



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
 Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR’s contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to “DLNR”) or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner’s financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Sierra Club	2. Contact Person Marti Townsend	
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B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	10. Firm Name	
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C. SUBJECT MATTER

17. Board Action Being Contested

ALEXANDER AND BALDWIN, INC., AND EAST MAUI IRRIGATION COMPANY, LLC's REQUEST FOR NEW REVOCABLE PERMITS (or any request for the continuation of the existing revocable permits) FOR TAX MAP KEY (2) 1-1-001:044 and :050; (2) 2-9-014:001, 005, 011, 012 & 017; 1-1-002:POR. 002; and (2) 1-2-004:005 & 007 FOR WATER USE ON THE ISLAND OF MAUI

18. Board Action Date

August 13, 2021

19. Item No.

D-4

20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case

21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection

Decades ago, the Hawai'i Supreme Court held that an agency hearing is required where a permit "adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). Because the Sierra Club's rights to a contested case hearing are constitutionally based, the Hawai'i Supreme Court's decision in *In re Maui Elec. Co.*, 141 Hawai'i 249, 408 P.3d 1 (2017) provides the straight-forward analytical framework to determine whether the BLNR should conduct a contested case hearing. By now, BLNR must be familiar with the recent rulings of the Environmental Court.

I. The Sierra Club Seeks to Protect Property Within the Meaning of the Due Process Clause of the State Constitution.

"The legitimate claims of entitlement that constitute property interests are . . . created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law—rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Maui Elec.*, 141 Hawai'i at 260, 408 P.3d at 12. The property interests that the Sierra Club seeks to protect are founded upon three bases.

A. The Sierra Club's Members Have the Right to Use Water From Free-Flowing Streams.

Sierra Club members enjoy the right to use water from free-flowing streams. This right is enjoyed by Sierra Club members who live and own property adjacent to streams in the area covered by the revocable permits as well as members who do not. Sierra Club members have riparian rights and/or appurtenant water rights. These are property rights protected by the due process clause of the State Constitution.

Sierra Club members enjoy the streams that were the subject of the June 20, 2018 Commission on Water Resource Management (CWRM) decision and order. They also use and enjoy the 12 streams that were not part of the recent CWRM proceedings.

The diversion of these streams adversely affects riparian rights and/or appurtenant rights. The diversion of these streams adversely affects the ability of Sierra Club members to use stream water for domestic and gardening purposes, enjoy their natural beauty, observe

and gather aquatic life, wade and/or swim. They are adversely affected when stream diversions reduce the quantity and diversity of native aquatic life.

B. The Sierra Club's Members Have Rights Protected by Article XI §9 of the State Constitution.

The right guaranteed by Article XI § 9 of the Hawai'i State Constitution "is a substantive right" which "is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process." Maui Elec., 141 Hawai'i at 260-61, 408 P.3d at 12-13. "Thus, where a source of state law — such as article XI, section 9 — grants any party a substantive right to a benefit — such as a clean and healthful environment — that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in Ala Loop is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality." Id. at 264, 408 P.3d at 16.

The Sierra Club's members have the right to a clean and healthful environment (including "conservation, protection and enhancement of natural resources") as defined by HRS chapters 171, 343 and 205A – just as the Sierra Club had rights pursuant to HRS chapter 269 in Maui Elec. These rights are adversely affected by any action by the BLNR that fails to include sufficient information and analysis.

1. HRS § 171-58 and -55 are laws relating to environmental quality.

HRS §§ 171-58 and -55 are laws law relating to environmental quality, including the "conservation, protection and enhancement of natural resources."

First, in determining whether a law is related to environmental quality, the Hawai'i Supreme Court has relied on the legislature's identification of laws related to environmental quality when it enacted of HRS § 607-25. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010). Each chapter cited in HRS § 607-25 "implements the guarantee of a clean and healthful environment established by article XI, section 9." Id. See also 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. HRS § 607-25(c) identifies HRS chapter 171.

Second, the legislature specified that all cases arising from title 12 – of which HRS chapter 171 is a part – are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). This legislative determination also demonstrates that this law that governs the use of the state's public trust natural resources is a law relating to environmental quality.

Third, HRS chapter 171 implements Hawai'i State Constitution Art. XI, § 2, which reads in relevant part: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about "the preservation of certain natural resources. . . . Hence, the importance of placing fairly rigid restrictions on the administration of these assets." Committee of the Whole Report No. 22 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI § 2, the 1962 state legislature codified the laws that govern the administration and management of the state's lands into RLH chapter 103A, which later became HRS chapter 171. See 1963 Supplement to Revised Laws of Hawaii 1955 at 485; Act 32, 1962 Session Laws of Haw. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

Fourth, HRS § 171-58 relates to the conservation, protection and enhancement of natural resources." HRS § 171-58(c) allows certain uses that do not affect "the volume and quality of water or biota in the stream." HRS § 171-58(e) requires that a lessee "develop and implement a watershed management plan" that prevents "the degradation of surface water and ground water quality"); Senate Stand. Com Rep. 2984, 1990 Senate Journal at 1217.

Fifth, HRS §§ 171-55 and -58 require that BLNR consider conditions that "best serve the interests of the State." These interests obviously include "resource protection." In *Re Water Use Permit Applications*, 94 Hawai'i 97, 136, 9 P.3d 409, 448 (2000) ("Waiāhole"); *id.* at 97, 137, 9 P.3d at 449; ("public interest in a free-flowing stream for its own sake"); *Robinson v. Ariyoshi*, 65 Haw. 641, 674-76, 658 P.2d 287, 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state)(1982); *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (acknowledging the public interest in "a free-flowing stream for its own sake").

Finally, in granting holdover approvals to Alexander and Baldwin and East Maui irrigation (collectively "A&B") pursuant to HRS §§ 171-58(c)(1) and/or -55, BLNR imposed conditions on A&B and EMI that are intended to provide some protection of natural resources. These conditions demonstrate that BLNR's position is that HRS § 171-58(c) and -55 relate to environmental quality, including the conservation and protection of natural resources. See *Maui Elec.*, 408 P.3d at 17.

2. HRS chapter 343 is a law relating to environmental quality.

In rendering any decision made pursuant to HRS chapter 171 (which involves the use of state land), the BLNR must comply with HRS chapter 343. Like HRS chapter 171, HRS chapter 343 is referred to in both HRS § 607-25 and 604A-2(a). There can be doubt that its content relates to environmental quality.

The "right to a clean and healthful environment includes the right that explicit consideration be given to" environmental issues in BLNR's decision-making, as provided for in HRS chapter 343 See *Maui Elec.*, 408 P.3d at 17. The Sierra Club's right includes the right that an environmental impact statement be prepared pursuant to HRS chapter 343 before state land is used and millions of gallons of water taken from public streams.

3. HRS chapter 205A is a law relating to environmental quality.

In rendering any decision made pursuant to HRS chapter 171, the BLNR must also comply with HRS chapter 205A. See HRS § 205A-4 and 205A-5(b). The Hawai'i Supreme Court has already definitely ruled that HRS chapter 205A is a law relating to environmental quality for purposes of article XI section 9. *Protect and Preserve Kahoma v. Maui Planning Comm'n*, SCWC-15-0000478 (June 16, 2021).

The "right to a clean and healthful environment includes the right that specific consideration be given to" the objectives and policies of HRS § 205A-2. See *Maui Elec.*, 408 P.3d at 17; HRS § 205A-4 and 205A-5(b). That includes specific consideration of HRS § 205A-2(c)(4)(D) ("Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs").

C. The Sierra Club's Members Have Rights Protected by Article XII § 4 and Article XI §§ 1 and 7 of the State Constitution.

The Sierra Club has the right to ensure that the public trust resources identified in Article XII § 4 and Article XI §§ 1 and 7 of the Hawai'i State Constitution are protected. These constitutional provisions afford members of the public the right to enforce them, see e.g., *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 140 P.3d 985 (2006), *Pele Def Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247(1992) and *Ching v. Case*, 145 Hawai'i 148, 449 P.3d 1146 (2019). Members of the public are beneficiaries of the trust. As such, their constitutional interests are adversely affected when the BLNR allows water to be diverted from streams in ways that cause significant harm. Before authorizing diversions, the BLNR must understand how much water is being taken from each stream and what the impacts are to those streams.

II. The BLNR Must Conduct a Contested Case Proceeding.

Given that the Sierra Club has multiple bases for establishing a protectable "property" interest, a contested case hearing is the most appropriate procedure for these rights to be protected. The Hawai'i Supreme Court has explained that three factors need to be balanced in determining what procedures should be employed (and therefore whether a contested case is the appropriate procedure): "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Maui Elec*, 141 Hawai'i at 265, 408 P.3d at 17.

A. The Diversions Adversely Affect the Sierra Club and its Members.

The Sierra Club is a membership organization advocating for the protection of our unique natural environment. Formed in 1968, the Hawai'i Chapter of the Sierra Club has thousands of members throughout the Hawaiian Islands. The Sierra Club's members are directly affected by the holdover of the revocable permits. They live along and draw water from the streams in the license area for residential and farming purposes. They enjoy the streams in the license area for their recreational and spiritual importance. This includes, but is not limited to, hiking, fishing, swimming, and other recreational uses in and around the streams of the proposed license area.

The Sierra Club's interests are harmed by these diversions. DLNR's division of aquatic resources has concluded that the diversions of East Maui streams harm aquatic life. Our members have seen streams run dry for long periods of time while A&B has diverted them. These diversions harm our members ability to use and enjoy free-flowing streams. BLNR has never clarified whether the permits give A&B an exclusive right to occupy the land; i.e. to exclude others. To the extent that the permit allows A&B to exclude Sierra Club members from hiking on state land, their rights are adversely affected.

B. A Contested Hearing is the Best Means to Protect the Public Interest.

The risk of erroneous deprivation of the Sierra Club's rights are high and there is no better means of ensuring that these rights are protected (short of going to court).

1. Existing BLNR procedures have failed to protect streams.

Existing procedures have not allowed for the protection of 12 Huelo streams. A&B and EMI continue to divert millions of gallons of water from free-flowing streams without any substantive review by BLNR. BLNR has failed to address the problems caused by diversion

structures on public land. It has failed to take meaningful action to get trash cleaned up. It has failed to ensure that A&B and EMI fulfill their burden. It has turned a blind-eye to the water that is no used. BLNR needs accurate and complete information in order to make an informed decision.

2. A contested case hearing on the holdover provides procedural protections.

A contested case proceeding would allow for a factual record to be developed. "A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). A contested case hearing provides procedural protections to all parties. A contested case can ensure that a decision is based exclusively on evidence in the record. It precludes *ex parte* communication. A contested case is an effective means of resolving disputed facts. And it allows for deliberate decisionmaking rather than hastily crafted and vague conditions.

If the Sierra Club is denied a contested case hearing and then sues over BLNR's decision, a trial would likely not take place for more than 18 months --after the term of this permit has expired.

3. The CWRM proceeding did not protect the Sierra Club's interests.

It would be a mistake to assume that the Sierra Club's interests were addressed or protected by CWRM in 2018.

First, the Sierra Club was not a party to the CWRM proceedings, which were initiated in 2001.

Second, many of the streams that Sierra Club members use in the area covered by the revocable permits were not addressed in any way in the CWRM proceeding.

Third, in setting minimum instream flow standards, CWRM did not impose a burden of proof on any of the parties. In contrast, when rendering a decision as to whether allow a private corporation to use public trust resources, the BLNR must impose on A&B the burden to (a) justify the diversions "in light of the purposes protected by the trust." *In re Water Use Permit Applications*, 94 Haw. 97, 9 P.3d 409, 455 (2000) and (b) show the diversions will not injure the rights of others. *Hawaiian Commercial & Sugar Company v. Wailuku Sugar Company*, 15 Haw. 675, 689 (1904). Application of this standard should provide greater protection of our streams.

C. BLNR has Substantial Interests in Conducting a Contested Case.

The BLNR has a substantial interest in making deliberate decisions when it comes to public trust land. "Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose." *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). See also *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 140 P.3d 985, 1011 (2006) (public trust duty requires agency to "ensure that the prescribed measures are actually being implemented"); *Mauna Kea*, 136

Hawai'i at 414, 363 P.3d at 262 (concurring opinion of J Pollack, joined by Wilson and McKenna) (trustee must "fulfill the State's affirmative constitutional obligations"). The BLNR's decision must be made "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." In Re Water Use Permit Applications, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000). When acting as a trustee, BLNR "must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency. . . Clarity in the agency's decision is all the more essential in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute." Id. at 158-59, 9 P.3d at 469-70 (2000)(citations and internal quotation marks omitted). These values are best assured in the context of a contested case. A contested case hearing would address: the amount of water not used; measures that can be taken to control invasive species in the area; mitigation measures that can be taken to reduce waste; alternative sources of water; the impact of diversion structures; debris that remains on public land; and much more.

22. Any Disagreement Petitioner May Have with an Application before the Board

See the Sierra Club's October 15, 2020 letter to Suzanne Case as well as the written testimony offered for the November 13, 2020 meeting. See the Sierra Club's motion for summary judgment, or in the alternative for a preliminary injunction filed on April 3, 2020. See the Sierra Club's July 22, 2021 letter.

The Supreme Court has mandated that decisions involving the use of stream water "must include provisions that encourage system repairs and limit losses." In re Water Use Permit Applications, 105 Hawai'i 1, 27, 93 P.3d 643, 669 (2004). A&B must prove that its use of water is "reasonable and beneficial." 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).

In its 2018 decision setting instream flow standards for many (but not all) of east Maui streams, CWRM wrote:

although estimates of over 20 percent transmission system losses may comport with current industry standards, they do not reflect best practices, will not serve the interests of future generations and are not acceptable. Modern agribusiness investors should not expect to build a new industry on the back of century-old infrastructure. Investment in ditch systems must be made to avoid leakage and waste, install modern ground water storage technologies, optimize use of non-potable water, and improve water capture and storage from storm events that increase total flow availability.

...

The Commission recognizes that authorizing how much water will be allowed to be diverted offstream once the instream flow standards are met is the purview of the Board of Land and Natural Resources. However, the Commission would ask the Land Board to consider the following issues for future water leases:

- require improvements in the water delivery systems to minimize leakage and waste, as well as to provide accurate and timely gaging and monitoring of all offstream water uses[.]

In November 2020, while approving the continuation of the revocable permits, BLNR expressed its clear intent "to deal with the question of the restoration of the non-IIFS streams and efficiency upgrades to the system no later than the time when the Board considers going out to auction with the final lease."

BLNR also required A&B to submit to the Department "a plan for their proposed upgrades, including an implementation timeline, to the irrigation system intended to address CWRM's concerns no later than June 30, 2021." Mahi Pono's June 2021 "plan" is one page long. Its plan includes no information as to the "implementation timeline" for the "future lining of reservoirs to reduce seepage loss." It provides no information as to when the "analysis" of the operational significance of the existing reservoirs will be completed.

Just a few months ago, CWRM restricted Mahi Pono and Wailuku Water Company system from losing more than five percent of the water diverted from Nā Wai 'Ehā. D&O ¶193(b).

Over the past 18 months, A&B has been providing BLNR with data regarding the amount of water it uses and how much it wastes. Except for two months when it took less than 15 mgd, far more than half the water taken has been wasted.

23. Any Relief Petitioner Seeks or Deems Itself Entitled to

The Sierra Club requests that numerous conditions be imposed.

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

The Sierra Club can bring to the BLNR's attention facts, documents and testimony that its staff has not provided to the board. Its cross examination of the applicant's witnesses will reveal that statements it has made lack credibility.

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.


Petitioner or Representative (Print Name) Martha Townsend Signature Aug. 11 2021 Date

STATE OF HAWAII
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