

First Circuit Court, State of Hawai'i

RE: Sierra Club vs. BLNR, Alexander & Baldwin, Inc., and
East Maui Irrigation Co., LLC.
Civil No. 20-0001541 (Environmental Court) (agency appeal)

RE: Ruling and Order Modifying Permits

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1. Following oral argument on the above agency appeal on April 15, 2021, the court issued its Interim Decision on Appeal on 5/28/21.

2. The Interim Ruling made clear it would vacate or modify the permits at issue because BLNR violated Sierra Club's constitutional rights by refusing to hold a contested case hearing on those permits. The court ordered BLNR to conduct a contested case hearing as soon as practicable. The Interim Order also noted (paragraph 7) that it had insufficient information to objectively decide on specific modifications to the permits at issue. Accordingly, in paragraph 7B of the Interim Order, the court set up a process and set a 6/30/21 filing deadline for the parties to make requests on whether or not **"and how"** the court should modify the permits at issue. The requests that were filed were heard on 7/7/21.

3. In response, BLNR's requested only that the court 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 Order, or in the alternative stay enforcement of the court's order pending appeal. At the hearing, the court denied all those requests on the record. This Ruling and Order more formally denies BLNR's requests.

4. The court notes that BLNR has 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 has made clear however that EMI/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.

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5. A&B and EMI joined in the above request by BLNR, 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. At the hearing on 7/7/21, the court explained that it could not leave the existing permits in place in light of recent authority from the Hawai'i Supreme Court, which held permits "cannot stand" if issued without the required contested case hearing. Mauna Kea Anaina Hou v. BLNR, 136 Hawai'i 376, 380-381 (2015). The court also notes that A&B/EMI, like BLNR, 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 whichever term is used) following a BLNR hearing that complies with constitutional requirements for a contested case hearing.

6. Maui County joined several but not all of BLNR's requests, and joined A&B/EMI's request that the permits remain in place if no stay was issued. Maui 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.

7. 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. (See filings of 6/28/21 at 12:35 PM and 12:38 PM.)

8. The permits at issue are hereby modified as follows: **the stream diversions covered by the permits at issue are hereby limited to no more than 25 million gallons of water per day (averaged monthly) from east Maui streams. 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.** This should be more than enough water to allow all users the water they require, while hopefully reducing apparent or potential waste. Any provision of the permits at issue contrary to the modification in this paragraph is hereby vacated.

9. The court also grants A&B/EMI's request that its underlying **request** for the permits at issue still be in effect. In other words, there need be no delay by BLNR requiring a new submission requesting "new" permits. A&B/EMI may supplement their prior/pending request for the permits at issue based on new information, if they choose to.

10. The court retains jurisdiction to further modify the permits at issue if necessary. This retention of jurisdiction will last until a contested case hearing is held on the permits at issue. If it appears to any party that the court's modification may or is leading to any shortage of water for the County, for Mahi Pono, or for other recognized beneficiaries, that party is welcome to immediately contact the court so that an expedited process can be set to hear and address any problems immediately.

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11. The court repeats its prior statements that it does not want to be in charge of the specifics of east Maui water distribution. That role should be filled by others with more expertise and experience. But the court will not risk a vacuum which causes hardship to those on Maui who rely on the water at issue. Therefore, this court's authority, granted by the legislature through HRS 91-14, and HRS 604A-2(b) and granted by the constitution and the obligation to protect public trust resources, will have to suffice until a better option emerges. Until then, if the parties can agree on any terms to further modify the permits, the court is more than willing to hear such requests.

12. This is a "short-form" order because of multiple pressing matters currently requiring the court's time, and because the court will not allow the unconstitutional status quo to continue any longer. The parties are free to submit proposed detailed orders and findings pursuant to Rule 23 or other authority no later than August 16, 2021, absent other request. The court will then settle any such proposed orders to formally finalize this Ruling and Order.

SO ORDERED. Dated: July 30, 2021, at 4:20 PM.

/s/ Jeffrey P. Crabtree



Judge of the above-titled court

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