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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 Motion Asking BLNR to Fulfill  
2-9-014:001, 005, 011, 012 & 017; (2) 1-1- ) Its Trust Duties to Seek Essential Information;  
002:002 (por.) and (2) 1-2-004:005 & 007 for ) 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 Motion Asking BLNR to Fulfill Its Trust Duties to Seek Essential Information

To protect its due process rights, the Sierra Club files this motion pursuant to HAR § 13-1-34 and the public trust doctrine.

**I. BLNR'S CONSTITUTIONAL DUTY**

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). 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 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.* “[L]imited and perfunctory review” that simply repeats the applicant’s representation and makes no “independent factual findings” are disfavored. *In re Application of Gas Co.* 147 Hawai‘i 186, 201, 465 P.3d 633, 648 (2020).

Moreover, “the State has an ongoing trust obligation to ensure third-party compliance with provisions designed to protect trust property [.]” *Ching v. Case*, 145 Hawai‘i 148, 179, 449 P.3d 1146, 1177 (2019).

As we reiterated in *Mauna Kea II*, a **state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution.** 143 Hawai‘i at 387, 431 P.3d at 760. We also note, however, that HG and the PUC's reliance on the ICA's decision in *In re Molokai Pub. Utils.*, 127 Hawai'i 234, 277 P.3d 328 (App. 2012), to argue that a rate case does not trigger a state agency's public trust obligations where there is no change in use of the public trust resource, is misplaced. That case was effectively overruled by this court's decision in *Ching v. Case*, 145 Hawai'i 148, 177-78, 449 P.3d 1146, 1175-76 (2019), in which we held that **the state has a continuing duty** to monitor the use of trust property, **even if the use of the property has not changed.** *See also Lāna'ians for Sensible Growth v. Land Use Comm'n*, 146 Hawai'i 496, 504-05, 463 P.3d 1153, 1162-63 (Haw. May 15, 2020) (noting that the LUC possesses **a continuing constitutional obligation** to ensure that measures it imposes to protect public trust resources are implemented and complied with). Thus, the PUC's **constitutional obligations are ongoing, regardless of the nature of the proceeding.**

*In re Application of Gas Co.* 147 Hawai‘i 186, 207, 465 P.3d 633, 654 (2020). In this case, the terms of the revocable permit require that A&B use the water taken from east Maui streams “for reasonable and beneficial uses.” “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.” *Id.* at 177, 449 P.3d at 1175. The BLNR Defendants “possesses a continuing constitutional obligation to ensure that the measures it imposes to protect public trust resources are implemented and complied with.” *Lāna'ians for Sensible Growth v. Land Use Comm'n*, 146 Hawai‘i 496, 504, 463 P.3d 1153, 1161 (2020). 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.

BLNR cannot “relegate itself to the role of a mere ‘umpire passively calling balls and strikes for adversaries appearing before it[.]” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455.

## II. ESSENTIAL INFORMATION

### A. Reasonable and Beneficial Uses

The only way BLNR can determine whether the water taken from east Maui streams has been – and will be – used in a reasonable and beneficial manner is to ask for pertinent information that Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.’s (collectively “**A&B**”) have failed to provide.

First, BLNR must require that A&B provide more detailed information regarding how much water has been used and is proposed to be used. A&B’s Exhibit X-13 fails to distinguish between consumptive uses and non-consumptive uses. BLNR’s failure to require this distinction has allowed A&B to disguise how much water has been wasted.<sup>1</sup> Consumptive uses (dust control and fire protection) need to be quantified. The Sierra Club has evidence that these consumptive

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<sup>1</sup> A&B and DLNR appear to take umbrage at the word “waste.” Water that is taken from streams that is not used is in fact wasted. As Chair Case explained at BLNR’s October 11, 2019 meeting, “And you know, I mean, the other consideration, obviously, is waste, you don’t want to be running water through the system that’s not being used.” Trial Exhibit S-51 at 5. Water taken from a stream that is not needed is wasted. *See Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 690 (1904). The supreme court described “nonuse” of water as “the perceived biggest waste of all.” *Waiāhole*, 94 Hawai‘i at 140, 9 P.3d at 452. The court recognized that “the policy against waste dictates that any water above the designated minimum flows and not otherwise needed for use remain in the streams in any event.” *Id.* at 156, 9 P.3d at 468.

uses constitute a tiny fraction of the water lumped into the category “Reservoir/seepage/fire protection/evaporation/dust control/hydroelectric.” Nevertheless, it is BLNR’s duty to require that A&B provide that distinction so that BLNR can determine how much of the diverted stream water has been reasonably used.

Second, BLNR must require that A&B provide a factual basis for its irrigation needs. A&B’s EIS discusses how much water various crops need per acre per day. But these numbers are made up out of thin air. There is no indication in the EIS where these numbers came from. A&B cannot simply invent numbers without any basis. “The Hawai’i Constitution requires the State to engage in evaluative” analysis “to protect against the conflict of interest inherent in self-reporting.” *Lāna‘ians*, 146 Hawai’i at 507, 463 P.3d at 1164.

Third, BLNR must require A&B to cogently explain why it is reasonable to ask for more than 2,500 gallons per acre per day given (a) the Commission on Resource Management’s 2021 Nā Wai ‘Ehā decision (COLs 95 and 193) limiting the use of stream water for irrigation to 2,500 gallons per day; (b) the November 2019 Stipulation and Order Regarding SWUPA 2206 Mahi Pono entered into limiting its use to 2,500 gallons per acre per day; (c) Mahi Pono’s usage over the past few months which has averaged less than 2,500 gallons per acre per day; and (d) CWRM’s conclusion that 2,500 gallons per cultivated acre per day was a reasonable amount of water to be used for agriculture in Central O‘ahu. *Waiāhole II*, 105 Hawai’i at 7 and 21, 93 P.3d at 649 and 663.

Fourth, BLNR must require that A&B explain why it needs any water from the Nahiku, Keanae, and Honomanu license areas in 2022. BLNR needs to know where the water in the revocable permit area came from in 2020 and 2021. Did all the water come from the Huelo area?

B. Alternatives

Not only must BLNR make reasonable inquiry into how much water is needed, how it is used, and how much is proposed to be used, but it also must make reasonable inquiry into alternative sources. *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455.

We now know that Mahi Pono is able to pump and use 5.81 mgd of groundwater on its farm. Exhibit X-13 (October 2021). BLNR must ask A&B to provide any and all data that suggests that this pumpage rate is not sustainable every month. An extra 5.81 mgd left in east Maui streams would benefit native species and recreational uses. BLNR must ask A&B to explain all the impediments that have barred and will bar maximum use of pumped groundwater. BLNR must require that A&B provide current salinity data from the groundwater wells as well as agricultural studies that discuss salinity tolerance of the relevant crops. It must require A&B to provide real evidence of costs, gross revenue and profits.

In order to ensure that alternative sources of water are being used, BLNR must ask A&B which of the fields in which crops are currently growing (and which fields which are proposed to be planted in 2022) is groundwater unavailable. It must ask why so little groundwater was pumped through out 2021.

C. Mitigation Measures

BLNR is also duty bound to implement reasonable measure to mitigate impacts to our streams. *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. To do so, it needs basic information.

BLNR must require that A&B explain which reservoirs are in use, which ones 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. BLNR must require that A&B explain how precisely the \$20 million that Mahi Pono pledged on more efficient irrigation systems has

been spent. BLNR must require that A&B explain what the water savings have been and how much of that money has been spent on lining and/or covering reservoirs. BLNR must also ask A&B to 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. BLNR must also ask A&B how much water could be saved by doing so.

The data from A&B's quarterly reports as well as A&B's Exhibit X-13 reveal that more than half the water taken from east Maui streams is not used. Such loss/non-use/waste is neither reasonable nor beneficial. BLNR must demand that A&B provide a meaningful plan that reduces this loss/non-use/waste.

D. Streams

Finally, BLNR must consider the impact of the diversions. *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455. It cannot do so without basic information. "As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin." *Ching* 145 Hawai'i at 177, 449 P.3d at 1175. BLNR has a "duty to investigate upon being made aware of evidence of possible damage" of public trust resources. *Id.* A&B's own FEIS reveals that full diversion of the dozen streams unaddressed by the 2018 CWRM order reduces the available habitat units by more than 88%. Exhibit X-2 at PDF 14 and 73. In 2020, the Division of Aquatic Resources determined that restoring four of the streams in the Huelo area should be a high priority given the presence of native species and potential habitat. BLNR must know which streams water has been coming from in 2021, whether the amount of water diverted has changed solely due to weather or due to temporary alterations in the diversion system itself, and which streams A&B intends to take water from in 2022. It is next to impossible for BLNR to determine the impact of the diversions without knowing whether (and the degree to which) water

was taken from a particular stream (and when). BLNR must inquire whether most of the water is coming from one stream, a handful of streams, a dozen streams, or more, and how that changes over the course of a year. BLNR needs to know, for example, whether A&B has taken all the baseflow of the dozen streams unaffected by CWRM's 2018 order all year long, or has allowed some baseflow to remain in some streams.

### **III. CONCLUSION**

BLNR's public trust obligations require that it seek this critical information that A&B has failed to disclose. This information is necessary for BLNR to reasonably determine what conditions make the most sense for the continuation of the revocable permits.

Dated: Honolulu, Hawai'i November 15, 2021

/s/ David Kimo Frankel  
Attorney for the Sierra Club

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Company, LLC for the remainder of the 2021 )  
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through the end of 2022 )

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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 15, 2021

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