

## **STATE AGENCY DELAYS LEAD TO TARO FARMER FRUSTRATION and SELF HELP**

**Background.** The law provides for various appropriate remedies for dealing with and managing serious conflicts over uses of stream water. The biggest conflicts over stream water uses have festered for years because of the massive diversions of East Maui streams by East Maui Irrigation Company for decades. EMI diverts as much water for its plantation uses in central Maui as the average amount that all of O`ahu consumes. The biggest conflict involves the water EMI is taking illegally from streams that feed taro patches and support native stream life vital to the preservation of Hawaiian traditional and customary practices in the cultural landscapes of Wailuanui and Honopou Valleys.

**State Agency Delays.** After 7 years of patiently waiting for the implementation of the appropriate administrative remedies theoretically available to it, Na Moku Aupuni O Ko`olau Hui's leadership has been repeatedly frustrated by the inaction of both the Board of Land and Natural Resources and the Commission on Water Resources Management in performing its public trust functions designed to protect the public interest and the water rights of East Maui taro farmers and subsistence gatherers. Those functions are based on the presumption that these agencies will respect and enforce clear law on water rights held by these farmers and gatherers, which are explicitly protected by the Hawai`i Constitution, the state Water Code, and a long line of water case law. These laws not only respect these practices of these cultural practitioners, but provide the basis for demanding that EMI demonstrate the ABSENCE of injury to these practitioners BEFORE diversions are allowed. Despite holding all the legal advantages of these laws, the BLNR and the Water Commission have delayed, without explanation or justification, the timely implementation of these laws, leading to chronic and severe cultural and monetary damages amongst farmers and gatherers trying to enforce their rights.

**Frustration.** For example, the CWRM has, without explanation or legal justification, delayed action on Na Moku's pending request to restore stream flows to support constitutionally protected water rights of taro farmers and subsistence gatherers since 2001, although the governing statute demands action within 6 months. Similarly, like its sister agency, the BLNR has allowed EMI to continue diversions from East Maui without regard for these same farmers and gatherers, even after a year since it supposedly acted to direct its staff to protect the water rights of those affected. The DLNR has failed to fully implement the year-old order of the BLNR, which was designed to provide farmers immediate interim relief from the effects of the existing EMI diversions.

**Self Help.** On July 9, 2008, taro farmers observing water being improperly diverted from Wailuanui Stream unilaterally released water from EMI diversions. The affected practitioners could not wait any longer, having suffered failed taro crops due to insufficient irrigation water, while EMI diversions took the water that would have saved

and supported their crops. This exercise of their constitutional rights did not follow the procedure outlined in either agency's timetable for action.

Nevertheless, the releases from EMI's diversion works are entirely consistent with the continuation of traditional and customary practices followed by their ancestors for growing taro and gathering from the streams. It is just that the BLNR and CWRM did not, and apparently chose not to, promptly protect the superior water rights of these practitioners as the law would otherwise require. Their failure to timely implement the law directly resulted in the level of frustration felt by all practitioners in East Maui who have attempted to patiently wait for the water to which they are entitled in the affected streams.

**Na Moku position.** The taro farmers and subsistence gatherers who took this unprecedented action in the midst of the delayed proceedings did so without prior approval of Na Moku. Na Moku has continued to make itself available to state agencies, in all available administrative processes, in efforts to seek the orderly restoration of streams illegally diverted by EMI. However, it cannot and does not condemn the unilateral releases of water into the streams last week by taro farmers frustrated by long, and unexplained, delays by state agencies. After all, tenants of an ahupua`a do have the reasonable right to access areas within the same ahupua`a to continue their traditional and customary practices, including taro growing and subsistence gathering.

Na Moku affirms its belief that these releases reflect the reasonable and overdue exercise of these rights, protected under the Hawai`i Constitution, statutes, and case law, with which responsible state agencies cannot and should not interfere. This responsibility for this resort to self help rests entirely with the BLNR/DLNR and the CWRM. Na Moku and the taro farmers who are now acting are all frustrated by these agencies failure to act timely enough to save their taro crops. Moreover, successful taro farmers contribute heavily to enhancing Hawai`i's food supply, its food security and long-term sustainability. Each agency should not exacerbate building tensions by any heavy-handed means to reacting to these farmer actions. The farmers are only reacting to belated processes each agency has not timely nor properly implemented.

In the spirit of moving forward in this unprecedented circumstance, Na Moku stands ready to cooperate with the CWRM and the BLNR/DLNR to continue any reasonably prompt process to assure that the rights of its members are respected and timely enforced.

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