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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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LAND DIVISION

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 to Supplement the  
2-9-014:001, 005, 011, 012 & 017; (2) 1-1- ) Record; Exhibit A; Certificate of Service  
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 Motion to Supplement the Record**

The Sierra Club requests pursuant to HAR §§ 13-1-11(d) and 13-1-45(b)(3) that the board allow for supplementation of the record to clear up troubling misunderstandings by BLNR members expressed during oral argument. Decisions must be made based upon the record and not based on a misunderstanding of events.

**I. Prior Board Action on Revocable Permits.**

At oral arguments, board members Canto and Yuen expressed an incorrect version of the history of these revocable permits. The Supreme Court clearly explains the chronology of decisionmaking on the revocable permits.

After the BLNR's 2002 holdover decision, the revocable permits were annually "continued" by a process in which the BLNR reviewed and voted to approve for continuation a "master listing" of hundreds of revocable permits submitted by the DLNR.<sup>8</sup> This process continued the revocable permits included on the master listing on a month-to-month basis for a one-year period. . . .

<sup>8</sup> The revocable permits were not subject to this annual review and continuation process in 2003 or 2004 and first appeared on the master listing submitted to the BLNR on November 18, 2005. In a declaration, the administrator of the Land Division of the DLNR stated that he put the revocable permits on the 2005 master listing “to be consistent with how all of the other revocable permits were being addressed by DLNR.”

*Carmichael v. Bd. of Land & Nat. Res.*, 150 Hawai‘i 547, 555, 506 P.3d 211, 219 (2022).

During the course of the Water Commission contested case hearing on the instream flow standards in 2015, EMI’s Garret Heu let slip that BLNR had renewed the revocable permits without any notice to Na Moku, which had previously requested a contested case hearing on these revocable permits. *See* A&B’s Trial Exhibit AB-13, AB-17 at 5, AB-20 at 2 and AB-3.

The Sierra Club’s counsel referred to the inadequate notice given from 2005 through 2014. The Sierra Club moves to supplement the record with the letter written to BLNR (on behalf of Na Moku) in 2015 referred to in oral argument. The November 30, 2015 letter to the Office of Information Practices was copied to BLNR Chair Suzanne Case among others. Given Chair Case’s receipt of this letter, all members of BLNR should see it. It reads:

It has come to the attention of the Native Hawaiian Legal Corporation that each December, the Board of Land and Natural Resources renews permits to use tens of thousands of acres of public trust ceded lands. The public has never had real notice of the BLNR's proposed action because the agenda item is poorly described each year.

It is likely that this coming Friday, December 4, the BLNR will once again issue its agenda without properly disclosing to the public the magnitude of its proposed action. We are writing to ask that you work with the staff at the department of land and natural resources to ensure that its agenda discloses which permits and which parcels of land are to be affected at its December 11, 2015 meeting. HRS § 92-1 declares: "Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." HRS § 92-7 requires that boards like the board of land and natural resources give written public notice of items to be considered on the agenda. It is not sufficient to list broad categories of items on the agendas. *See* Att’y Gen. No. 85-2, OIP Op. Ltr. No. 03-22 at 6; OIP Op. Ltr. No. 07-02.

Thank you for any assistance that you can provide the department of land and natural resources.

Exhibit A. Only after this letter was written did BLNR properly agendize the renewal of these

revocable permits. The Sierra Club asks that this letter, attached as Exhibit A, supplement the record.

**II. Overhanging Barrier**

BLNR member Yuen twice accused the Sierra Club's counsel of misrepresenting Dr. Strauch's testimony. He did not. A careful reading of the Sierra Club's proposed finding of fact 95 and a careful listening of the 12/09/21 Audio at 46:53-48:01 reveal that the two are consistent. The word "below" is not precise and apparently subject to different interpretations, but this proposed finding of fact is consistent with Dr. Strauch's testimony.

The existence of overhanging barriers on the tributaries on Ho'olawa Stream should not serve as a basis for not restoring stream flows below the New Hamakua Ditch. 12/09/21 Audio 46:53-48:01 (Strauch).

Moreover, in his sworn testimony at the trial, Dr. Strauch described the location of the overhanging barrier as being just below the Wailoa Ditch.

Q Thank you. Let's talk now about Trial Exhibit 54. That's Plaintiff's Exhibit 54, which is also a photograph that was entered into evidence.

A Okay. It's another --

Q Do you recognize what is depicted in this photograph?

A This is the Waialoa ditch intake on Hoolawa nui.

...

Q Okay. Well, let's turn to Trial Exhibit 55 please. Plaintiff's 55.

A Okay.

Q Okay. Do you recognize this photo?

A This is almost the same location, just a different direction of the photo from the previous -- from 54.

Q Can you explain where we're looking in relation to that previous photo?

A We're looking makai. Do you want the cardinal direction?

Q No. Thank you. Makai is fine. What -- what is -- what is this structure made of? What is this structure, what we're looking at?

A We're looking at a control gate, wrought iron, I think, that is used to lift up and release water and sluice material that gets caught in the diversion.

Q And is this -- is the pool of water that's below -- is that also Hoolawa nui Stream?

A Yes.

Q Is this a waterfall or -- it looks like a different elevation. Can you just explain?

A Like I said earlier, we -- the photograph is taken at the top of about a 100-foot waterfall. We are now looking down the stream over the lip of the waterfall. So the pool -- the plunge flow at the base of the waterfall, yes, is at a different elevation.

...

Q Yes, Dr. Strauch. Thank you. Do you see an overhanging lip in this photo?

A No. You can't determine that from this photo.

Q Have you observed an overhanging lip in person?

A Yes.

Q What's an overhanging lip?

A So a lot of the stream courses in young lava flows in East Maui and on the Big Island, but in East Maui in particular, which is a little bit older in geologic age -- the stream courses have eroded through former lava tubes, areas that are more easily eroded.

And in the development of the stream channel at places like where you see a plunge pool form is from the underlying geology that the lava tube in its formation is obviously different from the formation of the stream channel. And the lava tube conveyed lava and -- or magma and in that development, it created in some instances what are called overhanging lips. So it's basically basalt that has hardened, and as the stream channel is formed through these string courses, the overhang lip remains.

...

Q Looking down -- oh, are we looking makai in this photo?

THE COURT: Yes. He already testified to that.

MS. GOLDMAN: Thank you.

Trial Testimony 8/14/20 at 163-64, 165-66, and 168; *See also* Trial Transcript 8/3/30 at 76-77 and Trial Transcript 8/17/20 a.m. at 89-90. It is, of course, possible that there is another overhanging lip or barrier on this stream. It is, of course, possible that even though Dr. Strauch was testifying about the photograph that is Trial Exhibit 55, he veered of course and talked about a location much further downslope. But member Yuen's accusation of the Sierra Club's misrepresentation crosses a bridge too far. It reveals unwarranted antipathy. There may be ambiguity that was not apparent earlier, but an accusation of misrepresentation is simply not true. The clear impression that Dr. Strauch left in his trial testimony was that the overhanging lip was just below – not far, far below – Wailoa Ditch.

Dated: Honolulu, Hawai'i, June 3, 2022

/s/ David Kimo Frankel  
Attorney for the Sierra Club

# EXHIBIT A



# Native Hawaiian LEGAL CORPORATION

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November 30, 2015

Office of Information Practices  
250 South Hotel Street, Suite 107  
Honolulu, Hawai'i 96813

It has come to the attention of the Native Hawaiian Legal Corporation that each December, the Board of Land and Natural Resources renews permits to use tens of thousands of acres of public trust ceded lands. The public has never had real notice of the BLNR's proposed action because the agenda item is poorly described each year.

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HRS § 92-1 declares: "Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." HRS §92-7 requires that boards like the board of land and natural resources give written public notice of items to be considered on the agenda. It is not sufficient to list broad categories of items on the agendas. *See* Att'y Gen. No. 85-2, OIP Op. Ltr. No. 03-22 at 6; OIP Op. Ltr. No. 07-02.

Thank you for any assistance that you can provide the department of land and natural resources.

Aloha,

David Kimo Frankel  
Staff Attorney

copy BLNR Chair Suzanne Case  
State Land Administrator Russell Tsuji  
Deputy Attorney Linda Chow  
Senator Les Ihara

*Services made possible with major funding from the Office of Hawaiian Affairs*

Niolo. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Challenging ) DLNR File No. CCH-LD-21-01  
the Continuation of the Revocable Permits )  
Alexander & Baldwin, Inc. (A&B) and East ) Certificate of Service  
Maui Irrigation Company, LLC's (collectively )  
A&B) for Tax Map Keys (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 )  
\_\_\_\_\_ )

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, June 3, 2022

/s/ David Kimo Frankel  
Attorney for the Sierra Club