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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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 Memorandum in Opposition to
2-9-014:001, 005, 011, 012 & 017; (2) 1-1-) Maui County's Application to be Admitted as
002:002 (por.) and (2) 1-2-004:005 & 007 for) a Party; 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 Memorandum in Opposition to
Maui County's Application to be Admitted as a Party**

While the hearing officer has signaled the inevitability of Maui County's intervention, the Sierra Club objects. The County fails to satisfy the criteria for participation in this contested case hearing pursuant to HAR § 13-1-31(b) and (c).

HAR § 13-1-31(b)(1) authorizes intervention by all government agencies whose jurisdiction includes the land in question. An agency that has "jurisdiction" has authority to render decisions. The County lacks such jurisdiction (or authority) over these lands. These lands are owned entirely by the State. The State has not given the County authority to render decisions over these state-owned land *Cf. Kunimoto v. Kawakami*, 56 Haw. 582, 545 P.2d 684 (1976). Furthermore, these lands are entirely within the conservation district as BLNR admitted in its response to Plaintiff's Fourth Request for Admissions in *Sierra Club v. BLNR*, Civ. No. 19-1-0019-01 JPC (June 17, 2019). Generally, the counties lack authority in the conservation district

(except special management areas). *See Stop H-3 Ass'n v. State Dept. of Transp.*, 68 Haw. 154, 159, 706 P.2d 446, 450 (1985); HRS §§ 46-4(a), 183C-4 and 205-2. The county has pointed to no exceptions to the general rule. The County lacks jurisdiction over the land encompassed by the revocable permits.

HAR § 13-1-31(b)(2) authorizes intervention if the County can demonstrate that it will be so directly and immediately affected that its request is clearly distinguishable from that of the general public. The County will not be affected by anything that this contested case hearing will resolve. The Sierra Club has repeated *ad nauseum* that it does not seek to reduce the amount of water available to Maui County for its current domestic users or the Kula Agricultural Park. The Environmental Court has made clear the importance of ensuring that Upcountry Maui continues to receive the water it has been receiving. It should be abundantly clear to everyone that this contested case hearing will determine the conditions upon which the revocable permits are continued – not whether they will be continued.¹ . *See* HRS § 171-58(c) (“those conditions which will best serve the interests of the State”).

HAR § 13-1-31(c) allows for intervention if: (1) the County can show that it has a substantial interest in the matter; (2) its participation will assist decisionmaking, (3) the County’s position is different from that of other parties, and (4) the County will provide substantially new relevant information, or its participation will not render the proceedings inefficient or unmanageable.

The County has failed to show that it has a substantial interest in the matter. Given that

¹ Maui County relies on BLNR findings entered more than 15 years ago. Since then, the County has heavily invested in lining its reservoirs to significantly reduce waste. While the Sierra Club acknowledges that the County needs to continue to receive water, the County’s spin is troubling. It is abundantly clear that (a) the County uses only a small percent of the water that flows through the EMI ditch system (and none of the water that flows through the the New Hāmākua, Lowrie, Haiku, Center or Manuel Luis ditches), and (b) the EMI ditch system provides only a portion of the water used by Upcountry residents. Nevertheless, the Sierra Club agrees that the County should continue to receive east Maui stream water for its current domestic users and the Kula Agricultural Park.

everyone wants to ensure that its current Upcountry domestic users and the Kula Agricultural Park continue to receive water, it is hard for the County to justify how it has a substantial interest in the matter. Protection of its interests are assured. In fact, the Sierra Club will be advocating for the County's interests in a manner that the County has failed to do for decades. It will ask that BLNR include conditions in the revocable permit that require that that Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC (collectively A&B) (a) provide water to the County and (b) provide water to the County for free. It is unbelievable that these conditions have never been incorporated into these permits.

The County has not suggested how its participation will assist decisionmaking. What role can it play and what evidence can it provide that the existing parties cannot?

The County's position is no different than the other parties. In the decades of legal proceedings which the County refers to on page one of its memoranda, it routinely joins everything that A&B files. Fill-in-the-blank joinders do not reveal any differences with A&B.

Finally, the County has not indicated that it can provide any new relevant information. Does it have any data that contradicts, or adds to, what A&B has been providing to BLNR for the past seven quarters? For years now, A&B and the County have waived the bloody shirt of Central Maui fires. On June 22, 2021, the County finally provided data showing that fire fighting requires less than 100,000 gallons – not millions of gallons of water. Unless it can provide meaningful information as to how much water is genuinely required to fight fires, its participation is unnecessary.

Dated: Honolulu, Hawai'i November 1, 2021

/s/ David Kimo Frankel
Attorney for the Sierra Club

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Certificate of Service

Pursuant to Minute Order No.s 1 & 5, a copy of the foregoing is being served via email
today to:

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Dated: Honolulu, Hawai'i November 1, 2021

/s/ David Kimo Frankel
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