

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

November 9, 2018

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

MAUI

Holdover of Revocable Permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) to Alexander and Baldwin, Inc., and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) to East Maui Irrigation Company, Limited, for Water Use on the Island of Maui.

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

LEGAL AUTHORITY:

Section 171-58, Hawaii Revised Statutes (HRS), as amended.

BACKGROUND:

At its meeting on December 11, 2015, under agenda item D-14, as amended, the Board of Land and Natural Resources (Board) directed Land Division staff to submit annual revocable permit renewals by county over four meetings, with an explanation of why a revocable permit is the appropriate disposition and how the rent was set. At its meeting on June 24, 2016, under agenda item D-7, the Board further approved the recommendations of the Department of Land and Natural Resources Revocable Permit Task Force, as amended, requesting all divisions to notate any non-compliance issues and pending litigation in the renewal request. In compliance with these directives, staff presented the revocable permits for land uses by county over four separate meetings in 2016. However, staff omitted revocable permits for water use from the renewal requests because of the complex issues they present. At its meeting on December 9, 2016 under agenda item D-11, the Board approved, as amended, a one-year holdover of the existing water permits on the island of Maui pursuant to Section 171-58, HRS, as recently amended by Act 126 Session Laws of Hawaii 2016 (Act 126). The Board imposed additional conditions in granting its approval:

- 1) To require the holdover of the revocable permits to incorporate the July 18, 2016 order of the Commission on Water Resource

- Management (CWRM). There shall be no diversion from the streams listed in the CWRM order, and the timing for stopping the diversions shall be in accordance with the aforesaid CWRM order;
- 2) There shall be no waste of water. All diverted water shall be put to beneficial agricultural use or municipal use;
  - 3) Honomanu Stream shall also be designated as a stream from which no water diversion shall be permitted;
  - 4) A maximum of 80 million gallons per day (mgd) on average shall be permitted for diversions to central Maui. The permittees can apply for the diversion of additional water if necessary during the term of the permits;
  - 5) The permittees shall remove (from the no-diversion streams) the dry areas of streams that are created by erosion caused by a diversion, as mentioned on pages 10-11 of the DAR report, as part of the restoration of streams; and
  - 6) The permittees and taro farmers shall each designate a point-of-contact for their respective groups who will exchange phone numbers and communicate concerns from their group to the point-of contact for the other group.

At its meeting on November 9, 2017, the Board approved the continued holdover of the permits for an additional year but added additional requirements as follows:

- 1) The holdover shall comply with all conditions required by the CWRM's Interim Instream Flow Standards decision;
- 2) Permittee shall provide a specific report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the holdover period; and
- 3) Permittee shall begin cleanup of trash from revocable permit areas starting with areas that are accessible and close to streams.
- 4) Reword the previous condition 5 so it addresses the ability of stream biota to move upstream.

Staff now brings the existing water permits on the island of Maui to the Board for approval of an additional one-year holdover. The status as to the Board's additional conditions is addressed in the Remarks section.



REMARKS:

On July 1, 2016, Act 126 became law, amending Section 171-58, HRS. The amended section provides in part:

Where an application has been made for a lease under this section to continue a previously authorized disposition of water rights, a holdover may be authorized annually until the pending application for the disposition of water rights is finally resolved or for a total of three consecutive one-year holdovers, whichever occurs sooner; provided that the total period of the holdover for any applicant shall not exceed three years; provided further that the holdover is consistent with the public trust doctrine . . . .

A copy of the full text of Act 126 is attached as Exhibit 1. In the present matter, applicants Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Company, Limited (EMI) come before the Board to request that the Board consent to the pre-existing holdover status of the revocable permits issued to them, as explained in the following section.

Procedural History

On May 26, 2000, the Board approved the issuance of revocable permits to A&B and EMI to take water from four license areas on Maui. The diverted water is transported to central and upcountry Maui for agricultural and domestic purposes. Four revocable permits were issued for four license areas, respectively, S-7263 (Honomanu), S-7264 (Huelo), and S-7265 (Keanae) to A&B, and S-7266 (Nahiku) to EMI. See maps attached as Exhibit 2.

On May 14, 2001, A&B and EMI filed an Application for Long Term Water License with the Board. The application sought a continuation of the existing diversions for the same agricultural and domestic uses through a 30-year lease of water originating from state lands. At its meeting on May 25, 2001, the Board heard the request, which included the continued issuance of interim revocable permits on an annual basis pending the issuance of a long-term disposition. During the meeting, there was a request for a contested case hearing to challenge the legality of the long term license by Nā Moku Aupuni O Ko'olau Hui (Na Moku), which was granted by the Board. Pending the outcome of the contested case, the Board deferred action on the request and granted holdover revocable permits to A&B and EMI. In addition to the contested case hearing on the long term water license, Na Moku also filed petitions with CWRM to amend the Interim Instream Flow Standards (IIFS) for certain East Maui streams. The IIFS petitions resulted in litigation and a contested case hearing.

The Board affirmed the holdover status of the water permits at its meeting on May 24, 2002 and its intention to preserve the status quo until the resolution of the contested case. The water license contested case also led to litigation and ultimately resulted in the Board



issuing a Findings of Fact, Conclusions of Law and Decision and Order on March 23, 2007. The intent was to provide interim relief until the IIFS petitions were resolved, requiring A&B and EMI to decrease diversions on Waiokamilo Stream to allow for more water to flow downstream to the local taro growers.<sup>1</sup> The March 23, 2007 decision acknowledged that the environmental review and IIFS would likely take years to resolve, and that the holdover was essential to the Board's proper discharge of its public trust responsibilities.

In 2015, Na Moku filed a separate action with the First Circuit Court challenging that the annual renewal of the revocable permits did not undergo the appropriate environmental review under Chapter 343, HRS. The court decided that the continuance of the revocable permits was not an action subject to Chapter 343, HRS. However, the court, independent of any claims made by Na Moku, determined that the Board exceeded its authority under Sections 171-10 and 171-55 HRS, in placing the revocable permits into holdover status for 13 years, and declared the revocable permits invalid. The decision is currently on appeal in the Intermediate Court of Appeals (ICA) by the County of Maui, A&B, EMI and the State. The Board reaffirmed that the permits were in holdover status at its meeting on December 11, 2015. Na Moku filed another action with the State's Environmental Court challenging the December 11, 2015 reaffirmation. That matter has been stayed pending resolution of the appeal at the ICA.

On June 20, 2018, CWRM issued its Findings of Fact, Conclusions of Law & Decision and Order in the contested case hearing regarding the petition to amend the IIFS for the 27 East Maui streams that were subject to the petition. Of those 27 streams, 10 were fully restored, with no diversion of water allowed. In determining the IIFS, CWRM noted that it was its duty to protect instream values to the extent practicable and to protect the public interest. However, CWRM must also weigh the importance of off-stream uses of water, including the economic impact of restricting those uses. CWRM also determined that the off-stream use of water in preserving agricultural lands and assuring adequate water supplies for Maui was in the public interest. CWRM's Findings of Fact, Conclusions of Law & Decision and Order is available through the following link:

<http://files.hawaii.gov/dlnr/cwrm/cch/cchma1301/CCHMA1301-20180620-CWRM.pdf>

The Department considers the revocable permits to be in continued holdover status, until the resolution of the pending contested case before the Board on the water license.<sup>2</sup> Although the permits were invalidated by the Circuit Court, the ruling was stayed pending the appeal. Therefore, the permits remain in holdover status until that time. However, in

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<sup>1</sup> A&B eventually ceased all diversions of Waiokamilo Stream in 2007.

<sup>2</sup> As noted above, the Board approved the revocable permits to be in holdover in 2001, then reaffirmed the holdover status in 2002 and again in 2015. The holdover status was also validated by the hearings officer in the 2007 contested case decision. Only the 2015 decision was challenged by Na Moku. The inclusion of the revocable permits in the annual renewal for all revocable permits brought to the Board was simply to address the annual rent, not to reconsider the holdover status of the permits.



an abundance of caution and in the event the decision is upheld on appeal, staff recommends that the Board approve the written request submitted by A&B and EMI (attached in part as Exhibit 3<sup>3</sup>) to authorize the continued holdover of the revocable permits in compliance with Act 126. Staff takes the position that, despite the revocable permits already being in holdover status, the Board authorizing the continued holdover would comply with Act 126. As noted previously, Act 126 allows the Board to authorize annual holdovers where an application for a lease has been made to continue a previously authorized disposition of water rights. The Board did previously authorize the initial revocable permits in 2001, which have been in valid holdover since. Furthermore, A&B and EMI submitted their lease applications in 2001, and are currently proceeding with their environmental impact statement. The applications are attached as Exhibit 4.

In their request to approve the holdover, A&B and EMI contend the holdover is consistent with the public trust. Specifically, the continued diversion of water through the ditch system is necessary to preserve the operational integrity of the ditch system, which will in turn keep A&B's former sugar cane lands in central Maui viable for future agricultural uses, including diversified agriculture.<sup>4</sup> Additionally, a portion of water diverted through the ditch system is utilized by the County of Maui to service the Nahiku and Upcountry Maui communities.

In previous approvals for holdovers, the Department has noted that title to water resources is held in trust by the State for the benefit of its people, and with respect to the agricultural use of water, the Hawaii Constitution provides:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.

Hawaii Constitution, Article XI, Section 3.

The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

Hawaii Constitution, Article XI, Section 10.

Considering the foregoing constitutional provisions and in the absence of compelling evidence to the contrary, the Department finds that the justification provided by A&B and EMI is sufficient to recommend that the requested holdover is consistent with the public trust doctrine. Given the short term, one-year holdover period, Staff acknowledges the need to ensure the continued operation of the ditch system to provide water for the County of Maui to deliver to its residents, at a minimum. Since the IIFS has now been

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<sup>3</sup> Due to the length of the request document, its attachments have been omitted.

<sup>4</sup> A large portion of A&B's lands in central Maui has been designated as Important Agricultural Lands (IAL).



amended by CWRM, there is greater assurance that the use of water under the revocable permits would be consistent with public trust responsibilities. Additionally, staff recommends that the Board affirm that the diversion of water under the revocable permits be subject to compliance with the amended IIFS. However, staff emphasizes that such finding is based solely within the context of Act 126, and further inquiry and analysis are required to determine whether a long term lease would be consistent with the public trust doctrine.

As part of its 2017 approval, the Board set a maximum diversion amount at 80 million gallons per day (mgd). As the amended IIFS has been established, the Board is recommended to forego the 80 mgd limit, but instead require that any water diverted under the revocable permits shall be for reasonable and beneficial use and always subject to compliance with the amended IIFS.

The rent or fee to charge for water use is another issue. Standard appraisal methodologies may not work well in establishing a charge for water. There are few comparables that an appraiser could look at, and other types of appraisal methodology are ill-suited for determining a cost to charge for consuming a resource. It is even more difficult to appraise the non-consumptive use of water involved in hydroelectric uses.

Land Division staff has met with the Department of Hawaiian Home Lands (DHHL), the Office of Hawaiian Affairs (OHA) and the Office of Environmental Quality Control (OEQC) regarding the processing of water lease applications. All agencies are interested in devising a method of charging for the use of water in a way that will help to sustain the resource. As several applicants are making progress in meeting the statutory requirements for a water lease, staff intends to hire an appraiser to address the valuation issue.

The current rents for the revocable permits are as follows:

RP S-7263:	\$1698.32 per month
RP S-7264:	\$6588.40 per month
RP S-7265:	\$3476.72 per month
RP S-7266:	\$1426.88 per month

Staff has previously recommended keeping the current rents for holdover revocable permits in place. However, pursuant to further meetings between DLNR and DHHL staff, DHHL raised concerns that revocable permit rents have been static for an extended period of time with no adjustment and has advocated that, at a minimum, rents be adjusted for inflation. Acknowledging the difficulty in appraising a holdover revocable permit, staff concurs with DHHL's recommendation as an interim measure, and that the Board approve adjusting the rents accordingly. As the permits were originally granted in the year 2000, the original rents have been adjusted by CPI to the approximate value as of August 2018. The adjusted rents are as follows:

RP S-7263:	\$2478.15 per month
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RP S-7264: \$9613.65 per month  
RP S-7265: \$5073.15 per month  
RP S-7266: \$2082.07 per month

In addition to the rent issue, DHHL has commented that pursuant to HRS 171-58(c)(1), any holdover be “consistent with the public trust doctrine”, and furthermore that all revocable permits shall be subject to any existing or future reservations of water for DHHL. Staff concurs with DHHL’s comments and recommends that the Board incorporate them into approval of any holdover. A review of the files shows the permittees are compliant with the permit terms. Staff believes that a one-year holdover of these revocable permits is appropriate under Section 171-58, HRS, and Act 126. Additional agency comments were not solicited for this action since the revocable permits are limited term holdovers. Furthermore, as all permit holders subject to this approval have applied for water leases, there will be numerous opportunities for government agencies and general public to provide input during the Chapter 343 HRS environmental review process and any Board approval for a public auction for the water leases.

Since the Board’s prior approval of the holdover, A&B and EMI have proceeded with conducting their Environmental Impact Statement. An Environmental Impact Statement Preparation Notice (EISPN) was published in the Office of Environmental Quality Control Environmental Notice on February 8, 2017. A number of comments were received, with many expressing concerns about the proposed water lease. A&B and EMI will address the comments as part of the EIS. Additionally, A&B and EMI have taken action to address the additional conditions imposed by the Board pursuant to the prior holdover approvals in 2016 and 2017. A summary of the actions taken is attached as Exhibit 5.

In consideration of the foregoing, the Board is recommended to approve the holdover of the revocable permits, subject to all previous conditions that remain consistent with the June 20, 2018 CWRM Findings of Fact, Conclusions of Law & Decision and Order. In addition, previous conditions required by the Board that are inconsistent with the CWRM decision have been deleted from the recommendations.

RECOMMENDATION: That the Board:

1. Find that the holdover of the subject revocable permits is consistent with the public trust doctrine;
2. Approve the holdover of the subject revocable permits on a month-to-month basis for another one-year period through December 31, 2019, at the adjusted rent amounts previously identified;
3. Require the holdover of the revocable permits to incorporate the June 20, 2018 order of the Commission on Water Resource Management (CWRM). There shall be no diversion from the streams listed in the CWRM order, and the timing for stopping the diversions shall be in accordance with the aforesaid CWRM order;



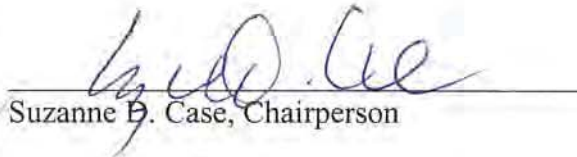
4. There shall be no waste of water. All diverted water shall be put to beneficial agricultural use or municipal use;
5. Any amount of water diverted under the revocable permits shall be for reasonable and beneficial use and always in compliance with the amended IIFS;
6. The holdover shall comply with all conditions required by the CWRM's Amended IIFS decision;
7. Permittee shall provide a specific report on the progress regarding the removal of diversions and fixing of the pipe issues before the end of the holdover period;
8. Permittee shall cleanup trash from revocable permit areas starting with areas that are accessible and close to streams; and
9. The revocable permits shall be subject to any existing or future reservations of water for DHHL.

Respectfully Submitted,



Ian Hirokawa  
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson



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## A BILL FOR AN ACT

RELATING TO WATER RIGHTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 171-58, Hawaii Revised Statutes, is  
2 amended by amending subsection (c) to read as follows:  
3 "(c) Disposition of water rights may be made by lease at  
4 public auction as provided in this chapter or by permit for  
5 temporary use on a month-to-month basis under those conditions  
6 which will best serve the interests of the State and subject to  
7 a maximum term of one year and other restrictions under the law;  
8 provided that [any]:

9 (1) Where an application has been made for a lease under  
10 this section to continue a previously authorized  
11 disposition of water rights, a holdover may be  
12 authorized annually until the pending application for  
13 the disposition of water rights is finally resolved or  
14 for a total of three consecutive one-year holdovers,  
15 whichever occurs sooner; provided that the total  
16 period of the holdover for any applicant shall not  
17 exceed three years; provided further that the holdover  
18 is consistent with the public trust doctrine;





1        (2) Any disposition by lease shall be subject to  
2                disapproval by the legislature by two-thirds vote of  
3                either the senate or the house of representatives or  
4                by majority vote of both in any regular or special  
5                session next following the date of disposition;  
6                [~~provided further that after~~] and  
7        (3) After a certain land or water use has been authorized  
8                by the board subsequent to public hearings and  
9                conservation district use application and  
10                environmental impact statement approvals, water used  
11                in nonpolluting ways, for nonconsumptive purposes  
12                because it is returned to the same stream or other  
13                body of water from which it was drawn, and essentially  
14                not affecting the volume and quality of water or biota  
15                in the stream or other body of water, may also be  
16                leased by the board with the prior approval of the  
17                governor and the prior authorization of the  
18                legislature by concurrent resolution."

19        SECTION 2. The department of land and natural resources  
20 shall prepare and submit annual reports to the legislature no  
21 later than twenty days before the convening of each of the





1 regular sessions of 2017, 2018, 2019, and 2020. The reports  
2 shall include:

- 3 (1) The status of applications to continue previously-  
4 authorized dispositions of water rights;
- 5 (2) Actions taken on the applications during the fiscal  
6 period of July 1, 2016, to November 30, 2016, fiscal  
7 year 2016-2017, fiscal year 2017-2018, and fiscal year  
8 2018-2019, respectively; and
- 9 (3) Any relevant recommendations for legislative action or  
10 appropriation.

11 SECTION 3. Statutory material to be repealed is bracketed  
12 and stricken. New statutory material is underscored.

13 SECTION 4. This Act shall take effect upon its approval,  
14 and shall apply to applications for a lease to continue a  
15 previously authorized disposition of water rights that are  
16 pending before the board of land and natural resources on the  
17 effective date of this Act or filed with the board of land and  
18 natural resources on or after the effective date of this Act,  
19 but prior to June 30, 2019; provided that:

- 20 (1) This Act shall be repealed on June 30, 2019, and  
21 section 171-58(c), Hawaii Revised Statutes, shall be



1 reenacted in the form in which it read on the day  
2 prior to the effective date of this Act; and  
3 (2) Any holdovers first applied for under this Act prior  
4 to June 30, 2019, may be reauthorized, as provided in  
5 section 1 of this Act, beyond June 30, 2019.





H.B. NO. 2501  
H.D. 2  
S.D. 2  
C.D. 1

**Report Title:**  
Water Rights; Holdover

**Description:**  
Requires that where an application has been made for a lease to continue a previously authorized disposition of water rights, a holdover may be authorized annually until the pending application for the disposition of water rights is finally resolved or for a total of three consecutive one-year holdovers, whichever occurs sooner. (HB2501 CD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

HB2501 CD1 HMS 2016-3425



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# RP S-7263 Hoomanu

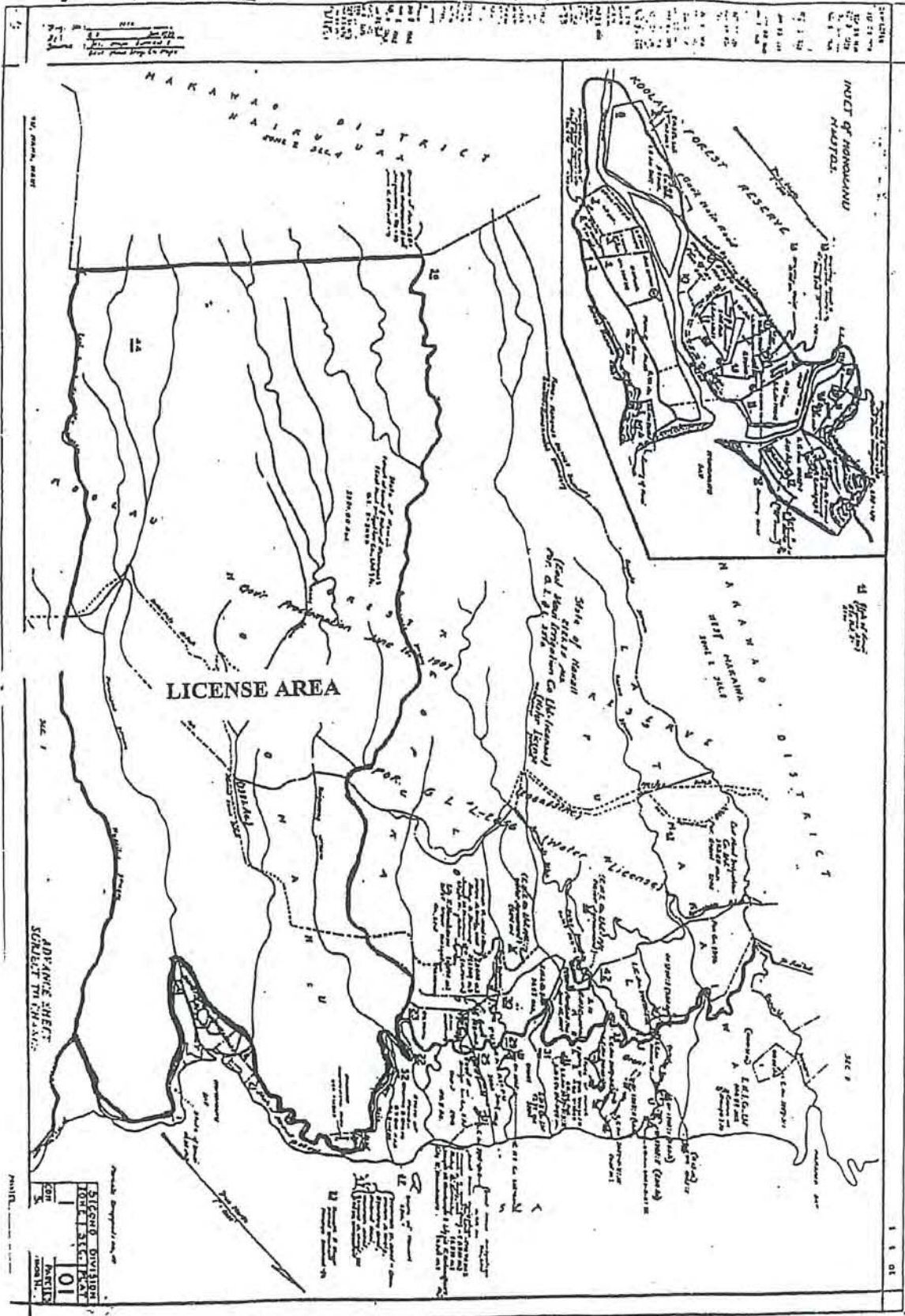


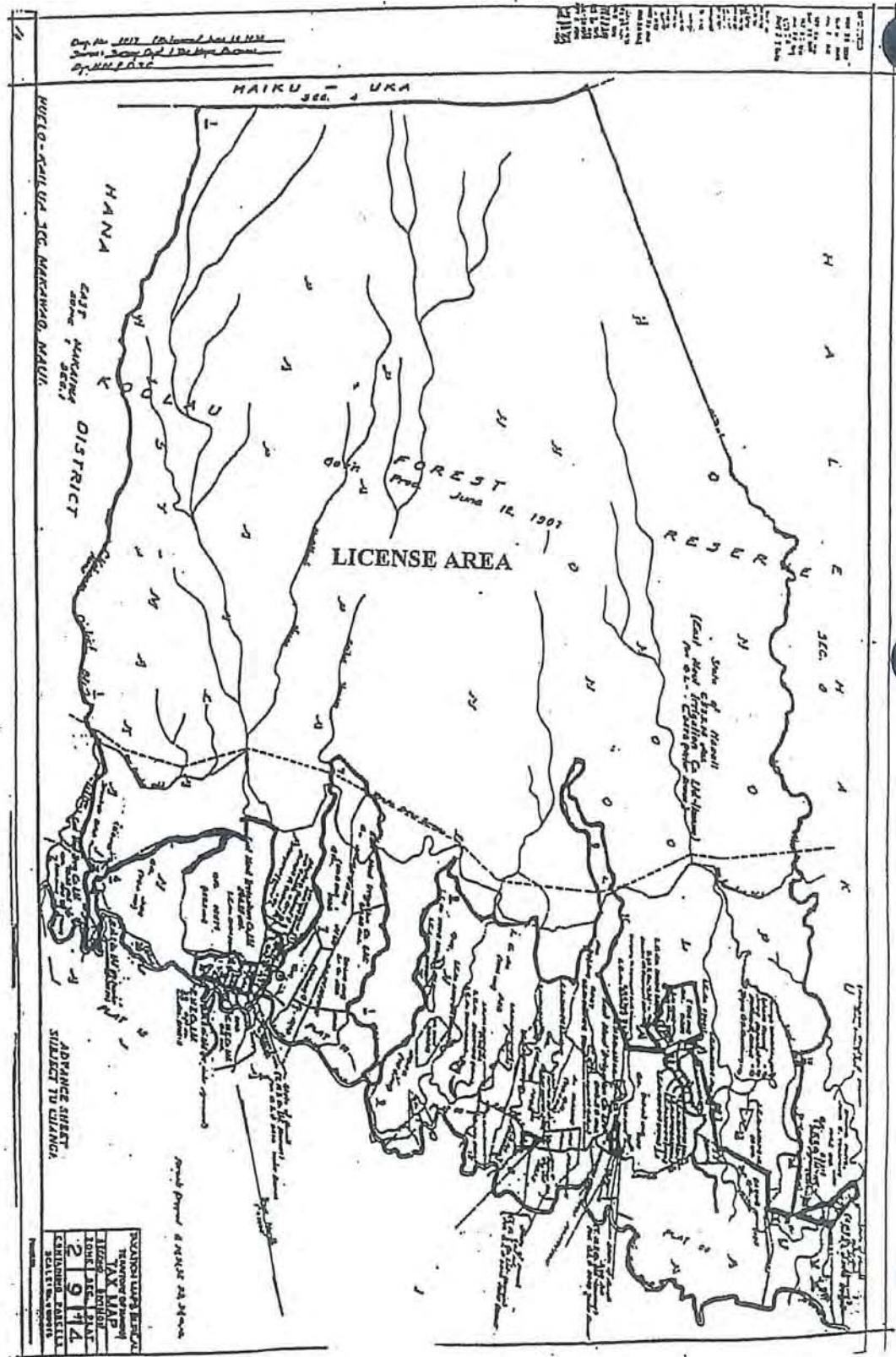
EXHIBIT "2"

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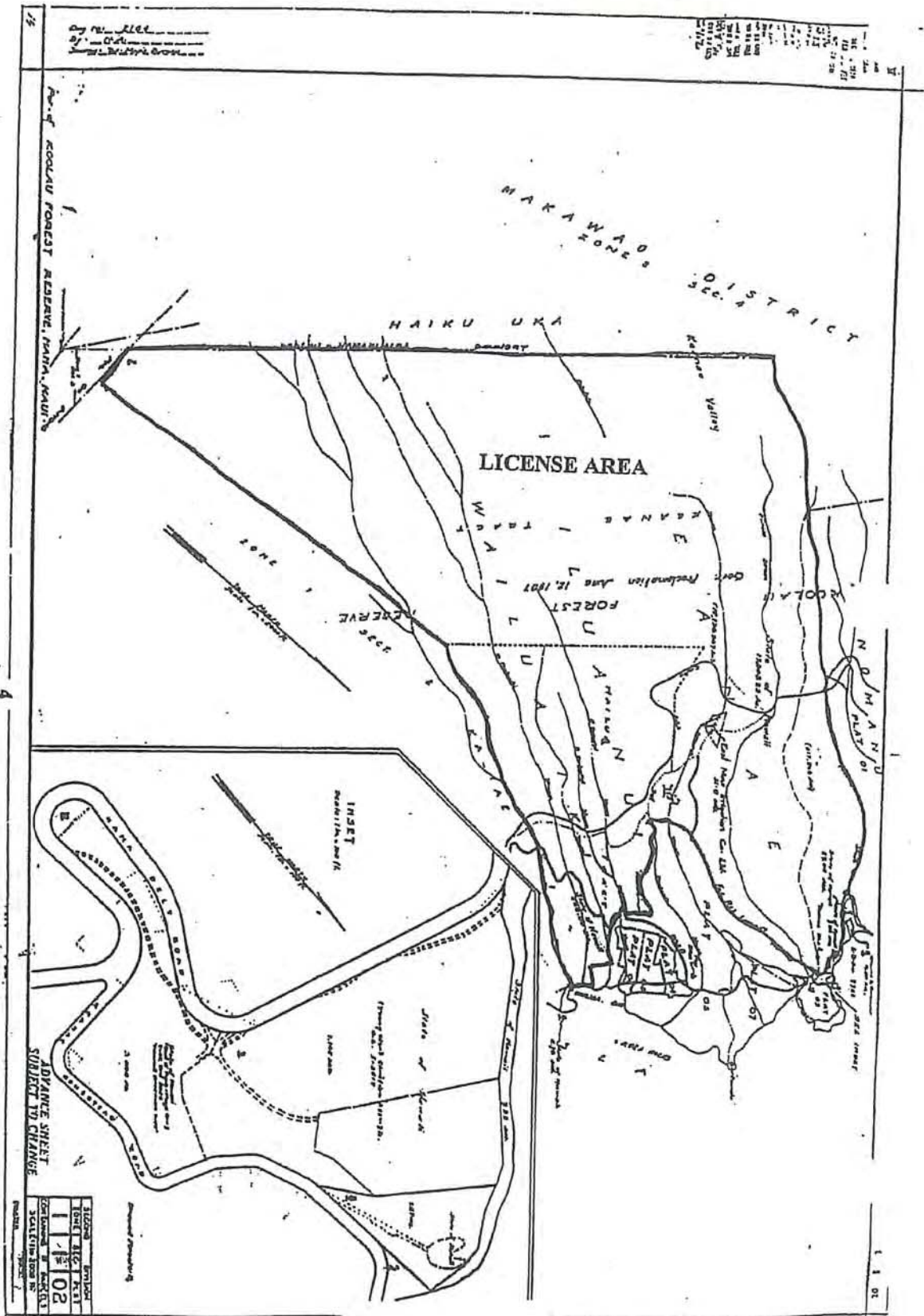
# RPS-7264 Huelo



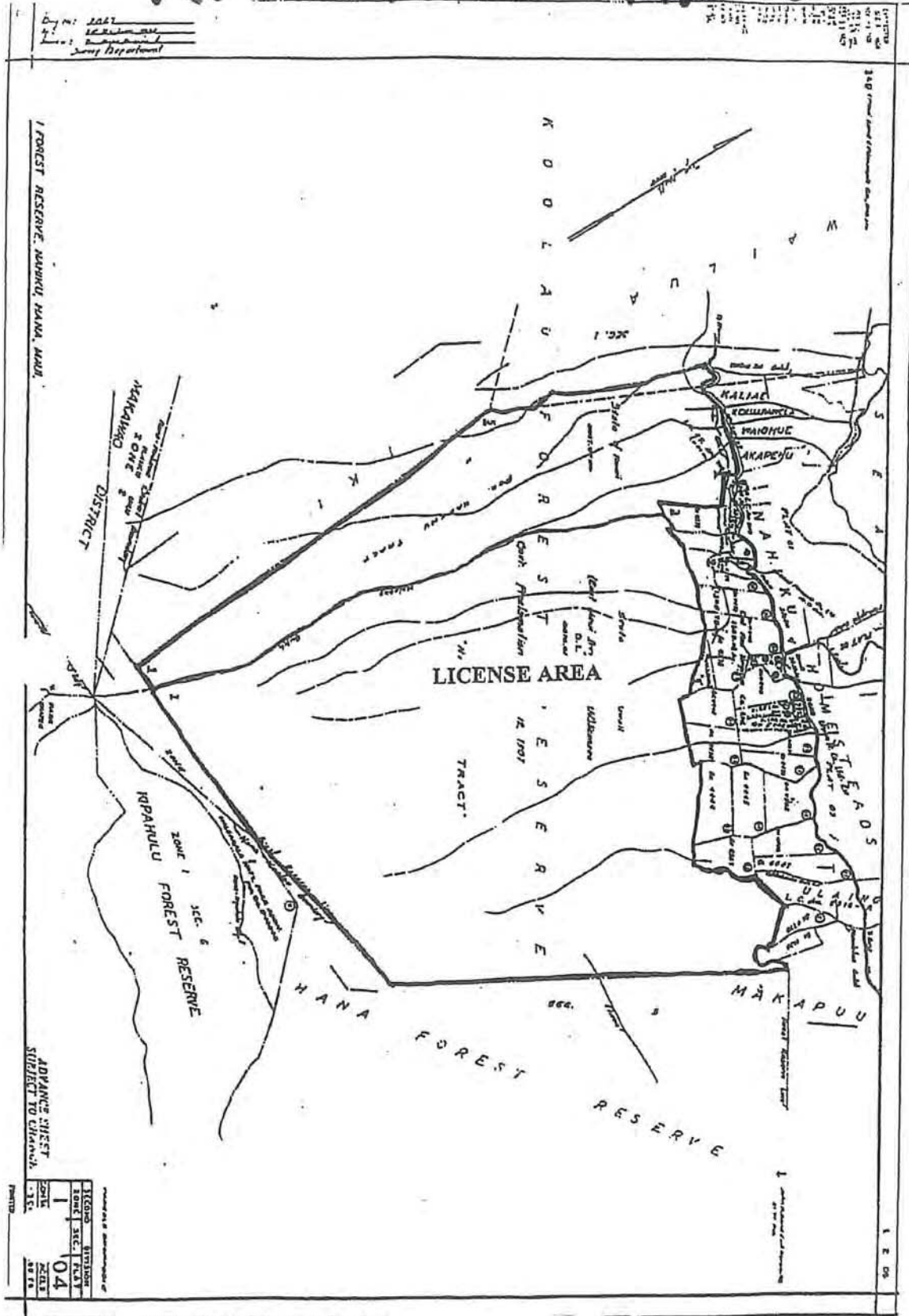
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# RPS-7265 Keanae



# RP S-7266 Nahiku







ALEXANDER & BALDWIN  
PARTNERS FOR HAWAII

October 24, 2018

VIA E-MAIL and U.S. MAIL

Ms. Suzanne D. Case  
Chairperson  
State of Hawaii  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809

RE: Authorization of Holdover Status of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to Alexander & Baldwin, Inc. and Revocable Permit No. S-7266 issued to East Maui Irrigation Company, Limited for purposes of Compliance with Act 126

Dear Ms. Case:

The purpose of this letter is to formally request the Board of Land and Natural Resources (“*BLNR*”), pursuant to Haw. Rev. Stat. §171-58, to review and authorize the holdover status of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to Alexander & Baldwin, Inc. (“*A&B*”) and Revocable Permit No. S-7266 issued to East Maui Irrigation Company, Limited (“*EMI*”) for purposes of Compliance with Act 126.

### **Background**

This is A&B/EMI’s third Act 126 request to BLNR for review and authorization of the continued holdover status of these four Revocable Permits (hereafter, the “*East Maui RP’s*”). EMI’s first request was made by letter dated November 23, 2016, and its second request was made by letter dated October 24, 2017. Copies of both letters are enclosed, with the November 23, 2016 letter providing a background of the East Maui RP’s.

The second holdover request was considered by the BLNR at its November 9, 2017 meeting and approved subject to conditions recommended by Department of Land and Natural Resources (DLNR) staff (see pages 6-7 of the Staff Submittal for item D-5, attached) as well as certain conditions imposed by the BLNR (the “*RP Additional Conditions*”), enumerated on

EXHIBIT "3"

page 13 of the minutes of the meeting, which were approved on December 8, 2017, a copy of which minutes is also enclosed.

### **Holdover of EMI's permits continues to be consistent with the Public Trust Doctrine**

As recognized by BLNR when it granted EMI's first and second requests to authorize the continued holdover status of the East Maui RP's, the holdover of EMI's permits is consistent with the Public Trust Doctrine. Water collection enabled by the East Maui RP's continue to serve the needs of the public water system that serves Upcountry Maui, owned and operated by the County of Maui Department of Water Supply, as well as increasing diversified agricultural activities in Central Maui. Maintaining these Central Maui lands in agriculture is consistent with the state's constitutional mandate to protect important agricultural lands, as well as the Hawaii State Plan, Maui Countywide Policy Plan, Maui Island Plan, and Maui community plans. These uses of East Maui stream water are further recognized and confirmed by the June 20, 2018 Interim Instream Flow Standard ("*IIFS*") decision issued by the Commission on Water Resource Management's ("*CWRM*") for East Maui streams, 24 of which are within the area covered by the East Maui RP's. Any extension by BLNR of the holdover status of the East Maui RP's will be subject to the CWRM's recently issued IIFS decision.

### **BLNR's conditions have been met**

A status report of A&B/EMI's compliance with the conditions imposed by the BLNR in 2017 for the second holdover request was recently provided to the Department of Land and Natural Resources, Land Division, a copy of which is also enclosed. Since our submittal letter, we have received all of the required regulatory approvals to proceed with work of permanently abandoning 15 of the taro stream diversions. That work will proceed immediately.

### **EIS/Lease process proceeding**

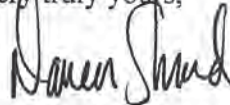
Lastly, work on the Environmental Impact Statement ("*EIS*") that BLNR ordered A&B to prepare in its July 8, 2016 Order Re Alexander & Baldwin, Inc.'s and East Maui Irrigation Company, Limited's Submission of Environmental Impact Statement Scope of Work filed June 9, 2016 has continued throughout the year, to the extent possible pending the CWRM's East Maui IIFS decision. With the issuance of the IIFS decision in June, the maximum amount of water that could be diverted pursuant to the state water lease could be defined, in turn enabling studies of the corresponding impacts to proceed. The current projected timeline estimates that the Draft EIS will be provided to the DLNR for its review, prior to publication, within the second quarter of 2019. Assuming no undue delays or challenges, the Final EIS should be able to be provided to the DLNR by the end of 2019, enabling the lease process to be initiated.



Ms. Suzanne D. Case  
October 24, 2018  
Page 3

In light of the above, EMI respectfully asks the BLNR to re-authorize the holdover of Revocable Permits Nos. S-7263, S-7264, S-7265 and S-7266 and to declare the holdover to be consistent with the public trust doctrine.

Very truly yours,



Darren Strand  
General Manager, Diversified Agriculture

Enclosures

cc: Linda Chow, Esq.  
Summer L. H. Sylva, Esq.  
Camille K. Kalama, Esq.  
Isaac Hall, Esq.  
Patrick K. Wong, Esq.  
Caleb P. Rowe, Esq.  
Kristin K. Tarnstrom, Esq.  
Robert H. Tomas, Esq.  
Russell Tsuji  
Kevin Moore  
Ian Hirokawa



822 Bishop Pkwy  
Honolulu, Hawaii 96813  
P.O. Box 3440  
Honolulu, HI 96801-3440  
www.alexanderbaldwin.com  
Tel (808) 525-6611  
Fax (808) 525-6652

May 14, 2001

**BY HAND DELIVERY**

Board of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, Hawaii 96809

**Re:** Sale of Lease (Water License) at Public Auction, Koolau Forest Reserve and Hanawi Natural Area Reserve, Hana and Makawao, Maui

Ladies and Gentlemen:

Alexander & Baldwin, Inc. and its subsidiary, East Maui Irrigation Company, Limited, request sale of a lease at public auction of the Koolau Forest Reserve and Hanawi Natural Area Reserve, Hana and Makawao, Maui, in accordance with the following:

Statute: Chapter 171, HRS generally; Section 171-58(c), HRS.

Location: Portion of the government land within the Koolau Forest Reserve and the Hanawi Natural Area Reserve generally identified as the Nahiku, Keanae, Huelo and Honomanu License areas.

Tax Map Keys 1-1-01, 1-1-02, 1-2-04, 2-9-14

<u>Area:</u>	Nahiku	10,111.22 acres, more or less
	Keanae	10,768.00 acres, more or less
	Huelo	8,752.69 acres, more or less
	Honomanu	3,381.00 acres, more or less
	Total Lease Area	33,012.91 acres, more or less

(The total area shall be subject to review and confirmation by the Department of Accounting and General Services, Survey Division)

Status: Nahiku encumbered under Revocable Permit No. S-7266

Keanae encumbered under Revocable Permit No. S-7265

Huelo encumbered under Revocable Permit No. S-7263

Honamanu encumbered under Revocable Permit No. S-7264

EXHIBIT S-2

EXHIBIT "4"



Board of Land and Natural Resources  
State of Hawaii  
May 14, 2001  
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- Land Title: Subsection 5(b) of the Admissions Act
- Zoning: State Land Use Commission: Conservation
- Purpose: Right, privilege and authority to enter and go upon the above-described areas for the purpose of developing, diverting, transporting and using government-owned waters.
- Term: Thirty (30) years, commencing sixty (60) days from public auction.
- Rental: Minimum Rental to be determined by appraisal, subject to review and acceptance by Chairperson. Minimum Rental shall be subject to reopening and redetermination at the end of the tenth (10<sup>th</sup>) and twentieth (20<sup>th</sup>) years of the term; such redetermination to be made by appraisal.
- Bond: A performance bond shall be posted to the extent required by statute.
- EIS: All bidders shall prepare and file with the Office of Environmental Quality Commission an Environmental Impact Statement with respect to the proposed use. Disposition of the cost of the EIS shall be determined at a future date.
- Other:
1. The lease shall be subject to that certain Indenture dated March 18, 1938, by and between the Territory of Hawaii and East Maui Irrigation Company, Limited, as amended by Correction Agreement dated March 24, 1938.
  2. Lessee shall maintain roads, trails and the water system.
  3. The State shall have limited rights, to be specified in the lease, to withdraw water for domestic purposes and for emergency purposes.
  4. Public hunting will be allowed, subject to reasonable restrictions to be contained in the lease and consistent with June 5, 1995 Vehicular Access Agreement.
  5. The lease shall be issued subject to Instream Flow Standards as subsequently determined by the Commission on Water Resource Management.
  6. Lessee shall continue to supply of water for domestic purposes to the Maui County Board of Water Supply pursuant to the April 13, 2000 Memorandum of Understanding between BWS and A&B.
  7. Other relevant terms as reflected in the existing revocable permits and expired license agreements shall be included.

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Summary: We request the Board to take the following action:

- A. Authorize the sale of a lease (water license) at public auction covering the area in question under the above-listed terms and conditions which are by reference incorporated herein and, in addition, under the following conditions:
  - i. Provision for proper maintenance of the water system.
  - ii. Compliance with all applicable laws, rules and regulations.
  - iii. Disapproval by the State legislature following date of sale.
  - iv. Filing of an Environmental Impact Statement by all bidders.
  - v. Other terms and conditions as Chairperson may prescribe.
  
- B. Authorize temporary continuation of the year-to-year revocable permit for existing permittees (the Nahiku revocable permit to Alexander & Baldwin, Inc. and the Honomanu, Huelo and Keanae revocable permits to East Maui Irrigation Company, Limited for fiscal year 2001/2002) pending issuance of the lease.

Thank you for your consideration of this request.

Very truly yours,

Alexander & Baldwin, Inc.

By:   
Its Vice President

East Maui Irrigation Company, Limited

By:   
Its Vice President



**HOLDOVER OF EAST MAUI WATER PERMITS  
2017 BLNR CONDITIONS: STATUS OF COMPLIANCE  
OCTOBER 16, 2018**

**CONDITIONS PER 11/9/17 STAFF SUBMITTAL (pp. 6, 7)**

3. **To require the holdover of the revocable permits to incorporate the July 18, 2016 order of the Commission on Water Resource Management (CWRM). There shall be no diversion from the streams listed in the CWRM order, and the timing for stopping the diversions shall be in accordance with the aforesaid CWRM order.**

*Status: The CWRM's July 18, 2016 order has been complied with. Streams that were ordered to remain undiverted were undiverted as total needs from the East Maui watershed remained at 20-25 million gallons per day (MGD). The CWRM's July 2016 order has now been superceded by the CWRM's June 2018 East Maui IIFS decision.*

4. **There shall be no waste of water. All diverted water shall be put to beneficial agricultural use or municipal use**

*Status: Total water diverted from East Maui streams approximated 20-25 MGD throughout 2018. All water was used to meet the needs of the County of Maui for its Upcountry and Nahiku public water systems, the Kula Ag Park, and fire suppression needs, as well as for diversified agricultural needs on former sugar lands in Central Maui.*

5. **Honomanu shall also be designated as a stream from which no water diversion shall be permitted**

*Status: All four sluice gate diversions on Honomanu Stream have remained open to-date, and no water is being diverted from this stream.*

6. **A maximum of 80 million gallons per day (mgd) on average shall be permitted for diversions to central Maui. The permittees can apply for the diversion of additional water if necessary during the term of the permits**

*Status: As mentioned above, total water diverted for use in Upcountry and Central Maui has approximated 20-25 MGD this past year.*

7. **The permittees shall remove (from the no-diversion streams) the dry areas of streams that are created by erosion caused by a diversion, as mentioned on pages 10-11 of the DAR report, as part of the restoration of streams**

*Status: See response to question 2 below, in "Additional Conditions".*

**BLNR ADDITIONAL CONDITIONS (Pg 13, 11/9/17 BLNR Meeting Minutes):**

**1. The holdover permit shall comply with all conditions required by the Commission on Water Resource Management's Interim Instream Flow Standards decision**

*Status: The Commission on Water Resource Management (CWRM) issued its East Maui Interim Instream Flow Standard ("IIFS") decision on June 20, 2018. No appeals were filed at the end of the 30-day appeal period, rendering the decision final. In that the current need for water from the East Maui streams averages 20-25 million gallons per day (MGD), only that amount of water is being diverted from the East Maui watershed—well within the bounds of the June IIFS decision with respect to total quantity as well as the use of specific streams. This water is being used to supply the County of Maui for its Nahiku and Upcountry Maui water systems, the Kula Ag Park, as well as fire suppression needs, and for agricultural uses in Central Maui. The Permittee is also in the process of submitting a proposed compliance plan to the CWRM staff to outline the diversion modifications that will be made to ensure compliance with the IIFS decision once irrigation demands increase, as is expected over the coming months and years.*

**2. Reword Condition 5 [sic] so it addresses the ability of stream biota to move upstream.**

*Status: (NOTE: Our response to this condition assumes that a typo was made, and that this condition is intended to refer to rewording condition 7, rather than condition 5. We assume the focus was to address the need to create pathways to allow for the upstream movement of stream biota.)*

*A number of modifications have been made on the EMI ditch system to facilitate the upstream movement of stream biota, as follows:*

- *Hanawi Stream: Modifications were made at the intake to ensure a constant wetted path across both sides of the dam diversion, via a pipe extending over the dam.*
- *Waiohue Stream: A two-inch pipe was installed to divert water from the upstream waterfall to the dam to create a wetted path across the dam.*
- *East Wailuaiki Stream: A two-inch pipe was installed to bring water from upstream across the top of the dam to create a wetted path across the dam.*
- *West Wailuaiki Stream: A two-inch pipe was installed between the upstream waterfall and the dam, to provide a wetted path across the dam.*
- *Honopou Stream at Haiku Ditch: Rocks were concreted in place next to the pipes in the dam to create a wetted path for upstream migration*
- *Puuloa Stream at Lowrie Ditch: The 8" pipe that carries water over the top of the ditch was extended to reach the small pool below the ditch to provide connectivity.*

*These actions have removed physical obstacles to upstream movement and/or provided wetted areas around dams. In addition, in our implementation of the June IIFS decision, we will be addressing the movement of stream biota as needed.*



**3. Need a more specific report on progress regarding removing diversions and fixing pipe issues before the end of holdover period**

*Status: We believe the pipe issues referred to above related to a pipe at Puolua Stream at the Lowrie Ditch. As mentioned in the last bullet point above, the pipe was extended to provide wetted pathways for the movement of stream biota.*

*As for the removal of diversions on the seven taro streams that A&B earlier volunteered to restore, permit applications have been submitted to the CWRM for the work necessary to permanently modify and abandon some 70 diversion structures on the EMI system and we are awaiting their approval. Additionally, approval has been sought from the Office of Conservation and Coastal Lands (OCCL) for work on diversions located within the Conservation District. Note that we have already sought and received concurrence from the Army Corps of Engineers and the County of Maui that Section 404 and Special Management Area (SMA) permits are not required for this work. Once approvals are received from the CWRM and OCCL, we will proceed with the planned work. Please note that pending this "final work" to permanently abandon these diversions, we have been able to accomplish the return of more than 90% of the water formerly diverted from these taro streams by making operational adjustments to the system, such as the opening of sluice gates, etc.*

**4. A&B needs to clear up their debris starting with more accessible areas and along streams.**

*Status: We have removed an abandoned tractor along Pi'ina'au Road, after first checking with the State Division of Forestry and Wildlife (DOFAW). Ownership of the tractor was unknown, but DOFAW had no objection to our removing and disposing of the item. There was little other debris specifically identified, however existing operating procedures which require the removal of all construction equipment, forms and tools when doing maintenance work on the ditch system have been reinforced with EMI crews, as well as the removal of any debris they may find during the course of their work. We also urge that if anyone has information about debris in the watershed area, please let us know and we will take action to remove the items.*