S. C. NO. 26404

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUI TOMORROW, formally known as MAUI TOMORROW FOUNDATION, INC., and its supports,

Appellant,

vs.

STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; PETER T. YOUNG, in his official capacity as Chairperson of the Board of Land and Natural Resources and the Director of the Department of Land and Natural Resources; ALEXANDER & BALDWIN, INC.; EAST MAUI IRRIGATION CO.; MAUI LAND & PINEAPPLE CO., INC., COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY; HAWAII FARM BUREAU FEDERATION,

Appellees.

CIVIL NO. 03-1-0289-02
(Agency Appeal)

APPEAL FROM THE ORDER DENYING APPELLANTS' BEATRICE KEKAHUNA, MARJORIE WALLETT AND NA MOKU AUPUNI O KO'OLAU HUI AND NATIVE HAWAIIAN LEGAL CORPORATION'S MOTION FOR ATTORNEY'S FEES, COSTS AND EXPENSES, FILED NOVEMBER 18, 2003, filed on January 16, 2004

FIRST CIRCUIT COURT

HONORABLE EDEN ELIZABETH HIFO
Judge

NA MOKU AUPUNI O KO`OLAU HUI, BEATRICE KEKAHUNA, MARJORIE WALLETT, AND ELIZABETH LAPENIA, MAUI TOMORROW,

Appellants,

vs.

STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; PETER T. YOUNG, in his official capacity as Chairperson of the Board of Land and Natural Resources and the Director of the Department of Land and

CIVIL NO. 03-1-0292-02
(Agency Appeal)

Natural Resources; ALEXANDER & BALDWIN, INC.; EAST MAUI IRRIGATION CO.; MAUI LAND & PINEAPPLE CO., INC.; COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY; HAWAII FARM BUREAU FEDERATION,

Appellees.

ANSWERING BRIEF OF APPELLEE HAWAII FARM BUREAU FEDERATION

CERTIFICATE OF SERVICE

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS 4610-0
1600 Pauahi Tower
1001 Bishop Street
Honolulu, Hawaii 96813
http://www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242
Pacific Legal Foundation
Telephone (808) 733-3373
Facsimile (808) 733-3374

Attorney for Appellee
HAWAII FARM BUREAU FEDERATION

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I. STATEMENT OF THE CASE

A. Nature of the Case

It may come as a surprise that all of this Court's decisions about water law and the public trust were decided under federal – not Hawaii – law.[1]

That, however, is the foundation of the position taken by the Appellants, and in order to sustain their appeal, this Court must hold the Hawaii common law of water use arises under the federal Admission Act, or that the Admission Act is the source of an entirely different species of water right and trust obligation, one rooted firmly in federal law. The Appellants ask this Court, in the context of a post-judgment fee motion and on an incomplete record, to surrender its water law and public trust jurisprudence to federal review.

This is an appeal from the judgment of the Circuit Court of the First Circuit denying the motion of the Appellants Na Moku Aupuni O Koolau Hui, Beatrice Kekahuna, Marjorie Wallett, and Elizabeth Lapenia ("Appellants") pursuant to 42 U.S.C. § 1988 for federal civil rights attorneys fees, and for an award of fees pursuant to the "private attorney general" theory. Section 1988 provides that a "prevailing party" on a federal claim may, in the court's discretion, be awarded fees. The "private attorney general" theory, which has not been adopted by this Court, awards fees to private litigants in the limited circumstance where they take on the

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1. *See, e.g., In re Waiola O Molokai, Inc.,* 103 Haw. 401, 83 P.3d 664 (2004); *In re Water Use Permit Applications*, 96 Haw. 27, 31, 25 P.3d 802, 806 (2001); *In re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409 (2000); *Ka Pa'akai v. Land Use Comm'n*, 94 Haw. 31, 7 P.3d 1068 (2000); *State v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1999); *Public Access Shoreline Hawaii v. County of Hawaii*, 79 Haw. 425, 903 P.2d 1246 (1995); *Robinson v. Ariyoshi*, 65 Haw. 541, 658 P.2d 287 (1982).

role of public proxy and prosecute cases of great general importance and of benefit to the entire public.

The court below correctly rejected the Appellants' demand to charge Hawaii Farm Bureau Federation ("Farm Bureau") for *seven years* of fees and costs for a Circuit Court appeal that took *eight months* and one dispositive hearing to resolve because there is no federal claim in this case on which the Appellants prevailed against Farm Bureau. In the Circuit Court the Appellants argued that State Board of Land and Natural Resources ("BLNR" or "State") was required to consider "traditional and customary native Hawaiian rights" before issuing a long term license to transport water out of a watershed. This claim was based exclusively on this Court's water rights decisions and cases interpreting the "public trust" doctrine. The Appellants prevailed on that issue.

However, after judgment was entered, the Appellants recharacterized this claim as one under the federal Admission Act. The Appellants post-judgment change of theory that "out-of-watershed diversions" is a federal Admission Act and not state water law claim was plainly an after-the-fact re-imagination of their theory of the case to justify their claim for § 1988 fee shifting. Not one of the authorities cited in the Appellants' Opening Brief support their conclusions, however, and to Farm Bureau's knowledge, no decision of this Court or any federal court has ever held that questions of Hawaii water law, the public trust, and the State's duty to consider traditional and customary rights are anything but local questions with their source solidly in Hawaii common law and the Hawaii Constitution, not the federal Admission Act. A fee motion on an undeveloped record is not the case in which to consider this issue. Awarding the Appellants federal civil rights fees for prevailing for an "out-of-watershed diversion" claim

unnecessarily opens up Hawaii water and public trust jurisprudence to federal court oversight and review, now and in the future. The Appellants' motion for fees was deeply flawed and frivolous in the extreme, and the Circuit Court was correct in rejecting it.

Perhaps recognizing their position flies in the face of the settled principles of Hawaii law, the Appellants admit in their Opening Brief's Question Presented that they did ***not*** prevail on a claim under federal law, but instead prevailed "on a claim on state law issues, in which liability under 42 USC § 1983 is necessarily implied but not specifically adjudicated." Opening Brief at 11. However, having admitted that they did not prevail on a federal claim, the predicate to an award of fees pursuant to § 1988, there remains nothing left for the Court to do but affirm, as the appeal is as frivolous as the Appellants' motion for fees.

Additionally, the Court has never adopted the "private attorney general" theory of fee shifting, and this case is not the one in which to do so. This essentially interlocutory appeal does not present a set of facts or the complete record necessary to carefully consider adoption of a major departure from the American Rule under which each party bears its own costs of litigation: the fees sought are grossly excessive, this case is nearly indistinguishable from *In re Water Use Permit Applications*, 96 Haw. 27, 25 P.2d 802 (2001) the case in which this Court refused to adopt the "private attorney general" theory, and the Appellants claimed rights based on special racial status, not to benefit the entire public.

The judgment of the Circuit Court should be affirmed.

B. QUESTIONS PRESENTED

1. When a party obtains a judgment in its favor based solely on state law, can it subsequently change its theory of liability to one under federal law in order to be eligible for an award of federal civil rights attorneys fees?

2. When the Appellants admit that they did not prevail on a claim under federal law, may they demand federal attorneys' fees for an "implied but not adjudicated" federal claim?

3. Whether this appeal presents the proper factual circumstances for the Court to adopt the "private attorney general" doctrine, and if so, whether parties who seek relief based on their alleged status as members of a racially based class represent "all the citizens of the state" as the doctrine requires?

C. STATEMENT OF FACTS

The factual background and procedural history of this case is set forth in detail in the Answering Brief of Alexander & Baldwin, Inc. and East Maui Irrigation Co. ("A&B/EMI"), and is incorporated by reference. Farm Bureau's brief focuses on facts pertinent to its participation.

1. The Underlying Dispute Is About The Propriety Of A Water Lease From The State BLNR

In 2001, A&B/EMI applied to the BLNR for a long term lease to continue to use water sourced in streams in east Maui State-owned land and transport it through its privately built and maintained irrigation system to various residential and agricultural water users across Maui, as it has for the last 120 years. At a BLNR public meeting at which the lease was on the agenda, the Appellants demanded a contested case hearing. BLNR granted their request and held a

contested case, at the conclusion of which it approved the license, subject to any future instream flow standards established by the Commission on Water Resource Management which is currently considering these standards.

2. Farm Bureau Is In This Case To Protect The Interests Of Maui Family Farmers As End Users Of Water

Farm Bureau intervened in the contested case to represent the interests of Maui small and family farmers who are end users of a portion of the water from the A&B/EMI irrigation system. Since being formed by windward Oahu farmers in 1948, Farm Bureau has grown to a statewide organization of 2200 members in 10 local bureaus on every island. It is a grassroots not-for-profit organization of farming families united for the purpose of insuring the future of agriculture in Hawaii, encouraging the adoption of sensible land use and water allocation policies, preserving the State's agricultural land, and promoting the well-being of Hawaii farming and the State's economy.

3. The Appellants Appealed From The BLNR To Circuit Court For "Out Of Watershed Diversions"

The Appellants appealed the BLNR's approval of A&B/EMI's license to the Circuit Court pursuant to Haw. Rev. Stat. § 91-14. The appellees were the State, A&B/EMI (as the lease applicant), Maui Land & Pineapple and the County of Maui (as users of water), and Farm Bureau (as a non-profit agricultural association). Index to Record on Appeal ("ROA") Vol. 1, 01 [Appellants' Statement of the Case] ¶ 14, at 6 (Feb. 7, 2003). The Appellants protested the diversion of water "without proper notice, contrary to common law, and without any of the required protections afforded constitutionally protected traditional and customary native Hawaiian rights." *Id.* at 1. Specifically, the Circuit Court appeal set forth four claims:

– Count I – "due process"
– Count II – "out-of-watershed diversions"
– Count III – "H.R.S. Chapter 343" (environmental assessment)
– Count IV – "native Hawaiian rights and public trust doctrine"[2]

The Appellants' Statement of the Case contained *only* citations to state law authorities, and the Appellants cited only to article XII of the Hawaii Constitution when they asserted "out of watershed diversions violates Applicants Na Moku, et al.'s constitutionally protected rights." ROA Vol. 1, 01 [Appellants' Statement of the Case] ¶¶ 48 – 53, at 12-13 (Feb. 7, 2003) (citing State Water Code (Haw. Rev. Stat. ch. 174C); Haw. Const. art. XII, § 7; Haw. Rev. Stat. §§ 1-1 & 7-1; *Ka Pa'akai v. Land Use Comm'n*, 94 Haw. 31, 7 P.3d 1068 (2000); *State v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1999); *Public Access Shoreline Hawaii v. County of Hawaii*, 79 Haw. 425, 903 P.2d 1246 (1995); *Robinson v. Ariyoshi*, 65 Haw. 541, 658 P.2d 287 (1982).

Federal law was not mentioned or cited. With the exception of the due process claim, all other claims, by the Appellants' own explicit assertion, arose under state law. ROA Vol.1, 01 [Appellants' Statement of the Case] ¶¶ 2, 3, 4, 5, 6. In those allegations, the Appellants claimed only their appeal was based upon their rights "ensured by Hawaii's Constitution Article XI, §§ 1 & 7, Article XII, § 7 and HRS § 174C-63." *Id.* ¶ 3, at 4.

Farm Bureau was only included in Count II. The Appellants did not allege Farm Bureau violated any of their rights and did not seek any specific relief against Farm Bureau. *See id.* at 12-13 & 16-17 (seeking relief only against the State and A&B/EMI).

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2. These are the Appellants' labels for their claims.

4. All Of The Appellants' Circuit Court Pleadings Were Based Exclusively On State Law

Similarly, the Appellants' Opening Brief in the Circuit Court relied exclusively on state law, and cited the same authorities in the Statement of the Case, adding one additional state law authority, this Court's first Waiahole Ditch opinion. *See* ROA Vol. 1, 164 [Appellants' Opening Brief] at 15 – 20 (May 5, 2003) (citing *In re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409 (2000)). As before, federal law was not mentioned at all in any allegation against Farm Bureau. The Appellants never alleged Farm Bureau did anything wrong or violated any of their alleged rights; their claims were primarily against the State as the trustee of the "public trust" as expressed in the Waiahole Ditch case, and marginally against A&B/EMI as the applicant. Farm Bureau is not even mentioned.

Also, like the Appellants' previous pleadings, federal law was not mentioned. Indeed, the Appellants did not invoke or mention 42 U.S.C. § 1983 anywhere in their Statement of the Case or in any subsequent pleading until it surfaced in the post-judgment fee motion. Federal law was neither raised nor argued anywhere in the case except in Count I ("due process"). The Appellants' subsequent pleadings similarly limited Counts II – IV to state law issues and authorities. *See* ROA Vol. 3, 01 [Appellants' Reply Brief] at 4 – 8 (July 25, 2003).

5. The Appellants Lost Their Only Federal Claim And Judgment On The Remaining Claims Was Rendered on State Law Grounds Alone

The Circuit Court rejected the Appellants' Count I claim that the State violated due process, and entered judgment *against* the Appellants on this federal claim. ROA Vol. 3, 228 [First Amended Final Judgment] at 2 (Nov. 4, 2003). Of the remaining judgments in favor of the Appellants on Counts II - IV, only one was entered against Farm Bureau: Count II "related

to out-of-watershed diversions," and did not mention any violation of federal law by anyone, including Farm Bureau. The Circuit Court's Order similarly is based solely on state law and authority and contains no references to federal authority prohibiting out-of-watershed diversions. *See* Order Affirming in Part and Reversing in Part the BLNR at 3-4 (Oct. 10, 2003). All other claims, even if pleaded, were dismissed with prejudice. *See* ROA Vol. 3, 228 [First Amended Final Judgment] at 3 (Nov. 2, 2003).

6. Post Judgment, The Appellants Transformed Their Claims From Ones Exclusively Under State Law To "Admission Act" Claims

The Appellants' "special counsel" then filed the fee motion seeking attorneys' fees and costs of nearly $250,000.[3] The fees demanded were so extreme for an *eight month* old Circuit Court appeal because the Appellants attempted to reach back *seven years* for fees and costs from 1996, legal fees for Water Commission proceedings not related to the Circuit Court appeal, and for various impermissible items such as electronic legal research. After litigating the case through judgment solely on state law issues, the Appellants for the first time asserted they were entitled to fee shift because they prevailed on a federal claim. They prevailed, they asserted, not based on the Hawaii common law of water use or the "public trust," but because they are beneficiaries of the Hawaii Admission Act. This entirely new theory, raised for the first time post-judgment, relied on entirely different authority than that relied upon by the Appellants in support of their pre-judgment claims.

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3. The attorneys who filed the fee motion purported to represent the Appellants *and their attorneys* Native Hawaiian Legal Corporation as "special counsel" without noticing the Court or the other parties in the case. They simply appeared of their own accord.

In a footnote, the Appellants also claimed fees as "private attorneys general." The Circuit Court denied the Appellants' motion.[4]

7. The Appellants Admit On Appeal That They Did Not Prevail On a Federal Claim

On appeal, the Appellants now admit that they did not prevail on a federal issue in the Circuit Court. In the "Questions Presented" portion of their Opening Brief, they now assert that they prevailed on a "claim on state law issues," and that the federal claim is "necessarily implied but not specifically adjudicated." The Opening Brief also admits that the Circuit Court appeal was brought "for enforcement of state legislation." Opening Brief at 15.

II. STANDARD OF REVIEW

Contrary to the Appellants' assertion, they are not "entitled of *right*" to fees; award or denial of § 1988 fees is reviewed for abuse of discretion. *Johnson v. City of Aiken*, 278 F.3d 333 (4th Cir. 2002). *See also Ranger Ins. Co. v. Hinshaw*, 103 Haw. 26, 79 P.3d 119 (2003) (abuse of discretion standards for fee awards under Hawaii law and rules of civil procedure).

III. ARGUMENT[5]

In an exception to the American Rule that each party in civil litigation bears its own expenses, Congress provided that when a plaintiff prevails on federal civil rights claims, it may, in the court's discretion, be entitled to fee shift:

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4. A&B/EMI filed a motion that the Appellants' demand for fees violated Haw. R. Civ. P. 11, which the Circuit Court also denied. That issue is the subject of a separate appeal to this Court. Maui Tomorrow, et al. v. Alexander & Baldwin, Inc., et al., S. Ct. No. 22623 (Aug. 13, 2004).

5. A&B/EMI's Answering Brief analyzes in great detail the key arguments of the private parties in this case, and rather than repeat them, for efficiency Farm Bureau incorporates them by reference. Farm Bureau's brief will highlight those issues which specifically affect it.

> In any action or proceeding to enforce a provision of [42 U.S.C. §] 1983, . . . the court, ***in its discretion***, ***may allow the prevailing party***, other than the United States, a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b) (2003) (emphasis added). Section 1983 provides:

> Every person who, under ***color of any statute, ordinance, regulation, custom, or usage, of any State*** or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities ***secured by the Constitution and laws***, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2003) (emphasis added). The only claim on which the Appellants prevailed against Farm Bureau was Count II for "out of watershed diversions," which the Appellants now admit is a state law claim. Perhaps realizing that this admission is fatal to this appeal, the Appellants assert that this state law claim "implies" a federal claim that was "not specifically adjudicated." Sections 1983 and 1988, however, require much more than hidden claims not adjudicated. The Circuit Court did not abuse its discretion in denying fee shifting:

A. Having obtained judgment against Farm Bureau based entirely on state authority, the Appellants cannot radically alter their theory of liability post-judgment and claim the judgment was based on federal issues.

B. As the Appellants now admit, their water law, public trust, and "traditional and customary rights" claims arose under state, not federal law.

C. A claim under Hawaii water law does not "imply" a federal Admission Act claim.

D. Mere participation in a contested case to defend the interests of Maui small and family farmers is not action "under color of" state law.

E. This Court has not adopted the "private attorney general" theory of fee shifting, and the facts of the present case make it a particularly poor vehicle in which to do so.

A. The Appellants Waived Any Claim That "Out-of-Watershed Diversions" Is An "Implied-But-Not-Adjudicated" Federal Issue By Not Asserting It Was Federal Until After The Judgment Was Entered

After judgment was entered in their favor based entirely on state law, the Appellants claimed their judgment was based on the federal Admission Act and they were entitled to federal civil rights attorneys fees. The Court need not reach the issue of whether the Appellants' Count II claims for out-of-watershed diversions arose under the federal Admission Act because the doctrines of waiver and judicial estoppel protect against just this sort of prejudicial sandbagging.[6] *See Moniz v. Freitas*, 79 Haw. 495, 501, 904 P.2d 509, 515 (1995) (party should not be allowed to withhold evidence and "sandbag" opponent in a later proceeding). Because the Appellants' claim under Count II was pleaded and argued solely on state grounds and they prevailed against Farm Bureau based upon those actions, they waived any right to argue post-judgment that the judgment was obtained pursuant to federal law, and are judicially estopped from changing their legal theory in order to fee shift:

> a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

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6. "Sandbagging" occurs when a party argues a theory of the case after the other party has committed to another argument. *See, e.g., State v. Timoteo*, 87 Haw. 108, 115, 952 P.2d 865, 872 (1997) (party waived right to claim error after it convinced the trial judge to rule a particular way); *Coreas v. United States*, 565 A.2d 594, 600 (D.C. App. 1989) (government altered its theory of the case on rebuttal).

Nelson v. University of Hawaii, 99 Haw. 262, 268, 54 P.3d 433, 439 (2002) (citing *Roxas v. Marcos*, 89 Haw. 91, 124, 969 P.2d 1209, 1242 (1998)).

1. The Appellants Obtained Judgment By Asserting Only A State Law Claim Which Is "Directly Contrary To" Their Post-Judgment Claim That The Judgment Was Based On The Federal Admission Act

Throughout the short eight-month history of this case in Circuit Court, the Appellants never characterized Count II for "out-of-watershed diversions" as one under the federal Admission Act. They did not invoke § 1983 or assert the Admission Act until they sought to fee shift post judgment. Only after all parties and the Circuit Court relied on the Appellants' assertions and judgment was entered did the Appellants recast their legal theory to claim they prevailed in Count II based on federal law, section 4 and section 5(f) of the Admission Act. The Appellants' failure to mention federal law any time during the eight months the appeal was pending in the Circuit Court is compelling evidence that the claim that the Circuit Court appeal that everyone (but the Appellants) believed was a state water law case was, in reality, a federal Admission Act case is simply a brazen post-hoc rationalization for fee shifting. The alternative is that the Appellants purposefully concealed the federal nature of their claim until after judgment. Even the loose standard of "notice pleading" contemplated in the Rules of Civil Procedure requires plaintiffs to make the court and the other parties aware of the nature of the allegations against them. The Appellants appear to try and have it both ways: they prevailed on a state law claim, but demanded attorneys fees for prevailing on a federal claim. The only conclusion that flow from this is that either the Appellants' motion for fees is frivolous, or their conduct during the Circuit Court appeal it is a stark example of bad-faith tactical maneuvering and trial by ambush.

Here, the Appellants' current position that their Count II claims arose under the federal Admission Act is inconsistent with all of their pre-judgment positions that "out-of-watershed diversions" were prohibited by state law and state law alone. The record – and particularly the Judgment entered by the Circuit Court – is devoid of any indication the Appellants prevailed on a federal claim against Farm Bureau. All of their pre-judgment arguments regarding Count II were based exclusively on state law, the Judgment entered on Count II was only based on state law, and the Circuit Court held that "all other claims, counterclaims, or cross-claims are dismissed with prejudice."[7] First Amended Final Judgment at 3 (Nov. 4, 2003); Order Affirming in Part and Reversing in Part the BLNR at 3-4 (Oct. 10, 2003).

2. Farm Bureau Is Prejudiced By A Post-Judgment Change Of The Theory Of Recovery

Judicial estoppel prevents theory-morphing when the other party suffers prejudice. *Nelson*, 99 Haw. at 268, 54 P.3d at 439. The Appellants' alteration of their legal theory is prejudicial to Farm Bureau and the other parties as they had absolutely no notice until after judgment was entered that the Appellants asserted that "out-of-watershed diversions" was a federal Admission Act claim. After the Circuit Court and the parties relied on the Appellants making claims under state law theories only, and after judgment had been entered based on those arguments, it was too late for the Appellants to radically alter their theory of liability. "Common sense suggests that when a party makes a last-minute change that adds a new theory of liability, the opposing side is likely to suffer undue prejudice." *McCaulay v. Anas*, 321 F.3d 45, 52 (1st

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7. Thus, even if the Appellants raised a federal issue in their appeal to the Circuit Court, the court *dismissed with prejudice*, and the Appellants have not appealed that judgment to this Court.

Cir. 2003). The prejudice in this case is magnified because the Appellants' change of theory came well beyond the "last-minute," it came after judgment had been rendered.

By concealing their purported federal claim from the Circuit Court and the parties until after judgment, the Appellants have caused Farm Bureau to suffer irrevocable prejudice. If "out of watershed diversions" is a federal Admission Act claim, then Farm Bureau was denied the opportunity to have these allegations against it litigated in federal court, and its right to remove the case to federal court has been prejudiced.[8] The federal courts "shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C. § 1331 (2003). The presence of a federal claim in a state court matter subjects the entire case to removal to federal court by any defendant. 28 U.S.C. § 1441 (2003). If the Appellants are successful in this case, water law cases in Hawaii courts will be subject to removal to federal court and to federal oversight.

B. Prevailing On State Law Claims Alone – As The Appellants Now Admit They Did – Is Insufficient To Trigger A Demand For § 1988 Fees

The predicate to an award of fees under § 1988 is to bring a federal claim and prevail, which the Appellants now admit they did not do. The Appellants admit they prevailed "on a *claim on state law issues*, in which liability under 42 USC § 1983 is *necessarily implied but not specifically adjudicated*," so the Court should affirm. Opening Brief at 11. "Implying" a federal claim and "not specifically adjudicating it" is a far cry from meeting the § 1988 standard of "prevailing" on a federal claim. "If it is determined that no [federal] constitutional right was

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8. Since the due process claim was not asserted against Farm Bureau, that allegation could not have been the basis for a removal to federal court by Farm Bureau. Also, to allow the Appellants to recover fees when they only gave notice of a federal claim after judgment was entered would deny Farm Bureau due process as it had no prior notice or opportunity to litigate the alleged federal issue before being potentially liable for seven years of fees and costs.

violated, the predicate for the award of fees vanishes." *McDonald v. Doe*, 748 F.2d 1055, 1057 (5th Cir. 1984) (plaintiff lost claim for violation of due process but prevailed under state law; fees denied since plaintiff did not prevail on federal claim). If a federal claim is joined with state law claims, as the Appellants' was here (out-of-watershed diversions joined with due process), to be awarded fees the party must win the federal claim. The Appellants *lost* their only colorable federal claim – due process – and have not appealed that judgment.[9] Every federal circuit that considered the issue holds that a plaintiff who brings an action under § 1983 along with state claims but prevails only on the state claims, is not a § 1988 "prevailing party." *See, e.g.*, *Mateyko v. Felix*, 924 F.2d 824, 828 (9th Cir.) ("All circuits that have considered the issue have held that a plaintiff . . . who loses on his federal claim and recovers only on a pendent state claim is not a prevailing party under § 1988 and may not be awarded fees."), *cert. denied*, 502 U.S. 814 (1991); *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 653–54 (D.C. Cir. 1994) ("We agree with the view of our sister circuits, which have uniformly held that a plaintiff who loses on the merits of its federal civil rights claim is not a 'prevailing party'"); *Kelly v. City of Leesville*, 897 F.2d 172, 177 (5th Cir. 1990) (plaintiff prevailed on state law claim but expressly lost first amendment challenge – no fees awarded). If the plaintiff prevails on a state due process claim but loses a federal due process claim, she is not a "prevailing party." *Robles v. Prince*

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9. The appellees prevailed on the due process claim, so if anyone is liable for § 1988 fees and costs, it is the Appellants. If this Court, like the Court of Federal Claims and the U.S. Court of Appeals for the District of Columbia Circuit instituted a "Chutzpah Championship" or "Chutzpah Award," Farm Bureau would respectfully suggest the Appellants' demand for § 1988 fees as a prevailing party on a federal claim, despite being the non-prevailing party, receive a nomination for the inaugural trophy. *See* Jack A. Guggenheim, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, The Chutzpah Award, Chutzpah Doctrine, And Now, the Supreme Court*, 87 Ky. L. J. 417, 419 (1999) (discussing, among other items, the federal courts' awards for baseless audacity and legal cheek).

George's County, 302 F.3d 262 (4th Cir. 2002) (plaintiff prevailed only on state law claim and due process claims were dismissed; trial court did not abuse its discretion in denying fees); *Johnson v. City of Aiken*, 278 F.3d 333, 336 (4th Cir. 2002) ("plaintiffs who do not prevail on their federal claims but achieve success on supplemental state law claims are not prevailing parties under § 1988, and are therefore not entitled to an award under that statute"). This is but a sampling of the reported cases on the subject, which all hold the same way.

The Appellants cite *Maher v. Gagne*, 448 U.S. 122 n.9 (1980) for the proposition that "a party need not explicitly prevail on a § 1983 action to establish the existence of a substantial federal claim." Opening Brief at 16-17. This is not what *Maher* holds. That case holds that prevailing on a federal *statutory* claim (as opposed to a federal constitutional claim) will trigger § 1988, and that winning via settlement is "prevailing." *Maher* says nothing about whether prevailing on a state law claim that "implies but does not adjudicate" an alleged federal claim meets the standard for "prevailing" on a federal claim.

C. A Hawaii Water Law Claim For "Out-of-Watershed Diversions" Does Not "Imply" A Federal Claim

Under this Court's settled understanding, the Hawaii common law of water and "public trust" are not matters of federal law for which a person may bring an Admission Act claim or a federal civil rights claim under 42 U.S.C. § 1983. Not a single case relied upon by the Appellants supports their freshly-minted theory that claims involving "out-of-watershed diversions," the "public trust," and "customary and traditional rights" are governed by the federal Admission Act.[10] The radical shift in the Appellants theory of the case can be seen by comparing

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10. The Appellants repeatedly refer to the claims they brought in the BLNR contested case. *See, e.g.*, Opening Brief at 22. However, the relevant claims for purposes of this appeal are (continued...)

their Opening Brief in the Circuit Court appeal (ROA Vol. 1, 164) at pages 15 – 20, which sets forth *Robinson*, the Waiahole Ditch case, Haw. Const. art XII, § 7, *Ka Pa'akai*, *PASH*, and Haw. Rev. Stat. §§ 1-1 & 7-1 as the controlling authority, not the admission act with their post-judgment fee motion (ROA Vol.4, 01) at pages 4 – 6, which mention none of these authorities. The cases relied upon by the Appellants in their fee motion deal only with the State's duties under section 4 of the Act (relating to Hawaiian Home Lands) and section 5(f) (ceded lands revenues). *See Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192 (1995) (challenging land awards by the Hawaiian Homes Commission); *Pele Defense Fund v. Paty*, 73 Haw. 578 (1992) (claimed injury based on state's use of ceded lands); *Price v. State*, 939 F.2d 702 (9th Cir. 1991) (claim to ceded land revenues); *Hou Hawaiians v. Cayetano*, 996 F. Supp. 989 (D. Haw. 1998) (Hawaiian Home Lands and ceded land revenues). These cases tell us nothing about water law or the requirements the State must follow when it continues to lease water. Perhaps recognizing this, the Appellants instead argue that because they are beneficiaries of the Admission Act, any case they bring is automatically a federal civil rights case. But for the Admission Act, they argue, the Hawaii Constitution would not contain a public trust provision; since the public trust owes its existence to federal law, any claim on public trust issues is a federal question. Opening Brief at 16. This "but for" causation test suggested by the Appellants sweeps away settled principles of federalism and state sovereignty, undermines this Court's public trust jurisprudence which appears to be based exclusively on Hawaii law, and invites the federal courts to abandon their considerable deference to that jurisprudence and intrude into an

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10. (...continued)
the four Counts the Appellants set forth in their Statement of the Case in their appeal of the contested case to Circuit Court. Any claim not appealed from the BLNR contested case to the Circuit Court was waived.

area that was previously believed insulated from federal scrutiny and review. Accepting the Appellants' strained reasoning would invite similar overreaching in other areas of law which until now have been assumed to be exclusively matters of local concern, for is there an issue of Hawaii law that does not, in some way, owe its existence to the Admission Act?

In any event, a claim under the Admission Act, even if raised by the Appellants, could not have been brought against Farm Bureau and the other private parties, since it is the State that has trust duties to ceded lands and Hawaiian Homes lands under the Admission Act, not private actors.

D. Farm Bureau's Participation In The Contested Case Is Not "Acting Under Color" Of State Law

Even if the Appellants did properly allege a federal claim for "out-of-watershed diversions/Admission Act" they did not state a claim under § 1983 against Farm Bureau as it does not act "under color of state law." To state a cause of action under § 1983, the Appellants were required to allege and prove that Farm Bureau subjected them to the deprivation of a federal right while acting under color of state law. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) (to state a claim for relief under § 1983 plaintiffs must establish they were deprived of a federal right, and that the alleged deprivation was committed under color of state law); *Makanui v. Bd. of Educ.*, 6 Haw. App. 397, 404, 721 P.2d 165,170 (Haw. App. 1986) (color of law requirement). Obviously, Farm Bureau is a private party, was not the applicant for the lease of water, and was not in a position to do anything about whether the BLNR considered the Appellants' purported rights prior to issuing the lease of water to A&B/EMI. Some of Farm Bureau's members are simply end users of the water, nothing more, and Farm Bureau's participation in the BLNR contested case and the subsequent appeal to the Circuit Court cannot

be construed as acting under color of state law to affect the Appellants' alleged federal rights since Farm Bureau had an absolute constitutional right and privilege to appear. To hold Farm Bureau liable for fees simply because it participated below would infringe on its exercise of its rights to petition government, speech, and due process, and any order requiring Farm Bureau to pay legal fees for merely exercising these rights would raise severe constitutional concerns.

As a party in the case only to defend the rights of family and small farmers who are among end users of water from the east Maui irrigation system, Farm Bureau cannot be liable for any fees or costs because a party prevailing on civil rights claim may only seek fees from an entity that violated its civil rights, not from others. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989). In that case, flight attendants sued their employer for discrimination and their union intervened. *Id.* at 757. There was no allegation the union discriminated against the flight attendants, and it was in the litigation on behalf of other airline employees whose rights may have been affected by the outcome. After the flight attendants prevailed on their federal civil rights claims for discrimination against their employer,[11] they sought fees from the intervenor under 42 U.S.C. § 2000e-5(k). That statute contains the same language as § 1988 and permits the court to award fees and costs to the "prevailing party" in its discretion, and the Court held that § 1988 should be interpreted in the same manner. *Zipes*, 491 U.S. at 759 n.2. The U.S. Supreme Court held that the lower court abused its discretion in allowing fees against the "innocent intervenor" because its presence in the litigation was "particularly welcome," it had not "been found to have violated anyone's civil rights," *id.* at 762, and it was in the case to protect persons that no other party in the litigation had any interest in

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11. Unlike appellants who explicitly *lost* the only federal claim in this case, the due process issue.

protecting. *Id.* at 765. *See also Natural Resources Defense Council, Inc. v. Thomas*, 801 F.2d 457, 461 – 462 (D.C. Cir. 1986) (industry intervenors not liable for fees). Here, Farm Bureau intervened in the BLNR contested case to protect the interests of Maui farmers whose interests were not adequately represented by the other parties already participating in the case. Therefore, appellants should recover nothing from Farm Bureau.

E. This Appeal Is Not The Right Case In Which To Adopt The "Private Attorney General" Theory Of Fee Shifting

"Bad facts make bad law."[12] The facts of the present case could be used as classic illustration that old law school maxim were the Court to approve the Appellants' demand for fee shifting and adopt the "private attorney general" theory in this appeal. The facts make the present case an exceptionally poor vehicle for the Court to analyze the respective merits of the private attorney general doctrine. If the facts of the present case were used as the exemplar for future applications of the private attorney general theory, doctrinal chaos and overreaching would result:

First, the Appellants have not narrowly drawn their request and seek seven years of fees for an appeal that took eight months to resolve. Affirming would encourage similar inflated fee demands. To highlight the excessive nature of the Appellants' request:

1. "Special counsel" for the Appellants sought nearly $16,000 for a motion that utterly lacks legal and factual merit and appears to be a brief recycled from another case.[13]

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12. *Kennedy v. Lockyer*, 2004 U.S. App. LEXIS 17190 (9th Cir. June 14, 2004) (O'Scannlain, J., dissenting); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447, 453 (S.D.N.Y. 2000).

13. Note that the fee motion refers to "State *Defendants*" despite the fact there are no "defendants" in this case, only appellees. Fee Motion at 20 (emphasis added). Additionally, it is (continued...)

2. In this ***eight month*** old administrative appeal, the Appellants seek a total of nearly $250,000 in fees and costs going back ***seven years*** to 1996, long before A&B/EMI even applied to the State for the lease, and long before many of the cases it relied upon to secure its judgment on Count II were decided.[14]

3. The Appellants seek fees for work done on a separate matter before the Water Commission.

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13. (...continued)
based on "Rule 54(d) of the *Federal* Rules of Civil Procedure." *Id.* at 3 (emphasis added). It also remains unclear by what authority the attorneys for the Appellants, Native Hawaiian Legal Corporation ("NHLC"), jumped the Bar in the Circuit Court and went from being Counsel of Record for the Appellants to a party seeking recovery of costs on its own behalf. The attorneys for the Appellants clearly were not "prevailing parties" since they never were "parties" to the Circuit Court appeal at all. It also remains unclear by what authority the Appellants' and NHLC's "special counsel" purported to represent them since it never appeared in the case, but instead of its own accord and without any notice to the Circuit Court and the other parties, filed the Appellants' motion for fees. *See Oluwo v. New York State Dep't of Insurance*, 1997 U.S. Dist. LEXIS 8050 *12 n.5 (S.D.N.Y. 1997) (counsel filed briefs without first appearing, court noted that as a general rule "the Court does not sanction the practice of attorneys appearing before the Court for Oral Argument and submitting briefs without filing a Notice of Appearance"); *Kitsch v. Riker Oil Co.*, 256 N.Y.S.2d 536, 537 (N.Y. App. 1965) ("The plaintiff is represented in the action by an attorney of record, Edmund F. Supple, Esq. Another attorney has made the application for relief herein. There is no authority for a party to be represented by more than one attorney in an action."). *See also Wehringer v. Douglas Gibbons-Hollyday & Ives, Inc.*, 373 N.Y.S.2d 347, 349 (N.Y. App. 1975) (lawyer who fails to file a notice of appearance is "totally without standing," and "by such attempted dual representation, attempts to act in plain disregard of the law and would, in effect, unfairly whipsaw the plaintiff between counsel of record and an interloper"); *Jackson v. Trapier*, 247 N.Y.S.2d 315, 316-317 (N.Y. S.Ct. 1964) ("Moreover, there is no authority for a defendant to have more than one attorney of record. Such procedure would substantially affect the rights of the plaintiffs as well as create chaos in the courts. A defendant could serve inconsistent answers, make duplicate motions or even stipulations to which he might or might not be bound. In addition, the plaintiff would be required to serve duplicate papers.").

14. Since appellants purported to challenge "A&B and EMI's diversions [which] have continued for nearly 130 years," one might expect them to claim attorneys fees back to 1873, but perhaps their billing records are not that complete.

4. The Appellants seek to cost shift for on-line legal research which is clearly impermissible. *See Bjornen v. State Farm Fire and Cas. Co.*, 81 Haw. 105, 912 P. 2d 602 (Haw. App. 1996).

Second, as analyzed above, Farm Bureau is an innocent intervenor and not the type of party typically held liable for fees in private attorney general doctrine cases where competing interests are establishing their respective rights in a limited resource.

Even if the Court considers adoption of the private attorney general theory, the Appellants have not shown that the Circuit Court abused its discretion when it rejected their claim for fee shifting. The present case is similar to the case in which the Court declined to adopt the private attorney general theory. *In re Water Use Permit Applications*, 96 Haw. 27, 31, 25 P.3d 802, 806 (2001). In that case, without adopting it, the Court set forth the three-part analysis for reviewing claims under the private attorney general doctrine: (1) the strength of the public policy vindicated; (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff; and (3) the number of people standing to benefit from the decision. *Id.* at 30, 25 P.3d at 805 (citing *Serrano v. Priest*, 20 Cal. 3d 25, 141 Cal. Rptr. 315 569 P.2d 1303 (1977)). The Court held that the theory, even if adopted, was not applicable to situations where, like here, the government agency is attempting to balance the many competing public and private interests in water resources.

The Appellants' demand for fees in the present case is even less compelling because it also fails the third part of the private attorney general test, because they were not, by their own admission, bringing this case to benefit "all of the citizens of the state, present and future." *In re Water Use Permit Applications,* 96 Haw. at 31, 25 P.3d at 806. They claimed their

rights stemmed from their allegedly protected status as members of a limited racial class endowed with special benefits pursuant to the Admission Act. Contrast this to the general public trust set forth in the Court's water rights jurisprudence which is much broader in scope of beneficiaries.

If anything, the facts of the present case demonstrate why the Court should provide definitive guidance to the lower courts and firmly reject the private attorney general theory of fee shifting in water rights and public trust cases. Otherwise, the antics witnessed in this case – shifting theories of liability, hide-the-ball pleading, and wasting valuable resources with frivolous motions for fees – will surely continue in similar cases, and the Court's docket will remain needlessly congested with such matters.

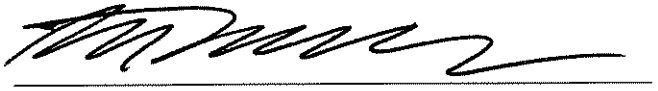
IV. CONCLUSION

The Circuit Court should be affirmed. Farm Bureau is an innocent intervenor, did nothing to infringe the Appellants' alleged rights, and is not liable for any of their grossly excessive and inflated fees and costs.

DATED: Honolulu, Hawaii, September 1, 2004.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



ROBERT H. THOMAS
Pacific Legal Foundation
Attorney for Appellee
HAWAII FARM BUREAU FEDERATION

S. C. NO. 26404

IN THE SUPREME COURT OF THE STATE OF HAWAII

MAUI TOMORROW, formally known as MAUI TOMORROW FOUNDATION, INC., and its supports, Appellant, vs. STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; PETER T. YOUNG, in his official capacity as Chairperson of the Board of Land and Natural Resources and the Director of the Department of Land and Natural Resources; ALEXANDER & BALDWIN, INC.; EAST MAUI IRRIGATION CO.; MAUI LAND & PINEAPPLE CO., INC., COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY; HAWAII FARM BUREAU FEDERATION, Appellees.	CIVIL NO. 03-1-0289-02 (Agency Appeal) APPEAL FROM THE ORDER DENYING APPELLANTS' BEATRICE KEKAHUNA, MARJORIE WALLETT AND NA MOKU AUPUNI O KO'OLAU HUI AND NATIVE HAWAIIAN LEGAL CORPORATION'S MOTION FOR ATTORNEY'S FEES, COSTS AND EXPENSES, FILED NOVEMBER 18, 2003, filed on January 16, 2004 FIRST CIRCUIT COURT HONORABLE EDEN ELIZABETH HIFO Judge
NA MOKU AUPUNI O KO`OLAU HUI, BEATRICE KEKAHUNA, MARJORIE WALLETT, AND ELIZABETH LAPENIA, MAUI TOMORROW, Appellants, vs. STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES; STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES; PETER T. YOUNG, in his official capacity as Chairperson of the Board of Land and Natural Resources and the Director of the Department of Land and Natural Resources; ALEXANDER &	CIVIL NO. 03-1-0292-02 (Agency Appeal)

BALDWIN, INC.; EAST MAUI IRRIGATION)
CO.; MAUI LAND & PINEAPPLE CO., INC.;)
COUNTY OF MAUI, DEPARTMENT OF)
WATER SUPPLY; HAWAII FARM BUREAU)
FEDERATION,)
)
Appellees.)
)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

Alan T. Murakami, Esq.
Moses K.N. Haia, III, Esq.
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813
Attorneys for Appellants
NA MOKU AUPUNI O KO`OLAU HUI, BEATRICE KEKAHUNA, MARJORIE WALLETT AND ELIZABETH LAPENIA

Linda Chow, Esq.
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawaii 96813
Attorney for Appellees
STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, PETER T. YOUNG

Richard Kiefer, Esq.
Richard Kiefer Attorney at Law LLC
444 Hana Highway, Suite 204
Kahului, Hawaii 96732
Attorney for Appellee
MAUI LAND & PINEAPPLE CO., INC.

Isaac D. Hall, Esq.
2087 Wells Street
Wailuku, Hawaii 96793
Attorney for Appellant
MAUI TOMORROW, formally known as Maui Tomorrow Foundation, Inc.

Brian T. Moto, Esq.
Corporation Counsel
Jane E. Lovell, Esq.
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793
Attorney for Appellee
COUNTY OF MAUI
DEPARTMENT OF PUBLIC
WORKS

Dennis Niles, Esq.
Tom Pierce, Esq.
Paul Johnson Park & Niles
P.O. Box 870
Wailuku, Hawaii 96793
Special Counsel for NATIVE
HAWAIIAN LEGAL
CORPORATION AND
APPELLANTS NA MOKU AUPUNI
O KO`OLAU HUI, BEATRICE
KEKAHUNA, MARJORIE
WALLETT

Alan M. Oshima, Esq.
Randall K. Ishikawa, Esq.
Oshima Chun Fong & Chung
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
and
David Schulmeister, Esq.
Elijah Yip, Esq.
Cades Schutte LLP
1000 Bishop Street, 12th Floor
Honolulu, Hawaii 96813
Attorneys for Appellees
ALEXANDER & BALDWIN, INC.
AND EAST MAUI IRRIGATION
COMPANY, LIMITED

DATED: Honolulu, Hawaii, September 1, 2004.

DAMON KEY LEONG KUPCHAK HASTERT

ROBERT H. THOMAS
Pacific Legal Foundation
Attorney for Appellee
HAWAII FARM BUREAU FEDERATION