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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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 APPLICANTS ALEXANDER & BALDWIN, INC. AND EAST MAUI IRRIGATION COMPANY, LLC'S **REPLY BRIEF**;

APPLICANTS ALEXANDER & BALDWIN, INC. AND
EAST MAUI IRRIGATION COMPANY, LLC'S REPLY BRIEF

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I. INTRODUCTION

Applicants Alexander & Baldwin, Inc. ("**A&B**") and East Maui Irrigation Company, LLC ("**EMI**") respectfully submit their pre-hearing reply brief in further support of its application to continue the subject revocable permits ("**RPs**") for the remainder of calendar year 2021 and calendar year 2022, and in response to Sierra Club's Responsive Brief filed November 29, 2021 ("**RB**").

Sierra Club's response demonstrates that it is using this hearing to re-litigate matters that the Environmental Court (Judge Crabtree) already considered and rejected in ruling against Sierra Club in the August 2020 Trial. Sierra Club's ever-changing running list of proposed additional conditions for the RPs simply reargues how BLNR's policy determinations should be made. It is not based on any materially new or different facts. As usual, completely absent from Sierra Club's recycled arguments is any recognition whatsoever that 1) a ***balancing*** of interests is required or 2) that BLNR need ***do anything at all*** to comply with the constitutional mandates to ***maximize the beneficial use of water*** and to ***promote agriculture***. Instead, Sierra Club pulls out of thin air a frivolous argument that Mahi Pono's farm plan should be held hostage to Sierra Club's demands that its water costs be "doubled, tripled, quadrupled, or quintupled" to magically erase all traces of invasive species in East Maui and to completely subsidize the cost of delivering water to the County of Maui. These arguments are not based on any facts at all, much less new facts. They are simply policy arguments premised on the Sierra Club's political agenda.

Sierra Club's proposals should be denied. Judge Crabtree affirmed that the BLNR's decisions to continue the RPs for calendar years 2019 and 2020 satisfied the applicable constitutional and statutory requirements. A&B/EMI have again proven the actual water needs for proposed future uses and that the balance of reasonable-beneficial uses of the diverted water and potential harm weighs in favor of continuing the RPs. Sierra Club's obvious disdain for the importance of diversified agriculture does not negate the Hawai‘i Constitution provisions which require the State to "promote diversified agriculture, increase agricultural self-sufficiency" and "conserve and protect agricultural lands." Haw. Const. art. XI, § 3.

II. ARGUMENT

A. A&B/EMI Has Proven Actual Water Needs for Proposed Future Uses and the Reasonable-Beneficial Nature of Its Uses

A&B/EMI have met any "threshold burden" to prove "its actual water needs for its proposed future uses 'insofar as circumstances allow.'" Trial Order at 37 (quoting *In re Waiola O Molokai, Inc.,* 103 Hawai'i 401, 438, 83 P.3d 664, 701 (2004)). In proposing various limits to the amount of water diverted, Sierra Club relies on conclusory and unsupported assertions that fail to counter the evidence submitted. The expansive scope of information Sierra Club seeks about the minutiae of daily water use loses sight of the standard of "reasonable prudence" under the circumstances of a one-year revocable permit terminable upon 30-days' notice applicable to the BLNR as a public trustee. Sierra Club persistently ignores the established precedent that "[t]here are no absolute priorities between uses under the public trust" and uses must be weighed and balanced in light of the best economic and social interests of the people of the State. Trial Order at 32 (quotations and citations omitted).

1. Water use limits in designated water management areas implemented in *Nā Wāi 'Ehā* and *Waiāhole* should not be imported and applied here

Sierra Club argues that "A&B has failed to explain why it is reasonable to ask for more than 2,500 gallons per acre per day[.]" RB at 4. The rationale proffered for this proposed 2,500 gallons per acre per day ("**gad**") limit, including (i) CWRM's "2021 Nā Wāi 'Ehā decision" "limiting the use of stream water for irrigation" to 2,500 gad, (ii) the analysis in *Waiāhole* relating to a designated water management area in Central Oahu, and (iii) the terms of a settlement (which CWRM did not adopt) in *Nā Wāi 'Ehā*, is without merit and should be rejected. RB at 4.

First, Nā Wāi 'Ehā has been a designated Surface Water Management Area since 2008. Thus, the contested case hearing addressed Surface Water Use Permit Applications for existing and/or new uses pursuant to HRS § 174C-48(a). *See* Ex. Y-18 (CWRM Order in Nā Wāi 'Ehā) at 1, 257, 344. Here, "it is undisputed that none of the streams are in a designated water management area, and therefore," CWRM's "discussion of what is required for a water use permit is inapposite."[1] Trial Order at 41.

[1] Even assuming arguendo that CWRM's 2,500 gad limit could be considered, the limit is measured per acre per day. Mahi Pono is transforming 30,000 acres of land in Central Maui from

More importantly, water needs are crop and site-specific. It is thus not useful to try to compare water duties established in relation to the farms served by the system at issue in *In re Water Use Permit Applications*, 105 Hawai‘i 1, 93 P.3d 643 (2004) (“*Waiahole*”) to Mahi Pono’s farm plan without establishing that the crops are similar and the farm lands in question share the same environmental factors, such as topography and soil properties, and climactic factors. Mahi Pono’s crop needs are distinct from those at issue in *Waiahole,* which involved farming practices with rotating crops or row crops, which “made it difficult to specify what a particular acreage’s water needs[.]” 105 Hawai‘i at 21, 93 P.3d at 663. As the name suggests, row crops are planted in rows, irrigated, fertilized and then harvested at the end of the crop cycle. The rotating nature of row crops allows portions of land to remain fallow. In contrast, orchard crops involve intentionally planted trees or shrubs, which remain in place throughout multiple crop cycles. The water needs for a row crop is different than the water needs for an orchard crop. For example, Mahi Pono estimates that an orchard crop requires 5,089 gallons per acre per day whereas a row crop requires 3,392 gallons per day. Ex. X-6 at 9. As Mahi Pono’s crops have different water needs than the crops at issue in *Waiahole*, *Waiahole* should not serve as a basis for determining Mahi Pono’s water needs here.

Third, Sierra Club’s reference to “the November 2019 Stipulation and Order Regarding SWUPA 2206” attempts to rely on the terms of a settlement negotiated between Mahi Pono and certain community groups in the *Nā Wāi ‘Ehā* proceeding. The public policy reasons for deeming settlements inadmissible as evidence of a party’s obligations or liabilities are well-established. *See State v. Gano*, 92 Hawai‘i 161, 167, 988 P.2d 1153, 1159 (1999) (“To allow admissions or evidence of settlement negotiations into evidence would hamper the negotiation and settlement process of our legal system and is therefore against the public policy of this jurisdiction.”) (internal citations omitted); *Han v. Yang*, 84 Hawai‘i 162, 167, 931 P.2d 604, 609 (Ct. App. 1997) (public policy “favors the resolution of controversies through compromise or settlement rather than by litigation”) (citations omitted). Sierra Club should be precluded from

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vacant former sugar cane fields to a diversified portfolio of food crops. Decl. of Howe at ¶ 5. Applying the 2,500 gad framework to 30,000 acres results in approximately 75 million gallons per day (“**mgd**”), which exceeds 40 mgd amounts at issue in this application. *See* Howe Decl. ¶ 20 (anticipating 40 mgd will be needed from the RP Area in 2022).

relying on the terms of the settlement as a pretense for its artificial cap of 2,500 gad. Sierra Club's argument for BLNR to impose a cap below 40 mgd should be rejected.

2. Mahi Pono's evidence of actual water needs for 2022 exceed 25 mgd

Sierra Club also argues that "A&B has failed to provide evidence to demonstrate that it needs more than 25 million gallons per day" and "[t]here is no factual basis for Mahi Pono's future irrigation needs." RB at 1, 4. This contention is belied by the evidence presented by A&B/EMI detailing Mahi Pono's anticipated diversified agriculture water needs. *See* Decl. of Howe, Ex. X-14 (Table of Diversified Agriculture Water Needs). In 2022, it is anticipated that 40 mgd (based on an annual average) will be needed from the RP Area, which includes 21.79 mgd for Mahi Pono's diversified agriculture, 6 mgd for the County of Maui's Department of Water supply, and 1.5 mgd for the County of Maui's Ag Park. Decl. of Howe at ¶ 20. The remaining amounts are 1.1 mgd for historic/industrial uses, 4 mgd cushion estimated at 20% of the projected diversified agriculture water needs, and 5.7 mgd for reservoir, fire protection, evaporation, dust control and/or hydroelectric uses. *Id.*

In response, Sierra Club makes a blanket assertion that "Mahi Pono exaggerates as to how much water it needs". RB at 4. Forecasting water needs depends on several factors including type of crop, growth stage, precipitation, soil, and climate. Suppl. Decl. of Howe at ¶ 1. Rather than being "made up out of thin air," RB at 4, Mahi Pono's estimates for 2022 are based on Hawai'i specific data and industry standards for calculating water demand of a crop. *Id.* at ¶ 2; *see* Suppl. Decl. of Nakama at ¶ 1 (testifying that Mahi Pono's calculations utilize numbers contained in reports produced by the University of Hawai'i College of Tropical Agriculture and Human Resources). As the Court recognized at Trial, the possibility that actual use will be less than the amount predicted does not make it improper for BLNR to rely on Mahi Pono's estimates:

> The court finds and concludes that the amount of water actually used by Mahi Pono in the first quarter of 2020 for diversified agriculture was less than the amount it predicted, and this fact does not mean it was improper for the BLNR to rely on Mahi Pono's initial estimates in setting the 45MGD limit. Mahi Pono was essentially starting from scratch, during a historic change, in a new market where the actual use of water depends on variables that Mahi Pono has little control over. Realistically, the court concludes that Mahi Pono deserves some time and mileage to gain experience and figure things out.

Trial Order at 19.

Despite having ample opportunity at Trial to question the water uses identified by A&B/EMI, and in fact doing so,[2] Sierra Club continues to offer endless questions that it contends must be answered before the BLNR can approve the continuation of the RPs for one year. *See, e.g.,* RB at 5 ("whether any of the agricultural uses irrigate with the water or do they just fill basins for animals to drink?"); *id.* at 5-6 ("how many helicopters and tankers Maui County owns"); *id.* at 6 ("How many dust control trucks are filled daily? What is the capacity of one of those trucks? … Is more than [7,000 gallons per hour] required for dust control in a single day?"); *id.* at 5 ("whether each of the end users use the same amount of water each day, or whether one user takes most of the water"); 11/15/21 Sierra Club Motion re: "Essential Information" (contending BLNR must know "whether (and the degree to which) water was taken from a particular stream (and when)" and "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").

No amount of information would ever satisfy the Sierra Club. A&B/EMI is not required to respond to and run down every inquiry that could imaginably be raised regarding the water uses. The standard for BLNR is that of "reasonable prudence," which "depends upon the circumstances as they reasonably appear" at the time of the act. Trial Order at 33. Sierra Club's continued demands for more information are unreasonable and unrealistic in the context of the continuation of one-year revocable permits terminable upon 30-days' notice. *Cf.* Trial Order at 26 (Judge Crabtree recognizing that "it could sometimes be helpful to have that information; however, the court finds it is simply unrealistic given the time pressures of a hold-over RP process"); *id.* ("Given these realities, the court concludes the Board was reasonable in deciding it had sufficient information to make what everyone expected would be a short-term decision").

As was the case during the Trial, there is ample evidence of the reasonable-beneficial uses of the diverted water. Sierra Club does not dispute that the diverted water is used for diversified agriculture, which the Hawai'i Constitution mandates the State to "promote,"

[2] For example, Sierra Club claims there is a lack of evidence about the fire fighting and dust control water uses, *see* RB at 5-6, but both issues were addressed at Trial. *See* 8/12/20 AM Trial Transcript at 62 (Mark Vaught testimony re: "what dust control is and how it is conducted"); *id.* at 58-62 (Vaught testimony re: water in reservoirs for fire protection, working with Maui Fire Department to ensure enough water is in the reservoirs, and 2020 fire that burned approximately 5,000 acres); 8/12/20 PM Trial Transcript at 62-63 (Sierra Club counsel's cross-examination of Vaught regarding his testimony about water uses for dust control and fire fighting).

"conserve and protect". Haw. Const. art. XI, § 3. Nor can it dispute that the water is used to meet the County of Maui's ("**County**") domestic water needs, which is specifically intended to be protected by the public trust. Trial Order at 31. The dual mandate of protection and maximum reasonable and beneficial use is satisfied by continuing the RPs for calendar year 2022 without Sierra Club's proposed conditions.

3. There is no basis to cap diversions to 25 mgd based on Sierra Club's Sept. 2021 IIFS petition

Sierra Club also argues that BLNR "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" for the streams in the Huelo license area. RB at 3. Sierra Club's IIFS petition submitted in September 2021 does not provide a basis for imposing a 25 mgd cap for 2022 when the anticipated water uses require 40 mgd.

Sierra Club claims that "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," citing a transcript and briefing from proceedings related to Nā Moku Aupuni O Ko'olau Hui's ("**Nā Moku**") challenge to A&B/EMI's application to the BLNR for a 30-year lease. RB at 12 (emphasis added). The cited statements regarding waiting for CWRM's final determination of 27 IIFS petitions before resuming the Nā Moku contested case hearing were made in the context of a long-term lease.

In contrast here, at issue are one-year revocable permits that allow ongoing water uses while the long-term lease process proceeds. It is not reasonable or practicable to wait for CWRM to amend the IIFS in this context. Judge Crabtree recognized this, determining that it was reasonable for BLNR to approve the RPs while allowing CWRM to continue its own process for the modification of diversion structures. *See* Trial Order at 26-27. The Court acknowledged Sierra Club's argument that "BLNR should not have approved the continued holdover of the RPs absent a detailed analysis of the harm caused by diversion structures," but found it "**simply unrealistic given the time pressures of a hold-over RP process**," as compared to the long-term lease process that involved an "extensive EIS." *Id*. at 26 (emphasis added).

In addition, Sierra Club's contention that allowing more than 25 mgd in diversions would "ensure that the streams are not further adversely affected" is contrary to what was already determined at Trial. Sierra Club asked the Court at Trial to "maintain the 'status quo' by

preventing A&B from diverting more than 27 MGD from East Maui." Trial Order at 29. The Court rejected this argument, reasoning that a 25 mgd cap would have a high detrimental impact on the roll-out of Mahi Pono's farming operations and impact Mahi Pono's future farming as well as the County's water uses. *Id.* The Court found that "***applying a cap of 27 MGD does not support the broader, comprehensive goals of the public trust***." Trial Order at 29 (emphasis added). Sierra Club has nothing new to justify a 25 mgd cap a year later.

Furthermore, while Sierra Club continues to insist that failing to impose the 25 mgd cap would harm the Huelo streams subject to its IIFS petition, as Judge Crabtree found, "even if the 12-13 streams were perpetually dry, there are other streams which CWRM has decided are ecologically more important, which more broadly support the health of the water shed, and which provide habitat for native species in the same license areas as the 12-13 streams," and "even dry streams are likely to recover if flows are ever returned." Trial Order at 29-30. As was the case during Trial only a year ago, Sierra Club's position that water uses from the RP Area must be capped at "current levels" is highly detrimental to Mahi Pono's diversified farming operations and future plans. Cutting off Mahi Pono's ability to expand farming and plan for additional crops is contrary to the dual mandate of the public trust doctrine and the "Board's constitutional duty to conserve and protect agricultural lands and promote diversified agriculture and other beneficial uses." Trial Order at 39-40; *see id.* at 38 (where there is an "allegation of harm that is not readily ascertainable," the BLNR "may nevertheless permit existing and proposed diversions of water" if it is demonstrated that the diversions are reasonable-beneficial notwithstanding the potential harm).

Sierra Club's suggestion of some imminent or irreparable harm to the streams in the Huelo license area absent a 25 mgd cap is also at odds with its decision to wait until September 2021 to bring its IIFS petition, *see* Ex. Y-51 (Sept. 2021 emails re: submitting petition), despite bringing the Lawsuit in January 2019. The proposed 25 mgd cap (or lower) should be rejected.

B. Sierra Club's Proposed Conditions are Unreasonable and Unnecessary in the Context of One-Year Revocable Permits

Sierra Club's laundry list of proposed conditions is unreasonable in the context of the BLNR's continuation of one-year revocable permits. The burdens sought to be imposed by Sierra Club on A&B/EMI and Mahi Pono ignores the "maximum reasonable and beneficial use" aspect of the "dual mandate" under the public trust doctrine and the need to accommodate offstream

diversions that promote the best economic and social interests of the people of this State. *See* Trial Order at 31-32.

1. Sierra Club's proposal to terminate RPs for three license areas and limit diversions from Huelo should be rejected

Sierra Club argues that the RPs for three license areas (Nahiku, Keanae, and Honomanu) should be terminated. For the remaining water diverted from the fourth license area of Huelo, Sierra Club argues that the amount of water diverted should be limited through three alternative scenarios: (i) that no water should be taken from Oʻopuola, Nailiilihaele, Kailua and Hoʻolawa streams; (ii) no more than 64% of the baseflow can be removed from Kolea Stream, Punaluʻu Stream, Kaʻaiea stream, ʻOʻopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanawana Stream (Ohanui tributary), Hoalua Stream, Waipiʻo Stream, Mokupapa Stream, and Hoʻolawa Stream (Hoʻolawa ili and Hoʻolawa nui tributaries); or (iii) water within the Huelo license area will only be taken from streams with/from the Wailoa Ditch. RB at 11.

First, the proposal to eliminate three of the four RP license areas fails to recognize the realities of the delivery system. As CWRM has recognized, the EMI Ditch System is a "**single coordinated**" "gravity flow ditch system, driven by the higher elevation diversions in the wetter, eastern portion of the watershed" that covers 50,000 acres, including the RP license areas. CWRM D&O, Executive Summary, at iii, 140, 232, 266. This is not like an electrical grid with "switching stations" where anyone "could send water from anywhere to anywhere by the click of a mouse." *See* Trial Order at 27. Although in 2021, all of the surface water diverted from the RP license areas was diverted from Huelo, if there is insufficient water available in the Huelo license area to meet the water needs of Mahi Pono and the County, EMI would then need to divert water from the Honomanu, Keanae and/or Nahiku license areas. Suppl. Decl. of Vaught at ¶ 2. Access to these license areas is important particularly during the summer months where there is significantly less surface water available, and the importance of maintaining all four license areas will only increase with the additional plantings Mahi Pono has planned for 2022. *Id.*

Second, delivering water to the County is unfairly characterized by Sierra Club as "dumping." To the contrary, any of the 7.5 mgd that is diverted for the County but not consumed by the County is, to the extent possible, used on Mahi Pono's farm. If the water cannot be immediately used on the farm, it is diverted to a reservoir. Suppl. Decl. of Vaught at ¶ 7. From a

practical planning perspective, EMI needs to divert enough water to meet Mahi Pono's water needs plus the entire 7.5 mgd that must be made available to the County. *Id.* at ¶ 8. While Sierra Club complains that EMI does not really "need" to deliver 7.5 mgd to the County because the County purportedly "in the last five years" has not needed that much water, *see* RB at 15, these are contractual obligations that EMI cannot disregard as lightly as Sierra Club. Suppl. Decl. of Vaught at ¶ 5. At Trial, Judge Crabtree determined that the "County's water use cannot safely be limited based on past averages, because the County needs flexibility in the amount of water it is able to use from the EMI system. At times it will need more than at other times." Trial Order at 29 (citations omitted).

Changes to the settings must be made days in advance with EMI staff physically going out into the field and manually opening and closing gates. Suppl. Decl. of Vaught at ¶ 9. If EMI does not take into account the entire 7.5 mgd when planning, there may be insufficient water to meet Mahi Pono's water needs if the County's water needs increase unexpectedly. Mahi Pono's diversified agriculture operations cannot reasonably be expected to work under such unpredictable conditions.

The Hawai'i Constitution mandates the promotion of diversified agriculture, Haw. Const. art. XI, § 3, which supports providing enough water for Mahi Pono to expand its farming operations in 2022. There is also no dispute that the water diversions serve approximately 22,254 acres of lands designated Important Agricultural Lands, which by statute are deemed to be "**needed** to promote the expansion of agricultural activities and income **for the future, even if currently not in production**." Trial Order at 38-39 (emphases added).

2. Sierra Club's proposed conditions that A&B provide 5 mgd to the County "for free" should be rejected

Sierra Club also argues that the RPs should be conditioned upon requiring A&B to "provide up to 5 million gallons of water per day to the County (for current upcountry Maui domestic uses and the Kula Agricultural Park) … for free." RB at 17. Unsurprisingly, no legal authority is cited to support this argument.

As stated, the County receives water from EMI pursuant to contracts. RB at 17; CWRM D&O (Trial Ex. J-14) at 00235; County's Opening Brief at 4. As reflected in the 2018 EMI Water Delivery Agreement, **since 1973**, EMI has charged the County the same fixed rate of six cents per thousand gallons delivered. *See* Trial Ex. J-25, at 000013. To suddenly require, after 50

years, A&B/EMI to provide water to the County "for free", would be contrary to public policy and the terms of the express written agreements.

The amounts charged to the County are reasonable and necessary to offset the significant costs associated with operating and maintaining the extensive infrastructure that comprises the EMI Ditch System. Thus, contrary to Sierra Club's arguments, fees charged to the County are not for the water itself, but rather some share of the operation and maintenance expenses and amortized portion of the capital costs of building and expanding the EMI Ditch System.

Here, the EMI Ditch System is a "complex system with 388 separate intakes, 24 miles of ditches, 50 miles of tunnels, as well as numerous small dams, intakes, pipes, and flumes," covering four watersheds over an area of approximately 50,000 acres. CWRM D&O, Executive Summary, at *iii*, 13. It should go without saying that to build, operate, and maintain such a system is no simple feat and is by no means "free". As Judge Crabtree recognized, although he had "envisioned a system like a modern train station or electrical grid, with walls of digital displays, and 'switching stations' so the supervisor could send water from anywhere to anywhere by the click of a mouse," that is simply not the reality. Trial Order at 27. It is obviously labor-intensive to maintain and operate this extensive system given the nature and scope of the RP Areas. Sierra Club's flippant contention that A&B/EMI should maintain and operate this complex system and deliver water to the County of Maui "for free" fails to recognize reality and should be disregarded.

3. Sierra Club's "community access" condition is superfluous and unnecessary

Sierra Club further asserts that "BLNR should require an email-based system by which community groups and organizations can obtain keys and access to hiking trails and streams." RB at 17. Sierra Club's proposed requirement is not necessary. Sierra Club has failed to present any evidence that its members were denied access to hiking trails and streams in the RP Areas. The declarations of the Sierra Club members do not assert that they were excluded from hiking on state land or that they even applied for permits to hike on state land. *See* Ex. Y-50 (Sierra Club Petition for CCH (06783-06798)); *see also* Decl. of Lurlyn Scott, Decl. of Wayne Tanaka, Decl. of Lucienne de Naie.

In fact, Sierra Club members testified at Trial that they frequently hiked and visited streams in the RP Areas. 8/6/20 AM Trial Tr. 11:6-16:12, 31:7-12; 82:7-84:22; 8/6/20 PM Trial

Tr. at 5:23-10:10. In 2021, Sierra Club also organized and completed hiking trips to East Maui streams and are planning more trips in the near future. *See* Decl. Tanaka at ¶¶ 8-9; Decl. de Naie at ¶ 4. Given the Sierra Club's members clear ability to access hiking trails and streams, Sierra Club's proposed "email-based system" is superfluous and should not be imposed as a condition for the RPs.

4. Sierra Club's request to increase Mahi Pono's costs is premised on an inaccurate baseline and improper comparison of Mahi Pono to "other farmers"

Sierra Club requests that the BLNR impose a condition on the RPs to increase Mahi Pono's costs. RB at 19. To support its request, Sierra Club asserts that it "costs Mahi Pono 4.8 cents per 1,000 gallons" to deliver water. *Id.* This assertion is an oversimplification of the EIS. The "4.8 cents per 1,000 gallons" figure is the unit cost of delivering water pro-rated over the considerable volume of water delivered for the 2008 to 2013 period. Ex. X-2 at 1817. This was during sugar cultivation when the long-term average delivery by EMI during sugar cultivation was 165 mgd. Ex. X-7 at 000158 (¶ 519). This is significantly more than the amount of water currently being diverted. *See, e.g.*, Ex. X-6 at 3 (17.79 mgd diverted on average during the third quarter of 2021). Sierra Club conveniently ignores the obvious fact that the same costs pro-rated over a ***smaller volume of water***, such as the amounts currently being delivered, would obviously translate into a ***higher unit cost***.

Sierra Club is essentially asking the BLNR to increase Mahi Pono's rent. However, the rent for the RPs has increased over the past several years. Ex. Y-20 (2018 Staff Submittal); Ex. Y-21 (2019 Staff Submittal); A&B/EMI Opening Brief ("**OB**"), Appendix F (2020 Staff Submittal). In 2020, rent was adjusted to be consistent with the Consumer Price Index and set at $2,518.59 per month for RP S-7263, $9,831.49 per month for RP S-7264, $5,155.93 per month for RP S-7265, and $2,116.04 per month for RP S-7266. OB, Appendix F (2020 Staff Submittal) at 25. In 2021, rent for the RPs was increased to $2,548.58 per month for RP S-7263, $9,952.45 per month for RP S-7265, and $2,142.07 per month for RP S-7266. *Id.* at 25-26. The rent is charged at a flat rate (i.e., not based on the amount of water diverted) and has increased at the same time that the amount of water diverted from the EMI Ditch System has decreased. If, as Sierra Club suggests, the rent should be determined by units of water delivered, then the total rent should actually ***decrease*** since A&B/EMI are diverting nowhere near the 165 mgd that was

being diverted at the height of sugar cultivation. Sierra Club's argument is thus arbitrary, illogical and unsupported.

Additionally, Sierra Club's request to increase Mahi Pono's costs is based on a narrow perspective of Mahi Pono's business operations and a misleading comparison of Mahi Pono to unspecified "other farmers." Mahi Pono's delivery costs do not account for the significant capital investment required for acquisition and improvement of the system. Sierra Club is asking the BLNR to disregard these significant expenditures made by Mahi Pono and increase Mahi Pono's costs purely based on a simplistic and false comparison to "other farmers" who haven't necessarily incurred these costs. It is particularly misleading to compare Mahi Pono to "other farms" that have not invested the capital to acquire and maintain their own water delivery systems.

5. Sierra Club's remaining proposed conditions were rejected by the Court after Trial.

The remaining conditions that Sierra Club claims "need to be incorporated into the RPs" retreads ground that was already covered or could have been covered at Trial. The scope of this contested case hearing is limited to "*new* evidence" that the parties "*could not* have presented during the Trial." Minute Order 8 at 4. This scope was established based on Sierra Club's claim that the hearing was required because new evidence arose *after* the August 2020 Trial and the "inability to bring this *new* evidence in the previous trial prejudiced its right to due process." *Id.* at n.1 (emphasis added).

For example, Sierra Club argues that Mahi Pono should be required to pump groundwater as a condition of the RPs. RB at 14. This issue was already litigated extensively and adjudicated as follows:

> The information before the Board also demonstrated that the rate at which groundwater is recharged would likely be much lower than under sugar cultivation, especially given that much of the former HC&S lands were not being irrigated. For the above and other reasons stated at the hearing, it was not unreasonable for the Board to prioritize amongst trust resources by allocating EMI ditch water to A&B/Mahi Pono for the proposed beneficial uses, and allowing the finite groundwater resource to be preserved for future uses.

Trial Order at 38.

Similarly, Sierra Club argues that the reservoirs should be lined and covered, RB at 14, despite Judge Crabtree's consideration of that option and finding that this was a "costly solution

that likely would not even be designed and completed before the RP expired." Trial Order at 44. Likewise, Sierra Club's claim regarding the removal of structures and equipment no longer in use was raised at Trial, with Judge Crabtree determining that setting firm deadlines on such removals was "problematic" given the permits and permissions required from multiple government entities. Trial Order at 2.

III. CONCLUSION

A&B/EMI respectfully request that the BLNR continue the RPs for the remainder of calendar year 2021 and calendar year 2022 and reject Sierra Club's proposed conditions.

DATED: Honolulu, Hawai'i, December 6, 2021.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

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 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Minute Order No. 3, a copy of the foregoing document was served via email on this date to the following parties as noted below:

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