

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

August 13, 2021

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

MAUI

Decision making regarding:

- (1) Alexander & Baldwin, Inc. (“A&B”) and East Maui Irrigation Company, LLC’s (“EMI’s”) July 22, 2021 Request for the Issuance of New Revocable Permits for Tax Map Keys (2) 1-1-001:044 & :050, (2) 2-9-014:001, 005, 011, 012 & 017, (2) 1-1-002:por. 002, and (2) 1-2-004:005 & 007 for Water Use on the Island of Maui; and
- (2) Sierra Club of Hawaii’s July 22, 2021 Request for a Contested Case Hearing to Challenge A&B/EMI’s July 22, 2021 Request for the Issuance of New Revocable Permits for Tax Map Keys (2) 1-1-001:044 & :050, (2) 2-9-014:001, 005, 011, 012 & 017, (2) 1-1-002:por. 002, and (2) 1-2-004:005 & 007 for Water Use on the Island of Maui

Pursuant to Section 92-5(a)(4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board’s powers, duties, privileges, immunities and liabilities.

## I. BACKGROUND

East Maui Irrigation Company, (“**EMI**”), a subsidiary of Alexander & Baldwin, Inc. (“**A&B**”), has operated a ditch system in East Maui for over 140 years. The ditch system traverses both public and private land. In 1938, the Territory of Hawai‘i and EMI entered into the East Maui Water Agreement, which provided for the disposition of water licenses at public auction for lands owned by the Territory at four license areas identified (from west to east) as Huelo, Honomanu, Keanae, and Nahiku (the “**license areas**”). The most recent long-term licenses were issued in the 1950s and 1960s. Following their expiration, annual revocable permits were issued by the Board.

On May 26, 2000, the Board approved the issuance of four revocable permits (“**RPs**”) to A&B and EMI to take water from the four license areas. RP S-7263 (for Honomanu), S-7264 (for Huelo) and S-7265 (for Keanae) were issued to A&B, and RP S-7266 (for Nahiku) was issued to EMI. Collectively, A&B and EMI are referred to as “**Permittee.**” Copies of the RPs are attached hereto as **Exhibits 1 – 4.**

Roughly 25 streams in the license areas were the subject of a lengthy contested case

hearing before the Commission on Water Resource Management (“**CWRM**”) to set interim instream flow standards (“**IIFS**”) for each stream. CWRM’s June 20, 2018 decision and order (“**CWRM D&O**”) resolving the contested case hearing is available here: <http://files.hawaii.gov/dlnr/cwr/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>

As the Board is aware, the four RPs have also been the subject of recent litigation. In 2018, 2019, and 2020, the Board approved the continued holdover of the RPs for subsequent year-long periods.<sup>1</sup> In Civil No. 19-10019 (JPC) (hereinafter, the “**direct action**”), the Sierra Club of Hawai‘i (“**Sierra Club**”) challenged the Board’s November 9, 2018 and October 11, 2019 decisions to continue the RPs for the 2019 and 2020 calendar years (respectively). The direct action went to trial in July 2020 and was decided in favor of Defendants on April 6, 2021. The court’s findings of fact and conclusions of law in the direct action are attached hereto as **Exhibit 5**. A final judgment has not been entered.

Before the direct action was decided, on October 1, 2020, Permittee wrote to the Board requesting that the RPs be continued yet again from the 2021 calendar year. See **Exhibit 6**. The Board took up A&B’s request at its November 13, 2020 meeting as item D-8. In connection with Item D-8, the Board considered a lengthy staff submittal, available here: <https://dlnr.hawaii.gov/wp-content/uploads/2020/11/D-8.pdf>. Members of the public, including organizations, submitted testimony in support of and against the continuation of the RPs, which can be viewed here: <https://dlnr.hawaii.gov/wp-content/uploads/2020/11/D-8T.pdf>.

On November 12, 2020, the day before the November 13, 2020 meeting, the Sierra Club submitted a petition for a contested case hearing on the continuation of the RPs. The petition is attached hereto as **Exhibit 7**.

At the meeting, the Board voted to deny the request for a contested case. See November 13, 2020 Minutes (<https://dlnr.hawaii.gov/wp-content/uploads/2021/01/Minutes-201113.pdf>) at p. 7. Following the denial of the contested case, the Board approved the staff recommendation on Item D-8 as submitted, except that the Board imposed certain additional amendments to the RP conditions. See *id.* at p. 8.

Immediately after the Board’s November 13, 2020 denial of the Sierra Club’s petition for a contested case, but before the Court issued its decision in the direct action, the Sierra Club filed a second action, Civil No. 20-0001541 (hereinafter, the “**agency appeal**”). The agency appeal challenged the Board’s decision not to grant the Sierra Club’s petition for a contested case and the Board’s continuance of the RPs for the 2021 calendar year.

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<sup>1</sup> According to HRS § 171-55, the Board may allow a permit to continue “on a month-to-month basis for additional one-year periods.” In *Carmichael v. Bd. of Land & Nat. Res.*, CAAP-16-0000071, 2019 WL 2511192 at \*7 (Haw. App. June 18, 2019), *cert. granted*, SCWC-16-0000071, 2019 WL 6314672 (Nov. 25, 2019), the Intermediate Court of Appeals held that HRS § 171-55 authorized the Board to continue to place the RPs in holdover status each year for one-year periods.

On May 28, 2021, the Court issued an “Interim Decision on Appeal” (“**Interim Decision**”) in the agency appeal, which is attached hereto as **Exhibit 8**. In the Interim Decision, the Court ordered that:

A. The court hereby orders BLNR to hold a contested case hearing on the Revocable Permits which were approved by BLNR on or about 11/13/20. The contested case hearing(s) shall be held as soon as practicable. This order is effective immediately. Pursuant to HRS 91-14(g)(i), the court reserves jurisdictional and expects to appoint a master or monitor to ensure prompt compliance with this order. The parties are invited to agree on a master or monitor, or promptly (no later than June 7, 2021) submit three names each to the court; and

B. The court hereby orders that the Revocable Permits approved on or about 11/13/20 be vacated. However, the effective date of this order is hereby stayed and the court reserves jurisdiction to consider any additional requests from the parties on whether or not the court should modify the existing permits, and how, or whether the court should leave the existing permits in place until their current expiration date. If no such further requests are filed by 4:00 p.m. on Wednesday, June 30, 2021, the stay ordered in this paragraph is lifted without further action by the court. In that event, the Revocable Permits approved on or about 11/13/20 shall automatically be vacated without further order of this court, at 4:00 p.m. on Wednesday, June 30, 2021. If such further requests are filed, then the stay remains in place and the court reserves jurisdiction until further order while the court considers the requests.

Exhibit 8 at p. 3.

The Board’s attorneys filed a motion seeking leave to appeal the Interim Decision and to stay any decision to vacate the RPs, but the Court denied the request.

Following the Interim Decision, Permittee submitted a July 22, 2021 letter to the Board (attached hereto as **Exhibit 9**), stating that:

While we do not believe that the Interim Decision nullifies our prior [October 1, 2020] request to continue the Holdover RPs for the calendar year 2021, in an abundance of caution and without prejudice to that position, we submit this formal request that, pursuant to Hawai‘i Revised Statutes section 171-55, ***BLNR issue new revocable permits to A&B/EMI, upon the same conditions BLNR imposed on the Holdover RPs at its November 13, 2020 meeting***, with a commencement date of August 1, 2021 and an expiration date of July 31, 2022.

Exhibit 9 at 1 (emphasis added).

The Sierra Club submitted a letter of their own on July 22, 2021, which, among other things, requested a contested case hearing to challenge Permittee’s continued diversion of water.

**Exhibit 10** at 1.

On July 30, 2021, the Court filed a “Ruling and Order Modifying Permits” (“**Ruling and Order**”), attached hereto as **Exhibit 11**), which, while not an appealable final order under Hawai‘i Rule of Civil Procedure (“HRCP”) Rule 54, provided further details about the Court’s decision. Specifically, the Court stated that:

8. The permits at issue are hereby modified as follows: **the stream diversions covered by the permits at issue are hereby limited to no more than 25 million gallons of water per day (averaged monthly) from east Maui streams. This limit shall remain in place until the anticipated contested case hearing is held and a decision rendered, or until further order of the court.** This should be more than enough water to allow all users the water they require, while hopefully reducing apparent or potential waste. Any provision of the permits at issue contrary to the modification in this paragraph is hereby vacated.

**Exhibit 11** at 2.

The Board’s attorneys argued to the Court that once the Court vacates the RPs, the Board could not hold a contested case on Permittee’s October 1, 2020 request to continue the permits (*see* Exhibit 6) because that request would essentially be moot. With little explanation, the Court stated:

9. The court also grants A&B/EMI’s request that its underlying request for the permits at issue still be in effect. In other words, there need be no delay by BLNR requiring a new submission requesting “new” permits. A&B/EMI may supplement their prior/pending request for the permits at issue based on new information, if they choose to.

**Exhibit 11** at 2.

The Court made clear that the Ruling and Order is not a final order and that the Court would retain jurisdiction to further modify the RPs until a contested case.

## **II. DISCUSSION**

The issue before the Board is whether to consider the issuance of revocable permits to A&B/EMI for the period of August 1, 2021, to July 31, 2022. In connection with that decision, the Board must consider whether it will convene a contested case, as requested by the Sierra Club, to challenge Permittees’ request to continue to withdraw water from the license areas under the authority of RPs issued by the Board. If the Board decides to convene a contested case, it should also determine the scope of the issues to be decided in the contested case. For the following reasons, staff recommends (1) that the Board convene a contested case,<sup>2</sup> and (2) that

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<sup>2</sup> The convening of a contested case hearing would also authorize the Chairperson to take appropriate measures to start that process, including but not limited to the hiring of a hearings

the Board limit the scope of the contested case to issues that were not, or could not have been, considered and decided in the direct action.

***A. Despite the Board's Arguments in the Agency Appeal, the Court Ruled that the Sierra Club is Entitled to a Contested Case.***

In the agency appeal, the Board's attorneys argued that the Sierra Club did not have an interest in the RPs which rose to the level of a constitutionally protected property interest. In its Petition the Sierra Club asserted the right to "a clean and healthful environment (including 'conservation, protection and enhancement of natural resources') as defined by HRS chapters 171, 343, and 205A." Even though the Hawai'i Supreme Court found that the enjoyment of "a clean and healthful environment, *as defined by laws relating to environmental quality*" can constitute "property" interests within the meaning of the due process clause, (*see In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019) (quoting Hawai'i State Constitution art. XI, sec. 9) (emphasis added)), the Board's power to continue the RPs comes from HRS § 171-55, a statute relating to land management, not environmental quality. Therefore, *In re HELCO* is distinguishable. If the Sierra Club were entitled to a contested case in this instance, arguably, every decision the Board makes which relates to land management would be subject to a contested case.

The Board's attorneys also argued that even if the Sierra Club had a cognizable property interest, it was not entitled to additional procedures when it already had gone through a trial in the direct action to protect its very same interests. To determine what process is due to protect a constitutionally protected interest, courts consider the following factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Flores v. Bd. of Land & Nat. Res.*, 143 Hawai'i 114, 126–27, 424 P.3d 479, 481–82 (2018) (quoting *Sandy Beach*, 70 Hawai'i at 378, 773 P.2d at 261).

A party is not at risk of the erroneous deprivation of its protected interest when it has "already been afforded a full opportunity to participate in a contested case hearing and express [its] views and concerns on the matter," such that "the provision of an additional contested case hearing is [not] necessary to adequately safeguard against erroneous deprivation" of its rights. *Id.* at 127, 424 P.3d at 482. Thus, in *Flores*, the appellant was not entitled to a contested case to challenge a Board decision because he had already "participated extensively" in a prior contested case hearing on a similar decision "by presenting evidence . . . and arguments concerning the effect that the" challenged action would have in his protected rights. *Id.* at 127, 424 P.3d at 482. He essentially sought a distinct hearing "in order to express the same concerns, and to vindicate the same interests, that he previously raised in the [prior] contested case hearing[.]" *Id.* The *Flores* court also noted that the appellant did not clarify the extent to which he would put forth evidence and arguments "materially different" from that which had already been proffered in the previous contested case. *Id.* "On this particular record," the *Flores* court wrote, "we are not convinced that an additional contested case hearing would offer any probable value in protecting against the erroneous deprivation of his interest[.]" *Id.*

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officers and issuing preliminary procedural orders in the contested case.

The Board’s attorneys argued that the agency appeal was analogous to the situation in *Flores*. Indeed, the Sierra Club had even more protection than a prior contested case. They had an entire trial, just a few months prior to the Board’s November 13, 2020 decision, specifically to challenge the issuance of the RPs to the Permittee. Moreover, like the appellant in *Flores*, the Sierra Club did not clarify the extent to which it would put forth “materially different” evidence or arguments. As the Board’s attorneys argued, “[t]o require [the Board] to hold a[] contested case hearing in such circumstances would require [the Board] to shoulder duplicative administrative burdens and comply with additional procedural requirements that would offer no further protective value.” *Id.* at 128, 424 P.3d at 483.

The Court in the agency appeal obviously rejected the Board’s arguments. It held that HRS § 171-55 is a law relating to environmental quality. Exhibit 8 at 1. It also rejected the argument that a contested case was not required under *Flores*:

5. Defendants’ arguments that Sierra Club already got the required due process because water permits were litigated in a trial in this court in 2020 are not persuasive. Here, the permits at issue covered the year after the trial. Things change with time (as the court observed in its FOFCOL following the trial). More specifically, the Sierra Club offered or had available to it new evidence on the permit renewals – information and issues which apparently arose after the trial.

Exhibit 8 at 2.

The Board’s attorneys disagree with the Court’s ruling and intend to appeal. To that end, as noted, the Board’s attorneys sought to appeal from the Interim Decision, but the Court denied their motion. Neither the Interim Decision nor the Ruling and Order have been distilled to a final, appealable order or judgment. Indeed, the Court’s Ruling and Order suggests that a final judgment may not be entered until *after* a contested case is held.

Nevertheless, the Board’s attorneys have always maintained that the decision to grant the Sierra Club’s requests for a contested case is ultimately up to a majority of the Board members. *See* HRS § 171-5 (“Any action taken by the board shall be by a simple majority of the members of the board[.]”). Given the Court’s Interim Decision and Ruling and Order, the members of the Board may decide that in this situation, it is prudent to grant the Sierra Club’s request for a contested case to facilitate the issuance of a final, appealable judgment in the agency appeal.

***B. The Scope of Any Contested Case Should be Limited to Issues Which Were Not Raised, or Could Not Have Been Raised, Before the Court in the Direct Action.***

While staff is recommending that the Board grant the Sierra Club’s request for a contested case to challenge Permittee’s request for RPs, the staff also recommends that the Board limit the scope of the contested case to only address issues which could not have been, or were not already considered by the Court in the direct action.

As discussed, under *Flores*, two of the factors which must be considered in determining

what process is due are “the risk of erroneous deprivation of [a constitutionally protected interest] through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards;” and “the governmental interest, including the burden that additional procedural safeguards would entail.” 143 Hawai‘i at 126–27, 424 P.3d at 481–82.

*Flores* is clear that a contested case petitioner is not entitled to a second bite at the apple merely to put forth evidence and arguments that are *not* “materially different” from those which were already proffered in a previous action. 143 Hawai‘i at 127, 424 P.3d at 482. Although the Court ruled against the Board in the agency appeal, it specifically found that “the Sierra Club offered or had available to it new evidence on the permit renewals – information and issues which apparently arose after the trial.” Exhibit 8 at 2. However, under *Flores*, if the Sierra Club *did not* have such evidence, the Court should have found that an additional contested case hearing would be unlikely to offer any probable value in protecting against the erroneous deprivation of a protected interest. 143 Hawai‘i at 127, 424 P.3d at 482. In other words, the Court’s Interim Decision does not mandate that the Board needs to have a contested case to reconsider issues that were already litigated at trial.

Furthermore, the basic elements of due process are notice and “an opportunity to be heard at a meaningful time and in a meaningful manner.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 389, 363 P.3d 224, 237 (2015). Thus, the Sierra Club would not be entitled to a contested case merely to present arguments that *could have* been presented to the Court in the direct action, but which the Sierra Club did not raise. *See Sandy Beach Def. Fund v. City Council of City & Cty. of Honolulu*, 70 Haw. 361, 378-79, 773 P.2d 250, 261-62 (1989) (appellants did not have a due process right to a contested case to challenge the issuance of a permit when they had ample notice of public hearings on the permit, and could have, and indeed did, present argument and testimony at the hearings).

For instance, during the trial in the direct action, the Sierra Club repeatedly represented to the Court that it was not challenging the 2018 CWRM D&O. *See Exhibit 12* (Excerpt of August 13, 2020 transcript in the direct action) at 62:15-21:

15 [Sierra Club’s attorney:] And so, let me attempt, if I wasn’t clear  
16 enough then, let me attempt to be more clear now.  
17 So the Sierra Club is not challenging the  
18 Water Commission’s decision made in 2018. What we are  
19 saying is, and by the way, the Board of Land and Natural  
20 Resources can use, and even depending on how you use the  
21 word rely, rely in part on the decision, absolutely.

Thus, the Sierra Club cannot use this second adjudicative hearing to now argue that the CWRM D&O was wrongly decided.

In light of the fact that a contested case merely to relitigate the direct action would provide minimal, if any, additional due process protection, *Flores* recognizes that the Board has a *strong* interest in avoiding the burden of holding an unnecessary contested case. *Id.* Under *Flores*, the Board would be justified in vindicating its interest by narrowing the scope of the contested case to *only* address the specific “information and issues which apparently arose after

the trial,” i.e. the issues which, according to the Court, justify granting the Sierra Club’s request for a contested case.

### III. RECOMMENDATION

In light of the foregoing, staff recommends the following:

1. That the Board grant the Sierra Club’s request for a contested case hearing to challenge A&B/EMI’s July 22, 2021 request for revocable permits.
2. That the Board limit the contested case hearing to only address evidence and arguments which were not or could not have been brought before the Court in the direct action or the CWRM 2018 decision.
3. That the Board authorize the Chairperson to select and appoint a hearing officer and issue any necessary preliminary procedural orders.

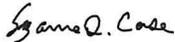
Respectfully Submitted,



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Ian Hirokawa  
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



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Suzanne D. Case, Chairperson

# EXHIBIT 1

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

REVOCABLE PERMIT NO. S-7263

KNOW ALL MEN BY THESE PRESENTS:

THAT, effective the 1<sup>st</sup> day of July, 2000, by and between the STATE OF HAWAII, hereinafter referred to as the "State," by its Board of Land and Natural Resources, called the "Board," and Alexander & Baldwin, Inc., a Hawaii Corporation, hereafter called the "Permittee," whose mailing address is Post Office Box 3440, Honolulu, Hawaii 96801, agree that commencing from the 1<sup>st</sup> day of July, 2000, ("commencement date"), Permittee is permitted to enter and occupy, on a month-to-month basis only, pursuant to section 171-58, Hawaii Revised Statutes, that certain parcel of government land (and any improvements located thereupon) situate at Tax Map Key no. (2) 1-1-01:44; Koolau Forest Reserve, Honomanu, Hana, Maui, Hawaii, as indicated on the map attached hereto, if any, and made a part hereof, containing an approximate area of 3,381.00 acres, more or less which parcel is hereinafter referred to as the "Premises."

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the premises for the following specified purposes only:

Right, privilege, and authority for the development, diversion, and use of water from the "Honomanu License" area, pursuant to the terms and conditions in now expired General Lease No. L-3695.

2. Pay, at the office of the Department of Land and Natural Resources, Honolulu, Oahu, or at the office of its land agent on the island where the Premises are located, the sum of ONE THOUSAND SIX HUNDRED NINETY- EIGHT AND 32/100 DOLLARS (\$1,698.32) being the rental due and payable on the first day of each and every month commencing July 1, 2000 and expiring on June 30, 2001.

The interest rate on any unpaid or delinquent rentals shall be at one per cent (1%) per month plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

3. Upon execution of this Permit, deposit with the Board of Land and Natural Resources, hereinafter called the "Board," in an amount equal to two times the monthly rental then payable, as security for the faithful performance of all of these terms and conditions. The deposit will be returned to the Permittee upon termination of this Permit, but only after all of the terms and conditions of this Permit have been observed and performed to the satisfaction of an authorized representative of the Department of Land and Natural Resources.
4. At the Permittee's own cost and expense, keep the government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties, and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and shall be filed with the Board. In the event of loss, damage, or destruction of those improvements, the Board shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.
5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. If a holdover permittee or licensee, pay all real property taxes, which shall be assessed against the Premises from the effective date of this Permit. In addition, a Permittee, not a holdover permittee or licensee, who has occupied the Premises for commercial purposes for a continued period of one year or more, shall pay the real property taxes assessed against the Premises after the first year of the Permit as provided in section 246-36(1)(D), Hawaii Revised Statutes.
7. Observe and comply with all laws, ordinances, rules, and regulations of the federal, state, municipal, or county governments affecting the Premises or improvements.
8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay, when due, all payments for water and other utilities, and whatever

charges for the collection of garbage as may be levied.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety and agree to indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Permittee or the Permittee's employees, agents, or officers under this Permit. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or termination of this Permit.
14. Procure, at its own cost and expense, and maintain during the entire period of this Permit, a policy or policies of commercial general liability insurance, in an amount acceptable to the Chairperson, insuring the State of Hawaii and the Permittee against all claims for personal injury, death, and property damage. The policy or policies shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the control or use of the Permittee. The Permittee shall furnish the State with a certificate showing the policy to be initially in force and shall furnish a like certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the State of any intention to cancel any policy at least sixty (60) calendar days prior to actual cancellation. The procuring of this policy shall not release or relieve the Permittee of its responsibilities under this Permit as set forth herein or limit the amount of its liability under this Permit.
15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State; furthermore, the Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of this Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

B. Additional Conditions:

1. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to

the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) business days prior to the revocation.

2. If the Permittee does not vacate the Premises upon the revocation of the Permit by the Board, the Permittee shall pay to the State liquidated damages at the daily rate of \$3.00 or twenty percent (20%) of the monthly rent, whichever is greater, for each day, or portion thereof, the Permittee remains on the Premises after the date of revocation. The payment is in addition to any other rights or remedies the Board may be entitled to pursue for breach of contract, or for illegal occupancy, including the right to evict the Permittee without court action, and the cost thereof to be paid by the Permittee.
3. If the Permittee fails to vacate the Premises upon the revocation of the Permit, the Board by its agents, or representatives may enter upon the Premises and remove and dispose of at Permittee's cost and expense, all vehicles, equipment, materials, or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal and disposition.
4. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent.
5. Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the Permittee shall fail to remove the improvements within thirty (30) calendar days, after written notice to remove has been sent, the Board may elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.
6. The Board reserves the right for its agents, or representatives to enter or cross any portion of the Premises at any time in the performance of its duties.
7. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
8. It is understood that the Permittee has inspected the Premises and knows

the conditions thereof and fully assumes all risks incident to its use.

9. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant, or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant, or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option of this Permit.
10. This month-to-month permit is effective for a period of one year from the commencement date. It may be extended by action of the Board for additional one-year periods. Any such extension shall have the same terms and conditions as this permit, except for the commencement date and any amendments to the terms, as reflected in the minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this permit and any amendments to this permit so long as Permittee continues to hold a permit for the Premises or continues to occupy or use the Premises.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates upon any basis or in any manner that is prohibited by any applicable federal, state, or county law.
12. Any and all disputes or questions arising under this Permit shall be referred to the Chairperson of the Board and his determination of these disputes or questions shall be final and binding on the parties.
13. Permittee shall not cause or permit the escape, disposal, or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Permittee.

Permittee agrees to indemnify, defend, and hold the State of Hawaii, the Board, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from and use or release of hazardous materials on the premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration or earlier termination of the permit.

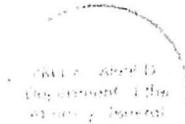
For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. At any time during the term or upon termination of this permit, the Chairperson, for good cause, may require the Permittee to conduct at Permittee's own cost, a Level One (1) Hazardous Waste Evaluation and a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Termination of this permit will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed where required.
15. This revocable permit shall cease and be void if the Board issues a water license pursuant to public auction of the right to collect water from the subject premises in accordance with section 171-58, Hawaii Revised Statutes, as amended.
16. The State reserves the right, subject to not less than thirty (30) days written notice, to withdraw water from this revocable permit to meet the following requirements as the State in its sole discretion may determine: Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under section 221 of the Hawaiian Homes Commission Act as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of section 171-58(d), Hawaii Revised Statutes.
17. The Permittee shall have full responsibility for the maintenance of roads

used within the water license area.

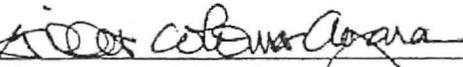
18. The State reserves all hunting rights. In the event the State should declare the whole or any portion of the Premises as a public shooting grounds, the State reserves the right and privilege to issue written permits to hunters, subject to rules and regulations issued by the Department of Land and Natural Resources; provided, however, that open season shall be coordinated with the activities of the Permittee on the Premises.
19. The Permittee shall comply with all requirements of the State Water Code, section 174C, Hawaii Revised Statutes, and other laws governing water in Hawaii.

Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.



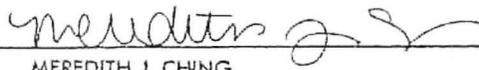
IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

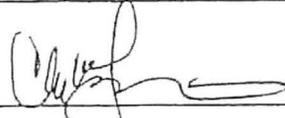
By   
Chairperson and Member  
Board of Land and Natural Resources *fw*

Approved by the Board of  
Land and Natural Resources  
at its meeting held on  
05/26/00, D-16. *(w)*

PERMITTEE  
ALEXANDER & BALDWIN, INC., a Hawaii  
Corporation

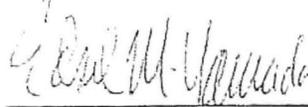
By   
MEREDITH J. CHING

Its Vice President

And By   
CHARLES W. LOCKINS

Its ASST. SECRETARY

APPROVED AS TO FORM:

  
Deputy Attorney General

Dated: 5/16/01



STATE OF HAWAII )  
 ) SS.  
CITY & COUNTY OF HONOLULU )

On this 21ST day of MAY, 2001,  
before me personally appeared MEREDITH J. CHING and  
CHARLES W. LOOMIS, to me personally  
known, who, being by me duly sworn or affirmed, did say that such person(s) executed  
the foregoing instrument as the free act and deed of such person(s), and if applicable  
in the capacity shown, having been duly authorized to execute such instrument in such  
capacity.



Aileen S. Miyahara  
Notary Public, State of Hawaii  
AILEEN S. MIYAHARA

My commission expires: 7/15/02



# EXHIBIT 2

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

REVOCABLE PERMIT NO. S-7264

KNOW ALL MEN BY THESE PRESENTS:

THAT, effective the 1<sup>st</sup> day of July, 2000, by and between the STATE OF HAWAII, hereinafter referred to as the "State," by its Board of Land and Natural Resources, called the "Board," and Alexander & Baldwin, Inc., a Hawaii Corporation, hereafter called the "Permittee," whose mailing address is Post Office Box 3440, Honolulu, Hawaii 96801, agree that commencing from the 1<sup>st</sup> day of July, 2000, ("commencement date"), Permittee is permitted to enter and occupy, on a month-to-month basis only, pursuant to section 171-58, Hawaii Revised Statutes, that certain parcel of government land (and any improvements located thereupon) situate at Tax Map Key no. (2) 1-1-01:50, 2-9-14:01, 05, 11, 12 & 17; Koolau Forest Reserve, Huelo, Hana, Maui, Hawaii, as indicated on the maps attached hereto, if any, and made a part hereof, containing an approximate area of 8,752.690 acres, more or less which parcel is hereinafter referred to as the "Premises."

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the premises for the following specified purposes only:

Right, privilege, and authority for the development, diversion, and use of water from the "Huelo License" area, pursuant to the terms and conditions in now expired General Lease No. L-3578.

2. Pay, at the office of the Department of Land and Natural Resources, Honolulu, Oahu, or at the office of its land agent on the island where the Premises are located, the sum of SIX THOUSAND FIVE HUNDRED EIGHTY-EIGHT AND 40/100 DOLLARS (\$6,588.40) being the rental due and payable on the first day of each and every month commencing July 1, 2000 and expiring on June 30, 2001.

The interest rate on any unpaid or delinquent rentals shall be at one per cent (1%) per month plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

3. Upon execution of this Permit, deposit with the Board of Land and Natural Resources, hereinafter called the "Board," in an amount equal to two times the monthly rental then payable, as security for the faithful performance of all of these terms and conditions. The deposit will be returned to the Permittee upon termination of this Permit, but only after all of the terms and conditions of this Permit have been observed and performed to the satisfaction of an authorized representative of the Department of Land and Natural Resources.
4. At the Permittee's own cost and expense, keep the government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties, and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and shall be filed with the Board. In the event of loss, damage, or destruction of those improvements, the Board shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.
5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. If a holdover permittee or licensee, pay all real property taxes, which shall be assessed against the Premises from the effective date of this Permit. In addition, a Permittee, not a holdover permittee or licensee, who has occupied the Premises for commercial purposes for a continued period of one year or more, shall pay the real property taxes assessed against the Premises after the first year of the Permit as provided in section 246-36(1)(D), Hawaii Revised Statutes.
7. Observe and comply with all laws, ordinances, rules, and regulations of the federal, state, municipal, or county governments affecting the Premises or improvements.
8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay, when due, all payments for water and other utilities, and whatever

charges for the collection of garbage as may be levied.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety and agree to indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Permittee or the Permittee's employees, agents, or officers under this Permit. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or termination of this Permit.
14. Procure, at its own cost and expense, and maintain during the entire period of this Permit, a policy or policies of commercial general liability insurance, in an amount acceptable to the Chairperson, insuring the State of Hawaii and the Permittee against all claims for personal injury, death, and property damage. The policy or policies shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the control or use of the Permittee. The Permittee shall furnish the State with a certificate showing the policy to be initially in force and shall furnish a like certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the State of any intention to cancel any policy at least sixty (60) calendar days prior to actual cancellation. The procuring of this policy shall not release or relieve the Permittee of its responsibilities under this Permit as set forth herein or limit the amount of its liability under this Permit.
15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State; furthermore, the Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of this Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

B. Additional Conditions:

1. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to



the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) business days prior to the revocation.

2. If the Permittee does not vacate the Premises upon the revocation of the Permit by the Board, the Permittee shall pay to the State liquidated damages at the daily rate of \$3.00 or twenty percent (20%) of the monthly rent, whichever is greater, for each day, or portion thereof, the Permittee remains on the Premises after the date of revocation. The payment is in addition to any other rights or remedies the Board may be entitled to pursue for breach of contract, or for illegal occupancy, including the right to evict the Permittee without court action, and the cost thereof to be paid by the Permittee.
3. If the Permittee fails to vacate the Premises upon the revocation of the Permit, the Board by its agents, or representatives may enter upon the Premises and remove and dispose of at Permittee's cost and expense, all vehicles, equipment, materials, or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal and disposition.
4. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent.
5. Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the Permittee shall fail to remove the improvements within thirty (30) calendar days, after written notice to remove has been sent, the Board may elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.
6. The Board reserves the right for its agents, or representatives to enter or cross any portion of the Premises at any time in the performance of its duties.
7. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
8. It is understood that the Permittee has inspected the Premises and knows

the conditions thereof and fully assumes all risks incident to its use.

9. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant, or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant, or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option of this Permit.
10. This month-to-month permit is effective for a period of one year from the commencement date. It may be extended by action of the Board for additional one-year periods. Any such extension shall have the same terms and conditions as this permit, except for the commencement date and any amendments to the terms, as reflected in the minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this permit and any amendments to this permit so long as Permittee continues to hold a permit for the Premises or continues to occupy or use the Premises.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates upon any basis or in any manner that is prohibited by any applicable federal, state, or county law.
12. Any and all disputes or questions arising under this Permit shall be referred to the Chairperson of the Board and his determination of these disputes or questions shall be final and binding on the parties.
13. Permittee shall not cause or permit the escape, disposal, or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Permittee.

Permittee agrees to indemnify, defend, and hold the State of Hawaii, the Board, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from and use or release of hazardous materials on the premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration or earlier termination of the permit.

For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. At any time during the term or upon termination of this permit, the Chairperson, for good cause, may require the Permittee to conduct at Permittee's own cost, a Level One (1) Hazardous Waste Evaluation and a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Termination of this permit will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed where required.
15. This revocable permit shall cease and be void if the Board issues a water license pursuant to public auction of the right to collect water from the subject premises in accordance with section 171-58, Hawaii Revised Statutes, as amended.
16. The State reserves the right, subject to not less than thirty (30) days written notice, to withdraw water from this revocable permit to meet the following requirements as the State in its sole discretion may determine: Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under section 221 of the Hawaiian Homes Commission Act as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of section 171-58(d), Hawaii Revised Statutes.
17. The Permittee shall have full responsibility for the maintenance of roads

used within the water license area.

18. The State reserves all hunting rights. In the event the State should declare the whole or any portion of the Premises as a public shooting grounds, the State reserves the right and privilege to issue written permits to hunters, subject to rules and regulations issued by the Department of Land and Natural Resources; provided, however, that open season shall be coordinated with the activities of the Permittee on the Premises.
19. The Permittee shall comply with all requirements of the State Water Code, section 174C, Hawaii Revised Statutes, and other laws governing water in Hawaii.

Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.



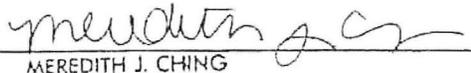
IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

By   
Chairperson and Member  
Board of Land and Natural Resources *pw*

Approved by the Board of  
Land and Natural Resources  
at its meeting held on  
05/26/00, D-16. *pw*

PERMITTEE  
ALEXANDER & BALDWIN, INC., a Hawaii  
Corporation

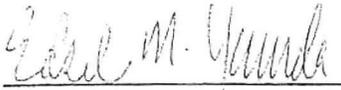
By   
MEREDITH J. CHING

Its Vice-President

And By   
CHARLES W. LOOMIS

Its ASST. SECRETARY

APPROVED AS TO FORM:

  
Deputy Attorney General

Dated: 5/16/01



STATE OF HAWAII )  
CITY + COUNTY OF HONOLULU ) SS.  
)

On this 21ST day of MAY, 2001,  
before me personally appeared MEREDITH J. CHING and  
CHARLES W. LOOMIS, to me personally  
known, who, being by me duly sworn or affirmed, did say that such person(s) executed  
the foregoing instrument as the free act and deed of such person(s), and if applicable  
in the capacity shown, having been duly authorized to execute such instrument in such  
capacity.



Aileen S. Miyahara  
Notary Public, State of Hawaii  
AILEEN S. MIYAHARA

My commission expires: 7/15/02



# EXHIBIT 3

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

REVOCABLE PERMIT NO. S-7265

KNOW ALL MEN BY THESE PRESENTS:

THAT, effective the 1<sup>st</sup> day of July, 2000, by and between the STATE OF HAWAII, hereinafter referred to as the "State," by its Board of Land and Natural Resources, called the "Board," and Alexander & Baldwin, Inc., a Hawaii Corporation, hereafter called the "Permittee," whose mailing address is Post Office Box 3440, Honolulu, Hawaii 96801, agree that commencing from the 1st day of July, 2000, ("commencement date"), Permittee is permitted to enter and occupy, on a month-to-month basis only, pursuant to section 171-58, Hawaii Revised Statutes, that certain parcel of government land (and any improvements located thereupon) situate at Tax Map Key no. (2) 1-1-02:Por. 02, Koolau Forest Reserve, Keanae, Hana, Maui, Hawaii, as indicated on the map attached hereto, if any, and made a part hereof, containing an approximate area of 10,768.00 acres, more or less which parcel is hereinafter referred to as the "Premises."

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the premises for the following specified purposes only:

Right, privilege, and authority for the development, diversion, and use of water from the "Keanae License" area, pursuant to the terms and conditions in now expired General Lease No. L-3349.

2. Pay, at the office of the Department of Land and Natural Resources, Honolulu, Oahu, or at the office of its land agent on the island where the Premises are located, the sum of THREE THOUSAND FOUR HUNDRED SEVENTY-SIX AND 72/100 DOLLARS (\$3,476.72) being the rental due and payable on the first day of each and every month commencing July 1, 2000 and expiring on June 30, 2001.

The interest rate on any unpaid or delinquent rentals shall be at one per cent (1%) per month plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

3. Upon execution of this Permit, deposit with the Board of Land and Natural Resources, hereinafter called the "Board," in an amount equal to two times the monthly rental then payable, as security for the faithful performance of all of these terms and conditions. The deposit will be returned to the Permittee upon termination of this Permit, but only after all of the terms and conditions of this Permit have been observed and performed to the satisfaction of an authorized representative of the Department of Land and Natural Resources.
4. At the Permittee's own cost and expense, keep the government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties, and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and shall be filed with the Board. In the event of loss, damage, or destruction of those improvements, the Board shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.
5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. If a holdover permittee or licensee, pay all real property taxes, which shall be assessed against the Premises from the effective date of this Permit. In addition, a Permittee, not a holdover permittee or licensee, who has occupied the Premises for commercial purposes for a continued period of one year or more, shall pay the real property taxes assessed against the Premises after the first year of the Permit as provided in section 246-36(1)(D), Hawaii Revised Statutes.
7. Observe and comply with all laws, ordinances, rules, and regulations of the federal, state, municipal, or county governments affecting the Premises or improvements.
8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay, when due, all payments for water and other utilities, and whatever

charges for the collection of garbage as may be levied.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety and agree to indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Permittee or the Permittee's employees, agents, or officers under this Permit. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or termination of this Permit.
14. Procure, at its own cost and expense, and maintain during the entire period of this Permit, a policy or policies of commercial general liability insurance, in an amount acceptable to the Chairperson, insuring the State of Hawaii and the Permittee against all claims for personal injury, death, and property damage. The policy or policies shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the control or use of the Permittee. The Permittee shall furnish the State with a certificate showing the policy to be initially in force and shall furnish a like certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the State of any intention to cancel any policy at least sixty (60) calendar days prior to actual cancellation. The procuring of this policy shall not release or relieve the Permittee of its responsibilities under this Permit as set forth herein or limit the amount of its liability under this Permit.
15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State; furthermore, the Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of this Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

B. Additional Conditions:

1. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to

the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) business days prior to the revocation.

2. If the Permittee does not vacate the Premises upon the revocation of the Permit by the Board, the Permittee shall pay to the State liquidated damages at the daily rate of \$3.00 or twenty percent (20%) of the monthly rent, whichever is greater, for each day, or portion thereof, the Permittee remains on the Premises after the date of revocation. The payment is in addition to any other rights or remedies the Board may be entitled to pursue for breach of contract, or for illegal occupancy, including the right to evict the Permittee without court action, and the cost thereof to be paid by the Permittee.
3. If the Permittee fails to vacate the Premises upon the revocation of the Permit, the Board by its agents, or representatives may enter upon the Premises and remove and dispose of at Permittee's cost and expense, all vehicles, equipment, materials, or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal and disposition.
4. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent.
5. Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the Permittee shall fail to remove the improvements within thirty (30) calendar days, after written notice to remove has been sent, the Board may elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.
6. The Board reserves the right for its agents, or representatives to enter or cross any portion of the Premises at any time in the performance of its duties.
7. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
8. It is understood that the Permittee has inspected the Premises and knows

the conditions thereof and fully assumes all risks incident to its use.

9. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant, or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant, or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option of this Permit.
10. This month-to-month permit is effective for a period of one year from the commencement date. It may be extended by action of the Board for additional one-year periods. Any such extension shall have the same terms and conditions as this permit, except for the commencement date and any amendments to the terms, as reflected in the minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this permit and any amendments to this permit so long as Permittee continues to hold a permit for the Premises or continues to occupy or use the Premises.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates upon any basis or in any manner that is prohibited by any applicable federal, state, or county law.
12. Any and all disputes or questions arising under this Permit shall be referred to the Chairperson of the Board and his determination of these disputes or questions shall be final and binding on the parties.
13. Permittee shall not cause or permit the escape, disposal, or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Permittee.

Permittee agrees to indemnify, defend, and hold the State of Hawaii, the Board, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from and use or release of hazardous materials on the premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration or earlier termination of the permit.

For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. At any time during the term or upon termination of this permit, the Chairperson, for good cause, may require the Permittee to conduct at Permittee's own cost, a Level One (1) Hazardous Waste Evaluation and a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Termination of this permit will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed where required.
15. This revocable permit shall cease and be void if the Board issues a water license pursuant to public auction of the right to collect water from the subject premises in accordance with section 171-58, Hawaii Revised Statutes, as amended.
16. The State reserves the right, subject to not less than thirty (30) days written notice, to withdraw water from this revocable permit to meet the following requirements as the State in its sole discretion may determine: Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under section 221 of the Hawaiian Homes Commission Act as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of section 171-58(d), Hawaii Revised Statutes.
17. The Permittee shall have full responsibility for the maintenance of roads

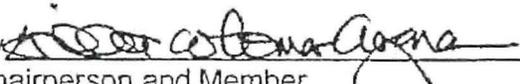
used within the water license area.

18. The State reserves all hunting rights. In the event the State should declare the whole or any portion of the Premises as a public shooting grounds, the State reserves the right and privilege to issue written permits to hunters, subject to rules and regulations issued by the Department of Land and Natural Resources; provided, however, that open season shall be coordinated with the activities of the Permittee on the Premises.
19. The Permittee shall comply with all requirements of the State Water Code, section 174C, Hawaii Revised Statutes, and other laws governing water in Hawaii.

Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.

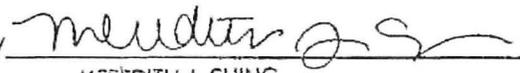
IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

By   
Chairperson and Member  
Board of Land and Natural Resources *Jul*

Approved by the Board of  
Land and Natural Resources  
at its meeting held on  
05/26/00, D-16. *Jul*

PERMITTEE  
ALEXANDER & BALDWIN, INC., a Hawaii  
Corporation

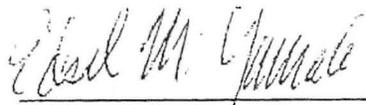
By   
MEREDITH J. CHING

Its VICE PRESIDENT

And By   
CHARLES W. LOOMIS

Its ASST. SECRETARY

APPROVED AS TO FORM:

  
Deputy Attorney General

Dated: 5/16/01

# EXHIBIT 4

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

REVOCABLE PERMIT NO. S-7266

KNOW ALL MEN BY THESE PRESENTS:

THAT, effective the 17<sup>th</sup> day of July, 2000, by and between the STATE OF HAWAII, hereinafter referred to as the "State," by its Board of Land and Natural Resources, called the "Board," and East Maui Irrigation Company, Limited, a Hawaii Corporation, hereafter called the "Permittee," whose mailing address is Post Office Box 48, Paia, Hawaii 96779, agree that commencing from the 1<sup>st</sup> day of July, 2000, ("commencement date"), Permittee is permitted to enter and occupy, on a month-to-month basis only, pursuant to section 171-58, Hawaii Revised Statutes, that certain parcel of government land (and any improvements located thereupon) situate at Tax Map Key no. (2) 1-2-04:05 & 07, Koolau Forest Reserve, Nahiku, Maui, Hawaii, as indicated on the map attached hereto, if any, and made a part hereof, containing an approximate area of 10,111.220 acres, more or less which parcel is hereinafter referred to as the "Premises."

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the premises for the following specified purposes only:

Right, privilege, and authority for the development, diversion, and use of water from the "Nahiku License" area, pursuant to the terms and conditions in now expired General Lease No. L-3505.

2. Pay, at the office of the Department of Land and Natural Resources, Honolulu, Oahu, or at the office of its land agent on the island where the Premises are located, the sum of ONE THOUSAND FOUR HUNDRED TWENTY-SIX AND 88/100 DOLLARS (\$1,426.88) being the rental due and payable on the first day of each and every month commencing July 1, 2000 and expiring on June 30, 2001.

The interest rate on any unpaid or delinquent rentals shall be at one per cent (1%) per month plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

3. Upon execution of this Permit, deposit with the Board of Land and Natural Resources, hereinafter called the "Board," in an amount equal to two times the monthly rental then payable, as security for the faithful performance of all of these terms and conditions. The deposit will be returned to the Permittee upon termination of this Permit, but only after all of the terms and conditions of this Permit have been observed and performed to the satisfaction of an authorized representative of the Department of Land and Natural Resources.
4. At the Permittee's own cost and expense, keep the government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties, and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and shall be filed with the Board. In the event of loss, damage, or destruction of those improvements, the Board shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.
5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. If a holdover permittee or licensee, pay all real property taxes, which shall be assessed against the Premises from the effective date of this Permit. In addition, a Permittee, not a holdover permittee or licensee, who has occupied the Premises for commercial purposes for a continued period of one year or more, shall pay the real property taxes assessed against the Premises after the first year of the Permit as provided in section 246-36(1)(D), Hawaii Revised Statutes.
7. Observe and comply with all laws, ordinances, rules, and regulations of the federal, state, municipal, or county governments affecting the Premises or improvements.
8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay, when due, all payments for water and other utilities, and whatever

charges for the collection of garbage as may be levied.

12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety and agree to indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Permittee or the Permittee's employees, agents, or officers under this Permit. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or termination of this Permit.
14. Procure, at its own cost and expense, and maintain during the entire period of this Permit, a policy or policies of commercial general liability insurance, in an amount acceptable to the Chairperson, insuring the State of Hawaii and the Permittee against all claims for personal injury, death, and property damage. The policy or policies shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the control or use of the Permittee. The Permittee shall furnish the State with a certificate showing the policy to be initially in force and shall furnish a like certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the State of any intention to cancel any policy at least sixty (60) calendar days prior to actual cancellation. The procuring of this policy shall not release or relieve the Permittee of its responsibilities under this Permit as set forth herein or limit the amount of its liability under this Permit.
15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State; furthermore, the Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of this Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

B. Additional Conditions:

1. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to

the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) business days prior to the revocation.

2. If the Permittee does not vacate the Premises upon the revocation of the Permit by the Board, the Permittee shall pay to the State liquidated damages at the daily rate of \$3.00 or twenty percent (20%) of the monthly rent, whichever is greater, for each day, or portion thereof, the Permittee remains on the Premises after the date of revocation. The payment is in addition to any other rights or remedies the Board may be entitled to pursue for breach of contract, or for illegal occupancy, including the right to evict the Permittee without court action, and the cost thereof to be paid by the Permittee.
3. If the Permittee fails to vacate the Premises upon the revocation of the Permit, the Board by its agents, or representatives may enter upon the Premises and remove and dispose of at Permittee's cost and expense, all vehicles, equipment, materials, or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal and disposition.
4. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent.
5. Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the Permittee shall fail to remove the improvements within thirty (30) calendar days, after written notice to remove has been sent, the Board may elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.
6. The Board reserves the right for its agents, or representatives to enter or cross any portion of the Premises at any time in the performance of its duties.
7. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
8. It is understood that the Permittee has inspected the Premises and knows

the conditions thereof and fully assumes all risks incident to its use.

9. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant, or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant, or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option of this Permit.
10. This month-to-month permit is effective for a period of one year from the commencement date. It may be extended by action of the Board for additional one-year periods. Any such extension shall have the same terms and conditions as this permit, except for the commencement date and any amendments to the terms, as reflected in the minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this permit and any amendments to this permit so long as Permittee continues to hold a permit for the Premises or continues to occupy or use the Premises.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates upon any basis or in any manner that is prohibited by any applicable federal, state, or county law.
12. Any and all disputes or questions arising under this Permit shall be referred to the Chairperson of the Board and his determination of these disputes or questions shall be final and binding on the parties.
13. Permittee shall not cause or permit the escape, disposal, or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Permittee.

Permittee agrees to indemnify, defend, and hold the State of Hawaii, the Board, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from and use or release of hazardous materials on the premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration or earlier termination of the permit.

For the purpose of this permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. At any time during the term or upon termination of this permit, the Chairperson, for good cause, may require the Permittee to conduct at Permittee's own cost, a Level One (1) Hazardous Waste Evaluation and a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Termination of this permit will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed where required.
15. This revocable permit shall cease and be void if the Board issues a water license pursuant to public auction of the right to collect water from the subject premises in accordance with section 171-58, Hawaii Revised Statutes, as amended.
16. The State reserves the right, subject to not less than thirty (30) days written notice, to withdraw water from this revocable permit to meet the following requirements as the State in its sole discretion may determine: Constitutionally protected water rights, instream flow standards, reservations needed to meet the Department of Hawaiian Home Lands rights under section 221 of the Hawaiian Homes Commission Act as well as other statutorily or judicially recognized interests relating to the right to withdraw water for the purposes of and in accordance with the provisions of section 171-58(d), Hawaii Revised Statutes.
17. The Permittee shall have full responsibility for the maintenance of roads



used within the water license area.

18. The State reserves all hunting rights. In the event the State should declare the whole or any portion of the Premises as a public shooting grounds, the State reserves the right and privilege to issue written permits to hunters, subject to rules and regulations issued by the Department of Land and Natural Resources; provided, however, that open season shall be coordinated with the activities of the Permittee on the Premises.
19. The Permittee shall comply with all requirements of the State Water Code, section 174C, Hawaii Revised Statutes, and other laws governing water in Hawaii.

Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.



IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

By *[Signature]*  
Chairperson and Member  
Board of Land and Natural Resources *[initials]*

Approved by the Board of  
Land and Natural Resources  
at its meeting held on  
05/26/00, D-16. *[initials]*

PERMITTEE  
EAST MAUI IRRIGATION COMPANY, LIMITED,  
a Hawaii Corporation

By *[Signature]*  
JOHN W. HOYTE, JR.

Its SENIOR VICE PRESIDENT

And By *[Signature]*  
GARRET W.C. HEW

Its ASST. SECRETARY

APPROVED AS TO FORM:

*[Signature]*  
Deputy Attorney General  
Dated: 5/16/01



STATE OF HAWAII )  
 ) SS.  
COUNTY OF *Maui* )

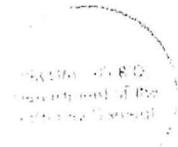
On this 21<sup>st</sup> day of May, 2001,  
before me personally appeared JOHN W. HOYTE, JR. and  
GARRET W.C. HEW, to me personally known, who,  
being by me duly sworn or affirmed, did say that such person(s) executed the foregoing  
instrument as the free act and deed of such person(s), and if applicable in the capacity  
shown, having been duly authorized to execute such instrument in such capacity.

*L.S.*

Valerie L. Nakashima  
Notary Public, State of Hawaii

Valerie L. Nakashima

My commission expires: 5/25/04



# EXHIBIT 5

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

SIERRA CLUB,	)	CIVIL NO. 19-1-0019 (JPC)
	)	(Environmental Court)
Plaintiff,	)	
	)	
vs.	)	
	)	
BOARD OF LAND & NATURAL	)	FINDINGS OF FACT AND
RESOURCES; DEPARTMENT OF LAND	)	CONCLUSIONS OF LAW
AND NATURAL RESOURCES; SUZANNE	)	
CASE, in her official capacity as	)	
Chairperson of the Board of Land and	)	Judge: Jeffrey P. Crabtree
Natural Resources; ALEXANDER &	)	
BALDWIN, INC.; EAST MAUI IRRIGATION,	)	Trial started: 8/03/2020
LLC., and COUNTY OF MAUI,	)	Closing Arguments: 9/24/2020
	)	
Defendants.	)	
_____	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **The court rules for Defendants.** Sierra Club raised legitimate questions and concerns over the BLNR's decisions on the two hold-over Revocable Permits in 2018 and 2019; however, several broader principles and factual issues guide the court's conclusion that the BLNR did not fail in its duties under either a constitution balancing test or under its public trust duties.

2. **This case involves 13 streams in East Maui.** Plaintiff alleges that the BLNR violated its public trust duties by not having sufficient information and not fully considering the impact to these 13 streams when deciding whether to renew two annual

“hold-over” revocable permits in 2018 and 2019 for off-stream uses of stream water. These off-stream uses include agriculture, residential customers in up-country Maui, fire-fighting, dust-suppression, and commercial customers. Plaintiff’s allegation in turn relates to the aggregate water flowing from the license area of 33,000 acres of the approximately 50,000 acres of the east Maui watershed. A related question is how much of the diverted water is not being used, and/or is being wasted, and how should the BLNR properly address that issue? These and other questions are all set in a context that includes:

- the historic demise of water-intensive sugar cane and the corresponding reduction of water needed for sugar cane production and other uses. The water needed went from 165 MGD (million gallons per day) during the height of sugar cane production down to 126 MGD (from about 2004-2013 as sugar production declined). It dropped to 40 MGD used in 2016 and down to 24-28 MGD used in 2017;
- a recent transfer of interests from Alexander & Baldwin to Mahi Pono, which is a company starting a new and extensive diversified agriculture venture on Maui;
- BLNR’s practice of using Revocable Permits (1 year maximum, with 30 days notice) to make short-term decisions (the last long-term lease expired in 1986 and a 2001 Contested Case Hearing is apparently still pending). This practice of continuing Revocable Permits was ruled invalid by the Circuit Court, was then addressed by the Legislature, and is currently on appeal to the Hawaii Supreme Court;
- ongoing efforts for a 30-year lease for the watershed, including an extensive EIS;
- an aqueduct collection and distribution system built between 1870 and 1923, in an area with highly variable rainfall, and with limited ability to timely collect data for water monitoring and water use decisions;
- the interrelationship between a) the Commission on Water Resource Management (“CWRM”), which has exclusive jurisdiction over setting in-stream flow standards and in 2018 issued a long-awaited Decision and Order setting IIFS for 27 East Maui streams (but not the 13 at issue in this case), and b) the BLNR;

-- all the above in the context of multiple agencies, private and public stakeholders, separate statutes, administrative regulations, and constitutional and public trust principles;

3. **Jurisdiction**. Alexander & Baldwin (“A&B”) and EMI argues this court lacks subject matter jurisdiction. Since this issue is potentially dispositive of all other issues, the court addresses it first.

A. First, as to in-stream values and waste: A&B/EMI argues that a) CWRM is the primary agency for stream issues, including issues of “waste,” b) CWRM has exclusive authority to set in-stream flow standards for the 13 streams, c) this case is a back-door effort to get BLNR to do what CWRM declined to do, d) Kauai Springs, Inc. v. Planning Comm’n of Cnty. of Kauai, 133 Hawai’i 141, 172 (2014) does not render the requirement to exhaust administrative remedies inapplicable to claims for breach of the public trust doctrine, and e) Plaintiff has not initiated a petition regarding the 13 streams with CWRM. A&B argues therefore that Plaintiff failed to exhaust its administrative remedies, depriving this court of jurisdiction on both in-stream flow issues and waste issues. See, Koga Eng’g & Const., Inc. v. State, 122 Hawaii, 60, 91 (2010).

B. Second, regarding the diversion structures: A&B/EMI argues CWRM also has exclusive authority over modifying or removing in-stream diversion structures, and Plaintiff did not request a contested case hearing regarding the modification of stream diversions works in the EMI Ditch System.

C. Plaintiff responds that our Constitution and appellate decisions make clear that BLNR has independent constitutional and public trust duties to preserve and protect our water resources in their natural state for current and future generations. See for example, Kauai Springs, Inc. v. Planning Comm’n of the Cnty. of Kaua’i, 133

Hawai'i 141 (2014); Pila'a 400, LLC v. Bd. of Land & Natural Res., 132 Hawai'i 247, 250 (2014). Plaintiff also argues that this case is about non-stream uses, not about instream flow standards. In other words, Plaintiff argues this case is about BLNR's decision-making in granting the two hold-over Revocable Permits allowing A&B to divert water for non-stream uses such as agriculture, residential use, etc., and that this is not the same thing as setting in-stream flow standards, which is CWRM's responsibility and jurisdiction.

D. The court finds and concludes Plaintiff is correct. BLNR's decisions and policies at issue here do not set instream flow standards for the 13 streams and therefore do not intrude into CWRM's jurisdiction. Rather, at issue here are BLNR's licensing decisions on how much water A&B is allowed to divert for non-stream uses. Plaintiff's complaints center on how these decisions are being made, whether the proper and necessary information is available, and whether the required criteria were considered. Granting Plaintiff the relief it requests simply would not set the instream flow standards for the 13 streams.

4. **The license or lease areas.** There are four water license areas in East Maui. From east to west, they are known as Nahiku, Keanae, Honomanū, and Huelo ("License Areas"). **Exhibit J-28.** These four areas total about 56,000 acres, with about 33,000 acres owned by the State, and about 17,000 acres owned by EMI. **Exhibit J-14 at p. 36.**

5. **The streams.** The Commission on Water Resource Management ("CWRM") identified at least 37 streams in the four license areas, as listed below. The streams are generally listed in geographical order from east to west.

- a) Nahiku license area:
  - 1. Makapipi Stream
  - 2. Hanawī Stream
  - 3. Kapaula Stream
  
- b) Keanae license area:
  - 4. Waiaaka Stream
  - 5. Pa'akea Stream
  - 6. Waiohue Stream
  - 7. Kopiliula Stream
  - 8. Pua'aka'a Stream (a tributary of Kopiliula)
  - 9. East Wailuaiki Stream
  - 10. West Wailuaiki Stream
  - 11. Wailuanui Stream (and Waikani waterfall)
  - 12. Kualani (or Hamau) Stream (a tributary of Waiokamilo stream)
  - 13. Waiokamilo Stream
  - 14. Ohia (or Waianu) Stream (never diverted by A&B/EMI)
  - 15. Palauhulu Stream (and its tributaries Hauoli Wahine and Kano)
  - 16. Pi'ina'au Stream (joins with Palauhulu before reaching the ocean)
  
- c) Honomanū license area:
  - 17. Nua'ailua Stream
  - 18. Honomanū Stream
  - 19. Punalau Stream (and its tributaries Kōlea and Ulunui)
  - 20. Ha'ipua'ena Stream
  
- d) Huelo license area:
  - 21. Puohokamoa Stream
  - 22. Wahinepe'e Stream
  - 23. Waikamoi Stream (and its tributary Alo)
  - 24. Kōlea Stream
  - 25. Punaluu Stream
  - 26. Kaaiea Stream
  - 27. Oopuola Stream (and its tributary Makanali)
  - 28. Puehu Stream
  - 29. Nailiilihaele Stream
  - 30. Kailua Stream
  - 31. Hanahana Stream (and its tributary Ohanui)
  - 32. Hoalua Stream
  - 33. Hanehoi Stream (Huelo, also known as Puolua Stream, is a tributary of Hanehoi Stream)
  - 34. Waipio Stream
  - 35. Mokupapa Stream
  - 36. Hoolawa Stream (and its tributary Hoolawa ili and Hoolawa nui)
  - 37. Honopou Stream (and its tributary Puniawa)

**Exhibit J-14 at pp. 40-41.**

6. **The ditches.** EMI's ditches generally run perpendicular to the streams. **Exhibit J-29; Vaught testimony, 8/12/20 A.M. Tr. at 36:10-36:21.** The ditches generally flow from east to west, toward the central Maui plain. **Exhibit J-14 at p. 38.** Water can be diverted out of the streams and into the ditches through structures such as gates, pipes, and dams, or the water can flow directly into a ditch. **Exhibit J-14 at p. 50, and Vaught testimony, 8/12/20 A.M. Tr. at 36:10-37:5.** The diversions in East Maui are designed to capture base flow, or "the ground water contribution to stream flow," and not all flow of water. **Strauch testimony, 8/14/20 at 110:5-110:11.** Higher flows, (such as after rain) can bypass diversion structures. These above base flow events occur about 20-30% of the time. **Strauch testimony, 8/14/20 at 112:16-112:19.**

7. **The leases.**

A. The last long-term licenses were issued in the 1950s and 1960s. After they expired, annual revocable licenses were issued by the BLNR. **Exhibit J-14 at p. 37.** The Revocable Permits ("RPs") in effect now were issued by the Board starting in 2000. They are revocable on one month's notice and continue on a month to month basis for one year unless extended by the Board. **Exhibits J-1 to J-4.**

B. In early 2016, A&B announced that sugarcane cultivation was ending and diversified agriculture was beginning. **Exhibit J-14 at p. 32.** Because of this major change, CWRM reopened proceedings. In April, 2016, A&B informed CWRM it intended to fully restore the flow of eight streams identified as "priority" streams by CWRM and the Native Hawaiian Legal Corporation ("NHLC"). **Exhibit 33 at p. 1.** In July, 2016, CWRM issued an interim order in the contested case

regarding the IIFS Petitions ordering that 10 streams remain undiverted: Waiokamilo, East Wailuanui, West Wailuanui, Makapipi, Hanawī, Waiohue, East Wailuaiki, West Wailuaiki, Waikamoi, Kopiliula, and Pua'aka'a. **Exhibit J-14 at p. 34.** The Board approved another holdover RP (**Exhibit J-12 at p. 12**), and imposed conditions on A&B/EMI including a maximum diversion of 80 MGD, additional water could be requested if needed, no water be wasted, the diverted water be used for agriculture or County use, and no diversions would be made for the streams listed in CWRM's 7/18/16 order. **Exhibit J-12 at p. 12.**

C. The 2017 holdover RP also added conditions that A&B clean up debris and provide a specific report regarding removing certain diversions and pipe repairs. **Exhibit J-13 at p. 13.** The re-opened CWRM hearing was in February, 2017.

D. In 2018, holdover RPs were again approved. **Exhibit J-15 and J-16.** The 2018 RP did not include a MGD limit for diversion. Instead, by this time (late 2018) CWRM had issued its long-awaited 6/18/18 D&O which set new in-stream flow standards for many streams, which A&B was to comply with (discussed in more detail below). A&B/EMI was ordered not to waste water, and to use all diverted water for reasonable and beneficial use. **Exhibit J-16 at pp. 7-8.** The 2018 holdover RP was unanimously approved. The Board also denied Plaintiff's request for a contested case hearing. **Exhibit J-18 at pp. 9-10.**

E. In 2019, the Board again considered a holdover RP. **Exhibit S-50 at pp. 7-9.** A&B submitted a report regarding its compliance with the 2018 holdover RP approval. **Exhibit J-21 at p. 94.** A&B informed the Board it had sold most of its sugar cane agricultural land to Mahi Pono, which became a co-owner of EMI. **Id.** A&B also

reported that about 27 MGD were being diverted from the license area, and was used by Maui County for domestic use as well as for the Kula Agricultural Park, and for fire suppression needs and Mahi Pono's diversified agriculture lands. The Board unanimously approved the 2019 holdover. **Exhibit S-50 at p. 9.** The Board again imposed additional conditions to the RPs, including:

- a. A&B submit quarterly written reports with information on how much water was diverted monthly, broken down by categories. **Exhibit J-21 at pp. 7-8;**
- b. The quarterly reports shall include updates on restoring flow to each stream addressed in CWRM's final D&O; **Id at pp. 8-9.**
- c. Requiring updates on the removal of trash; **Id.**; and that the 13 or 14 streams not covered by CWRM's 6/18/18 D&O be cleaned of debris and status reports provided; **Id.**
- d. A limit of 45 MGD of water diverted, averaged annually **Exhibit S-50 at p. 9;**

F. Another holdover RP (for 2020-2021) was apparently issued after trial in this case, but is not part of this case.

G. On 7/31/19, the ICA in Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071 (Haw. Ct. App. June 18, 2019) held that the holdover RPs were not subject to Chapter 343 requirements. The Supreme Court granted cert (No. SCWC-16-0000071, 11/25/19), the appeal was argued, but no decision has yet issued.

**8. The water.** Historically, the EMI ditch system delivered about 165 MGD during the height of sugar cane. **Exhibit J-14 at p. 158.** From 2004 to 2013, the average delivery went down to about 126 MGD. **Id.** Sugar cultivation ended in 2016. **Exhibit J-14 at p. 32.** In the first quarter of 2020, the water delivered by EMI was down to about 27.79 MGD on average. **Exhibit J-27 at p. 8.**

**9. CWRM's 6/18/18 D&O.**

A. This context of this case cannot be fully evaluated or understood by looking only at BLNR's actions or inactions. CWRM is an important decision-maker with exclusive jurisdiction over multiple aspects of in-stream water standards. CWRM has specialized staff and resources that BLNR does not have. CWRM's decisions impact BLNR's decision-making.

B. Definitions. "Instream flow standard" ("IFS") means the amount or flow/depth of water required at a specific location in a stream system at specified times of year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. HRS § 174C-3. An "interim instream flow standard" ("IIFS") is a *temporary* instream flow standard for immediate application, adopted by CWRM without a public hearing. It ends upon issuing an instream flow standard. HRS § 174C-3. IIFS are expressed as a numeric flow rate, measured in cubic feet per second (cfs) or million gallons per day (MGD) that must remain in the stream at a certain location.

**Exhibit J-14 at p. 18.**

C. CWRM's 6/18/18 D&O arose from 27 Petitions filed by Na Moku, a community organization, involving some 25 streams (the number of "streams" is not always consistent as some are considered tributaries).

D. Before CWRM's D&O issued in 2018, all the East Maui streams were subject to a "status quo" IIFS set back in 1988, per HAR § 13-168-44. This is not particularly helpful, since those 1988 IIFS were not based on numerous important factors, including biological, ecological or recreational value of those streams, and are not sufficient to protect streams. **Case testimony, 8/17/20 at 48:20-48:23, and Exhibit**

**S-78.** Since the D&O did not address the 13 streams, it is fair to say, and the court finds, that there were no meaningful IIFS for the 13 streams when the BLNR made its decisions in 2018 and 2019.

E. CWRM's 6/18/18 D&O fundamentally changed many streams in the watershed.

1. Ten streams were restored to their natural and full flows (meaning, no diversions). CWRM concluded that restoring flow to streams across the watershed would allow more protection for habitats and result in broader ecological function across the watershed. **Exhibit J-14 at p. 262.**
2. Five streams were restored to 64% of their median base flow, aka "H90 flow." H90 flow is expected to provide 90% of a stream's natural habitat. **Exhibit J-14 at pp. 261-262 and p. 188.**
3. Seven streams were designated as "connectivity" streams, meaning restored to 20% of their median base flow. **Id at p. 262.** These seven streams are "gaining" streams, meaning their flow increases as they move down, often because of additional water entering from ground springs, and therefore they can maintain habitat below the diversions. CWRM specifically found that for these gaining streams, restoration of more normal flow would not result in significant biological or ecological gains, and the water may be better used for non-instream uses. **Id at p. 282.**
4. Finally, CWRM found that 3 streams would not have additional significant benefits from restoration. For example, one of the streams is below the ditch system and has never been diverted. **Id at p. 39.**

F. CWRM's 6/18/18 D&O stated that it was "only looking at modifications to main stem and major diversions to accomplish the amended IIFS ..."

The Commission recognized that modifying and fine-tuning the diversions would be addressed later, and complete removal of diversions would only be as necessary to achieve the IIFS. **Id at p. 292.**

G. Na Moku's petitions to CWRM did not involve 13 streams within the license areas:

1. Puakea Stream
2. Kōlea Stream
3. Punaluu Stream
4. Ka'aiea Stream
5. 'O'opuola Stream
6. Puehu Stream
7. Nailiilihaele Stream
8. Kailua Stream
9. Hanahana Stream
10. Hoalua Stream
11. Waipio Stream
12. Mukupapa Stream
13. Ho'olawa Stream (Ho'olawa ili and Ho'olawa nui tributaries)

**Exhibit J-14 at p. 41.** These are the streams at issue in the instant case.

**10. This litigation.** Plaintiffs filed their Complaint in January, 2019. The First Amended Complaint was filed in December, 2019 ("FAC") to add a challenge to the BLNR's 2019 approval of the holdover RP for 2020. The FAC is the operative Complaint in this case. The opening paragraph of the FAC reads:

As it has done annually for more than a decade, in November 2018, the board of land and natural resources (**BLNR**) approved the continuation of revocable permits authorizing East Maui Irrigation and Alexander and Baldwin, Inc. (collectively herein "**A&B**") to use approximately 33,000 acres of state land and to divert millions of gallons of water daily from East Maui streams. It did so, once again, without: the completion of an environmental impact statement (**EIS**); evidence regarding how much water is taken from each stream; a requirement that A&B actually measure how much water it is taking from each stream; an understanding of the harm caused; or efforts to ensure that A&B has complied with permit conditions.

The FAC had three counts:

A. Count 1 alleged a violation of HRS 343. Count 1 was dismissed by an order filed July 22, 2019, granting in part and denying in part A&B's January 28,

2019 Motion to Dismiss, per the ICA's ruling that HRS Section 171-55 nullifies HRS Section 343's requirement for an EA and/or EIS. Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071 (Haw. Ct. App. June 18, 2019), and cert. granted, No. SCWC-16-0000071 (Haw. Nov. 25, 2019).

B. The trial was primarily about Count 2 of the First Amended Complaint. Count 2 alleges a breach of the public trust. It reads in its entirety:

**COUNT 2**

(BLNR, DLNR and Chair Case Breached Their Trust Duties)

114. Plaintiff hereby realleges and incorporates by reference all the above allegations.

115. BLNR, DLNR and Chair Case have trust responsibilities to conserve and protect Hawai'i's natural resources.

116. BLNR, DLNR and Chair Case may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

117. BLNR, DLNR and Chair Case have a trust duty to ensure that prescribed measures are actually being implemented.

118. BLNR, DLNR and Chair Case have a trust duty to thoroughly assess possible adverse impacts of the diversion of streams.

119. BLNR, DLNR and Chair Case have a trust duty to seek relevant information when rendering decisions affecting public trust resources.

120. BLNR, DLNR and Chair Case have a trust duty to incorporate conditions in decisionmaking that protect public trust resources.

121. BLNR, DLNR and Chair Case have a trust duty to protect natural stream flow.

122. BLNR, DLNR and Chair Case have a trust duty to ascertain the absence of practicable alternative water sources.

123. BLNR, DLNR and Chair Case have breached their trust duties.

C. The Prayer for Relief in the FAC reads as follows.

## PRAYER FOR RELIEF

The plaintiff asks for the following relief:

- A. Declare that the defendants violated HRS chapter 343
- B. Declare that BLNR, DLNR and Chair Case breached their public trust duties.
- C. Declare that BLNR, DLNR and Chair Case violated their HRS chapter 205A obligations.
- D. Declare invalid the BLNR's November 2018 and October 2019 decisions approving the holdover of Revocable Permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) to Alexander and Baldwin, Inc., and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) to East Maui Irrigation Company, Limited.
- E. Based on the balancing of the harms, enjoin Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC from taking more than 25.75 million gallons of water on any day from East Maui (as measured at Honopou Stream) until completion of the HRS chapter 343 process and the proper issuance of a permit, license or lease from the BLNR.
- F. Enjoin the BLNR Defendants from authorizing the diversion of more water from the revocable permit areas than 25.75 million gallons of water daily from east Maui streams – and enjoin A&B from taking more water – unless and until:
  - existing legal obligations are first fulfilled;
  - the applicant(s) upholds its burden in justifying the taking of more water;
  - the BLNR Defendants estimate in good faith how much water would flow in each stream without diversion, how much is currently diverted, and how much more water is proposed to be diverted from each stream;

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- the BLNR Defendants require that the applicant(s) take steps to measure the amount of water taken from individual streams;
- the BLNR Defendants ensure that freshets upon which native species depend will flow below stream diversions, or make a finding consistent with its public trust obligations as to why that is not necessary for the specific stream;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures impede the migration of native aquatic species;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures entrain native aquatic species;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures create mosquito breeding grounds;
- the BLNR Defendants require the removal and alteration of those stream modification structures within a clear timeframe (with a proviso for extensions when compelling reasons so warrant) that (a) are on streams that CWRM has ordered be fully restored; (b) pose the greatest harm to native aquatic species; and (c) create mosquito breeding grounds;
- Hanehoi and Honopou streams are fully restored with the removal or alteration of those diversion structures that impede the migration of native aquatic species or entrain them;
- the BLNR Defendants require that A&B make efforts to control of invasive species on the public land encompassed by the revocable permits;
- the BLNR Defendants provide some level of protection for Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana (Hanawana) Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries);
- the BLNR Defendants take steps to stop the diversion of water being used for purposes that are not “reasonable and beneficial”;
- the BLNR Defendants require the applicant(s) to fully explain and justify the amount of water it needs, including disclosures as to how much water is needed per acre of each crop, and all sources available for irrigation.

- G. Order BLNR, DLNR and Chair Case to fulfill their public trust duties.
- H. Award the plaintiff its attorneys' fees and costs in bringing this action.
- I. Provide for such other and further relief as the Court shall deem just and proper.

**11. Plaintiff's criticism of the BLNR's decision-making.** Plaintiff's criticisms regarding the BLNR's decisions to allow the 2018 and 2019 holdover RPs fall into several categories:

A. Lack of information. The amount of water being diverted from each of the 13 streams was essentially unquantified, and the BLNR did not seek the information.

**Exhibit 104 at pp. 9-11, and Case testimony, 8/17/20 at 46:10-47:3.**

B. The Parham study. This was a study included as part of the DEIS (Draft Environmental Impact Statement). In essence the study concluded that because the diversions were designed to capture so much of the water (100% of normal low flow), when low flow conditions occurred diversions resulted in negative impacts on habitat – up to 85%. **Exhibit J-20 at p. 623, Ching testimony, 8/04/20 at 56:21-24.**

C. Lack of conditions. The BLNR decisions did not assert any conditions to protect the instream use for the 13 streams.

D. Lack of justification. The BLNR did not explain any justification for allowing less water than necessary to better support habitat in the 13 streams.

E. Diversion structures. The BLNR did not adequately require modifications to diversion structures that would better protect habitat, even though DLNR's own DAR (Division of Aquatic Resources) recommended specific modifications to specific diversion structures on specific streams. **Exhibits 16 and J-21 at pp. 161-164 and Vaught testimony, 8/12/20 P.M. at 57:22-58:13.**

F. Where will the increased MGD come from and what impact will that have?

Regarding the 2019 hold-over RP, the diversion was going up from an average use of about 27 MGD to potentially as much as 45 MGD. Plaintiff argues that this cannot be allowed when the BLNR does not know which streams this water would come from and what the impact would be. **Case testimony, 8/17/20 at 46:25-47:5 and 89:5-10.**

G. Increasing the allowable MGD up to 45 MGD without really knowing how much was needed.

**12. The BLNR's information and rationale.** The BLNR argues it had ample information to make its decisions.

A. Farmers and potential farmers provided testimony that they needed to know necessary water would be available over the long term. **Exhibit AB-68 at p. 19; Exhibit J-13 at p. 13; Exhibit S-38 at pp. 05, 7, 15; Exhibit S-39 at p. 12.**

B. Testimony also supported the core concepts that keeping lands in agriculture benefitted the public interest by providing jobs, food sustainability, food sources, strengthened the state and county economy, and dependable water was essential to achieve those ends. **Exhibit AB-68 at pp. 18-19; Exhibit S-38 at pp. 3-8, 11-12, 15, 21-22, 26-27; Exhibit S-49 at p. 4, 13-15; Exhibit S-39 at pp. 11-13.**

C. Testimony was received regarding the difficulties and uncertainties of the historic change from sugar cane to a "roll-out" of the new model of diversified agriculture, and the need to have enough water to help make that uncertain transition. **Exhibit AB-68 at p. 20; Exhibit S-38 at pp. 3-8; 15, 23, 25, 26-27, Exhibit S-49 at pp. 13-15; Exhibit S-39 at p.10-13.**

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D. The Maui Dept. of Water Supply (“MDWS”) receives water from the ditch system per contracts and MOUs. **Exhibit J-14 at p. 235.** CWRM concluded the MDWS upcountry system covers over 35,000 individuals, businesses, organizations and government facilities, with about 60% of the MDWS upcountry water being for domestic use and 40% for agriculture.

E. The BLNR did not increase the amount of water withdrawn. Rather, it placed a cap of 45 MGD on average. However, A&B was only allowed to actually divert water that was actually needed for reasonable uses. In other words, BLNR argues it prevented waste by only allowing diversion of an amount reasonably necessary for use, as opposed to allowing all diversion up to the 45 MGD limit. The available use information at trial supported this argument. In 2018, A&B reported 20-25 MGD on average was diverted. **Exhibit J-16 at p. 25.** In 2019, A&B reported diversions averaging 27 MGD. **Exhibit J-21 at p. 96.** In 2020, A&B reported an average of 27.79 MGD. **Exhibit J-27 at p. 8.** The 27.79 MGD contrasts sharply with the 126 MGD diverted in 2013, when sugar cane still existed.

F. Testimony at the 2018 meeting showed that the new diversified agricultural plan was still in its formative stages. **Exhibit S-39 at p. 3.** A&B disclosed a potential partner who would farm most of A&B’s land. Water needs were predicted to be similar to A&B’s existing diversified agricultural plan. **Id at pp. 4-6.** The BLNR discussed its reason for not limiting the MGD for the next year. Basically this was because it would be hard to attract new farmers needed to replace sugar with new crops, and in any event it was doubtful that water use would drastically increase over the next year. As for a long-term plan, that was in essence being deferred until the EIS

was completed and the long-term lease process unfolded. Further, the BLNR placed a condition for the 2019 hold-over RP – that no water be wasted and that all diverted water be used for reasonable and beneficial purposes and compliance with the amended IIFS. **Exhibit J-16 at p. 8.**

G. Per CWRM's 6/18/18 D&O, of about 30,000 acres of agricultural land in central Maui, 2/3rds of it was designated as Important Agricultural Lands per HRS Chapter 205. Those lands historically relied on water delivered via the EMI ditch system.

H. System losses. The CWRM D&O analyzed system losses, meaning how much of the diverted water is lost, usually due to seepage, evaporation, and other miscellaneous causes. CWRM decided the historical (2008-2013) amount of system loss was 41.67 MGD or 22.7% of the water received, and that this was reasonable under the then-circumstances, due to a practical inability to measure the water actually lost, the nature of sugarcane cultivation, and the opinion that most of the loss was probably due to the unlined reservoirs used by HC&S. **Exhibit J-14 at pp. 215-217, Volner testimony, 8/11/20 at 130:22-131:4.** CWRM reasoned that since (for the time being) the same basic system would be used for the diversified agriculture effort, the same general amount of system loss was acceptable. **Exhibit J-14 at pp. 216-217.** When Mahi Pono submitted testimony to the BLNR in October, 2019, it predicted using an average of 45 MGD, and it allocated about 10 MGD of the 45 MGD to a category of "Reservoir/Fire Protection/Hydroelectric/Seepage/Evaporation." **Exhibit J-26 at p. 2.** This resulted in a predicted system loss of less than the 22.7% loss CWRM considered reasonable.

I. The BLNR understood that Mahi Pono's farming plan was in development, and Mahi Pono needed a reliable amount of water to be able to attract farming tenants.

**Case testimony, 8/13/20 at 190:21-191:4.**

J. Setting the 45 MGD limit.

1. A&B testified at the same October, 2019 BLNR meeting that after complying with CWRM's IISF there should be about 93 MGD "excess" water in the streams available for off-stream use. **Exhibit S-51 at p. 50.**

2. The Board approved Mahi Pono's request for a cap of 45 MGD, on average, for the next calendar year. **Exhibit S-51 at pp. 55-57.**

3. The Board required A&B to provide quarterly written updates on the amount of water used monthly, broken down by end-use. **Exhibit J-21 at pp. 7-8**, and required that all water diverted be for reasonable and beneficial uses. **Id at p. 8.**

4. A&B/EMI submitted its first quarterly report to the Board on April 25, 2020. **Exhibit J-27.** A&B reported just 27.79 MGD used on average over the first quarter. **Id at p. 8.** The amount of water reportedly used for diversified agriculture was only 2.50 MGD on average. **Id.** The court finds and concludes that the amount of water actually used by Mahi Pono in the first quarter of 2020 for diversified agriculture was less than the amount it predicted, and this fact does not mean it was improper for the BLNR to rely on Mahi Pono's initial estimates in setting the 45 MGD limit. Mahi Pono was essentially starting from scratch, during a historic change, in a new market where the actual use of water depends on variables that Mahi Pono has little control over. Realistically, the court concludes that Mahi Pono deserves some time and mileage to gain experience and figure things out.

5. Further, the quarterly report also showed an average of 16.44 MGD attributed to “Reservoir/Fire Protection/Evaporation/Dust Control/Hydroelectric.”

**Exhibit J-27 at p. 8.** The same report showed a column for “system losses” of 22.7% of water delivered, which averaged 6.31 MGD for the first quarter. **Id.** To summarize, the amount of current system losses includes 6.31 MGD plus some unknown amount from the 16.44 MGD “Reservoir” column. **Ching testimony, 8/04/20 at 38:21-39:13.**

The amount of system loss is currently more than 22.7% of water deliveries. However, the current water losses occur after the water leaves the EMI system and is distributed on the farm. **Id.** CWRM recognized that while system losses of over 20% might meet industry standards, modern agribusinesses should invest in better and more efficient infrastructure. **Exhibit J-14 at p. 22.** In that vein, Mahi Pono testified it would invest \$20 million to install more efficient irrigation systems. **Exhibit S-51 at p. 8.**

6. Given all these factors, and applying the law discussed in the COL, the court finds and concludes it was reasonable for the BLNR to put a 45 MGD limit on how much water A&B could withdraw for the 2020 calendar year. The court cannot fault Mahi Pono or BLNR for wanting a “cushion” of available water that might be more than what was actually used was preferable to running short of water needed to support Mahi Pono’s developing diversified agriculture plan. This is particularly true where the D&O’s new requirements had to be met first (restoring all or parts of many streams), when even at a maximum of 45 MGD, this was still far less than in 2013, and was less than 50% of the estimated 93 MGD available after CWRM’s IISF were satisfied.

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J. Weighing the potential harm to stream habitat against the benefits of continuing to divert water from the 13 streams.

1. Of the 13 streams Plaintiff identifies in this case as not addressed by the CWRM 6/18/18 D&O, one of them, Puakea Stream, is a tributary of the Pa'akea Stream -- which was addressed in the D&O. **Exhibit J-14 at pp. 136-140.** The court is not aware of any evidence in this case that water from Puakea Stream is actually diverted. The court spent significant time trying to understand this issue, but was unable to come to a firm conclusion one way or the other. However, the precise status of this one stream does not impact the court's final conclusion(s), and thus the court declines to make any specific findings as to whether this stream is diverted at all.

2. The other 12 streams at issue are all in the Huelo license area. **Id at p. 41.** Ayron Strauch, Ph.D., a hydrologist for CWRM, testified to the Board that the other 27 streams for which CWRM's 6/18/18 D&O re-established full or partial flow, were the largest and most important streams in the area. **Exhibit S-39 at p. 37.** Dr. Strauch testified in the instant trial that his job is to prioritize streams to establish instream flow standards. **Strauch testimony, 8/14/20 at 161:3-11.** Dr. Strauch was a highly qualified witness with extensive experience and the court found him credible. Putting it simply, not all streams are the same in terms of their importance to the water system's health as a whole. To the court, this may have been the most important single piece of information introduced during the entire trial.

3. In evaluating the impacts on habitat, the Division of Aquatic Resources provided a report called "The Use of Hawaiian Stream Habitat Evaluations Procedure to Provide Biological Resource Assessment in Support of Instream Flow

Standards for East Maui Streams” on November 20, 2009 (“DAR Report”). The DAR report used a model called the Hawaiian Stream Habitat Evaluation Procedure (“HSHEP”) to predict the overall “habitat units” that would occur in each stream with and without stream diversions. **Exhibit S-19 at pp. 2-4.** Per the DAR report, 64% of a stream’s median base flow, or H90 flow, is the minimum flow to provide suitable conditions for growth, reproduction, and recruitment of native stream creatures. **Exhibit J-14 at p. 173.** H90 flow is expected to provide 90% of the natural habitat in a stream. **Id at p. 171.**

4. DAR also advised CWRM that restoring suitable flow to a single stream is better than inadequate flow to multiple streams. **Exhibit J-24 at p. 3.** DAR’s advice was based on “the ‘biggest bang for the buck’ concept, placing priority on streams with the greatest potential to increase suitable habitat for native species.” **Id.** DAR also advised CWRM that restoring streams that are spread out geographically provides more protection and better ecosystem function across East Maui. **Exhibit J-23 at p. 1.**

5. Diverted streams can still have water flow as a result of rainfall, and if they are gaining streams, they can gain water from springs or other sources as they move down below a diversion. **Strauch testimony, 8/14/20 at 111:12-17.** Mr. Strauch spends a lot of time in streams on Maui, and the court found his testimony particularly reliable.

6. In sum, at the November 2018 meeting, it was reasonable for the Board to allow A&B to continue to divert water from the “13 streams,” where, on one hand, returning water to the streams was not guaranteed to result in “H90” flow, and

therefore, was not guaranteed to restore sufficient habitat to native species. Barring diversions from the 13 streams could mean A&B would be forced to reopen diversions in the Keanae and Kahiku areas that were previously closed. On the other hand, continuing to allow the 13 streams to be diverted did not necessarily mean that native species would not be able to migrate in those streams if there was sufficient flow from freshets and storm events. This is a classic balancing and the court is persuaded and finds and concludes that applying the applicable law (see COLs, *infra*), it was not unreasonable for the BLNR to balance these considerations as it did.

7. The evidence at trial was clear that even when streams have been diverted for years, they will likely recover if and when flows are returned. **Kido testimony, 8/3/20 at 88:3-14.** No contrary expert testimony was produced.

K. The Parham report.

1. As described briefly above, Plaintiff relies heavily on the Parham report to establish that inadequate consideration was given to the negative impact on stream habitat when stream flow is diverted substantially or entirely cut off.

2. A&B's DEIS was published by the Office of Environmental Quality Control ("OEQC") in September, 2019. **Exhibit J-21 at p. 4.** The entire DEIS as published by OEQC was stipulated into evidence at trial as **Exhibit J-20.** The DEIS contained a report called the "Assessment of the Environmental Impact of Stream Diversions on 33 East Maui Streams using the Hawaiian Stream Habitat Evaluation Procedure (HSHEP) Model" prepared by James Parham, Ph.D. of Trutta Environmental Solutions, LLC (the "Parham Report"). **Exhibit J-20 at p. 568.** The Parham Report attempted to quantify the amount of habitat for stream animals in the IIFS streams

under various scenarios, and it predicted that if the 12-13 non-IIFS streams were fully diverted they would lose 85% of their predicted habitat. However, the Parham Report also concludes that, “[f]rom a habitat availability perspective, the 2018 IIFS does a good job at improving instream habitat over a wide range of streams.” **Exhibit J-20 at p. 632.** So again we see evidence that the 6/18/18 D&O, in addressing the most important 27 streams, improved instream habitat generally regardless of the exact posture of any of the 12-13 non-IIFS streams.

3. The court finds and concludes that given the above factors, the Parham Report raises issues that should be considered as part of fulfilling public trust duties. However, the Board’s decision here was consistent with balancing. On one hand there is potential but likely not permanent harm from continued diversion of the 12-13 non-IIFS streams. On the other hand, there are important benefits to ensuring sufficient water is available for agriculture and domestic use.

L. The feasibility of alternative sources of water.

1. The court is not aware of any evidence from any source that there is any present realistic alternative to the EMI ditch system providing the necessary water for upcountry residents and Mahi Pono’s farmers on Maui’s central plain.

2. CWRM had discussed alternative sources of water in its 6/18/18 D&O, and found that while sugar cultivation historically used 70 MGD of ground water from wells on HC&S’s fields to irrigate its crops (20 to 30% of all water used), groundwater would be significantly reduced from historic levels when changing to diversified agriculture. **Exhibit J-14 at p. 219.** Reasons: reduced recharge of the groundwater aquifer due to lower levels of irrigation from diverted east Maui streams,

the uncertain tolerance of diversified agricultural crops to brackish water, and the higher costs of pumping groundwater. **Id at p. 273.**

3. The court is not aware of any evidence that groundwater could or would realistically change the current essential need for water via the ditch system.

**Exhibit J-20 at p. 177.**

4. Per the above, the court finds and concludes it was reasonable for the BLNR not to require Mahi Pono to rely on using groundwater to irrigate its crops in 2019.

M. Balancing recreational uses with off-stream uses.

The court assumes that the continued diversion of the 12-13 non-IIFS streams negatively affects Plaintiffs' enjoyment of those streams. There is unquestionably a qualitative difference between hiking beside a thriving stream versus walking up a dried-out former stream bed. However, the court again returns to the balancing involved in this case. 27 streams were completely or substantially restored by the 6/18/18 D&O. They were considered the most important streams, where improvements would have a disproportionate impact across the entire water system, including the license area where the 12-13 streams in this case are located. The court concludes and finds this is a reasonable balancing, especially during this period of historic change where the needs of diversified agriculture are still difficult to estimate, habitat destruction from insufficient stream flow appears reversible, broad watershed improvements have been achieved, and no EIS is required for hold-over RPs per the ICA's ruling in Carmichael. Further, the Board imposed reasonable conditions on the clean-up of all streams, as discussed below.

N. Negative impacts.

1. Plaintiff argues that the BLNR should not have approved the continued holdover of the RPs absent a detailed analysis of the harm caused by diversion structures. The court understands the argument, and the court agrees it could sometimes be helpful to have that information; however, the court finds it is simply unrealistic given the time pressures of a hold-over RP process. Further, it is not as though the issue is being cast aside and ignored. An extensive EIS is in progress in connection with an expected long-term lease, which will undoubtedly address impact on habitat, and related modifications to or removal of diversion structures because of their impact on stream creatures. Given these realities, the court concludes the Board was reasonable in deciding it had sufficient information to make what everyone expected would be a short-term decision.

O. Deadline for removal or alteration of stream diversion structures.

1. The CWRM 6/18/18 D&O specifically states that the CWRM will decide how diversions will be modified in a subsequent process. **Exhibit J-14 at p. 292.** Diversions only need to be modified if necessary to accomplish the IIFS and allow for the passage of stream biota. **Id.** Diversions need not be removed unless necessary to achieve the IIFS. **Id.**

2. Removal of diversion structures may cause more environmental harm than leaving them in. **Ching testimony, 8/04/20 at 17:17-23.** It was reasonable for the BLNR to allow the CWRM to continue its process of determining what modifications are needed for which diversion structures.

3. Removal of diversion structures can require permits and permissions from multiple government entities, which makes setting any firm deadlines problematic.

4. Plaintiff failed to show that the balance of harms requires the BLNR to place deadlines on the removal of specific diversion structures.

5. Given the above, the court finds and concludes the BLNR was not required to place a deadline on A&B for the modification of diversion structures to comply with the IIFS.

P. The BLNR was not required to find out how much water is specifically taken from each of the 12-13 streams.

1. No doubt, it would help everyone involved if all or most of the streams had real-time gauges which could be monitored remotely. The court envisioned a system like a modern train station or electrical grid, with walls of digital displays, and “switching stations” so the supervisor could send water from anywhere to anywhere by the click of a mouse, and thereby reliably meet all in-stream and off-stream uses simultaneously. Someday perhaps, but clearly not now or anytime soon.

2. In the meantime, Plaintiff did not show it would be reasonable, let alone necessary, for the BLNR to require stream gaging on the non-IIFS streams to measure how much water A&B is taking from each stream.

3. Maintaining the equipment needed to accurately gauge streams requires constant supervision. Stream “flow” is calculated using data gathered from multiple, fixed points within a stream, but Hawaii’s “dynamic streams . . . are constantly eroding” and equipment does not always stay in place. **Strauch testimony, 8/14/20 at**

**98:3-99:22.** The watershed area contains “difficult conditions” including “rapidly eroding watersheds, watersheds that have gaining and losing reaches that make measurements difficult relative to the equipment,” and accessibility is limited by “the availability of roads and trails.” **Strauch testimony, 8/14/20 at 98:13-22.**

4. All of the approximately 12 gaging stations that the Water Commission maintains in the East Maui license areas must be visited in person in order to retrieve the data. **Strauch testimony, 8/14/20 at 100:18-25.** The amount of water taken from any given stream varies by day, and water must be taken where it is available. **Ching testimony, 8/04/20 ay 65:2-13.**

5. Given the above, the court finds and concludes Plaintiff has not shown that requiring information on the amount of water taken from each stream before allowing decision-making is simply impractical at present, or that having that information would demonstrably benefit the decision-making on the two hold-over RPs at issue.

Q. Removal of trash and debris from the license areas.

1. In 2017, the BLNR required A&B to clear debris in the license areas, beginning with the more accessible areas and next to the streams. **Exhibit J-16 at p. 27.** The Board kept the same condition in 2018. **Id at p. 8.** Status reports for each year basically indicated that work crews were instructed to identify potential material not serving any function. It appears that over time, A&B reported that several hundred feet of old pipe, along with other debris, had been removed. Plaintiff/members have identified what they consider to be trash, but evidence at trial was that at least some and perhaps most of these old pipes are dilapidated but still functional parts of the EMI ditch system. **Strauch testimony, 8/14/20 at 171:14-173:7, 161:22-163:12.**

Other items cannot be removed without an evaluation by CWRM. **Strauch testimony, 8/17/20 at 91:8-91:23.**

2. Per the above, the BLNR's conditions regarding trash removal in 2018 and 2019 were reasonable.

R. The public trust does not require Plaintiff's requested relief.

1. Plaintiff asks this court to maintain the "status quo" by preventing A&B from diverting more than 27 MGD from East Maui. **JEFS No. 808 at 65.**

2. However, the court heard testimony from Grant Nakama, the vice president of operations for Mahi Pono, that a cap of 25 MGD would have a "high detrimental impact" on the roll-out of Mahi Pono's farming operations. **Nakama testimony, 8/13/20 at 19:19-20:3.** The remaining acreage of crops to be planted would likely need to be put on hold, and would impact Mahi Pono's future farming plan. **Id.**

3. Imposing a cap on the total amount of water that can be diverted also caps the amount that can be used by Mahi Pono while also providing sufficient water to the County of Maui. During times of low rainfall and higher water use, the County relies heavily on diverted water. **Pearson testimony, 8/14/20 at 26:7-18.** The County's water use cannot safely be limited based on past averages, because the County needs flexibility in the amount of water it is able to use from the EMI system. At times it will need more than at other times. **Id.** Clearly the County's needs are a legitimate public trust interest, so applying a cap of 27 MGD does not support the broader, comprehensive goals of the public trust.

S. The balance of harms does not support a permanent injunction.

1. As discussed above, even if the 12-13 streams were perpetually

dry, there are other streams which CWRM has decided are ecologically more important, which more broadly support the health of the water shed, and which provide habitat for native species in the same license areas as the 12-13 streams.

2. Also as discussed above, even dry streams are likely to recover if flows are ever returned.

3. Plaintiff has not shown that placing a deadline on the removal, alteration, or abandonment of stream diversions is necessary to prevent irreparable harm.

4. Plaintiff has not shown that the beauty of the streams is in danger of irreparable damage.

5. Per the above, the balance of harms weighs against a permanent injunction invalidating the hold-over RPs and capping the amount of water that can be taken from the license areas.

### **CONCLUSIONS OF LAW**

#### **A. The Public Trust Duties.**

1. The Public Trust imposes a **dual** mandate on the State to both protect water resources, and to make maximum reasonable beneficial use of the State's water resources.

2. The public trust doctrine has been incorporated into article XI, sections 1 and 7 of the Hawai'i Constitution. See *In re Water Use Permit Applications*, 94 Hawai'i 97, 132 (2000) ("Waiahole I").

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3. Haw. Const. art. XI, § 1 states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

4. Haw. Const. art. XI, § 7 specifically relates to water resources, stating that: "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."

5. "[A]rticle XI, section 1 of the Hawai'i Constitution requires the state both to 'protect' natural resources and to promote their 'use and development.' The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." Waiāhole I, 94 Hawai'i at 138–39 (emphasis added).

6. This "dual mandate" means that the State must not always choose maximum protection. While the State should "protect public trust uses whenever feasible," the Hawai'i Supreme Court does not define "feasible" in this context as "capable of achievement." *Id.* at 141, 141 n.39 (emphasis added).

7. Resource protection is but one of several considerations the State must make in carrying out its public trust duties. *Id.* at 142.

8. The Hawai'i Supreme Court has identified several distinct uses that are specifically intended to be protected by the public trust, including the maintenance of water in its natural state, domestic uses, and the exercise of Native Hawaiian

traditional and customary rights. *Id.* at 136–37. Reserving water to the Department of Hawaiian Homelands is another public trust use. *In re Wai‘ola o Mokola‘i, Inc.*, 103 Hawai‘i 401, 431 (2004).

9. Domestic uses such as drinking water are considered “as among the highest uses of water resources.” *Waiāhole I*, 94 Hawai‘i at 137.

10. Regarding “use,” the Court has also recognized that “[t]he public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture.” *Waiāhole I*, 94 Hawai‘i at 141 (citation omitted). “Therefore, apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.” *Id.* “[A]rticle XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state.” *Id.* (emphasis added).

11. “[T]here are no ‘absolute priorities’ between uses under the public trust, so the state and its subdivisions must ‘weigh competing public and private water uses on a case-by-case basis,’ according to any standards applicable by law.” *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai*, 133 Hawaii 141, 172 (2014). A “higher level of scrutiny” is applied to proposals for private commercial use. ***Id.***

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**B. The standard of care under the public trust is the standard of reasonableness required of a trustee.**

12. “The duties imposed upon the state [under the public trust] are the duties of a trustee and not simply the duties of a good business manager.” Matter of Conservation Dist. Use Application HA-3568, 143 Hawai‘i 379, 402 (2018). A trustee’s duties include:

(a) the duty to preserve trust property using the care and skill of a person of ordinary prudence. Ching v. Case, 145 Hawai‘i 148, 177 (2019); Matter of Estate of Dwight, 67 Haw. 139, 146 (1984).

(b) the duty to administer the trust solely in the interest of the beneficiary. Ahuna v. DHHL, 64 Haw. 327, 340 (1982). In administering the trust, the trustee must exercise ordinary prudence, (or exercise any greater skill if the trustee holds itself out to possess such skill). Restatement (Second) of Trusts § 174 (1959).

(c) the duty to “use reasonable skill and care to make trust property productive, or simply ... act as an ordinary and prudent person would in dealing with his own property.” *Id.* (citation omitted).

(d) the duty to comply with the terms of the trust. Awakuni v. Awana, 115 Hawai‘i 126, 135 (2007) (agreeing that “the extent of the duties of a trustee depends primarily upon the terms of the trust.”)

13. The standard of “reasonable prudence” does not require perfect judgment. “We understand that a trustee is not expected to be infallible in his judgments or decisions.” Ahuna, 64 Haw. at 340; see also Restatement (Second) of Trusts § 174 cmt. b (“Test of prudence. Whether the trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to him at the time when he

does the act and not at some subsequent time when his conduct is called in question.”).

C. **The Board’s decision is presumed valid, and the burden is on the plaintiff to prove that the Board did not act as a reasonably prudent fiduciary.**

14. The Board’s 2018 and 2019 decisions at issue here did not result from a HRS § 91-9 contested case. Rather, the Board’s 2018 and 2019 decisions were made in the regular course of the Board’s open meetings, held pursuant to HRS § 92-3.

15. In an HRS § 91-9 contested case, the agency may only consider matters within the “record” when making its decision. HRS § 91-9(g). The “record” in a contested case includes only certain categories of documents and evidence that are specifically set out by HRS § 91-9(e)(1)-(6).

16. Special rules of evidence apply to contested cases. HRS § 91-10. HRS § 91-10(4) governs the ability of an agency to judicially recognize certain facts within their specialized knowledge. HRS § 91-10 (5) requires that the “degree or quantum of proof shall be a preponderance of the evidence.”

17. In contrast, in an open meeting held pursuant to HRS § 92-3, the Board is required to “afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The [B]oards shall also afford all interested persons an opportunity to present oral testimony on any agenda item.”

18. The Board’s powers include the right to dispose of water rights by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State, HRS § 171-58(c), and may allow the permit to continue on a month-to-month basis for additional one year periods. HRS § 171-55.

19. Thus, certain requirements that are specific to HRS § 91-9 contested cases do not apply to this case.

20. In an HRS § 91-9 contested case, findings of fact and conclusions of law are required. HRS § 91-12. There is no requirement that the Board render findings of fact and conclusions of law with respect to any disposition of water rights or permits that it makes in the regular course of the exercise of its powers during a Chapter 92 meeting.

21. A person aggrieved by a final decision and order in a contested case may appeal to the circuit court for appellate review. HRS § 91-14(a)-(b). By statute, the reviewing court must apply certain standards of review to the agency's final decision. HRS § 91-14(g)(1)-(6).

22. In this case, the plaintiff is not appealing a decision following a contested case, but has filed a declaratory action pursuant to HRS § 631-1 seeking a declaration that the Board, by a decision made in an open meeting pursuant to HRS § 92-3, violated the public trust.

23. Whether the public trust has been breached is a question of fact for which the plaintiff bears the burden of proof. See, e.g., Ching, 145 Hawai'i at 179 ("Typically, whether a fiduciary acted prudently—or in other words, as a reasonably prudent fiduciary—is a question of fact."); Kelly v. Oceanside Partners, 111 Hawai'i 205, 234 (2006) (party arguing that agency breached its public trust duties had burden of proof).

24. Agency decisions affecting public trust resources carry a presumption of validity. Waiāhole I, 94 Hawai'i at 143. A court will take a "close look" at the action to determine if it complies with the public trust doctrine, but it will not supplant its judgment for that of the agency. *Id.* at 144.

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25. The court is guided by the “principle that decisions of administrative bodies acting within their sphere of expertise are accorded a presumption of validity.” Ka Pa‘akai O Ka‘Aina v. Land Use Comm'n, State of Hawai‘i, 94 Hawai‘i 31, 40 (2000).

26. The DLNR, headed by the Board, manages, administers, and exercises control “over the public lands, the water resources, ocean waters, navigable streams . . . and all other interests therein and exercise[s] such powers of disposition thereof as may be authorized by law.” HRS § 171-3(a). The license areas and management of streams are therefore squarely within the Board’s “sphere of expertise.”

27. While the balancing of public and private uses begins with a presumption in favor of “public use, access, and enjoyment,” (In re Waiola O Molokai, Inc., 103 Hawai‘i 401, 432 (2004)), the public trust does not require that the 12-13 streams all be “fully protected” before any water can be diverted. The Hawai‘i Supreme Court recognized that “reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.” *Id.* at 432 (emphasis added) (quoting Waiāhole I, 94 Hawai‘i at 141).

28. The public trust requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people. Waiāhole I, 94 Hawai‘i at 141, 9 P.3d at 453.

29. Plaintiff relies heavily on Kauai Springs, 133 Hawai‘i at 174-175 for items an “applicant” for water must prove. Kauai Springs, however holds that the “framework” it presents is not mandatory and does not preclude other analytical approaches that are consistent with the public trust doctrine. *Id.* at 174, n.25.

30. The discussions in Kauai Springs and Waiāhole I are instructive as to the “general principles and factors that an agency must consider when reviewing a permit for the use of a public resource,” (see Kauai Springs, 133 Hawai‘i at 171). The cases do not describe the degree of proof that the Board should require before approving the holdover of a revocable permit under HRS § 171-55 or HRS § 171-58.

31. Although applicant had the burden before the Board, Plaintiff now has the burden to show that the Board’s decision was not reasonable.

32. The “threshold burden” on A&B was to prove “its actual water needs for its proposed futures uses ‘insofar as circumstances allow.’” In re Waiola O Molokai, Inc., 103 Haw. 401, 438 (2004) (quoting Waiāhole I, 94 Hawai‘i at 161).

33. The lack of complete information, even potentially useful information, does not prohibit the Board from allowing offstream use. Instead, the [agency] must apply, in its own words, “a methodology that recognizes the preliminary and incomplete nature of existing evidence,” . . . and, indeed, incorporates elements of uncertainty and risk as part of its analysis. Such a methodology, by its nature, must rely as much on policy considerations as on hard scientific “facts.” Waiāhole I, 94 Hawai‘i at 158–59.

34. “[B]esides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources.” Waiāhole I, 94 Hawai‘i at 161, 9 P.3d at 473.

35. “Considering whether alternative water resources are practicable innately requires prioritizing among public trust resources.” In re Water Use Permit Applications, 105 Hawai‘i 1, 20 (2004) (“Waiāhole II”). CWRM determined there were no reasonable

alternatives to using stream water; the only possibly “practicable” alternative was groundwater pumped from wells on the former HC&S fields. The information before the Board also demonstrated that the rate at which groundwater is recharged would likely be much lower than under sugar cultivation, especially given that much of the former HC&S lands were not being irrigated. For the above and other reasons stated at the hearing, it was not unreasonable for the Board to prioritize amongst trust resources by allocating EMI ditch water to A&B/Mahi Pono for the proposed beneficial uses, and allowing the finite groundwater resource to be preserved for future uses.

36. When the matter before the agency “involves an allegation of harm that is not readily ascertainable, the [agency] may nevertheless permit existing and proposed diversions of water if [the applicant] can demonstrate that such diversions are reasonable-beneficial notwithstanding [the potential harm.]” In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai‘i 481, 499 (2007).

37. Here, there was substantial testimony and information provided to the Board regarding the water available for allocation (after the CWRM’s IIFS were met) for the diversified agricultural needs of A&B, Mahi Pono, and the County of Maui.

38. In addition to upholding the public trust, the Hawai‘i Constitution directs the State to “conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.” Haw. Const. art. XI, §3.

39. Here, there is no dispute that water diverted by A&B was being used for diversified agriculture on land zoned for agriculture. There is also no dispute that

approximately 22,254 acres of the former HC&S lands have been designated as Important Agricultural Lands (“IAL”) pursuant to HRS Chapter 205, Part III. By statute, Important Agricultural Lands:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State’s economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

40. It was reasonable for the Board to find that providing water for A&B, Mahi Pono, and the County’s diversified agriculture operations would provide jobs, grow the economy, keep agricultural lands productive, prevent agricultural lands and the infrastructure supporting them from falling into disrepair, and promote food sustainability.

41. The Board was not required to force Mahi Pono to plant only crops that are tolerant to brackish water or require the least amount of water. Doing so is not in the interest of promoting diversified agriculture, which the Hawai’i Constitution directs the Board to do. Likewise, given the early stages of Mahi Pono’s operations, it was reasonable for the Board to allow Mahi Pono flexibility in using its business judgment to choose the crops it would cultivate.

42. Given that hold-over RPs are allowed, per the above FOFs, the court concludes the Board had enough information to reasonably conclude that allowing the continued holdover of the two RPs for one year each would be in the public interest and

meet the Board's constitutional duty to conserve and protect agricultural lands and promote diversified agriculture and other beneficial uses.

43. Authorizing the two hold-over RPs for additional one-year periods did not impair the Board's ability to restore more water if warranted, and did not impair the Board's ability to hold A&B to task if it was not honoring the permit conditions.

44. "Lastly, if the impact is found to be reasonable and beneficial, then in light of the cumulative impact of existing and proposed diversions on trust purposes, the applicant must implement reasonable measures to mitigate this impact." Kauai Springs, 133 Hawai'i at 173.

45. While a public trustee should "protect public trust uses whenever feasible," "feasible" does not merely mean "capable of achievement." It still requires the balancing of benefits and costs. *Id.* at 141 n.39.

46. The management of stream diversions and enforcement of the D&O is within CWRM's responsibilities. HRS § 174C-5 (the general administration of the water code rests with the CWRM); HRS § 174C-93 ("No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.")

47. In *Waiāhole I*, the CWRM determined that it could not calculate the "exact relationship" between instream flows and ecological benefit due to the lack of scientific knowledge, and so it set an IIFS that it deemed "practicable." 94 Hawai'i at 147. The Supreme Court remanded for the CWRM to make a determination based on what would protect the instream values of the streams based on the best available information. *Id.* at 156-57.

48. Waiāhole I did not hold that no offstream diversions will ever be allowed from streams without amended IIFS. Rather, CWRM may decide to allow continued offstream use despite a definitive instream flow standard: “At the present time, we hold only that the Commission’s inability to designate more definitive instream flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes.” *Id.* at 159.

49. In this case, it is undisputed that none of the streams are in a designated water management area, and therefore, discussion of what is required for a water use permit is inapposite.

50. A trustee’s duty to monitor trust property is also based on a standard of reasonableness:

It is self-evident that an obligation to reasonably monitor trust property to ensure it is not harmed is a necessary component of this general duty, as is a duty to investigate upon being made aware of evidence of possible damage. This obligation inherently includes a duty to make reasonable efforts to monitor third-parties’ compliance with the terms of agreements designed to protect trust property.

Ching, 145 Hawai‘i at 177–78.

51. Plaintiff argues that the CZMA applies to this case (see Count 3 for details) insofar as it sets out requirements for the “Coastal Zone Management Area” which includes all lands of the State. HRS § 205A-1. This claim was hardly mentioned during trial, and was mentioned in only one conclusory statement in Plaintiff’s closing argument.

52. Plaintiff generally alleges that the Board “did not exercise an overall conservation ethic, practice stewardship, minimize impacts, or effectively regulate.”

[JEFS No. 808 at 62-63]. “Conservation” means “the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits.” Waiāhole I, 94 Hawai‘i at 139.

53. Conditioning the use and development of streams on “conservation” requires that all uses, offstream and instream, public or private, also promote the best economic and social interests of the people of the state. *Id.* at 141.

54. As discussed above in the context of balancing interests, the evidence supports the conclusion that the Board properly carried out its “conservation” mandate by weighing competing interests and making reasonable decisions to promote the economic and social interests of the people of the state. Plaintiff’s claims that the Board violated the “conservation” mandates of the CZMA are thus without merit.

55. Injunctive relief. Even if plaintiff were to prevail on the merits of its public trust and CZMA claims, the court is not obligated to issue the mandatory and prohibitory injunctions prayed for. An injunction is an extraordinary remedy. Morgan v. Planning Dept., County of Kauai, 104 Hawai‘i 173, 188, 86 P.3d 982, 997 (2004). “The appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction.” Pofolk Aviation Hawaii, Inc. v. Dep’t of Transp. for State, 134 Hawai‘i 255, 261 (App. 2014), *aff’d* on other grounds, 136 Hawai‘i 1 (2015) (internal quotation marks and citation omitted). Here, Plaintiff has not prevailed on the merits, and even if Plaintiff did prevail on the underlying merits, per the above FOF the court concludes the balance of harms does not require an injunction,

and since hold-over RPs for these water rights are currently allowed without environmental review per Carmichael, and per the multiple FOFs above, the court concludes the public interest in granting the two hold-over RPs is at least as strong as the public interest in denying the hold-over RPs.

56. Here, as discussed above in the FOF, the evidence shows and the court concludes that the 12-13 streams are not likely to suffer irreparable harm from the temporary impact of the two hold-over RPs at issue.

57. Relief.

A. The public interest and the balancing of harms weighs against issuing a permanent injunction limiting the amount of water that can be diverted from the license areas to the “status quo” level of 27 MGD, or requiring the Board to re-visit its decision-making on the 2 RPs in order to gather more information. The court concludes and finds these remedies would likely have negative effects for Mahi Pono the company, and to the people that Mahi Pono employs, the farmers who lease land from Mahi Pono, and the County. The negative effects extend to leaving important agricultural lands fallow, and missing opportunities to significantly increase Hawaii’s food diversification, independence and sustainability. Against this likely harm one weighs the issue of waste, and the harm to habitat and loss of beauty in the 12-13 non-IIFS streams.

B. Waste. As explained above in more detail, the court ultimately concludes that in the context of temporary 1-year hold-over RPs, and with the context of Mahi Pono’s new agricultural model, CWRM’s determination that the level of on-farm waste was acceptable is sufficient to support the Board’s balancing decision. It is not all

the information one would like to have about water waste, and there is additional information the Board could but did not request. That said, there is no clear evidence that having the additional information would or should have made a difference in the Board's decision-making on the two RPs at issue under the circumstances of this case. For example, there was no evidence that the waste identified as "on farm" waste was unreasonable in light of industry norms or the particulars of farming on Maui. Another example: the only potentially major improvement shown by the evidence that would significantly and reliably reduce wasted water during the storage phase would be to line all the storage reservoirs. This is a costly solution that likely would not even be designed and completed before the RP expired. Bottom line: the court concludes the Board had enough information to make rational and informed decisions on the 2 RPs at issue. Further, the Board ordered that waste be avoided. As Mahi Pono develops its plans and practices, the court draws the inference that more data will become available to help guide upcoming decisions about both using water and avoiding waste.

C. Habitat. This issue has also been discussed in these FOF but in summary, CWRM's D&O has gone a long way to re-establishing habitat in the license area of the 12-13 streams, there is evidence the 12-13 streams are gaining streams which will support habitat as the streams descend, there is no evidence of a dire die-off, and there is evidence that if the 12-13 streams are ultimately restored, partially or fully, more habitat and creatures will return. All these and other factors discussed in the FOFs weigh against this court finding for Plaintiff, or otherwise ordering injunctive relief, or ordering the Board to re-examine its decision-making for the 2 hold-over RPs.

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58. To the extent any of these findings of fact are deemed conclusions of law or conclusions of law are deemed findings of fact, they shall be so construed and given the full effect intended.

59. Except as otherwise noted, each of the findings of fact set forth herein has been proven by a preponderance of the evidence.

60. To a substantial but not exclusive extent, the court's FOFCOL used many of the State's proposed FOFCOL as a foundation. The court is aware that many additional FOFs could have been issued; however, the court made the findings the court thought were necessary, and declined to make findings on all issues raised in the parties' proposed FOFCOL. The fact that the court did not make a finding or conclusion on an issue raised by a party does not mean the court made a contrary finding on that point, by inference or otherwise. The court unfortunately does not have time to check and include each "winning" FOFCOL by each party, and so many proposed FOFCOL drop out even if they might have merit. For example, exhibits were introduced and legal authorities provided that were considered and analyzed but not expressly cited above. A trial judge is only required to make brief and pertinent findings. It is not necessary to over-elaborate or particularize facts. The trial court must include enough subsidiary facts as necessary to disclose to the appellate court the steps and facts by which the trial judge reached his or her ultimate conclusion. Upchurch v. State, 51 Haw. 150, 155 (1969). "As to the adequacy of the trial court's findings, an appellate court will consider whether the findings are sufficiently comprehensive and pertinent to the issue to form a basis for the conclusion of law and whether they are supported by the evidence." Ventura v. Grace, 3 Haw. App. 371, 374 (1982) (citing Palama v. Sheehan, 50 Haw.

298 (1968); Shannon v. Murphy, 49 Haw. 661, 426 P.2d 816 (1967)). The court believes it has complied with this standard.

61. If any party concludes that further FOFCOL are *critical* in order to prevent a remand for further findings, that party should inform the court before the Judgment is entered so that the court can consider the issue.

### **DECISION AND ORDER**

Based on the above Findings of Fact and Conclusions of Law, it is HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment shall enter in favor of all Defendants on all claims alleged in the First Amended Complaint filed herein on December 6, 2019.
2. There are no other remaining parties or claims or issues to be resolved.
3. To the extent there are any remaining parties or claims, they are hereby dismissed without prejudice.

DATED: Honolulu, Hawai'i, April 6, 2020

/s/ Jeffrey P. Crabtree



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Judge of the Above-Entitled Court

Sierra Club v. BLNR; 1CC 19-1-0019 (JPC); First Circuit Court;  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

# EXHIBIT 6

# EAST MAUI IRRIGATION COMPANY, LLC

P.O. BOX 791628, PAIA, MAUI, HAWAII 96779-1628 • (808) 579-9516

October 1, 2020

VIA E-MAIL AND U.S. MAIL

Ms. Suzanne Case, Chairperson  
and Members of the Board of Land and Natural Resources  
State of Hawaii  
P. O. Box 621  
Honolulu, HI 96809

RE: Holdover of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to Alexander & Baldwin, Inc. and Revocable Permit No. S-7266 issued to East Maui Irrigation Company, Limited for Water Use on the Island of Maui

Dear Chair Case:

The purpose of this letter is to request the Board of Land and Natural Resources (“**Board**”) to review and authorize the renewal of the subject permits (“**RP’s**”), to enable the continued provision of water to Mahi Pono to support its farming activities in Central Maui, as well as to the County of Maui for its Upcountry Maui and Nahiku public water systems. As noted last year, Mahi Pono’s objective is to transition as much of the former sugarcane land as possible to diversified agriculture.

In past years, we have accompanied this request letter with a status report on A&B/EMI’s compliance with the relevant RP permit conditions. As you are aware, in approving the RP’s for the year 2020, the Board requested quarterly written reports of permit compliance. Accordingly, status reports for the first and second quarter of 2020 have been duly submitted to the Board, and we anticipate the third quarter report will be transmitted in October. With those reports, we have transmitted the agenda, minutes, and staff recommendation of the BLNR’s October 11, 2019 meeting relating to the subject permits. These documents are the source of the permit conditions covered in the quarterly reports.

During 2020, water collection enabled by these East Maui revocable water permits supported the increasing diversified agricultural activities in Central Maui undertaken by Mahi Pono as described in the permit compliance status reports submitted to the Board. Maintaining these Central Maui lands in agriculture is consistent with the state’s constitutional mandate to protect important agricultural lands, as well as the Hawaii State plan, Maui Countywide Policy Plan, Maui Island Plan, and relevant Maui community plans. In addition, the permits continued to serve the needs of the public water systems that serve Upcountry Maui and Nahiku, both owned and operated by the County of Maui Department of Water Supply, as well as the County’s Kula Ag Park. These uses of East Maui stream waters are further recognized and

**EXHIBIT 6**

confirmed by the June 20, 2018 Interim Instream Flow Standard (“**IIFS**”) decision issued by the Commission on Water Resource Management (“**CWRM**”) for East Maui streams, which involved streams within the area covered by the subject revocable permits. The diversion and use of the East Maui stream water this year has been in compliance with the CWRM’s June 2018 IIFS decision, as noted in the attached permit compliance status report.

Lastly, we would like to note that substantial progress continues to be made on the Environmental Impact Statement (“**EIS**”) for the issuance of a long-term State water lease for East Maui, in lieu of these revocable permits. Following the September 23, 2019 publication of the Draft Environmental Impact Statement (“**DEIS**”), approximately 400 comment letters were received during the 45-day comment period, some of them quite extensive. We have been working diligently, along with our technical consultants, to provide thorough responses to each of the letters. The volume of letters, along with the impacts of Covid on working conditions and communications, has resulted in a longer-than-estimated work period to produce a final EIS document. We expect to complete the document shortly.

Please do not hesitate to contact us, if you have any questions on this request or the attached permit compliance status report.

Sincerely,



---

Meredith J. Ching, A&B



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Mark Vaught, EMI

cc: Ian Horikawa, DLNR Land Division (via email)

# EXHIBIT 7

RECEIVED



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

2020 NOV 12 AM 8:53

PETITION FOR A CONTESTED CASE HEARING

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

**INSTRUCTIONS:**

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
 Department of Land and Natural Resources  
 Administrative Proceedings Office  
 1151 Punchbowl Street, Room 130  
 Honolulu, Hawaii 96813  
 Phone: (808) 587-1496. Fax: (808) 587-0390
  - DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form>). Please review these rules before filing a petition.
  - If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
  - Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in three (3) photocopies

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Sierra Club	2. Contact Person Marti Townsend	
3. Address P.O. Box 2577	4. City Honolulu	5. State and ZIP HI 96803
6. Email hawaii.chapter@sierraclub.org	7. Phone (808) 538-6616	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	10. Firm Name	
11. Address 1638-A Mikahala Way	12. City Honolulu	13. State and ZIP HI 96816
14. Email davidkimofrankel@gmail.com	15. Phone (808) 345-5451	16. Fax

**C. SUBJECT MATTER**

**17. Board Action Being Contested**

CONTINUATION OF REVOCABLE PERMITS S-7263 (TAX MAP KEY (2) 1-1-001:044), S-7264 (TAX MAP KEYS (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) AND S-7265 (TAX MAP KEY (2) L-L-002:POR. 002) TO ALEXANDER AND BALDWIN, INC., AND S-7266 (TAX MAP KEYS (2) 1-2-004:005 & 007) TO EAST MAUI IRRIGATION COMPANY, LIMITED, FOR WATER USE ON THE ISLAND OF MAUI

**18. Board Action Date**

November 13, 2020

**19. Item No.**

D-8

**20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case**

**21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection**

Decades ago, the Hawai'i Supreme Court held that an agency hearing is required where a permit "adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). Because the Sierra Club's rights to a contested case hearing are constitutionally based, the Hawai'i Supreme Court's decision in *In re Maui Elec. Co.*, 141 Hawai'i 249, 408 P.3d 1 (2017) provides the straight-forward analytical framework to determine whether the BLNR should conduct a contested case hearing.

1. The Sierra Club Seeks to Protect Property Within the Meaning of the Due Process Clause of the State Constitution.

"The legitimate claims of entitlement that constitute property interests are . . . created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law—rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Maui Elec.*, 141 Hawai'i at 260, 408 P.3d at 12. The property interests that the Sierra Club seeks to protect are founded upon three bases.

A. The Sierra Club's Members Have the Right to Use Water From Free-Flowing Streams.

Sierra Club members enjoy the right to use water from free-flowing streams. HRS § 7-1 provides "The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple." This right is enjoyed by Sierra Club members who live and own property adjacent to streams in the area covered by the revocable permits as well as members who do not. Sierra Club members have riparian rights and/or appurtenant water rights. These are property rights protected by the due process clause of the State Constitution.

Sierra Club members enjoy the streams that were the subject of the June 20, 2018 Commission on Water Resource Management (CWRM) decision and order, including Hanehoi Stream. They also use and enjoy the 13 streams that were not part of the recent CWRM proceedings. Sierra Club members own property, live next, and enjoy to streams that flow within the area covered by the revocable permits.

The diversion of these streams adversely affects riparian rights and/or appurtenant rights. The diversion of these streams adversely affects the ability of Sierra Club members to use stream water for domestic and gardening purposes, enjoy their natural beauty, observe and gather aquatic life, wade and/or swim.

B. The Sierra Club's Members Have Rights Protected by Article XI §9 of the State Constitution.

The right guaranteed by Article XI § 9 of the Hawai'i State Constitution "is a substantive right" which "is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process." Maui Elec., 141 Hawai'i at 260-61, 408 P.3d at 12-13. "Thus, where a source of state law — such as article XI, section 9 — grants any party a substantive right to a benefit — such as a clean and healthful environment — that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in Ala Loop is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality" Id. at 264, 408 P.3d at 16.

The Sierra Club's members have the right to a clean and healthful environment (including "conservation, protection and enhancement of natural resources") as defined by HRS chapters 171, 343 and 205A – just as the Sierra Club had rights pursuant to HRS chapter 269 in Maui Elec. These rights are adversely affected by any action by the BLNR that fails to include sufficient information and analysis.

1. HRS § 171-58 is a law relating to environmental quality.

HRS § 171-58 is a law relating to environmental quality, including the "conservation, protection and enhancement of natural resources."

First, in determining whether a law is related to environmental quality, the Hawai'i Supreme Court has relied on the legislature's identification of laws related to environmental quality when it enacted of HRS § 607-25. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010). Each chapter cited in HRS § 607-25 "implements the guarantee of a clean and healthful environment established by article XI, section 9." Id. See also 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. HRS § 607-25(c) identifies HRS chapter 171.

Second, the legislature specified that all cases arising from title 12 of which HRS chapter 171 is a part – are subject to the jurisdiction of the environmental court, HRS § 604A-2(a). This legislative determination also demonstrates that this law that governs the use of the state's public trust natural resources is a law relating to environmental quality.

Third, HRS chapter 171 implements Hawai'i State Constitution Art. XI, § 2, which reads in relevant part: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about "the preservation of certain natural resources. . . . Hence, the importance of placing fairly rigid restrictions on the administration of these assets." Committee of the Whole Report No. 22 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI § 2, the 1962 state legislature codified the laws that govern the administration and management of the state's lands into RLH chapter 103A, which later became HRS chapter 171. See 1963 Supplement to Revised Laws of Hawaii

1955 at 485; Act 32, 1962 Session Laws of Haw. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

Fourth, HRS § 171-58 relates to the conservation, protection and enhancement of natural resources." HRS § 171-58(c) allows certain uses that do not affect "the volume and quality of water or biota in the stream." HRS § 171-58(e) requires that a lessee "develop and implement a watershed management plan" that prevents "the degradation of surface water and ground water quality"); Senate Stand. Com Rep. 2984, 1990 Senate Journal at 1217.

Finally, in granting holdover approvals to Alexander and Baldwin and East Maui irrigation (collectively "A&B") pursuant to HRS § 171-58(c)(1), BLNR imposed conditions on A&B and EMI. These conditions demonstrate that BLNR's position is that HRS § 171-58(c) relates to environmental quality, including the conservation and protection of natural resources. See Maui Elec., 408 P.3d at 17.

2. HRS chapter 343 is a law relating to environmental quality.

In rendering any decision made pursuant to HRS chapter 171 (which involves the use of state land), the BLNR must comply with HRS chapter 343. Like HRS chapter 171, HRS chapter 343 is referred to in both HRS § 607-25 and 604A-2(a). There can be doubt that its content relates to environmental quality.

The "right to a clean and healthful environment includes the right that explicit consideration be given to" environmental issues in BLNR's decision-making, as provided for in HRS chapter 343 See Maui Elec., 408 P.3d at 17. The Sierra Club's right includes the right that an environmental impact statement be prepared pursuant to HRS chapter 343 before state land is used and millions of gallons of water taken from public streams.

3. HRS chapter 205A is a law relating to environmental quality.

In rendering any decision made pursuant to HRS chapter 171, the BLNR must also comply with HRS chapter 205A. See HRS § 205A-4 and 205A-5(b). The Hawai'i Supreme Court has already definitely ruled that HRS chapter 205A "is a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas." *Morgan v. Planning Dep't*, 104 Hawai'i 173, 181, 86 P.3d 982, 990 (2004). HRS chapter 205A is also identified in HRS § 607-25(c), the statute that reflected "the legislature's determination that chapter 205 is an environmental quality law" in *Ala Loop*, 123 Hawai'i at 410, 235 P.3d at 1122.

The "right to a clean and healthful environment includes the right that specific consideration be given to" the objectives and policies of HRS § 205A-2. See Maui Elec., 408 P.3d at 17; HRS § 205A-4 and 205A-5(b). That includes specific consideration of HRS § 205A-2(c)(4)(D) ("Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs").

C. The Sierra Club's Members Have Rights Protected by Article XII § 4 and Article XI §§ 1 and 7 of the State Constitution.

The Sierra Club has the right to ensure that the public trust resources identified in Article XII § 4 and Article XI §§ 1 and 7 of the Hawai'i State Constitution are protected. These constitutional provisions afford members of the public the right to enforce them, see e.g., *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 140 P.3d 985 (2006), *Pele Def Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992) and *Ching v. Case*, 145 Hawai'i 148, 449 P.3d 1146 (2019). Members of the public are beneficiaries of the trust. As such, their constitutional interests are

adversely affected when the BLNR allows water to be diverted from streams in ways that cause significant harm. Before authorizing diversions, the BLNR must understand how much water is being taken from each stream and what the impacts are to those streams.

## II. The BLNR Must Conduct a Contested Case Proceeding.

Given that the Sierra Club has multiple bases for establishing a protectable "property" interest, a contested case hearing is the most appropriate procedure for these rights to be protected. The Hawai'i Supreme Court has explained that three factors need to be balanced in determining what procedures should be employed (and therefore whether a contested case is the appropriate procedure): "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." Maui Elec, 141 Hawai'i at 265, 408 P.3d at 17.

### A. The Diversions Adversely Affect the Sierra Club and its Members.

The Sierra Club is a membership organization advocating for the protection of our unique natural environment. Formed in 1968, the Hawai'i Chapter of the Sierra Club has over 5,000 members throughout the Hawaiian Islands. The Sierra Club's members are directly affected by the holdover of the revocable permits. They live along and draw water from the streams in the license area for residential and farming purposes. They enjoy the streams in the license area for their recreational and spiritual importance. This includes, but is not limited to, hiking, fishing, swimming, and other recreational uses in and around the streams of the proposed license area.

The Sierra Club's interests are harmed by these diversions. DLNR's division of aquatic resources has concluded that the diversions of East Maui streams harm aquatic life. Our members have seen streams run dry for long periods of time while A&B has diverted them. These diversions harm our members ability to use and enjoy free-flowing streams. BLNR has never clarified whether the permits give A&B an exclusive right to occupy the land; i.e. to exclude others. To the extent that the permit allows A&B to exclude Sierra Club members from hiking on state land, their rights are adversely affected.

### B. A Contested Hearing is the Best Means to Protect the Public Interest.

The risk of erroneous deprivation of the Sierra Club's rights are high and there is no better means of ensuring that these rights are protected (short of going to court).

#### 1. Existing BLNR procedures have failed to protect streams.

Existing procedures have not allowed for the protection of 13 streams. A&B and EMI continue to divert millions of gallons of water from free-flowing streams without any substantive review by BLNR. BLNR has failed to address the problems caused by diversion structures on public land. It has failed to take meaningful action to get trash cleaned up. It has failed to ensure that A&B and EMI fulfill their burden. It has turned a blind-eye to the water that is no used. BLNR needs accurate and complete information in order to make an informed decision.

2. A contested case hearing on the holdover provides procedural protections.

A contested case proceeding would allow for a factual record to be developed. "A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). A contested case hearing provides procedural protections to all parties. A contested case can ensure that a decision is based exclusively on evidence in the record. It precludes *ex parte* communication. A contested case is an effective means of resolving disputed facts. And it allows for deliberate decisionmaking rather than hastily crafted and vague conditions.

If the Sierra Club is denied a contested case hearing and then sues over BLNR's decision, a trial would likely not take place for more than 18 months --after the term of this permit has expired.

3. The CWRM proceeding did not protect the Sierra Club's interests.

It would be a mistake to assume that the Sierra Club's interests were addressed or protected in the recently concluded CWRM proceedings.

First, the Sierra Club was not a party to the CWRM proceedings, which were initiated in 2001.

Second, many of the streams that Sierra Club members use in the area covered by the revocable permits were not addressed in any way in the CWRM proceeding.

Third, in setting minimum instream flow standards, CWRM did not impose a burden of proof on any of the parties. In contrast, when rendering a decision as to whether allow a private corporation to use public trust resources, the BLNR must impose on A&B the burden to (a) justify the diversions "in light of the purposes protected by the trust." *In Re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409, 455 (2000) and (b) show the diversions will not injure the rights of others. *Hawaiian Commercial & Sugar Company v. Wailuku Sugar Company*, 15 Haw. 675, 689 (1904). Application of this standard should provide greater protection of our streams.

C. BLNR has Substantial Interests in Conducting a Contested Case.

The BLNR has a substantial interest in making deliberate decisions when it comes to public trust land. "Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose." *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). See also *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 140 P.3d 985, 1011 (2006) (public trust duty requires agency to "ensure that the prescribed measures are actually being implemented"); *Mauna Kea*, 136 Hawai'i at 414, 363 P.3d at 262 (concurring opinion of J Pollack, joined by Wilson and McKenna) (trustee must "fulfill the State's affirmative constitutional obligations"). The BLNR's decision must be made "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000). When acting as a trustee, BLNR

"must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency. . . Clarity in the agency's decision is all the more essential in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute." Id. at 158-59, 9 P.3d at 469-70 (2000)(citations and internal quotation marks omitted). These values are best assured in the context of a contested case. A contested case hearing could answer questions with testimony given under oath like:

- how much would A&B have to pay for water if water from these parcels was not available to A&B (the avoided cost)?
- how much would it cost A&B to install meters that estimated how much water it was diverting daily from each stream?
- how much water is A&B diverting from each stream?
- how much water is available to A&B from its own land?
- how much water from East Maui has &B actually been used the past three years and how much is predicted to be used this coming year?
- is aquatic life harmed when a stream flows at 64% of median base flows (BFQ50) rather than when the stream is free-flowing?
- how much water taken from east Maui streams is lost due to evaporation and seepage?
- how much garbage - including discarded pipes - remains on the public land that A&B is using?

Please keep in mind that BLNR retains a property interest in the East Maui Irrigation system and can authorize the use of the system to provide water to Maui County for its existing uses.

**22. Any Disagreement Petitioner May Have with an Application before the Board**

See the Sierra Club's October 15, 2020 letter to Suzanne Case, as well as the written testimony offered for the November 13, 2020 meeting. See the Sierra Club's motion for summary judgment, or in the alternative for a preliminary injunction filed on April 3, 2020.

**23. Any Relief Petitioner Seeks or Deems Itself Entitled to**

The Sierra Club requests that numerous conditions be imposed if this revocable permit is going to be continued.

**24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest**

The Sierra Club can bring to the BLNR's attention facts, documents and testimony that its staff has not provided to the board. Its cross examination of the applicant's witnesses will reveal that statements it has made lack credibility. Last year, for example, A&B falsely told you that it was using and needed stream water to irrigate 6,500 acres of pasture.

**25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR**

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Marti Townsend  
Petitioner or Representative (Print Name)

M d .  
Signature

Nov. 16, 2020  
Date



7. One of the Sierra Club's purposes is the protection of natural resources, including our streams and native aquatic life.

8. The Sierra Club and its members seek to preserve and enjoy free-flowing streams.

9. Sierra Club members hike along streams that have been or are diverted by A&B pursuant to the continuation of revocable permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) (“**revocable permits**”).

10. I have hiked to, or along, Makapipi Stream, Hanawī Stream, Kopili‘ula Stream, West Wailuaiki Stream, Wahinepe‘e Stream, Waikamoi Stream, and Honopou Stream.

11. I hike in the East Maui watershed several times a year.

12. On these hikes to and along streams in East Maui, I explore the plant and aquatic life made possible by stream flows, enjoy views of dramatic waterfalls, appreciate the beauty of nature, experience the sounds made by flowing water, dip into the stream to cool off, and bask in nature’s wonder.

13. One of the joys of hiking is getting away from civilization and seeing the world in its natural condition.

14. I have hiked above, below and next to the stream diversions.

15. When the streams are flowing, I revel in watching stream life reinvigorated.

16. I have seen the streams flowing with lots of water and I have seen the streams with only a trickle of water.

17. When the streams lack water, it has saddened me because I come to enjoy a natural experience. The hiking experience is also less interesting when stream flow is diminished by diversions.

18. That experience is diminished when I see man-made blockages along our streams.

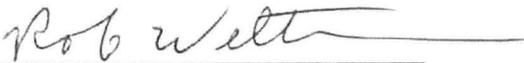
19. I have participated in numerous service projects on Maui to get rid of invasive species – but have not been able to do so within the area covered by the revocable permits.

20. I have seen invasive plants crowd out native species in the East Maui watershed covered by the revocable permits.

21. My interests would be adversely affected if the revocable permits are continued for another year without sufficient conditions to protect our natural environment.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kihei, Hawai'i, January 14, 2019.

  
\_\_\_\_\_  
Rob Weltman

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,	)	CIVIL NO. 19-1-0019-01 JPC
	)	(Environmental Court)
Plaintiff,	)	
vs.	)	DECLARATION OF MEGAN LOOMIS
	)	POWERS
BOARD OF LAND AND NATURAL	)	
RESOURCES, DEPARTMENT OF LAND	)	
AND NATURAL RESOURCES,	)	
SUZANNE CASE in her official capacity as	)	
Chairperson of the Board of Land and	)	
Natural Resources, ALEXANDER AND	)	
BALDWIN, INC., and EAST MAUI	)	
IRRIGATION, LLC	)	
	)	
Defendants.	)	

**DECLARATION OF MEGAN LOOMIS POWERS**

I, Megan Loomis Powers, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I live on, and am a resident of, Maui.
3. I have been a member of the Sierra Club since 2003.
4. I lived next to Ho'olawa Stream for many years.
5. My parents still own land next to Ho'olawa Stream and I enjoy returning there to swim and observe the beauty of the stream.
6. I have also lived next to Honopou Stream and Hanawana Stream.
7. I have played in these three streams from the age of 4 to the age of 54, rescued fish and pollywogs when they were drying out, floated on every imaginable toy, rope-swunged, bathed, lounged, swam a mile for exercise daily with my father for many years. And in my

Junior year in high school at Seabury Hall, I started my day by jumping off the 30-foot waterfall. I know the many faces of these streams through their yearly cycles.

8. I plan to continue visiting and using these streams for the rest of my life and my adult children plan to do the same.

9. Between 1972 and 2016, on Ho'olawa stream, after more than a 1/4 mile of stagnant, stinky, mucky streamwater and debris was cleared out after a big rain event, and when diversions are curbed (1x/yr.) allowing for the natural stream flow, I would witness an event unfold over the next few weeks where life returned to the streams and banks with spring-like fervor to finally settle into a state of thriving balance. It is the most beautiful thing one can ever imagine! Water is life! Life in Balance! But it was always taken away and everything would dry out again and again and again for many years.

10. I have seen the ill effects of diversions on all three of these streams.

11. When these streams have been diverted, the streams are fairly dry, which impacts the streamlife's ability to flourish and allows invasive weed species to take over the banks, it also impacts my ability to enjoy and recreate in them. Also, the dry streambeds prevent seepage which has caused springs to dry out from which we used to gather drinking water. This is very disturbing, heartbreaking and scary to lose our drinking water. I know firsthand, from daily experience, the difference of how BAD it usually is with the total diversion and, how GOOD it can get when allowed to thrive.

12. Before 2016, Ho'olawa stream below the Haiku Ditch diversion was generally pretty dry except after winter storms, or when EMI decided to open the gates, causing unexpected flooding. Since A&B stopped growing sugarcane, it has been flowing in excess of what would be considered "normal stream flow" because water diverted from other streams is

being dumped into Ho'olawa Stream via an underground tunnel. This has impacted my ability to enjoy the stream because of the danger of getting washed away over the next waterfall. In addition, it has caused a lot of erosion on the banks of the river and root rot which killed a whole grove of trees, not to mention flooding Ho'olawa Bay with excess silt, adversely impacting the fishery.

13. Allowing diversions to continue, or to increase, adversely affects my enjoyment of these streams.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Haiku, Hawai'i, February 25<sup>th</sup>, 2019.

  
MEGAN LOOMIS POWERS



8. I love hiking along streams with running water. I cannot fully describe how happy it makes me to see streams full of life flowing from mauka to makai. I enjoy seeing the diversity of life in streams and experiencing the natural world.

9. I have hiked above, below and next to the stream diversions.

10. It is far more pleasant to hike along a stream that is flowing than one that is bone dry or just a trickle.

11. While some streams are in better health than they used to be, I am concerned both that existing diversions and an increase in the amount of water diverted will diminish my enjoyment of hiking to and along streams in east Maui.

12. I appreciate seeing native plants and am discouraged by the growth of invasive species.

13. When the streams are diverted, the natural experience is diminished.

14. I have participated in numerous service projects on Maui to get rid of invasive species – but have not been able to do so within the area covered by the revocable permits.

15. I have seen invasive plants crowd out native species in the East Maui watershed covered by the revocable permits.

16. My interests would be adversely affected if the revocable permits are continued for another year without sufficient conditions to protect our natural environment.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Kihei, Hawai'i, February 15 2019.

  
\_\_\_\_\_  
Miranda Camp

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB, ) CIVIL NO. 19-1-0019-01 JPC  
 ) (Environmental Court)  
 )  
 ) Plaintiff, )  
 )  
 vs. ) DECLARATION OF PAUL CARTER  
 )  
 )  
 BOARD OF LAND AND NATURAL )  
 RESOURCES, DEPARTMENT OF LAND )  
 AND NATURAL RESOURCES, SUZANNE )  
 CASE in her official capacity as Chairperson )  
 of the Board of Land and Natural Resources, )  
 ALEXANDER AND BALDWIN, INC., and )  
 EAST MAUI IRRIGATION, LLC )  
 )  
 )  
 Defendants. )  
 )  
 )

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**DECLARATION OF PAUL CARTER**

I, Paul Carter, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I live on, and am a resident of, Maui – and have been for decades.
3. I have been a member of the Sierra Club for decades.
4. I live very close to Waipio Stream.
5. I walk down to dip into the stream approximately five or six times a year.
6. When the water from the stream is diverted, I cannot dip in the water because there is none.
7. Approximately once a week, I walk to Hoolawa stream to swim in one of the pools there.

8. When the water levels in Hoolawa stream are low, there is too little water in some of the pools to swim in.

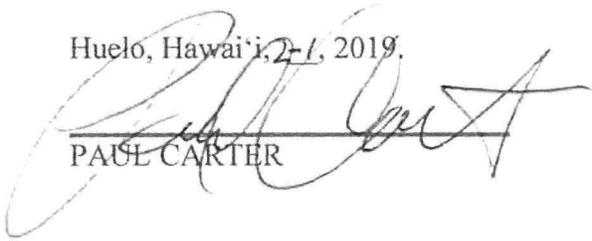
9. I enjoy the beauty and the sounds of a running stream.

10. I plan to continue visiting and using these streams, but my use is affected when too much water is diverted from these streams.

11. Allowing diversions to continue, or to increase, adversely affects my enjoyment of these streams.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Huelo, Hawai'i, ~~2-1~~, 2019.

  
\_\_\_\_\_  
PAUL CARTER



9. If more water were restored to Hanehoi Stream, I would be able to irrigate my crops without worry that I will run out of water from my catchment tank, which is currently the only source of water for my property.

10. A free-flowing Hanehoi Stream is important to me as a source of water for my home and farm; I enjoy the sound of the rushing water; I enjoy looking at the water flowing; I would enjoy seeing native fish in the stream.

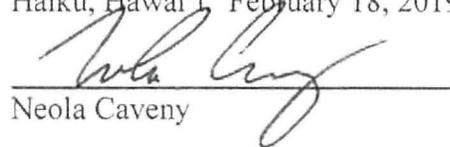
11. A free-flowing Hanehoi Stream increases my enjoyment of my home and enhances the value of my property.

12. While more water is flowing in Hanehoi Stream than in the past, this past summer, the water levels in the stream were very low.

13. My interests would be adversely affected if the revocable permits are continued for another year without conditions that require restoration of natural water flows in Hanehoi Stream by a fixed deadline and without fixing the diversion structures that interfere with the migration of fish upstream and the flow of larvae downstream.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Haiku, Hawai'i, February 18, 2019.

  
\_\_\_\_\_  
Neola Caveny

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

<p>SIERRA CLUB,  Plaintiff,  vs.  BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE in her official capacity as Chairperson of the Board of Land and Natural Resources, ALEXANDER AND BALDWIN, INC., and EAST MAUI IRRIGATION, LLC  Defendants.</p>	<p>CIVIL NO. 19-1-0019-01 JPC (Environmental Court)  DECLARATION OF LUCIENNE DE NAIE</p>
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**DECLARATION OF LUCIENNE DE NAIE**

I, Lucienne de Naie, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

- 1.The statements below are based upon my personal knowledge.
- 2.I live on, and am a resident of, Maui. And have been so for decades.
- 3.I have been a member of the Sierra Club for decades.
- 4.I live in Huelo not far from Hanehoi and Waipio Iki Streams.
- 5.I have served in various roles in the Sierra Club Hawai'i chapter and the Maui Group, including as a hike leader.
- 6.I have participated in many service trips in which we have worked to get rid of invasive species.
- 7.I have hiked to or along many east Maui streams as a part of Sierra Club outings.

8.I have also hiked to or along many east Maui streams as an individual or with friends (i.e. not part of an official Sierra Club outing).

9.I plan to continue to visit many of the east Maui streams this year and in future years.

10.I have hiked to or along the following streams in east Maui: Honopou, Hoolawa ili'ili, Hoolawa nui, Honokala, Mokupapa, Waipio, Waipioiki/Kapalaea, Puolua, Hanehoi, West Hanehoi, Huelo, Hoalua, Hanawana, Kailua, Nailiilihaele, Puehu, Oopuola, Ka'aiea, Kolea, Waiakamoi, Waihinepe'e, Puohakamoa, Haipuaena, Punalau, Honomanu, Nua'ailua, Piina'au, Waiokamilo, Wailuanui, West Wailua iki, East Wailuaiki, Kopiliula, Waiohue, Paakea, Waiakea, Kapaula, Hanawi and Makapipi.

11.I enjoy observing natural beauty, including free-flowing streams and the native aquatic life that is dependent upon them.

12.Over the past 25 years, I have observed the spread of invasive species throughout the east Maui watershed.

13.My enjoyment of hiking in East Maui has been diminished when I have seen:

- a.debris (such as unused/discarded/obsolete pipes) in or near streams;
- b.diversion structures that interfere with the flow of water and the migration of native aquatic life up and downstream;
- c.reduced flow in streams, making it more difficult (and sometimes impossible) to swim or dip in a stream, and making it more difficult for native aquatic species to survive; and
- d.invasive species taking over native forests.

14.I have recreational, aesthetic, environmental and public trust interests in ensuring that streams are free-flowing and that public lands are properly managed.

15. Allowing the revocable permits to be held over for another year (without appropriate conditions) will harm my interests by:

- a. allowing debris to be left in or next streams because the department of land and natural resources has not attempted to verify the conditions on the ground or take any meaningful action to get A&B and EMI to clean up their mess;
- b. allowing diversion structures to continue to interfere with the migration of native aquatic species on many east Maui streams;
- c. preventing sufficient water from flowing within many streams;
- d. allowing A&B and EMI to divert water from one stream and dump it into another stream;
- e. allowing A&B and EMI to divert more water than they have been diverting over the past three years;
- f. potentially jeopardizing my ability to hike in this area; and
- g. allowing invasive species to continue to spread.

16. My recreational, aesthetic, environmental and public trust interests are harmed by allowing the revocable permits to be held over for another year.

17. I read environmental impact statements (EISs) and reports by government agencies to educate myself and to craft testimony.

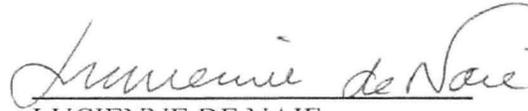
18. The lack of information that an EIS would provide has hindered my ability to be fully informed as to the status of east Maui streams.

19. The failure of BLNR to require A&B and EMI to provide relevant data (including what percentage of water they are taking from each stream) makes it more difficult for me to protect the streams that I enjoy.

20.I provided a 91-paragraph declaration to the Commission on Water Resources Management in December 2014. A true and correct copy of it was attached to A&B's motion to dismiss as its Exhibit 43.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Haiku, Hawai'i, February 28 2019.

  
LUCIENNE DE NAIE

# EXHIBIT 8

Electronically Filed  
FIRST CIRCUIT  
1CCV-20-0001541  
28-MAY-2021  
09:07 AM  
Dkt. 291 DOC

First Circuit Court, State of Hawai'i

RE: Sierra Club vs. BLNR, Alexander & Baldwin, Inc., and  
East Maui Irrigation Co., LLC.  
Civil No. 20-0001541 (Environmental Court) (agency appeal)

RE: Interim Decision on Appeal

1. Oral argument on the above agency appeal was heard on the record remotely via Zoom hearing on April 15, 2021. The court took the matter under advisement, and now issues an Interim Decision.

2. The court concludes the Sierra Club's due process rights were violated, because a contested case hearing was required before the BLNR voted on November 13, 2020 to extend A&B's revocable permits.

3. The court sees this as a straightforward matter. Hawai'i recognizes the right to a clean and healthful environment "as defined by laws relating to environmental quality." This right includes protecting natural resources. Our Supreme Court has held this is a substantive right and a legitimate entitlement under state law. It therefore is a property interest protected by due process. In re Maui Electric, 141 Hawai'i 249, 260-261 (2017). A protected property interest need not be tangible. In re Maui Elec Light Co., 145 Hawai'i 1, 16 (2019) (citation omitted). The court concludes that "laws relating to environmental quality" are implicated by the revocable permits at issue; including but not limited to HRS 171-55, 171-58, HRS 604A-2(a), HRS 607-25, HRS 343, and HRS 205A-4(a), et seq. See also, Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64 (1994); Mauna Kea Anaina Hou v. BLNR, 136 Hawai'i 376 (2015); In re Water Use Permit Applications, 94 Hawai'i 97 (2000); In re 'Iao Ground Water Mgmt. Area, 128 Hawai'i 228, 240-244 (2012); County of Hawai'i v. Ala Loop Homeowners, 123 Hawai'i 391, 410 (2010).

4. The court also rejects the argument that a) requiring contested case hearings based on the above statutes b) could mean that virtually everything BLNR decides could require contested case hearings, and c) BLNR does not have the necessary resources, and therefore d) due process cannot be so broadly required.

The court well understands the challenge of time and resources in ensuring due process; however, minimizing or denying persons or organizations their established due process rights is not a solution to those challenges. The related argument that due process rights should not apply to revocable permits because those permits are so short-lived that a contested case hearing cannot be held quickly enough is also not persuasive, especially where the short-term permits are repeatedly extended.

5. Defendants' arguments that Sierra Club already got the required due process because water permits were litigated in a trial in this court in 2020 are not persuasive. Here, the permits at issue covered the year after the trial. Things change with time (as the court observed in its FOFCOL following the trial). More specifically, the Sierra Club offered or had available to it new evidence on the permit renewals – information and issues which apparently arose after the trial. As just one example, DLNR's own Division of Aquatic Resources recommended that restoring four more of the streams should be a high priority. In addition, more recent reports showed significantly less water was needed for off-stream uses than previously estimated, yet the proposal for the revocable permit extensions was to take more water out of the streams, not less. A new issue of defining "waste" to expressly exclude system losses and evaporation was also up for consideration with the permits at issue. Previous CWRM findings recognized that when dealing with a hundred year old delivery system, part of the solution to needing less water from the streams and leaving more water in the streams requires investment to upgrade the ditch and storage systems. And finally, all this should be balanced in context: our environmental law system has a goal that the decision-makers will hear from stake-holders before decisions are made, to help decision-makers reach sound policy decisions examined from multiple perspectives. The new information and issues described above are relevant, and are not insignificant.

6. Regarding A&B's argument that revocable permits need not be renewed annually and therefore no contested case hearing is required, the court disagrees. See HRS 171-40, -55, and -58. The plain meaning of those laws is that annual review is required.

7. HRS 91-14(g) defines what this court can order. Since the court concludes Sierra Club had a property interest protected by due process rights under the Hawai'i Constitution as defined by laws relating to environmental quality, and since the court concludes those rights were prejudiced because of the BLNR's denial of a contested case hearing, the court may "reverse or modify" the BLNR's decision per HRS 91-14(g). Here, the court has no record or briefing to objectively decide on any specific modification of the permits. At the same time, the court does not wish to create unintended consequences or chaos by vacating the permits without knowing the practical consequences of such an order, especially when in seven months (absent further legal developments) there will likely be another hearing to extend the existing RPs and new RPs will likely replace the existing RPs. Therefore:

A. The court hereby orders BLNR to hold a contested case hearing on the Revocable Permits which were approved by BLNR on or about 11/13/20. The contested case hearing(s) shall be held as soon as practicable. This order is effective immediately. Pursuant to HRS 91-14(g)(i), the court reserves jurisdictional and expects to appoint a master or monitor to ensure prompt compliance with this order. The parties are invited to agree on a master or monitor, or promptly (no later than June 7, 2021) submit three names each to the court; and

B. The court hereby orders that the Revocable Permits approved on or about 11/13/20 be vacated. However, the effective date of this order is hereby stayed and the court reserves jurisdiction to consider any additional requests from the parties on whether or not the court should modify the existing permits, and how, or whether the court should leave the existing permits in place until their current expiration date. If no such further requests are filed by 4:00 p.m. on Wednesday, June 30, 2021, the stay ordered in this paragraph is lifted without further action by the court. In that event, the Revocable Permits approved on or about 11/13/20 shall automatically be vacated without further order of this court, at 4:00 p.m. on Wednesday, June 30, 2021. If such further requests are filed, then the stay remains in place and the court reserves jurisdiction until further order while the court considers the requests.

SO ORDERED. Dated: May 28, 2021.

/s/ Jeffrey P. Crabtree



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Judge of the above-titled court

RE: Sierra Club, Appellant, vs. BLNR, Alexander & Baldwin, Inc.,  
and East Maui Irrigation Co., LLC.

Civil No. 20-0001541 (Environmental Court) (agency appeal)

RE: Interim Decision on Appeal

# EXHIBIT 9

**EAST MAUI IRRIGATION COMPANY, LLC**

P.O. BOX 1104, PU'UNĒNĒ, MAUI, HAWAI'I 96784 • (808) 579-9516

July 22, 2021

VIA E-MAIL AND U.S. MAIL

Ms. Suzanne Case, Chairperson  
and Members of the Board of Land and Natural Resources  
State of Hawai'i  
P.O. Box 621  
Honolulu, HI 96809

RE: Request for Revocable Permits for Water Use on Island of Maui

Dear Chair Case:

As you are aware, on May 28, 2021, Judge Jeffrey P. Crabtree issued his Interim Decision on Appeal (the "**Interim Decision**") in *Sierra Club v. Bd. of Land & Natural Resources*; Civil No. 1CCV-20-0001541 (Haw. 1st Cir.) (the "**Sierra Club Agency Appeal**") vacating the Board of Land and Natural Resources' ("**BLNR**") November 13, 2020 decision to continue Revocable Permits Nos. S-7263, S-7264, S-7265 issued to Alexander & Baldwin, Inc. ("**A&B**") and No. S-7266 issued to East Maui Irrigation Company, Limited ("**EMI**") (collectively, the "**Holdover RPs**") for calendar year 2021. Although the Interim Decision directs BLNR to hold a contested case hearing on the continuation of the Holdover RPs for calendar year 2021, our understanding is that BLNR's position is that such a hearing cannot be held because upon the vacatur of the Holdover RPs there would be no pending request before BLNR since the Holdover RPs would have lapsed at the end of 2020.

While we do not believe that the Interim Decision nullifies our prior request to continue the Holdover RPs for calendar year 2021, in an abundance of caution and without prejudice to that position, we submit this formal request that, pursuant to Hawai'i Revised Statutes section 171-55, BLNR issue new revocable permits to A&B/EMI, upon the same conditions BLNR imposed on the Holdover RPs at its November 13, 2020 meeting, with a commencement date of August 1, 2021 and an expiration date of July 31, 2022. This will enable the continued provision of water to Mahi Pono to support its development of diversified agriculture in Central Maui, as well as to the County of Maui for its Upcountry Maui and Nahiku public water systems which will serve the best interest of the State. This request is based upon the same record BLNR considered when deciding upon the Holdover RPs at its November 13, 2020 meeting, as well as additional testimony that may be presented prior to and at the meeting at which BLNR considers this request.

## EAST MAUI IRRIGATION COMPANY, LLC

P.O. BOX 1104, PU'UNĒNĒ, MAUI, HAWAII 96784 • (808) 579-9516

We ask that BLNR consider this request on an emergency basis and before July 31, 2021 as Judge Crabtree has indicated he intends to issue an order vacating the Holdover RPs as of July 31, 2021. An expedited decision on this request is necessary to ensure no lapse in water service to Mahi Pono as it continues the transition of Important Agricultural Lands to diversified agriculture, as well as to the County of Maui, which has already declared a stage 1 water shortage for Upcountry Maui, to enable a continued supply of water for the Upcountry Maui residents, farmers and businesses.

Please do not hesitate to contact us, if you have any questions on this request.

Sincerely,

Meredith J. Ching by  
Meredith J. Ching, A&B *David Schulman,*  
*her atty in fact*

Mark Vaught  
Mark Vaught, EMI

cc: Ian Hirokawa (via e-mail)  
Linda Chow (via e-mail)  
Lauren Chun (via e-mail)  
Melissa Goldman (via e-mail)  
David Frankel (via e-mail)  
Caleb Rowe (via e-mail)

# EXHIBIT 10



To: Ms. Suzanne Case, Chairperson  
and Members of the Board of Land and Natural Resources  
VIA E-MAIL

Date: July 22, 2021

Re: A&B/EMI's Request for Revocable Permits for Water Use on Island of Maui

Dear Chair Case:

The Sierra Club objects to Alexander & Baldwin and East Maui Irrigation Company, LLC's (collectively herein "**A&B**") request that (a) BLNR issue new revocable permits to A&B and (b) BLNR consider the request on an emergency basis before July 31, 2021.

First, it would be inappropriate for BLNR to meet on an emergency basis. The Sierra Club has been asking BLNR (through its deputy attorneys general) to put this issue on its agenda since May 31. The "emergency" has been created by BLNR's failure to put this issue on its agenda for the last three meetings since the court issued its interim decision and your deputy attorney general's unilateral and novel position that the court's order somehow invalidates A&B's prior requests to continue taking water from east Maui streams.

Second, to the extent that A&B's request can be interpreted as a cynical ploy to circumvent the court's order, it should be denied.

Third, BLNR cannot grant a new revocable permit without ensuring compliance with HRS chapter 343.

Fourth, the Sierra Club once again requests a contested case hearing on the continued diversion of water from public streams.

Some of the issues that BLNR must consider include:

- (a) the waste of most of the water that is taken from east Maui's streams;
- (b) the significant harm to our streams;

- (c) the availability of alternative sources of water;
- (d) the need to modify diversion structures;
- (e) the trash that litters the landscape;
- (f) the need to control invasive species in the revocable permit area; and
- (g) the urgent need for more information.

**A. Waste**

It is important for BLNR to recognize that while Maui residents are being asked to conserve and ration water, BLNR has been allowing Mahi Pono to waste water. In fact, most of the water taken out of east Maui streams is not used. Data that A&B has been submitting to you confirm this fact.

First Quarter 2020:

<i>Month</i>	<i>East Maui Water @ Honopou</i>	<i>System Losses (22.7% as cited in CWRM D&amp;O)</i>	<i>County of Maui DWS <sup>1</sup></i>	<i>County of Maui Ag Park <sup>2</sup></i>	<i>Diversified Agriculture <sup>4</sup></i>	<i>Historical/Industrial Uses <sup>5</sup></i>	<i>Reservoir / Fire Protection / Evaporation / Dust Control / Hydroelectric <sup>3</sup></i>
JANUARY	30.10	6.83	1.07	0.39	2.45	1.10	18.26
FEBRUARY	25.28	5.74	1.17	0.37	2.46	1.10	14.45
MARCH	27.98	6.35	0.95	0.37	2.58	1.10	16.63
QUARTERLY AVERAGE	27.79	6.31	1.06	0.38	2.50	1.10	16.44

Second Quarter 2020:

<i>Month</i>	<i>East Maui Water @ Honopou</i>	<i>System Losses (22.7% as cited in CWRM D&amp;O)</i>	<i>County of Maui DWS <sup>1</sup></i>	<i>County of Maui Ag Park <sup>2</sup></i>	<i>Diversified Agriculture <sup>4</sup></i>	<i>Historic/Industrial Uses <sup>5</sup></i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric <sup>3</sup></i>
APRIL	25.70	5.83	0.91	0.35	3.58	1.10	13.94
MAY	21.60	4.90	1.86	0.39	3.62	1.10	9.73
JUNE	20.50	4.65	2.64	0.51	3.73	1.10	7.88
QUARTERLY AVERAGE	22.60	5.13	1.80	0.41	3.64	1.10	10.51

Third Quarter 2020:

<i>Month</i>	<i>East Maui Water @ Hanopou</i>	<i>County of Maui DWS<sup>1</sup></i>	<i>County of Maui Ag Park<sup>2</sup></i>	<i>Diversified Agriculture<sup>3</sup></i>	<i>Historic/Industrial Uses<sup>4</sup></i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric<sup>5</sup></i>
July	16.8	3.2	0.45	2.6	1.1	9.47
August	19.7	2.5	0.46	2.5	1.1	13.20
September	20.1	3.4	0.69	2.4	1.1	12.49
<b>QUARTERLY AVERAGE</b>	<b>18.9</b>	<b>3.0</b>	<b>0.5</b>	<b>2.5</b>	<b>1.1</b>	<b>11.7</b>

Fourth Quarter 2020:

<i>Month</i>	<i>East Maui Water @ Hanopou</i>	<i>County of Maui DWS<sup>1</sup></i>	<i>County of Maui Ag Park<sup>1</sup></i>	<i>Diversified Agriculture<sup>4</sup></i>	<i>Historic/Industrial Uses<sup>1</sup></i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric<sup>1</sup></i>
OCTOBER	11.51	3.81	0.56	2.51	1.10	3.53
NOVEMBER	25.34	2.16	0.53	3.44	1.10	18.11
DECEMBER	28.13	2.19	0.50	4.43	1.10	19.91
<b>QUARTERLY AVERAGE</b>	<b>21.66</b>	<b>2.72</b>	<b>0.53</b>	<b>3.46</b>	<b>1.10</b>	<b>13.85</b>

First Quarter 2021:

<i>Month</i>	<i>East Maui Water @ Honopou</i>	<i>County of Maui DWS<sup>1</sup></i>	<i>County of Maui Ag Park<sup>2</sup></i>	<i>Diversified Agriculture<sup>4</sup></i>	<i>Historic/Industrial Uses<sup>5</sup></i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric<sup>3</sup></i>
JANUARY	28.09	1.40	0.36	3.91	1.10	21.33
FEBRUARY	25.90	0.88	0.38	3.93	1.10	19.61
MARCH	23.55	0.61	0.40	3.01	1.10	18.44
Quarterly Average	25.85	0.96	0.38	3.62	1.10	19.79

The County rarely needs more than 4 million gallons per day. Mahi Pono rarely needs more than 4 million gallons per day. Almost all the rest – far more than half the water taken – is wasted. That fact becomes clear when you understand that (a) the water that goes through the hydroelectric plant is then subsequently used for irrigating crops (so it should not be counted twice); (b) a very small amount of water is used for dust control (far less than 100,000 gallons a day); (c) very little water is actually used to fight fires (a fire that takes 72 hours to extinguish, using 10,000 gallons of water an hour takes less than one million gallons of water); and (d) the water that sits in the reservoirs is not actually used (and if it is used, it is recorded instead in the Diversified Ag column of the Monthly Water Usage chart). Virtually all the water in the “Reservoir/Fire Protection/Evaporation/Dust Control/Hydroelectric” column is lost due to evaporation and seepage.

It is absurd for A&B to claim that the “lost” water is not lost, but rather returns to the water cycle of the island. One could say that about every single drop of water on earth. The fact is more than half of the water that is currently being taken out of east Maui streams is not used. Returning it to the atmosphere should not be a policy goal of DLNR’s. Nor does it make sense to drain streams dry (and damage those native ecosystems) to replenish an aquifer, which is not really being used.

In 2018, CWRM determined that system losses of 22.7% were reasonable losses for diversified agriculture, but that in the future, such losses would need to be reduced. Not using – or, losing, or wasting – more than half of the water is unacceptable.

BLNR required A&B to submit to the Department “a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM’s concerns no later than June 30, 2021.” A&B’s plan is one page long. It includes no information as to the “implementation timeline” for the “future lining of reservoirs to reduce seepage loss.” It provides no information as to when the “analysis” of the operational significance of the existing reservoirs will be completed.

A&B and EMI should be required to ensure that at least six of the reservoirs into which east Maui stream water flows are lined and covered within six months. It should also be required to line the EMI ditches which lose water as well. If Maui residents are being asked to conserve water, so too should Mahi Pono. Mahi Pono has testified to BLNR that it is investing \$20 million to install more efficient irrigation systems. BLNR should follow up and ask how much of that money has been spent so far and how specifically it has been spent.

There is no justification to authorize up to 45 million gallons of water per day to be diverted. Far too much of the currently diverted water is wasted. If the status quo is to be preserved, no more than 27 million gallons of water per day (averaged monthly) from east Maui streams (as measured at Honopou Stream) should be taken – which is more than the average of what has been taken. A cap could create an incentive to conserve water, like other Maui residents.

## **B. Harm to streams**

A&B is asking BLNR for authorization to take all of the water from 13 streams 80% of the time. These streams are left bone dry below the diversions 80% of the year. According to A&B’s own consultant, A&B’s diversions on these 13 streams reduces the amount of habitat by 85%. 64% of a stream’s baseflow is the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth, and reproduction of native stream animals. DLNR’s Division of Aquatic Resources identified four of these 13 streams (O’opuola, Nailiilihaele, Kailua, and Ho’olawa streams) as “high priority” for restoration

Taking all the water from any stream is wrong: ecologically, morally and legally. Just as one would not deprive a human of oxygen, it is simply wrong to deprive a stream of all of its water. There may be extraordinary circumstances that on rare occasions could justify such conduct, but it is impossible to conceive of any in this case. Taking so much water from a stream that less than 64% of that stream’s baseflow remains can only be justified in extraordinary and unusual circumstances.

### **C. Alternative sources**

Mahi Pono has approximately 17 million gallons of groundwater available (from its own wells) as well as approximately 11 million gallons of water from streams west of Honopou Stream. A&B and EMI should be required to pump at least 10 million gallons of groundwater per day in conjunction with the use of east Maui water. If the Board, Department or Commission on Water Resource Management (CWRM) determines that pumpage of that quantity of water is not sustainable, the pumpage shall be reduced accordingly.

### **D. Diversion structures**

In an April 1, 2010 letter, the Division of Aquatic Resources identified simple modifications to diversion structures on public land on Puohokamoa, Waiohue and Hanawi streams to allow native species to migrate. BLNR should require A&B to submit stream alteration permits to CWRM to modify these diversion structures.

### **E. Trash**

It is our understanding that unused pipes and other debris continue to litter the landscape. A&B should be required to increase its staffing to prioritize the removal of trash and other debris (including unused pipes). It should disclose changes in staffing levels in its quarterly reports.

### **F. Invasive species**

BLNR has recognized the problems caused by invasive species, including those in east Maui. DLNR spends its resources controlling invasive species in the east Maui watershed. A&B should be required to deposit \$500,000 into the forest stewardship fund, HRS §195F-4, for the control of invasive species in the east Maui watershed, or contribute \$500,000 to the East Maui Watershed Partnership to hire additional staff members to reduce the spread of invasive species within the revocable permit area.

### **G. Information**

Far more information needs to be gathered to justify the de-watering of our streams.

- BLNR must require that A&B provide detailed information as to the \$20 million that Mahi Pono allegedly committed to investing in more efficient irrigation systems. How much of that money is being used to line the reservoirs that hold east Maui stream water? How much of that money has been spent already? On what?

- A&B should be required to provide quarterly written reports on the fifteenth day after the end of the quarter containing the following information in the following format:

Water Used in mgd

Month	East Maui water @ Honopou	County DWS	County Ag Park	Diversified Ag	Industrial Uses*	Other miscellaneous consumptive uses (e.g. dust control)*	All non-consumptive uses including seepage, evaporation, other losses, storage, & hydroelectric
Quarterly Average							

\* Industrial and other non-agricultural uses shall specify the character and purpose of water use and the user of the water.

Sources of Water Used for diversified agriculture the Quarter

Month	Water from RP area mgd	Water from streams west of Honopou mgd	Groundwater pumped mgd
Quarterly Average			

Acres of irrigated agricultural land using east Maui water per month:

Crop	Acres	Water Used mgd	Field	groundwater available?
Total			-	-

In addition, A&B should be required to provide retroactive revisions of the reports submitted over the past 18 months in the above format.

Finally, BLNR should consider:

- What is the point of having four permits when one would do?
- Why is Alexander & Baldwin an applicant when it apparently is not using any water anymore? Why is Mahi Pono not an applicant?

Sincerely,



Marti Townsend  
Director

# EXHIBIT 11

First Circuit Court, State of Hawai'i

RE: Sierra Club vs. BLNR, Alexander & Baldwin, Inc., and  
East Maui Irrigation Co., LLC.  
Civil No. 20-0001541 (Environmental Court) (agency appeal)

RE: Ruling and Order Modifying Permits

1. Following oral argument on the above agency appeal on April 15, 2021, the court issued its Interim Decision on Appeal on 5/28/21.

2. The Interim Ruling made clear it would vacate or modify the permits at issue because BLNR violated Sierra Club's constitutional rights by refusing to hold a contested case hearing on those permits. The court ordered BLNR to conduct a contested case hearing as soon as practicable. The Interim Order also noted (paragraph 7) that it had insufficient information to objectively decide on specific modifications to the permits at issue. Accordingly, in paragraph 7B of the Interim Order, the court set up a process and set a 6/30/21 filing deadline for the parties to make requests on whether or not **"and how"** the court should modify the permits at issue. The requests that were filed were heard on 7/7/21.

3. In response, BLNR's requested only that the court allow a Rule 54(b) certification and enter final judgment so an appeal could be filed, or in the alternative, grant an interlocutory appeal from the Interim Decision, or in the alternative, reconsider and amend the Interim Order, or in the alternative stay enforcement of the court's order pending appeal. At the hearing, the court denied all those requests on the record. This Ruling and Order more formally denies BLNR's requests.

4. The court notes that BLNR has offered nothing in the way of any options, plans, or specifics for how the permits can safely be modified to ensure the people of Maui continue to get the water they need pending the outcome of BLNR's contested case hearing (whether compelled by court order or on BLNR's own initiative). BLNR has made clear however that EMI/A&B would no longer be authorized to distribute water if the permits were vacated. This representation continued after the court made clear at the hearing on 7/7/21 that there would be no immediate appeal or stay.

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5. A&B and EMI joined in the above request by BLNR, but added a request that if the court would not permit an immediate appeal and issue a stay, then the court should leave the existing permits in place until they expire in late 2021. At the hearing on 7/7/21, the court explained that it could not leave the existing permits in place in light of recent authority from the Hawai'i Supreme Court, which held permits "cannot stand" if issued without the required contested case hearing. Mauna Kea Anaina Hou v. BLNR, 136 Hawai'i 376, 380-381 (2015). The court also notes that A&B/EMI, like BLNR, did not offer any specifics on how to safely modify the permits at issue for the period between the court vacating the permits and when the permits (presumably) are re-issued (or held-over or extended or whichever term is used) following a BLNR hearing that complies with constitutional requirements for a contested case hearing.

6. Maui County joined several but not all of BLNR's requests, and joined A&B/EMI's request that the permits remain in place if no stay was issued. Maui also asked the court to ensure that the water needed for upcountry Maui and the Kula Ag Park was delivered. The court stated on the record and repeats in this order that the court will do everything in its power to ensure those needs are met.

7. The Sierra Club was the only party which offered the court concrete and specific options and support for how to modify the defective permits and not leave a vacuum until BLNR conducts a contested case hearing. (See filings of 6/28/21 at 12:35 PM and 12:38 PM.)

8. The permits at issue are hereby modified as follows: **the stream diversions covered by the permits at issue are hereby limited to no more than 25 million gallons of water per day (averaged monthly) from east Maui streams. This limit shall remain in place until the anticipated contested case hearing is held and a decision rendered, or until further order of the court.** This should be more than enough water to allow all users the water they require, while hopefully reducing apparent or potential waste. Any provision of the permits at issue contrary to the modification in this paragraph is hereby vacated.

9. The court also grants A&B/EMI's request that its underlying **request** for the permits at issue still be in effect. In other words, there need be no delay by BLNR requiring a new submission requesting "new" permits. A&B/EMI may supplement their prior/pending request for the permits at issue based on new information, if they choose to.

10. The court retains jurisdiction to further modify the permits at issue if necessary. This retention of jurisdiction will last until a contested case hearing is held on the permits at issue. If it appears to any party that the court's modification may or is leading to any shortage of water for the County, for Mahi Pono, or for other recognized beneficiaries, that party is welcome to immediately contact the court so that an expedited process can be set to hear and address any problems immediately.

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11. The court repeats its prior statements that it does not want to be in charge of the specifics of east Maui water distribution. That role should be filled by others with more expertise and experience. But the court will not risk a vacuum which causes hardship to those on Maui who rely on the water at issue. Therefore, this court's authority, granted by the legislature through HRS 91-14, and HRS 604A-2(b) and granted by the constitution and the obligation to protect public trust resources, will have to suffice until a better option emerges. Until then, if the parties can agree on any terms to further modify the permits, the court is more than willing to hear such requests.

12. This is a "short-form" order because of multiple pressing matters currently requiring the court's time, and because the court will not allow the unconstitutional status quo to continue any longer. The parties are free to submit proposed detailed orders and findings pursuant to Rule 23 or other authority no later than August 16, 2021, absent other request. The court will then settle any such proposed orders to formally finalize this Ruling and Order.

SO ORDERED. Dated: July 30, 2021, at 4:20 PM.

/s/ Jeffrey P. Crabtree



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Judge of the above-titled court

RE: Sierra Club, Appellant, vs. BLNR, Alexander & Baldwin, Inc.,  
and East Maui Irrigation Co., LLC.

Civil No. 20-0001541 (Environmental Court) (agency appeal)

RE: Ruling and Order Modifying Permits

# EXHIBIT 12

1 just address a question that you asked Ms. Akagi.

2 If you look at the bottom of the AB-128,  
3 which is one of the exhibits that were referenced,  
4 there's a notation of C-91 which is, I believe, what it  
5 was marked as in the contested case hearing.

6 And if you look at Exhibit J-14, which is  
7 the actual decision and order from the contested case,  
8 on page 28 and paragraphs 11 and 12, they mention  
9 Exhibit C-91, and there are references to page numbers  
10 in there.

11 I'm unsure about AB-133, but as far as  
12 AB-128, that is a direct reference to that exhibit in  
13 the CWRM decision and order.

14 THE COURT: Thank you. Hold on second.  
15 Off record.

16 (Off record.)

17 THE COURT: All right. Back on record.

18 All right, Mr. Frankel, go ahead.

19 MR. FRANKEL: So let me respond, if I can,  
20 and I hope I remember to respond to each thing.

21 The last thing that Mr. Rowe brought up  
22 about C-91 being referenced in the commission decision,  
23 that is in the procedural history section of the order.

24 All that paragraph says is, that's what the  
25 commission did on that day, and by the way, I think if

**EXHIBIT 12**

1 it's not clear to the Court yet, I know it's clear to  
2 all the attorneys in this case, that what happened back  
3 then changed dramatically in 2018.

4           Whatever was decided back in 2010 is -- or  
5 2010 is no longer particularly relevant to the 2018  
6 decision. There's procedural context, but substantively  
7 there's nothing there. So the one thing that Mr. Rowe  
8 cites doesn't make this particular exhibit relevant to  
9 anything.

10           But let's go to the more substantive points  
11 that were raised. I attempted to address this on Monday  
12 when we dealt with the 52 motions to get rid of the  
13 Sierra Club case, and Mr. Wynhoff even said I was very  
14 clear in my six points that I raised.

15           And so, let me attempt, if I wasn't clear  
16 enough then, let me attempt to be more clear now.

17           So the Sierra Club is not challenging the  
18 Water Commission's decision made in 2018. What we are  
19 saying is, and by the way, the Board of Land and Natural  
20 Resources can use, and even depending on how you use the  
21 word rely, rely in part on the decision, absolutely.

22           The point is, there is a different context  
23 in 2019 than there was in 2018, and there are  
24 repeated -- repeated Court decisions which talk about  
25 the Board's independent duty, and I cited -- I cited

1 them to you on Monday, and those include Judge Hifo's  
2 order back in 2003, the reliance for sensible growth  
3 decision, that was just a few months ago, talking about  
4 the continuing duties of public agencies to fulfill  
5 their public trust duty. The Hawaii Gas Company case,  
6 which is even more recent.

7                   There are trust duties, and there is so  
8 much that the Water Commission's 2018 order did not  
9 address.

10                   Now, Ms. Akagi and Mr. Wynhoff are  
11 partially correct that there is a little bit of overlap,  
12 and so let me try to address each of those separately.

13                   The first issue is the point about the  
14 diversion structures themselves, and if you turn to  
15 Exhibit J-14, and if we turn to page 92 itself,  
16 Mr. Wynhoff correctly quotes from paragraph I of that  
17 decision, in terms of the commission's intent.

18                   But the very next paragraph says, The  
19 commission also recognizes that it is not the purpose of  
20 this proceeding to determine how the diversion will be  
21 modified.

22                   Now, the purpose of the proceeding in 2018  
23 was to talk about the amount of water that should be  
24 flowing in the streams, and that is completely conveyed  
25 or conveyed in a summary fashion in that table that's