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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 Responsive Brief  
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. 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 Responsive Brief

Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.'s (collectively "A&B") have failed to meet their burden of proof. A&B has failed to provide evidence to demonstrate that it needs more than 25 million gallons per day from east Maui streams. It has failed to prove that it needs to divert more than 25 million gallons per day in 2022. It has failed to prove that it has been using all the water taken from east Maui streams in a reasonable and beneficial manner.<sup>1</sup> It has failed to prove that it cannot rely in part on alternative sources of water. It has failed to prove

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<sup>1</sup> As the Sierra Club has pointed out previously, the trial court's decision in the related case that went to trial (involving a different burden of proof) is not a final judgment that has any *res judicata* effect. Moreover, the supreme court has emphasized 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). Finally, A&B's FEIS points to errors in the Commission on Water Resource Management's (CWRM) 2018 decision. See e.g. Exhibit X-1 at 2-2 n.5 and 1-5 n.6. If A&B is free to correct mistakes in CWRM's decision, so too is the Sierra Club.

that it cannot implement mitigation measures. The evidence demonstrates that A&B's diversions harm the natural resources and recreational uses dependent on flowing east Maui streams. In order to protect public trust resources, BLNR will need to limit the amount of water that can be diverted. It needs to also incorporate new conditions into the permits that ensure that unused equipment is removed, diversion structures are altered, and the forest is managed better.<sup>2</sup>

**I. A&B HAS FAILED TO MEET ITS BURDEN OF PROOF.**

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).<sup>3</sup> 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.

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

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<sup>2</sup> Because much evidence will come through live testimony and the Sierra Club does not know what many of the answers will be, this responsive brief does not address all the evidence, reasons and conditions that the Sierra Club will point to at the conclusion of this hearing.

<sup>3</sup> This framework has been applied in every appellate case involving agency decisions regarding the use of water.

P.3d 320, 338, (2007). “At a very minimum, applicants must prove their own actual water needs.” *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 161, 9 P.3d 409, 473 (“*Waiāhole*”). A&B has categorized the uses of the diverted water into the following categories: County of Maui DWS, County of Maui Ag Park, Diversified Agriculture, Historic/Industrial Uses, and a category of non-consumptive uses: Reservoir/Seepage/Fire Protection/Evaporation/Dust Control/Hydroelectric. Exhibits Y5—Y11.

A. County of Maui DWS and the Kula Agricultural Park

Over the past five years, the County has never needed more than 3.82 mgd for upcountry domestic uses and no more than 1.08 mgd for the Kula Agricultural Park. Exhibits Y-1 and Y-5-Y-11; Trial Exhibits 111 (September 2017, 112.656 divided by 30); M-4; M-5; M-6; J-27 at 6 and 8; AB-33 at 9; Trial Transcript 8/14/20 at 15-20 (Pearson). The County has not needed more than 5 mgd for any month over the past five years. *Id.* The County is using less water from east Maui streams for domestic purposes (Kamole-Weir facility) today than it was a few years ago because of significant infrastructure improvements made to reduce seepage and increase its capacity. Trial Transcript 8/14/20 at 23-25, 41-43 (Pearson); Exhibit J-14 at 234 FOF 801.

Over the past seven quarters, the County has averaged needing 2.66 mgd. There is no evidence that the County will need more than 5 mgd. And while the County may want more water to be available – as a precautionary measure – that is no reason for any of the extra water to go unused.<sup>4</sup> Any water that the County does not need and use can and should be used – actually used – by Mahi Pono. But it should not be dumped.

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<sup>4</sup> 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.” Exhibit Y-30 (Trial Exhibit S-51) at 5. 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.

B. Mahi Pono

Mahi Pono exaggerates as to how much water it needs. On October 9, 2019, Mahi Pono projected that it would need 31.11 mgd of water by the end of 2020. Exhibit Y-14 (Trial Exhibit J-26). By the end of 2021, Mahi Pono is not close to using half that amount of water.

There is no factual basis for Mahi Pono's future 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.

A&B has failed to 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, Exhibit Y-18 and Y-19; (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, Exhibit Y-17; (c) Mahi Pono's usage over the past few months which has averaged less than 2,500 gallons per acre per day, Exhibits Y-9—Y-11; 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.

Not only does Mahi Pono exaggerate about how many gallons per day it needs, it also exaggerates how many acres it will plant in 2022. It is unrealistic to expect that Mahi Pono will more than double its cultivated acreage in a single year.

C. Historic/Industrial Uses

A&B's categorization of uses as Historic/Industrial Uses appears to be a misnomer.

Several of the uses are actually for agriculture. But A&B fails to disclose:

- how it is possible that the amount of water used has not changed at all for the past two years – regardless of the number of days in a month, regardless of the weather, regardless of the number of fires, and regardless of HC&D's discontinuing its use of east Maui stream water;
- what the capacity is of 702 cistern;
- whether each of the end users use the same amount of water each day, or whether one user takes most of the water;
- whether any of the agricultural uses irrigate with the water or do they just fill basins for animals to drink?
- how is the 1.1 mgd calculated?

All this information is necessary for BLNR to reasonably determine whether the use of 1.1 million gallons of stream water is reasonable.

D. Fire fighting

A&B has failed to provide evidence that a significant amount of water is needed to fight fires daily.

According to the Maui County Fire Department, a helicopter uses approximately 2,400 gallons per hour of water; tankers use 7,000 gallons per hour; type 1 engines use 1,500 gallons per hour; type 5 engines use 800 gallons per hour; and utility vehicles use 300 gallons per hour. Exhibit Y-12. Assuming that is only safe to fight a fire during day light, a fire requiring one each of these would use 144,000 gallons of water (12,000 x 12). No one has provided any evidence

regarding how many helicopters and tankers Maui County owns. Assuming they own two of each and use them all day, the fire would use 288,000 gallons. There is not a fire of that nature every day, or every week, or every month. A reservoir that contains (in all senses of that word) 300,000 gallons of water makes sense for public safety. It does not make sense, however, to fill a reservoir with 300,000 gallons of water daily for firefighting – let alone many millions of gallons every single day.

E. Dust control

A&B has failed to provide evidence that more than a trivial amount of water is used for dust control. How many dust control trucks are filled daily? What is the capacity of one of these trucks? A fire tanker uses 7,000 gallons per hour. Is more than that required for dust control in a single day?

F. Unused Water

The terms of the revocable permit require that A&B use the water taken from east Maui streams “for reasonable and beneficial uses.” Exhibit Y-22 at 8. “[T]he 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). 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.

Most of the water taken from east Maui streams in 2020 and 2021 was not used. Exhibits

Y-1, Y-5—Y-11; X-13. 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.

A&B points to its “contractual obligation.” More important than any contractual commitment is the condition that BLNR has imposed that water shall be for reasonable and beneficial use.” The Sierra Club has no objection to A&B delivering all the water that the County does not use (below the “contractual obligation”) to Mahi Pono for irrigation. It is patently wrong, however, for millions of gallons of water diverted from east Maui streams to be left unused. 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.” Exhibit Y-30 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.” *Waiahole*, 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. In an agreement ratified by the CWRM ratified an agreement that embraced a series of principles, one being: “Any diversion of water from a stream must be justified with no more water taken than is needed for other beneficial uses, and even then, the health of the stream must be preserved at all times. All waters not needed at any given time belong in the stream and the IIFS numbers are the minimum mounts to be provided.” Exhibit Y-48 at pdf 9, and Y-49.

As will be discussed below, there are a variety of measures that A&B can and must take to reduce this waste of water.

## II. CONDITIONS THAT NEED TO BE INCORPORATED INTO THE RPs.

HRS § 171-58(c) requires that BLNR impose those “conditions which will best serve the interests of the State.” HRS §§ 205A-4, 205A-5, and 205A-2(b)(4)(A), 205A-2(c)(4)(A) and 205A-2(c)(4)(D) require: the protection of valuable coastal ecosystems from disruption and minimization of adverse impacts on all coastal ecosystems; the exercise of an overall conservation ethic and the practice of stewardship in the protection of coastal resources; and the minimization of the disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs. “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.

### A. Some Protection of a Dozen Huelo Streams

“The BLNR is constitutionally mandated to conserve and protect Hawai‘i’s natural resources.” *Pila‘a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai‘i 247, 250, 320 P.3d 912, 915 (2014). “The most basic aspect of the State’s trust duties is the obligation to protect and maintain the trust property and regulate its use.” *Ching*, 145 Hawai‘i at 170, 449 P.3d at 1168. “As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin.” *Id.* at 177, 449 P.3d at 1175. BLNR “must apply a presumption in favor of public use, access, enjoyment, and resource protection.” *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983. It must determine whether the proposed use is consistent with public trust purpose of protecting and maintaining “waters in their natural state.” *Id.* at 172 and 174, 324 P.3d at 982 and 984. They must “take the public trust into account in the planning and allocation



of water resources, and to protect public trust uses whenever feasible.” *Id.* Reasonable measures are necessary to mitigate impacts to our streams. *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455.<sup>5</sup> Protection of free-flowing streams is in the public interest. *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (“can it be said that there is no public interest in a free-flowing stream for its own sake?”); *Waiāhole*, 94 Hawai‘i 97, 137, 9 P.3d 409, 449 (2000) (“public interest in a free-flowing stream for its own sake”); *Kauai Springs*, 133 Hawai‘i at 172, 324 P.3d at 982 (“the maintenance of waters in their natural state constitutes a distinct ‘use’ that the public trust protects”).

The current status quo standards offer no protection of instream uses of a dozen Huelo streams: Kōlea Stream, Punalu‘u Stream, Ka‘aiea Stream, ‘O‘opuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanawana Stream (Ohanui tributary), Hoalua Stream, Waipi‘o Stream, Mokupapa Stream, and Ho‘olawa Stream (Ho‘olawa ili and Ho‘olawa nui tributaries). CWRM established interim instream flow standards for these twelve streams in 1988 for whatever was flowing on June 15, 1988, the height of the summer. HAR §13-169-44; Trial Transcript 8/11/20 at 19 (Meredith Ching). BLNR, however, has no idea how much water was flowing in these twelve streams as of June 15, 1988. As CWRM recognizes on its website, this “status quo” standard is “not adequate to protect streams.” Exhibit Y-44. The 1988 interim instream flow standard for these 13 streams was not based on the biological, ecological or recreational value of those streams. Trial Transcript 8/17/20 a.m. at 76-77

(Strauch). *See also In Re Water Use Permit Applications*, 94 Hawai‘i 97, 150 and n.54, 9 P.3d

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<sup>5</sup> These requirements echo those in HRS chapter 205A. HRS §§ 205A-4, 205A-5, and 205A-2(b)(4)(A) require that BLNR protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems. HRS §§ 205A-4, 205A-5, 205A-2(c)(4)(A) require that the BLNR Defendants exercise an overall conservation ethic and practice stewardship in the protection of coastal resources. HRS §§ 205A-4, 205A-5, 205A-2(c)(4)(D) require that the BLNR Defendants minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water need

409, 462 and n.54 (2000) (“*Waiāhole*”). There are no meaningful instream flow standards for these dozen east Maui streams. *Id.*

The 2018 CWRM decision did not address these dozen Huelo streams. Exhibit Y-46 at 40-41 (FOF 58); Trial Exhibit J-20 at 574 n.1 and 603-06. They were not the subject of that proceeding. Transcript 8/17/20 p.m. at 47-48 (Case). The 2018 CWRM decision did not consider the biological or recreational value of any of the 12 streams. Exhibit Y-46; Trial Transcript 8/11/20 at 16 (Meredith Ching); Trial Transcript 8/17/20 p.m. at 48 (Case).

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. Aquatic biology experts Michael Kido explains why restoration of these streams is important. He explains why A&B’s Exhibit D-1 is too quick to disparage the restoration of stream flows to these streams.

Moreover, the U.S. Fish and Wildlife Service has observed that the “long history of stream diversions by the EMI system on East Maui has created an array of impacts to trust resources, including both the native stream biota, other species which inhabit the adjacent upland forests, and nearshore marine ecosystems that rely on streams for nutrient inputs.” Exhibit X-3 at 8. “Among the major threats to the survival in the wild of the listed [as endangered] forest bird species is mortality caused by avian malaria, which is vectored by the introduced mosquito *Culex quinquefasciatus*. This mosquito species breeds in stagnant pools free from fish in dewatered stream beds, and is by contrast uncommon along stream channels with continuous flow and healthy fish populations. By converting continuously flowing streams into nearly dry beds with

scattered pools, the current EMI diversions create corridors of habitat by which *Culex* mosquitoes can penetrate uphill more deeply into the native forest, and more readily reach susceptible native forest populations. This represents a significant, although indirect, impact of the proposed diversions to this set of listed species.” Exhibit X-3 at 10; *see also* Exhibit Y-41 at 14 and Exhibit X-1 at 4-89—4-90. Professor Freed has pointed out that it is likely that infectious mosquitoes are blown from low elevation to high elevations where they infect native birds. Exhibit Y-42 at 6.

Finally, in 2008, both Ho‘olawanui and Ho‘olawaliilii hosted populations of the endangered damselfly *Megalagrion pacificum*. Exhibit Y-41 at 6. *Megalagrion pacificum* breeds in stream pools and side channels, with adults patrolling the margins of the stream corridor.” Exhibit X-3 at 8. *Megalagrion pacificum* “suffers from direct impacts from loss of habitat linked to diminished stream flows.” *Id.* The U.S. Fish and Wildlife Service concluded that the tributaries to Ho‘olawa Stream “represents suitable habitat for this and other damselfly species.” Exhibit Y-41 at 6. Given the recorded existence of an endangered species above Wailoa Ditch, and the harm that the diversions cause to the habitat in which the damselfly breed, steps need to be taken to restore stream flows to protect an endangered species.<sup>6</sup>

The Sierra suggests three possible mitigation measures to provide increased protection for these streams and the species dependent on free-flowing streams.

- a. No water shall be taken from O‘opuola, Nailiilihaele, Kailua, and Ho‘olawa streams (the streams that the Division of Aquatic Resources identified as the streams that are the highest priority for restoration, Exhibit Y-40); or
- b. No more than 64% of the baseflow can be removed from Kōlea Stream, Punalu‘u Stream, Ka‘aiea Stream, ‘O‘opuola Stream (Makanali tributary),

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<sup>6</sup> *See* HRS § 195D-5(a), (b) and (d).

Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanawana Stream (Ohanui tributary), Hoalua Stream, Waipi‘o Stream, Mokupapa Stream, and Ho‘olawa Stream (Ho‘olawa ili and Ho‘olawa nui tributaries) (the amount of baseflow that is required to allow native stream animals to grow and reproduce. Exhibit Y-46 at iii); or

- c. Water within the Huelo area will only be taken from streams with/from the Wailoa Ditch (the only ditch which provides the County with water).

Given that half the water taken from east Maui streams has not been used for the past two years, implementing one of these measures would not adversely affect any water user.

B. Await CWRM Decision Before Increasing the Total Amount Diverted

In the past, BLNR has stated that it does not have the expertise to determine how much water should remain within a stream. Exhibit Y-54 at 26-27. BLNR has concluded that a contested case hearing on the long-term disposition of water cannot go forward until CWRM has amended the interim instream flow standard. *Id.* at 26; Exhibit Y-53 at 36. A&B has likewise argued that BLNR should not complete a contested case hearing until the interim instream flow standards that are the subject of a petition have been set:

The BLNR is not required by statute or rule to complete a contested case within a specific timeframe. The BLNR therefore has discretion to set its own timetable for completing the contested case proceeding. As demonstrated below, the BLNR is properly exercising its discretion to wait for the outcome of the East Maui IIFS CCH before resuming the Water License CCH.

Here, the CWRM is actively making progress toward final determination of the East Maui IIFS Petitions. But for Na Moku's demand for a contested case for 13 of the 27 East Maui IIFS Petitions, the CWRM would have rendered its final determination of all 27 IIFS petitions by now. In any event, the contested case hearing on all 27 petitions is now scheduled to begin in January 2015. Given their imminence, it is well within the BLNR's discretion to wait for the outcome of those proceedings before resuming the Water License CCH.

Exhibit Y-52 at 23-24.

If BLNR lacks the competence to determine how much water should stay in any of the dozen Huelo streams, then it certainly should not increase diversions greater than the 25 mgd cap until after CWRM resolves the Sierra Club's petition to amend the interim instream flow standards. Exhibit Y-50. The time for balancing of interests is **before** the amount of water diverted increases – not afterwards.

Here, **the close of sugar operations** in Central O'ahu has provided the Commission a **unique and valuable opportunity to restore previously diverted streams** while rethinking the future of O'ahu's water uses. The Commission should thus take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.

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As stated above, the public trust authorizes the Commission to **reassess previous diversions** and allocations, even those made with due regard to their effect on trust purposes.

*Waiāhole*, 94 Hawai'i at 149, 185, 9 P.3d at 461.

The tentative grant of water use permits without any determination of instream flow standards, conversely, presents the least desirable scenario: no assurance that public rights are receiving adequate provision, no genuine comprehensive planning process, and no modicum of certainty for permit applicants and grantees. Cf. *Concerned Citizens of Putnam County for Responsive Gov't v. St. John's River Water Management Dist.*, 622 So.2d 520, 523 (Fla.Ct.App.1993) ("[I]t is difficult . . . to imagine how the water supply can be managed without the establishment of minimums.").

*Id.* Meaningful instream flow standards should be established before authorizing increased diversions. Failure to do so could “leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows.” *Id.* at 158, 9 P.3d at 471. Designation of instream flow standards before authorizing increased diversions will ensure “that instream uses do not suffer inadvertent and needless impairment.” *Id.* at 148, 9 P.3d at 460.

Capping the amount of water that can be taken out of east Maui at current levels would ensure that the streams are not further adversely affected. The existing 25 mgd has not led to a

shortfall of water for Mahi Pono. Mahi Pono has failed to provide any credible evidence that it will need more than 25 mgd in 2022. Moreover, even if it could, it has groundwater available to it (as discussed below). It is the Sierra Club's position that the evidence in this contested case hearing will show that the cap must be set even lower than 25 mgd.

C. Groundwater alternative

Mahi Pono is able to pump and use 5.81 mgd of groundwater on its farm – and did so in October 2021. Exhibit X-13 (October 2021). There is no evidence that 5.81 mgd cannot be pumped every month. In fact, A&B's FEIS states that the sustainable yield is 32 mgd. Exhibit X-1 at 3-3. The Sierra Club is not (at this time) calling for Mahi Pono to pump 32 mgd. But there is no evidence that Mahi Pono cannot pump 5.81 mgd or even 10 mgd of groundwater to irrigate its crops. It should be required to do so as a condition of the continuation of the revocable permit(s). Ten wells are available to irrigate approximately 17,200 acres, and groundwater can be used on another 5,000 upper elevation acres. Exhibit X-1 at 2-22 and 2-25.

Every gallon of groundwater that is pumped allows a gallon (or more, given losses) to remain in east Maui streams. Leaving water in streams benefits native species and recreational uses.

A&B has provided no data that it cannot pump 10 mgd to irrigate its crops. It can pump groundwater at about 52 cents per 1,000 gallons, which is still less than farmers in Central O'ahu pay for water from the Waiāhole ditch. Exhibit X-2 at PDF 1817.

D. Reservoirs

The reservoirs into water is currently being dumped could be – and should be – lined and covered. Doing so would reduce water losses – and reduce the need to take so much water from east Maui streams. A&B acknowledges the value in improving the reservoirs. Improvements to

the County's reservoir at the Kula Agricultural Park will allow east Maui stream water "to be used more efficiently." Exhibit X-1 at page 2-21. It acknowledges the possibility of "improvements to the on-farm irrigation system that could reduce the amount of system losses." *Id.* at 2-26 n. 6.

Mahi Pono complains that it should not have to pay to line and cover any reservoir given the duration of the revocable permit. Yet, it is spending significant chunks of change to plant trees which will not bear fruit for years. If it is willing to spend and risk money on trees, not knowing whether a long-term lease will be granted, it can likewise spend money on mitigating water losses by starting to line and cover reservoirs now.

D. Dumping

A&B's Exhibit X-13 appears to suggest that A&B has no choice but to deliver 7.5 mgd to Maui County. There is no evidence that the County in the last five years has ever needed that much water delivered on a single day. This paradigm "allows" A&B to divert 4.78 mgd on average that is never used. That is enough water to fully restore at least two streams in east Maui that are drained dry.

If A&B is going to continue delivering more water than the County has used for the past five years to satisfy a "contractual obligation", all the un-used water must be used by Mahi Pono for irrigation. And if the County ever actually needs the entire "contractual obligation" amount, Mahi Pono can supplement its irrigation needs with groundwater.

Given that more than half the water taken out of east Maui streams for the past two years has not been used, A&B needs to reduce the amount taken from the streams.

Adding a new condition to the revocable permits could stop this unnecessary waste while ensuring that the County gets all the water it needs all the time.

E. Lining Ditches

In 2012, USGS completed a study titled Measurements of Seepage Losses and Gains, East Maui Irrigation Diversion System, Maui, Hawai'i. Exhibit Y-65. A&B and its consultants have mischaracterized the conclusion of this study. This study does **not** say anywhere that there is no net loss in the ditch. Nor does the study conclude that lining the ditches is unnecessary.

Rather, the study says:

- 11 miles of the EMI ditch system consists of unlined ditches;
- 2.5 miles are only partially lined;
- The partially-lined Ko'olau ditch has seepage losses of 3 cubic feet per second per mile, constituting losses of up to 32.2%;
- Ko'olau Ditch and Spreckels Ditch at Pāpa'a'ea generally had seepage losses; and
- Discharge measurements in the open-ditch seepage-run measurement reaches—lined and unlined—generally indicated seepage losses

Exhibit Y-65. A&B has long argued and assumed that because there are seepage gains in the tunnels, that the seepage in the unlined ditches do not matter. Hogwash. The seepage gains in the tunnels are irrelevant. Seepage losses can be reduced (and more water kept in our streams) by lining the unlined ditches.

F. Eastern revocable permit areas.

A&B has failed to demonstrate that it needs any water from the Nahiku, Keanae, and Honomanu license areas in 2021 or 2022. Because the revocable permits are for water pursuant to HRS § 171-58, there is no basis to continue them in 2022.

G Domestic water

For years A&B has argued that continuation of the revocable permits is necessary to ensure that Maui residents receive water. Yet, remarkably, the terms of the permits do not require that the County receive any water. New conditions must be added that require that (a) A&B provide up to 5 million gallons of water per day to the County (for current upcountry Maui



domestic uses and the Kula Agricultural Park) and (b) the water be provided to the County for free.

I Community Access

The legislature determined that “inland recreational areas under the jurisdiction of the State are inaccessible to the public due to the absence of public rights-of-way . . . and that the absence of public access to Hawaii's shorelines and inland recreational areas constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas.” HRS § 115-1. More specifically,

**Prior to the disposition of any public lands**, the board of land and natural resources shall lay out and establish over and across such lands a reasonable number of rights-of-way from established highways to the public beaches, game management areas, public hunting areas, and **public forests and forest reserves** in order that the right of the people to utilize the public beaches, game management areas, public hunting areas, and public forests and forest reserves shall be protected.

HRS § 171-26.

Allowing for controlled community access to the revocable permit area is in the public interest. EMI has allowed controlled community access in the past. This process should be institutionalized and modernized. BLNR should require an email-based system by which community groups and organizations can obtain keys and access to hiking trails and streams within the revocable permit area.

J. Structures and Equipment No Longer in Use

Structures and equipment that are no longer in use are a blight on the landscape, create mosquito breeding ground, and alter stream flow patterns. They should be removed. CWRM has no jurisdiction to require the removal of equipment and structures (like pump houses and old pipes) that are not within a stream. BLNR must require their removal.

K. Watershed Management

In 2003, the legislature determined that “the silent invasion of Hawaii, by insects, disease-bearing organisms, snakes, weeds, and other pests is the single greatest threat to Hawaii's economy and natural environment and to the health and lifestyle of Hawaii's people. . . . The present problem is severe. The future, though, may be even more dire. Slow, piecemeal action will not be sufficient. Drastic improvements must be made now to stem the tide of invasive species.” Act 85, 2003 Sess Laws of Haw. 157. The legislature has also declared:

All indigenous species of aquatic life, wildlife, and land plants are integral parts of Hawaii's native ecosystems and comprise the living heritage of Hawaii, for they represent a natural resource of scientific, cultural, educational, environmental, and economic value to future generations of Hawaii's people.

To insure the continued perpetuation of indigenous aquatic life, wildlife, and land plants, and their habitats for human enjoyment, for scientific purposes, and as members of ecosystems, it is necessary that the State take positive actions to enhance their prospects for survival.

HRS § 195D-1.

It is in “the interests of the State” to ensure that the watershed is properly managed. The control of invasive species can protect native forests, aid in the recovery of endangered species, enhance biodiversity, and actually increase rainwater recharge, which benefits streams in the long-term. A&B should be contributing to the management of the forest reserve that it uses.

Within or near the revocable permit area live the endangered crested honey creeper (‘akohekohe) and the endangered Maui parrotbill (kiwikiu), seven endangered insects, and more than a dozen endangered plants. Exhibit X-3 at 8-9; Exhibit X-1 at 309.

The legislature has mandated that DLNR “shall” use its authority to “carry out programs for the conservation, management and protection of such [indigenous and endangered] species and their associated ecosystems.” HRS § 195D-5(a). DLNR shall carry out programs for the protection of threatened and endangered species and take such action as may be necessary to

ensure that actions it authorizes do not jeopardize the continued existence of threatened or endangered species. HRS § 195D-5(b).

If BLNR charged ten cents per 1,000 gallons taken out of the watershed and used the money to manage the watershed, if A&B took 25 mgd, it would generate \$912,500 (= \$2,500 x 365 days). Such a charge is consistent with HRS § 171-58(c), 171-58(e) and (f) and the public trust.

G. Increased costs to Mahi Pono

None of the proposed conditions will impose a hardship on Mahi Pono. Mahi Pono gets water at a far cheaper rate than other farmers. It costs Mahi Pono 4.8 cents per 1,000 gallons. Exhibit X-2 at PDF 1817. “Farmers in Central O‘ahu— who compete with Maui farmers in the Honolulu and export markets—are charged 58 cents per 1,000 gallons for surface water from Waiahole Ditch.” *Id.* Mahi Pono’s competitors pay more than ten times more for water. More than two decades ago, many farmers paid between 60 cents to \$2.47 per thousand gallons of water. *Waiāhole*, 94 Hawai‘i at 165, 9 P.3d at 477. They pay far more than that now. If Mahi Pono’s water costs doubled, tripled, quadrupled, or quintupled, it would still be paying far less than any of its competitors.

**III. CONCLUSION**

With appropriate conditions, the revocable permits can be continued. But A&B cannot be given a blank check.

Dated: Honolulu, Hawai‘i November 29, 2021

/s/ David Kimo Frankel  
Attorney for the Sierra Club

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) ) Certificate of Service  
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. and East Maui Irrigation )  
Company, LLC for the remainder of the 2021 )  
RPs, if applicable, and for their continuation )  
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 29, 2021

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