



SIERRA CLUB OF HAWAII

MĀLAMA I KA HONUA. Cherish the Earth.

SIERRA CLUB'S PETITION REQUESTING A CONTESTED CASE HEARING BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

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SUBJECT MATTER

17. **Board Action Being Contested:** 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) L-L-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
18. **Board Action Date:** November 9, 2018
19. **Item number:** D-7

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STATE OF HAWAII

ARGUMENT

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action:

The Sierra Club is a membership organization advocating for the protection of Hawai'i's unique natural environment. Formed in 1968, the Hawai'i Chapter of the Sierra Club has over 5,000 members throughout the Hawaiian Islands. Our members in East Maui are directly affected by the actions of this Board on item D-7, which seeks to renew temporary licenses, also known as the holdover of revocable permits, to Alexander and Baldwin (A&B) for the diversion of public trust water resources from streams in East Maui. Our members live along and draw water from the streams in the license area for residential and farming purposes. Our members 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. Our members reside near, and use the stream water from the following streams: Hanehoi, Waipio, Ho'olawa, Hanawana, Mokupapa, Kailua, Makapii, and Honokolā.

The rights of our members relevant to these streams are protected by the Hawai'i State Constitution and state law. Sierra Club's members have rights to a clean and healthful environment under article XI, section 9 of the Constitution, which mandates a contested case hearing whenever the State makes binding decisions under "laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." In re Application of Maui Elec. Co., Ltd. ("MECO"), 141 Hawai'i 249, 264, 408 P.3d 1, 16 (2017) (quoting Haw. Const. art. XI, § 9); see also, Flores v BLNR, 2018 WL 3751294, 2018 Haw. LEXIS 168. To be clear, this right is created and protected by the Hawai'i State Constitution.

All Land Board actions related to "conservation, protection, and enhancement of natural resources" are governed by Hawai'i Revised Statutes Chapter 171, 205, and 343. The specific action proposed to the Land Board in the D-7 agenda item on November 9, 2018 cites HRS §171-58 as the "legal authority" for the Board's action.

In relevant part, Hawai'i Rev. Stat. §171-58 states that:

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;**

HRS §171-58(b)(1). Emphasis added.

In Hawai'i, the public trust doctrine is enshrined in Article XI, section 1 of the state constitution. This constitutional provisions states in full:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Haw. Const. art. XI, §1. This means that the Land Board may not renew a holdover of revocable permits without first ensuring that the minimum expectations of the public trust doctrine are satisfied. Hawai'i Revised Statutes Chapters 171, 205A and 343 are laws relating to environmental quality that protect the Sierra Club's interests as well as its members.

Because the Land Board is considering authorizing a private company to divert public trust water resources away from streams, the constitution, state law, and due process require that a contested case hearing be held first. A contested case hearing is the mechanism by which the Board fulfills its duty to the public under the public trust doctrine. This is also the mechanism for the Club and its members to protect their environmental rights in the East Maui streams that are the subject of this agency action.

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

The Sierra Club opposes the renewal of these permits because:

- (a) Alexander and Baldwin has failed to provide sufficient information to the BLNR as to how much water it is taking from each stream;
- (b) the Land Board does not know how much water is being taken from each stream and if any water is being "wasted" by being taken from one stream and "dumped" into other streams where it overwhelms the stream channels, undercuts the banks and sends debris down stream to impact homesteads, farms and ocean water quality;
- (c) Alexander and Baldwin has failed to comply with conditions that BLNR has previously imposed;
- (d) the Environmental Impact Statement is not complete. The EIS has been unnecessarily delayed and as a result the Land Board does not have the information it needs to assess the impact of diversions prior to its decisionmaking, as Chapter 343 requires;
- (e) the proposal violates HRS chapters 171, 205A and 343;
- (f) granting the request violates the BLNR's public trust responsibilities;
- (g) A&B has failed restore all the streams it promised to restore more than two years ago and BLNR has failed to impose any deadlines or require consultation with wildlife agencies and local residents and cultural practitioners for needed alterations of diversion structures and more complete restoration of streams that allow native species to thrive.

The basic issue raised in this proceeding is fulfilling the Land Board's duty under the constitutional public trust and state law to protect public trust resources. At issue in the action before the Land Board includes, but is not limited to:

- the impacts of diversions on the stream and surrounding ecosystem as well as water quality, and feasible action to mitigate or eliminate these impacts;
- the impacts of diversions on other uses of each stream including recreational and aesthetic enjoyment, and feasible action to mitigate or eliminate these impacts;
- the actual water needs of Alexander and Baldwin's central Maui lands,
- practicable timelines for the restoration of stream connectivity, historical diversions no longer needed, and other restoration and mitigation activities,
- the amount of water actually needed to maintain Alexander and Baldwin land uses in central Maui, continued domestic County water use, and agricultural County water uses.
- the amount of water generated from lands in East Maui privately owned by Alexander and Baldwin,
- proposals and timelines for the removal of historic diversions,
- consultation with downstream residents and farmers to minimize harm to them,
- culturally and environmentally appropriate amounts of stream flow diversion, if any.

Alexander and Baldwin seeks yet another renewal of holdovers on four revocable permits to access the public lands in East Maui for the purpose of diverting water from streams. The Club opposes the renewal of these revocable permits in part because conditions previously imposed by this Board on these permits have not been adequately satisfied.

In its 2016 and 2017 decisions renewing the holdover of Alexander and Baldwin's revocable permits, this Board imposed conditions that required the "immediate" restoration of seven streams, the removal of debris, and sufficient connectivity between parts of severed streams to ensure native species survivability. The Board has not verified that these conditions have been satisfied. In public testimony, we presented eye-witness accounts and photographic evidence of dry streams where there should be water, large pieces of twisted metal in and along stream beds, and the lack of connection between severed parts of streams such that native species cannot complete their natural life cycle. We have demonstrated that the applicant has not complied with prior permit conditions and those should not be granted a renewed permit, at least not without ensuring complete compliance first.

BLNR and Lease Applicants have the duty to protect public trust resources and uphold the State Water Code in all the streams in the License area, not just the 25 streams included in the recently decided interim in-stream flow standard petition. For example, the entire Huelo License area has no public water supply and communities there along Kailua, Hanawana, Hoaloha, Waipio, Waipio Iki, Mokupapa, Honokala and Ho'olawa streams need sufficient water in the stream year round for residents living downstream to use water from the stream to meet domestic and recreational

needs as well as kuleana rights. None of these streams are included in Interim Instream Flow Standards petition.

The staff recommendation to the Land Board states that analyzing impacts to downstream users like this need not be considered in the context of a revocable permit holdover, only in the context of a 30-year lease. We disagree. Holdovers of these four revocable permits have been summarily renewed every year for the last 15 years. People who live and farm downstream from A&B's diversions have suffered with insufficient water and substandard stream water management for decades. The damage caused to the stream ecosystem and harm to downstream water users must be considered by the Land Board prior to making a decision on A&B's latest request to renew the holdover of their revocable permits.

All stream restoration needs to take into account the health and safety needs of downstream residents. Current plans have no consultation with downstream residents. That is why we request direct consultation with the residents and farmers downstream of the license areas on a quarterly basis.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

The Sierra Club requests that the permits be denied. The applicant has not demonstrated sufficient need to justify the continued diversion of water from the license areas. In the alternative, petitioner requests that if the permit is granted, the following conditions be imposed.

- Each License renewal shall have a report on specific amounts of water (in MGD) diverted by EMI System in the License area and amount consumed by County Upcountry system; County agricultural park and A&B Diversified agricultural tenants by crop category. This should be delivered to the Land Board within 30 days.
- Each License renewal shall have specific information and updated maps on which streams are currently being diverted and gauges shall be installed to measure how much flow each diverted stream sends into the EMI ditch system. This should be delivered to the Land Board within 30 days.
- Within 30 days, each License renewal shall have a clear map and chart that indicates how much water the East Maui Irrigation (EMI) ditch system is utilizing from each stream, respective to water originating on State land and water origination on EMI lands. It shall also include the amount of water diverted by the EMI on the approximately 15 streams that are west of Honopou stream and outside of the License area.
- Each License renewal shall have current reports or comments from DAR and/or USFWS that address verification of diversion removal and adequate remediation for native species' instream migration needs on streams in the License area.

- Within 30 days, each License renewal shall describe the scope and summarize activities of cooperative stream monitoring and maintenance programs set up in each License area between A&B/ EMI and community members. Access shall be provided to community groups and members to implement monitoring and maintenance programs.
- Each License Renewal shall provide a section on methods and remedies utilized to verify and enforce the License conditions adopted. These remedies shall include, where appropriate, performance bonds for the failure to execute required actions within a timely manner.
- Within 30 days, each License Renewal shall provide a timeline for stream flow restoration activities in each License area on a stream by stream basis and independent verification by community representatives that the restoration has been completed.
- Within 30 days, the applicant shall publish a calendar for quarterly meetings with residents and farmers affected by changes to the streams in the License Renewal area.
- No more than fifty percent of the water within a stream at any given time can be taken from the stream.
- Within 60 days, A&B submit a report that documents that all trash, including all broken and unused pipes, have been removed from the revocable permit area.
- Within 60 days, A&B deliver to the Land Board for public review and approval a plan to provide sufficient water in the stream for residents living downstream to use water from the stream.

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

We provided eye-witness accounts and photographic evidence confirming that conditions imposed on prior permits have not been satisfied. In a contested case hearing, we will provide the Board with additional direct testimony from residents directly affected by the outcome of agenda item D-7. Our evidence will demonstrate which streams remain diverted, the location of debris, where connectivity is needed but is lacking, and where stream water is being wasted. We will also show that the applicant has made changes to stream flows without consideration to the affect on downstream residents and farmers. Our participation in a contested case hearing will help to ensure this Board has all the information it needs to make a decision that fully protects the public's interests and satisfies the Board's public trust obligations per the Hawai'i State Constitution.

24. 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

The residents and farmers of East Maui have struggled with insufficient water and poor stream management for many decades. The interim instream flow standards recently set by the Water Commission concerned only 25 streams in this watershed. There are many more streams in this watershed, on public land, that need to be restored for the sake of the ecosystem and the people who rely on it. The Land Board is the only entity responsible for ensuring these additional streams are wisely used and fully protected. Yet it is clear from the record so far that the Land Board does not have the information it needs to make informed decisions about the fate of these streams. A contested case hearing will help to give the Land Board the information it needs to make an informed decision and fully uphold its duty under the public trust doctrine.

✓ 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.

Marti Townsend M. J. J. 11-19-18
Petitioner or Representation (Print and Sign Name) Date

