invalidating their four revocable permits: Alexander & Baldwin. No other permits to divert water for farming, ranching, drinking, clean energy production, and other important uses – not a single one – has been declared unlawful. And none, other than Alexander & Baldwin, would be prohibited by any operative law or enforceable court order from relying on the law effective *prior to* and *after* Act 126 is repealed to authorize their continued water uses. In fact, Act 126's expiration clearly contemplated an end date after which the law would revert to its prior state. HB 1326, HD2 is drafted that way, too. That both bills mandate the statute "shall be reenacted in the form in which it read on the day prior to [Act 126's] effective date" for new and existing revocable permittees debunks the fiction that chaos and uncertainty will ensue in the absence of a statutory amendment. This reasoning is also consistent with the Department of Land and Natural Resources' *December 2018 Report to the Thirtieth Legislature, 2019 Regular Session*,

Relating to Water Rights in which it concluded “**DLNR does not have any immediate recommendations for further legislative action . . . at this time.**” The only significant change between the time the department completed its report and now is the December 20, 2018 sales agreement between Alexander & Baldwin and Mahi Pono memorializing the two parties’ \$62 million dollar wager on Alexander & Baldwin’s ability to legislate away a bad ruling at the expense and suffering of farming communities and water permit holders alike statewide.

Neither the Department of Land and Natural Resources nor the Department of the Attorney General is constrained by any law or court order to continue to provide all new and existing water permittees the water to which each of them is lawfully entitled. Again, Alexander & Baldwin is the only existing revocable permit holder whose water use was declared unlawful by a court of law. None of the other eight to nine permit holders, or new permit applicants for that matter, need be unduly concerned about a lawsuit to which none was a party, or a court order that cannot be enforced against their specific water uses. The Department of the Attorney General’s silence on this point in particular is unacceptable.

As the chief legal officer for the State of Hawai’i, the Attorney General has a duty to correct Governor Ige and his Administrative Director Fuchigami’s public misrepresentation that the court’s order in Carmichael, et al. v. BLNR, et al., “is the current state of the law” for all revocable water permit holders such that all their permits have been “legally prohibited or invalidated by a court of law.” That statement has no basis in law or fact. None. That the Executive Branch nevertheless introduced this ill-advised, legally erroneous statement into a public conversation admittedly mired in misinformation is irresponsible. Misstatements like these have fomented unnecessary discord and division across our communities, most of whose members have neither the money nor the power to secure a private audience with the Governor. The public’s trust and confidence in the ability of the Department of the Attorney General to provide sound, legal advice and counsel to government officials speaking on matters of law and policy deserve more and better than this.

As other attorneys have already attested, it is well-established law that such “unpublished decisions of trial courts have no precedential value.” Chun v. Bd. of Trustees, 92 Hawai'i 432, 446 (2000). While on appeal, the Carmichael order is merely the law of the case, not the law of the State. Likewise, it is only enforceable against the specific parties to that case, not all water users and pending lease applicants statewide. The agency is always free to adopt policies that avoid running afoul of court orders. Its policies, however, cannot be so restrictive or unreasonable as to infringe on the legal rights of *bona fide* water permit holders and lease applicants indiscriminately. The agency is obligated to exercise prudent judgment at all times. If it elects instead to adopt or threaten to adopt punitive policies against all water permit holders to defend one, all-powerful water permittee, the problem isn't the law. The problem is the agency's abuse of its discretion.

The Department of Land and Natural Resources and its Board can and should exercise their lawful authority to allow for the continued issuance of water disposition permits as necessary. They can and should exercise their discretion, as trustees of our public trust resources, to ensure continued access to water for the affected revocable permittees, most of whose uses reportedly have minimal or no significant effect on the environment. HAWAII ADMINISTRATIVE RULE §11-200-8 provides the department and the land board with legal authority to declare “minimal” or “insignificant” water uses “exempt” from the preparation of an environmental assessment. Indeed, for decades prior to the passage of Act 126, the department had repeatedly, without complaint or incident, declared the water uses of the Ka'ū ranchers and farmers, the small-scale diversified agricultural and domestic water users on Kaua'i, and other non-consumptive, non-injurious water permit holders statewide “exempt” from the preparation of an environmental assessment. No one has challenged any of these small-scale water users' exemption determinations or water permits in a court of law, most likely because their uses are *actually* minimal and *actually* have no significant effect on the environment. The law that existed prior to Act 126 worked fine for them. Those laws will be workable once again when Act 126 sunsets.

Alexander & Baldwin is a different story altogether. For good reason. The Carmichael lawsuit specifically challenges the Board of Land and Natural Resources' December 2014 decision to approve for another year (thirteen years total) continuation of their four revocable permits. And the story that is buried every time proponents of Act 126 or HB 1326, HD2 attempt to lump all revocable water permit holders together is that Alexander & Baldwin's permits supported water uses of a scale and magnitude unique to them alone as the State's largest commercial diverter ever. Their 74-mile ditch system crossed 33,000 acres of state ceded lands to divert, on average, approximately 160 million gallons of water every day from over 100+ streams and tributaries. Incredibly, the Board routinely approved this continued use without first requiring an environmental assessment. None was ordered at the December 2014 Board Meeting or at any time prior to then. None has been completed since. Ever.

We believed then, as we do now, that the HAR §11-200-8 exemptions applicable to small-scale water users are not applicable to Alexander & Baldwin. Small-scale water users' daily uses reportedly average tens of thousands of gallons of water (not 160 million gallons). Typically, their water sources originate from no more than a handful of streams or a single groundwater source (not 100+ streams and tributaries). These small-scale uses support small-scale drinking, farming, and ranching operations (not the profits of a publicly-traded, billion dollar company). For all these reasons, their resulting, cumulative impact on the environment are likely "minimal" or "not significant," thereby qualifying their uses for an exemption from an environmental assessment. The same conclusion, however, cannot be drawn from Alexander & Baldwin's large-scale, wholesale water use. To argue otherwise is not even credible.

In January 2016, the Carmichael court declared all four of Alexander & Baldwin's revocable permits invalid. All parties appealed to the Intermediate Court of Appeals. The Carmichael plaintiffs maintain that the lower court correctly invalidated the revocable permits, but for different reasons than those articulated in its court order. The other parties, by contrast, urge reversal of the court's permit invalidation. Aside from the propriety of ruling the permits invalid, the crux of the appeal is whether BLNR's action to continue Alexander & Baldwin's

revocable permits required (or not) the preparation of an environmental assessment. The Carmichael plaintiffs argue that an environmental assessment was required when BLNR approved the continuation of Alexander & Baldwin's revocable permits annually because the company's wholesale water use did not qualify for an administrative exemption. The other parties dispute this and contend that BLNR's continuation of Alexander & Baldwin's revocable permits did not trigger the protections provided under the Hawai'i Environmental Protection Act because the century-old status quo was simply continued via consecutive, one-year renewals of their revocable permits; a practice never before subject to our State's environmental review process. Straining credulity, Alexander & Baldwin conceded that while they "agree[d] that an environmental impact statement [wa]s required for a long-term lease of the License Areas,"¹ their continuing long-term use via the consecutive, one-year renewal of their revocable permits for thirteen years required, well, nothing. No EIS. No EA. On this point, BLNR – the trustee of our state water resources – agreed. BLNR even joined Alexander & Baldwin in arguing that plaintiffs were ineligible for relief under Hawaii's environmental protection statute.

Contrary to the statements made by Governor Ige's administration, the laws in place do not create uncertainty for all water permit holders. It is the abuse and misapplication of our laws for the benefit of one permit holder that are to blame for today's uncertainty, if any. Only one permit holder has sought to immunize itself from our laws and to escape the consequences of one courageous court ruling that dared to end their unlawful conduct. Only one permit holder has benefitted from the discriminatory application of our laws now and for over a century. Only one permit holder has been allowed to wreak havoc on our environment and to inflict harm upon the Maoli communities of East Maui for the last six generations with impunity. That one permit holder is Alexander & Baldwin. And no executive in the history of this state has ever used their power or public platform to bring an end to this longstanding and

¹ Alexander & Baldwin's concession stems from a 2003 circuit court order requiring the preparation of an environmental assessment, if not an environmental impact statement, prior to the issuance of any long-term lease requested by them.

well-documented injustice. None has attempted to provide even a shred of relief to the East Maui community after a century of diversions. Indeed, no governor until now has used their executive power and privilege to urge legislators to resurrect a law whose origin always intended to deprive the Carmichael plaintiffs of justice long overdue.

If enacted, HB 1326, HD2 would extend all revocable water permits renewed on a holdover basis annually for an additional seven years, from 2019 to 2026. The new ten-year limit more than doubles the three-year limit originally imposed by Act 126. To add insult to injury, HB 1326, HD2 would also eliminate completely BLNR's existing discretion to review holdovers annually provided the holdover is consistent with the public trust doctrine. The new law mandates that any one-year holdover subject to a contested case **"shall be continued without any action of the board pending completion of the proceedings."** In effect, any "contested" or "legally challenged" holdover – no matter the degree, nature, or duration of the alleged harm – would be continued as a matter of law until the close of proceedings; proceedings that may very well extend beyond 2026. East Maui residents still engaged in a contested case that began in 2001 find this provision especially egregious. The "pending completion of the proceedings" justification has harmed them greatly, prolonging injustice and permitting the status quo to continue for nearly two decades and counting. Their contested case has yet to be completed and has not been convened in over a decade. HB 1326, HD2 leaves BLNR even less incentive to take timely action on contested matters, and provides no meaningful relief or recourse in the interim for those most directly impacted by the actions of bad faith permittees or the inaction of an inert agency. Any law that would sanction this continued practice is indefensible.

Our clients are farmers too. They descend from and carry on the farming traditions and mālama 'āina values of Hawaii's first mahi'ai. They do not seek advantage, privileges, or special treatment from you or the Governor. Their request of you is simple and costs nothing: Allow Act 126 to sunset as intended on June 30, 2019. Leave the Board of Land and Natural Resources

Members of the Hawai'i State Legislature
April 21, 2019
Page 8 of 8

to do its work and steward our state resources. Do not stand in the way of justice. Instead, show them that the injustice they have endured matters to you and ends now.