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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

In the Matter of a Contested Case Regarding ) DLNR File No. CCH-LD-21-01  
the Continuation of Revocable Permits (RPs) )  
for Tax Map Keys (2) 1-1-001:044 & 050; (2) ) Sierra Club’s **Reply** to A&B’s Opposition to  
2-9-014:001, 005, 011, 012 & 017; (2) 1-1- ) the Sierra Club’s Motion to Obtain Essential  
002:002 (por.) and (2) 1-2-004:005 & 007 for ) Information; Certificate of Service  
Water Use on the Island of Maui to Alexander )  
& Baldwin, Inc. and East Maui Irrigation )  
Company, LLC for the remainder of the 2021 )  
RPs, if applicable, and for their continuation )  
through the end of 2022 )

Sierra Club’s **Reply** to A&B’s Opposition to the Sierra Club’s Motion to Obtain Essential  
Information

Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.’s (collectively “**A&B**”) memorandum in opposition is based on flawed assumptions. It assumes that it can evade its burden of proof by relying on a decision which has not been finalized. It assumes that the Sierra Club is requesting to depose witnesses.

On page two of its memorandum, A&B states that it does not “object to providing any information that the Board or hearings officer may request.” Given BLNR’s constitutional duty to “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) (cleaned up), BLNR must order A&B to provide the information to ensure that A&B is an and will be using the diverted water in a reasonable and beneficial manner and that mitigating measures of any sort are impracticable.

BLNR is both constitutionally empowered to ask for this information and constitutionally required to. As a trustee, BLNR is 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.” *In re Kukui (Molokai), Inc.*, 116 Hawai‘i 481, 490, 174 P.3d 320, 329, (2007). BLNR is “duty bound to hold an applicant to its burden during a contested-case hearing.” *In re Waiola* 103 Hawai‘i 401, 441, 83 P.3d 664, 704 (2004).<sup>1</sup> The public trust doctrine imposes a duty on BLNR “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.

**I. The Scope of this Hearing is not Limited by the Trial or by CWRM’s Decision.**

While BLNR may have intended that the contested case hearing not duplicate matters decided in the trial at the Environmental Court, nothing was “decided” in that trial. “Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy.” *E. Sav. Bank, FSB v. Esteban*, 129 Hawai‘i 154, 296 P.3d 1062 (2013). “A party asserting res judicata has the burden of establishing: (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical with the one presented in the action in question.” *PennyMac Corp. v. Godinez*, 474 P.3d 264, 268 (2020) (cleaned up).

While A&B, BLNR and the deputy attorneys general who represent BLNR may wish to

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<sup>1</sup> The Sierra Club is not unilaterally dictating the scope of this hearing as A&B argues on page two of its memorandum. The supreme court has dictated the scope.

preclude matters that were debated at the trial in this matter, they cannot do so in this contested case hearing for three reasons.<sup>2</sup>

First, *res judicata* only applies where there has been a final judgment on the merits. “A judgment is final where the time to appeal has expired without appeal being taken.” *James W. Glover, Ltd. v. Fong*, 42 Haw. 560, 574 (1958). When a judgment is timely appealed it is **not** final for *res judicata* purposes. *In re Mitsuo Yoneji Revocable Trust Dated Nov. 27, 1985*, 464 P.3d 892, 900 (ICA 2020). The trial court has not rendered a final judgment in the trial that took place in 2020. In fact, BLNR itself filed a motion to amend the trial court’s finding of fact. That motion, like the Sierra Club’s motion to clarify, has not been resolved. Because these motions are unresolved, the court has not entered final judgment. Without final judgment – and without the time to appeal expiring – *res judicata* principles do not apply.

Second, the legal issue argued in the trial is significantly different than the one being argued in this contested case hearing. As the Environmental Court concluded in its decision ordering this contested case hearing, “Moreover, the burden of proof in a contested case hearing over the continuation of revocable permits (see e.g., *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455 and *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)) is different than a trial over a breach of trust (*Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 233, 140 P.3d 985, 1013 (2006)).” The claim in this case is **not** identical to the one argued that went to trial. The shifting of the burden of proof is very significant, as the Environmental Court noted. At the trial, the Sierra Club bore the burden of proving that BLNR breached its trust duties. In this case, however, A&B will need to prove:

- a. its “actual needs and the propriety of draining water from public streams to satisfy

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<sup>2</sup> The Sierra Club was not a party to the CWRM proceeding. The issues in this contested case are not identical to the ones raised in the CWRM proceeding. Moreover, James Parham’s study and DAR’s conclusions were produced after CWRM’s 2018 decision.

- those needs”;
- b. “the absence of a practicable alternative water source”;
  - c. “the requested use is nevertheless reasonable and beneficial”; and
  - d. it can “implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes”

*Kauai Springs*, 133 Hawai‘i at 174-75, 324 P.3d at 984-85.

Third, there are additional facts that were not available at the August 2020 trial. In the court’s August 23, 2021 ruling that ordered this very contested case hearing, the Environmental Court found that the Sierra Club has new evidence available to it that was not available during the trial.

This appeal involves some significantly different facts. More specifically, the Sierra Club had available to it new evidence on the permit renewals – information and issues that 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. JEFS:32 CROA:6-9 and JEFS:130 CROA:6-10. 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. JEFS:33 CROA:14. A new issue of defining “waste” to expressly exclude system losses and evaporation was also up for consideration with the permits at issue. JEFS:31 CROA:14; JEFS:32 CROA:14 and JEFS:137 CROA:4. 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. JEFS:114 CROA:23-24.

The information that the Sierra Club seeks – and that A&B is constitutionally obligated to provide – is directly relevant to whether BLNR should approve a continuation of the revocable permits and upon what terms. None of the information requested could possibly be considered beyond the scope of this contested case hearing. Such a determination would be reversible error given that Hawai‘i Supreme Court’s rulings in *Kauai Springs*, *Kukui*, 116 Hawai‘i at 499, 174 P.3d at 338, and *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 161, 9 P.3d 409, 473

(2000) (“*Waiāhole*”).

## **II. The Sierra Club’s Request is a Standard One.**

As A&B well knows, when BLNR conducts contested case hearings, BLNR’s practice is to ask the party with the burden of proof to submit its witness testimony and exhibits in writing first. The opposing party subsequently files its witness testimony and exhibits. Then the party with the burden submits any rebuttal testimony. Only after all these documents are provided does the portion of the contested case proceeding involving live witness testimony take place.<sup>3</sup> Labelling these submissions as “pre-hearing” is misleading.

A&B does not contest that it bears a heavy burden of proof in this case. A&B must produce witnesses to fulfill its burden of proof. The Sierra Club’s request regarding witnesses is that A&B provide this witness testimony in its initial production of testimony and exhibits. The Sierra Club is **not** requesting to depose anyone. It is **not** asking for the pre-hearing attendance of witnesses. It is asking for the attendance of witnesses at the contested case hearing itself for the purpose of taking oral testimony before BLNR’s designated representative, the chair of BLNR. The Sierra Club is also asking that these witnesses be prepared and be competent to testify regarding the issues identified in the Sierra Club’s motion.

Because the witnesses that the Sierra Club is seeking to testify all represent A&B or its agents, the address for relevant subpoena will be A&B’s counsel. And since, presumably, this contested case hearing will be conducted via zoom, there is no need for any mileage fee.

## **III. The Specific Requests are Reasonable and Necessary.**

First, in order to ensure that A&B is using and will use east Maui stream water in a reasonable and beneficial manner, to ensure that alternative sources of water are being used, and

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<sup>3</sup> That has been the practice in the half dozen BLNR contested case hearings that the Sierra Club’s counsel has participated in.

to ensure that A&B meets its burden of proof, 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.<sup>4</sup>

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 <sup>5</sup> |
|-------|---------------------------|------------|----------------|----------------|------------------|---|--|
|       |                           |            |                |                |                  |   |  |
| etc.  |                           |            |                |                |                  |   |  |

\* 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 |       |                | -     | -                                    |

In the August 23, 2021 ruling that ordered this very contested case hearing, the Environmental Court identified waste, need and uses as material in this contested case hearing:

<sup>4</sup> 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.

<sup>5</sup> A&B should not be allowed to mislead BLNR by lumping consumptive uses with non-consumptive uses.

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. JEFS:33 CROA:14. A new issue of defining “waste” to expressly exclude system losses and evaporation was also up for consideration with the permits at issue. JEFS:31 CROA:14; JEFS:32 CROA:14 and JEFS:137 CROA:4. 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. JEFS:114 CROA:23-24.

Thus, obtaining this information is essential.

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

- a) the actual water needs.

The witness must be able to: identify how the diverted water has been used; how much water is realistically needed for each month in 2022 for diversified agriculture in Central Maui; how many acres area currently planted for each crop; how much water each crop needs per acre per day on average; how much more is projected to be planted for each crop in the next year; and 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.

- b) why A&B needs RPs for the Nahiku, Keanae and Honomanu license areas in 2022.
- c) the use of alternative water sources

The witness(es) 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.

d) mitigation measures

The witness(es) must explain which reservoirs lose the most water, how much it would cost to line and cover each one (to reduce water loss due to seepage and evaporation), and how long it would take. The witness(es) should explain 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 (d) how precisely that money has been spent and (e) how it will be spent. The witness(es) should also describe 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. The witness(es) should 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(es) 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. The witness(es) should 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(es) should explain how much water could be saved by doing so. Finally, the witness should identify the conditions that it suggests should be imposed on the continuation of any of the revocable permits.

**III. CONCLUSION**

BLNR should, pursuant to HAR § 13-1-32(c), compel A&B to identify and produce witnesses and produce 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

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 ) Certificate of Service  
Maui Irrigation Company, LLC's (collectively )  
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 Maui )  
\_\_\_\_\_ )

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 October 11, 2021

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