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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,)	CIVIL NO. 20-0001541
)	(Environmental Court)
Appellant,)	
vs.)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW AND ORDER
BOARD OF LAND AND NATURAL)	
RESOURCES, ALEXANDER &)	
BALDWIN, INC., EAST MAUI)	
IRRIGATION COMPANY, LLC, and)	
COUNTY OF MAUI)	
)	
Appellees)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Sierra Club appealed the Board of Land and Natural Resources' (BLNR) November 13, 2020 decisions that denied the Sierra Club's request for a contested case hearing and approved the continuation of revocable permits S-7263, S-7264, S-7265, and S-7266 ("permits at issue") that authorize the use of approximately 33,000 acres of public land and the diversion of up to 45 million gallons per day on average from dozens of east Maui streams.

The court reviewed the briefs, held oral arguments via Zoom on April 15, 2001, issued an interim decision on the appeal on May 28, 2021, and issued a ruling on the permits at issue on July 30, 2021. It also heard related motions and held status conferences with the parties. This order supersedes and formalizes the prior orders and resolves **the immediate issues on appeal while retaining temporary jurisdiction as may be necessary to modify the court's order pending further events as described below.** (Red text shows changes by Judge Crabtree).

FINDINGS OF FACT

1. In May 2000, BLNR authorized Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.'s (collectively "A&B") to use, pursuant to revocable permits 7263, 7264, 7265, and 7266 ("permits at issue"), approximately 33,000 acres of public land and to divert millions of gallons of water per day from the streams flowing through this area. JEFS:15 ANSW:2 and JEFS:1 NA:5 ¶36; JEFS:69-72.

2. The permits at issue have been repeatedly extended. JEFS:15 ANSW:2 and JEFS:1 NA:5 ¶40.

3. On October 1, 2020, A&B requested that BLNR renew the permits at issue for another year. JEFS:227 STIP:3.

4. On November 12, 2020, the Sierra Club filed its written petition for a contested case hearing on the continuation of the permits at issue. JEFS:15 ANSW:3 and JEFS:1 NA:10 ¶¶ 59-60.

5. On November 13, 2020, BLNR voted to deny the Sierra Club's request for a contested case hearing and voted to approve the continuation of the permits at issue. JEFS:15 ANSW:3 and JEFS:1 NA:10 ¶¶62 and 65; JEFS:53 CROA at 02:48:05.

6. BLNR denied the Sierra Club the opportunity to cross examine witnesses. JEFS:15 ANSW:3 and JEFS:1 NA:11 ¶63.

7. The permits at issue authorize A&B to take all the baseflow from 13 east Maui streams. JEFS:15 ANSW:2 and JEFS:1 NA:6 ¶43; JEFS:94 CROA:20, 30; JEFS 95 CROA:27; JEFS:117 CROA:28.

8. The Sierra Club has sufficiently demonstrated that it and its members are adversely affected by the continuation of the permits, the diversion of streams, and inadequate

permit conditions. JEFS:128 and JEFS:129; JEFS:130 CROA:6-10 and 78-91; JEFS:117 CROA:83; JEFS:94 CROA:15-16, 20, 30; JEFS:95 CROA:27.

9. The same parties were involved in a case that went to trial in which the Sierra Club challenged BLNR's decisions in 2018 and 2019 continuing these same permits. *Sierra Club v. BLNR*, Civ. No. 19-1-0019-01 JPC. This appeal involves some significantly different facts. More specifically, the Sierra Club had available to it new evidence on the permit renewals – information and issues that apparently arose after the trial. As just one example, DLNR's own Division of Aquatic Resources recommended that restoring four more of the streams should be a high priority. JEFS:32 CROA:6-9 and JEFS:130 CROA:6-10. In addition, more recent reports showed significantly less water was needed for off-stream uses than previously estimated, yet the proposal for the revocable permit extensions was to take more water out of the streams, not less. JEFS:33 CROA:14. A new issue of defining "waste" to expressly exclude system losses and evaporation was also up for consideration with the permits at issue. JEFS:31 CROA:14; JEFS:32 CROA:14 and JEFS:137 CROA:4. Previous CWRM findings recognized that when dealing with a hundred-year-old delivery system, part of the solution to needing less water from the streams and leaving more water in the streams requires investment to upgrade the ditch and storage systems. JEFS:114 CROA:23-24.

10. In its Interim Decision, the court set up a process and set a deadline for the parties to make requests on whether or not and how the court should modify the permits at issue. BLNR responded by asking the court to allow a Rule 54(b) certification and enter final judgment so an appeal could be filed, or in the alternative, grant an interlocutory appeal from the Interim Decision, or in the alternative, reconsider and amend the Interim Decision, or in the alternative stay enforcement of the court's order pending appeal. BLNR offered nothing in the

way of any options, plans, or specifics for how the permits can safely be modified to ensure the people of Maui continue to get the water they need pending the outcome of BLNR's contested case hearing (whether compelled by court order or on BLNR's own initiative). BLNR made clear however that A&B would no longer be authorized to distribute water if the permits were vacated. This representation continued after the court made clear at the hearing on 7/7/21 that there would be no immediate appeal or stay.

11. A&B joined most of BLNR's motion, but added a request that if the court would not permit an immediate appeal and issue a stay, then the court should leave the existing permits in place until they expire in late 2021. Like BLNR, A&B did not offer any specifics on how to safely modify the permits at issue for the period between the court vacating the permits and when the permits (presumably) are re-issued (or held-over or extended or continued) following a BLNR hearing that complies with constitutional requirements for a contested case hearing.

12. Maui County joined several but not all of BLNR's requests, and joined A&B's request that the permits remain in place if no stay was issued. Maui County also asked the court to ensure that the water needed for Upcountry Maui and the Kula Ag Park was delivered. The court stated on the record and repeats in this order that the court will do everything in its power to ensure those needs are met.

13. The Sierra Club was the only party which offered the court concrete and specific options and support for how to modify the defective permits and not leave a vacuum until BLNR conducts a contested case hearing. JEFS:321 MEO:11-14; JEFS:325 MEO:2.

14. Twenty-five million gallons of water per day from east Maui streams should be more than enough water to allow all the users the water that they require, while hopefully reducing apparent or potential waste. JEFS:39 CROA:10; JEFS:50:9; JEFS:33 CROA:14.

CONCLUSIONS OF LAW

1. These revocable permits are required to be renewed annually. HRS §§ 171-40, -55 and -58. The plain meaning of those laws is that annual review is required.

2. The BLNR's November 13, 2020 decisions were final decisions subject to review pursuant to HRS § 91-14.

3. Hawai'i recognizes the right to a clean and healthful environment "as defined by laws relating to environmental quality" including those laws related to protection of natural resources. Hawai'i State Constitution Article XI, section 9. Our supreme court has held this is a substantive right and a legitimate entitlement under state law. It therefore is a property interest protected by due process. *In re Maui Electric*, 141 Hawai'i 249, 260-61, 408 P.3d 1, 12-13 (2017). A protected property interest need not be tangible. *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019). *See also Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015); *In Re Water Use Permit Applications*, 94 Hawai'i 97, 120 n.15, 9 P.3d 409, 432 n.15 (2000) ("*Waiāhole*"); *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 240-44, 287 P.3d 129, 141-45 (2012). The constitutional right at issue here ~~is an important right~~ **is not discretionary and must be enforced by the court.**

4. The court concludes that "laws relating to environmental quality" are implicated by the revocable permits at issue, including, but not limited to, HRS §§ 171-55 and/or 171-58, HRS chapter 343, and HRS chapter 205A. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010); HRS §§ 604A-2(a) and HRS 607-25.

5. The Sierra Club has also argued that its members also enjoy constitutionally protected rights as beneficiaries of the public trust pursuant to Article XI section 1, Article XI

section 7, and Article XII section 4 of the State Constitution. The court does not need to address this basis for a contested case hearing as the analysis pursuant to Article XI, section 9 is straightforward.

6. The court rejects the arguments that requiring contested case hearings based on the laws relating to environmental quality could mean that virtually everything BLNR decides could require contested case hearings and that BLNR does not have the necessary resources, and therefore due process cannot be so broadly required. The court well understands the challenge of time and resources in ensuring due process; however, minimizing or denying persons or organizations their established due process rights is not a solution to those challenges. The related argument that due process rights should not apply to revocable permits because those permits are so short-lived that a contested case hearing cannot be held quickly enough is also not persuasive, especially where the short-term permits are repeatedly extended.

7. Appellees' arguments that Sierra Club already got the required due process because water permits were litigated in a trial in this court in 2020 are not persuasive. Here, the permits at issue covered the year after the trial. Things change with time. More specifically, the Sierra Club had available to it new evidence on the permit renewals – information and issues which apparently arose after the trial. The new information and issues are relevant and are not insignificant. *See* FOF 9.

8. This case is not like *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018). The Sierra Club has not been afforded the opportunity to participate in a contested case hearing on the revocable permits and their impact. Moreover, the burden of proof in a contested case hearing over the continuation of revocable permits (*see e.g., Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 and *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)) is different than a trial over a breach of trust (*Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 233,140 P.3d 985, 1013 (2006)).

9. Our environmental law system has a goal that the decision-makers will hear from stake-holders before decisions are made, to help decision-makers reach sound policy decisions examined from multiple perspectives. Process is important. A contested case hearing plays an important role in our system of environmental protection. The new information and issues described above are relevant, and are not insignificant. A contested case hearing will allow all constitutional rights to be acknowledged and protected. We all stand to benefit from a thorough contested case hearing in which all interests are represented.

10. The Sierra Club has standing. JEFS:130 CROA:78-91; JEFS:128 and 129. *See e.g., Maui Electric.*

11. The Sierra Club’s constitutional due process rights were violated. A contested case hearing was required before the BLNR voted on November 13, 2020, to continue A&B’s revocable permits for another year. *Mauna Kea*. This court will not allow the unconstitutional status quo to continue any longer.

12. Since the court concludes that Sierra Club had a property interest protected by due process rights under the Hawai‘i Constitution as defined by laws relating to environmental quality, and since the court concludes those rights were prejudiced because of the BLNR’s denial of a contested case hearing, the court may “reverse or modify” the BLNR’s decision per HRS § 91-14(g).

13. This court had ordered that the revocable permits be vacated, but stayed the effective date of that order to give the parties an opportunity to explain whether and how the

permits can be modified to avoid chaos. As a general rule, when an agency fails to conduct a necessary contested case hearing, any approval it has issued is void. *Mauna Kea.*, 136 Hawai‘i at 380-81, 363 P.3d at 228-29; *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 429, 903 P.2d 1246, 1250 (1995) (affirming the circuit court’s decision voiding permit granted without conducting a contested case hearing) and *In re Hawai‘i Elec. Light Co.*, 145 Hawai‘i 1, 445 P.3d 673 (2019) (vacating Public Utilities Commission decision made without conducting a contested case hearing).

14. This case is an exceptional case. The court does not wish to create unintended consequences or chaos by vacating the permits without knowing the practical consequences of such an order, especially when in a few months (absent further legal developments) there will likely be another hearing to extend the existing revocable permits or grant new revocable permits to replace the existing ones. The court will not risk a vacuum which causes hardship to those on Maui who rely on the water at issue. Given the equities of the situation, BLNR’s representation that A&B would no longer be authorized to distribute water if the permits were vacated, and the need to ensure that Upcountry Maui continues to receive the water it has been receiving, this court will modify the permits instead of vacating them *in toto*.

ORDER

Pursuant to the above Findings of Fact and Conclusions of Law, and with good cause shown, it is hereby ordered that:

A. Given the equities, and pursuant to HRS §§ 91-14, 604A-2(b), the court’s inherent equitable powers (*see Richardson v. Sport Shinko*, 76 Hawai‘i 494, 507, 880 P.2d 169, 182 (1994) and *Jenkins v. Wise*, 58 Haw. 592, 598, 574 P.2d 1337, 1342 (1978)), and public trust principles, the permits at issue are modified to limit the total amount of water diverted by the

stream diversions to no more than 25 million gallons of water per day (averaged monthly) from east Maui streams (as measured at Honopou Stream). Any provision of the permits at issue contrary to the modification in this paragraph is hereby vacated. This limit shall remain in place until the anticipated contested case hearing is held and a decision rendered, or until further order of the court.

B. The court’s Interim Decision vacating the permits at issue is stayed.

C. A&B’s underlying **request** that the revocable permits be continued remains in effect. There need be no delay by BLNR requiring A&B to ask for new permits. A&B may supplement their prior/pending request for the permits at issue based on new information, if they choose to.

D. BLNR shall hold a new hearing on the permits at issue as soon as practicable. It shall be a contested case hearing assuming a proper request is made.

~~D. The Sierra Club is entitled to a contested case hearing on the continuation of the revocable permits. BLNR is ordered to hold a contested case hearing on the continuation of the revocable permits at issue. This court previously ordered BLNR to hold a contested case hearing “as soon as practicable.” The court acknowledges that this term is insufficiently precise. Nevertheless, the court expects BLNR to act promptly in holding the contested case hearing.~~

E. The court retains ~~/~~^{/limited} jurisdiction to ~~/~~^{/further} modify the permits at issue if necessary. This retention of ~~/~~^{/limited} jurisdiction will last until ~~/~~^{/further order of the court, or until} the contested case hearing on the permits concludes ~~/~~^{/and a decision or order is issued.}

If it appears to any party that the court’s modification may or is leading to any shortage for the County, for Mahi Pono, or for other recognized beneficiaries, that party may immediately contact the court so that an expedited process can be set to hear and address any problems immediately.

Dated: Honolulu, Hawai‘i, August 23, 2021.

/s/ Jeffrey P. Crabtree



Judge of the Above-Entitled Court