

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case ) DLNR File No. CCH-LD-21-01  
Regarding the Continuation of Revocable )  
Permits (RPs) for Tax Map Key Nos. ) **MINUTE ORDER NO. 11**  
(2) 1-1-001:044 & 050; (2) 2-9-014:001, )  
005, 011, 012 & 017; (2) 1-1-002:002 ) **ORDER DENYING “SIERRA CLUB’S**  
(por.) and (2) 1-2-004:005 & 007 for ) **MOTION ASKING BLNR TO FULFILL**  
Water Use on the Island of Maui to ) **ITS TRUST DUTIES TO SEEK**  
Alexander & Baldwin, Inc. (A&B) and ) **ESSENTIAL INFORMATION” FILED**  
East Maui Irrigation Company, LLC ) **NOVEMBER 15, 2021**  
(EMI) for the remainder of the 2021 RPs, )  
if applicable, and for their continuation ) CERTIFICATE OF SERVICE  
through the end of 2022 )  
\_\_\_\_\_ )

**MINUTE ORDER NO. 11**

**ORDER DENYING “SIERRA CLUB’S MOTION  
ASKING BLNR TO FULFILL ITS TRUST DUTIES TO SEEK  
ESSENTIAL INFORMATION” FILED NOVEMBER 15, 2021**

Sierra Club’s “Motion Asking BLNR to Fulfill Its Trust Duties to Seek Essential Information” (“Motion”) filed November 15, 2021 is hereby DENIED.

First, it is not clear what relief the Sierra Club is requesting, exactly. *See* 60 C.J.S. Motions and Orders § 12 (explaining that a motion should point out specifically what relief is desired or demanded, or at least make a reasonable specification). In Minute Order No. 7, the Hearing Officer already denied the Sierra Club’s request that Alexander & Baldwin, Inc. and East Maui Irrigation Company, LLC (collectively, “A&B”) be subpoenaed to produce certain evidence and testimony when Sierra Club did not comply with the requirements of Hawaii Administrative Rules (“HAR”) § 13-1-33, which governs the issuance of subpoenas in these contested case proceedings. Sierra Club’s present Motion does not attempt to provide the information required by HAR § 13-1-33. Thus, to the extent that the Sierra Club is requesting

that the Board of Land and Natural Resources (“Board”) issue an order requiring A&B to provide certain evidence or testimony at the contested case hearing, Sierra Club’s Motion is denied.

Second, to the extent that the Sierra Club is requesting an order which holds, as a matter of law, that the revocable permits (“RPs”) at issue cannot be continued unless A&B provides each piece of information sought by the Sierra Club, the Hearing Officer declines to so order. Whether or not A&B’s evidence is sufficient to meet A&B’s burden show that the continuance of the RPs is justified under the public trust doctrine is exactly the mixed question of fact and law that will be decided following the contested case hearing. *See, e.g., In re Waiola O Molokai, Inc.*, 103 Hawai’i 401, 438, 83 P.3d 664, 701 (2004) (holding that the Commission on Water Resource Management (“CWRM”) did not clearly err in finding that the water use permit applicant met its burden to prove proposed uses were reasonable-beneficial); *see also In re ‘Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai’i 228, 255, 287 P.3d 129, 156 (2012) (holding that CWRM did not err when its findings were supported by substantial evidence in the record). The Hearing Officer “is entitled to reserve difficult questions of law and fact for full development at trial on the merits.” *Ctr. for Econ. Just. v. Am. Ins. Ass’n*, 39 S.W.3d 337, 346 (Tex. App. 2001).

Third, the Hearing Officer disagrees with the Sierra Club to the extent that it argues that the public trust requires the Board to specify the evidence that A&B must introduce *before* the hearing even commences. To fulfill its public trust duties, the Board must weigh competing private and public uses of water on a case-by-case basis. *In re Water Use Permit Applications*, 94 Hawai’i 97, 142, 9 P.3d 409, 454 (2000) [hereinafter *Waiahole I*]. Until the presentation of evidence is complete, the Board cannot determine whether A&B has met its burden. As long as

the Board’s decision making “evinces a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state,” it will necessarily satisfy the required “close look” review governing public trust resources. *In re 'Iao*, 128 Hawai‘i at 253, 287 P.3d at 154 (quoting *In re Waiola*, 103 Hawai‘i at 422, 83 P.3d at 685) (internal quotation marks omitted).

To be clear, this order should not be interpreted to mean that A&B does *not* need to introduce any of the evidence requested by the Sierra Club. A&B must justify its proposed uses “insofar as circumstances allow.” *Waiahole I*, 94 Hawai‘i 161, 9 P.3d at 473. While uncertainty and incomplete information may not necessarily prevent A&B from meeting this burden, it must “still demonstrate [its] actual needs and, within the constraints of available knowledge, the propriety of draining water from public streams to satisfy those needs.” *Id.* at 162, 9 P.3d at 474. As stated in Minute Order No. 7: “[A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource.” *Kauai Springs, Inc. v. Plan. Comm’n of Cty. of Kauai*, 133 Hawai‘i 141, 174, 324 P.3d 951, 984 (2014).

Based on the foregoing, the Sierra Club’s “Motion Asking BLNR to Fulfill Its Trust Duties to Seek Essential Information” is hereby DENIED.

DATED: Nov 24, 2021, Honolulu, Hawai‘i

*Suzanne D. Case*

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Suzanne D. Case  
Chairperson, Board of Land and Natural Resources  
Hearing Officer

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*In the Matter of a Contested Case Regarding the Continuation of Revocable Permits (RPs) for Tax Map Key Nos. (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 to Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Company, LLC (EMI) for the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022, DLNR File No. CCH-LD-21-01; Minute Order No. 11, ORDER DENYING “SIERRA CLUB’S MOTION ASKING BLNR TO FULFILL ITS TRUST DUTIES TO SEEK ESSENTIAL INFORMATION” FILED NOVEMBER 15, 2021.*

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Alexander & Baldwin, Inc. (A&B) and )  
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(EMI) for the remainder of the 2021 RPs, )  
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through the end of 2022 )  
\_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies a true and accurate copy of the foregoing was duly served upon the following parties by electronic mail, on November 24, 2021.

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DATED: November 24, 2021, Honolulu, Hawai'i.



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