

DEPARTMENT OF THE
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COUNTY OF MAUI

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-
1-001:004 & 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-21-01

COUNTY OF MAUI'S PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER; CERTIFICATE OF
SERVICE

Hearing:

Dates: December 8, 9, 13, 14, and 15, 2021
Time: 9:00 a.m.

**COUNTY OF MAUI'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER**

The County of Maui joins in the Findings of Fact, Conclusions of Law, and Decision and Order filed by the Alexander and Baldwin, Inc., and East Maui Irrigation Company, LLC ("A&B Defendants") in this matter, and offers the following additional proposed findings relative to its position.

INTRODUCTION

A contested case hearing was conducted in this case on December 8, 2021, December 9, 2021, December 13, 2021, December 14, 2021 and December 15, 2021 before the Hearings Officer Suzanne Case. David Kimo Frankel appeared for Plaintiff Sierra Club. David Schulmeister and Trisha H. S. T. Akagi appeared on behalf of Defendants Alexander and Baldwin, Inc. and East Maui Irrigation Company, LLC. Deputy Corporation Counsel Caleb P. Rowe appeared on behalf of Defendant County of Maui.

This Board, having duly reviewed the pleadings filed by the parties, the arguments made and the authorities cited therein, the records, and the oral arguments made by the parties, makes the following findings of fact, conclusions of law, decision and order. To the extent that any Findings of Fact (“FOF”) is more appropriately categorized as a Conclusion of Law (“COL”), it is adopted as such. Similarly, to the extent that any COL is more appropriately categorized as a FOF, it is adopted as such.

FINDINGS OF FACT

1. The County of Maui Department of Water Supply (“MDWS”) is the sole municipal water provider for the County of Maui. MDWS’ Upcountry System serves the Upcountry service area, which includes the communities of Kula, Haiku, Makawao, Pukalani, Haliimaile, Waiakoa, Keokea, Waiohuli, Ulupalakua, Kanaio, Olinda, Omaopio, Kula Kai, and Pulehu. Exhibit J-14, p. 210, ¶ 796.
2. The population served by the MDWS Upcountry System is approximately 35,251 as of 2010, and is expected to increase to approximately 43,675 by 2030. In addition, MDWS’

system also serves several businesses, churches, schools (including Kamehameha Schools), Hawaiian Homelands and various government facilities. Ex. J-14, p. 233, ¶ 797; p. 237, ¶ 815.

3. In addition, MDWS provides non-potable water to the Kula Agricultural Park (“KAP”), an agricultural park owned by the County of Maui which consists of 31 individually metered farm lots. Ex. J-14, p. 165, ¶ 547; p. 235, ¶ 805.

4. MDWS relies on surface water from the license areas at issue in this case. Surface water is delivered to MDWS via East Maui Irrigation, LLC’s (“EMI”) Wailoa Ditch to MDWS’ Kamole-Weir Water Treatment Plant (“Kamole WTP”) and the KAP. Ex. “J-14,” p. 235, ¶ 804.

5. This water is delivered to MDWS by EMI under the terms of the EMI Water Delivery Agreement dated September 14, 2018 (“EMI Agreement”). Ex. J-25.

6. In addition to the Kamole WTP, MDWS also provides water to the upcountry service area via the Olinda Water Treatment Plant (“Olinda WTP”), Piiholo Water Treatment Plant (“Piiholo WTP”) and various ground water wells. *Declaration of Tony Linder* (“Linder Dec.”) ¶ 2; Ex. “J-14,” p. 236, ¶ 808.

7. The Kamole WTP has the largest production capacity of the County’s three Water Treatment Plants at 6 million gallons per day (“MGD”). Historically, the Kamole WTP also treated and delivered the greatest amount of water in the Upcountry Water System at approximately 3.6 MGD. Ex. “J-14,” p. 236, ¶ 808..

8. The yearly average usage of water from the Wailoa Ditch at the Kamole WTP and KAP from 2017 to 2020 is as follows:

	Kamole Yearly Total Production in Gallons	Average Kamole MGD	KAP deliveries
2017	374,360,000	1.03	144,397,000

2018	449,530,000	1.50	140,512,000
2019	610,880,000	1.67	126,707,000
2020	679,440,000	1.86	131,155,000

Exhibits “M-1,” pp. 27, 96; “M-2,” pp. 24 ,104; “M-3,” pp. 40, 124; “Z-1” pp. 41, 70..

9. Yearly averages, however, are not necessarily reflective of the day to day needs of MDWS for water from the Wailoa Ditch. For example, in the weeks leading up to the declaration of a Stage 1 Water Shortage between July 2, 2021 and October 22, 2021, County water usage surpassed 5 MGD:

Date	Demand at Kamole WTF in MGD	Average KAP Usage for that month in MGD	Combined County Usage in MGD
6/23/21	4.6	1.01	5.61
6/24/21	4.5	1.01	5.51
6/25/21	4.8	1.01	5.81
6/26/21	4.4	1.01	5.41
6/27/21	4.3	1.01	5.31
6/28/21	4.6	1.01	5.61
6/30/21 ¹	4.7	1.01	5.71

Exhibits “Y-1,” “Z-3,” “Z-4,” “Z-5,” “Z-7,” “Z-8,” “Z-9,”

10. Fluctuations in usage of water from the Wailoa Ditch at the Kamole WTP are largely due to weather. *August 14, 2020, Trial Transcript, ¶¶ 20:8 – 20:20; 21:9 – 21:20.*

11. During periods of time when it rains a lot, the reservoirs serving the Piiholo WTP and Olinda WTP are filled and water flows directly into the treatment plants, which then flows downhill into the Upcountry Water System. *August 14, 2020, Trial Transcript, ¶¶ 21:12 - 21:20.*

¹ See Exhibit “Z-8”

12. In contrast, during dry conditions, there is more likely to be water available from the Wailoa Ditch than at the intakes or reservoirs for the Piiholo WTP and Olinda WTP. As a result, water availability is greater at the Kamole WTP, which can then be pumped uphill to serve areas that would normally be serviced by the Piiholo WTP and Olinda WTP. Accordingly, water from the Wailoa Ditch acts as a crucial back up for the entire Upcountry Water System. *August 14, 2020, Trial Transcript, ¶¶ 21:21 – 22:7.*

13. If the Kamole WTP, which has a more reliable source of water via the Wailoa Ditch, was not in service during dry periods and low flow periods, the ability of MDWS to provide water to its customers in the Upcountry Service Area would be negatively impacted. *August 14, 2020, Trial Transcript, ¶¶ 26:1 – 26:13.*

14. In addition, there are operational reasons why the County needs access to the 6.5 – 8.675 MGD that is delivered by EMI on a daily basis. *Supplemental Declaration of Mark Vaught, ¶ 5; Linder Oral Testimony, December 12, 2021, 2:18:15.320 - ; 2:24:36.202; Exhibit “Z-10.”*

15. The intake system from the Wailoa Ditch into the Kamole WTP is controlled by the County. Approximately 6.5 MGD of water is necessary to assure that pressurization is sufficient for water to enter the Kamole WTP, and that sedimentation from the forebay does not affect the quality of drinking water. *Linder Oral Testimony, December 12, 2021, 2:18:15.320 - ; 2:24:36.202; Exhibit “Z-10.”*

CONCLUSIONS OF LAW

1. Pursuant to HRS § 171-55:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which

will **serve the best interests of the State**, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

HRS § 171-55 (emphasis added).

2. Pursuant to HRS § 171-58(c):

Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will **best serve the interests of the State** and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and environmental impact statement approvals, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

HRS § 171-58(c) (emphasis added)

3. The Supreme Court has enumerated four distinct classes of public trust uses of water as follows:

(1) water resource protection, which includes the maintenance of waters in their natural state as a distinct use and disposes of any portrayal of retention of waters in their natural state as waste; (2) **domestic use protection, particularly drinking water**; and (3) the exercise of native Hawaiian and traditional and customary rights.

And

we hold that DHHL's reservations of water throughout the State are entitled to the full panoply of constitutional protections afforded to other public trust purposes.

In re Waiola O Molokai, Inc., 103 Hawaii 401, 429, 431, 83 P.3d 664, 692, 694 (2004)(citing Waiahole I, 94 Hawaii at 136-138, 9 P.3d at 448-450)(internal quotations omitted)(emphasis added).

4. Plaintiff does not dispute that the use of water by MDWS from the license areas in this case is a protected public trust use, and that it was appropriate for the Board of Land and Natural Resources to consider the County's public trust use of water in granting the revocable permits at issue in this case. *August 7, 2020 Transcript*, ¶¶ 91:22 – 92:22.

5. MDWS use of water from the license areas is primarily for domestic use, including drinking water, and on that basis, MDWS' use of water serves one of the purposes of the public trust. FOF 1, 2.

6. Accordingly, continued provision of domestic water to over 35,000 people in Upcountry Maui serves the best interests of the state for the purposes of HRS §§ 171-55 and 171-58(c). FOF 2.

DECISION AND ORDER

Based upon the reliable, probative and substantial evidence in the record, the Board of Land and Natural Resources approves the holdover of Revocable Permits S-7263, S-7264, S-7265 and C-7265 is in the best interest of the State.

DATED: Wailuku, Maui, Hawaii, December 21, 2021.

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By /s/ Caleb P. Rowe
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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document,
was duly served upon the following individuals via email at their last known address as follows:

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Hearings Officer

DATED: Wailuku, Maui, Hawaii, December 21, 2021.

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