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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Challenging) DLNR File No. CCH-LD-21-01
the Continuation of the Revocable Permits)
Alexander & Baldwin, Inc. (A&B) and East) Sierra Club’s Motion to Obtain Essential
Maui Irrigation Company, LLC’s (collectively) Information; Certificate of Service
A&B) for Tax Map Keys (2) 1-1-001:044 &)
050; (2) 2-9-014:001, 005, 011, 012 & 017;)
(2) 1-1-002:002 (por.) and (2) 1-2-004:005 &)
007 for Water Use on the Island of Maui¹)
_____)

Sierra Club’s Motion to Obtain Essential Information

Pursuant to HAR §§ 13-1-33 and -34, the Sierra Club asks for an order compelling Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.’s (collectively “**A&B**”) to produce documentary evidence and witnesses with information that is essential to determining whether the four revocable permits at issue should be continued, and, if so, what conditions should be imposed. HAR § 13-1-32(c) empowers the presiding officer to “compel attendance of witnesses and the production of documentary evidence.” *See also* HAR § 13-1-33. The presiding officer has the power to issue subpoena. *Id.*

I. LEGAL OBLIGATIONS

The law is clear. A&B must provide the information needed to fulfill its burden of proof.

¹ DLNR has provided an incorrect caption for this contested case. BLNR’s motion approving this contested case hearing can be found at <https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-210813-1.m4a> at 4:23:17 – 4:25:33. BLNR member Chris Yuen sent the language to BLNR member Canto to read. 4:20:54-57. The subject of the contested case hearing is not a request for a new permit. That request is now moot.

in support of its application. BLNR is obliged to obtain this information. And the Sierra Club is entitled to this information so that it can meaningfully participate in this contested case hearing.

A. A&B is Obligated to Provide Essential Information with its Application.

The Hawai‘i Supreme Court has neatly summarized the burden that an applicant, such as A&B, must satisfy.

Applicants have the burden to justify the proposed water use in light of the trust purposes.

a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.

b. The applicant must demonstrate the absence of a practicable alternative water source.

c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.

d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.

Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua‘i, 133 Hawai‘i 141, 174-75, 324 P.3d 951, 984-85 (2014). A&B’s burden to provide sufficient information to justify its diversion of – and harm to – public streams is constitutionally based. The public trust doctrine imposes a “duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.” *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982); Haw. Const. art. XI, § 7.

B. BLNR is Obligated to Obtain this Information.

When an agency lacks data or information to discharge its duties pursuant to the public trust doctrine, the agency “must 'take the initiative' to obtain the information it needs.” *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 262, 287 P.3d 129, 163 (2012).

As trustees, the BLNR Defendants are obliged to ensure that applicants fulfill their burden of proof. BLNR is “duty-bound to place the burden on the applicant to justify the

proposed water use in light of the trust purposes and 'weigh competing public and private water uses on a case-by-case basis[,] requiring a higher level of scrutiny for private commercial water usage." *Kukui*, 116 Hawai'i at 490, 174 P.3d at 329. BLNR is "duty bound to hold an applicant to its burden during a contested-case hearing." *Waiola* 103 Hawai'i at 441, 83 P.3d at 704.

BLNR

must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead **must take the initiative** in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process. . . . Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including using alternative resources. . . . In sum, the state 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.

In Re Water Use Permit Applications, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) ("*Waiāhole*")

(citations omitted) (emphasis added). Under "no circumstances" does the constitution allow

BLNR "to grant permit applications with minimal scrutiny." *Id.* 94 Hawai'i at 160, 9 P.3d at 472.

The BLNR is barred from taking a "permissive view towards stream diversions, particularly while the instream flow standards remained in limbo." *Id.*

C. **The Sierra Club Has the Right to Obtain This Information.**

A contested case hearing "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 & Natural Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). A contested case hearing allows all parties to be heard "in a meaningful manner." *Id.*

A contested case hearing affords parties extensive procedural protections similar to those afforded parties in a civil bench trial before a judge. These protections include the **opportunity to issue subpoenas for witnesses to testify under oath or produce documents[.]**

Id at 391, 363 P.3d at 239 (emphasis added). A&B cannot withhold information that it is legally obligated to provide in order to obtain a permit and that the Sierra Club needs in order to participate in this contested case in a meaningful way.

II. SPECIFIC INFORMATION

Under the public trust doctrine, “it is the applicant's burden to demonstrate that the use requested is ‘reasonable-beneficial.’” *In re Kukui (Molokai), Inc.*, 116 Hawai‘i 481, 499, 174 P.3d 320, 338, (2007). “Furthermore, besides 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. Such a requirement is intrinsic to the public trust[.]” *Waiāhole*, 94 Hawai‘i at 161, 9 P.3d at 473.

In order to ensure that A&B is using and will use east Maui stream water in a reasonable and beneficial manner and to ensure that alternative sources of water are being used, A&B must be compelled to (a) provide the following information in the following format for each month since January 2020 and (b) produce witnesses who are competent to explain the basis for the numbers and including how the numbers were calculated.² This information should be provided before the Sierra Club’s exhibits and witness declarations are due:

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
etc.							

² The witnesses should be equivalent to an HRCF rule 30b6 witnesses who can explain how the numbers were derived; how accurate they are; and what methodologies were employed.

* 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
etc.			

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

Crop	Acres	Water Used mgd	Field	groundwater available at that field?
etc.				
Total			-	-

A&B is currently providing much of the information in the first table, but A&B has attempted to disguise the system losses by lumping consumptive uses with non-consumptive uses in the last category even though the consumptive uses constitute a trivial amount of the water used. First, the water that goes through the hydroelectric plant is then subsequently used for irrigating crops (so it cannot be counted as a consumptive use of water). Second, EMI's Mark Vaught testified under oath that approximately 100,000 gallons per day are used for dust control. That estimate seems quite high given that a fire tanker discharges 7,000 gallons per hour. In any case, dust control constitutes a small fraction of the water used. Third, 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). Consumptive uses must be separated from non-consumptives uses and A&B must either collect the data or use reasonable estimates (and explain how the estimates were derived).

A&B has not been provided the information in the second table. It needs to.

Mahi Pono's Grant Nakama testified under oath that the information in the third category could be provided. August 13, 2020 Trial Transcript at 27-28.

In addition to providing the information in these tables and producing competent witness who can testify as to the foundation of this information, A&B also needs to produce witnesses who can testify with specificity regarding the following issues.

A. Actual water needs

“At a very minimum, applicants must prove their own actual water needs.” *Waiāhole*, 94 Hawai'i at 161, 9 P.3d at 473.

Not only does A&B need to provide a competent witness who can testify regarding how the diverted water has been used, but A&B also needs to provide a witness who can explain how much water is realistically needed for each month in 2022 for diversified agriculture in Central Maui. The witness should be able to explain: how many acres area currently planted for each crop; how much water each crop needs per acre per day on average; and how much more is projected to be planted for each crop in the next year. The witness should also explain why more than 2500 gallons per acre per day would be required given (a) the Commission on Resource Management's 2021 Nā Wai 'Ehā decision (COLs 95 and 193); (b) the November 2019 Stipulation and Order Regarding SWUPA 2206 Mahi Pono entered into; and (c) its usage over the past few months which has averaged significantly less than 2500 gallons per day.

A&B should also produce a witness to explain why it needs, in addition to a revocable permit to divert water from the Huelo area, revocable permits for the Nahiku, Keanae and Honomanu license areas in 2022.

B. Alternatives

“The applicant must demonstrate the absence of a practicable alternative water source.”

Kauai Springs, 133 Hawai‘i at 174, 324 P.3d 984.

A&B must produce a witness who can explain how much water has been used – and how much is proposed to be used in 2022 – from alternative sources including pumping of groundwater pumping and water derived from streams west of Honopou. The witness should be able to explain all the impediments that have barred and will bar maximum use of these alternative sources. If the barriers are economic, then witnesses need to provide evidence of costs, gross revenue and profits. If the barriers are based on impacts to the resource, then witnesses need to provide evidence as to how the resources would be affected and A&B’s commitment to protection of that resource. A witness with sufficient experience and knowledge needs to explain why use of the resource is not practical. In other words, simply claiming that an alternative is not practical is insufficient.

C. Mitigation Measures

“If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.” *Kauai Springs*, 133 Hawai‘i at 175, 324 P.3d at 985. “[P]ermit applicants must also demonstrate the absence of practicable mitigating measures[.]” *Waiāhole*, 94 Hawai‘i at 161, 9 P.3d at 473.

A&B must produce a witness who can explain which reservoirs lose the most water, how much it would cost to line and cover them (to reduce water loss due to seepage and evaporation), and how long it would take.

A&B should also produce a witness who can testify regarding the \$20 million that Mahi Pono pledged to install on more efficient irrigation systems, including (a) how much of that \$20 million has been spent (b) what the water savings have been (c) how much of that money has

been spent on lining and/or covering reservoirs and (d) how precisely that money has been spent.

A&B should also produce a witness who can testify as to how many acres of tree (whether orchard or tropical fruit) crops have been planted that will not bear fruit until after 2022 – as well as how much has been spent to plant these crops.

A&B should produce a witness who can describe with specificity which diversion structures on public land that have been modified over the past few years, which ones it is still planning on modifying, and when. The witness should describe how recommendations made by U.S. Fish and Wildlife Service, the Division of Forestry and Wildlife and the Division of Aquatic Resources have been implemented.

A&B should produce a witness who can explain how much it would cost, and how long it would take, to line the unlined EMI ditches that were the subject of the 2012 USGS study. The witness should explain how much water could be saved by doing so.

Finally, A&B should produce a witness or document that identifies the conditions that it suggests should be imposed on the continuation of any of the revocable permits.

III. CONCLUSION

BLNR should compel A&B to identify and produce witnesses and documents that are meaningfully responsive to all the above issues.

Dated: Honolulu, Hawai'i September 27, 2021

/s/ David Kimo Frankel
Attorney for the Sierra Club

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Certificate of Service

Pursuant to Minute Order No. 1, a copy of the foregoing is being served via email today

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Dated: Honolulu, Hawai'i September 27, 2021

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