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ALEXANDER & BALDWIN, INC.
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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case
Regarding the Continuation of Revocable
Permits (RPs) for Tax Map Key Nos.
(2) 1-1-001 :044 & 050; (2) 2-9-014:001,
005, 011, 012 & 017; (2) 1-1-002:002 (por.)
and (2) 1-2-004:005 & 007 for Water Use on
the Island of Maui to Alexander & Baldwin,
Inc. (A&B) and East Maui Irrigation
Company, LLC (EMI) for the remainder of
the 2021 RPs, if applicable, and for their
continuation through the end of 2022

DLNR File No. CCH-LD-21-01

APPLICANTS ALEXANDER &
BALDWIN, INC. AND EAST MAUI
IRRIGATION COMPANY, LLC'S
OPENING BRIEF;

APPENDIX A-F

**APPLICANTS ALEXANDER & BALDWIN, INC. AND
EAST MAUI IRRIGATION COMPANY, LLC'S OPENING BRIEF**

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I. INTRODUCTION

Applicants Alexander & Baldwin, Inc. (“**A&B**”) and East Maui Irrigation Company, LLC (“**EMI**”) respectfully submit their opening pre-hearing brief.

The “purpose of this contested case hearing is to decide whether A&B/EMI’s request for the continued holdover of the four Revocable Permits for the 2021 and 2022 calendar years should be granted.” Minute Order No. 8. The subject Revocable Permits are S-7263, S-7264, S-7265, and S-7266 (collectively, the “**RPs**”). The hearing is limited to “evidence and arguments to address whether any *new* evidence that [the parties] *could not* have presented during the [August 2020 trial in *Sierra Club v. Dept. of Land & Nat. Res.*, Civ. No. 19-1-0019-01 JPC, in the Circuit Court of the First Circuit, State of Hawaii (the ‘**Trial**’)] supports their argument that the Revocable Permits at issue should, or should not, be continued.” Minute Order No. 8 (emphases in original). Each party is “allowed to present *new* information that it could not have offered during the mid-2020 trial that is not irrelevant, immaterial, or unduly repetitious.”¹ Minute Order No. 7.

The Board of Land and Natural Resources’ (“**BLNR**”) decisions to continue the RPs for calendar years 2019 and 2020, respectively, were at issue in the Trial. Following the Trial, the Honorable Jeffrey P. Crabtree ruled that the “BLNR did not fail in its duties under either a constitution balancing test or under its public trust duties” in approving the continuation of the subject RPs. Appendix A, 4/6/2021 Findings, Conclusions, Decision & Order (“**Trial Order**”) at p. 1. The same framework used by BLNR in determining to continue the RPs for calendar years 2019 and 2020 should be applied here, given that Judge Crabtree affirmed that said framework satisfied the applicable constitutional and statutory requirements.

¹ Consistent with the Hearings Officer’s minute orders, A&B/EMI will not re-submit exhibits or witness testimony that are part of the Trial record to support its application for the remainder of calendar year 2021 and calendar year 2022.

Accordingly, A&B/EMI will supplement the existing record, which includes evidence submitted in the Trial and to the BLNR at the November 13, 2020 meeting,² with updated information. This updated information will include, but is not limited to: Mahi Pono’s farm plans for the remainder of calendar year 2021 and calendar year 2022, the anticipated water needs for 2022, updates to the status of the Commission on Water Resource Management (“CWRM”) proceedings regarding diversion modifications and restorations, and updates to the most recent quarterly report submitted to the BLNR on October 29, 2021 (“Q3 2021 Report”). See A&B/EMI written testimony.

The supplemental evidence supports the prior record created by the Trial and November 13, 2020 meeting and demonstrates that continuing the RPs for the remainder of calendar year 2021 and calendar year 2022 would be in the best interest of the State and consistent with the public trust doctrine.

II. BRIEF SUMMARY OF RELEVANT BACKGROUND

For the past 140 years, EMI, a subsidiary of A&B, has owned and operated a ditch system that diverts surface water emanating in part from State lands in East Maui and transports it to Central and Upcountry Maui for agricultural, domestic, and other purposes (“EMI Ditch System”). See *Maui Tomorrow v. State, Bd. of Land & Nat. Res. of State of Hawai‘i*, 110 Hawai‘i 234, 236, 131 P.3d 517, 519 (2006).

The RPs authorize the use of and diversion of water from State lands designated as Nahiku, Keanae, Huelo and Honomanu (collectively, the “RP Areas”) which covers 33,000 of the approximately 50,000 acres of the east Maui watershed. The RPs have a maximum term of one year and are terminable upon 30-days’ notice.

The water diverted pursuant to the RPs is used by the County of Maui (the “County”) to supply its 35,000 Upcountry and Nahiku customers as well as Mahi Pono for its diversified agriculture operations in central Maui that provides jobs, grows the economy, keeps important

² Pursuant to Hawai‘i Administrative Rules § 13-1-32.4, “[r]ecords directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such record.” Information considered by the BLNR in connection with the RPs prior to and during the November 13, 2020 public meeting is thus part of the record in this contested case hearing.

agricultural lands (“**IAL**”) productive, and promotes food security and sustainability. Historically, the water diverted from the EMI Ditch System was used to irrigate Hawaiian Commercial & Sugar (“**HC&S**”) sugar cane crops in central Maui. At the height of sugar cane production, approximately 165 million gallons of water per day (“**mgd**”) were diverted from the east Maui watershed.

Following the cessation of sugarcane cultivation and the sale of HC&S’s former sugar cane lands to Mahi Pono, the amount of water diverted from the east Maui watershed dropped dramatically. Most recently, during the third quarter of 2021, diversions from the RP Areas averaged approximately 17.79 mgd. This amount is anticipated to increase as Mahi Pono continues its farm buildout.

A. In 2001, A&B/EMI Submitted Its Application for a 30-Year Lease.

The RPs are an interim measure to allow the continued diversion of water while a long-term lease is sought. The long-term lease process began on May 14, 2001 when A&B/EMI submitted an application to the BLNR for a 30-year lease to continue using water sourced in streams in East Maui (“**Application**”). Nā Moku Aupuni O Ko’olau Hui (“**Nā Moku**”) requested and was granted a contested case hearing to challenge the legality of the Application’s proposed disposition of public lands and resources (the “**Water License CCH**”). Pending a decision in the Water License CCH, the BLNR put the RPs into holdover status, first at its May 25, 2001 meeting and again at its May 24, 2002 meeting.

B. CWRM Sets IIFS For Certain East Maui Streams.

Also in May 2001, Nā Moku filed with CWRM 27 petitions to amend the interim instream flow standards (“**IIFS**”) for certain streams in the east Maui watershed which were the subject of the Application (the “**IIFS Petitions**”). After some litigation, CWRM convened a contested case hearing (the “**IIFS CCH**”) on all 27 petitions.

The IIFS CCH consisted of 15 days of hearings, the live testimony of 36 witnesses, written testimony of 16 witnesses, and approximately 550 Exhibits. On June 20, 2018, CWRM issued its 271-page Findings of Fact, Conclusions of Law, & Decision and Order (“**CWRM**

D&O”) resolving the 27 IIFS Petitions filed by Nā Moku.³

1. CWRM found the EMI Ditch System was a “single, coordinated system”.

The CWRM D&O described the EMI Ditch System as follows:

The ditch system was constructed in phases, beginning in the 1870s and extending to the completion of the current system in 1923. *It remains a valuable asset that delivers offstream public trust benefits such as drinking water, as well as irrigation water for reasonable and beneficial uses. It is a complex system with 388 separate intakes, 24 miles of ditches, 50 miles of tunnels, as well as numerous small dams, intakes, pipes, and flumes.* ... It is a gravity flow ditch system, driven by the higher elevation diversions in the wetter, eastern portion of the watershed.

CWRM D&O, Executive Summary, at page iii (emphasis added); *see also id.* at p. 13, ¶ 43-44; *id.* at p. 266, ¶ 151.

CWRM found the EMI Ditch System “cover[s] four watersheds of approximately 50,000 acres, of which 33,000 acres are owned by the State, and 17,000 acres are owned by EMI.” *Id.* at p. 13, ¶ 43-44. CWRM recognized that the EMI Ditch System is “maintained as a single, coordinated system,” *id.* at p. 140, 232, ¶ 538, 866, and concluded that “[t]he reduction in diversions does not by itself compromise the structural integrity of the ditch system so long as it continues to be maintained as a single coordinated system.” *Id.* at p. 266, ¶ 151 (emphasis added). CWRM explicitly stated that its intent in setting the amended IIFS was “*to allow for the continued use and viability of the EMI Ditch System*” and thus, it would “not require the complete removal of diversions unless necessary to achieve the IIFS.” *Id.* at p. 269, ¶ k (emphasis added).

³ The CWRM D&O was admitted into evidence at Trial as joint exhibit J-14. *See* Minute Order No. 8 (“parties may also refer to trial exhibits from the Trial”). Given that the CWRM D&O issued in June 2018, before the August 2020 Trial, any issues addressed in the D&O could have been presented during the Trial and should not be duplicated in this contested case hearing. *See* Minute Order No. 8 (limiting evidence and arguments to new evidence that could not have been presented during Trial); Minute Order No. 7 (same).

During the BLNR’s August 13, 2021 meeting when it granted Sierra Club’s request for a contested case hearing, the BLNR stated: “It is the intent of the Board that the contested case hearing not duplicate matters decided in the trial at the Environmental Court or the 2018 CWRM decision.” BLNR 8/13/2021 Meeting Minutes, p. 9-10 re: Item D-4, *available at* <https://dlnr.hawaii.gov/wp-content/uploads/2021/10/Minutes-210813.pdf>.

2. CWRM intended to provide sufficient water for diversified agricultural uses.

CWRM noted that the “prioritization of the East Maui Streams is based on the ‘biggest bank for the buck’ concept, where priority is placed on streams with the greatest potential to increase suitable habitat for native species.” *Id.* at p. 21, ¶ 65. CWRM “recognized that there are streams for which restoration of flow would not result in significant biological or ecological gains and that the water may be better used for noninstream uses.” *Id.* at p. 259, ¶ 129. CWRM “also recognized that *there is significant value in the noninstream uses which include municipal use, which includes domestic use, and agricultural use.*” *Id.* at p. 259, ¶ 130 (emphasis added). The value of the noninstream uses “also ensures the continued presence of agriculture in central Maui, a value which has been incorporated by the community through its inclusion in the Maui Island Plan/General Plan 2030, the Countywide Policy Plan, and the various Community Plans.” *Id.* CWRM expressly stated that its intent was “to ensure that a sufficient amount of offstream water is available to support the cultivation of diversified agricultural crops on lands designated as [Important Agricultural Lands (“IAL”)] in central Maui. Our best estimate is that we have provided for about 90% of the irrigation needs for 23,000 acres of IAL.” *Id.* at p. vi.

CWRM recognized that “[t]he public interest includes not only protecting instream values *but also preserving agricultural lands and assuring adequate water supplies for Maui.*” *Id.* at p. 267, ¶ d (emphasis added). CWRM stated that it “[d]id not require that every diversion on every tributary be removed or modified, [CWRM was] only looking at modifications to main stem and major diversions to accomplish the amended IIFS[.]” *Id.* at p. 269, ¶ j. CWRM further noted that how stream diversions were to be modified “will be before [CWRM] in a subsequent process.” *Id.*

C. CWRM is Currently Considering Applications for Modifications of Diversion Structures.

To address the modifications of stream diversion structures needed to comply with the 2018 CWRM D&O, A&B/EMI filed applications for stream diversion work permits for different categories of stream diversion works on certain taro streams, *i.e.*, Categories 1, 2, 3, and 4, as requested by CWRM staff. The CWRM proceedings addressing the applications for stream diversion work permits are ongoing. Lucienne de Naie, Sierra Club’s Maui Group Chair,

participated in some of those CWRM proceedings, testifying on behalf of Sierra Club in opposition to the proposed stream diversion work permits.

D. Sierra Club’s 2019 Lawsuit Unsuccessfully Challenged the BLNR’s Continuation of the RPS for 2019 and 2020.

Pursuant to a request by A&B and EMI to continue the RPs for calendar year 2019, the BLNR approved the continuation of the RPs subject to certain conditions. At its October 11, 2019 meeting, the BLNR considered the continuation of the RPs for calendar year 2020. After receiving the BLNR staff submittal, written and oral testimony and engaging in discussion, the BLNR unanimously voted to continue the RPs for calendar year 2020.

On January 7, 2019, Sierra Club filed a Complaint in the Circuit Court of the First Circuit, State of Hawai‘i, captioned *Sierra Club v. Dept. of Land & Nat. Res.*, Civil No. 19-1-0019-01 JPC (the “**2019 Lawsuit**”). The lawsuit challenged the BLNR’s November 2018 decision to continue the RPs for calendar year 2019, asserting among other things that the BLNR breached its public trust duties in rendering its decision. On December 6, 2019, Plaintiff filed its First Amended Complaint, adding allegations related to the BLNR’s October 2019 decision to continue the RPs for calendar year 2020. Judge Crabtree presided over the 2019 Lawsuit.

The lawsuit culminated in the Trial before Judge Crabtree between August 3 and 17, 2020. Prior to and throughout the Trial, Sierra Club argued that the continuation of the RPs and diversion of water from the RP Areas did not provide adequate protections to 13 streams,⁴ address the harm caused by diversion structures, hold A&B to its burden to justify commercial use, and ensure A&B clean up debris. *See* Appendix B (Sierra Club’s 7/31/2020 Trial Memo) at 3. In arguments relating to motions in limine, counsel for Sierra Club stated they would be “arguing four major points in trial”: (1) “the Board failed to protect the 13 streams that it is allowing Alexander & Baldwin to drain dry”; (2) “there’s trash littering public land”; (3) “[t]he Board failed to set any deadlines or make any requirement that the diversion structures be modified or altered in any way by any time”; and (4) “the burden that the Board failed to hold Alexander & Baldwin to,” meaning “whether and how much water should leave the streams and

⁴ The 2019 Lawsuit involved 13 “streams” for which Nā Moku did not petition to amend IIFS: Puakea; Kōlea; Punaluu; Ka‘aiea; ‘O‘opuola; Puehu; Nailiilihaele; Kailua; Hanahana; Hoalua; Waipio; Mokupapa; Ho‘olawa Stream (Ho‘olawa ili and Ho‘olawa nui tributaries). Appendix A, Trial Order, at p. 11 ¶ G.

be taken by Alexander & Baldwin/EMI to Central Maui.” Appendix C (7/31/20 Tr.) at 46:25-48:25.

Sierra Club’s counsel reiterated these same four arguments during his opening statement: “The evidence in this case will show four things. First and most importantly, DLNR failed to protect the streamflows within 13 streams. Second, DLNR failed to deal with the harmful diversion structures on public land. Third, DLNR failed to hold Alexander & Baldwin to its burden. And fourth, DLNR failed to ensure that A&B cleaned up its trash that litters public land.” Appendix D (8/3/20 Tr.) at 16:5-16:11. And again during closing arguments, Sierra Club’s counsel re-emphasized the contention that BLNR (1) “failed to protect 13 streams”; (2) “failed to address the harmful diversion structures on public land”, (3) “failed to scrutinize A&B’s request for public water from these streams”, and (4) “failed to make sure that A&B cleaned all its mess that litters public land.” Appendix E (9/24/20 Tr.) at 8:25-9:8.

E. Judge Crabtree Ruled that the BLNR Did Not Fail in Its Duties in Approving the Continuation of the RPs for Calendar Years 2019 and 2020, Respectively.

On April 6, 2021, Judge Crabtree issued the Court’s findings, conclusions, and decision and order (“**Trial Order**”). The Court ruled for Defendants and held that in deciding to continue the RPs for calendar years 2019 and 2020, “BLNR did not fail in its duties under either a constitution balancing test or under its public trust duties.” Trial Order, at p. 1 ¶ 1.

Judge Crabtree ruled: “Given that hold-over RPs are allowed, per the above FOFs, the *court concludes the Board had enough information to reasonably conclude that allowing the continued holdover of the two RPs for one year each would be in the public interest and meet the Board’s constitutional duty to conserve and protect agricultural lands and promote diversified agriculture and other beneficial uses.*” *Id.* at p. 39, ¶ 42 (emphasis added).

Judge Crabtree ordered that judgment shall enter in favor of all Defendants on all claims alleged in Sierra Club’s First Amended Complaint filed December 6, 2019. *Id.* at p. 46.

F. In November 2020, BLNR Continued the RPs for 2021.

Following the Trial, on November 13, 2020, the BLNR voted to continue the RPs for a one-year period through December 31, 2021 (“**November 2020 Approval**”).

Prior to the November 13, 2020 BLNR meeting at which the BLNR was to decide on the renewal of the RPs for 2021, the BLNR staff prepared a staff submittal that was presented to the BLNR members. Appendix F. The staff submittal recommended that in addition to any pre-

existing requirements, the BLNR approve the continuation of the RPs subject to the following requirements:

1. Permittee shall cooperate with CWRM and [Division of Aquatic Resources (“**DAR**”)] in studies, site inspections and other actions as necessary to address the streams in the license areas not covered by the CWRM order.
2. Permittee shall work with CWRM and [Division of Forestry and Wildlife (“**DOFAW**”)] to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in their quarterly reports.
3. If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.
4. For water used for agricultural crops, Permittee are to estimate how much water is required for each crop per acre per day.
5. Permittee shall 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.
6. Permittee shall pay the 2021 monthly rent amounts as determined [in the staff submittal].
7. “Trash and debris” shall be further defined as “any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is).”
8. System losses and evaporation shall not be considered as a waste of water.

Appendix F (staff submittal) at p. 26-27.

Ultimately, the staff submittal recommended that the BLNR: (1) find that the continuation of the subject revocable permits is consistent with the public trust doctrine, (2) declare that, after considering the potential effects of the proposed dispositions as provided by HRS Chapter 343, and Hawai‘i Administrative Rules (“**HAR**”) Chapter 11-200.1, these projects will probably have minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment, and (3) subject to the terms and conditions noted in the submittal, approve the holdover or continuation of the revocable permits on a month-to-month basis for another one-year period through December 31, 2021. *Id.* at p. 27.

Prior to the November 13, 2020 BLNR meeting, Sierra Club filed a petition requesting a contested case hearing. The BLNR denied the petition following an executive session.

The BLNR also considered an Instream Flow Standard Assessment Report (“**IFSAR**”) Summary dated October 2020 for non-petitioned streams within the EMI Ditch System. *See* Appendix F (staff submittal) at p. 25 (“CWRM staff has developed a draft Instream Flow Standard Assessment Report (IFSAR) Summary, which is included as part of the Appendix for the Board’s information.”). During the November 13 meeting, the BLNR reviewed a powerpoint presentation by Dr. Ayrton Strauch, hydrologist for the instream protection and management branch of CWRM, regarding the IFSAR. Dr. Strauch explained CWRM’s conclusion in the IFSAR, that “the non-petitioned streams support limited to no recruitment or reproduction and ***existing diversions have minimal impact on the life-history of native aquatic biota.***” IFSAR at p. 15 (emphasis added). BLNR member Chris Yuen pointed out the additional information regarding the non-petition streams available to the BLNR, particularly the IFSAR report and noted the IFSAR’s conclusion: “thus the non-petition streams support limited to no recruitment or reproduction and existing diversions have minimal impact on the life history of the native aquatic biota.” 11/03/2020 BLNR Meeting audio recording at 6:23:17 - 6:24:09, available at <https://files.hawaii.gov/dlnr/meeting/> audio/Audio-LNR-201113.m4a. Member Yuen went on to explain that although the IFSAR might not be “the last and final word” on the non-petition streams, that information was sufficient to allow diversions from streams to continue for calendar year 2021. *Id.* at 6:23:17 - 6:24:09. After receiving and considering the above information, as well as extensive written and oral testimony, the BLNR adopted the staff recommendations with the following conditions:

1. Old conditions remain in effect to the extent they are consistent with new conditions.
2. Include a representative of the Huelo Community Association to the interim discussion group first authorized in 2018.
3. Permittee shall look into supplying the Maui Invasive Species Committee with water, and if feasible, and despite it not being an agricultural use, be considered a reasonable and beneficial and permitted use under the RP.
4. Regarding staff recommendation #5, in reviewing efficiency upgrades to their system, Permittee is to work with the Maui Fire Department to determine what their exact needs are.
5. Statement of intent- the Board intends 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.

State of Hawai‘i Bd. of Land & Nat. Res., Minutes for the Bd. of Land & Nat. Res. (Nov. 13, 2020), *available at* <https://dlnr.hawaii.gov/wp-content/uploads/2021/01/Minutes-201113.pdf>.

G. Sierra Club Appealed to the Circuit Court the BLNR’s Denial of Its Request for a Contested Case Hearing and Decision to Continue the RPs for 2021.

On November 17, 2020, Sierra Club filed its notice of appeal to the Circuit Court of the First Circuit, State of Hawai‘i, in the case captioned *Sierra Club v. Board of Land and Natural Resources et al.*, 1CCV-20-0001541 (“**2020 Appeal**”), appealing from the BLNR’s November 13, 2020 decisions denying Sierra Club’s request for a contested case hearing and approving the continuation of the RPs for 2021. Judge Crabtree presided over the 2020 Appeal.

On August 23, 2021, Judge Crabtree entered his order deciding the 2020 Appeal (the “**August 2021 Order**”). Based on Sierra Club’s contention that it “had available to it new evidence on the permit renewals - *information and issues that apparently arose after the trial*”, Judge Crabtree ordered the BLNR to hold a contested case hearing on the RPs (assuming a proper request was made). August 2021 Order, pp. 3, 9.

On August 13, 2021, the BLNR granted Sierra Club’s request for a contested case hearing on the remainder of the 2021 RPs, if applicable, and for their continuation through the end of 2022 (the “**RP contested case hearing**”).

III. THE RPS SHOULD BE APPROVED FOR 2021 AND 2022

Approval of the RPs is governed by standards imposed by the public trust doctrine incorporated into article XI, sections 1 and 7 of the Hawai‘i Constitution, and HRS §§ 171-55 and 171-58. With respect to the applicable statutes, “[t]he Board’s powers include the right to dispose of water rights by permit for temporary use on a month-to-month basis under those conditions *which will best serve the interests of the State*”⁵, HRS § 171-58(c), and may allow the permit to continue on a month-to-month basis for additional one year periods. HRS § 171-55.” Trial Order at p. 34, ¶ 34 (emphasis added).

“Haw. Const. art. XI, § 7 specifically relates to water resources, stating that: ‘The State has an obligation to protect, control and regulate the use of Hawaii’s water resources for the

⁵ Generally, actions that satisfy the requirements of the public trust doctrine are in the “public’s best interests.” *Waiāhole I*, 94 Hawai‘i at 196, 9 P.3d at 508 (Ramil, J., dissenting).

benefit of its people.” Trial Order at p. 31, ¶ 4. “[A]rticle XI, section 1 of the Hawai‘i Constitution requires the state both to ‘protect’ natural resources and to promote their ‘use and development.’ The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use.” Trial Order at p. 31, ¶ 5 (quoting *In re Water Use Permit Applications*, 94 Hawai‘i 97, 138-39, 9 P.3d 409, 450-51 (2000) (“*Waiāhole I*)). “This ‘dual mandate’ means that the State must not always choose maximum protection. While the State should ‘protect public trust uses whenever feasible,’ the Hawai‘i Supreme Court does not define ‘feasible’ in this context as ‘capable of achievement.’” Trial Order at p. 31, ¶ 6.

As set forth below, Judge Crabtree affirmed the BLNR’s recent decisions approving the continuation of the RPs for calendar years 2019 and 2020 and determined that said decisions satisfy constitutional standards. Thus, the BLNR should continue to use the same framework to consider the continuation of the RPs for the remainder of calendar year 2021 and calendar year 2022. Sierra Club’s attempts to re-litigate the Trial and impose new burdens upon A&B/EMI should be rejected.

A. BLNR’s Prior Decisions to Continue the RPs Employed the Appropriate Framework and Were Affirmed by Judge Crabtree.

The Trial and Judge Crabtree’s resulting Trial Order covered in exhaustive detail the BLNR’s decisions to continue the RPs for calendar years 2019 and 2020 and how those decisions satisfied the BLNR’s constitutional duties under the public trust doctrine. *See* Trial Order at p. 30-46. The Court fully addressed Sierra Club’s complaints centering on “how these decisions are being made, whether the proper and necessary information is available, and whether the required criteria were considered,” *id.* at p. 4, and ruled in favor of Defendants on the procedure used to approve the continuation of the RPs.

Specifically, the Court considered the BLNR’s process for approving the RPs in light of the dual mandate imposed by the public trust doctrine, a “higher level of scrutiny” for proposed private commercial use, the standards of reasonableness required of the State as trustee under the public trust, and the BLNR’s statutory authority under HRS §§ 171-55 and 171-58. Trial Order at pp. 30-34. The Court held that the “threshold burden” on A&B was to prove “its actual water needs for its proposed future uses ‘insofar as circumstances allow,’” and the “lack of complete information, even potentially useful information, does not prohibit the Board from allowing offstream use.” *Id.* at p. 37, ¶¶ 32-33. The Court also considered that “permit applicants must

also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources,”⁶ and “[w]hen the matter before the agency ‘involves an allegation of harm that is not readily ascertainable, the [agency] may nevertheless permit existing and proposed diversions of water if [the applicant] can demonstrate that such diversions are reasonable-beneficial notwithstanding [the potential harm].’” *Id.* at pp. 37-38.

After considering the foregoing standards, the Court ruled that authorizing the continuation of the RPs for calendar years 2019 and 2020 satisfied the BLNR’s constitutional duties. *Id.* at pp. 39-40. The Court’s specific rulings on the issues of alternative water sources and other relevant factors are outlined below.

1. A&B/EMI satisfied any “threshold” burden of proving actual water needs for proposed future uses.

The Court found it undisputed that the water diverted by A&B/EMI was being used for diversified agriculture. Trial Order at p. 38, ¶ 39. The Court concluded that it was reasonable for the BLNR to put a 45 mgd limit on how much water A&B could withdraw for 2020. *Id.* at p. 20, ¶ 6. The Court considered, among other things, that the County of Maui Dept. of Water Supply receives water from the Ditch System, and that A&B/EMI had reported diversions of 20-25 mgd on average for 2018, 27 mgd on average for 2019, and 27.79 mgd on average for 2020. *Id.* at p. 17.

The Court ruled:

[I]t was reasonable for the BLNR to put a 45 MGD limit on how much water A&B could withdraw for the 2020 calendar year. The court cannot fault Mahi Pono or BLNR for wanting a ‘cushion’ of available water that might be more than what was actually used was preferable to running short of water needed to support Mahi Pono’s developing diversified agricultural plan. This is particularly true where the D&O’s new requirements had to be met first (restoring all or parts of many streams), when even at a maximum of 45 MGD, this was still far less than in 2013, and was less than 50% of the estimated 93 MGD available after

⁶ The requirement that “permit applicants must also demonstrate the absence of practicable mitigating measures” derives from *Waiāhole I*, 94 Hawai‘i at 161, 9 P.3d at 985. *Waiāhole I* applies to applications for water use permits for a designated water management area. Here, “it is undisputed that none of the streams are in a designated water management area, and therefore, discussion of what is required for a water use permit is inapposite.” Trial Order at p. 41, ¶ 49. Nevertheless, the Trial Court considered this standard and found that it was satisfied by the record presented to the BLNR in deciding to continue the RPs for calendar years 2019 and 2020. *See id.* at pp. 37-38.

CWRM's IISF were satisfied.

Id. at p. 20, ¶ 6.

2. The Court found no evidence of realistic alternatives or additional mitigation measures.

With respect to the issue of demonstrating the absence of practicable mitigation measures, including the use of alternative water sources, the Court found that it was “not aware of any evidence from any source that there is any present realistic alternative to the EMI ditch system providing the necessary water for upcountry residents and Mahi Pono’s farmers on Maui’s central plain.” Trial Order at p. 24, ¶ L.1.

As to ground water as an alternative, the Court noted that the CWRM D&O had discussed alternative sources of water, and had found that groundwater would be significantly reduced from historic levels when changing to diversified agriculture due to reduced recharge of the groundwater aquifer caused by lower levels of irrigation from diverted east Maui streams, the uncertain tolerance of diversified agricultural crops to brackish water, and the higher costs of pumping groundwater. *Id.* at pp. 24-25, ¶ L.2. The Court found that it was “***not aware of any evidence that groundwater could or would realistically change the current essential need for water via the ditch system.***” *Id.* at p. 25, ¶ L.3 (emphasis added). Accordingly, the Court found and concluded that “***it was reasonable for the BLNR not to require Mahi Pono to rely on using groundwater to irrigate its crops in 2019.***” *Id.* at p. 25, ¶ L.4 (emphasis added).

On a proposed mitigation measure of lining reservoirs, the Court concluded that lining all storage reservoirs to reduce seepage during the storage phase was “a costly solution that likely would not even be designed and completed before the RP expired.” *Id.* at p. 44, ¶ 57.B.

3. The Court found it was reasonable for BLNR to approve the continuation of the RPs in light of the benefits of the uses supported by the water diverted through the Ditch System and the evidence that the 12-13 streams were not likely to suffer irreparable harm.

The Court further considered the balance of reasonable-beneficial uses and potential harm. Trial Order at p. 38, ¶ 37. On the one hand, the Court determined that the “evidence shows and the court concludes that 12-13 streams are not likely to suffer irreparable harm from the temporary impact of the two hold-over RPs at issue.” *Id.* at p. 43, ¶ 56. “[R]eturning water to the streams was not guaranteed to result in ‘H90’ flow [(the minimum flow to provide suitable conditions for growth, reproduction, and recruitment of native stream creatures)], and therefore,

was not guaranteed to restore sufficient habitat to native species,” and the “evidence at trial was clear that even when streams have been diverted for years, they will likely recover if and when flows are returned.” *Id.* at pp. 22-23, ¶¶ 3, 6-7.

On the other hand, the Court was presented with ample evidence of the reasonable-beneficial uses of the water. The Court found “there was substantial testimony and information provided to the Board regarding the water available for allocation (after the CWRM’s IIFS were met) for the diversified agricultural needs of A&B, Mahi Pono, and the County of Maui.” *Id.* at p. 38, ¶ 37. The Court concluded that there was no dispute that the diverted water was used for diversified agriculture on land zoned for agricultural, and that approximately 22,254 acres of the former HC&S lands are designated Important Agricultural Lands, meaning they (1) are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology, (2) contribute to the State’s economic base and produce agricultural commodities for export or local consumption, or (3) are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production. *Id.* at pp. 38-39, ¶ 39.

Ultimately, the Court concluded: “It was reasonable for the Board to find that providing water for A&B, Mahi Pono, and the County’s diversified agriculture operations would provide jobs, grow the economy, keep agricultural lands productive, prevent agricultural lands and the infrastructure supporting them from falling into disrepair, and promote food sustainability.” *Id.* at p. 39, ¶ 40.

4. The Court found it was reasonable for the BLNR to allow CWRM to continue its ongoing proceedings addressing stream diversion modifications.

The Court also addressed the issue of removal or alteration of stream diversion structures in the EMI Ditch System. *See* Trial Order at pp. 26-27. The Court recognized that the CWRM D&O stated that CWRM would decide how diversions would be modified in a subsequent process, and that diversions only needed to be modified if necessary to accomplish the IIFS and allow for the passage of stream biota. *Id.* at p. 26, ¶ O.1. The Court concluded that BLNR was not required to place deadlines on the removal or modification of specific diversion structures:

2. Removal of diversion structures may cause more environmental harm than leaving them in. Ching testimony, 8/04/20 at 17:17-23. ***It was reasonable for the***

BLNR to allow the CWRM to continue its process of determining what modifications are needed for which diversion structures.

3. Removal of diversion structures can require permits and permissions from multiple government entities, which makes setting any firm deadlines problematic.

4. Plaintiff failed to show that the balance of harms requires the BLNR to place deadlines on the removal of specific diversion structures.

5. Given the above, the court finds and concludes the ***BLNR was not required to place a deadline on A&B for the modification of diversion structures to comply with the IIFS.***

Id. at pp. 26-27 (italicized emphasis added).

5. The Court found that the BLNR's existing conditions on the RPs regarding trash removal were reasonable.

The Court also considered Sierra Club's arguments regarding the existence of trash or debris in the RP Areas, and concluded that the BLNR's related conditions imposed upon the RPs were reasonable:

1. In 2017, the BLNR required A&B to clear debris in the license areas, beginning with the more accessible areas and next to the streams. Exhibit J-16 at p. 27. The Board kept the same condition in 2018. *Id.* at p. 8. Status reports for each year basically indicated that work crews were instructed to identify potential material not serving any function. It appears that over time, A&B reported that several hundred feet of old pipe, along with other debris, had been removed. Plaintiff/members have identified what they consider to be trash, but evidence at trial was that at least some and perhaps most of these old pipes are dilapidated but still functional parts of the EMI ditch system. Strauch testimony, 8/14/20 at 171:14-173:7, 161:22-163:12. Other items cannot be removed without an evaluation by CWRM. Strauch testimony, 8/17/20 at 91:8-91:23.

2. Per the above, the BLNR's conditions regarding trash removal in 2018 and 2019 were reasonable.

Id. at pp. 28-29 (emphasis added).

6. Applying the same framework affirmed by Judge Crabtree supports continuing the RPs for the remainder of calendar year 2021 and calendar year 2022.

Given the extensive evidence considered by the Trial Court and the Court's conclusion that information presented to the BLNR to approve the continuation of the RPs for calendar years 2019 and 2020 satisfied the statutory and constitutional requirements, the same framework should be applied to approve the continuation of the RPs for the remainder of calendar year 2021 and calendar year 2022.

For example, Sierra Club has argued in this proceeding that the BLNR is obligated to adopt the framework purportedly set forth in *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai*, 133 Hawai'i 141, 324 P.3d 951 (2014). See Sierra Club's Motion to Obtain Essential Information. However, as Judge Crabtree recognized, the analysis in *Kauai Springs* is not mandatory. *Kauai Springs*, 133 Hawai'i at 174 n. 25, 324 P.3d at 984 n. 25 (“We provide this framework for assistance and **do not indicate that it is mandatory** or that it precludes other analytical approaches that are consistent with the public trust doctrine.”) (emphasis added). “The discussions in *Kauai Springs* and *Waiāhole I* are instructive as to the ‘general principles and factors that an agency must consider when reviewing a permit for the use of a public resource,’” but the “cases do not describe the degree of proof that the Board should require before approving the holdover of a revocable permit under HRS § 171-55 or HRS § 171-58.”⁷ Trial Order at p. 37, ¶ 30.

In light of the Hearings Officer's direction to limit the evidence in this contested case hearing to information that could not have been presented in the Trial, and the extensive analysis of the public trust burdens undertaken in the Trial, A&B/EMI's presentation will be limited to supplementing the existing record, including the evidence submitted prior to and at the November 13, 2020 BLNR meeting, with updated information that arose after the Trial.

B. The Supplemental Evidence Supports Approving the Continuation of the RPs for the Remainder of Calendar Year 2021 and Calendar Year 2022.

Pursuant to Hawai'i Administrative Rules § 13-1-32.4, “[r]ecords directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any

⁷ In *Kauai Springs*, the Kauai planning commission was addressing a new application for zoning permits to allow “a water harvesting and bottling operation,” and the commission concluded that it had not received any “substantive evidence” that the applicant “had legal standing and authority for its proposed water use.” 133 Hawai'i at 153, 324 P.3d at 963. The position that the Kauai planning commission found itself in, struggling to understand the impacts of the proposed water use, is **nothing** like the position of the BLNR here, which has a lengthy history with the EMI Ditch System and the subject RPs going back to at least 2001, when A&B/EMI submitted the Application for the long-term 30-year lease to the BLNR.

The decision in *Waiāhole I* addressed the burdens on permit applicants in designated Water Management Areas. *Waiāhole I*, 94 Hawai'i at 111-12, 9 P.3d at 423-24. Here, “it is undisputed that none of the streams are in a designated water management area, and therefore, discussion of what is required for a water use permit is inapposite.” Trial Order at p. 41, ¶ 49.

party may object, in the manner provided in section 13-1-35, to any part of such record.” Information considered by the BLNR in connection with the RPs prior to and during the November 13, 2020 public meeting is thus part of the record in this contested case hearing and supports the approval of the continuation of the RPs for the remainder of calendar year 2021 and calendar year 2022.

In the 2020 Appeal, Sierra Club argued that a contested case hearing was necessary because, among other things, “new evidence” was available, such as “DLNR’s own Division of Aquatic Resources recommended that restoring four more of the streams should be a high priority.” August 2021 Order at p. 3 ¶ 9. While this “new evidence” may have been a basis for Judge Crabtree’s decision that Sierra Club is entitled to a contested case hearing, it does not support denying A&B/EMI’s request to continue the RPs, particularly in light of the overwhelming evidence presented by Dr. Strauch and his conclusion that “the non-petitioned streams support limited to no recruitment or reproduction and *existing diversions have minimal impact on the life-history of native aquatic biota.*” IFSAR at p. 15 (emphasis added).

Indeed, the existing record along with the supplemental evidence to be provided by A&B/EMI only further supports that the RPs should be approved for the remainder of calendar year 2021 and calendar year 2022. This evidence includes, but is not limited to:

- A&B/EMI’s continued compliance with permit conditions imposed by the BLNR in connection with the continuation of the RPs, with the most recent quarterly status report (“**Q3 2021 Report**”) submitted to the BLNR on October 29, 2021. Ex. X-6.
- Updates to the Q3 2021 Report, including Mahi Pono’s 2021 diversified agricultural water usage and anticipated water needs for 2022. *See* C. Howe written testimony.
- Mahi Pono’s efforts to increase the efficiency of water use on the farm. *See* C. Howe written testimony.
- Status of proposed work for diversion structures relative to the proceedings before CWRM regarding the modification, removal and abandonment of stream diversion structures to comply with the CWRM D&O. *See* Q3 2021 Report and M. Vaught written testimony.

- Status of EMI's standard operating procedures to identify and remove trash and debris from the RP Areas. *See id.*
- Updates to categories of users of water diverted pursuant to RPs. *See Q3 2021 Report and G. Nakama written testimony.*

As demonstrated by the supplemental evidence and the substantial existing record from the Trial and November 13, 2020 BLNR meeting, continuing the RPs for the remainder of calendar year 2021 and calendar year 2022 is in the best interests of the State and consistent with the public trust doctrine.

IV. CONCLUSION

A&B/EMI respectfully request that the BLNR continue the RPs for the remainder of calendar year 2021 and calendar year 2022.

DATED: Honolulu, Hawai'i, November 12, 2021.

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and EAST MAUI IRRIGATION COMPANY, LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SIERRA CLUB,	)	CIVIL NO. 19-1-0019 (JPC)
	)	(Environmental Court)
Plaintiff,)	
)	
vs.)	
)	
BOARD OF LAND & NATURAL	)	FINDINGS OF FACT AND
RESOURCES; DEPARTMENT OF LAND	)	CONCLUSIONS OF LAW
AND NATURAL RESOURCES; SUZANNE)	
CASE, in her official capacity as)	
Chairperson of the Board of Land and	)	Judge: Jeffrey P. Crabtree
Natural Resources; ALEXANDER &)	
BALDWIN, INC.; EAST MAUI IRRIGATION,	)	Trial started: 8/03/2020
LLC., and COUNTY OF MAUI,	)	Closing Arguments: 9/24/2020
)	
Defendants.)	
_____)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The court rules for Defendants. Sierra Club raised legitimate questions and concerns over the BLNR's decisions on the two hold-over Revocable Permits in 2018 and 2019; however, several broader principles and factual issues guide the court's conclusion that the BLNR did not fail in its duties under either a constitution balancing test or under its public trust duties.

2. This case involves 13 streams in East Maui. Plaintiff alleges that the BLNR violated its public trust duties by not having sufficient information and not fully considering the impact to these 13 streams when deciding whether to renew two annual

“hold-over” revocable permits in 2018 and 2019 for off-stream uses of stream water. These off-stream uses include agriculture, residential customers in up-country Maui, fire-fighting, dust-suppression, and commercial customers. Plaintiff’s allegation in turn relates to the aggregate water flowing from the license area of 33,000 acres of the approximately 50,000 acres of the east Maui watershed. A related question is how much of the diverted water is not being used, and/or is being wasted, and how should the BLNR properly address that issue? These and other questions are all set in a context that includes:

- the historic demise of water-intensive sugar cane and the corresponding reduction of water needed for sugar cane production and other uses. The water needed went from 165 MGD (million gallons per day) during the height of sugar cane production down to 126 MGD (from about 2004-2013 as sugar production declined). It dropped to 40 MGD used in 2016 and down to 24-28 MGD used in 2017;
- a recent transfer of interests from Alexander & Baldwin to Mahi Pono, which is a company starting a new and extensive diversified agriculture venture on Maui;
- BLNR’s practice of using Revocable Permits (1 year maximum, with 30 days notice) to make short-term decisions (the last long-term lease expired in 1986 and a 2001 Contested Case Hearing is apparently still pending). This practice of continuing Revocable Permits was ruled invalid by the Circuit Court, was then addressed by the Legislature, and is currently on appeal to the Hawaii Supreme Court;
- ongoing efforts for a 30-year lease for the watershed, including an extensive EIS;
- an aqueduct collection and distribution system built between 1870 and 1923, in an area with highly variable rainfall, and with limited ability to timely collect data for water monitoring and water use decisions;
- the interrelationship between a) the Commission on Water Resource Management (“CWRM”), which has exclusive jurisdiction over setting in-stream flow standards and in 2018 issued a long-awaited Decision and Order setting IIFS for 27 East Maui streams (but not the 13 at issue in this case), and b) the BLNR;

- all the above in the context of multiple agencies, private and public stakeholders, separate statutes, administrative regulations, and constitutional and public trust principles;

3. **Jurisdiction**. Alexander & Baldwin (“A&B”) and EMI argues this court lacks subject matter jurisdiction. Since this issue is potentially dispositive of all other issues, the court addresses it first.

A. First, as to in-stream values and waste: A&B/EMI argues that a) CWRM is the primary agency for stream issues, including issues of “waste,” b) CWRM has exclusive authority to set in-stream flow standards for the 13 streams, c) this case is a back-door effort to get BLNR to do what CWRM declined to do, d) Kauai Springs, Inc. v. Planning Comm’n of Cnty. of Kauai, 133 Hawai’i 141, 172 (2014) does not render the requirement to exhaust administrative remedies inapplicable to claims for breach of the public trust doctrine, and e) Plaintiff has not initiated a petition regarding the 13 streams with CWRM. A&B argues therefore that Plaintiff failed to exhaust its administrative remedies, depriving this court of jurisdiction on both in-stream flow issues and waste issues. See, Koga Eng’g & Const., Inc. v. State, 122 Hawaii, 60, 91 (2010).

B. Second, regarding the diversion structures: A&B/EMI argues CWRM also has exclusive authority over modifying or removing in-stream diversion structures, and Plaintiff did not request a contested case hearing regarding the modification of stream diversions works in the EMI Ditch System.

C. Plaintiff responds that our Constitution and appellate decisions make clear that BLNR has independent constitutional and public trust duties to preserve and protect our water resources in their natural state for current and future generations. See for example, Kauai Springs, Inc. v. Planning Comm’n of the Cnty. of Kaua’i, 133

Hawai'i 141 (2014); Pila'a 400, LLC v. Bd. of Land & Natural Res., 132 Hawai'i 247, 250 (2014). Plaintiff also argues that this case is about non-stream uses, not about instream flow standards. In other words, Plaintiff argues this case is about BLNR's decision-making in granting the two hold-over Revocable Permits allowing A&B to divert water for non-stream uses such as agriculture, residential use, etc., and that this is not the same thing as setting in-stream flow standards, which is CWRM's responsibility and jurisdiction.

D. The court finds and concludes Plaintiff is correct. BLNR's decisions and policies at issue here do not set instream flow standards for the 13 streams and therefore do not intrude into CWRM's jurisdiction. Rather, at issue here are BLNR's licensing decisions on how much water A&B is allowed to divert for non-stream uses. Plaintiff's complaints center on how these decisions are being made, whether the proper and necessary information is available, and whether the required criteria were considered. Granting Plaintiff the relief it requests simply would not set the instream flow standards for the 13 streams.

4. The license or lease areas. There are four water license areas in East Maui. From east to west, they are known as Nahiku, Keanae, Honomanū, and Huelo ("License Areas"). **Exhibit J-28.** These four areas total about 56,000 acres, with about 33,000 acres owned by the State, and about 17,000 acres owned by EMI. **Exhibit J-14 at p. 36.**

5. The streams. The Commission on Water Resource Management ("CWRM") identified at least 37 streams in the four license areas, as listed below. The streams are generally listed in geographical order from east to west.

- a) Nahiku license area:
 - 1. Makapipi Stream
 - 2. Hanawī Stream
 - 3. Kapaula Stream

- b) Keanae license area:
 - 4. Waiaaka Stream
 - 5. Pa'akea Stream
 - 6. Waiohue Stream
 - 7. Kopiliula Stream
 - 8. Pua'aka'a Stream (a tributary of Kopiliula)
 - 9. East Wailuaiki Stream
 - 10. West Wailuaiki Stream
 - 11. Wailuanui Stream (and Waikani waterfall)
 - 12. Kualani (or Hamau) Stream (a tributary of Waiokamilo stream)
 - 13. Waiokamilo Stream
 - 14. Ohia (or Waianu) Stream (never diverted by A&B/EMI)
 - 15. Palauhulu Stream (and its tributaries Hauoli Wahine and Kano)
 - 16. Pi'ina'au Stream (joins with Palauhulu before reaching the ocean)

- c) Honomanū license area:
 - 17. Nua'ailua Stream
 - 18. Honomanū Stream
 - 19. Punalau Stream (and its tributaries Kōlea and Ulunui)
 - 20. Ha'ipua'ena Stream

- d) Huelo license area:
 - 21. Puohokamoa Stream
 - 22. Wahinepe'e Stream
 - 23. Waikamoi Stream (and its tributary Alo)
 - 24. Kōlea Stream
 - 25. Punaluu Stream
 - 26. Kaaiea Stream
 - 27. Oopuola Stream (and its tributary Makanali)
 - 28. Puehu Stream
 - 29. Naililihaele Stream
 - 30. Kailua Stream
 - 31. Hanahana Stream (and its tributary Ohanui)
 - 32. Hoalua Stream
 - 33. Hanehoi Stream (Huelo, also known as Puolua Stream, is a tributary of Hanehoi Stream)
 - 34. Waipio Stream
 - 35. Mokupapa Stream
 - 36. Hoolawa Stream (and its tributary Hoolawa ili and Hoolawa nui)
 - 37. Honopou Stream (and its tributary Puniawa)

Exhibit J-14 at pp. 40-41.

6. **The ditches.** EMI's ditches generally run perpendicular to the streams. **Exhibit J-29; Vaught testimony, 8/12/20 A.M. Tr. at 36:10-36:21.** The ditches generally flow from east to west, toward the central Maui plain. **Exhibit J-14 at p. 38.** Water can be diverted out of the streams and into the ditches through structures such as gates, pipes, and dams, or the water can flow directly into a ditch. **Exhibit J-14 at p. 50, and Vaught testimony, 8/12/20 A.M. Tr. at 36:10-37:5.** The diversions in East Maui are designed to capture base flow, or "the ground water contribution to stream flow," and not all flow of water. **Strauch testimony, 8/14/20 at 110:5-110:11.** Higher flows, (such as after rain) can bypass diversion structures. These above base flow events occur about 20-30% of the time. **Strauch testimony, 8/14/20 at 112:16-112:19.**

7. **The leases.**

A. The last long-term licenses were issued in the 1950s and 1960s. After they expired, annual revocable licenses were issued by the BLNR. **Exhibit J-14 at p. 37.** The Revocable Permits ("RPs") in effect now were issued by the Board starting in 2000. They are revocable on one month's notice and continue on a month to month basis for one year unless extended by the Board. **Exhibits J-1 to J-4.**

B. In early 2016, A&B announced that sugarcane cultivation was ending and diversified agriculture was beginning. **Exhibit J-14 at p. 32.** Because of this major change, CWRM reopened proceedings. In April, 2016, A&B informed CWRM it intended to fully restore the flow of eight streams identified as "priority" streams by CWRM and the Native Hawaiian Legal Corporation ("NHLC"). **Exhibit 33 at p. 1.** In July, 2016, CWRM issued an interim order in the contested case

regarding the IIFS Petitions ordering that 10 streams remain undiverted: Waiokamilo, East Wailuanui, West Wailuanui, Makapipi, Hanawī, Waiohue, East Wailuaiki, West Wailuaiki, Waikamoi, Kopiliula, and Pua‘aka‘a. **Exhibit J-14 at p. 34.** The Board approved another holdover RP (**Exhibit J-12 at p. 12**), and imposed conditions on A&B/EMI including a maximum diversion of 80 MGD, additional water could be requested if needed, no water be wasted, the diverted water be used for agriculture or County use, and no diversions would be made for the streams listed in CWRM’s 7/18/16 order. **Exhibit J-12 at p. 12.**

C. The 2017 holdover RP also added conditions that A&B clean up debris and provide a specific report regarding removing certain diversions and pipe repairs. **Exhibit J-13 at p. 13.** The re-opened CWRM hearing was in February, 2017.

D. In 2018, holdover RPs were again approved. **Exhibit J-15 and J-16.** The 2018 RP did not include a MGD limit for diversion. Instead, by this time (late 2018) CWRM had issued its long-awaited 6/18/18 D&O which set new in-stream flow standards for many streams, which A&B was to comply with (discussed in more detail below). A&B/EMI was ordered not to waste water, and to use all diverted water for reasonable and beneficial use. **Exhibit J-16 at pp. 7-8.** The 2018 holdover RP was unanimously approved. The Board also denied Plaintiff’s request for a contested case hearing. **Exhibit J-18 at pp. 9-10.**

E. In 2019, the Board again considered a holdover RP. **Exhibit S-50 at pp. 7-9.** A&B submitted a report regarding its compliance with the 2018 holdover RP approval. **Exhibit J-21 at p. 94.** A&B informed the Board it had sold most of its sugar cane agricultural land to Mahi Pono, which became a co-owner of EMI. **Id.** A&B also

reported that about 27 MGD were being diverted from the license area, and was used by Maui County for domestic use as well as for the Kula Agricultural Park, and for fire suppression needs and Mahi Pono's diversified agriculture lands. The Board unanimously approved the 2019 holdover. **Exhibit S-50 at p. 9.** The Board again imposed additional conditions to the RPs, including:

- a. A&B submit quarterly written reports with information on how much water was diverted monthly, broken down by categories. **Exhibit J-21 at pp. 7-8;**
- b. The quarterly reports shall include updates on restoring flow to each stream addressed in CWRM's final D&O; **Id at pp. 8-9.**
- c. Requiring updates on the removal of trash; **Id.**; and that the 13 or 14 streams not covered by CWRM's 6/18/18 D&O be cleaned of debris and status reports provided; **Id.**
- d. A limit of 45 MGD of water diverted, averaged annually **Exhibit S-50 at p. 9;**

F. Another holdover RP (for 2020-2021) was apparently issued after trial in this case, but is not part of this case.

G. On 7/31/19, the ICA in Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071 (Haw. Ct. App. June 18, 2019) held that the holdover RPs were not subject to Chapter 343 requirements. The Supreme Court granted cert (No. SCWC-16-0000071, 11/25/19), the appeal was argued, but no decision has yet issued.

8. The water. Historically, the EMI ditch system delivered about 165 MGD during the height of sugar cane. **Exhibit J-14 at p. 158.** From 2004 to 2013, the average delivery went down to about 126 MGD. **Id.** Sugar cultivation ended in 2016. **Exhibit J-14 at p. 32.** In the first quarter of 2020, the water delivered by EMI was down to about 27.79 MGD on average. **Exhibit J-27 at p. 8.**

9. CWRM's 6/18/18 D&O.

A. This context of this case cannot be fully evaluated or understood by looking only at BLNR's actions or inactions. CWRM is an important decision-maker with exclusive jurisdiction over multiple aspects of in-stream water standards. CWRM has specialized staff and resources that BLNR does not have. CWRM's decisions impact BLNR's decision-making.

B. Definitions. "Instream flow standard" ("IFS") means the amount or flow/depth of water required at a specific location in a stream system at specified times of year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. HRS § 174C-3. An "interim instream flow standard" ("IIFS") is a *temporary* instream flow standard for immediate application, adopted by CWRM without a public hearing. It ends upon issuing an instream flow standard. HRS § 174C-3. IIFS are expressed as a numeric flow rate, measured in cubic feet per second (cfs) or million gallons per day (MGD) that must remain in the stream at a certain location.

Exhibit J-14 at p. 18.

C. CWRM's 6/18/18 D&O arose from 27 Petitions filed by Na Moku, a community organization, involving some 25 streams (the number of "streams" is not always consistent as some are considered tributaries).

D. Before CWRM's D&O issued in 2018, all the East Maui streams were subject to a "status quo" IIFS set back in 1988, per HAR § 13-168-44. This is not particularly helpful, since those 1988 IIFS were not based on numerous important factors, including biological, ecological or recreational value of those streams, and are not sufficient to protect streams. **Case testimony, 8/17/20 at 48:20-48:23, and Exhibit**

S-78. Since the D&O did not address the 13 streams, it is fair to say, and the court finds, that there were no meaningful IIFS for the 13 streams when the BLNR made its decisions in 2018 and 2019.

E. CWRM's 6/18/18 D&O fundamentally changed many streams in the watershed.

1. Ten streams were restored to their natural and full flows (meaning, no diversions). CWRM concluded that restoring flow to streams across the watershed would allow more protection for habitats and result in broader ecological function across the watershed. **Exhibit J-14 at p. 262.**
2. Five streams were restored to 64% of their median base flow, aka "H90 flow." H90 flow is expected to provide 90% of a stream's natural habitat. **Exhibit J-14 at pp. 261-262 and p. 188.**
3. Seven streams were designated as "connectivity" streams, meaning restored to 20% of their median base flow. **Id at p. 262.** These seven streams are "gaining" streams, meaning their flow increases as they move down, often because of additional water entering from ground springs, and therefore they can maintain habitat below the diversions. CWRM specifically found that for these gaining streams, restoration of more normal flow would not result in significant biological or ecological gains, and the water may be better used for non-instream uses. **Id at p. 282.**
4. Finally, CWRM found that 3 streams would not have additional significant benefits from restoration. For example, one of the streams is below the ditch system and has never been diverted. **Id at p. 39.**

F. CWRM's 6/18/18 D&O stated that it was "only looking at modifications to main stem and major diversions to accomplish the amended IIFS ...". The Commission recognized that modifying and fine-tuning the diversions would be addressed later, and complete removal of diversions would only be as necessary to achieve the IIFS. **Id at p. 292.**

G. Na Moku's petitions to CWRM did not involve 13 streams within the license areas:

1. Puakea Stream
2. Kōlea Stream
3. Punaluu Stream
4. Ka'aiea Stream
5. 'O'opuola Stream
6. Puehu Stream
7. Naililihaele Stream
8. Kailua Stream
9. Hanahana Stream
10. Hoalua Stream
11. Waipio Stream
12. Mokupapa Stream
13. Ho'olawa Stream (Ho'olawa ili and Ho'olawa nui tributaries)

Exhibit J-14 at p. 41. These are the streams at issue in the instant case.

10. This litigation. Plaintiffs filed their Complaint in January, 2019. The First Amended Complaint was filed in December, 2019 ("FAC") to add a challenge to the BLNR's 2019 approval of the holdover RP for 2020. The FAC is the operative Complaint in this case. The opening paragraph of the FAC reads:

As it has done annually for more than a decade, in November 2018, the board of land and natural resources (**BLNR**) approved the continuation of revocable permits authorizing East Maui Irrigation and Alexander and Baldwin, Inc. (collectively herein "**A&B**") to use approximately 33,000 acres of state land and to divert millions of gallons of water daily from East Maui streams. It did so, once again, without: the completion of an environmental impact statement (**EIS**); evidence regarding how much water is taken from each stream; a requirement that A&B actually measure how much water it is taking from each stream; an understanding of the harm caused; or efforts to ensure that A&B has complied with permit conditions.

The FAC had three counts:

A. Count 1 alleged a violation of HRS 343. Count 1 was dismissed by an order filed July 22, 2019, granting in part and denying in part A&B's January 28,

2019 Motion to Dismiss, per the ICA's ruling that HRS Section 171-55 nullifies HRS Section 343's requirement for an EA and/or EIS. Carmichael v. Bd. of Land & Nat. Res., No. CAAP-16-0000071 (Haw. Ct. App. June 18, 2019), and cert. granted, No. SCWC-16-0000071 (Haw. Nov. 25, 2019).

B. The trial was primarily about Count 2 of the First Amended Complaint. Count 2 alleges a breach of the public trust. It reads in its entirety:

COUNT 2

(BLNR, DLNR and Chair Case Breached Their Trust Duties)

114. Plaintiff hereby realleges and incorporates by reference all the above allegations.

115. BLNR, DLNR and Chair Case have trust responsibilities to conserve and protect Hawai'i's natural resources.

116. BLNR, DLNR and Chair Case may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

117. BLNR, DLNR and Chair Case have a trust duty to ensure that prescribed measures are actually being implemented.

118. BLNR, DLNR and Chair Case have a trust duty to thoroughly assess possible adverse impacts of the diversion of streams.

119. BLNR, DLNR and Chair Case have a trust duty to seek relevant information when rendering decisions affecting public trust resources.

120. BLNR, DLNR and Chair Case have a trust duty to incorporate conditions in decisionmaking that protect public trust resources.

121. BLNR, DLNR and Chair Case have a trust duty to protect natural stream flow.

122. BLNR, DLNR and Chair Case have a trust duty to ascertain the absence of practicable alternative water sources.

123. BLNR, DLNR and Chair Case have breached their trust duties.

C. The Prayer for Relief in the FAC reads as follows.

PRAYER FOR RELIEF

The plaintiff asks for the following relief:

- A. Declare that the defendants violated HRS chapter 343
- B. Declare that BLNR, DLNR and Chair Case breached their public trust duties.
- C. Declare that BLNR, DLNR and Chair Case violated their HRS chapter 205A obligations.
- D. Declare invalid the BLNR's November 2018 and October 2019 decisions approving the 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.
- E. Based on the balancing of the harms, enjoin Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC from taking more than 25.75 million gallons of water on any day from East Maui (as measured at Honopou Stream) until completion of the HRS chapter 343 process and the proper issuance of a permit, license or lease from the BLNR.
- F. Enjoin the BLNR Defendants from authorizing the diversion of more water from the revocable permit areas than 25.75 million gallons of water daily from east Maui streams – and enjoin A&B from taking more water – unless and until:
 - existing legal obligations are first fulfilled;
 - the applicant(s) upholds its burden in justifying the taking of more water;
 - the BLNR Defendants estimate in good faith how much water would flow in each stream without diversion, how much is currently diverted, and how much more water is proposed to be diverted from each stream;

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- the BLNR Defendants require that the applicant(s) take steps to measure the amount of water taken from individual streams;
- the BLNR Defendants ensure that freshets upon which native species depend will flow below stream diversions, or make a finding consistent with its public trust obligations as to why that is not necessary for the specific stream;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures impede the migration of native aquatic species;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures entrain native aquatic species;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures create mosquito breeding grounds;
- the BLNR Defendants require the removal and alteration of those stream modification structures within a clear timeframe (with a proviso for extensions when compelling reasons so warrant) that (a) are on streams that CWRM has ordered be fully restored; (b) pose the greatest harm to native aquatic species; and (c) create mosquito breeding grounds;
- Hanehoi and Honopou streams are fully restored with the removal or alteration of those diversion structures that impede the migration of native aquatic species or entrain them;
- the BLNR Defendants require that A&B make efforts to control of invasive species on the public land encompassed by the revocable permits;
- the BLNR Defendants provide some level of protection for Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana (Hanawana) Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries);
- the BLNR Defendants take steps to stop the diversion of water being used for purposes that are not “reasonable and beneficial”;
- the BLNR Defendants require the applicant(s) to fully explain and justify the amount of water it needs, including disclosures as to how much water is needed per acre of each crop, and all sources available for irrigation.

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- G. Order BLNR, DLNR and Chair Case to fulfill their public trust duties.
- H. Award the plaintiff its attorneys' fees and costs in bringing this action.
- I. Provide for such other and further relief as the Court shall deem just and proper.

11. Plaintiff's criticism of the BLNR's decision-making. Plaintiff's criticisms regarding the BLNR's decisions to allow the 2018 and 2019 holdover RPs fall into several categories:

A. Lack of information. The amount of water being diverted from each of the 13 streams was essentially unquantified, and the BLNR did not seek the information.

Exhibit 104 at pp. 9-11, and Case testimony, 8/17/20 at 46:10-47:3.

B. The Parham study. This was a study included as part of the DEIS (Draft Environmental Impact Statement). In essence the study concluded that because the diversions were designed to capture so much of the water (100% of normal low flow), when low flow conditions occurred diversions resulted in negative impacts on habitat – up to 85%. **Exhibit J-20 at p. 623, Ching testimony, 8/04/20 at 56:21-24.**

C. Lack of conditions. The BLNR decisions did not assert any conditions to protect the instream use for the 13 streams.

D. Lack of justification. The BLNR did not explain any justification for allowing less water than necessary to better support habitat in the 13 streams.

E. Diversion structures. The BLNR did not adequately require modifications to diversion structures that would better protect habitat, even though DLNR's own DAR (Division of Aquatic Resources) recommended specific modifications to specific diversion structures on specific streams. **Exhibits 16 and J-21 at pp. 161-164 and Vaught testimony, 8/12/20 P.M. at 57:22-58:13.**

F. Where will the increased MGD come from and what impact will that have?

Regarding the 2019 hold-over RP, the diversion was going up from an average use of about 27 MGD to potentially as much as 45 MGD. Plaintiff argues that this cannot be allowed when the BLNR does not know which streams this water would come from and what the impact would be. **Case testimony, 8/17/20 at 46:25-47:5 and 89:5-10.**

G. Increasing the allowable MGD up to 45 MGD without really knowing how much was needed.

12. The BLNR's information and rationale. The BLNR argues it had ample information to make its decisions.

A. Farmers and potential farmers provided testimony that they needed to know necessary water would be available over the long term. **Exhibit AB-68 at p. 19; Exhibit J-13 at p. 13; Exhibit S-38 at pp. 05, 7, 15; Exhibit S-39 at p. 12.**

B. Testimony also supported the core concepts that keeping lands in agriculture benefitted the public interest by providing jobs, food sustainability, food sources, strengthened the state and county economy, and dependable water was essential to achieve those ends. **Exhibit AB-68 at pp. 18-19; Exhibit S-38 at pp. 3-8, 11-12, 15, 21-22, 26-27; Exhibit S-49 at p. 4, 13-15; Exhibit S-39 at pp. 11-13.**

C. Testimony was received regarding the difficulties and uncertainties of the historic change from sugar cane to a "roll-out" of the new model of diversified agriculture, and the need to have enough water to help make that uncertain transition. **Exhibit AB-68 at p. 20; Exhibit S-38 at pp. 3-8; 15, 23, 25, 26-27, Exhibit S-49 at pp. 13-15; Exhibit S-39 at p.10-13.**

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D. The Maui Dept. of Water Supply (“MDWS”) receives water from the ditch system per contracts and MOUs. **Exhibit J-14 at p. 235.** CWRM concluded the MDWS upcountry system covers over 35,000 individuals, businesses, organizations and government facilities, with about 60% of the MDWS upcountry water being for domestic use and 40% for agriculture.

E. The BLNR did not increase the amount of water withdrawn. Rather, it placed a cap of 45 MGD on average. However, A&B was only allowed to actually divert water that was actually needed for reasonable uses. In other words, BLNR argues it prevented waste by only allowing diversion of an amount reasonably necessary for use, as opposed to allowing all diversion up to the 45 MGD limit. The available use information at trial supported this argument. In 2018, A&B reported 20-25 MGD on average was diverted. **Exhibit J-16 at p. 25.** In 2019, A&B reported diversions averaging 27 MGD. **Exhibit J-21 at p. 96.** In 2020, A&B reported an average of 27.79 MGD. **Exhibit J-27 at p. 8.** The 27.79 MGD contrasts sharply with the 126 MGD diverted in 2013, when sugar cane still existed.

F. Testimony at the 2018 meeting showed that the new diversified agricultural plan was still in its formative stages. **Exhibit S-39 at p. 3.** A&B disclosed a potential partner who would farm most of A&B’s land. Water needs were predicted to be similar to A&B’s existing diversified agricultural plan. **Id at pp. 4-6.** The BLNR discussed its reason for not limiting the MGD for the next year. Basically this was because it would be hard to attract new farmers needed to replace sugar with new crops, and in any event it was doubtful that water use would drastically increase over the next year. As for a long-term plan, that was in essence being deferred until the EIS

was completed and the long-term lease process unfolded. Further, the BLNR placed a condition for the 2019 hold-over RP – that no water be wasted and that all diverted water be used for reasonable and beneficial purposes and compliance with the amended IIFS. **Exhibit J-16 at p. 8.**

G. Per CWRM's 6/18/18 D&O, of about 30,000 acres of agricultural land in central Maui, 2/3rds of it was designated as Important Agricultural Lands per HRS Chapter 205. Those lands historically relied on water delivered via the EMI ditch system.

H. System losses. The CWRM D&O analyzed system losses, meaning how much of the diverted water is lost, usually due to seepage, evaporation, and other miscellaneous causes. CWRM decided the historical (2008-2013) amount of system loss was 41.67 MGD or 22.7% of the water received, and that this was reasonable under the then-circumstances, due to a practical inability to measure the water actually lost, the nature of sugarcane cultivation, and the opinion that most of the loss was probably due to the unlined reservoirs used by HC&S. **Exhibit J-14 at pp. 215-217, Volner testimony, 8/11/20 at 130:22-131:4.** CWRM reasoned that since (for the time being) the same basic system would be used for the diversified agriculture effort, the same general amount of system loss was acceptable. **Exhibit J-14 at pp. 216-217.** When Mahi Pono submitted testimony to the BLNR in October, 2019, it predicted using an average of 45 MGD, and it allocated about 10 MGD of the 45 MGD to a category of "Reservoir/Fire Protection/Hydroelectric/Seepage/Evaporation." **Exhibit J-26 at p. 2.** This resulted in a predicted system loss of less than the 22.7% loss CWRM considered reasonable.

I. The BLNR understood that Mahi Pono's farming plan was in development, and Mahi Pono needed a reliable amount of water to be able to attract farming tenants.

Case testimony, 8/13/20 at 190:21-191:4.

J. Setting the 45 MGD limit.

1. A&B testified at the same October, 2019 BLNR meeting that after complying with CWRM's IISF there should be about 93 MGD "excess" water in the streams available for off-stream use. **Exhibit S-51 at p. 50.**

2. The Board approved Mahi Pono's request for a cap of 45 MGD, on average, for the next calendar year. **Exhibit S-51 at pp. 55-57.**

3. The Board required A&B to provide quarterly written updates on the amount of water used monthly, broken down by end-use. **Exhibit J-21 at pp. 7-8**, and required that all water diverted be for reasonable and beneficial uses. **Id at p. 8.**

4. A&B/EMI submitted its first quarterly report to the Board on April 25, 2020. **Exhibit J-27.** A&B reported just 27.79 MGD used on average over the first quarter. **Id at p. 8.** The amount of water reportedly used for diversified agriculture was only 2.50 MGD on average. **Id.** The court finds and concludes that the amount of water actually used by Mahi Pono in the first quarter of 2020 for diversified agriculture was less than the amount it predicted, and this fact does not mean it was improper for the BLNR to rely on Mahi Pono's initial estimates in setting the 45 MGD limit. Mahi Pono was essentially starting from scratch, during a historic change, in a new market where the actual use of water depends on variables that Mahi Pono has little control over. Realistically, the court concludes that Mahi Pono deserves some time and mileage to gain experience and figure things out.

5. Further, the quarterly report also showed an average of 16.44 MGD attributed to “Reservoir/Fire Protection/Evaporation/Dust Control/Hydroelectric.”

Exhibit J-27 at p. 8. The same report showed a column for “system losses” of 22.7% of water delivered, which averaged 6.31 MGD for the first quarter. **Id.** To summarize, the amount of current system losses includes 6.31 MGD plus some unknown amount from the 16.44 MGD “Reservoir” column. **Ching testimony, 8/04/20 at 38:21-39:13.**

The amount of system loss is currently more than 22.7% of water deliveries. However, the current water losses occur after the water leaves the EMI system and is distributed on the farm. **Id.** CWRM recognized that while system losses of over 20% might meet industry standards, modern agribusinesses should invest in better and more efficient infrastructure. **Exhibit J-14 at p. 22.** In that vein, Mahi Pono testified it would invest \$20 million to install more efficient irrigation systems. **Exhibit S-51 at p. 8.**

6. Given all these factors, and applying the law discussed in the COL, the court finds and concludes it was reasonable for the BLNR to put a 45 MGD limit on how much water A&B could withdraw for the 2020 calendar year. The court cannot fault Mahi Pono or BLNR for wanting a “cushion” of available water that might be more than what was actually used was preferable to running short of water needed to support Mahi Pono’s developing diversified agriculture plan. This is particularly true where the D&O’s new requirements had to be met first (restoring all or parts of many streams), when even at a maximum of 45 MGD, this was still far less than in 2013, and was less than 50% of the estimated 93 MGD available after CWRM’s IISF were satisfied.

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J. Weighing the potential harm to stream habitat against the benefits of continuing to divert water from the 13 streams.

1. Of the 13 streams Plaintiff identifies in this case as not addressed by the CWRM 6/18/18 D&O, one of them, Puakea Stream, is a tributary of the Pa'akea Stream -- which was addressed in the D&O. **Exhibit J-14 at pp. 136-140.** The court is not aware of any evidence in this case that water from Puakea Stream is actually diverted. The court spent significant time trying to understand this issue, but was unable to come to a firm conclusion one way or the other. However, the precise status of this one stream does not impact the court's final conclusion(s), and thus the court declines to make any specific findings as to whether this stream is diverted at all.

2. The other 12 streams at issue are all in the Huelo license area. **Id at p. 41.** Ayron Strauch, Ph.D., a hydrologist for CWRM, testified to the Board that the other 27 streams for which CWRM's 6/18/18 D&O re-established full or partial flow, were the largest and most important streams in the area. **Exhibit S-39 at p. 37.** Dr. Strauch testified in the instant trial that his job is to prioritize streams to establish instream flow standards. **Strauch testimony, 8/14/20 at 161:3-11.** Dr. Strauch was a highly qualified witness with extensive experience and the court found him credible. Putting it simply, not all streams are the same in terms of their importance to the water system's health as a whole. To the court, this may have been the most important single piece of information introduced during the entire trial.

3. In evaluating the impacts on habitat, the Division of Aquatic Resources provided a report called "The Use of Hawaiian Stream Habitat Evaluations Procedure to Provide Biological Resource Assessment in Support of Instream Flow

Standards for East Maui Streams” on November 20, 2009 (“DAR Report”). The DAR report used a model called the Hawaiian Stream Habitat Evaluation Procedure (“HSHEP”) to predict the overall “habitat units” that would occur in each stream with and without stream diversions. **Exhibit S-19 at pp. 2-4.** Per the DAR report, 64% of a stream’s median base flow, or H90 flow, is the minimum flow to provide suitable conditions for growth, reproduction, and recruitment of native stream creatures. **Exhibit J-14 at p. 173.** H90 flow is expected to provide 90% of the natural habitat in a stream. **Id at p. 171.**

4. DAR also advised CWRM that restoring suitable flow to a single stream is better than inadequate flow to multiple streams. **Exhibit J-24 at p. 3.** DAR’s advice was based on “the ‘biggest bang for the buck’ concept, placing priority on streams with the greatest potential to increase suitable habitat for native species.” **Id.** DAR also advised CWRM that restoring streams that are spread out geographically provides more protection and better ecosystem function across East Maui. **Exhibit J-23 at p. 1.**

5. Diverted streams can still have water flow as a result of rainfall, and if they are gaining streams, they can gain water from springs or other sources as they move down below a diversion. **Strauch testimony, 8/14/20 at 111:12-17.** Mr. Strauch spends a lot of time in streams on Maui, and the court found his testimony particularly reliable.

6. In sum, at the November 2018 meeting, it was reasonable for the Board to allow A&B to continue to divert water from the “13 streams,” where, on one hand, returning water to the streams was not guaranteed to result in “H90” flow, and

therefore, was not guaranteed to restore sufficient habitat to native species. Barring diversions from the 13 streams could mean A&B would be forced to reopen diversions in the Keanae and Kahiku areas that were previously closed. On the other hand, continuing to allow the 13 streams to be diverted did not necessarily mean that native species would not be able to migrate in those streams if there was sufficient flow from freshets and storm events. This is a classic balancing and the court is persuaded and finds and concludes that applying the applicable law (see COLs, *infra*), it was not unreasonable for the BLNR to balance these considerations as it did.

7. The evidence at trial was clear that even when streams have been diverted for years, they will likely recover if and when flows are returned. **Kido testimony, 8/3/20 at 88:3-14.** No contrary expert testimony was produced.

K. The Parham report.

1. As described briefly above, Plaintiff relies heavily on the Parham report to establish that inadequate consideration was given to the negative impact on stream habitat when stream flow is diverted substantially or entirely cut off.

2. A&B's DEIS was published by the Office of Environmental Quality Control ("OEQC") in September, 2019. **Exhibit J-21 at p. 4.** The entire DEIS as published by OEQC was stipulated into evidence at trial as **Exhibit J-20.** The DEIS contained a report called the "Assessment of the Environmental Impact of Stream Diversions on 33 East Maui Streams using the Hawaiian Stream Habitat Evaluation Procedure (HSHEP) Model" prepared by James Parham, Ph.D. of Trutta Environmental Solutions, LLC (the "Parham Report"). **Exhibit J-20 at p. 568.** The Parham Report attempted to quantify the amount of habitat for stream animals in the IIFS streams

under various scenarios, and it predicted that if the 12-13 non-IIFS streams were fully diverted they would lose 85% of their predicted habitat. However, the Parham Report also concludes that, “[f]rom a habitat availability perspective, the 2018 IIFS does a good job at improving instream habitat over a wide range of streams.” **Exhibit J-20 at p. 632.** So again we see evidence that the 6/18/18 D&O, in addressing the most important 27 streams, improved instream habitat generally regardless of the exact posture of any of the 12-13 non-IIFS streams.

3. The court finds and concludes that given the above factors, the Parham Report raises issues that should be considered as part of fulfilling public trust duties. However, the Board’s decision here was consistent with balancing. On one hand there is potential but likely not permanent harm from continued diversion of the 12-13 non-IIFS streams. On the other hand, there are important benefits to ensuring sufficient water is available for agriculture and domestic use.

L. The feasibility of alternative sources of water.

1. The court is not aware of any evidence from any source that there is any present realistic alternative to the EMI ditch system providing the necessary water for upcountry residents and Mahi Pono’s farmers on Maui’s central plain.

2. CWRM had discussed alternative sources of water in its 6/18/18 D&O, and found that while sugar cultivation historically used 70 MGD of ground water from wells on HC&S’s fields to irrigate its crops (20 to 30% of all water used), groundwater would be significantly reduced from historic levels when changing to diversified agriculture. **Exhibit J-14 at p. 219.** Reasons: reduced recharge of the groundwater aquifer due to lower levels of irrigation from diverted east Maui streams,

the uncertain tolerance of diversified agricultural crops to brackish water, and the higher costs of pumping groundwater. **Id at p. 273.**

3. The court is not aware of any evidence that groundwater could or would realistically change the current essential need for water via the ditch system.

Exhibit J-20 at p. 177.

4. Per the above, the court finds and concludes it was reasonable for the BLNR not to require Mahi Pono to rely on using groundwater to irrigate its crops in 2019.

M. Balancing recreational uses with off-stream uses.

The court assumes that the continued diversion of the 12-13 non-IIFS streams negatively affects Plaintiffs' enjoyment of those streams. There is unquestionably a qualitative difference between hiking beside a thriving stream versus walking up a dried-out former stream bed. However, the court again returns to the balancing involved in this case. 27 streams were completely or substantially restored by the 6/18/18 D&O. They were considered the most important streams, where improvements would have a disproportionate impact across the entire water system, including the license area where the 12-13 streams in this case are located. The court concludes and finds this is a reasonable balancing, especially during this period of historic change where the needs of diversified agriculture are still difficult to estimate, habitat destruction from insufficient stream flow appears reversible, broad watershed improvements have been achieved, and no EIS is required for hold-over RPs per the ICA's ruling in Carmichael. Further, the Board imposed reasonable conditions on the clean-up of all streams, as discussed below.

N. Negative impacts.

1. Plaintiff argues that the BLNR should not have approved the continued holdover of the RPs absent a detailed analysis of the harm caused by diversion structures. The court understands the argument, and the court agrees it could sometimes be helpful to have that information; however, the court finds it is simply unrealistic given the time pressures of a hold-over RP process. Further, it is not as though the issue is being cast aside and ignored. An extensive EIS is in progress in connection with an expected long-term lease, which will undoubtedly address impact on habitat, and related modifications to or removal of diversion structures because of their impact on stream creatures. Given these realities, the court concludes the Board was reasonable in deciding it had sufficient information to make what everyone expected would be a short-term decision.

O. Deadline for removal or alteration of stream diversion structures.

1. The CWRM 6/18/18 D&O specifically states that the CWRM will decide how diversions will be modified in a subsequent process. **Exhibit J-14 at p. 292.** Diversions only need to be modified if necessary to accomplish the IIFS and allow for the passage of stream biota. **Id.** Diversions need not be removed unless necessary to achieve the IIFS. **Id.**

2. Removal of diversion structures may cause more environmental harm than leaving them in. **Ching testimony, 8/04/20 at 17:17-23.** It was reasonable for the BLNR to allow the CWRM to continue its process of determining what modifications are needed for which diversion structures.

3. Removal of diversion structures can require permits and permissions from multiple government entities, which makes setting any firm deadlines problematic.

4. Plaintiff failed to show that the balance of harms requires the BLNR to place deadlines on the removal of specific diversion structures.

5. Given the above, the court finds and concludes the BLNR was not required to place a deadline on A&B for the modification of diversion structures to comply with the IIFS.

P. The BLNR was not required to find out how much water is specifically taken from each of the 12-13 streams.

1. No doubt, it would help everyone involved if all or most of the streams had real-time gauges which could be monitored remotely. The court envisioned a system like a modern train station or electrical grid, with walls of digital displays, and “switching stations” so the supervisor could send water from anywhere to anywhere by the click of a mouse, and thereby reliably meet all in-stream and off-stream uses simultaneously. Someday perhaps, but clearly not now or anytime soon.

2. In the meantime, Plaintiff did not show it would be reasonable, let alone necessary, for the BLNR to require stream gaging on the non-IIFS streams to measure how much water A&B is taking from each stream.

3. Maintaining the equipment needed to accurately gauge streams requires constant supervision. Stream “flow” is calculated using data gathered from multiple, fixed points within a stream, but Hawaii’s “dynamic streams . . . are constantly eroding” and equipment does not always stay in place. **Strauch testimony, 8/14/20 at**

98:3-99:22. The watershed area contains “difficult conditions” including “rapidly eroding watersheds, watersheds that have gaining and losing reaches that make measurements difficult relative to the equipment,” and accessibility is limited by “the availability of roads and trails.” **Strauch testimony, 8/14/20 at 98:13-22.**

4. All of the approximately 12 gaging stations that the Water Commission maintains in the East Maui license areas must be visited in person in order to retrieve the data. **Strauch testimony, 8/14/20 at 100:18-25.** The amount of water taken from any given stream varies by day, and water must be taken where it is available. **Ching testimony, 8/04/20 at 65:2-13.**

5. Given the above, the court finds and concludes Plaintiff has not shown that requiring information on the amount of water taken from each stream before allowing decision-making is simply impractical at present, or that having that information would demonstrably benefit the decision-making on the two hold-over RPs at issue.

Q. Removal of trash and debris from the license areas.

1. In 2017, the BLNR required A&B to clear debris in the license areas, beginning with the more accessible areas and next to the streams. **Exhibit J-16 at p. 27.** The Board kept the same condition in 2018. **Id at p. 8.** Status reports for each year basically indicated that work crews were instructed to identify potential material not serving any function. It appears that over time, A&B reported that several hundred feet of old pipe, along with other debris, had been removed. Plaintiff/members have identified what they consider to be trash, but evidence at trial was that at least some and perhaps most of these old pipes are dilapidated but still functional parts of the EMI ditch system. **Strauch testimony, 8/14/20 at 171:14-173:7, 161:22-163:12.**

Other items cannot be removed without an evaluation by CWRM. **Strauch testimony, 8/17/20 at 91:8-91:23.**

2. Per the above, the BLNR's conditions regarding trash removal in 2018 and 2019 were reasonable.

R. The public trust does not require Plaintiff's requested relief.

1. Plaintiff asks this court to maintain the "status quo" by preventing A&B from diverting more than 27 MGD from East Maui. **JEFS No. 808 at 65.**

2. However, the court heard testimony from Grant Nakama, the vice president of operations for Mahi Pono, that a cap of 25 MGD would have a "high detrimental impact" on the roll-out of Mahi Pono's farming operations. **Nakama testimony, 8/13/20 at 19:19-20:3.** The remaining acreage of crops to be planted would likely need to be put on hold, and would impact Mahi Pono's future farming plan. **Id.**

3. Imposing a cap on the total amount of water that can be diverted also caps the amount that can be used by Mahi Pono while also providing sufficient water to the County of Maui. During times of low rainfall and higher water use, the County relies heavily on diverted water. **Pearson testimony, 8/14/20 at 26:7-18.** The County's water use cannot safely be limited based on past averages, because the County needs flexibility in the amount of water it is able to use from the EMI system. At times it will need more than at other times. **Id.** Clearly the County's needs are a legitimate public trust interest, so applying a cap of 27 MGD does not support the broader, comprehensive goals of the public trust.

S. The balance of harms does not support a permanent injunction.

1. As discussed above, even if the 12-13 streams were perpetually

dry, there are other streams which CWRM has decided are ecologically more important, which more broadly support the health of the water shed, and which provide habitat for native species in the same license areas as the 12-13 streams.

2. Also as discussed above, even dry streams are likely to recover if flows are ever returned.

3. Plaintiff has not shown that placing a deadline on the removal, alteration, or abandonment of stream diversions is necessary to prevent irreparable harm.

4. Plaintiff has not shown that the beauty of the streams is in danger of irreparable damage.

5. Per the above, the balance of harms weighs against a permanent injunction invalidating the hold-over RPs and capping the amount of water that can be taken from the license areas.

CONCLUSIONS OF LAW

A. The Public Trust Duties.

1. The Public Trust imposes a **dual** mandate on the State to both protect water resources, and to make maximum reasonable beneficial use of the State's water resources.

2. The public trust doctrine has been incorporated into article XI, sections 1 and 7 of the Hawai'i Constitution. See *In re Water Use Permit Applications*, 94 Hawai'i 97, 132 (2000) ("Waiahole I").

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3. Haw. Const. art. XI, § 1 states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i'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.

All public natural resources are held in trust by the State for the benefit of the people.

4. Haw. Const. art. XI, § 7 specifically relates to water resources, stating that: "The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."

5. "[A]rticle XI, section 1 of the Hawai'i Constitution requires the state both to 'protect' natural resources and to promote their 'use and development.' The state water resources trust thus embodies a dual mandate of 1) protection and 2) maximum reasonable and beneficial use." Waiāhole I, 94 Hawai'i at 138–39 (emphasis added).

6. This "dual mandate" means that the State must not always choose maximum protection. While the State should "protect public trust uses whenever feasible," the Hawai'i Supreme Court does not define "feasible" in this context as "capable of achievement." *Id.* at 141, 141 n.39 (emphasis added).

7. Resource protection is but one of several considerations the State must make in carrying out its public trust duties. *Id.* at 142.

8. The Hawai'i Supreme Court has identified several distinct uses that are specifically intended to be protected by the public trust, including the maintenance of water in its natural state, domestic uses, and the exercise of Native Hawaiian

traditional and customary rights. *Id.* at 136–37. Reserving water to the Department of Hawaiian Homelands is another public trust use. *In re Wai‘ola o Mokola‘i, Inc.*, 103 Hawai‘i 401, 431 (2004).

9. Domestic uses such as drinking water are considered “as among the highest uses of water resources.” *Waiāhole I*, 94 Hawai‘i at 137.

10. Regarding “use,” the Court has also recognized that “[t]he public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture.” *Waiāhole I*, 94 Hawai‘i at 141 (citation omitted). “Therefore, apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.” *Id.* “[A]rticle XI, section 1 does not preclude offstream use, but merely requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people of this state.” *Id.* (emphasis added).

11. “[T]here are no ‘absolute priorities’ between uses under the public trust, so the state and its subdivisions must ‘weigh competing public and private water uses on a case-by-case basis,’ according to any standards applicable by law.” *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai*, 133 Hawaii 141, 172 (2014). A “higher level of scrutiny” is applied to proposals for private commercial use. ***Id.***

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B. The standard of care under the public trust is the standard of reasonableness required of a trustee.

12. “The duties imposed upon the state [under the public trust] are the duties of a trustee and not simply the duties of a good business manager.” Matter of Conservation Dist. Use Application HA-3568, 143 Hawai‘i 379, 402 (2018). A trustee’s duties include:

(a) the duty to preserve trust property using the care and skill of a person of ordinary prudence. Ching v. Case, 145 Hawai‘i 148, 177 (2019); Matter of Estate of Dwight, 67 Haw. 139, 146 (1984).

(b) the duty to administer the trust solely in the interest of the beneficiary. Ahuna v. DHHL, 64 Haw. 327, 340 (1982). In administering the trust, the trustee must exercise ordinary prudence, (or exercise any greater skill if the trustee holds itself out to possess such skill). Restatement (Second) of Trusts § 174 (1959).

(c) the duty to “use reasonable skill and care to make trust property productive, or simply ... act as an ordinary and prudent person would in dealing with his own property.” *Id.* (citation omitted).

(d) the duty to comply with the terms of the trust. Awakuni v. Awana, 115 Hawai‘i 126, 135 (2007) (agreeing that “the extent of the duties of a trustee depends primarily upon the terms of the trust.”)

13. The standard of “reasonable prudence” does not require perfect judgment. “We understand that a trustee is not expected to be infallible in his judgments or decisions.” Ahuna, 64 Haw. at 340; see also Restatement (Second) of Trusts § 174 cmt. b (“Test of prudence. Whether the trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to him at the time when he

does the act and not at some subsequent time when his conduct is called in question.”).

C. The Board’s decision is presumed valid, and the burden is on the plaintiff to prove that the Board did not act as a reasonably prudent fiduciary.

14. The Board’s 2018 and 2019 decisions at issue here did not result from a HRS § 91-9 contested case. Rather, the Board’s 2018 and 2019 decisions were made in the regular course of the Board’s open meetings, held pursuant to HRS § 92-3.

15. In an HRS § 91-9 contested case, the agency may only consider matters within the “record” when making its decision. HRS § 91-9(g). The “record” in a contested case includes only certain categories of documents and evidence that are specifically set out by HRS § 91-9(e)(1)-(6).

16. Special rules of evidence apply to contested cases. HRS § 91-10. HRS § 91-10(4) governs the ability of an agency to judicially recognize certain facts within their specialized knowledge. HRS § 91-10 (5) requires that the “degree or quantum of proof shall be a preponderance of the evidence.”

17. In contrast, in an open meeting held pursuant to HRS § 92-3, the Board is required to “afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The [B]oards shall also afford all interested persons an opportunity to present oral testimony on any agenda item.”

18. The Board’s powers include the right to dispose of water rights by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State, HRS § 171-58(c), and may allow the permit to continue on a month-to-month basis for additional one year periods. HRS § 171-55.

19. Thus, certain requirements that are specific to HRS § 91-9 contested cases do not apply to this case.

20. In an HRS § 91-9 contested case, findings of fact and conclusions of law are required. HRS § 91-12. There is no requirement that the Board render findings of fact and conclusions of law with respect to any disposition of water rights or permits that it makes in the regular course of the exercise of its powers during a Chapter 92 meeting.

21. A person aggrieved by a final decision and order in a contested case may appeal to the circuit court for appellate review. HRS § 91-14(a)-(b). By statute, the reviewing court must apply certain standards of review to the agency's final decision. HRS § 91-14(g)(1)-(6).

22. In this case, the plaintiff is not appealing a decision following a contested case, but has filed a declaratory action pursuant to HRS § 631-1 seeking a declaration that the Board, by a decision made in an open meeting pursuant to HRS § 92-3, violated the public trust.

23. Whether the public trust has been breached is a question of fact for which the plaintiff bears the burden of proof. See, e.g., Ching, 145 Hawai'i at 179 ("Typically, whether a fiduciary acted prudently—or in other words, as a reasonably prudent fiduciary—is a question of fact."); Kelly v. Oceanside Partners, 111 Hawai'i 205, 234 (2006) (party arguing that agency breached its public trust duties had burden of proof).

24. Agency decisions affecting public trust resources carry a presumption of validity. Waiāhole I, 94 Hawai'i at 143. A court will take a "close look" at the action to determine if it complies with the public trust doctrine, but it will not supplant its judgment for that of the agency. *Id.* at 144.

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25. The court is guided by the “principle that decisions of administrative bodies acting within their sphere of expertise are accorded a presumption of validity.” Ka Pa‘akai O Ka‘Aina v. Land Use Comm'n, State of Hawai‘i, 94 Hawai‘i 31, 40 (2000).

26. The DLNR, headed by the Board, manages, administers, and exercises control “over the public lands, the water resources, ocean waters, navigable streams . . . and all other interests therein and exercise[s] such powers of disposition thereof as may be authorized by law.” HRS § 171-3(a). The license areas and management of streams are therefore squarely within the Board’s “sphere of expertise.”

27. While the balancing of public and private uses begins with a presumption in favor of “public use, access, and enjoyment,” (In re Waiola O Molokai, Inc., 103 Hawai‘i 401, 432 (2004)), the public trust does not require that the 12-13 streams all be “fully protected” before any water can be diverted. The Hawai‘i Supreme Court recognized that “reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values.” *Id.* at 432 (emphasis added) (quoting Waiāhole I, 94 Hawai‘i at 141).

28. The public trust requires that all uses, offstream or instream, public or private, promote the best economic and social interests of the people. Waiāhole I, 94 Hawai‘i at 141, 9 P.3d at 453.

29. Plaintiff relies heavily on Kauai Springs, 133 Hawai‘i at 174-175 for items an “applicant” for water must prove. Kauai Springs, however holds that the “framework” it presents is not mandatory and does not preclude other analytical approaches that are consistent with the public trust doctrine. *Id.* at 174, n.25.

30. The discussions in Kauai Springs and Waiāhole I are instructive as to the “general principles and factors that an agency must consider when reviewing a permit for the use of a public resource,” (see Kauai Springs, 133 Hawai‘i at 171). The cases do not describe the degree of proof that the Board should require before approving the holdover of a revocable permit under HRS § 171-55 or HRS § 171-58.

31. Although applicant had the burden before the Board, Plaintiff now has the burden to show that the Board’s decision was not reasonable.

32. The “threshold burden” on A&B was to prove “its actual water needs for its proposed futures uses ‘insofar as circumstances allow.’” In re Waiola O Molokai, Inc., 103 Haw. 401, 438 (2004) (quoting Waiāhole I, 94 Hawai‘i at 161).

33. The lack of complete information, even potentially useful information, does not prohibit the Board from allowing offstream use. Instead, the [agency] must apply, in its own words, “a methodology that recognizes the preliminary and incomplete nature of existing evidence,” . . . and, indeed, incorporates elements of uncertainty and risk as part of its analysis. Such a methodology, by its nature, must rely as much on policy considerations as on hard scientific “facts.” Waiāhole I, 94 Hawai‘i at 158–59.

34. “[B]esides advocating the social and economic utility of their proposed uses, permit applicants must also demonstrate the absence of practicable mitigating measures, including the use of alternative water sources.” Waiāhole I, 94 Hawai‘i at 161, 9 P.3d at 473.

35. “Considering whether alternative water resources are practicable innately requires prioritizing among public trust resources.” In re Water Use Permit Applications, 105 Hawai‘i 1, 20 (2004) (“Waiāhole II”). CWRM determined there were no reasonable

alternatives to using stream water; the only possibly “practicable” alternative was groundwater pumped from wells on the former HC&S fields. The information before the Board also demonstrated that the rate at which groundwater is recharged would likely be much lower than under sugar cultivation, especially given that much of the former HC&S lands were not being irrigated. For the above and other reasons stated at the hearing, it was not unreasonable for the Board to prioritize amongst trust resources by allocating EMI ditch water to A&B/Mahi Pono for the proposed beneficial uses, and allowing the finite groundwater resource to be preserved for future uses.

36. When the matter before the agency “involves an allegation of harm that is not readily ascertainable, the [agency] may nevertheless permit existing and proposed diversions of water if [the applicant] can demonstrate that such diversions are reasonable-beneficial notwithstanding [the potential harm.]” In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai‘i 481, 499 (2007).

37. Here, there was substantial testimony and information provided to the Board regarding the water available for allocation (after the CWRM’s IIFS were met) for the diversified agricultural needs of A&B, Mahi Pono, and the County of Maui.

38. In addition to upholding the public trust, the Hawai‘i Constitution directs the State to “conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.” Haw. Const. art. XI, §3.

39. Here, there is no dispute that water diverted by A&B was being used for diversified agriculture on land zoned for agriculture. There is also no dispute that

approximately 22,254 acres of the former HC&S lands have been designated as Important Agricultural Lands (“IAL”) pursuant to HRS Chapter 205, Part III. By statute, Important Agricultural Lands:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State’s economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

40. It was reasonable for the Board to find that providing water for A&B, Mahi Pono, and the County’s diversified agriculture operations would provide jobs, grow the economy, keep agricultural lands productive, prevent agricultural lands and the infrastructure supporting them from falling into disrepair, and promote food sustainability.

41. The Board was not required to force Mahi Pono to plant only crops that are tolerant to brackish water or require the least amount of water. Doing so is not in the interest of promoting diversified agriculture, which the Hawai’i Constitution directs the Board to do. Likewise, given the early stages of Mahi Pono’s operations, it was reasonable for the Board to allow Mahi Pono flexibility in using its business judgment to choose the crops it would cultivate.

42. Given that hold-over RPs are allowed, per the above FOFs, the court concludes the Board had enough information to reasonably conclude that allowing the continued holdover of the two RPs for one year each would be in the public interest and

meet the Board's constitutional duty to conserve and protect agricultural lands and promote diversified agriculture and other beneficial uses.

43. Authorizing the two hold-over RPs for additional one-year periods did not impair the Board's ability to restore more water if warranted, and did not impair the Board's ability to hold A&B to task if it was not honoring the permit conditions.

44. "Lastly, if the impact is found to be reasonable and beneficial, then in light of the cumulative impact of existing and proposed diversions on trust purposes, the applicant must implement reasonable measures to mitigate this impact." Kauai Springs, 133 Hawai'i at 173.

45. While a public trustee should "protect public trust uses whenever feasible," "feasible" does not merely mean "capable of achievement." It still requires the balancing of benefits and costs. *Id.* at 141 n.39.

46. The management of stream diversions and enforcement of the D&O is within CWRM's responsibilities. HRS § 174C-5 (the general administration of the water code rests with the CWRM); HRS § 174C-93 ("No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.")

47. In *Waiāhole I*, the CWRM determined that it could not calculate the "exact relationship" between instream flows and ecological benefit due to the lack of scientific knowledge, and so it set an IIFS that it deemed "practicable." 94 Hawai'i at 147. The Supreme Court remanded for the CWRM to make a determination based on what would protect the instream values of the streams based on the best available information. *Id.* at 156-57.

48. Waiāhole I did not hold that no offstream diversions will ever be allowed from streams without amended IIFS. Rather, CWRM may decide to allow continued offstream use despite a definitive instream flow standard: “At the present time, we hold only that the Commission’s inability to designate more definitive instream flow standards neither allows the prolonged deferral of the question of instream use protection nor necessarily precludes present and future allocations for offstream purposes.” *Id.* at 159.

49. In this case, it is undisputed that none of the streams are in a designated water management area, and therefore, discussion of what is required for a water use permit is inapposite.

50. A trustee’s duty to monitor trust property is also based on a standard of reasonableness:

It is self-evident that an obligation to reasonably monitor trust property to ensure it is not harmed is a necessary component of this general duty, as is a duty to investigate upon being made aware of evidence of possible damage. This obligation inherently includes a duty to make reasonable efforts to monitor third-parties’ compliance with the terms of agreements designed to protect trust property.

Ching, 145 Hawai’i at 177–78.

51. Plaintiff argues that the CZMA applies to this case (see Count 3 for details) insofar as it sets out requirements for the “Coastal Zone Management Area” which includes all lands of the State. HRS § 205A-1. This claim was hardly mentioned during trial, and was mentioned in only one conclusory statement in Plaintiff’s closing argument.

52. Plaintiff generally alleges that the Board “did not exercise an overall conservation ethic, practice stewardship, minimize impacts, or effectively regulate.”

[JEFS No. 808 at 62-63]. “Conservation” means “the protection, improvement and use of natural resources according to principles that will assure their highest economic or social benefits.” *Waiāhole I*, 94 Hawai‘i at 139.

53. Conditioning the use and development of streams on “conservation” requires that all uses, offstream and instream, public or private, also promote the best economic and social interests of the people of the state. *Id.* at 141.

54. As discussed above in the context of balancing interests, the evidence supports the conclusion that the Board properly carried out its “conservation” mandate by weighing competing interests and making reasonable decisions to promote the economic and social interests of the people of the state. Plaintiff’s claims that the Board violated the “conservation” mandates of the CZMA are thus without merit.

55. Injunctive relief. Even if plaintiff were to prevail on the merits of its public trust and CZMA claims, the court is not obligated to issue the mandatory and prohibitory injunctions prayed for. An injunction is an extraordinary remedy. *Morgan v. Planning Dept., County of Kauai*, 104 Hawai‘i 173, 188, 86 P.3d 982, 997 (2004). “The appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction.” *Pofolk Aviation Hawaii, Inc. v. Dep’t of Transp. for State*, 134 Hawai‘i 255, 261 (App. 2014), *aff’d* on other grounds, 136 Hawai‘i 1 (2015) (internal quotation marks and citation omitted). Here, Plaintiff has not prevailed on the merits, and even if Plaintiff did prevail on the underlying merits, per the above FOF the court concludes the balance of harms does not require an injunction,

and since hold-over RPs for these water rights are currently allowed without environmental review per Carmichael, and per the multiple FOFs above, the court concludes the public interest in granting the two hold-over RPs is at least as strong as the public interest in denying the hold-over RPs.

56. Here, as discussed above in the FOF, the evidence shows and the court concludes that the 12-13 streams are not likely to suffer irreparable harm from the temporary impact of the two hold-over RPs at issue.

57. Relief.

A. The public interest and the balancing of harms weighs against issuing a permanent injunction limiting the amount of water that can be diverted from the license areas to the “status quo” level of 27 MGD, or requiring the Board to re-visit its decision-making on the 2 RPs in order to gather more information. The court concludes and finds these remedies would likely have negative effects for Mahi Pono the company, and to the people that Mahi Pono employs, the farmers who lease land from Mahi Pono, and the County. The negative effects extend to leaving important agricultural lands fallow, and missing opportunities to significantly increase Hawaii’s food diversification, independence and sustainability. Against this likely harm one weighs the issue of waste, and the harm to habitat and loss of beauty in the 12-13 non-IIFS streams.

B. Waste. As explained above in more detail, the court ultimately concludes that in the context of temporary 1-year hold-over RPs, and with the context of Mahi Pono’s new agricultural model, CWRM’s determination that the level of on-farm waste was acceptable is sufficient to support the Board’s balancing decision. It is not all

the information one would like to have about water waste, and there is additional information the Board could but did not request. That said, there is no clear evidence that having the additional information would or should have made a difference in the Board's decision-making on the two RPs at issue under the circumstances of this case. For example, there was no evidence that the waste identified as "on farm" waste was unreasonable in light of industry norms or the particulars of farming on Maui. Another example: the only potentially major improvement shown by the evidence that would significantly and reliably reduce wasted water during the storage phase would be to line all the storage reservoirs. This is a costly solution that likely would not even be designed and completed before the RP expired. Bottom line: the court concludes the Board had enough information to make rational and informed decisions on the 2 RPs at issue. Further, the Board ordered that waste be avoided. As Mahi Pono develops its plans and practices, the court draws the inference that more data will become available to help guide upcoming decisions about both using water and avoiding waste.

C. Habitat. This issue has also been discussed in these FOF but in summary, CWRM's D&O has gone a long way to re-establishing habitat in the license area of the 12-13 streams, there is evidence the 12-13 streams are gaining streams which will support habitat as the streams descend, there is no evidence of a dire die-off, and there is evidence that if the 12-13 streams are ultimately restored, partially or fully, more habitat and creatures will return. All these and other factors discussed in the FOFs weigh against this court finding for Plaintiff, or otherwise ordering injunctive relief, or ordering the Board to re-examine its decision-making for the 2 hold-over RPs.

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58. To the extent any of these findings of fact are deemed conclusions of law or conclusions of law are deemed findings of fact, they shall be so construed and given the full effect intended.

59. Except as otherwise noted, each of the findings of fact set forth herein has been proven by a preponderance of the evidence.

60. To a substantial but not exclusive extent, the court's FOFCOL used many of the State's proposed FOFCOL as a foundation. The court is aware that many additional FOFs could have been issued; however, the court made the findings the court thought were necessary, and declined to make findings on all issues raised in the parties' proposed FOFCOL. The fact that the court did not make a finding or conclusion on an issue raised by a party does not mean the court made a contrary finding on that point, by inference or otherwise. The court unfortunately does not have time to check and include each "winning" FOFCOL by each party, and so many proposed FOFCOL drop out even if they might have merit. For example, exhibits were introduced and legal authorities provided that were considered and analyzed but not expressly cited above. A trial judge is only required to make brief and pertinent findings. It is not necessary to over-elaborate or particularize facts. The trial court must include enough subsidiary facts as necessary to disclose to the appellate court the steps and facts by which the trial judge reached his or her ultimate conclusion. Upchurch v. State, 51 Haw. 150, 155 (1969). "As to the adequacy of the trial court's findings, an appellate court will consider whether the findings are sufficiently comprehensive and pertinent to the issue to form a basis for the conclusion of law and whether they are supported by the evidence." Ventura v. Grace, 3 Haw. App. 371, 374 (1982) (citing Palama v. Sheehan, 50 Haw.

298 (1968); Shannon v. Murphy, 49 Haw. 661, 426 P.2d 816 (1967)). The court believes it has complied with this standard.

61. If any party concludes that further FOFCOL are *critical* in order to prevent a remand for further findings, that party should inform the court before the Judgment is entered so that the court can consider the issue.

DECISION AND ORDER

Based on the above Findings of Fact and Conclusions of Law, it is HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Judgment shall enter in favor of all Defendants on all claims alleged in the First Amended Complaint filed herein on December 6, 2019.
2. There are no other remaining parties or claims or issues to be resolved.
3. To the extent there are any remaining parties or claims, they are hereby dismissed without prejudice.

DATED: Honolulu, Hawai'i, April 6, 2020

/s/ Jeffrey P. Crabtree



Judge of the Above-Entitled Court

Sierra Club v. BLNR; 1CC 19-1-0019 (JPC); First Circuit Court;
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB,)	CIVIL NO. 19-1-0019-01 JPC
	)	(Environmental Court)
Plaintiff,)	
vs.	)	PLAINTIFF'S TRIAL MEMORANDUM
)	
BOARD OF LAND AND NATURAL	)	Trial Date: August 3, 2020
RESOURCES, DEPARTMENT OF LAND)	
AND NATURAL RESOURCES,	)	Judge: Honorable Jeffrey Crabtree
SUZANNE CASE in her official capacity)	
as Chairperson of the Board of Land and)	
Natural Resources, ALEXANDER AND)	
BALDWIN, INC., EAST MAUI)	
IRRIGATION COMPANY, LLC and)	
COUNTY OF MAUI)	
)	
Defendants.)	

PLAINTIFF'S TRIAL MEMORANDUM

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PLAINTIFF'S TRIAL MEMORANDUM

An undiverted east Maui stream can look this:

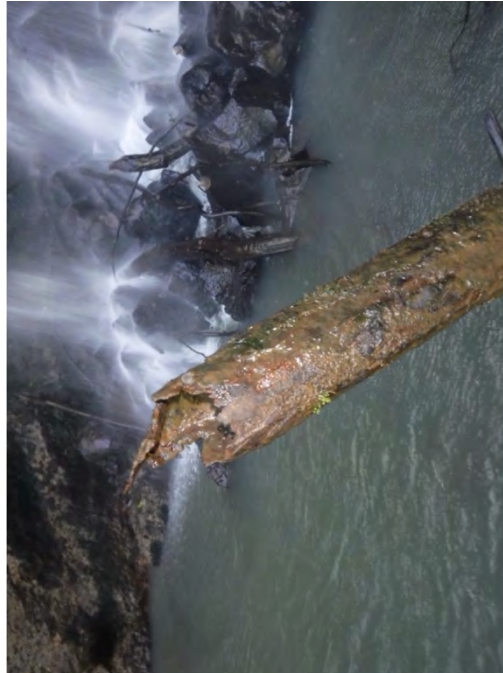


In contrast, the Board of Land and Natural Resources (**BLNR**) has authorized our streams to look like this, with diversions taking all the water from these streams, leaving dry stream beds:



Moreover, the inaction of the Department of Land and Natural Resources (**DLNR**), BLNR and BLNR Chair Suzanne Case (collectively herein, “**BLNR Defendants**”) has left public trust

ceded lands littered with debris:



The BLNR Defendants are fully aware that the diversion of water from east Maui streams can adversely affect native aquatic species, native stream habitat, ecosystem health, recreational values, natural beauty, and cultural uses. Yet, as it has done annually for more than a decade, in

November 2018 and October 2019, BLNR rubberstamped the continuation of revocable permits authorizing East Maui Irrigation and Alexander and Baldwin, Inc. (collectively herein “A&B”) to use approximately 33,012.91 acres of state land and to divert millions of gallons of water daily from east Maui streams. It did so *without*:

- (1) providing any protection to 13 streams that A&B can drain dry;
- (2) addressing the harm caused by diversion structures on public land;
- (3) holding A&B to its burden to justify private commercial uses at the expense of public trust resources; and
- (4) ensuring that A&B cleans up its mess.

This trial memorandum begins by providing historical context and summarizing facts. It then explains the BLNR Defendants’ legal duties and how the BLNR Defendants have failed to meet these obligations. It addresses some of the defenses that may be offered. It concludes with a discussion of the relief that the Sierra Club seeks.

I. HISTORICAL CONTEXT

According to Handy and Handy, *NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE AND ENJOYMENT* (1972), in traditional Hawaiian culture, no ditch was permitted to divert more than half the flow from a stream.¹

For more than 130 years, A&B has operated a ditch system that diverts surface water emanating in part from State lands in east Maui, and transports it to central and upcountry Maui

¹ The Supreme Court has taken judicial notice of, and relied on, *Native Planters*. See *Reppun v. Board of Water Supply*, 65 Haw. 531, 541 and n. 3 and 14, 656 P.2d 57, 64-65 and n. 3 and 14 (1982) and *McBryde Sugar Co., Ltd. v. Robinson*, 55 Haw. 260, 270, 292 and n. 35, 517 P.2d 26, 32, 44 and n.35 (1973). The Commission on Water Resource Management (**CWRM**) relied on it as well, as discussed in *In re Water Use Permit Applications*, 105 Hawai‘i 1, 11, 93 P.3d 643, 653 (2004)(*Waiāhole II*).

for agricultural, domestic, and other purposes. *Maui Tomorrow v. BLNR*, 110 Hawai‘i 234, 236, 131 P.3d 517, 519 (2006). Construction of the East Maui Irrigation (**EMI**) Ditch System began in the 1870s and was completed in 1923. Exhibit J-14 at 19 (iii). Historically, the EMI Ditch System captured **all the of the stream's base flow** as well as an unknown percentage of total flow. *Id.*; Exhibit J-20 at 574 (p.7 of the report); Exhibit S-19 at 18.

A&B obtained the water from the State lands pursuant to water leases from four license areas (Nāhiku, Ke‘anae, Honomanū, and Huelo), which were issued by BLNR and its predecessors. *Maui Tomorrow v. BLNR*, 110 Hawai‘i 234, 236-38, 131 P.3d 517, 519-20 (2006); Exhibit 2 at 3-4. The last of those water leases expired in 1986. Exhibit 2 at 4. Since then, A&B’s right to take the water has been provided through one-year revocable permits. *Id.* The 33,000 acres of ceded land that BLNR allows A&B to use lie within the state conservation district. Exhibit 106 ¶¶6 and 12.

The revocable permits at issue in this case, S-7263, S-7264, S-7265, S-7266, were first approved in May 2000. Exhibits J-1 – J-4. BLNR voted to allow A&B to continue to use the 33,000 acres of public land in east Maui and to divert water from dozens of streams in 2001 and 2002. Exhibit J-6 at 13; Exhibit J-7 at 7. For each year since 2005, BLNR has annually approved the continuation of the four revocable permits. Exhibit 101 admitting to paragraph 1 of the first amended complaint; *Carmichael v. Bd. of Land & Nat. Res.* CAAP-16-0000071 (ICA, 2019) (“For each year since 2005, up to and including 2014, the A&B and EMI Revocable Permits were included on the list of permits subject to BLNR's annual review.”); Exhibit J-11; Exhibit J-12 at 12; Exhibit J-15 at 11; Exhibit J-16.² It is unclear whether A&B had any legal authority to

² A&B will likely provide a very lengthy and convoluted rendering of this history prior to 2018. A&B has often mischaracterized this history. More importantly, most details of that long, complex history are irrelevant to this case.

divert any water in 2003 and 2004 and whether the revocable permits by operation of law expired more than a decade ago.

A. Recognition of the Harm Caused by Diversions

In 2005, DLNR's Hawaii's Comprehensive Wildlife Conservation Strategy officially acknowledged that DLNR knew that the diversion of east Maui's streams were a key threat to native aquatic species on Maui. Exhibit 4 at 128-129, 189, 192 and 194.

In November 2009, DLNR's Division of Aquatic Resources collaborated with the Bishop Museum to produce a seminal report on the impacts of stream diversions in east Maui. The report concluded:

- "Stream diversions decrease the size of the freshwater plume and therefore make it harder for recruiting animals to detect the freshwater from their offshore larval development areas." Exhibit S-19 at 7.
- "In addition to the size of the freshwater plume, in many streams, a stream mouth berm is created when deposition from wave action is greater than erosion by stream flow. . . . [I]ncreased stream flow will decrease the amount of time that stream remains closed by a berm and therefore blocked to recruitment." *Id.*
- "The diversion structures can be a physical barrier, create dry sections that prohibit movement by aquatic species, or entrain animals as they attempt to pass over the diversion structure." *Id.* at 9
- "Depending on the design of the diversion structure, migrating animals may be entrained in the diversion and removed from the stream population (Figures 13 and 14). Many diversion structures on Hawaiian streams divert water through a grate into a diversion ditch. Entrainment into the ditch would not only be possible, but likely with the

typical diversion design.” *Id.* at 13.

- “From a management perspective, the maintenance of adequate stream flow from upstream adult habitat to the stream mouth is critical for amphidromous animals. Given the vagaries of the timing recruitment and the short development window for upstream movement, minimizing the time that barriers to upstream movement exist will increase the chance that suitable upstream habitat will be colonized by newly recruiting animals.”

Id. at 13-14.

- “In the most extreme cases, the diverting of 100% of the water can result in the elimination of all habitats downstream of the diversion by dewatering the downstream sections.” *Id.* at 14.

- “Typical stream diversion structures divert 100% of the water at low to moderate flows. Under these conditions, 100% of downstream moving individuals would be entrained by the diversion.” *Id.* at 18

- “The streams of northeast Maui in this analysis had a range of surface water diversions affecting their stream flow and, therefore, the amount of instream habitat for native amphidromous animals. . . . In most cases where diversions did occur, the diversions blocked the stream and captured 100% of the stream flow at low and moderate rates of discharge.” *Id.* at 77.

In May 2010, DLNR’s Division of Aquatic Resources reported that “native animals are missing from a number of stream sections where they should naturally exist.” Exhibit J-24 at 2.

“The removal of stream diversions and the complete restoration of stream flow would be the best possible condition for native aquatic animals.” *Id.* at 3. It also concluded that 64% of the naturally occurring baseflow of a stream is required to allow native stream animals to grow and

reproduce. *Id.* at 2.

In 2016, the U.S. Fish and Wildlife Service pointed out:

The long history of stream diversions by the EMI system on East Maui has created an array of impacts to trust resources, including both the native stream biota, other species which inhabit the adjacent upland forests, and nearshore marine ecosystems that rely on streams for nutrient inputs.

Exhibit J-20 at 1971.

According to DLNR's Hawai'i's State Wildlife Action Plan (2015), diversion structures and insufficient stream flow harm 'o'opu nākea, 'o'opu 'alamo'o, and 'o'opu nōpili and 'ōpae kala'ole. Exhibit S-26 at 6-60-61, and 7-376-403. Here is what some of these creatures look like:

'O'opu 'alamo'o *Lentipes concolor* *Id.* at 7-382:



'O'opu nōpili *Sicyopterus stimpsoni* *Id.* at 7-385:



‘Ōpaekala‘ole *Atyoida bisulcata* Id. at 7-391:



B. Action by the Commission on Water Resource Management (CWRM)

In 1988, CWRM adopted interim instream flow standards for all streams within east Maui. HAR §13-169-44. The standard was whatever was flowing on June 15, 1988. The Supreme Court has noted that similar categorical status quo standards were established on the basis of existing water diversion structures rather than on the basis of the biological or ecological value of any given stream flow level, and did little more than ratify the existing diversions. *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 150 and n.54, 9 P.3d 409, 462 and n.54 (2000) (“*Waiāhole*”); *see also* Exhibit S-78 at 1.

In May 2001, Nā Moku Aupuni o Ko‘olau Hui (Nā Moku), an organization comprised of Native Hawaiian kalo farmers and cultural practitioners petitioned CWRM to amend the interim instream flow standards for 27 streams. Exhibit J-14 at 25, 192-95, 267 (FOF 2, 657-660, COL 57). Shortly thereafter, A&B’s Vice President for Natural Resources and Government Affairs, Meredith Ching, was appointed to CWRM. For years, CWRM did little in response to the petition to amend the interim instream flow standards for 27 streams. Finally, after much delay, protracted legal proceedings and a contested case hearing, in June 2018, CWRM issued an order establishing interim instream flow standards for many – but not all – east Maui streams that were

diverted by the EMI ditch system. CWRM recognized, “There is universal agreement that more water and better connectivity in streams is a good thing for native habitat restoration.” Exhibit J-14 at 21 (v). Understanding how many streams, and which streams, CWRM’s order affected can be very confusing.³

First, CWRM usually defines a stream as one that flows into the ocean, as distinguished from a tributary. Exhibit J-14 at 39 (FOF 56). Thus, although Nā Moku petitioned to set standards on 27 streams, CWRM concluded that not all 27 were actually streams; some were tributaries of other streams. *Id.* CWRM’s treatment of tributaries is somewhat inconsistent, however, as it treated at least two tributaries separately in its order (Pua‘aka‘a and Huelo), but not other tributaries. To avoid confusion in this trial, the Sierra Club will attempt to use the word “stream” in the way CWRM uses it in its FOF 56.

Second, spellings can vary. Sometimes kahaō and ‘okina are omitted. CWRM refers to the stream as “Hanahana Stream.” Members of the community and the Hawai‘i Board on Geographic Names, however, refers to the stream as Hanawana.

<http://files.hawaii.gov/dbedt/op/gis/bgn/placenames/HBGN%20-%20Maui%20-%20Official%20May%202018.pdf>. A&B’s consultant calls it Hanauana. Exhibit J-20 at 606.

Similarly, Ho‘olawa Li‘ili is also referenced as Ho‘olawa ‘ili and Ho‘olawa Lii Lii Exhibit J-20 at 604, 795, 865.

Third, some streams share a common name. For example, one of the 27 petitioned “streams” is Kōlea Stream. Kōlea is a tributary of Punalau Stream, found in the Honomanū area,

³ In this part of this memorandum, the Sierra Club mentions specific streams in the revocable permit area. The Sierra Club, however, is **not** asking this court to keep track of each stream in the course of the trial. To do so would be a daunting task. Only a few of the streams will be highlighted during the trial because the factual and legal issues in this case are common to the various categories of streams outlined below.

for which CWRM set an instream flow standard. Exhibit J-14 at 40-42 (FOFs 58(c) and 60). It feeds into Punalau Stream mauka of the highway. A different Kōlea Stream is found in the Huelo area and it was not part of the contested case hearing. *Id.* at 41 (FOF 58 and 60). This Kōlea Stream ends with a terminal waterfall entering the ocean. Exhibit J-22 at 6. In this trial, the Sierra Club will occasionally refer to this Kōlea Stream, the one CWRM did not address in 2018.

CWRM found that there are 36 streams in the area encompassed by the revocable permits. Exhibit J-14 at 40-41 FOF 58. A year later, however, A&B's paid consultant concluded that there are actually 37 streams. Exhibit J-20 at 604-6. CWRM did not identify Puakea Stream. *Id.* at 574 n.1 and 603.

It is easiest to discuss the streams by dividing them into four categories that CWRM placed them in: full restoration streams, 64% baseflow streams, connectivity streams, and the 13 streams that were not part of CWRM's 2018 order.

1. Full Restoration Streams (9 streams)

CWRM ordered that no water be taken from nine streams. Seven of these streams supported significant kalo cultivation: Honopou, Hanehoi (including tributary Huelo/Puolua), Pi'ina'au, Palauhulu, Waiokamilo, Wailuanui, Makapipi. Two other streams slated for full restoration, Waihoue and West Wailuaiki, are identified as habitat reference streams. Exhibit J-14 at 20-21 and 291-92.⁴ CWRM called for these nine streams to have: "full habitat restoration", *id.* at 268 (COL 60); "free flowing water, with no upstream diversions," *id.* at 20; and "natural, undiverted base flows." *id.* at 290.

2. 64% Baseflow Streams (5 streams)

⁴ CWRM mentioned two other streams (Kualani and Ohia), but concluded that they flowed below the ditch system and had never been diverted. Exhibit J-14 at 39 (FOF 57).

CWRM ordered that for five streams a minimum of 64% of each stream's median base must continue to flow: Honomanū, Waikamoi, East Wailuaiki, Kopiliula, and Punalau/Kōlea. *Id.* at 21. The figure is based on research concluding that the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals is 64% of median base flow. *Id.* at 19 (iii).

3. Connectivity Streams (8 streams)

CWRM identified 8 streams and one tributary to have at least 20% of their baseflow in them. Exhibit J-14 at 19-22, 262 (COL 30), 286-88 (COL 146), 291-92; Exhibit J-20 at 576, 604-6, 627-629. It allowed 80% of the baseflow to be diverted from Puohokamoa, Ha'ipua'ena, Nua'ailua, Pa'akea, Kapaula, and Hanawi streams.⁵ These streams are required to have 20% of their baseflow in them, which is not enough for native species to grow and reproduce. Exhibit J-14 at 19.

4. Thirteen Streams Unaffected by CWRM's 2018 Decision

The 2018 CWRM decision identified 12 streams that were not part of the petitions and contested case hearing: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries). *Id.* at 40-41 (FOF 58); Exhibit J-20 at 603-06.

In 2019, A&B's consultant identified a thirteenth stream in the area that CWRM did not address in its 2018 decision: Puakea Stream. Exhibit J-20 at 574 n.1. The BLNR Defendants may argue that Puakea Stream is not diverted by the EMI ditch system. There is evidence that it is

⁵ Waiiaaka and Wahinepe'e are also identified as connectivity streams, but not needing any more water restored to them. Exhibit J-14 at 22 (vi) and 287 (COL 146(g)) and 292. CWRM also included a tributary, Pua'aka'a, as a connectivity stream.

diverted. For the time being, the Sierra Club will refer to these 13 streams – although at the conclusion of the trial, this court may conclude that it should refer to a dozen streams unaffected by CWRM’s order rather than 13.

The interim instream flow standard for these 13 streams is whatever was flowing on June 15, 1988. HAR §13-169-44. BLNR, however, has no idea how much water was flowing in these twelve streams as of June 15, 1988. Exhibit 106 ¶1; Exhibit 107 ¶1; *see also* Exhibit 110 ¶2.

Given the lack of information regarding how much water flowed in east Maui streams on June 15, 1988, and given no update to the standard in three decades, there are no meaningful standards for these 13 east Maui streams.

5. Summary

To reduce confusion, the Sierra Club does not plan to spend time during the trial on each of the 37 streams. Rather, only a few of the streams will be highlighted during the trial because the factual and legal issues in this case are common to the various categories of streams outlined below. The court may want to refer to CWRM’s list of streams, which can be found at Exhibit J-14 at 40-41(FOF 58). Or it may wish to refer to A&B’s consultant’s list, Exhibit J-20 at 603-06. Or it may wish to see them on a map, Exhibit J-20 at 40 and 58. Below is the Sierra Club’s list organized by category:

6. List of Streams

Full restoration streams 7 kalo streams; and 2 other habitat streams

Honopou

Hanehoi (and tributary Huelo (Puolua))

Pi'ina'au

Palauhulu

Waiokamilo

Wailuanui

Makapipi

West Wailuaiki (habitat stream)

Waiohue (habitat stream)

64% baseflow (5 streams)

Punalau/Kōlea

Honomanū

Waikamoi

East Wailuaiki

Kopiliula

20% of baseflow (8 streams and one tributary)

Wahinepe'e *

Puohokamoa

Ha'ipua'ena

Nua'ailua

Pua'aka'a (tributary of Kopiliula Stream)

Pa'akea

Waiaka *

Kapaula

Hanawi

13 streams

Puakea Stream

Kōlea Stream

Punaluu Stream

Kaaiea Stream

Opuola Stream (Makanali tributary)

Puehu Stream

Nailiilihaele Stream

Kailua Stream

Hanahana Stream (Ohanui tributary)

Hoalua Stream

Waipio Stream

Mokupapa Stream

Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries)

Not diverted

Ohia (Waianui)

Kualani (eastern tributary of Waiokamilo Stream) or Hamau

II. SUMMARY OF FACTS

In its 2018 order, CWRM acknowledged the role played by BLNR: “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.” Exhibit J-14 at 22 (vi). CWRM noted that it did “not have the authority to determine how much water may be used for noninstream use by HC&S or MDWS. That is under the authority of the Board of Land and Natural Resources ("Board") pursuant to HRS § 171-58, subject to the IIFS set by the Commission.” *Id.* at 288. CWRM also encouraged BLNR to require a reduction in leakage and waste of water in the EMI ditch system, to obtain accurate information as to all offstream water uses, to monitor stream flows, and to restore native habitat. *Id.* at 22- 23 (vi-vii).

As it has done annually for more than a decade, in November 2018, BLNR approved the continuation of revocable permits authorizing A&B to use approximately 33,000 acres of state land and to divert millions of gallons of water daily from East Maui streams. It did so, once again, without: the completion of an environmental impact statement; evidence regarding how much water is taken from each stream; a requirement that A&B actually measure how much water it is taking from each stream; an understanding of the harm caused; or efforts to ensure that A&B has complied with permit conditions. Exhibit 101 admitting to paragraph 1 of the First Amended Complaint. It did so again in 2019.

Soon after the November 2018 decision, A&B sold approximately 30,000 acres of land in central Maui to Mahi Pono. The sales agreement provides that if A&B is unable to legally deliver 30 million gallons per day to Mahi Pono to implement its farming plan, A&B is liable to pay Mahi Pono up to \$62 million. Exhibit 34 at 6-7 and 47. The revocable permits state: “This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or

otherwise transferred or disposed of.” Exhibits J-1 – J-4, additional condition 7 at page 4 of each. Mahi Pono has not acquired the revocable permits. When Mahi Pono purchased A&B’s lands, it assumed the risk that water from east Maui streams would continue to be available to irrigate crops.

A. Water Use

A&B increases and decreases the amount of water taken from different east Maui streams by opening and closing different types of gates. Exhibit J-14 at 159-62 (FOFs 525-535). Historically, A&B diverted 165 million gallons of water daily on average from east Maui streams, but between 2004 and 2013, its diversions averaged 126 million gallons of water daily. Exhibit J-14 at 158 (¶ 519). Despite Judge Nishimura decision invalidating the revocable permits in January 2016, A&B continued to take water from east Maui streams to serve both the County and its own needs. Exhibit 86; Exhibit 110 ¶¶7, 14; Exhibit 112 ¶¶1-2 . In February, March, April, and May 2016, A&B continued to divert more than forty million of gallons of water daily from east Maui streams and convey that water to Central Maui for its own uses despite the invalidation of the revocable permits. Exhibit 102 ¶5 and last page. In 2016, BLNR limited the total amount of water that A&B could take from east Maui to 80 million gallons, Exhibit J-12, but that limit was removed in 2018. Exhibit J-15 and J-16. Since 2016 and the closing of the sugar plantation, A&B has been diverting far less water than it had been diverting historically. In 2017, A&B diverted on average 23.99 million gallons daily. Exhibit 110 ¶ 8. In 2018, A&B diverted on average 25.75 million gallons daily. *Id.* ¶9; see also Exhibit J-16 at 25 and 26; Exhibit J-21 at 125.

A&B planned to increase the total amount of water diverted in 2019 from 25.75 million gallons daily to 35 million gallons daily. Exhibit 110 ¶¶ 8-10. Instead, it diverted approximately

27 million gallons per day on average. Exhibit J-21 at 96. Mahi Pono planned to increase the amount of water diverted to 45 million gallons in 2020. Exhibit J-26. In the first quarter of 2020, however, A&B diverted an average of 27.79 million gallons daily. Exhibit J-27 at 6.

The defendants have long claimed that the diversion of tens of millions of gallons of water daily from east Maui streams is essential for the County of Maui to provide to upcountry residents and for diversified agriculture. But only a small fraction of the water taken out of east Maui through the EMI ditch system actually satisfies those needs.⁶ Of the 27.79 million gallons daily A&B diverted in the first quarter of 2020, no more than 1.17 million gallons per day (averaged per month), went to the County's Department of Water Supply. Exhibit J-27 at 6. From January 2017-April 2019, the County did not need more than 3.76 million gallons per day (averaged per month), Exhibit 111 (September 2017, 112.656/30). Of the 27.79 million gallons daily A&B diverted in the first quarter of 2020, fewer than three million gallons of east Maui water were used for agriculture. Exhibit J-27 at 6.

B. Thirteen Streams Unaffected by CWRM's 2018 Decision

In its decisionmaking in 2018 and 2019, BLNR did not include any conditions that protect the instream uses (including fishery, wildlife, recreational, or other beneficial instream uses) of the 13 streams unaffected by CWRM's 2018 decision. It did not place a limit on the amount of water that could be taken out of any of these streams. It did not inquire as to how much water was currently being taken out of the streams, or how much more water would be diverted if the revocable permit was continued for another year.

The EMI ditch system was built to capture 100% of normal low flow (roughly analogous

⁶ Maui County gets water through EMI's Wailoa Ditch. Maui County also gets surface water off of Mahi Pono's land, but the use of that surface water is not affected by the revocable permits, and is not being disputed or at issue in this case.

to the stream's baseflow) plus some smaller amount of storm runoff. Exhibit J-20 at 574; Exhibit S-19 at 18; Exhibit J-14 at 19 (iii).⁷ DLNR allowed A&B to drain these 13 streams dry most of the time. Given current research indicating that the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals is 64% of median base flow, Exhibit J-14 at 19 (iii), and given that the diversions on these streams allow for 100% of normal flow plus some smaller amount of storm runoff to be diverted, the diversions cause a significant impact to native stream animals. A&B's own consultant concluded that the diversion of water from these 13 streams reduces habitat units on those streams from 588,000 square meters to 88,386 square meters – a reduction of 85%. Exhibit J-20 at 629.

DLNR's Division of Aquatic Resources identified one of those 13 streams, Kōlea Stream, as having "a large amount of potential habitat in the middle and upper reach" for native species. Exhibit J-22 at 8 (6). It concluded that restoration of water flow to Kōlea Stream would "greatly improve the productivity of the stream and increase the availability of potential habitat for native species." *Id.*

Another of the 13 streams is 'O'opuola. An old translation of 'O'opuola is "long oopu fish," Exhibit J-20 at 1146, suggesting that this stream may well have provided good habitat traditionally for 'o'opu.

Instead of protecting these 13 streams, DLNR argued that it was the responsibility of the

⁷ Resolution of this case should not require a technical understanding of hydrology. To the extent that the defendants insist on talking about Q values, here is primer on understanding them. The Q_{90} of a stream is the minimum amount of water that flows in the stream 90% of the time. It may seem counterintuitive, but that is not a lot of water. The Q_{10} is the amount of water that flows in it 10% of the time, i.e., when it floods. So, the amount of water flowing in a stream for Q_{40} is higher than the Q_{70} . A DLNR witness may testify that the EMI ditch system was designed to capture the Q_{40} flows and that the base flow in east Maui streams is approximately Q_{70} . Again counterintuitively, when the ditch system captures Q_{40} flows it captures all of the stream's base flow plus some storm runoff.

Sierra Club to take steps to protect them by filing a petition with CWRM. Exhibit J-21 at 7. The BLNR Defendants failed to take any steps to protect the 13 streams not regulated by the 2018 CWRM order (including the flow of water within, stream life in, and recreational uses of those streams).

C. Connectivity streams

A&B's consultant also concluded that for four of the connectivity streams protected with only 20% of their base flow – Puohokamoa, Ha'ipua'ena, Nua'ailua, and Pa'akea streams – 20% baseflow destroys 68% of the available habitat. Exhibit J-20 at 629. In 2010, the Division of Aquatic Resources ranked Puohokamoa Stream as the third highest priority stream for restoration. Exhibit J-23 at 8. If Puohokamoa Stream were fully restored, it is predicted to have large amounts of suitable habitat units: 189,000 square meters. Exhibit J-20 at 628. In 2010, the Division of Aquatic Resources ranked Ha'ipua'ena Stream as the sixth highest priority stream for restoration in east Maui. Exhibit J-23 at 11. The BLNR Defendants allowed the A&B Defendants to take so much water from these four streams that less than the minimum flow necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals remains in them. Exhibit J-14 at 19 (iii).

D. Diversion Structures

Diversion structures can: (a) interfere with native aquatic species (blocking migration as well as entraining larvae); (b) facilitate mosquito breeding; and (c) mar natural beauty. Exhibit 4 at 128-129, 189, 192, 194; Exhibit 16; Exhibit 18; Exhibit 19; Exhibit AB-104; Exhibit S-19 at 9-18; Exhibit J-23; Exhibit J-24. The U.S. Fish and Wildlife Service observed:

Among the major threats to the survival in the wild of the two listed forest bird species is mortality caused by avian malaria, which is vectored by the introduced mosquito *Culex quinquefasciatus*. This mosquito species breeds in stagnant pools free from fish in dewatered stream beds, and is by contrast uncommon along stream channels with

continuous now and healthy fish populations. By converting continuously flowing streams into nearly dry beds with scattered small pools, the current EMI diversions thus create corridors of habitat by which *Culex* mosquitoes can penetrate uphill more deeply into the native forest, and more readily reach susceptible native forest bird populations. This represents a significant, although indirect, impact of the proposed diversions to this set of listed species.

Exhibit J-20 at 1972. DLNR's Division of Forestry & Wildlife noted:

In our field assessments conducted in May of this year, we noted several general issues of concern related to the proposed abandonment of diversion structures in the forest reserve. Those include: 1. Walls, structures, or channels that alter the natural course of the stream, such that water becomes trapped and stagnant in areas where flow is restricted. Stagnant waters become breeding sites for mosquitoes, which are vectors for introduced diseases that are a major threat to native forest birds. 2. Use of pipes or other structures that are known to obstruct passage of native fish.

Exhibit J-19. DLNR's Division of Aquatic Resources has expressed its concerns repeatedly:

“natural stream habitat must also be restored to allow ‘o‘opu, opae and hihiwai to migrate upstream.” Exhibit 13.

[T]he walls and dams that have been constructed to direct water to intakes and diversions must also be removed or ‘modified.’ These areas that constrict flow prevents animals from migrating upstream. The presence of some animals which we've identified helps to validate that few animals can migrate upstream. The multiple diversions prevents healthy populations to successfully migrate to upper elevations.

Exhibit 15. To be clear, the Sierra Club is concerned about the diversion structures remaining on **all** the streams in the revocable permit area – not just those on the 13 streams unaffected by CWRM's 2018 order.

DLNR's Division of Aquatic Resources concluded that it would be “relatively simple” to modify one of the diversions on Puohokamoa Stream. Exhibit J-23 at 7. It also ranked modifying the diversions on Waiohue and Hanawi streams as simple. *Id.* at 11 and 12. The Division of Forestry and Wildlife also recommended the removal of diversion structures. Exhibit J-19.

But BLNR did not require any modification of any diversion structures on Puohokamoa stream or Ha'ipua'ena Stream. In fact, it did not require the modification of any diversion

structure on public land, or set any deadline for the modifications that A&B claims that it is working on. BLNR did not impose conditions that would protect native aquatic species from the adverse impacts caused by diversion structures. The BLNR Defendants not even seek information regarding which diversions cause the greatest threat to native species.

E. The BLNR Defendants' Scrutiny of the Requests

Because the BLNR Defendants have routinely rubberstamped the continuation of the A&B's revocable permits, A&B has provided very little information to BLNR. And the BLNR Defendants have not sought the kind of information necessary to make prudent decisions.

In 2018, A&B did **not** disclose how much water it would be taking from east Maui streams in total for 2019. Nor did the BLNR Defendants ask. A&B (and Mahi Pono) did **not** disclose how much water was needed for each crop per acre and for how many acres for 2019 or 2020. In 2018 and 2019, they did **not** disclose how many gallons of water the crops that had already been planted in Central Maui needed daily on average. Nor did the BLNR Defendants ask.⁸

A&B did **not** disclose why it would be impractical to use alternative water sources (including groundwater and water from sources west of Honopou Stream) instead of, or in conjunction with, water from east Maui streams. Nor did the BLNR Defendants ask.

Prior to BLNR's decision in 2018 and 2019, A&B did **not** disclose with specificity how the water that had been diverted from east Maui streams had actually been used in the two immediate prior years. Nor did the BLNR Defendants ask. Only thanks to the Sierra Club's 2019 interrogatory do we have a better idea as to how the water that is being taken out of east Maui is

⁸ In similar contexts, CWRM concluded that 2,500 gallons per cultivated acre per day was a reasonable amount of water to be used for agriculture. *Waiāhole II*, 105 Hawai'i at 7 and 21, 93 P.3d at 649 and 663.

being used. But the picture is still not as clear as it needs to be. A&B did not disclose the specific end use of the amorphous category of uses it labelled “Reservoir/Fire Protection/ Hydroelectric/ Seepage/Evaporation.” Hydroelectricity and reservoirs are **not** an end use of water; water does not simply disappear after it flows through a hydroelectric plant or into a reservoir. Even more troubling is A&B’s apparent waste of water. CWRM determined that it was reasonable for 22.7% of the water taken from east Maui streams to be lost due to seepage, evaporation and other system losses. Exhibit J-14 at 216-17 ¶¶ 733, and 737; *see also* Exhibit J-20 at 178. In the first quarter of 2020, in addition to system losses of 6.31 million gallons per day on average (22.7%), A&B reported 16.44 million gallons per day is “used” for Reservoir/Fire Protection/Evaporation/ Dust Control/ Hydroelectric. Exhibit J-27 at 6. A&B is claiming that water is lost due to evaporation in two separate categories – exceeding the amount that CWRM determined would be reasonable. BLNR never determined that losses exceeding 22.7% would be reasonable.

A&B did **not** submit evidence to BLNR prior to decisionmaking in 2018 and 2019 that its diversions were not causing any adverse impacts to any streams, stream life, or recreational uses. Nor did the BLNR Defendants ask what the impact would be. A&B did **not** disclose which streams increased diversions will come from – and whether some or all of it would come from the 13 streams – and what the harm will be to those streams. Nor did the BLNR Defendants ask. A&B did **not** disclose which stream diversion structures were harming native species. Nor did the BLNR Defendants ask.

The BLNR Defendants admit that they have had the authority since 2001 to condition approval of the continuation of revocable permits on the requirement that A&B provide information regarding:

- a. how much water A&B had taken daily from each stream upon which it had a

- diversion;
- b. how much water A&B had taken on average from each stream upon which it had a diversion;
 - c. what percentage of each stream's flow was being taken from each stream upon which there was a diversion;
 - d. which diversions cause the greatest threat of entrainment of native aquatic species;

Exhibit 101 admitting to paragraph 83 of the first amended complaint. Yet, BLNR has never exercised this authority. The BLNR Defendants do not know how much water naturally flowed in many of the streams and how much of that water A&B was, is, and will be diverting from each stream. Exhibit 104 at 9-11. Nor did BLNR seek such information. *Id.* at 20-24. BLNR did not know how much water A&B had taken daily from each stream upon which it had a diversion for the past two years. Since 2001, BLNR and DLNR have not required that A&B install gauges or meters on streams to measure (a) how much water A&B is taking from each stream and (b) how much water remains in the stream after the diversion point.

The BLNR Defendants did not carefully scrutinize or balance the benefits to diverting water from east Maui streams with the impacts.

F. Trash

In November 2017, BLNR approved the continuation of the revocable permits on the condition that "A&B needs to clean up their debris starting with more accessible areas and along streams." Exhibit J-13 at 13. In 2018, the Sierra Club provided testimony and photographs regarding trash littering public land encompassed by the revocable permits. Exhibit J-15 at 4. The BLNR Defendants made no effort prior to BLNR's 2018 and 2019 decisions to verify

whether trash continues to litter public lands. Exhibit 101 admitting to paragraph 85 of the first amended complaint. The BLNR Defendants made no effort prior to BLNR's 2018 and 2019 decisions to ensure that A&B was making sufficient efforts to clean up the trash. Exhibit 105 ¶ 3. The BLNR Defendants have taken no enforcement action of any kind to ensure that A&B cleans up the mess left in and around east Maui streams. The evidence is clear that trash remains on public land encompassed by the revocable permits. Exhibits 56-66.

G. Summary

In summary, the BLNR Defendants failed to: (a) provide any protection whatsoever to 13 streams (and uses of them, by streamlife and recreational users) unaddressed by CWRM's 2018 decision; (b) justify allowing streams to have less water flowing in them necessary for native stream animals to grow and reproduce; (c) take any action to systematically assess the impact of, or require the removal (with a deadline) of, any of the diversion structures on public land that harm native aquatic species, facilitate mosquito breeding, and mar natural beauty; (d) seek the information it needed to make an informed decision, or carefully scrutinize the request for more water; (e) ask A&B to use water from available alternative sources before or in conjunction with the use of water taken from east Maui; (f) ensure that east Maui stream water is being used efficiently and in a reasonable and beneficial manner, and; (g) monitor whether trash continues to litter public land and effectively respond to reports of old debris littering the landscape.⁹

⁹ Since the Sierra Club filed its complaint in January 2019 and its motion for partial summary judgment as to count 2 in July 2019, it has narrowed its focus to facilitate this trial. Part of the reason for doing so is the new information that has come to light. A&B finally filed its draft EIS, which includes reports and information never provided before. Appendix A to that DEIS quantifies the devastating impact that A&B's diversions cause. Although the focus of the trial will not address all the allegations raised in the Sierra Club's complaint or all the issues argued in its July 2019 motion for partial summary judgment as to count 2, none of the issues the Sierra Club raises in this trial should come as a surprise to the defendants. These issues were laid out in the Sierra Club's April 3, 2020 Motion For Summary Judgment, Or In The Alternative, For A

III. THE BLNR DEFENDANTS BREACHED THEIR TRUST DUTIES.

Under the Hawai'i Constitution, **all public natural resources are held in trust** by the State for the common benefit of Hawai'i's people and the generations to come. Additionally, the constitution specifies that the public lands ceded to the United States following the overthrow of the Hawaiian Monarchy and returned to Hawai'i upon its admission to the Union hold a special status under our law. These lands are held by the State in trust for the benefit of Native Hawaiians and the general public. Accordingly, our constitution places upon the State duties with respect to these trusts much like those of a common law trustee, including **an obligation to protect and preserve the resources** however they are utilized.

Ching v. Case, 145 Hawai'i 148, 152, 449 P.3d 1146, 1150 (2019) (emphasis added). *See also* Hawai'i State Constitution Art. XI, §§ 1 and 7 and Art. XII, § 4. The BLNR Defendants owe a high standard of care when managing public trust ceded lands. *Pele Def. Fund v. Paty*, 73 Haw. 578, 605 n.18, 837 P.2d 1247, 1264 n. 18. The BLNR Defendants were required to act pursuant to public trust principles when considering whether to allow the A&B Defendants to use public lands and take water from streams pursuant to revocable permits. *Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 324 P.3d 951 (2014); *Ching*, 145 Hawai'i at 178, 449 P.3d at 1176 ("the State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty."). The BLNR Defendants were required to

take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process. Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to **implement reasonable measures to mitigate** this impact, **including the use of alternative sources.** The trust also requires planning and decisionmaking from a global, long-term perspective. In sum, the state may

Preliminary Injunction and the replies in support of it, as well as the Sierra Club's May 1, 2020 memoranda in opposition to A&B's motions for summary judgment as to counts 2 and 3.

When this case began, the Sierra Club was outraged that BLNR had taken no steps to ensure the full restoration of the nine "full restoration" streams. In April 2016, A&B promised in a press release and in a letter to CWRM to fully and permanently restore five streams. Yet, water had not been fully restored by the time BLNR voted to allow A&B to take more water in 2018. By July 2020, however, it is unclear to the Sierra Club whether water is still being taken from those nine streams – although diversion structures still clog them.

compromise public rights in the resource pursuant only to a **decision 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) (“*Waiāhole*”) (emphasis added). The BLNR Defendants cannot simply rubberstamp requests to use and impair public trust resources. The BLNR Defendants breached their trust duty to: (a) protect streams; (b) hold A&B to its burden, and; (c) protect public land from garbage.

A. The BLNR Defendants Breached Their Duty to Protect Public Streams.

“The BLNR is constitutionally mandated to conserve and protect Hawai‘i’s natural resources.” *Pila‘a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai‘i 247, 250, 320 P.3d 912, 915 (2014). “The most basic aspect of the State’s trust duties is the obligation to protect and maintain the trust property and regulate its use.” *Ching*, 145 Hawai‘i at 170, 449 P.3d at 1168. “As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin.” *Id.* at 177, 449 P.3d at 1175. As a trustee, the BLNR Defendants “must apply a presumption in favor of public use, access, enjoyment, and resource protection.” *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983. They must determine whether the proposed use is consistent with public trust purpose of protecting and maintaining “waters in their natural state.” *Id.* at 172 and 174, 324 P.3d at 982 and 984. They must “take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” *Id.*

When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.

Id. at 173, 324 P.3d at 983 (internal citations omitted). And the BLNR Defendants must

implement reasonable measures to mitigate impacts. *Id.*

When CWRM set instream flow standards for Waiāhole and other streams, CWRM allowed half the water from each stream to be diverted. *Waiāhole II*, 105 Hawai‘i at 11, 93 P.3d at 653. CWRM had noted that “[a]ccording to one Hawaiian historian, ‘no ditch was permitted to divert more than half the flow from a stream.’” 105 Hawai‘i at 11, 93 P.3d at 653. (citing Handy, E.S.C. and Handy, E.G., *Native planters in Old Hawaii: Their Life, Lore, and Environment*, 1972, at 58). CWRM used that fact to decide that “half of a stream flow is sufficient to **protect** instream values.” *Id.* (emphasis added) The Supreme Court vacated CWRM’s decision because CWRM failed to protect streamflow. The court held that the “interim standards must still provide **meaningful protection** of instream uses.” *Id.* (emphasis added). The diversion of half of a stream’s flow was insufficient to protect instream values in that case. In this case, BLNR’s authorization of the diversion of all (not just half) of 13 streams’ flow fails to protect any instream values of any of these 13 streams.

The BLNR Defendants breached their duty to protect public trust resources when they (a) failed to take any steps to protect the 13 streams not regulated by the 2018 CWRM order (including the flow of water within, stream life in, and recreational uses of those streams), allowing these 13 streams to be drained dry;¹⁰ (b) allowed the A&B Defendants to take so much water from streams that less than the minimum flow necessary remains in them that is necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream

¹⁰ The interim instream flow standard for these 13 streams is whatever was flowing on June 15, 1988. HAR §13-169-44. The 1988 interim instream flow standard was established on the basis of existing water diversion structures rather than on the basis of the biological or ecological value of any given stream flow level, and did little more than ratify the existing diversions. *Cf. Waiāhole*, 94 Hawai‘i at 150 and n. 54, 9 P.3d at 462 and n. 54.

animals;¹¹ (c) failed to set any deadlines for the removal or alteration of any of the diversions structures on public land; and (d) failed to set deadlines for the implementation of measures to mitigate the harm caused by diversion structures on public land.

In addition, the BLNR Defendants have a trust duty to protect the 13 streams from diversions until substantive instream flow standards are established. In other words, substantive instream flow standards must be established **before** diversions are authorized. “[I]nterim standards must still provide **meaningful protection** of instream uses.” *Waiāhole II*, 105 Hawai‘i at 11, 93 P.3d at 653.

The tentative grant of water use permits without any determination of instream flow standards, conversely, presents the least desirable scenario: no assurance that public rights are receiving adequate provision, no genuine comprehensive planning process, and no modicum of certainty for permit applicants and grantees. Cf. *Concerned Citizens of Putnam County for Responsive Gov't v. St. John's River Water Management Dist.*, 622 So.2d 520, 523 (Fla.Ct.App.1993) (“[I]t is difficult . . . to imagine how the water supply can be managed without the establishment of minimums.”).

Waiāhole, 94 Hawai‘i at 149, 9 P.3d at 461. An agency must “take the initiative in planning for

¹¹ The BLNR also has a trust duty to make findings that are clear and that explain the basis of its decision, particularly when their decision harms stream life. *Kauai Springs*, 133 Hawai‘i at 173-74, 324 P.3d at 983-84. It breached this duty when it failed to provide any specific justification for the dewatering of **specific streams** regardless of the impact to stream life, recreational uses and natural beauty. DLNR’s aquatic biologist explained in his deposition:

Q Okay. What about is there a significant difference in habitat quality in a stream with 64 percent base flow and one that just has 20 percent base flow?

A Oh, yeah, they're substantial.

Q Can you be more -- can you describe how it would --

A Well, you don't have enough water in the stream for animals to actually grow, to reproduce, you know, to spawn. So I mean it's not enough water that, you know, the animals can live their normal life. You may be able to sustain the animals but it's not necessarily getting to, you know, their full functional cycles of productivity and whatnot.

Q And I think there's some reference in some of your correspondence. But it's not a linear relationship, 20 percent --

A Yes, it's not. It's not. You think it would be but it's not.

Q Okay. Now, is there a significant difference in habitat quality in a stream with 20 percent base flow and one with no base flow where all the base flow can be taken and diverted?

A Well, then you have a dry streambed, yeah. So you don't have any animals.

the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.” *Id.* Meaningful instream flow standards should be established before authorizing increased diversions. Failure to do so could “leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows.” *Id.* at 158, 9 P.3d at 471. Early designation of instream flow standards fulfills the BLNR Defendants’ duty of protection under the constitution, “ensuring that instream uses do not suffer inadvertent and needless impairment.” *Id.* at 148, 9 P.3d at 460. Instead of working to establish instreams flow standards for the 13 streams, the BLNR Defendants have annually authorized the diversion of as much water as the A&B Defendants desired since 2000.

This trust duty is re-enforced by the legislature’s emphasis on setting instream flow standards before increasing diversions. Conf. Comm. Rep. No. 118, in 1987 Senate Journal, at 886 (“To the fullest extent possible, it is the intent of the Legislature that interim instream flow standards be established prior to either new or expanded diversions of water from a stream.”). The BLNR Defendants’ obligation is compounded by Judge Hifo’s 2003 order that “before authorizing the diversion” of water from east Maui streams, BLNR would have to either conduct an investigation as to how much water in the streams was excess, or wait for CWRM to do so. Exhibit J-10. After noting that BLNR cannot determine the best interests of the state without data on what water is excess, *id.* at 4, Judge Hifo held that BLNR cannot dispose of water “in light of the lack of knowledge or information of what the CWRM will ultimately determine in the future, notwithstanding [A&B’s] argument that the CWRM has exclusive jurisdiction over determining what amount of water must flow through the streams which all agencies have a duty to protect.” *Id.* BLNR is entitled to rely on and use CWRM’s instream flow standards, but

if there is no CWRM determination to amend instream flow standards, then any BLNR investigation it could itself perform on these issues would not be parallel to the CWRM.

If the BLNR believes it does not have the requisite expertise to investigate, then it should wait until the CWRM has acted or make its own application to establish instream flows reflecting the diversion it proposes to make, before authorizing the diversion.

In any case, given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the **BLNR is obligated to make a truly independent investigation** as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams. . . . This Court simply affirms that the **BLNR may not merely rubber-stamp every CWRM determination.**

Id. at 5. There is no meaningful distinction between a 30-year lease and the continuation of a revocable permit that has been in effect for two decades. BLNR's decision was inconsistent with its trust duties because its decision "could drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows." *Waiāhole*, 94 Hawai'i at 158, 9 P.3d at 471. The BLNR improperly displayed a "permissive view towards stream diversions, particularly while the instream flow standards remained in limbo." *Id.* at 159, 9 P.3d at 472. Given Judge Hifo's order, the Supreme Court's admonishment against draining a stream dry, the profound ecological consequences of taking all the water from a stream, and the decades that this has been going on, the BLNR Defendants breached their trust duty when they authorized the diversion of these 13 streams without meaningful instream flow standards.

B. The BLNR Defendants Breached Their Duty to Hold A&B to its Burden.

When an agency lacks data or information to discharge its duties pursuant to the public trust doctrine, the agency "must 'take the initiative' to obtain the information it needs." *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 262, 287 P.3d 129, 163 (2012). The public trust doctrine requires "a thorough assessment of the possible adverse impacts the development would have on the State's natural resources." *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006). The BLNR

Defendants have a “duty to investigate upon being made aware of evidence of possible damage” of public trust resources. *Ching*, 145 Hawai‘i at 177, 449 P.3d at 1175. Where studies are lacking, a trustee can require that water diverters pay for them. *Waiāhole*, 94 Hawai‘i at 185, 9 P.3d at 497. *See also* HRS §171-6(6) (“Establish additional restrictions, requirements, or conditions, . . . relating to the use of particular land being disposed of, [and] the terms of . . . permit.”), HRS §171-55 (“under conditions and rent which will serve the best interests of the State.”) and HRS §171-58(c) (“under those conditions which will best serve the interests of the State”).

Decisions involving public trust resources require “a ‘higher level of scrutiny’ for private commercial uses such as those proposed in this case. In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.” *Waiāhole* at 142, 9 P.3d 454. Under “no circumstances” does the constitution allow BLNR “to grant permit applications with minimal scrutiny.” *Id.*, 94 Hawai‘i at 160, 9 P.3d at 472. “The Hawai‘i Constitution requires the State to engage in evaluative” analysis “to protect against the conflict of interest inherent in self-reporting.” *Lāna‘ians for Sensible Growth v. Land Use Comm’n* __ Hawai‘i __ (May 15, 2020). The Supreme Court has condemned “limited and perfunctory review” that simply repeats the applicant’s representation and makes no “independent factual findings.” *In re Application of Gas Co.* __ Hawai‘i __ (June 9, 2020). An agency cannot simply restate an applicant’s representations “without substantiating” them. *Id.*

As trustees, the BLNR Defendants are obliged to ensure that applicants fulfill their burden of proof.

Applicants have the burden to justify the proposed water use in light of the trust purposes.

- a. Permit applicants must **demonstrate their actual needs** and the propriety of draining

water from public streams to satisfy those needs.

b. The applicant must **demonstrate the absence of a practicable alternative water source**.

c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must **demonstrate that there is no harm** in fact or that the requested use is nevertheless **reasonable and beneficial**.

d. If the impact is found to be reasonable and beneficial, the applicant **must implement reasonable measures to mitigate the cumulative impact** of existing and proposed diversions on trust purposes, if the proposed use is to be approved.

Kauai Springs, 133 Hawai‘i at 174-75, 324 P.3d 984-85 (emphasis added).

1. The BLNR Defendants Failed to Make A&B Prove its Water Needs.

“At a very minimum, applicants must prove their own actual water needs.” *Waiāhole*, 94 Hawai‘i at 161, 9 P.3d at 473. The BLNR Defendants breached their duty to ensure that A&B met its burden to demonstrate its actual water needs when A&B failed to disclose prior to BLNR’s decisionmaking: (a) how much water was needed for each crop per acre; (b) how the water that had been diverted from east Maui streams had actually been used (in detail) in the two immediate prior years; and (c) how much water is being lost, or wasted.

2. The BLNR Defendants Failed to Make A&B Prove the Absence of Alternative Water Sources.

“The applicant must demonstrate the absence of a practicable alternative water source.” *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d 984. The BLNR Defendants breached their duty to ensure that A&B met its burden to demonstrate the absence of practicable alternative water sources when it failed to: (a) ask about the use of alternative water sources (including groundwater and water from sources west of Honopou Stream); (b) ask A&B to provide any evidence that the groundwater would be too brackish for any of the proposed crops, and; (c) require the use of groundwater in conjunction with the use of east Maui water.

3. The BLNR Defendants Failed to Make A&B Disclose the Impacts of the Diversions.

“If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that **there is no harm in fact** or that the requested use is nevertheless reasonable and beneficial.” *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d 984. “The applicant is obligated to demonstrate affirmatively that the proposed use will not affect a protected use, in other words, the absence of evidence that the proposed use would affect a protected use is insufficient.” *Id.* at 173, 324 P.3d 983 (internal quotation marks and brackets omitted). Under the public trust, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource. These public rights include the protection of fish and wildlife from unreasonably harmful effects. *Waiāhole*, 94 Hawai‘i at 160, 9 P.3d at 472. The BLNR Defendants breached their duty to ensure that A&B met its burden when they failed to: (a) ask A&B which streams increased diversions will come from, and what the harm will be; (b) seek information needed to prudently evaluate the effects of the A&B Defendants’ use of public trust lands and water; and (c) require that A&B provide evidence that its diversions would not harm streams, stream life or recreational uses.

4. The BLNR Defendants Failed to Ensure that A&B Used the Diverted Water Reasonably and Beneficially.

“If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact **or that the requested use is nevertheless reasonable and beneficial.**” *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d 984. The BLNR Defendants have a trust duty to ask for specific information from the applicant as to how water diverted from streams is put to a reasonable and beneficial use. *Kauai Springs*, 133 Hawai‘i at 172, 324 P.3d at 982; *Waiāhole*, 94 Hawai‘i at 162, 9 P.3d at 474; *In re 'Iao*, 128 Hawai‘i at 262,

287 P.3d at 163. In addition, the BLNR Defendants are obligated to ensure that the water has been used, and is proposed to be used, in a reasonable and beneficial manner. *Ching*, 145 Hawai‘i at 152 and 177-79, 449 P.3d at 1170 and 1175-77; *Kelly*, 111 Hawai‘i at 231, 140 P.3d at 1011; *Waiāhole*, 94 Hawai‘i at, 143, 9 P.3d at 455; HRS § 171-7(5).

The BLNR Defendants breached their trust duty to ensure that water diverted from east Maui streams is used in a reasonable and beneficial manner when they failed to: (a) require any information as to how water from east Maui streams was actually and specifically used in the two immediate prior years before the 2018 and 2019 decisions; (b) learn the specific end use of the amorphous category of uses labelled “Reservoir/Fire Protection/ Hydroelectric/ Seepage/ Evaporation”; (c) prevent A&B from wasting more water than what CWRM determined was a reasonable amount to be lost through evaporation and seepage; (d) determine how much water per day per cultivated acre is needed for diversified agriculture, and; (e) carefully scrutinize how the water was proposed to be used.

5. The BLNR Defendants Failed to Require Reasonable Mitigation Measures.

“If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved.” *Kauai Springs*, 133 Hawai‘i at 175, 324 P.3d at 985. “[P]ermit applicants must also demonstrate the absence of practicable mitigating measures[.]” *Waiāhole*, 94 Hawai‘i at 161, 9 P.3d at 473. When deadlines are not set, unreasonable delay can result. *Cf. Hanabusa v. Lingle*, 119 Hawai‘i 341, 352, 198 P.3d 604, 615 (2008) (in the absence of a legal deadline, the governor took an “unreasonable period of time . . . to perform her constitutional and statutory duty of nominating and appointing the six remaining regents”).

The BLNR Defendants breached their duty to hold A&B to its burden when they failed to require that A&B demonstrate the absence of practicable mitigating measures. They did not even ask A&B to provide an analysis as to which diversion structures are harmful. They failed to ask about, or impose, mitigation measures such as (a) setting deadlines for the removal/ modification of harmful diversion structures on public land; (b) requiring the use of alternative water sources; (c) mandating the lining and covering of the reservoirs to reduce seepage and evaporation; and (d) limiting diversions from any of the 13 streams that have no meaningful instream flow standards.

C. The BLNR Defendants Breached Their Trust Duty to Protect Public Land.

“The most basic aspect of the State's trust duties is the obligation to protect and maintain the trust property and regulate its use.” *Ching*, 145 Hawai‘i at 170, 449 P.3d at 1168. “As trustee, the State must take an active role in preserving trust property and may not passively allow it to fall into ruin.” *Id.* at 177, 449 P.3d at 1175. “An essential component of the State's duty to protect and preserve trust land is an obligation to reasonably monitor a third party's use of the property.” *Id.* at 152, 449 P.3d at 1150. Reasonable monitoring ensures that a trustee fulfills the mandate of “elementary trust law” that trust property not be permitted to “fall into ruin on [the trustee's] watch.” *Id.* at 170, 449 P.3d at 1168. “It is self-evident that an obligation to reasonably monitor trust property to ensure it is not harmed is a necessary component of this general duty, as is **a duty to investigate upon being made aware of evidence of possible damage.**” *Id.* at 177, 449 P.3d at 1175. “This obligation inherently includes a duty to make reasonable efforts to monitor third-parties' compliance with the terms of agreements designed to protect trust property. *Id.* at 177-78, 449 P.3d at 1175-76. “[T]he State has an ongoing trust obligation to ensure third-party compliance with provisions designed to protect trust property [.]” *Id.* at 179, 449 P.3d at

1177. “[M]anifestly, it is not reasonable for a trustee to delegate the supervision of a third party's compliance with an agreement that is designed to protect trust property to the third party itself. . . . The Hawai‘i Constitution requires the State to engage in evaluative monitoring.” *Lāna‘ians for Sensible Growth v. Land Use Comm'n* __ Hawai‘i __ (May 15, 2020). A trustee does not fulfill its duties by relying solely on the submission of reports by the permit holder (self-reporting). *Id.* The BLNR Defendants are required “to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented.” *Kelly*, 111 Hawai‘i at 231, 140 P.3d at 1011. A trustee

must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead **must take the initiative** in considering, **protecting, and advancing public rights** in the resource at every stage of the planning and decisionmaking process.

Waiāhole, 94 Hawai‘i at 143, 9 P.3d at 455. HRS § 171-7 mandates that BLNR “**shall** . . . (5) enforce . . . permits or other disposition of public land.” BLNR is required to prevent illegal activities on public land. HRS § 171-7(2). HRS §§ 339-4 and 708-829 prohibit discarding litter on public property.

The BLNR Defendants breached their trust duties when they (a) relied exclusively on the self-reporting by A&B on the debris remaining on public land; (b) failed to do any investigation to determine the extent to which trash litters public land after being provided with photographs of debris near east Maui streams; and (c) failed to take any type of enforcement action in response to the debris littering public lands.

IV. **THE BLNR DEFENDANTS VIOLATED HRS CHAPTER 205A.**

The plain language of HRS chapter 205A imposes mandatory duties on the BLNR Defendants. “Where the word 'shall' is used in statutes, it is 'generally imperative or mandatory.’ *Leslie v. Bd. of Appeals of Cnty. of Hawai‘i*, 109 Hawai‘i 384, 393, 126 P.3d 1071,

1081 (2006) (quoting *Black's Law Dictionary* 1375 (6th ed. 1990)).” *Asato v. Procurement Policy Board*, 132 Hawai‘i 333, 347, 322 P.3d 228, 242 (2014). *See Leslie*. HRS § 205A-4(a) states that “agencies **shall** give full considerations to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development.” HRS § 205A-4(b) states that HRS chapter 205A’s objectives and policies “**shall** be binding upon actions within the coastal zone management area.”¹² HRS § 205A-5(b) states that all agencies, “**shall** enforce the objectives and policies” of HRS chapter 205A. The use of the word “shall” reveals that these are duties that the BLNR Defendants are required to perform.

Ensuring that agencies comply with binding statutory objectives is not unusual. When developers proposed to build an amusement park on agricultural land in Waianae, the Hawai‘i Supreme Court was left

with a definite and firm conviction that the recreational theme park proposal fails to comply with the first and critical requirement that the proposed use not run contrary to the **objectives** sought to be accomplished by the Land Use Laws and Regulations, the counterpart of the statutory mandate that the proposed use promote the effectiveness and objectives of HRS ch. 205.

Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n, 64 Haw. 265, 270, 639 P.2d 1097, 1101 (1982) (emphasis added). The Supreme Court reversed a Land Use Commission (LUC) decision which “frustrates the **objectives**” of HRS chapter 205. *Id.* at 272, 639 P.2d at 1103 (emphasis added).

¹² The “coastal zone management area” is defined as “**all lands of the State** and the area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea.” HRS § 205A-1. The legislature expanded this definition in 1993. Act 91, 1993 Haw Sess. Law at 123. As the Senate Committee on Planning and Water Use Management explained, “This bill would expand the coastal zone management area to include the entire land mass of the State. . . . Your Committee finds that this bill will help ensure the continued preservation of Hawaii’s unique and limited land base[.]” SCRep. 1142, 1993 Senate Journal at 1189. It is therefore irrelevant whether any of the land within the revocable permit area lie within the special management area.

The binding objectives and policies of HRS chapter 205A require that the BLNR Defendants: (a) “[p]rotect valuable coastal ecosystems from disruption and **minimize adverse impacts** on all coastal ecosystems,” HRS § 205A-2(b)(4)(A); (b) “[e]xercise an **overall conservation ethic and practice stewardship** in the protection of coastal resources, use and development of marine and coastal resources,” HRS § 205A-2(c)(4); and (c) “[m]inimize disruption or degradation of coastal water ecosystems **by effective regulation of stream diversions**, channelization, and similar land and water uses, recognizing competing water needs,” HRS §205A-2(c)(4)(D). In short, the binding objective and policies call for protection, stewardship and effective regulation.¹³

The BLNR Defendants violated the obligations imposed by HRS §§ 205A-2, -4 and -5(b) when they failed to (a) consider or protect the instream uses and values of the 13 streams; and (b) ensure that diversion structures on public land that are causing harm are removed within a specified timeframe. The BLNR Defendants did not protect the streams, exercise an overall conservation ethic, practice stewardship, minimize impacts, or effectively regulate.

V. **THE DEFENSES**

The Sierra Club is not clear as to how the defendants will respond. One thing we know: the defendants will **not** be relying on any expert testimony. The defendants have not submitted any expert reports. To date, they have brought a mishmash of defenses.

A. **The Sierra Club Has Standing.**

A&B has repeatedly argued that the Sierra Club lacks standing to pursue this case. Given the Supreme Court’s decisions in *Tax Found. of Hawai‘i v. State*, 144 Hawai‘i 175, 439 P.3d 127

¹³ “Clearly, the underlying intent of the CZMA is to protect, preserve, and, where possible, restore the natural resources of Hawai‘i’s coastal zone.” *Morgan v. Planning Dept., County of Kauai*, 104 Hawai‘i 173, 185, 86 P.3d 982, 994 (2004).

(2019) (not required for suits filed pursuant to HRS § 632-1(b)); *Kaapu v. Aloha Tower Development Corp.*, 74 Haw. 365, 380-83, 846 P.2d 882, 888-90 (1993) (not required for suits filed pursuant to HRS § 92-12); *Asato v. Procurement Policy Board*, 132 Hawai‘i 333, 342-46, 322 P.3d 228, 237-41 (2014)(not required for suits filed pursuant to HRS § 91-7), the Sierra Club does not believe that it is required to prove any injury to itself or its members. And if it is required to do so, the Supreme Court has repeatedly declared that in cases involving environmental interests, the doctrine of standing should not serve as a barrier to a plaintiff’s legitimate claims. *Kilakila ‘O Haleakalā v. Bd. of Land & Natural Res.*, 131 Hawai‘i 193, 204, 317 P.3d 27, 38 (2013). Nevertheless, in abundance of caution, the Sierra Club will demonstrate that it and its members have been injured, and are threatened with further injury. But the emphasis in this trial will be to the harm that the streams – and the native aquatic life dependent on them – suffer. Streams may not have standing, but the Sierra Club stands in their waters to defend them.

B. This Court has Jurisdiction.

A&B has argued that this court’s jurisdiction prohibits it from reviewing BLNR’s decision. On October 4, 2019, this court entered an order rejecting that argument. HRS § 171-58(c), Judge Hifo’s order, Exhibit J-10, CWRM’s order, Exhibit J-14 all demonstrate that BLNR’s role is to determine whether A&B should be able to divert water off of public land, and if so, under what conditions. This court is reviewing whether in doing so the BLNR Defendants breached their trust duties and whether they violated HRS chapter 205A.

C. BLNR Cannot Abdicate its Duties.

The defendants have argued that it was the Sierra Club’s duty to petition CWRM to amend the interim instream flow standard for the 13 streams. Exhibit J-21 at 7. But it is the

BLNR Defendants who are constitutionally obligated to protect these 13 streams. “[T]he State may not delegate its constitutional duties to third-parties.” *Ching*, 145 Hawai‘i at 180, 449 P.3d at 1178. The defendants want more water to be diverted from public streams than has been diverted since the beginning of 2017 – increasing the harm to the streams. They are the ones who must file petitions to amend the instream flow standards for the 13 streams before increasing the diversions.

D. It is Not Too *Early* to Address these Issues.

The defendants have suggested that some of the issues raised by the Sierra Club will be addressed when BLNR leases the land covered by the revocable permits. This argument is flawed for at least three reasons.

First, the BLNR Defendants have been routinely rubberstamping the continuation of the revocable permits since they were issued in the year 2000. It has been twenty years, and it could continue this way forever. The defendants assume that a lease will be issued one day. But no one knows if a lease will ever be issued. In fact, the BLNR cannot render any decision on whether to issue a lease until a final environmental impact statement is accepted, and we have no idea when that will occur.

Second, the time to address these issues is **before** the amount of water diverted increases – not afterwards. *Waiāhole* also arose with the closing of sugar plantation (in 1995). The court held:

[T]his case largely involves "existing" diversions predating the Code. But this does not relieve the Commission of its duty to consider and support the public interest in instream flows. Here, the close of sugar operations in Central O‘ahu has provided the Commission **a unique and valuable opportunity to restore previously diverted streams** while rethinking the future of O‘ahu's water uses. The Commission should thus take the initiative in planning for the appropriate instream flows **before demand for new uses** heightens the temptation simply to accept renewed diversions as a foregone conclusion.

...

Waiāhole, 94 Hawai‘i at 149, 185, 9 P.3d at 461. Failure to do so could “leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows.” *Id.* at 158, 9 P.3d at 471. “Early designation of instream flow standards furthers several important objectives. First, it **fulfills the Commission’s duty of protection under constitution** and statute, ensuring that instream uses do not suffer inadvertent and needless impairment.” *Id.* at 148, 9 P.3d at 460. *Cf.* *Ka Pa ‘akai O Ka ‘aina v. Land Use Comm’n*, 94 Hawai‘i 31, 51-52, 7 P.3d 1068, 1088-89 (2000)(holding that determinations should be made before decisionmaking). A&B and Mahi Pono are proposing to increase the amount of water diverted in 2020.

Third, BLNR’s trust duties are continuing duties and are not limited to the context of the issuance of a lease. They apply to the continuation of a revocable permit that was first granted in 2000. The Supreme Court has held that trust duties apply to decisions and actions of CWRM, *Waiāhole*, the Department of Health, *Kelly*, the Kaua‘i planning commission, *Kaua ‘i Springs*, the land use commission, *Lāna ‘ians for Sensible Growth v. Land Use Comm’n* ___ Hawai‘i ___ (May 15, 2020), the public utilities commission, *In re Application of Gas Co.* ___ Hawai‘i ___ (June 9, 2020), and the BLNR Defendants, *Ching*. The public trust doctrine contains no special exemption clause that excludes the annual renewal of revocable permits from its applicability. The constitutional duty to protect public trust resources applies regardless of the agency and regardless of the nature of the proceeding.

As we reiterated in *Mauna Kea II*, a **state agency must perform its functions in a manner that fulfills the State’s affirmative obligations under the Hawai‘i constitution**. 143 Hawai‘i at 387, 431 P.3d at 760. We also note, however, that HG and the PUC’s reliance on the ICA’s decision in *In re Molokai Pub. Utils.*, 127 Hawai‘i 234, 277 P.3d 328 (App. 2012), to argue that a rate case does not trigger a state agency’s public trust obligations where there is no change in use of the public trust resource, is misplaced. That case was effectively overruled by this court’s decision in *Ching v. Case*, 145 Hawai‘i 148, 177-78, 449 P.3d 1146, 1175-76 (2019), in which we held that **the state has a continuing duty** to monitor the use of trust property, **even if the use of the**

property has not changed. See also *Lāna'ians for Sensible Growth v. Land Use Comm'n*, 2020 WL 2511131, at *7 (Haw. May 15, 2020) (noting that the LUC possesses **a continuing constitutional obligation** to ensure that measures it imposes to protect public trust resources are implemented and complied with). Thus, the PUC's **constitutional obligations are ongoing, regardless of the nature of the proceeding.**

In re Application of Gas Co. ___ Hawai'i ___ (June 9, 2020).

E. It is Not Too Late to Address these Issues.

In his deposition, BLNR member Sam Gon *sua sponte* explained that BLNR did not impose any measures to protect native aquatic species from the adverse impact caused by stream diversions in 2018 and 2019 “because there were no impacts above and beyond that which occurred for over a century.” The Supreme Court has condemned that logic. The long-term deprivation of water from east Maui streams does not reduce the need for BLNR to consider the impact of diversions on instream values such as native aquatic life, natural beauty and recreational uses. The public trust doctrine does “not differentiate among ‘protecting,’ ‘enhancing,’ and ‘restoring’ public instream values, or between preventing and undoing ‘harm’ thereto.” *Waiāhole*, 94 Hawai'i at 150, 9 P.3d at 462. The fact that A&B has “historically deprived downstream users” and aquatic life of water “does not negate” the value of those interest in the water. *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 242, 287 P.3d 129, 143 (2012).

Here, **the close of sugar operations** in Central O`ahu has provided the Commission a **unique and valuable opportunity to restore previously diverted streams** while rethinking the future of O`ahu's water uses. The Commission should thus take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.”

...

As stated above, the public trust authorizes the Commission to **reassess previous diversions** and allocations, even those made with due regard to their effect on trust purposes.

Waiāhole, 94 Hawai'i at 149, 185, 9 P.3d at 461.

F. The Harm to the Streams is Irreparable, but Not Permanent.

The defendants have argued that the harm to our streams is not irreparable. In the context of injunctive relief, “irreparable” harm the term does not mean permanent injury. As our Supreme Court has explained:

"It is somewhat difficult to frame a general definition of irreparable injury that would be applicable to all the cases. **The term has acquired in the law of injunctions a meaning which, perhaps, is not quite in keeping with its derivation or its literal signification,** and has been often defined by the courts in varying language. The question whether the complainant will in fact suffer an irreparable injury in the sense here intended must depend for its solution largely upon the character of the act or acts alleged to be injurious. * * * **As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law,** so that to refuse the injunction would be a denial of justice; where, in other words, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, **it cannot be readily, adequately, and completely compensated for with money. * * * The term `irreparable damage' does not have reference to the amount of damage caused, but rather to the difficulty of measuring the amount of damages inflicted. * * ***"

"An injury will be regarded as irreparable so as to warrant injunctive relief where it tends toward the destruction of the complainant's estate, or where it is of such a character as to work the destruction of the property as it has been held and enjoyed, so that no judgment at law can restore it to him in that character. * * *" (28 Am. Jur., *Injunctions*, § 48.)

Klausmeyer v. Makaha Valley Farms, Ltd., 41 Haw. 287, 339-40 (1956).

The diversion of water from a stream harms the stream and stream life. Streams can recover when water is returned to them. In other words, the damage is not forever. That does not mean, however, that there is no ecological damage in the meantime. There is a distinction between a stream's ability to recover, and the damage that is incurred before the recovery. The EMI ditch system has profoundly reduced the overall biological integrity of East Maui streams and thus the abundance of native species in these streams for many generations.

G. BLNR's Decision was Not Balanced.

The defendants have argued that BLNR's decisions were balanced.

When a stream is completely de-watered, the dry streambed is *prima facie* evidence of a complete lack of balance. BLNR's decisions offered no protection of the streamflow of 13 streams. Their decisions allow the removal of all the baseflow from these 13 streams. They have allowed A&B to drain these streams completely dry.

When an applicant's proposed use is not scrutinized, there is no balance. The BLNR Defendants do not know the end use of much of the water. They have no idea how much water flows in these 13 streams, how much is being diverted from them for agriculture or drinking water, and how much more will be taken from them. Under "no circumstances" does the constitution allow BLNR "to grant permit applications with minimal scrutiny." *Waiāhole*, 94 Hawai'i at 160, 9 P.3d at 472.

When feasible mitigation measures are ignored, there is no balance.

H. Catastrophe will Not Ensur if the Amount of Water is Limited.

For years, the defendants in various contexts have argued that calamity would strike if A&B was limited as to how much water it could take from east Maui. There is no need to worry.

First, only a small fraction of the water taken out of east Maui through the EMI ditch system goes to the County of Maui. Of the 27.79 million gallons daily A&B diverted in the first quarter of 2020, no more than 1.17 million gallons per day (averaged per month), went to the County's Department of Water Supply. Exhibit J-27 at 6. From January 2017-April 2019, the County did not need more than 3.76 million gallons per day (averaged per month), Exhibit 111 (September 2017, 112.656/30).

Second, past practice demonstrates that EMI will continue to deliver water to the County even if there is no valid water delivery agreement. When the agreement lapsed in 2001, EMI continued to deliver water to the County for nearly two decades.

The term of the 1973 Agreement **expired** on April 30, 2000, and thereafter EMI **continued to deliver water** to the County via the Ditch System and the County continued to draw such water in an informal, unwritten arrangement consistent with the terms of the 1973 Agreement and the parties' practices thereunder.

Exhibit J-25. For eighteen years, EMI continued to deliver water without a valid water delivery agreement. This eighteen-year history demonstrates that regardless of the terms or effect of the agreement, EMI will continue to deliver water to the County. New language conditioning water delivery to “EMI’s continued receipt of permits or receipt of a lease from the State,” Exhibit J-25 at 2, was added to the agreement in 2018 – after the *Carmichael* decision – to allow A&B to argue that calamity would strike if the revocable permits were revoked.

Third, the defendants’ claims are exaggerated. In October 2019, Mahi Pono claimed that it would use 16.53 million gallons of water daily for its diversified agriculture and the Kula Agricultural Park would require an additional 1.5 million gallons daily. Exhibit J-26 at 2. In fact, they used 2.5 million gallons for diversified agriculture – six times less water. And the County’s agricultural park only needed .38 million gallons, about four times less than claimed. Of the 27.79 million gallons daily A&B diverted in the first quarter of 2020, fewer than three million gallons of east Maui water were used for agriculture. Exhibit J-27 at 6.

Fourth, there appears to be a considerable amount of wasted water. CWRM determined that it was reasonable for 22.7% of the water taken from east Maui streams to be lost due to seepage, evaporation and other system losses. Exhibit J-14 at 216-17 (FOFs 733 and 737). In 2020, in addition to system losses of 6.31 million gallons per day on average (22.7%), A&B reported that 16.44 million gallons per day is “used” for “Reservoir/ Fire Protection/ Evaporation/ Dust Control/ Hydroelectric”. Exhibit J-27 at 6. A&B is including evaporation in two categories: in the 22.7% system loss category **and** the amorphous Reservoir/ Fire Protection/ Evaporation/ Dust Control/ Hydroelectric” category. That suggests that more water is

being wasted than is permissible. Moreover, reservoirs and hydroelectricity are not end uses after which water disappears. The water placed in the reservoirs and used for hydroelectricity can be used for irrigation. *See e.g.* Exhibit J-20 at 76-77, 171 and 304 (2-15, 2-16, 4-58 and 4-191).

Fifth, Mahi Pono has an agricultural plan that does not rely on water from the revocable permit area. Exhibit J-20 at 104-05. That plan still allows for 9,080 acres of irrigated farm land (including 200 acres of tropical fruit, 4,180 of orchard, 400 acres of row and annual crops, in addition to 300 acres for a community farms), and 24,470 acres of cattle pasture, comprised of 3,800 acres of irrigated pasture, and 20,670 acres of unirrigated pasture. Fully implemented, this plan would allow for the production of 110.5 million pounds of crops per year.

Sixth, Mahi Pono has agreed to limit its use of stream water (from Central Maui streams) for some of its fields in Central Maui to 2,500 gallons per acre. Exhibit 43. CWRM concluded that 2,500 gallons per cultivated acre per day was a reasonable amount of water to be used for agriculture. *Waiāhole II*, 105 Hawai‘i at 7 and 21, 93 P.3d at 649 and 663.

Seventh, there is a significant amount of water available from alternative sources, including groundwater and water from streams west of Honopou Stream, that could be used in conjunction with water from east Maui streams. 17.84 million gallons of groundwater daily can be used to irrigate much of Central Maui. Exhibit J-14 at 221 (FOF 750). Seven percent of the water in the EMI ditch came from lands west of Honopou Stream (i.e. west of the revocable permit area). *Id.* at 38 (FOF 52). Seven percent of 165 is 11.6 mgd. *Id.* at 158 (FOF 519). If Mahi Pono made better use of the water west of Honopou stream, used groundwater, used water in the Reservoir/ Fire Protection/ Evaporation / Dust Control/ Hydroelectric category for irrigation, continued to receive 25.75 million gallons of water daily, and limited its irrigation to 2,500 gallons per acre per day, it would have more than enough water to meet its current water needs

for agriculture.

Eighth, up to a million gallons of water from east Maui stream water are used daily for concrete batching, which has never been held to further a public trust purpose. Exhibit 111 and Exhibit J-27.

Ninth, A&B and Mahi Pono have been taking less water than they claimed that they needed. A&B planned to take 35 million gallons of water daily from east Maui in 2019. Exhibit 110 ¶10. Instead, it diverted approximately 27 million gallons per day on average. Exhibit J-21 at 96. Mahi Pono planned to increase the amount of water diverted to 45 million gallons in 2020. Exhibit J-26. In the first quarter of 2020, however, A&B diverted an average of 27.79 million gallons daily. Exhibit J-27 at 6. A limit would preserve the status quo rather than resulting in any calamity.

The only calamity is one that A&B may suffer. It will have to pay Mahi Pono up to \$62 million if it is unable to secure at least 30 million gallons of water daily over the course of eight years from east Maui. Exhibit 34 at 6-7 and 47.

I. The Sierra Club is Not Asking to Reduce Flows on Streams.

The defendants may suggest that if more water is restored to the 13 streams, it will have to come from the flows of the full restoration streams, the 64% baseflow streams, and/or the connectivity streams. The Sierra Club rejects any effort to pit streams against each other in some sort of Sophie's Choice. Given the amount of water wasted, the demonstrated agricultural needs, and the alternative sources of water, there is no scenario in which increasing flows to any of the 13 streams (or any stream) will result in reduced flows to other streams. Such a scenario is not contemplated in any of the relief that the Sierra Club is seeking.

J. The BLNR's Action Cannot Be Justified by Relying on CWRM's Decision or Prior BLNR Decision.

The defendants cannot rely on CWRM's 2018 order, or prior BLNR's decisions, as some sort of cloak of immunity for the BLNR's 2018 and 2019 decisions. The issues being tried are not the same ones that CWRM considered.

First, CWRM's 2018, by its plain terms, did not address 13 streams. CWRM did not consider the biological and recreational value of these 13 streams because Nā Moku did not file any petition to amend their instream flow standards. No agency has performed a public trust analysis as to whether it is appropriate to drain these 13 streams dry.

Second, CWRM's 2018 decision had nothing to do with the trash that litters public land.

Third, CWRM expected BLNR to engage in a proper analysis: "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." Exhibit J-14 at 22 (vi). CWRM noted that it did "not have the authority to determine how much water may be used for noninstream use by HC&S or MDWS. That is under the authority of the Board of Land and Natural Resources ("Board") pursuant to HRS § 171-58, subject to the IIFS set by the Commission." *Id.* at 288 (265). CWRM also encouraged BLNR to require a reduction in leakage and waste of water in the EMI ditch system, to obtain accurate information as to all offstream water uses, to monitor stream flows, and to restore native habitat. *Id.* at 22- 23 (vi-vii).

Fourth, the issue before the CWRM was the amount of water that should flow within 27 (or fewer) streams pursuant to HRS § 174C-71. "Our decision establishes a quantity of water that must remain in each stream." Exhibit J-14 at 18 (ii). It addressed the quantity of water, but did not make any determination as to the need to modify any specific diversion structure within any timeframe. "The Commission also recognizes that it is not the purpose of this proceeding to

determine how the diversions will be modified.” Exhibit J-14 at 292 ¶j.

Fifth, Judge Hifo has ruled that “given the provisions of the Hawai'i Constitution, neither the BLNR nor this Court can rubber-stamp any determination of the CWRM. Rather, the **BLNR is obligated to make a truly independent investigation** as to whether it's in the state's best interest to authorize the diversion of water from East Maui streams. . . . This Court simply affirms that the **BLNR may not merely rubber-stamp every CWRM determination.**” Exhibit J-10 at 5.

Sixth, the Supreme Court has emphasized that agencies have a continuing duty to perform their public trust duties.

As we reiterated in *Mauna Kea II*, a **state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution.** 143 Hawai'i at 387, 431 P.3d at 760. We also note, however, that HG and the PUC's reliance on the ICA's decision in *In re Molokai Pub. Utils.*, 127 Hawai'i 234, 277 P.3d 328 (App. 2012), to argue that a rate case does not trigger a state agency's public trust obligations where there is no change in use of the public trust resource, is misplaced. That case was effectively overruled by this court's decision in *Ching v. Case*, 145 Hawai'i 148, 177-78, 449 P.3d 1146, 1175-76 (2019), in which we held that **the state has a continuing duty** to monitor the use of trust property, **even if the use of the property has not changed.** See also *Lāna 'ians for Sensible Growth v. Land Use Comm'n*, 2020 WL 2511131, at *7 (Haw. May 15, 2020) (noting that the LUC possesses **a continuing constitutional obligation** to ensure that measures it imposes to protect public trust resources are implemented and complied with). Thus, the PUC's **constitutional obligations are ongoing, regardless of the nature of the proceeding.**

In re Application of Gas Co. ___ Hawai'i ___ (June 9, 2020). Thus, regardless of whatever BLNR may have concluded more than a decade ago when sugarcane was being grown, the BLNR must be considering current conditions.

VI. THE RELIEF SOUGHT

In 1904, A&B's HC&S sued to stop Wailuku Sugar Company from diverting water from Wailuku Stream. The Hawai'i Supreme Court ruled that Wailuku Sugar Co.'s diversion could “not violate the requirement of the well established rule that such diversion shall be without

injury to the rights of others.” *Hawaiian Commercial & Sugar Company v. Wailuku Sugar Company*, 15 Haw. 675, 689 (1904). The trial will show that A&B’s diversions are harming the interests of others. Protection of free-flowing streams is in the public interest. *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (“can it be said that there is no public interest in a free-flowing stream for its own sake?”); *Waiāhole*, 94 Hawai‘i 97, 137, 9 P.3d 409, 449 (2000) (“public interest in a free-flowing stream for its own sake”); *Kauai Springs*, 133 Hawai‘i at 172, 324 P.3d at 982 (“the maintenance of waters in their natural state constitutes a distinct ‘use’ that the public trust protects”).

This court will need to “adopt relief and ‘mold its decree to satisfy the requirements of the particular case and thereby conserve the equities of all of the parties.’” *Ching*, 145 Hawai‘i at 183, 449 P.3d at 1181 (brackets omitted). The Supreme Court recognized that the court is **not** “required to provide all of the precise remedies that the Plaintiffs requested. It is well settled that in an equitable action, a court has ‘broad discretionary power to . . . craft remedies to preserve equity.’” *Ching*, 145 Hawai‘i at 172, 449 P.3d at 1170.

The Sierra Club’s preference is that this court order the cessation of the diversion from all 13 streams and set a deadline for the removal and alteration of harmful diversion structures. But the Sierra Club recognizes that there may be practical realities that impede immediate implementation of an order preventing the diversion of water from the 13 streams and the modification of diversion structures. It also recognizes that although mandatory injunctive relief was ordered in *Ching*, the court may be less comfortable ordering mandatory injunctive relief instead of prohibitory relief.

Thus, the Sierra Club offers a more nuanced approach.

First, it asks that this court make it abundantly clear what the BLNR Defendants’ duties

are and clearly identify how they erred. These findings are necessary to change the BLNR Defendants' historic misconduct.

Second, the Sierra Club asks this court to limit the amount of water taken out of east Maui streams until the BLNR Defendants fulfill their trust duties. Given A&B's and Mahi Pono's desire for more water, they will finally have an incentive to ensure that the BLNR Defendants' trust functions are fulfilled. They will have an incentive: to provide all the necessary information to BLNR; to work diligently on modifying harmful diversion structures; to clean up their mess; and to file a petition that promptly amends the instream standard for 13 streams. Given the BLNR Defendants' duty to perform their "functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution" and that its "constitutional obligations are ongoing, regardless of the nature of the proceeding," *In re Application of Gas Co.* ___ Hawai'i ___ (June 9, 2020), the BLNR Defendants will be compelled to act. Such a remedy preserves the status quo "before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion." *Waiāhole*, 94 Hawai'i at 149, 9 P.3d at 461.

At the conclusion of the trial, the Sierra Club will offer specific language for the injunctive relief with its proposed findings of fact and conclusions of law. For the present, the court can consider this language:

Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC are enjoined from taking more than 25.75 million gallons of water on any day from east Maui streams (as measured at Honopou Stream) – and the BLNR Defendants are enjoined from authorizing the diversion of more water from the revocable permit areas than 25.75 million gallons of water daily from east Maui streams – unless and until:

- the BLNR Defendants take specific measures to protect instream uses (including fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses) of Puakea Stream, Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana (Hanawana) Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries);
- instream flow standards (that prevent them from being de-watered most of the time) are established for Puakea Stream, Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana (Hanawana) Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries);
- the BLNR Defendants require the applicants to pay for an assessment of each diversion structure on state land to determine the degree to which each one: (a) adversely affects native aquatic species (including by blocking migration or entraining); (b) facilitates mosquito breeding; and (c) mars natural beauty.
- the BLNR Defendants evaluate all the diversion structures on state land and determine the degree to which each diversion structure: (a) adversely affects native aquatic species (including by blocking migration or entraining); (b) facilitates mosquito breeding; and (c) mars natural beauty;
- the BLNR Defendants require the removal or alteration of those stream modification structures on public land within a clear timeframe (with a proviso for

extensions when compelling reasons so warrant) that it determines (a) pose the greatest harm to native aquatic species; (b) pose the greatest risk of facilitating mosquito breeding; and/or (c) mar natural beauty.

- the BLNR Defendants justify allowing less water to remain in streams than is needed to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals;
- the applicants uphold their burden in justifying the taking of more water;
- the BLNR Defendants determine how much water is available from alternative water sources to the applicants and mandate the use of these sources before or in conjunction with the use of water taken from east Maui;
- the BLNR Defendants require the applicants to fully explain and justify the amount of water needed, including disclosures as to how much water is needed per acre of each crop, and all sources of water available for irrigation;
- the BLNR Defendants determine how much water is appropriate to be lost (through evaporation, seepage etc.), and take steps to prevent waste (such as requiring that the reservoirs be lined and covered); and
- the BLNR Defendants visit the revocable permit area to verify whether abandoned pipes, unused infrastructure, and other trash litter public lands, and pursue enforcement action where appropriate.

The BLNR Defendants are further ordered to require that Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC submit

- a written plan within thirty days for removing debris from ceded lands that includes an increase in staffing and time devoted to the removal of debris; and

- monthly reports with photographs that document how much debris is removed from ceded lands each month.

DLNR is further ordered to annually conduct at least one inspection annually of the lands encompassed by the revocable permits to determine whether debris continues to litter public land. DLNR is further ordered to annually determine, after reviewing inspection report(s) from its staff and hearing from members of the public, whether Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC have removed all litter, debris and trash from public land, and if not, to take further action consistent with its public trust duties and its authority pursuant to HRS §§ 171-6(6), -6(12), -6(14) -6(15), -7(2), -7(5), -7(7) and -7(8).

Dated: Honolulu, Hawai'i, July 31, 2020.

/s/ David Kimo Frankel
Attorney for the Sierra Club

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

2 STATE OF HAWAII

3	_____)	
4	SIERRA CLUB,	)	CIVIL NO. 19-1-0019
5	Plaintiff,)	
6	vs.)	
7	BOARD OF LAND AND NATURAL)	
8	RESOURCES, et al.,)	
9	Defendants.)	
	_____)	

10 TRANSCRIPT OF PROCEEDINGS

11 had before the HONORABLE JEFFREY P. CRABTREE, Judge, Sixth
12 Division, presiding on Friday, July 31, 2020. MOTIONS
13 IN LIMINE.

14 APPEARANCES:

15	DAVID K. FRANKEL, ESQ.	For Sierra Club
16	LAUREN K. CHUN	For State of Hawaii
17	WILLIAM J. WYNHOFF	
	Deputies Attorney General	
18	DAVID SCHULMEISTER, ESQ.	For Alexander & Baldwin
19	TRISHA H. S. T. AKAKI, ESQ.	and East Maui
		Irrigation Company
20	CALEB P. ROWE	For County of Maui
	Deputy Corporation Counsel	

21
22
23 REPORTED BY:
24 Lila H. M. Grumling, CSR 159
25 Official Court Reporter
First Circuit Court
State of Hawaii

Official Court Reporters
First Circuit Court
State of Hawaii

1 FRIDAY, JULY 31, 2020

9:04 A.M.

2 --oOo--

3 (The case was called.)

4 THE BAILIFF: Counsel, appearances, please,
5 starting with the plaintiffs.

6 MR. FRANKEL: Good morning, Your Honor.

7 David Frankel on behalf of Sierra Club, and with me
8 virtually today is Marti Townsend, Sierra Club's Hawaii
9 director.

10 THE COURT: All right, thank you. Welcome,
11 Ms. Townsend.

12 Who's next?

13 THE BAILIFF: And Alexander & Baldwin next.

14 MR. SCHULMEISTER: Good morning, Your Honor.

15 David Schulmeister and Trisha Akagi for defendants
16 Alexander & Baldwin and East Maui Irrigation Company.

17 THE COURT: Okay, good morning.

18 THE BAILIFF: And then State of Hawaii.

19 MS. CHUN: Good morning, Your Honor. Lauren
20 Chun and Bill Wynhoff for the State of Hawaii.

21 THE COURT: Good morning. You're coming
22 through loud and clear so thank you. It's an upgrade
23 today.

24 Mr. Rowe?

25 MR. ROWE: Oh, yes, Deputy Corporation

1 Counsel Caleb Rowe on behalf of the County of Maui.

2 THE COURT: All right, thank you.

3 Okay, so I propose -- excuse me. All right,
4 so I propose to just go through these in order. Let's
5 start with the plaintiff's motions in limine. I do have
6 inclinations, I think, on all of them, although some
7 stronger inclinations than others, but I'll give them to
8 you one at a time.

9 On plaintiff's motion in limine number 1
10 regarding Mr. Thyne -- I don't know if that's the right
11 way to pronounce it, the Maui fire chief -- my inclination
12 is to grant that motion. I mean, as near as I can
13 understand, the chief was never named or identified until,
14 I don't know, like a week or two ago. That's just not how
15 these things work. I mean, why have pretrial deadlines if
16 we're going to do that so. Anyway, that's my inclination.

17 So Mr. Frankel?

18 MR. FRANKEL: I have nothing to add.

19 THE COURT: All right. All right, so let's
20 see, who wants to -- I think it was -- let's see, there
21 were joinders, but it was basically A&B's op, right? So
22 Mr. Schulmeister, will it be you or Ms. Akagi?

23 MR. SCHULMEISTER: I'll speak to that one.

24 THE COURT: All right, thank you.

25 MR. SCHULMEISTER: Your Honor, Mr. Thyne's

1 entirely clearly, but to the extent that the plaintiff is
2 asking the court to invalidate the revocable permits, then
3 the court should have all the information, including what
4 the CWRM looked at, to say what kind of standard should be
5 set for these streams. And if that's the analysis that
6 the plaintiff wants the court to make, then the court
7 should have that information.

8 THE COURT: Understood. Thank you.

9 Mr. Rowe, anything?

10 MR. ROWE: (Shakes head from side to side)

11 THE COURT: No. Okay. Just for the record,
12 Mr. Rowe shook his head no, remained mute, which is fine.
13 Thank you.

14 All right, Mr. Frankel, go ahead.

15 MR. FRANKEL: Thank you, Your Honor.

16 Mr. Schulmeister has mischaracterized the
17 Sierra Club's complaint, and you're going to get a trial
18 memo from us in a few hours. But let me attempt to be
19 clear. I thought that we had been in many of the motions
20 we filed. The Sierra Club has not alleged that the
21 Department of Land and Natural Resources -- or, rather,
22 the Board of Land and Natural Resources breached its trust
23 duties by relying on the Water Commission's decision.
24 That is not what we've argued.

25 I think we've argued four major points, and

1 we will be arguing four major points in trial. Heads up,
2 everybody.

3 First, that the Board failed to protect the
4 13 streams that it is allowing Alexander & Baldwin to
5 drain dry. Those 13 streams, by the plain language of the
6 Water Commission's 2018 decision, were not addressed. So
7 that first issue in no way, shape, or form attacks the
8 Water Commission's decision. It is not an allegation
9 there's a breach of reliance by relying on the CWRM
10 decision. The Water Commission did not look at those 13
11 streams because there were no petitions to deal with them.

12 The second -- actually, I'm going to go to
13 the -- I'm going to jump around. This is going to be our
14 fourth issue, but I'm going to say the second here because
15 it's easier to say. Trash, there's trash littering public
16 land. That issue was not before the Water Commission in
17 the proceeding. The Water Commission proceeding focused
18 on how much water should flow in streams. It did not deal
19 with trash. So it is irrelevant what documents were
20 presented to the Water Commission for points 1 and 4, the
21 13 streams and the trash.

22 The second issue we're going to be talking
23 about, the third issue I'm talking about now, are the
24 diversion structures. The Board failed to set any
25 deadlines or make any requirement that the diversion

1 structures be modified or altered in any way by any time.
2 These are structures on public land. The Board of Land
3 and Natural Resources is a landlord, unlike the Water
4 Commission. It has authority far broader than the
5 Commission to deal with structures that are on public
6 land. I know that Alexander & Baldwin has argued that the
7 Board has no authority whatsoever, that it's the exclusive
8 jurisdiction of the Water Commission. That argument is
9 mistaken. The Board has the authority. And in any case,
10 the materials before the -- the Water Commission's
11 decision does not address in any specific way how any
12 specific structure is going to be altered or set any
13 deadlines for that.

14 The third issue that we're going to talk
15 about in trial and the fourth issue I'm talking about
16 today is the burden that the Board failed to hold
17 Alexander & Baldwin to. The Water Commission is very
18 clear in its decision in three different places -- we've
19 cited it to you before, and we'll cite it again in a trial
20 memo -- that it is the Board's jurisdiction to determine
21 whether and how much water should leave the streams and be
22 taken by Alexander & Baldwin/EMI to Central Maui. The
23 Board has a burden -- sorry, the Board has a legal duty to
24 hold Alexander & Baldwin to its burden. That is
25 information that must be presented to the Board.

1 or just --

2 THE COURT: Well, yeah, I'm asking for now.
3 I might as well find out. I mean, we can --

4 MS. CHUN: Well, we still reserve our
5 objections to the photographs. But they're not the topic
6 of this motion, Your Honor.

7 THE COURT: That's true. But I'm just trying
8 to find out ahead of the middle of the trial whether this
9 is going to be an issue or not. But you can certainly --
10 I'm not asking anyone to waive anything. So if you don't
11 want to take a position now, that's okay. We'll take it
12 up during trial. But I just tell you now my inclination
13 would be to allow photographs just in terms of coming into
14 evidence without commentary that would add to the
15 disclosures that the expert made before the cutoff.

16 MS. CHUN: Yes, Your Honor, I mean, with the
17 proper foundation and with Mr. Kido testifying to them,
18 then sure. But it's just not something that we're willing
19 to stipulate to right now.

20 THE COURT: Okay, that's understandable.

21 Okay, any clarification necessary on that?
22 We'll probably have more discussions about it during the
23 trial, but I think we've at least got some decent
24 guidelines laid out.

25 So the State of Hawaii's motion in limine

1 number 1 and number 2 are granted in part and denied in
2 part, I guess, is the way to summarize it. The court will
3 allow, of course, the initial opinions expressed in
4 Mr. Kido's October 30 report. He'll be allowed to testify
5 about Maui, but he will not be allowed to use the
6 observations of what he saw on Maui to add to the record
7 of the bases for his opinions. But he can certainly -- I
8 guess the way it'll arise is someone will ask him on
9 cross, well -- maybe they won't even bother now. But
10 somebody would ask, well, you've never been there, you
11 don't know what you're talking about. And he'll be able
12 to say no, that's not true, I was there and I saw a lot of
13 things, and none of it changed the opinions I just gave
14 you or the bases for them. That's pretty much going to be
15 it. No new info that constitutes a basis for an opinion
16 or a new opinion. And I guess the push-pull during the
17 trial will come down to exactly what that means, but at
18 least you have the court's guidelines.

19 Okay, so that takes care of the motions
20 in limine.

21 I think based on today, especially if
22 Mr. Rowe gets back into the room that he was in last time,
23 the technological part of this seems to be functioning
24 quite well, I think especially when -- Mr. Rowe, when you
25 get closer to your microphone and speak slowly, that makes

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C E R T I F I C A T E

I, LILA H. M. GRUMLING, CSR 159, Official
Court Reporter of the First Circuit, State of Hawaii, do
hereby certify that the foregoing is a true and correct
transcript of the proceedings had in connection with the
aforementioned cause.

Dated this 1st day of August, 2020.

/s/ Lila H. M. Grumling
Lila H. M. Grumling, CSR 159
Official Court Reporter

Official Court Reporters
First Circuit Court
State of Hawaii

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
2 STATE OF HAWAII
3 _____)
4 SIERRA CLUB,) Cv. No. 19-1-0019
5) Plaintiff,)
6) vs.)
7 BOARD OF LAND AND NATURAL) RESOURCES, et al.,)
8) Defendants.)
9 _____)

1 TRANSCRIPT OF PROCEEDINGS
2 Had before the HONORABLE JEFFREY P. CRABTREE, Judge
3 presiding, on AUGUST 3, 2020, regarding the
4 above-entitled matter; to wit, JURY-WAIVED TRIAL.

4 APPEARANCES:
5
6 DAVID KIMO FRANKEL, ESQ. For the Plaintiff
7 DAVID SCHULMEISTER, ESQ. For Alexander &
8 TRISHA AKAGI, ESQ. Baldwin
9 WILLIAM WYNHOFF For State of Hawaii
10 MELISSA GOLDMAN (DLNR/BLNR)
11 Deputies Attorney General
12
13 CALEB ROWE For County of Maui
14 Deputy Corporation Counsel

23 REPORTED BY:
24 Jamie S. Miyasato
25 Official Court Reporter
First Circuit Court
State of Hawaii

I N D E X

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WITNESS

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MICHAEL KIDO

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1 AUGUST 3, 2020

2 -o0o-

3 THE BAILIFF: Circuit Court of the First
4 Circuit is now in session. Calling Case No. 1 on the
5 calendar. Civil No. 19-1-0019. Sierra Club versus Board
6 of Land and Natural Resources. Jury-waived trial.
7 Counsel, appearances please starting with plaintiff.

8 MR. FRANKEL: Good morning, Your Honor. This
9 is David Frankel with the Sierra Club. Here with me
10 virtually is Marti Townsend, the director of the Sierra
11 Club's Hawaii Chapter.

12 THE COURT: Hi. Good morning. Welcome.

13 THE BAILIFF: And the State of Hawaii.

14 MR. WYNHOFF: Good morning. Deputy Attorney
15 Generals Bill Wynhoff and Melissa Goldman, the State's
16 representative, and also I guess -- well, the State's
17 representative is Suzanne Case, who is virtually here.

18 THE COURT: Welcome. And Mr. Wynhoff, you're
19 coming through much more clearly, so thank you for
20 whatever adjustments you folks made. They worked.

21 MR. WYNHOFF: Thank you, Your Honor.

22 THE BAILIFF: Alexander & Baldwin.

23 MR. SCHULMEISTER: Good morning, Your Honor.
24 David Schulmeister and Trisha Akagi for Alexander &
25 Baldwin and East Maui Irrigation Company.

1 Okay. Mr. Frankel, you're on.

2 MR. FRANKEL: What's the difference between
3 ignorance and apathy? I don't know, and I don't care.

4 For decades, the trustees of the public
5 streams in East Maui did not know how much damage A&B and
6 EMI were causing to the streams of East Maui. And once
7 they learned, they did not care enough to take necessary
8 action to protect the streams and the aquatic life
9 dependent on them.

10 By 2005, DLNR officially acknowledged that it
11 knew that stream diversions and insufficient streamflows
12 were a key threat to aquatic species on Maui, `opae and
13 `o`opu.

14 THE COURT: Mr. Frankel, I'm very sorry to
15 interrupt. I truly apologize, but I forgot to do
16 something that just arose. So we need to be very careful
17 when we're talking about acronyms. So DLNR, BLNR, they
18 sound very similar to the court reporter and to the
19 Court. So you might want to use Department versus Board
20 or some other method of communications.

21 And again, I apologize. I don't like
22 interrupting people during their opening, but I wanted to
23 make that general statement. Please go ahead.

24 MR. FRANKEL: Thank you, Your Honor.

25 So in 2005, the Department of Land and Natural

1 Resources officially acknowledged that it knew that
2 stream diversions and insufficient streamflows were a key
3 threat to native aquatic species on Maui, `o`opu and
4 `opae.

5 In 2009, the Department's Division of Aquatic
6 Resources concluded that typical diversion structures in
7 East Maui blocked the stream, captured 100 percent of the
8 streamflow except during storms, captured all of the
9 `o`opu and `opae, and destroyed downstream habitat.

10 In May 2010, the Department's Division of
11 Aquatic Resources informed the Department that, quote,
12 The removal of stream diversions and complete restoration
13 of streamflow would be the best possible condition for
14 native aquatic animals.

15 The Division of Aquatic Resources also
16 concluded that streams need at least 64 percent of their
17 naturally occurring base flow to allow native stream
18 animals to grow and reproduce.

19 The Board of Land and Natural Resources may
20 not have known that fact back in the Year 2000, when it
21 voted to issue the four revocable permits to Alexander &
22 Baldwin and East Maui Irrigation, but it did know that in
23 2018 and 2019, when the Board of Land and Natural
24 Resources rubber-stamped A&B and EMI's requests -- drain
25 public streams dry and to let harmful diversion

1 structures remain in place.

2 Although some of the issues dealing with East
3 Maui streams can be very complex, the issues in this case
4 are quite simple.

5 The evidence in this case will show four
6 things. First and most importantly, DLNR failed to
7 protect the streamflows within 13 streams. Second, DLNR
8 failed to deal with the harmful diversion structures on
9 public land. Third, DLNR failed to hold Alexander &
10 Baldwin to its burden. And fourth, DLNR failed to ensure
11 that A&B cleaned up its trash that litters public land.

12 First issue, the 13 streams. In renewing the
13 permits, DLNR authorized A&B and EMI to take all the
14 water from 13 East Maui streams, all of it. The Board
15 did not require that 64 percent of the base flow remain
16 in these streams.

17 More than three decades ago, the Water
18 Commission set flow standards for all streams in East
19 Maui. The standard was whatever was flowing on June 15,
20 1988. The Board, however, doesn't know how much water
21 was flowing in these 13 streams as of June 15, 1988. And
22 so the existing diversion structures can capture as much
23 water as they've been taking for decades, all of this
24 flow, plus more. When all base flow is taken, you're
25 left with a dry stream bed. Board of Land and Natural

1 STATE OF HAWAII)
)
 2)
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 3 CITY AND COUNTY OF HONOLULU)
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8 I, JAMIE S. MIYASATO, an Official Court
 9 Reporter for the First Circuit Court, State of Hawaii, do
 10 hereby certify that the foregoing comprises a full, true,
 11 and correct transcription of my stenographic notes taken
 12 in the above-entitled matter, so transcribed by me to the
 13 best of my ability.

14 Dated this 4th day of August 2020.

15
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17

/s/ Jamie S. Miyasato

19

 JAMIE S. MIYASATO, CSR #394

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25 sierra club/080320

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

SIERRA CLUB,)	
)	
Plaintiff,)	
v.	)	Civil No.
	)	19-1-0019-01 (JPC)
BOARD OF LAND AND NATURAL)	
RESOURCES, DEPARTMENT OF LAND AND)	
NATURAL RESOURCES, SUZANNE CASE in)	
her official capacity as Chairperson))	
of the Board of land and natural)	
Resources, ALEXANDER AND BALDWIN,)	
INC., EAST MAUI IRRIGATION COMPANY,)	
LLC and COUNTY OF MAUI,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JEFFREY P. CRABTREE Judge, Sixth
Division, presiding, on Thursday, September 24, 2020.

CLOSING ARGUMENTS

APPEARANCES:

DAVID FRANKEL, ESQ.
For the Plaintiff

DAVID SCHULMEISTER, ESQ.
TRISHA AKAGI, ESQ.
For Alexander and Baldwin and EMI, LLC

WILLIAM WYNHOFF, ESQ.
For the State of Hawaii

REPORTED BY:
NIKKI BEAVER CHEANG, CRR, CSR-340
OFFICIAL COURT REPORTER

1 moved.

2 Okay. Everyone else is showing movement,
3 but Mr. Frankel's image is just totally frozen, so I
4 think we have a band width problem.

5 THE CLERK: Judge, I think we have to dial
6 in again.

7

8 THE COURT: Does he just need to call back
9 in?

10 THE CLERK: So they're all there, but it's
11 just the line is not showing on here.

12 THE COURT: Okay. Mr. Frankel, I don't
13 know if you can hear me, if you can, you're going to
14 need to come back in again.

15 (Break.)

16 THE COURT: We're back, we had to redial
17 our WebEx connection, so we're back in. Can everyone
18 hear me?

19 MR. WYNHOFF: Good morning, Your Honor.

20 THE COURT: Here we go.

21 Recall the case. Thank you.

22 THE CLERK: Recalling the case now, 'cause
23 of our technical difficulties, before the Honorable
24 Jeffrey Crabtree in the First Circuit, Sixth Division on
25 this September 24th, 2020.

1 Calling Civil case No. 19-1-0019, Sierra
2 Club versus Board of Land and Natural Resources for
3 closing arguments.

4 Appearances of counsel first, please.

5 MR. FRANKEL: Good morning, Your Honor.
6 David Frankel and Marti Townsend here for the Sierra
7 Club.

8 THE COURT: Good morning. Mr.
9 Schulmeister, go ahead.

10 MR. SCHULMEISTER: Good morning,
11 Your Honor. David Schulmeister and Trisha Akagi for A&B
12 and EMI.

13 THE COURT: Good morning. Mr. Wynhoff.
14 Not hearing you, you're muted.
15 Okay. Go ahead.

16 MR. WYNHOFF: Your Honor, good morning.
17 William Wynhoff, Deputy Attorney General, on behalf of
18 the State of Hawaii. I'd like to note that Melissa
19 Goldman, my colleague, and Lauren Chun are also here.
20 I believe that Linda Chow may be in and out.

21 I would note for the Court that to the best
22 of my knowledge, Board members Suzanne Case, James Gomes
23 and Chris Yuen are also listening in, and I'm quite
24 certain that there's a number of other people from the
25 DLNR.

1 THE COURT: All right. Thank you.

2 Welcome, everybody.

3 Mr. Rowe, go ahead.

4 MR. ROWE: Good morning, Your Honor.

5 Deputy Corporation Counsel Caleb Rowe on behalf of the
6 County of Maui.

7 My boss Moana Lutey who is the head
8 corporation counsel will also be coming on, and she will
9 not be participating, but she will be observing.

10 THE COURT: All right. Thank you, and
11 she's welcome, of course.

12 All right, then we have, I'm guessing,
13 about 15 or 20 people who are listening. I'm not going
14 to put all their names on the record at this point, but
15 you do need to remain signed in under an identified
16 account, we don't let people listen in if they're not
17 willing to identify themselves, so thank you everyone.

18 So the court reporter is asking that if
19 you're not speaking, please mute yourself in your own
20 office 'cause we're getting a lot of feedback in here.

21 Mr. Schulmeister, you're not muted, please
22 do so.

23 We have a lot of people listening in who
24 are not muted, we need you to mute yourselves, please.

25 THE CLERK: I'm just muting everybody.

1 THE COURT: We're just going to have to
2 universally mute everyone 'cause we're just getting too
3 much feedback in here.

4 MR. WYNHOFF: Nobody that isn't muted is
5 muting themselves. Well, I see one person did.

6 THE COURT: Well we're going to mute
7 everyone, and we'll just have to mute each person as
8 it's their turn to speak.

9 Okay. Mr. Frankel.

10 MR. FRANKEL: It's a lot better now.

11 THE COURT: It is. All right. We're good
12 to go on our end. Thank you everyone for your patience.

13 MR. WYNHOFF: It is better.

14 THE COURT: Mr. Frankel, you ready to go?

15 Mr. Frankel, can you hear me?

16 MR. FRANKEL: We can't hear you, Your
17 Honor. You're muted.

18 THE COURT: Oh, 'cause I'm muted, hang on.
19 I'll unmute myself.

20 Okay. Still getting a little used to this
21 even after five, six months.

22 Okay, Mr. Frankel, you ready to go?

23 MR. FRANKEL: Yes, I am, Your Honor.

24 THE COURT: All right. Go ahead.

25 (Continued on the next page.)

1 CLOSING ARGUMENT

2

3 MR. FRANKEL: Our streams are public trust
4 resources, that has been the black letter law of this
5 state for more than four decades.

6 The State may compromise public rights in
7 the resource pursuant only to a decision made with a
8 level of openness, diligence and foresight, commensurate
9 with a high priority these rights command under the laws
10 of our state.

11 This principle was articulated by the
12 Supreme Court in the *Waiahole* decision 20 years ago. It
13 was repeated in the *Waiahole* decision in 2004. It was
14 repeated in *Kelly* decision in 2006. It was repeated in
15 the *Kukui* decision in 2007.

16 Agencies must take the initiative in
17 considering, protecting and advancing public rights and
18 the resource at every stage of the decision making
19 process.

20 All those cases articulate and rearticulate
21 this principle, as well as in the case of *Iao* and *Kauai*
22 *Springs*.

23 Although this has been black letter law in
24 this state for the past two decades, the Board of Land
25 and Natural Resources has repeatedly ignored its legal

1 duties, whether out of ignorance or apathy, BLNR has:

- 2 1. Failed to protect 13 streams.
- 3 2. Failed to address the harmful diversion
4 structures on public land.
- 5 3. Failed to scrutinize A&B's request for
6 public water from these streams; and
- 7 4. BLNR failed to make sure that A&B
8 cleaned all its mess that litters public land.

9 I'm going to discuss these four points
10 today, but before doing so, just a little bit of
11 context.

12 The demand for water from east Maui streams
13 has been increasing. In 2017, 23.99 million gallons of
14 water a day were taken from east Maui streams. In 2018,
15 that increased to 25.75 million gallons a day. In 2019
16 it increased again to 27 million gallons a day, and this
17 year, in 2020, A&B and EMI and Mahi Pono have requested
18 that they be allowed to take 45 million gallons of water
19 per day on average.

20 All right, given that context, let's look
21 at each of the issues. First, BLNR failed to protect
22 streamflow within 13 streams.

23 More than three decades ago the Water
24 Commission set flow standards for all the streams in
25 east Maui.

1 The status quo standard was, Water was
2 flowing in the water on June 15, 1988, the height of the
3 summer.

4 As the Water Commission's Ayron Strauch
5 explained, his testimony is August 17th:

6 The status quo standard was based on
7 existing diversions, and not on the biological,
8 ecological or recreational values.

9 Your Honor, I provided the Court and all
10 the parties with an exhibit, a PDF of a number of the
11 documents, exhibits in evidence and transcripts, and the
12 first two pages that I provided to you are the
13 transcripts of Ayron Strauch's testimony, that's exactly
14 what he testifies to on page 76 and 77 of his testimony,
15 August 17th.

16 Those standards did not protect the
17 biological, ecological, recreational value of those
18 streams. The Water Commission itself explains on its
19 website, which is the third page of the documents I
20 provided to you, and it's Exhibit S-78:

21 The status quo interim instream flow
22 standards were not adequate to protect streams.

23 As the Hawaii Supreme Court explained in
24 its *Waiahole* decision:

25 The status quo standards did nothing more

1 #

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3 STATE OF HAWAII)

4 CITY AND COUNTY OF HONOLULU)

5 _____)

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8 I, NIKKI BEAVER CHEANG, RPR, CRR, CSR-340, an
9 Official Court Reporter for the First Circuit Court,
10 State of Hawaii, hereby certify that the foregoing
11 comprises a full, true and correct transcription of my
12 stenographic notes taken in the above-entitled cause.

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15 Dated this 25th day of September, 2020.

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OFFICIAL COURT REPORTER

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/s/ Nikki Beaver Cheang

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NIKKI BEAVER CHEANG, CRR, CSR-340

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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawai'i 96813

November 13, 2020

Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

MAUI

Holdover/Continuation 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.

I. BACKGROUND

The four revocable permits for the island of Maui are RP S-7263, S-7264 and S-7265 to Alexander & Baldwin, Inc. (A&B), and S-7266 to East Maui Irrigation, Ltd. (EMI), referred to collectively as "Permittee." 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. In addition to the use of water and the irrigation system, the four license areas included in the permits consist of approximately 33,000 acres of the Ko'olau Forest Reserve and the Hanawā Natural Area Reserve¹ under the DLNR Division of Forestry and Wildlife (DOFAW). The four revocable permits cover the four revocable permit areas as follows, 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 A**. Due to the voluminous amount of background materials, an appendix with links to various reference sources is attached as **Exhibit B**.

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

¹ In 2019 the Board withdrew the Hanawā Natural Area Reserve from the Nahiku revocable permit area.

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 (Nā 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, Nā Moku also filed petitions with the Commission on Water Resource Management (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.² 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, Nā 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.³ 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 Nā Moku, determined that the Board exceeded its authority under Sections 171-10 and 171-55 Hawaii Revised Statutes (HRS), in placing the revocable permits into holdover status for 13 years, and declared the revocable permits invalid. The decision was appealed to the Intermediate Court of Appeals (ICA), which vacated the Circuit Court’s decision. Certiorari was granted to the Hawai‘i Supreme Court, where the case is now pending.

The Board reaffirmed that the permits were in holdover status at its meeting on December 11, 2015. Nā Moku filed another action with the State’s Environmental Court challenging the December 11, 2015 reaffirmation.⁴ That matter has been stayed pending resolution of the appeal.

On June 18, 2019, the Intermediate Court of Appeals (ICA) issued an opinion vacating the Circuit Court decision and remanded the case back to the Circuit Court. Of note to the present action, the ICA concluded that the wording in Section 171-55, HRS, that applied the phrase “notwithstanding any law to the contrary” authorized the Board to continue the revocable permits despite the one-year term prescribed by Section 171-58, HRS. The ICA also noted that the revocable permits must be temporary and issued under such conditions and rent which would serve the best interests of the State. The ICA determined that whether these requirements were

² A&B eventually ceased all diversions of Waiokamilo Stream in 2007.

³ *Carmichael v. Bd of Land and Natural Res.*, First Cir. Court, Civ. No. 151-0650-04 (RAN) (*Carmichael*).

⁴ *Nā Moku Aupuni O Ko‘olau Hui v. Bd of Land and Natural Res.*, First Cir. Court, Civ. No. 16-1-0052-01 (JPC).

met were genuine issues of material fact and should not have been resolved by the Circuit Court via summary judgment.

Additionally, the ICA affirmed the Circuit Court's conclusion that Chapter 343, HRS is not applicable to the holdover of the water permits. The ICA reasoned that the phrase in section 171-55, HRS, "notwithstanding any other law to the contrary," nullified HRS chapter 343 EA and EIS requirements for temporary permits. The ICA interpreted the purpose behind section 171-55 as authorizing the Board "to issue a temporary permit in the interim while a permittee pursues a long-term lease, for which an environmental review process under HRS chapter 343 must be undertaken."

Despite the ruling of the ICA, and out of an abundance of caution, an exemption notice for the continuation of the revocable permits is included for the Board's review and approval. The ICA decision was appealed to the Hawaii Supreme Court, which heard argument in the case in May 2020. The Court has yet to render a decision.

Between 2016 and 2018, the Board has approved the holdover of revocable permits for water use statewide pursuant to Act 126, Session Laws of Hawaii 2016. The legislature passed Act 126 in response to a decision by the Circuit Court of the First Circuit (Circuit Court) regarding litigation of the water permits held by Alexander & Baldwin, Inc. (A&B) and East Maui Irrigation Co., Ltd. (EMI). As discussed above, the Circuit Court in *Carmichael* invalidated the revocable permits on the basis that the uninterrupted use of the land by A&B/EMI was not a "temporary" use authorized under Sections 171-10 and 171-55, HRS. Act 126 authorized the holdover of revocable permits for the use of water under certain conditions. Under the Act, the Board could authorize three consecutive one-year holdovers. Pursuant to its terms, Act 126 was automatically repealed on June 30, 2019.

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 petitions. Of those 27 streams, the CWRM ordered that flows in 10 of those streams should be fully restored, with no diversion of water allowed.

In determining the IIFS, CWRM noted that its duty was to protect instream values to the extent practicable and to protect the public interest. However, CWRM must also weigh the importance of offstream uses of water, including the economic impact of restricting those uses. CWRM also determined that the offstream use of water in preserving agricultural lands and assuring adequate water supplies for Maui was in the public interest. Finally, CWRM stressed that the IIFS determined the amount of water that must remain in the identified streams, but that allocations for the offstream use of water is under the authority of the Board. In the decision CWRM requested that the Board consider the following issues for future water leases:

1. Require improvements in the water delivery system to minimize leakage and waste, as well as to provide accurate and timely gaging and monitoring of all offstream water uses; and

2. Set aside a portion of water lease revenues to support the East Maui Watershed Partnership, monitoring stream flows and native habitat restoration in east Maui.

CWRM's June 20, 2018 decision, was not appealed by any party and is now final and binding. A link to the entire contested case record, including CWRM's written Findings of Fact, Conclusions of Law & Decision and Order (CWRM D&O) is available through the following link:

<https://dlnr.hawaii.gov/cwrn/newsevents/cch/cch-ma13-01/>

Originally, the Board had placed these four permits into holdover status as a result of the original contested case requests. The Board has maintained its position that these permits were correctly placed into holdover status. Act 126 provided for a statutory holdover of these permits. Although the Board is continuing the revocable permits pursuant to section 171-55, HRS, the Board maintains that these revocable permits remain in holdover status as the contested case hearing has not yet been resolved and the Board has not acted to take these permits out of holdover status.

A&B has sold most of its former sugar cane lands in central Maui and a portion of the ownership in EMI to Mahi Pono, LLC (Mahi Pono). Mahi Pono's goal is to engage in diversified agriculture on the former sugar cane lands and has begun cultivating various food crops on those lands. At this time, A&B and EMI remains as the revocable permit holders, as well as the applicants for the water lease.

On September 23, 2019, a Draft Environmental Impact Statement (EIS) for the water lease was published in the Office of Environmental Quality Control's (OEQC) *The Environmental Notice*. Upon completion of the public comment period and subsequent revision, the Final EIS will be brought before the Board for review and acceptance. The Draft EIS can be accessed through the link below:

http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2019-09-23-MA-DEIS-East-Maui-Water-Lease.pdf

At its meeting on November 9, 2018 under agenda item D-7, the Board approved, as amended, the holdover of all four permits. Sierra Club of Hawaii (Sierra Club) verbally requested a contested case at the meeting and submitted a written petition thereafter. At its meeting on December 7, 2018, the Board voted to deny the contested case. Sierra Club again requested and submitted a written petition for the Board's subsequent approval of the continuation of the four permits at the Board's October 11, 2019 meeting under agenda item D-1. At its meeting on January 24, 2020, the Board voted to deny the contested case. Sierra Club did not appeal the Board's decisions but instead filed an original action against the State, alleging public trust

violations regarding the Board's approval of the 2018 and 2019 holdovers.⁵ The case went to trial in August 2020.

II. DISCUSSION

A. Public Trust

1. Authorizing the continued holdover of the RPs is consistent with the “dual mandate” of the public trust.

Title to water resources is held in trust by the State for the benefit of its people. Pursuant to *In re Water Use Permits*, 94 Hawai'i 97, 9 P.3d 409 (2000) (*Waiāhole I*), and *In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004), the Hawai'i Supreme Court has identified four public trust purposes with respect to water:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
4. Reservations for Hawaiian home lands.

In addition, the Courts have indicated that the “dual mandate” of the public trust not only calls for the protection of water resources, but also requires the Board to promote the reasonable and beneficial use of water resources in order to maximize their social and economic benefits to the people of this state. *Waiāhole I*, 94 Hawai'i at 139, 141, 9 P.3d at 451, 453 (“The public has a definite interest in the development and use of water resources for various reasonable and beneficial public and private offstream purposes, including agriculture.”). In order to satisfy its public trust obligations, the Board must balance the proposed use of water against the foregoing public trust purposes, as well as competing uses.

In addition to its public trust duties, the Board also has a constitutional duty to promote diversified agriculture. The Hawai'i 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.

Hawai'i Constitution, Article XI, Section 3.

⁵*Sierra Club v. Bd of Land and Natural Res.*, First Cir. Court, Civ. No. 19-1-0019-01 (JPC) (The Court's ruling in the bench trial, which concluded September 24, 2020, is pending at the time of drafting). The Complaint alleged public trust violations regarding the Board's approval of the 2018 holdover. The Complaint was later amended to include the 2019 holdover.

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.

Hawai`i Constitution, Article XI, Section 10.

Staff notes that 22,254 acres out of HC&S's 30,000 acres of former sugar cane land in central Maui, which is now owned by Mahi Pono, had been designated as Important Agricultural Lands (IAL). See CWRM D&O at Finding of Fact (FOF) 111. By statute, IAL:

- (1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;*
- (2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or*
- (3) **Are needed** to promote the expansion of agricultural activities and income for the future, even if currently not in production.*

HRS § 205-42(a) (emphasis added).

The IAL designation may be removed from lands if a sufficient supply of water is no longer available to allow profitable farming of the land due to governmental actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control. HRS § 205-50(g).

[A]s a general matter, water use for diversified agriculture on land zoned for agriculture is consistent with the public interest. Such use fulfills state policies in favor of reasonable and beneficial water use, diversified agriculture, conservation of agricultural lands, and increased self-sufficiency of this state. See Haw. Const. art. XI, §§ 1 & 3; HRS § 174C-2(c).

Waiāhole I, 94 Hawai`i at 162, 9 P.3d at 474.

Making irrigation water available for food crops supports the long-term viability and security of local agricultural operations. This is critical to the State's compliance with the constitutional mandates of Article XI, and it is consistent with the State's "dual mandate" under the public trust to balance resource protection against maximum reasonable-beneficial use. It also allows for the local production of food, supporting the goal of food sustainability and food security for Hawai`i. Given the large size of Mahi Pono's planned operation, there is a potential to achieve economies of scale that could translate into lower prices for consumers when produce does not have to be shipped to Hawai`i from outside of the state. Although Mahi Pono has not planted this year as much as planned due to the COVID-19 pandemic, Mahi Pono has confirmed that it intends to still achieve full build out of its 30,000 acres pursuant to its farm plan by 2029. In addition to the direct irrigation of crops, the continued diversion of water through the ditch system is necessary to preserve the operational integrity of the ditch system, which will in turn allow for the expansion of Mahi Pono's diversified agriculture operations.

Additionally, a portion of water diverted through the ditch system is used for domestic purposes through the Maui Department of Water Supply (MDWS) that services approximately 35,251 people as well as businesses, churches, organizations, and government facilities. There is no feasible way to provide enough water to MDWS's upcountry customers without the use of water from East Maui streams. The diverted water is also provided to the Kula Agricultural Park for the use of the farmers in that area.

The continued diversion of water through the revocable permits on a temporary basis serves the public trust purpose of providing domestic water for the public, including drinking water. If the revocable permits were to be terminated and diversions interrupted, it would negatively impact the critically important delivery of water to about 36,000 residents of upcountry Maui.⁶

With respect to the "protection" prong of the public trust's dual mandate, the Board "bears an 'affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.'" *Waiāhole I*, 94 Haw. at 141, 9 P.3d at 453. However, "reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values." *Id.* Staff believes that the additional conditions which have been imposed by the Board over the course of its holdover approvals fulfill its public trust obligations as a steward of the public's water resources, and recommends the Board approve the continued holdover of the revocable permits allowing the diversion of water under such conditions.

2. The Board should continue to impose conditions on the RPs to fulfill its public trust duty to protect water resources and maximize their reasonable beneficial use.

In addition to the conditions that were contained in the original permits, between 2016 and 2019 the Board imposed the following additional conditions, that are still in effect, in order to ensure that the use of water is properly balanced against the public trust purposes:

1. Require the holdover of the revocable permits to incorporate the June 20, 2018 CWRM order. There shall be no out of watershed diversions from the streams listed as full restoration streams in the CWRM order, and the timing for stopping the diversions shall be in accordance with the aforesaid CWRM order.⁷

⁶ It is uncertain whether Permittee would continue the system solely to provide water to the County of Maui in the event the revocable permits are terminated. It is also questionable whether the County has the resources and expertise to acquire, operate, and maintain the system in the event it is no longer operated by the Permittee.

⁷ CWRM issued orders addressing diversion modifications and abandonment dated February 19, 2019 and August 29, 2019 for Category 2 and 3 diversions respectively. CWRM will issue future decisions to address Category 1 and 4 diversions.

2. There shall be no waste of water. All water diverted shall be put to beneficial agricultural use or municipal use.
3. Any amount of water diverted under the revocable permits shall be for reasonable and beneficial use and always in compliance with the amended interim instream flow standards (IIFS).
4. The holdover shall comply with all conditions required by the CWRM's Amended IIFS decision.
5. 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.
6. Permittee shall cleanup trash from revocable permit areas starting with areas that are accessible and close to streams.
7. The revocable permits shall be subject to any existing or future reservations of water for the Department of Hawaiian Home Lands (DHHL).
8. Establish an interim committee to discuss water usage issues in the license area. The committee shall consist of five members, representing Alexander & Baldwin, Farm Bureau, Office of Hawaiian Affairs, the Native Hawaiian Legal Corporation and the County of Maui. The interim committee shall meet once a month for the first quarter, then at least quarterly thereafter, more often as useful.
9. Permittee shall provide quarterly written reports to the Board containing the following information:
 - a. The amount of water used on monthly basis, including the monthly amount of water delivered for: the County of Maui Department of Water Supply (DWS) and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses, and reservoir/fire protection/hydroelectric uses. Also, provide an estimate of the system loss for the EMI ditch system and the A&B field system. Diversified agricultural uses shall also provide information as to location, crop, and user of the water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of the water.
 - b. For each stream that is subject to the CWRM order, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been removed as required by CWRM.
 - c. Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including documenting any reports of such items received from the Department, other public or private entities and members of the general public and action taken by Permittee to remove the reported items.

- d. The method and timeline for discontinuing the diversion of water from Waipio and Hanehoi streams into Ho`olawa stream, including status updates on implementation.
10. The Permittee may not divert an amount of water exceeding an average of 45 million gallons per day (mgd), averaged annually, for all permits combined, further subject to all water diverted shall be for reasonable and beneficial uses.
11. For RP S-7266, the area identified as the Hanawā Natural Area Reserve shall be removed from the revocable permit premises. Additionally, A&B/EMI shall continue discussions with DOFAW to identify additional forest reserve lands to be removed from the license areas to be implemented in connection with the issuance of a water lease, if any, or sooner.
12. Require Mahi Pono to advise any third-party lessees that their decisions be based on a month to month revocable permit for water use until a lease is completed.
13. For the streams in the revocable permit area that have not had interim instream flow standards set, Permittee shall continue to clean up and remove debris from the permit areas and staff shall inspect and report every three months on the progress of the clean-up. For the purposes of clean-up, debris shall not include any structures and equipment currently used for the water diversions.
14. Staff is to inspect the streams and report on whether those lands could be developed for agricultural uses, including the viability of agricultural land or water leases.⁸

The requirements imposed by the Board serve to effectuate the priorities outlined by CWRM in their decision. In issuing its decision, CWRM was also bound to fulfill the dual mandate of the public trust. As part of the IIFS process, CWRM classified specific streams in order to prioritize the protection of the following resource values: taro and community streams, native habitat streams, public use streams, and other streams. In doing so, CWRM recognized that streams classified as other streams could be diverted to support diversified agriculture. In addition to protecting resource values for specific streams, CWRM looked at the entirety of the affected streams in an integrated manner considering the overall ecological ramifications. CWRM acknowledged that diverting water for diversified agriculture was reasonable and beneficial use due to the economic benefits provided and the contribution to food sustainability.

CWRM set IIFS for the petitioned streams not to protect public trust purposes at the expense of all other offstream uses, but rather to balance them in a manner that ensures that a sufficient amount of offstream water is available to support the cultivation of diversified agricultural crops on central Maui IAL lands. CWRM was also concerned that leaving those land uncultivated would increase wind-blown erosion that would damage the near shore environment, air quality and tourism competitiveness. CWRM also recognized the value of municipal uses of water and

⁸ Regarding the last two requirements, staff did not conduct any inspections of the license areas due to the COVID-19 pandemic.

noted that the continued use of diverted water for that purpose was appropriate. See CWRM D&O at Conclusions of Law (COL) 149.

3. The Board should hold the Permittee to its burden to prove its need for stream water and the reasonable-beneficial use of all water diverted.

In compliance with the Board's requirements, Permittee has submitted quarterly reports for the first three quarters of the calendar year, providing information requested by the Board. The most recent report for the third quarter of the year is attached as **Exhibit C**. The reports provided updates on several key issues that have arisen in the water disposition process. Permittee reported that the diversions and use of water is consistent with the CWRM IIFS order and the Board's revocable permit requirements. In terms of water usage, Permittee noted that approximately 27.79 mgd, 22.60 mgd and 18.9 mgd of water was diverted during the first, second, and third quarters respectively. The amount of water was within the 45 mgd limit imposed by the Board as well as the amount allowed to be diverted under the IIFS. The uses of the water included agricultural uses in central Maui, supplying the County of Maui water for upcountry Maui and the Kula Agricultural Park, fire suppression, and historical industrial/non-agricultural uses.

Diversified agricultural uses of water averaged 2.50 mgd, 3.64 mgd and 2.5 mgd in the first, second and third quarters respectively. Specific uses of the water include irrigation of food crops consisting of coffee and hau; citrus and pongamia; papaya; potato and onions; and sweet potato. Water supplied to the County of Maui averaged approximately 1.44 mgd, 2.21 mgd and 3.5 mgd for the first, second and third quarters respectively. Water used for historical and industrial uses averaged 1.10 mgd for each quarter. The report states that historical and industrial uses are "uses other than plantation and A&B uses." Included are uses by other entities located either adjacent to or within the boundaries of the farm. Water used for reservoir storage, fire suppression, evaporation, dust control and hydro-electric purposes averaged 16.44 mgd and 10.51 mgd for the first and second quarters respectively. In their responses to the Department's request for further information, Permittee confirmed that water used for hydroelectric purposes was non-consumptive and returned to the ditch and consumptively re-used for the other purposes noted in the reports. The water is stored in reservoirs both for agricultural use and to ensure that the County of Maui has an available water supply to combat brush fires. The end of sugar cultivation has resulted in a reduction of irrigated areas and an increased risk of brush fires. Finally, systems losses averaged 6.31 mgd and 5.13 mgd for the first and second quarters respectively. For the third quarter report, Permittee did not provide a separate amount for system losses but instead incorporated the estimate into the other uses including reservoir storage, fire suppression, evaporation, dust control and hydro-electric purposes reporting a third quarter average of 11.7 mgd.

Staff followed up with Permittee to provide further information regarding system loss and evaporation. Permittee provided the following background and explanation for system losses as follows:

"System Losses" for the EMI Ditch System both east and west of Maliko Gulch have

been evaluated by the Commission on Water Resource Management (“CWRM”) as recounted in CWRM’s June 20, 2018 Decision and Order (the “D&O”).

The EMI Ditch System east of Maliko Gulch is the integrated system of diversions, intakes, tunnels, ditches and reservoirs located on both State owned and private lands that run from Makapipi Stream at the eastern boundary of the License Areas to Maliko Gulch, which is located several miles west of Honopou Stream. Honopou Stream represents the western boundary of the License Areas.

USGS conducted a field study from March to October 2011 to identify ditch characteristics and quantify seepage losses and gains in the EMI Ditch System. The study was undertaken in cooperation with CWRM and its results were summarized in USGS Open-File Report 2012-1115, which was presented to CWRM at its meeting held on January 23, 2013. USGS concluded that there were both seepage gains and losses in the EMI Ditch System which largely cancelled each other out. As summarized in Finding of Fact (FOF) No. 723 of the D&O:

“Thus, because both open ditches and tunnels in the EMI diversion system not only incur seepage losses but also gains from ground water, especially in the tunnels, it is not clear whether net seepage losses even occur in the EMI diversion system. At low flows, the USGS study results show that losses are greater than gains, but at higher flows, gains are greater than losses, supra, FOF 721”

System losses in the HC&S irrigation system of ditches, reservoirs and related infrastructure west of Maliko Gulch were evaluated by CWRM based on the evidence submitted by HC&S in the contested case hearing that resulted in the D&O. HC&S submitted testimony and documentary evidence supporting its estimate that the average annual amount of “system losses” in the HC&S irrigation system was 41.67 mgd, or 22.7 percent of the total of the surface water delivered to HC&S at Maliko Gulch and ground water pumped from HC&S brackish water wells to irrigate the Central Maui fields then cultivated in sugar. This was illustrated in a table prepared by HC&S analyzing data from 2008 to 2013, which was submitted as Exhibit C-137, and was discussed in FOF Nos. 724-727. This estimate included not only water assumed to be lost to seepage and evaporation, but also to “miscellaneous losses such as back-flushing of filters, drip tube ruptures or breaks, animal damage, pipeline breaks, misreported irrigation (if they are not applying the correct hours to the amount they ran), testing of systems prior to planting, or where water is taken out of the system but not accounted for in daily irrigation.” D&O FOF No. 733.

To cross check the reasonableness of this estimate, HC&S performed a separate estimate of seepage and evaporation by 1) calculating the range of expected seepage rate losses through the lined and unlined surfaces of HC&S’s on-farm (non-EMI) ditches and reservoirs utilizing factors published by the United States Department of Agriculture (“USDA”) in its National Engineering Handbook, and 2) calculating direct evaporation into the atmosphere from the surface area of the water typically present in the ditches and reservoirs. The result was presented in a table submitted as Exhibit C-139. The methodology used was discussed in detail in FOF Nos. 728 - 732 of the D&O. As found by CWRM, “the average of high and low estimated losses from

seepage and evaporation is 27.55 percent, and HC&S's losses of 22.7% fell below this average." D&O FOF No. 731 and Exhibit C-139. CWRM concluded:

Thus, HC&S's system losses of 22.7 percent (41.67 mgd of 183.61 mgd of surface water delivered and ground water pumped) were reasonable losses under sugarcane cultivation. Because the same distribution system would be used for diversified agriculture, the same rate of 22.7 percent losses should be applicable."

In the quarterly reports filed with the BLNR up until Q2 2020, the 22.7% "System Losses" referred to above was presented in a separate column. This was not a directly measured amount but simply represented the average rate of HC&S system losses CWRM had validated as reasonable during sugar cultivation. The current rate of system losses is not precisely known, though it is thought that while the absolute amount of system losses is lower, the rate of system losses is higher since most of the seepage losses occur in the reservoirs of the former HC&S plantation, and those are still generally being filled for fire suppression purposes for the County, even though the total amount of water deliveries is currently only a fraction of what was being imported during sugar cultivation. The seepage losses thus represent significantly more than 22.7% of current EMI deliveries, which are far less than the deliveries during sugar cultivation. Recognizing that this may cause confusion, and to eliminate such confusion, starting with the Q3 2020 quarterly report, the 22.7% column was eliminated and all system losses of the on-farm (non-EMI) irrigation system were combined with all the water that is not otherwise separately measured and accounted for, i.e., for reservoirs, fire protection, dust control, and hydroelectric uses, along with system losses associated with those uses ("Other Uses"). The figure apportioned to these Other Uses represents the net amount of water remaining after the Honopou East Maui water deliveries are allocated to the County of Maui DWS and Kula Ag Park, A&B's tenants and other historical water users, and Mahi Pono's agricultural operations.

Again, total "system losses" west of Maliko Gulch are currently higher than the 22.7% rate determined to be reasonable under sugar cultivation, or under the anticipated full buildout of Mahi Pono's diversified agricultural farm plan. This is primarily due to the need to continue to maintain water levels in the reservoirs largely for the County of Maui's fire suppression needs. Seepage losses from the reservoirs are thus expected and continue to occur in the unlined reservoirs just as they did during sugar cultivation. This water is not being irretrievably "lost," however, or 'lost' at all, since it is being returned to the underlying aquifer, which is the source for the brackish water wells that supplement the current and future irrigation needs of the Mahi Pono farm plan as well as other users in Central Maui.

In their responses to the Department's request for additional information, Permittee further clarified that water classified as evaporation is the amount of water lost through evaporation from the surface of water in the ditches and reservoirs that are located on-farm, west of Maliko Gulch. According to the Permittee, this amount was estimated during the course of the CWRM East Maui IIFS contested case hearing, using a pan evaporation rate of 0.40-acre inches a day, to be approximately 2.645 million gallons per day during sugar cultivation. Permittee stated that the majority of this amount, 2.37 mgd, was estimated to be the amount of water lost by direct evaporation into the atmosphere from HC&S' on-farm reservoirs. Permittee reiterated that the

reservoirs are currently being kept generally full at the request of the Maui Fire Department to help with fire suppression needs. Permittee noted that with the more wetted perimeter, there will be greater evaporation.

Staff notes that CWRM discussed this issue in its decision, Executive Summary at vi, noting that:

“In addition, 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.”

Furthermore, CWRM requested that the Board consider requiring 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 consideration of the foregoing, staff believes that Permittee should be required to proactively address this issue prior to the Board’s consideration of a water lease. Therefore, staff recommends that Permittee submit to the Department a plan for their proposed upgrades to the irrigation system intended to address CWRM’s concerns no later than June 30, 2021. This will allow staff to review and consult with CWRM to determine whether the plan is sufficient and include it for the Board’s future review. Staff also recommends that the Board also amend its previous requirement prohibiting the waste of water to specifically exclude system losses and evaporation.

According to the reports, the use of water by the Permittee is generally in compliance with the revocable permit requirements. However, staff noted that the reported historical and industrial uses may not be consistent with the Board’s requirements. As part of its 2019 approval, the Board required that all diverted water shall be put to beneficial agricultural or municipal use. According to the report some of those uses are agricultural in nature such as pasture, orchard and stock water/cattle. Those uses appear to be consistent with the revocable permit and not an issue. However, the report identifies multiple industrial users, but does not specify the exact nature of the water use and the amount of water used. These uses may not be compatible with the revocable permits. In order to get further clarity on the issue, the Board is requested to require the Permittee to provide more information on the non-agricultural historical and industrial uses, identifying the specific uses of the water, explaining how those uses are ancillary to agricultural operations or are otherwise reasonable and beneficial, and the amount used. If those uses are ancillary to the agricultural uses (such as base yard operations), then it may be permissible.

Permittee has stated that the users are not individually metered, so they are unable to identify the amounts of water used by the individual users. However, staff believes that Permittee must provide further information on the historic and industrial uses of water. If those uses are unrelated to the agricultural operations or municipal use, the Permittee must justify those uses as reasonable and beneficial and request that the Board expand the permissible uses of water under the revocable permits to include these additional uses. Staff notes that regardless of whether

those uses are historical, they are not permitted under the Board's current requirements. The draft EIS does not include these uses as part of the proposed water lease. These additional uses would need to be addressed in the Final EIS in order to be permitted uses under a long term disposition. Although the amount of water used for these purposes are relatively small in relation to the total amount of water diverted, it is not an insignificant amount and Board action would be appropriate.⁹

Opponents to the continued holdover of the revocable permits argue that the amount of water the Permittee is allowed to divert is excessive and that Permittee is using the diverted water for unauthorized uses in violation of the revocable permits. Regarding the amount of water diverted, the Permittee is well under the 45 mgd limit imposed by the Board and has made effort through the quarterly reports to verify that their use is reasonable and beneficial. However, staff recommends that Permittee further report how much water is needed for each crop per acre, to ensure that Permittee is not diverting more water than necessary. The farm plan provided by permittee does provide an estimate of the acreage dedicated to certain types of crops, but does not specify the crops nor provide any estimates on how much the water is needed for the various types of crops intended to be planted. Furthermore, the farm plan does provide projections for estimated future water needs, but does not provide any justification for those estimates, such as a timeline for crop plantings. Permittee estimated its water demand at 24.5 mgd in 2020 and 32.3 mgd in 2021.

CWRM recognized that relying solely on groundwater sources would not be a feasible alternative to the use of surface water. While the CWRM decision calculated 17.84 mgd as an estimate of how much well water might be used for HC&S's then-existing diversified agriculture plan, there is some concern with that continued level of groundwater use at this time. According to comments from CWRM's groundwater division, Central Maui, or the Kahului Aquifer System Area, has an estimated sustainable yield of 1 million gallons per day (mgd) based on natural conditions. However, this does not consider the historic or continued importation of water from both EMI and Wailuku Water, which historically exceeded an average 200 mgd and undoubtedly contributes to return-irrigation recharge of very low salinity water. The ground water in the area is not overly brackish and is actually quite good to the point where the county is relying on some wells (Maui Lani wells) for potable needs. Yet, CWRM is not sure this freshwater condition for the area will continue with the reduction of imported water from EMI and Wailuku Water Co.

Regarding water service to upcountry Maui, CWRM's groundwater division also advises that it will be very costly to move groundwater upcountry for both capital and operational expenses for a resource that may become too brackish in the future for potable needs.

Mahi Pono confirmed that it is using groundwater this year to supplement surface water used for crop irrigation. In the third quarter of 2020, Mahi Pono used approximately 12.7 million gallons of brackish groundwater. According to Mahi Pono, this was necessitated by their growing farm operation as well as lack of surface water availability due to uncommonly dry weather conditions.

⁹ As noted previously all historical and industrial uses (including agricultural) averages approximately 1.10 mgd per quarter.

Given the Permittee has complied with the Board's requirements to be transparent about the water use, staff recommends no adjustment to the current 45 mgd limit provided that the Permittee continue to provide timely and thorough quarterly reports. As to the potentially unauthorized use of the water, staff presents recommendations below to address that specific issue in lieu of reducing the 45 mgd limit.

4. The Permittee is complying with the CWRM order's requirement to restore flow and modify/abandon diversion structures to the extent required by CWRM.

Opponents to the holdovers argue that the Board should order that diversion structures in the streams which were subject to the CWRM decision be removed or modified to prevent the entrainment of native species. However, the CWRM decision specifically says that its intention is that "diversion structures only need to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed[,] and that the issue of how specific diversions are to be modified "will be before the Commission in a subsequent process." Indeed, that "subsequent process" is already taking place.

Permittee reports that they are working with CWRM and making progress in carrying out CWRM's order with respect to restoring stream flow and modifying or abandoning stream diversion structures. Permittee has obtained all initial approval for the abandonment of taro stream diversions to allow for full restoration. Permittee is working to meet the conditions of those approvals so abandonment work can proceed. Permittee has initiated discussions with CWRM regarding the non-taro streams, including submitting a draft work plan and seeking to establish measurement protocols for flow compliance. Further action has been delayed due to COVID-19 restrictions, but staff has consulted with CWRM, who noted that Permittee is working with CWRM to fulfill connectivity requirements in the IIFS to the extent possible without conducting work requiring a permit.

Staff does not recommend that the Board supplant the CWRM's decision as to how diversions should be modified. The continued holdover of the RPs at this time does not prevent the Board from later determining that certain diversions should be removed entirely if it is determined that they no longer serve a purpose after the full implementation of Mahi Pono's diversified agriculture operations.

Opponents have also raised issues about the timeliness or lack thereof regarding the removal of diversions and stream restoration. Given that CWRM requires permits for such work and the fact that other state and federal agencies may also have jurisdiction, the Permittee appears to be working in good faith to complete the permitting process. Staff recommends that the Board take no further action on this particular issue. Imposing an arbitrary deadline may result in compromising CWRM's ability to adequately review and process the permits and potentially result in the Permittee having to conduct unauthorized work in order to comply with the revocable permits. If the Permittee fails to continue working in good faith to obtain the permits, this issue can be brought back to the Board for further action.

5. The Board's conditions fulfill its duty to protect and preserve and the trust resources.

As to the issue of trash and debris removal, Permittee has developed procedures regarding cleanup of trash and debris. Permittee continues to remove trash when observed during field inspections. Permittee reports removing PVC and steel pipes, old wooden and steel gates, discarded wooden structures and remnant pieces of concrete. Permittee's report contains photo documentation of trash removed over the first two quarters of the year. Permittee has also discussed with DOFAW the potential removal of additional forest reserve lands from the license areas beyond the Hanawī Natural Area Reserve. Staff has further consulted with DOFAW who stated that both parties reached mutual agreement in concept for future withdrawals and agreed to work on the specific details. DOFAW met with A&B/EMI on a limited basis due to COVID-19, most recently in September and twice overall for the year; and feel they have been productive discussions.

In its litigation against the Department, Sierra Club made repeated assertions that the Permittee is in violation of the revocable permits by failing to adequately address the trash and debris issue. Staff believes that the Permittee has satisfactorily complied with this requirement. Permittee has provided information on their ongoing efforts to identify and remove trash. Furthermore, staff is unaware of any instances where the Permittee has disregarded any reports or complaints of trash and debris. Rather than expect the Permittee to conduct a comprehensive search of the entire license area to identify and remove trash, a reasonable alternative would be to remove trash on a case by case basis, either as encountered in the field or via a report or complaint.

There has been disagreement with the Sierra Club as to what constitutes trash and debris that requires removal by Permittee. In order to provide clarity on this issue, staff recommends that the Board define "trash and debris" as any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is). This definition is consistent with CWRM's prior practice.

Staff has also consulted with other divisions to provide information addressing Sierra Club's concerns. Staff consulted with DOFAW regarding the issues of conducting inspections, clean up and removal of trash and mosquito breeding in the abandoned diversions.

DOFAW noted that they do not schedule regular inspections of the forest reserve or natural area reserve specifically for the A&B and EMI RPs. Furthermore, DOFAW has not been requested or assigned to support with the monitoring of the RPs at this time, but remains available to support Land Division in this capacity as needed. DOFAW has supported the monitoring of these RP most recently with abandonment of the diversions and submitted a report to CWRM with recommendations dated June 28, 2019. While DOFAW does not have an established schedule of regular inspections for the RP areas; DOFAW conducts routine management in forest reserve and natural area reserve throughout the year. Routine management of the area is done on a 1 week per month on average (i.e.: 1 forest reserve crew, 1 natural area reserve crew, and 1 forest bird crew (that mostly works in the Natural Area Reserve). As the forest reserve and natural area

reserve are very large areas and the majority of the work is done in the higher elevation and in areas that are not necessarily adjacent to the water infrastructure.

DOFAW is able to report any issues or concerns to Land Division that are observed or encountered during its route management missions. DOFAW accepts reports from the public via its office phone, by mail or email. If/when a report is received, DOFAW investigates and takes appropriate action. If the report is related to the RP areas, then DOFAW would consult with Land Division to work with and determine the appropriate action. Staff believes that current inspection actions are appropriate and sufficient. Given the limited staffing of both Land Division and DOFAW on Maui, it would be overly burdensome to require Land Division and DOFAW staff to thoroughly inspect the entire RP areas on a routine basis. It would be most effective for Land Division and DOFAW to respond to complaints of trash as received and then address with the Permittee as appropriate. Staff notes that we have not received further complaints of trash after the reports in 2018, and the Permittee has been providing updates on trash removal in their quarterly reports.

To address the spread of invasive species, DOFAW and partners conduct ongoing forest management throughout the forest reserve and natural area reserve. The majority of intensive management actions, including those related to the control of invasive species, is focused within fenced units above 2000 to 4000 feet elevation with the goal of protecting native biodiversity and associated watershed health. Management actions below the fence areas are focused on maintaining existing forest cover and preventing further advancement of invasive species. At the lower elevations, invasive species control is focused on addressing incipient species (such as pampas grass, African tulip, etc.) to prevent their further establishment in the area. Ko'olau Forest Reserve and Hanawai Natural Area Reserve are high-priority watershed management areas, and DOFAW and partners spend significant resources and funds annually on the management of this area (millions annually). However due to the overall limited budget for the managing an area of this size, DOFAW implements the most cost-effective strategies to address natural resource threats in the region, as detailed above.

DOFAW's primary concern is the spread of mosquitoes carried diseases, such as avian malaria, that impact Hawaii's native birds. The June 2019 report to CWRM identifies the areas that need to be addressed more immediately and provides the details on the associated concerns for those sites. The report identifies sites that are being abandoned and should correspondingly address/remove the infrastructure that promotes mosquito breeding. While there is an elevation concern with mosquitoes and forest birds, DOFAW believes that mitigating sites, especially if they are no longer needed for water conveyance, that create ideal situations where mosquitoes can breed, would be in the best interest of the health of our ecosystems - especially with potential impacts associated with climate change, and change in mosquito breeding elevations. The Department has initiated an inquiry with the State Department of Health (DOH) regarding the concerns about the impact mosquito breeding on human health at lower elevations.

Staff discussed the mosquito breeding issue with DOFAW further and clarified whether DOFAW considered any alternatives to diversion removal in the event that abandoned diversions may be re-activated in the future if appropriate. DOFAW is not aware of alternative measures to removal that effectively prevent mosquito breeding as none have been presented to them.

DOFAW would review and assess alternatives if presented to them. In consideration of the foregoing, staff recommends that the Board not impose additional conditions on diversion removal beyond those already required by CWRM, given that CWRM has the regulatory authority and expertise to address diversion abandonment and removal. However, staff recommends that the Board require the Permittee to work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. The Board is also recommended to require the Permittee to include the status of alternatives in their quarterly reports.

DOFAW, as previously stated, recommends that future RPs and/or lease agreements be limited to only the areas needed for the intended purpose of the RP or lease. For the A&B and EMI RP this would be limited to the areas needed for maintenance of the water infrastructure and conveyance, and would result in a substantially reduced area under the RP (i.e.: they currently cover the majority of the forest reserve and natural area reserve). DOFAW recommends that Land Division, A&B, and EMI work with DOFAW to identify the specific area needed for the RP and/or lease area. Staff concurs with DOFAW's recommendation and remains available to assist as needed.

The Division of Aquatic Resources (DAR) has summarized information and conducted an evaluation of 12 East Maui Streams within the Huelo license area. Information was also provided for Puakea stream, however since this stream occurs within the Nahiku license area, it was excluded from the Huelo complex stream evaluation. With these comments DAR attempts to prioritize streams based on biological recovery potential, or in other words, which stream's restoration of flow would have the greatest benefit to aquatic resources. For this evaluation indigenous aquatic species and their habitat is of great importance. These include stream species such as oopu alamoo (*lentipes concolor*), oopu nopili (*Sicyopterus stimpsoni*), oopu nakea (*Awaous guamensis*), oopu naniha (*Stenogobius hawaiiensis*), opae kalaole (*Atyoida bisulcate*), opae oehaa (*Macrobrachium grandimanus*), hihiwai (*Neritina granosa*), and endangered damselflies (*Megalagrion spp.*). Although this is an evaluation of streams, the status of an estuary is directly tied to the status of the stream that feeds it. Therefore, estuary species such as aholehole (*Kuhlia xenura*), amaama (*Mugil cephalus*), moi (*Polydactylus sexfilis*), and others are also considered of great importance. To a lesser extent prawns (*Macrobrachium lar*) are considered. Although introduced, this species serves as an important food resource, consumed by many rural communities and adds to our State's food security.

Relative to other stream systems within the region of East Maui, little is known about the 12 Huelo license area systems, therefore the best available information was used for this evaluation. Additional studies are needed to better understand these systems and re-evaluate accordingly. To evaluate these systems, DAR considered information from three data sources: potential habitat units, geospatial assessment of available estuary habitat types, and input from DAR's Maui Stream Biologist.

Potential habitat units relate to the amount of habitat available within a stream during natural flow conditions. This data is derived from the East Maui Habitat Evaluation Study prepared by Parham (2019). A summary table of this information was provided by CWRM to DAR.

The geospatial assessment of available estuary habitat types was conducted by DAR staff. This analysis attempted to identify the presence of estuary bays (a setting where marine water is being intruded by freshwater, usually outside the stream mouth), and riverine estuaries (a setting where a stream is being intruded by marine water, usually landward of the stream mouth). Estuary bays was primarily determined by the two-dimensional shape of the coastline and the presence of a freshwater source. Riverine estuaries were primarily determined by the underlying slope of the stream near the coastline. From an estuary perspective, systems with multiple estuary types are valued higher.

Input from DAR's Maui Stream Biologist came from Skippy Hau. With the onset of expressed interest on these streams he initiated spot checks to quickly assess the aquatic resources. Although he was able to visit only six streams, the information provided was invaluable to this effort. Additionally, based on Skippy's knowledge and experience, recommendations on streams recommended for prioritization of natural flow restoration was provided.

Although the presence of a terminal waterfall and geographic distribution were also considered, they were not weighed as heavily as other factors described above given that terminal waterfall may have a variety of influences on the distribution of native and non-native aquatic organisms. More studies related to terminal waterfalls would help to better understand the influence of these features on aquatic resources. The Huelo license area is predominantly represented by coastal terminal waterfalls, which is reflected in DAR's recommendation. Prioritization based on geographic distribution was also considered to ensure that high priority streams have a broad distribution across the east Maui coastline to promote estuarine productivity, and habitat and population connectivity.

The following summarizes the best available information on the 12 East Maui Streams of the Huelo license area in addition to Puakea stream of the Nahiku license area and prioritized (Huelo license area only) based on restoration potential and overall contribution to the ecosystem.

Kolea

Restoration Priority: Low

Kolea stream has the potential for 572,600 habitat units, which is in the lower range relative to other streams in this evaluation. It abruptly enters marine waters on the open coast with a terminal waterfall. The estuarine area at this site is likely to be minimal. A recent stream check in October 2020 revealed an occurrence of prawns and important local food source. Due to a low potential for habitat units, a relatively small estuary, and lack of knowledge on this system, Kolea stream is of low priority (8th) relative to other streams in this evaluation.

Punaluu (Puaaluu)

Restoration Priority: Low

Punaluu or Puaaluu stream has the potential for 320,200 habitat units, which is the lowest relative to other streams in this evaluation. It abruptly enters marine waters on the open coast with a terminal waterfall. The estuarine area at this site is likely to be minimal. This stream has not been visited by DAR recently. Due to a low potential for habitat units, a relatively small estuary, and lack of knowledge on this system, Punaluu stream is of low-priority (11th) relative to other streams in this evaluation.

Kaiea (Kaaiea)

Restoration Priority: Medium

Kaiea or Kaaiea stream has the potential for 2,088,000 habitat units, which is in the upper range relative to other streams in this evaluation. It abruptly enters marine waters on the open coast with a terminal waterfall. The estuarine area at this site is likely to be minimal. A recent stream check in October 2020 revealed an occurrence of prawns and guppies (*Poecilia reticulata*). Although Kaiea is in the upper tier for habitat units it is ranked as medium priority (5th) due to a relatively substantial diversion in this system.

Oopuola

Restoration Priority: High

Oopuola stream has the potential for 611,200 habitat units, which is in the lower range relative to other streams in this evaluation. It gradually enters marine waters at Makaiwa Bay, with no major barriers. Estuaries within this system are represented by a riverine estuary and estuarine bay. A recent stream check in October 2020 revealed an occurrence of juvenile oopu alamoo. Although Oopuola is in the lower range for habitat units, it does have multiple estuary types, and a recent visit confirmed presence of indigenous aquatic resources. These considerations resulted in a high priority (3rd) relative to other streams in this evaluation. Additionally, it is important to note that the inclusion of this stream within the group of streams ranked as high priority and maintains the appropriate ratio of streams with terminal waterfalls to streams with no major barriers near the coastline within the Huelo license area.

Puehu

Restoration Priority: Low

Puehu stream has the potential for 653,500 habitat units, which is in the mid-range relative to other streams in this evaluation. It abruptly enters marine waters on the open coast with a terminal waterfall. The estuarine area at this site is likely to be minimal. This stream has not been recently visited by DAR staff. Due to a relatively small estuary, and lack of knowledge on this system, Puehu stream is of low priority (9th) relative to other streams in this evaluation.

Nailiilihaele

Restoration Priority: High

Nailiilihaele stream has the potential for 5,936,100 habitat units, which is in the upper range relative to other streams in this evaluation. It abruptly enters marine waters at Kailua Bay with a terminal waterfall. An estuarine bay is found at the coastline of this system. A recent stream check in October 2020 revealed an occurrence oopu nakea, opae kalaole, guppies, prawns, and swordtails (*Xiphophorus helleri*). This stream has a high potential for habitat units, an identified estuary, and a recent confirmed presence of indigenous aquatic resources. These considerations resulted in a high priority ranking (1st) for Nailiilihaele relative to other streams in this evaluation. It is important to note that Nailiilihaele ends in the same bay as Kailua, which was also evaluated as a high priority stream. This should be considered in determining which streams to restore flows in order to ensure a broader distribution of restoration efforts within the Huelo license area.

Kailua

Restoration Priority: High

Kailua stream has the potential for 9,361,700 habitat units, which is the most relative to other streams in this evaluation. It abruptly enters marine waters at Kailua Bay with a terminal waterfall. An estuarine bay is found at the coastline of this system. A recent stream check in October 2020 revealed an occurrence of prawns. This stream has a high potential for habitat units, an identified estuary, and recent confirmed presence of a resource species. These considerations resulted in a high priority ranking (1st) for Kailua relative to other streams in this evaluation. It is important to note that Kailua ends in the same bay as Nailiilihaele. Nailiilihaele is also ranked as high priority. This should be considered in determining which streams to restore flows in order to ensure a broader distribution of restoration efforts within the Huelo license area.

Hanahana (Hanawana)

Restoration Priority: Medium

Hanahana or Hanawana stream has the potential for 683,000 habitat units, which is in the mid-range relative to other streams in this evaluation. It gradually enters marine waters at Hanawana Bay, with no major barriers. Estuaries within this system are represented by a riverine estuary and estuarine bay. This stream has not been recently visited by DAR staff. Due to the combination of multiple estuaries and limited biological information Hanahana stream received a medium priority ranking (6th).

Hoalua

Restoration Priority: Medium

Hoalua stream has the potential for 1,234,300 habitat units, which is in the mid-range relative to other streams in this evaluation. It enters marine waters at Hoalua Bay with no major barrier. An estuarine bay is found at the coastline of this system. This stream has not been recently visited by DAR staff. Due to the presence of an estuarine bay and limited biological information Hoalua stream received a mid-priority ranking (4th).

Waipio

Restoration Priority: Low

Waipio stream has the potential for 548,800 habitat units, which is in the lower range relative to other streams in this evaluation. It abruptly enters marine waters at Waipio Bay with a terminal waterfall. An estuarine bay is found at the coastline of this system. This stream has not been recently visited by DAR staff. With a low potential for habitat units and limited biological information, Waipio stream received a low priority ranking (10th).

Mokupapa

Restoration Priority: Medium

Mokupapa stream has the potential for 666,000 habitat units, which is in the mid-range relative to other streams in this evaluation. It enters marine waters on the open coast with no major barrier. The estuarine area at this site is likely to be minimal. This stream has not been recently visited by staff from DAR. Due to a moderate potential for habitat units, a relatively small estuary, and lack of knowledge on this system, Mokupapa stream is of mid-priority (7th) relative to other streams in this evaluation.

Hoolawa

Restoration Priority: High

Hoolawa stream has the potential for 3,627,000 habitat units, which is in the upper range relative to other streams in this evaluation. It abruptly enters marine waters at Hoolawa Bay, with a terminal waterfall. Estuaries within this system are represented by a riverine estuary and estuarine bay. A recent stream check in October 2020 revealed an occurrence guppies, prawns, and swordtails. This stream has a high potential for habitat units, multiple estuary types, and recent confirmed presence of a resource species. These considerations resulted in a high priority ranking (2nd) for Hoolawa relative to other streams in this evaluation.

Puakea

Restoration Priority: Not Included in Ranking

Puakea stream has the potential for 1,826,100 habitat units. It gradually enters marine waters at a bay with no major barriers. Estuaries within this system are represented by a riverine estuary and estuarine bay. This stream has not been recently visited by DAR staff. Puakea stream is part of the Nahiku complex, located quite a distance away from the Huelo complex. Due to the large distance from the other streams described above, it was omitted from the Huelo license area stream evaluation and was not prioritized.

6. Staff recommends that Permittee be allowed to divert water from streams which did not have new IIFS set by the 2018 CWRM decision.

In its most recent lawsuit against the Department, Sierra Club opposed the continued diversions of approximately 13 streams in the license areas that are not subject to the IIFS (13 streams). Staff has consulted CWRM on this issue, and below is CWRM's response:

In the 2018 Decision and Order, the Commission [(i.e., CWRM)] used a holistic perspective to balance instream and non-instream uses by prioritizing streams for restoration that supported substantial instream values such as traditional and customary practices, habitat for aquatic biota and wildlife, and aesthetic and recreational values. The Commission recognized that non-instream uses, such as for municipal water supply and the irrigation of lands designated as IAL [(important agricultural lands)], were public trust uses (domestic water supply) or reasonable-beneficial uses of water in the public interest. In this prioritization, the Commission presumed the availability of water to meet these needs would come from certain streams identified within the 2001 petitions as well as streams not part of the 2001 petitions but part of the larger license area. The Commission estimated the availability of water to meet these needs using the available hydrological data that was part of the contested case record, specifically the flow of water in each ditch at the end of individual license areas, the amount of water distributed to Maui County Department of Water Supply at the Kamole Weir and at the Kula agricultural park, the amount of groundwater pumped from available wells, and the water used for the irrigation and processing of sugarcane by Hawaiian Commercial & Sugar.

This explanation echoes CWRM's unchallenged Conclusion of Law from the 2018 Decision and Order, in which the CWRM explained:

In not requiring the full restoration of all streams, the Commission has allowed for the some [sic] streams to continue to be diverted so that the Board may continue to license the diversion of water not needed to meet the IIFS from these streams for noninstream use. The available water would also include freshets and stormwater which are not included in the calculation of the IIFS.

See CWRM D&O at Conclusion of Law (COL) 150.

Sierra Club members have testified before the Board and during the litigation that their recreational use and enjoyment of the 13 streams is negatively impacted by Permittee's diversions. While the Board has considered these members' interests, and should again consider all testimony in connection with this submittal, staff recommends that the interest of these members should not outweigh the overwhelming interest of the public in ensuring that Permittee has sufficient water to meet the needs of diversified agriculture and the domestic use of MDWS's customers.

While the members of the public express a recreational interest in the 13 streams, staff is not aware of any reason preventing any members of the public from enjoying other streams in the East Maui area, including those that have been ordered fully restored by CWRM. Further, while Sierra Club has previously asked that the Permittee's water use be capped at 27 mgd, it appears undisputed that limiting Permittee to that much water will not necessarily fully restore the 13 streams in any event.

Although staff is recommending that the Permittee be allowed to continue diverting from the streams that did not have new IIFS set by the CWRM decision, staff acknowledges and appreciates DAR's analysis and recommendations. Therefore, staff is recommending that the Board require the Permittee to cooperate with CWRM and DAR in studies, site inspections and other actions as necessary to address the streams in the license areas not covered by the CWRM order.

A. The Coastal Zone Management Act (CZMA); HRS Chapter 205A.

In its litigation against the Board, the Sierra Club alleged that the Board violated certain sections of the Coastal Zone Management Act (CZMA). It argues that the CZMA applies insofar as it sets out requirements for the "coastal zone management area" which includes all lands of the State. HRS § 205A-1.

The objectives of the CZMA include the: "[p]rotect[ion of] valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems." HRS § 205A-2(b)(4)(A).

Its policies include:

(A) Exercis[ing] an overall conservation ethic, and practic[ing] stewardship in the protection, use, and development of marine and coastal resources;

. . . .
(D) Minimiz[ing] disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs[.]

HRS § 205A-2(c)(4)(A) & (D).

HRS § 205A-4 directs State agencies to follow the objectives and policies of the CZMA:

(a) In implementing the objectives of the coastal zone management program, the agencies shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development.

(b) The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority.

HRS § 205A-5 further states:

(a) All agencies shall ensure that their rules comply with the objectives and policies of this chapter and any guidelines enacted by the legislature.

(b) All agencies shall enforce the objectives and policies of this chapter and any rules adopted pursuant to this chapter.

The Sierra Club contends that the Board violated each of the above-quoted sections of the CZMA by approving the continued holdover of the RPs. Staff disagrees.

Protection of coastal ecosystems. While the diversion of certain streams may prevent native amphidromous species from migrating to the ocean as larvae, where they would become part of the coastal ecosystem, the ecosystem at large should be sufficiently protected because of the presence of streams that have been ordered to be fully restored by CWRM, and those which have been designated as “habitat streams.” Flow in these streams should be sufficient to allow larvae to migrate to the ocean and join the coastal ecosystem. Further, even in streams that are not fully restored or are not habitat streams, larvae may still be flushed out into the ocean by freshets, which can bypass diversion structures. Ensuring connectivity, which the CWRM order commands, will also allow stream animals to complete their life cycle by migrating from the ocean upstream as they mature.

Effective regulation of stream diversions recognizing competing water needs. As discussed at length above, the staff believes that the continued holdover of the RPs, subject to the conditions recommended, constitutes the effective regulation of stream diversions recognizing competing instream and offstream needs.

Ecological, cultural, and historic values. Staff has considered the comments of DAR and CWRM with respect to the ecological, cultural, and historic values of the streams in the RP areas, as well as the DEIS published by the Permittee, public testimony provided at past

meetings, and testimony presented during the trial in the Sierra Club litigation. Staff is satisfied that the ecological, cultural, and historic values of the petitioned streams have been sufficiently protected by the CWRM decision, as CWRM acted as a public trustee, exercised its expertise, and no party appears to contest its findings. With respect to the “13 streams” or the non-petitioned streams, staff is satisfied that CWRM is in the process of ascertaining the ecological values of these streams and the propriety of setting IIFS for these streams, and that continuing the RPs on a temporary basis will not interfere with CWRM’s analysis. CWRM staff has developed a draft Instream Flow Standard Assessment Report (IFSAR) Summary, which is included as part of the Appendix for the Board’s information. However, staff notes that the summary has not been reviewed or accepted by the Commission itself. Staff will provide DAR’s comments for their review.

Aesthetic, recreational, scenic, and open space values. As discussed above, the CWRM decision takes into account and balances the aesthetic, recreational, scenic, and open space values with respect to the petitioned streams. Sierra Club has also presented extensive testimony regarding these values in connection with previous board meetings, which staff and the Board have considered.

Coastal hazards. Staff is unaware of any coastal hazards that are implicated by the continuation of the RPs.

Needs for economic development. As discussed extensively above, continuing the holdover of the RPs is in the best interest of economic development.

III. RENT

Staff is consulting with DHHL to ensure that dispositions of water sufficiently address the State’s trust obligations to DHHL beneficiaries. As DHHL is entitled to 30% of water license revenues pursuant to section 213 of the Hawaiian Home Commission Act, DHHL was concerned that revocable permit rents remained static for an extended period with no adjustment and requested that, at a minimum, rents be adjusted annually for inflation. Acknowledging the difficulty in appraising a holdover revocable permit, staff concurred with DHHL’s recommendation as an interim measure, and the Board approved adjusting the rents accordingly. As the permits were originally granted in the year 2000, as part of its 2018 and 2019 approvals, the Board authorized the adjustment of revocable permit rent consistent with the Consumer Price Index (CPI). The current 2020 revocable permit rents are as follows:

RP S-7263:	\$2,518.59 per month
RP S-7264:	\$9,831.49 per month
RP S-7265:	\$5,155.93 per month
RP S-7266:	\$2,116.04 per month

Adjusted for CPI calculated from September 2019 to August 2020, the 2021 rents are as follows:

RP S-7263:	\$2,549.58 per month
RP S-7264:	\$9,952.45 per month

RP S-7265: \$5,219.37 per month

RP S-7266: \$2,142.07 per month

In addition to the rent issue, pursuant to HRS § 171-58(g), any lease of water rights shall be subject to the rights of DHHL and include a reservation of water rights sufficient to support current and future homestead needs. To fulfill that obligation, DHHL and Department conducted a beneficiary consultation on January 14, 2018 to determine an appropriate reservation. However, DHHL has also requested that any holdover be consistent with the public trust doctrine, and furthermore that all revocable permits shall also be subject to any existing or future reservations of water for DHHL. Staff concurred with DHHL's comments and the Board has approved incorporating them into the revocable permits.

IV. CONCLUSION

The most prudent action would be to maintain the status quo while the parties properly comply with the extensive requirements of the water leasing process, which is underway and in progress. Because the permits are temporary in nature, the Board retains the authority to terminate them at any time in the event that it deems that the Permittee is not working in good faith toward obtaining a water lease.

In conclusion, staff recommends that in addition to any pre-existing requirements, the Board approve the continuation of the revocable permits subject further to the following requirements:

1. Permittee shall cooperate with CWRM and DAR in studies, site inspections and other actions as necessary to address the streams in the license areas not covered by the CWRM order.
2. Permittee shall work with CWRM and DOFAW to determine whether there are alternatives to diversion removal that effectively prevent mosquito breeding and can be feasibly implemented. Permittee shall include the status of alternatives in their quarterly reports.
3. If the Board finds that a use of water is not reasonable and beneficial and does not comply with the permitted uses, Permittee shall cease such use within a timeframe as determined by the Department.
4. For water used for agricultural crops, Permittee are to estimate how much water is required for each crop per acre per day.
5. Permittee shall 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.
6. Permittee shall pay the 2021 monthly rent amounts as determined above.

7. "Trash and debris" shall be further defined as "any loose or dislodged diversion material such as concrete, rebar, steel grating, corrugated metals, railroad ties, etc., that can be removed by hand (or by light equipment that can access the stream as is)."
8. System losses and evaporation shall not be considered as a waste of water.

V. RECOMMENDATION

That the Board:

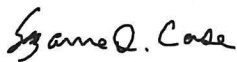
1. Find that the continuation of the subject revocable permits is consistent with the public trust doctrine;
2. Declare that, after considering the potential effects of the proposed dispositions as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, these projects will probably have minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment;
3. Subject to the terms and conditions noted in this submittal, approve the holdover or continuation of the revocable permits on a month-to-month basis for another one-year period through December 31, 2021,

Respectfully Submitted,



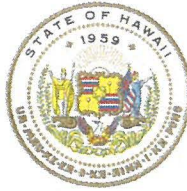
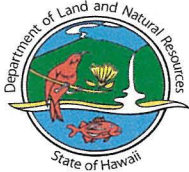
Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

November 13, 2020

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, Hawaii Revised Statutes (HRS), and Chapter 11-200.1, Hawaii Administrative Rules (HAR):

- Project Title:** Holdover/Continuation 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.
- Project Location:** Maui
- Project Description:** Revocable permits for interim water use.
- Chap. 343 Trigger(s):** Use of State Water (Land)
- Exemption Class No. and Description:** In accordance with HAR § 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on March 3, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," and Item 45 that states, "Permits, licenses, registrations, and rights-of-entry issues by the Department that are routine in nature, involving negligible impacts beyond that previously existing."
- Cumulative Impact of Planned Successive Actions in Same Place Significant:** No, this action applies only to pre-existing diversions, and will not serve to authorize any new diversions of water beyond that currently occurring.
- Action May Have Significant Impact on** No. Revocable permits are temporary in nature and applicants are conducting environmental reviews.

**Particularly Sensitive
Environment:**

Analysis:

The State Intermediate Court of Appeals has determined that pursuant to Section 171-55, HRS the Board may issue a temporary permit in the interim while a permittee pursues a long-term water lease. The proposed use under the revocable permits will involve negligible or no expansion or change of use beyond that previously existing.

Consulted Parties:

Commission of Water Resource Management, Division of Forestry and Wildlife, Division of Aquatic Resources.

Recommendation:

That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

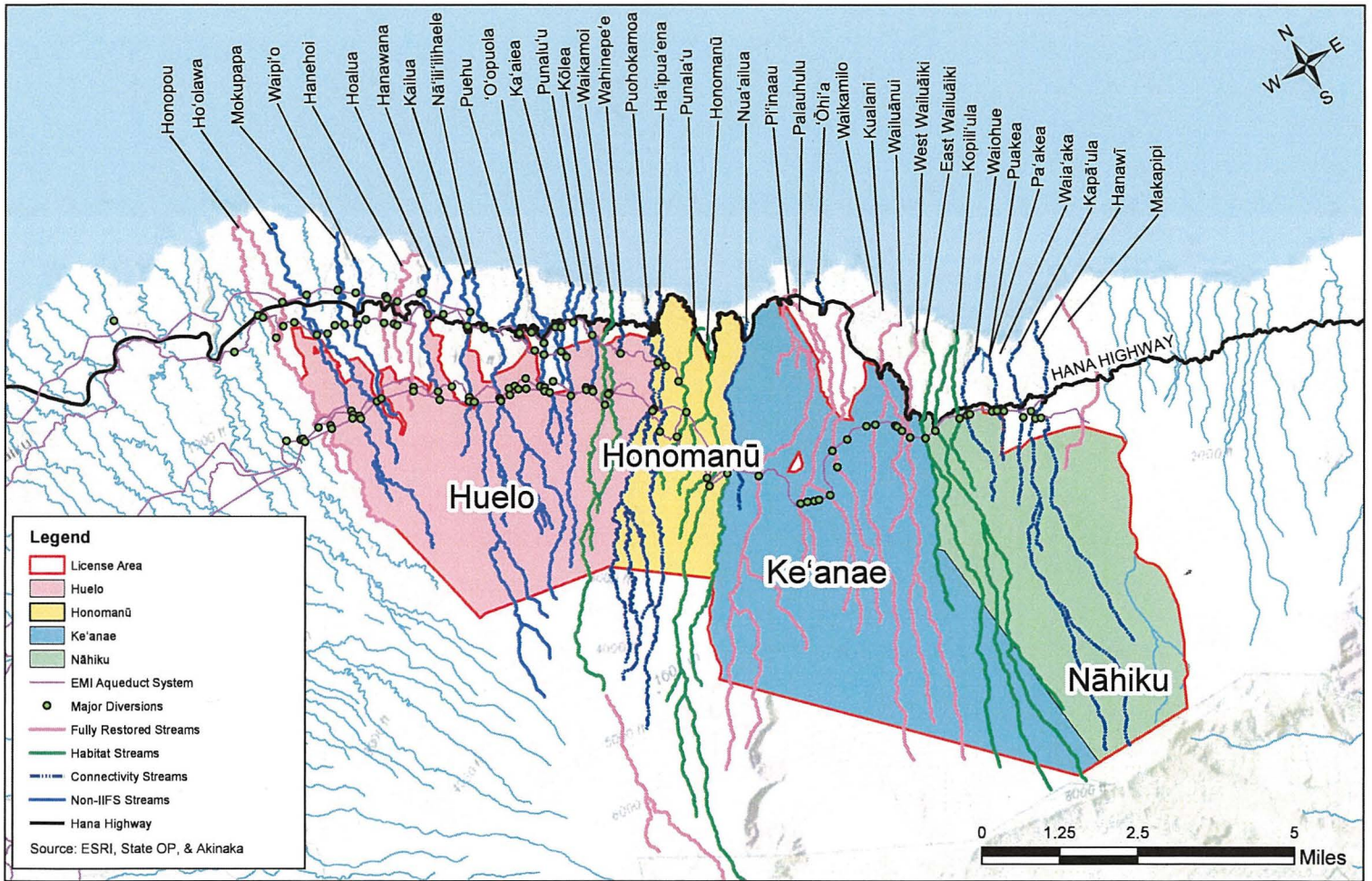


FIGURE 1-3

CWRM IIFS DECISION & ORDER MAP

PROPOSED LEASE (WATER LEASE) FOR THE NĀHIKU, KE'ANAE, HONOMANŪ, AND HUELO LICENSE AREAS



EXHIBIT A

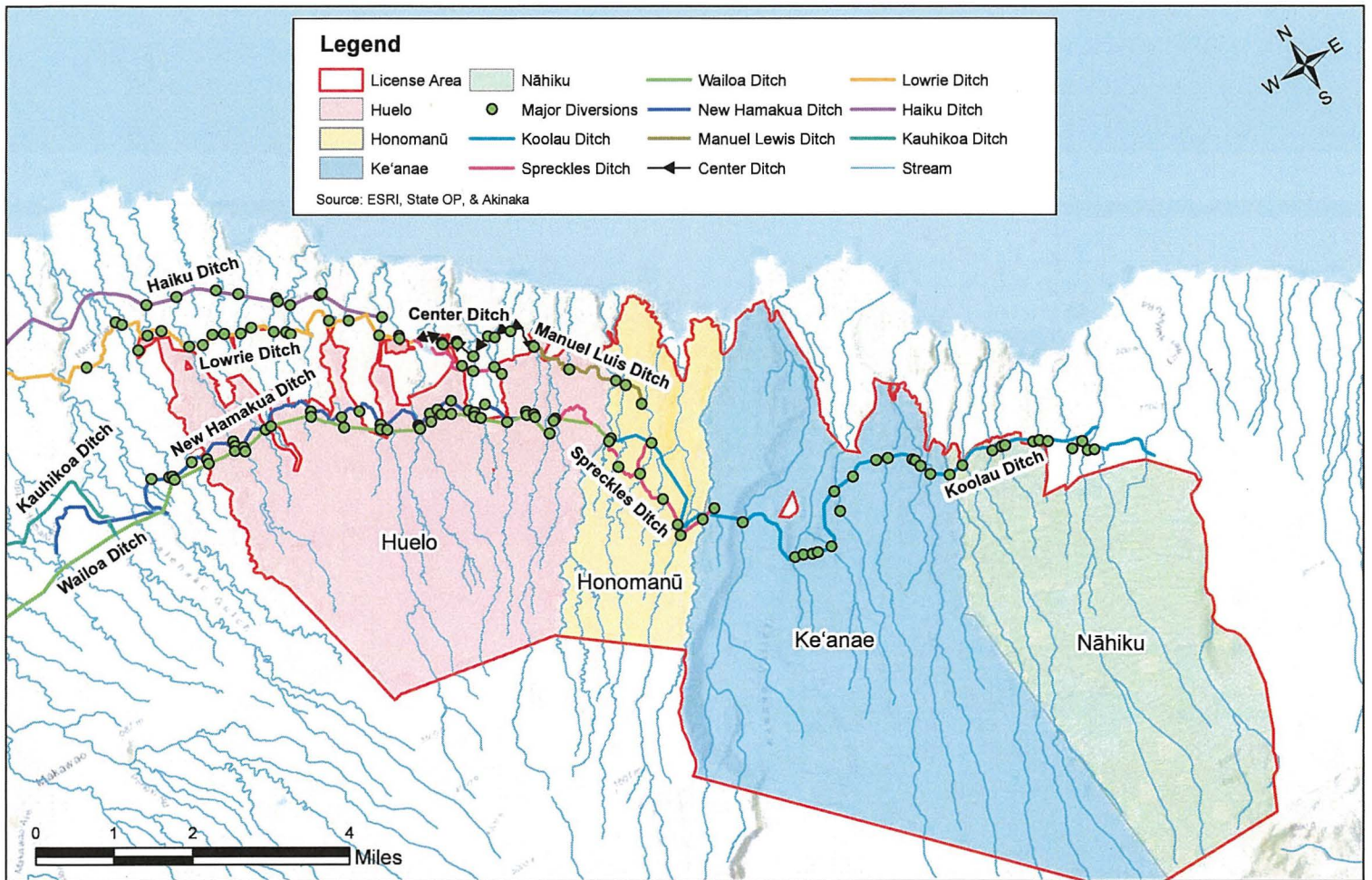


FIGURE 2-1



EMI AQUEDUCT AQUEDUCT - EAST MAUI

PROPOSED LEASE (WATER LEASE) FOR THE NĀHIKU, KE'ANAE, HONOMANŪ, AND HUELO LICENSE AREAS

<p>Additional Records, Documents and Reference Materials, including Revocable Permits, Previous Water Leases and Quarterly Status Reports https://dlnr.hawaii.gov/ld/additional-records-documents-and-reference-material-111320_d8/</p>
<p>Commission on Water Resource Management Surface-Water Hydrologic Units: A Management Tool for Instream Flow Standards, PR-2005-01 (June 2005), <i>available at</i> https://files.hawaii.gov/dlnr/cwrmpublishedreports/PR200501.pdf</p>
<p>Mitchell, C., et al., 2005. Hawaii's Comprehensive Wildlife Conservation Strategy, Department of Land and Natural Resources. Honolulu, Hawai'i (Oct. 1, 2005), 722 pp., <i>available at</i> https://dlnr.hawaii.gov/wildlife/files/2013/09/CWCS-Full-Documnet-2005Oct01.pdf</p>
<p>Gingerich, S.B., 2004, Median and Low-Flow Characteristics for Streams under Natural and Diverted Conditions, Northeast Maui, Hawaii: Honolulu, HI, U.S. Geological Survey, Scientific Investigations Report 2004-5262, 72 p., <i>available at</i> https://pubs.usgs.gov/sir/2004/5262/pdf/sir2004-5262.pdf</p>
<p>Gingerich, S.B. and Wolff, R.H., 2005, Effects of surface-water diversions on habitat availability for native macrofauna, northeast Maui, Hawaii: U.S. Geological Survey Scientific Investigations Report 2005-5213, 93 p., <i>available at</i> https://pubs.usgs.gov/sir/2005/5213/pdf/sir2005-5213.pdf</p>
<p>Hawaii Stream Assessment: a Preliminary Appraisal of Hawaii's Stream Resources, Report R84 (December 1990), <i>available at</i> https://files.hawaii.gov/dlnr/cwrmpublishedreports/R84_HSA.pdf</p>
<p>"The Use of Hawaiian Stream Habitat Evaluation Procedure to Provide Biological Resource Assessment in Support of Instream Flow Standards for East Maui Streams," by Bishop Museum and DAR (Nov. 20, 2009) [104 pages] https://files.hawaii.gov/dlnr/cwrmp/activity/iifismaui1/dar-hshep.pdf</p>
<p>Cheng, C.L., 2016, Low-flow characteristics for streams on the Islands of Kaua'i, O'ahu, Moloka'i, Maui, and Hawai'i, State of Hawai'i: U.S. Geological Survey Scientific Investigations Report 2016-5103, 36 p., <i>available at</i> https://pubs.usgs.gov/sir/2016/5103/sir20165103.pdf</p>
<p>J. Michael Fitzsimons, Mark G. McRae, & Robert T. Nishimoto, <i>Behavioral Ecology of Indigenous Stream Fishes in Hawai'i</i>, in <i>Biology of Hawaiian Streams and Estuaries</i> (N.L. Evenhuis & J.M. Fitzsimons, eds. 2007), Bishop Museum Bulletin in Cultural & Environmental Studies 3:11-22, <i>available at</i> http://hbs.bishopmuseum.org/pubs-online/strm/03-fitzsimons.pdf</p>
<p>Parham, J.E., et al., 2008, <i>Atlas of Hawaiian Watersheds and Their Aquatic Resources</i>, Island of Maui, Division of Aquatic Resources & Bishop Museum, Honolulu, HI, 866 p., <i>available at</i> http://hawaiiwatershedatlas.com/</p>

EXHIBIT B- APPENDIX

Parham, J.E., et al., 2009, The Use of Hawaiian Stream Habitat Evaluation Procedure to Provide Biological Resource Assessment in Support of Instream Flow Standards for East Maui Streams (Nov. 20, 2009), Bishop Museum & Department of Aquatic Resources, Honolulu, HI, 104 p., available at <https://files.hawaii.gov/dlnr/cwr/activity/iifsmaui1/dar-hshep.pdf>

Maui County DWS reports regarding water delivery for their Upcountry system can be found here: <https://www.mauicounty.gov/1085/Upcountry-Water-Levels>

CWRM Staff Submittal re: SDWP 4915.6 (Category 2 Diversions) (Feb. 19, 2019)
<https://files.hawaii.gov/dlnr/cwr/submittal/2019/sb20190219B3.pdf>

CWRM - STAFF SUBMITTAL - re: SDWP 4950.6 (Category 3 Diversions) (Aug. 29, 2019)
<https://files.hawaii.gov/dlnr/cwr/submittal/2019/sb20190829B2.pdf>

CWRM - Meeting MINUTES - re: SDWP 4950.6 (Category 3 Diversions) (Aug. 29, 2019)
<https://files.hawaii.gov/dlnr/cwr/minute/2019/mn20190829.pdf>

CWRM Staff Submittal re: SDWP 4951.6 (Category 4 Diversions) (Nov. 20, 2019)
<https://files.hawaii.gov/dlnr/cwr/submittal/2019/sb20191120C1.pdf>

CWRM minutes re: SDWP 4951.6 (Category 4 Diversions) (Nov. 20, 2019)
<https://files.hawaii.gov/dlnr/cwr/minute/2019/mn20191120.pdf>

EXHIBIT B- APPENDIX

EAST MAUI IRRIGATION COMPANY, LLC

P.O. BOX 791628, PAIA, MAUI, HAWAII 96779-1628 • (808) 579-9516

October 15, 2020

The Honorable Suzanne Case, Chair
and Members of the Board of Land and Natural Resources
State of Hawaii
P.O. Box 621
Honolulu, Hawaii 96809

RE: Holdover 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 Water Use on the Island of Maui: Q3 2020 Status Report

Dear Chair Case:

The purpose of this letter is to provide the 3rd quarter status report on A&B/EMI's compliance with permit conditions imposed by the Board of Land and Natural Resources ("**BLNR**") as part of its October 11, 2019 approval of the holdover of Revocable Permits Nos. S-7263, S-7264, and S-7265 issued to A&B and Revocable Permit No. S-7266 issued to EMI for the calendar year 2020. We are providing this status report at this time in compliance with the conditions of the permits requiring quarterly written reports to the BLNR.

The attached document lists each of the permit conditions and corresponding compliance actions undertaken as of September 30, 2020. As you know, the agenda, minutes, and staff recommendation for the BLNR's October 11, 2019 meeting relating to the subject permits are the source of the permit conditions listed on the attached.

Since the last report that was submitted, water collection enabled by these East Maui revocable permits continued to serve the needs of the public water systems that serve Upcountry Maui and Nahiku, both owned and operated by the County of Maui Department of Water Supply, as well as the County's Kula Ag Park and increasing diversified agricultural activities in Central Maui undertaken by Mahi Pono. 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 ("**CWRM**") for East Maui streams, 24 of which are within the area covered by the East Maui RP's. The diversion and use of East Maui stream water this year has been in compliance with the CWRM's June 2018 IIFS decision.

EXHIBIT C

A&B and EMI continue to work with Mahi Pono on the preparation of the Environmental Impact Statement (“**EIS**”) for the proposed long-term water lease for East Maui, in lieu of these revocable permits. We expect to complete the EIS for DLNR review in the fourth quarter of this year.

Additionally, previously scheduled MP/A&B East Maui Revocable Permit Committee meetings for the year 2020 had been postponed because of the COVID-19 pandemic. With travel restrictions still in place throughout Q3 2020, a Committee meeting was held through video conference on September 25, 2020. The meeting was well attended by representatives from the County of Maui Department of Water Supply, Native Hawaiian Legal Corporation, Maui County Farm Bureau, Nā Moku Aupuni O Ko’olau Hui, Office of Hawaiian Affairs, East Maui Irrigation, and Mahi Pono. Updates relating to the IIFS, EIS, and Mahi Pono’s farming operations were provided to the Committee. The minutes of this 9/25/20 meeting will be submitted as part of a future quarterly report, once approved by the RP Committee.

Please do not hesitate to contact us should you have any questions on the attached permit compliance status report.

Sincerely,



Meredith J. Ching, A&B



Mark Vaught, EMI

cc: Ian Horikawa, DLNR Land Division (via email)

EAST MAUI IRRIGATION COMPANY, LLC

P.O. BOX 791628, PAIA, MAUI, HAWAII 96779-1628 • (808) 579-9516

BLNR CONDITIONS FOR HOLDOVER OF EAST MAUI WATER PERMITS STATUS OF COMPLIANCE AS OF SEPTEMBER 30, 2020

CONDITIONS PER 11/9/18 STAFF SUBMITTAL

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.

The need for water from the East Maui streams averaged approximately 18.9 million gallons per day (MGD) during the third quarter of 2020, and only that amount of water is being diverted from the East Maui watershed. This amount continues to be well within the bounds of the 2018 IIFS decision concerning total quantity as well as the use of specific streams, and is also significantly less than the 45 mgd allocation set by the BLNR at its October 11, 2019. This is primarily related to two factors:

- *COVID-19 Impact on Mahi Pono Planting Schedule* – The pandemic has negatively impacted the availability of farming supplies, including equipment, plants, and irrigation materials. While Mahi Pono has continued to plant citrus, coffee, and food crops, due to current conditions, its focus has partly shifted to place a higher priority on land preparation in anticipation of an accelerated planting schedule in 2021.
- *Low Rainfall During Q3 2020 in East Maui* – EMI is strongly committed to IIFS compliance. During periods of particularly low rainfall in Q3 2020, this commitment has severely limited EMI's ability to divert water from East Maui. In order to compensate for this lack of surface water availability, EMI supplemented its irrigation supply by pumping 12.7 million gallons of groundwater during Q3 2020.

Despite the impact of COVID and the low rainfall conditions in East Maui, the water that was diverted in Q3 2020 continued to supply the County of Maui for its Nahiku and Upcountry Maui water systems, the Kula Ag Park, as well as fire suppression needs, historical industrial/non-agricultural use, and agricultural uses in Central Maui, on lands now owned and managed by Mahi Pono.

Mahi Pono will continue the expansion of its agricultural operations, which will result in a corresponding increase in the need for water from East Maui over the remainder of the year. In addition to the expansion that occurred in Q3 2020, Q4 2020 will see the planting of an

**HOLDOVER OF EAST MAUI WATER PERMITS
2019 BLNR CONDITIONS: STATUS OF COMPLIANCE
AS OF SEPTEMBER 30, 2020
Page 2 of 14**

additional 1,000 acres of citrus and 150 acres of coffee. The Permittees – and by extension, Mahi Pono – remain committed to the efficient use of East Maui stream water. Mahi Pono's total amount of water usage, together with that of the County of Maui, will not exceed the limits of the IIFS decision at any point during its expansion.

All of the initial approvals have been sought and received from the CWRM for the abandonment of the use of the diversions on the "taro streams" to achieve full restoration of their streamflow. EMI is currently working to meet conditions of those approvals, including the development of Best Management Practices (BMP) to be implemented at each diversion so that the diversion work can proceed. We are currently working on a diversion-by-diversion analysis of the "Category 1" diversions as requested by the CWRM as part of its deliberations of the abandonment permits for these 15 diversions.

The Permittees have also initiated discussions with CWRM staff on IIFS compliance for the 'non-taro streams.' A draft work plan has been submitted to CWRM for 41 diversions on 17 additional streams that are implicated by the 2018 IIFS decision. Prior to the issuance of the needed permits to undertake the work, CWRM will need to conduct site visits to each diversion site. In the meantime, the Permittees are complying with the IIFS decision with respect to instream flow requirements (i.e., by individual streams and the total quantity of flow). This compliance is subject to CWRM staff verification through the use of CWRM-installed and maintained gauges along IIFS streams. The Permittees also opened discussions with CWRM field staff on establishing proper measurement protocols for flow compliance, but the furthering of these discussions was delayed due to COVID travel restrictions. Connectivity requirements of the IIFS decision are being met to the extent possible without the physical modifications that require governmental reviews and approvals. The draft work plan transmitted by the Permittees to the CWRM does address means of achieving full connectivity compliance for these additional non-taro streams.

In summary, the Permittees' diversion of water under the subject 2020 RP's has been in compliance with the CWRM's June 20, 2018, IIFS order concerning flow volumes, by individual streams, compliance with connectivity requirements has been met to the extent legally possible without further governmental review and approvals and significant progress has been made on pursuing the modifications and abandonment of diversions on the seven 'taro streams,' an established and continued priority for both the permittees and the State.

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

Status: See uses outlined in response to #3 above. All are beneficial uses related to agriculture and municipal/public needs.

**HOLDOVER OF EAST MAUI WATER PERMITS
2019 BLNR CONDITIONS: STATUS OF COMPLIANCE
AS OF SEPTEMBER 30, 2020
Page 3 of 14**

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.

Status: See responses to #3 and #4 above.

6. The holdover shall comply with all conditions required by the CWRM's Amended IIFS Decision.

Status: As mentioned above, total water diverted for use in Upcountry and Central Maui approximated an average of 18.9 MGD this past quarter, which is well within the bounds of the CWRM's 2018 IIFS decision concerning the diversion of specific streams and the total amount of water diverted. The Permittees achieved significant progress in 2019 and in the first nine months of 2020 relative to pursuing the ditch system/diversion modifications that are necessary to ensure IIFS compliance as water needs increase.

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.

Status: This permit condition was initially imposed in 2018 and we believe relates to a pipe at Pualoa (aka Puolua) Stream at the Lowrie Ditch. In last year's status report, we reported that the pipe had been extended to provide wetted pathways for the movement of stream biota on Pualoa Stream. At the 2018 BLNR hearing on the subject RP's (for 2019), statements were made that the pipe needs to be extended further to go under the road and that two 4" rusted pipes needed to be removed. Accordingly (and as reported in previous quarterly reports), the two 4" pipes have since been removed from the watershed and a new design intended to improve fish migration has been incorporated in the diversion modification plan for compliance with the IIFS, and approved by the CWRM in its approval of the Category 3 SWUP's. This specific scope of work was part of the overall work plan referenced earlier. Road maintenance and repair activities were also conducted in order to better facilitate access to several of the remaining intakes that are subject to Category 2 permits. A BMP plan for these intakes will be submitted to the Department of Health Clean Water Branch shortly.

8. Permittee shall clean up trash from revocable permit areas starting with areas that are accessible and close to streams.

Status: The Permittees have established a number of standard operating procedures to address the cleanup of trash and debris in the license areas. Besides recognizing unnecessary debris in the field during routine maintenance tasks, EMI has conducted specific identification and removal operations of debris that has been observed from previous field work. In the third quarter of 2020, EMI has continued to remove PVC and steel pipe, old wooden and steel gates, discarded wooden structures and remnant pieces of concrete. EMI

**HOLDOVER OF EAST MAUI WATER PERMITS
2019 BLNR CONDITIONS: STATUS OF COMPLIANCE
AS OF SEPTEMBER 30, 2020
Page 4 of 14**

also has in place a practice of removing any equipment and excess materials it brings into the license area to perform work on the ditch system as soon as the job(s) is completed. Additional pictures of trash that has been removed over the past 9 months is attached as Exhibit D, including trash that was removed from locations surrounding the streams outside of the IIFS area.

BLNR ADDITIONAL CONDITIONS (11/9/18 BLNR Meeting):

- 1. *The Board established an interim committee to discuss water usage issues in the license area. The committee shall consist of five members, representing Alexander & Baldwin, Farm Bureau, OHA, Native Hawaiian Legal Corporation and the County of Maui. The interim committee shall meet once a month for the first quarter, then at least quarterly thereafter, more often as useful***

Status: Previously scheduled MP/A&B East Maui Revocable Permit Committee meetings for the year 2020 had been postponed because of the COVID 19 pandemic. With travel restrictions still in place throughout Q3 2020, a Committee meeting was held through video conference on September 25, 2020. The meeting was well attended by the following:

- Jeff Pearson – Director, County of Maui Department of Water Supply
- Summer Sylva – Executive Director, Native Hawaiian Legal Corporation
- Warren Watanabe – Executive Director, Maui County Farm Bureau
- Mahealani Wendt – Nā Moku Aupuni O Ko’olau Hui
- Mark Vaught – Director, East Maui Irrigation
- Carmen Hulu Lindsey (via Kanani laea) – Trustee, Office of Hawaiian Affairs
- Grant Nakama – Vice President of Operations, Mahi Pono LLC

An update on the work related to the IIFS and EIS were provided by EMI, and an update on ongoing farming operations was provided by Mahi Pono. Updates were well-received by attendees. The minutes of this 9/25/20 meeting will be submitted as part of a future quarterly report, once approved by the RP Committee.

CONDITIONS PER 10/11/19 STAFF SUBMITTAL

- 1. *Permittees shall provide quarterly written reports to the Board containing the following information:***
 - a. The amount of water used on a monthly basis, including the monthly amount of water delivered for: the County of Maui DWS and the County of Maui Kula Agricultural Park; diversified agriculture; industrial and non-agricultural uses, and**

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reservoir/fire protection/hydroelectric uses. Also provide an estimate of the system loss for the EMI ditch system and the A&B field system. Diversified agricultural uses shall also provide information as to location, crop, and user of water. Industrial and non-agricultural uses shall specify the character and purpose of water use and the user of water.

Status: The amount of water used on a monthly basis, including the monthly amount of water delivered for the County of Maui DWS and Kula Ag Park, diversified agriculture, industrial and non-agricultural uses, and reservoir/fire protection/hydroelectric uses can be found in the table attached as Exhibit A. The existence of and continued use of reservoirs is extremely important for fire safety reasons. They are a major source of water for fighting fires on Maui, which occur during the dry months of the year. The location, crop, and users of agricultural water, and the specifics on industrial and non-agricultural uses can be found in the table attached as Exhibit B.

- b.** For each stream that is subject to the CWRM order, a status update as to the degree to which the flow of each stream has been restored, and which artificial structures have been removed as required by CWRM.

Status: EMI prioritizes its compliance with the CWRM order and has been working with CWRM staff on implementation plans and permitting. EMI notes that the language of the CWRM order relating to the removal of artificial structures is spelled out on page 269 of the D&O, items i, j, and k which state in part that “it is intended that diversion structures only need to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed.” and “The intent of the Commission is to allow for the continued use and viability of the EMI ditch system and will not require the complete removal of diversions unless necessary to achieve the IIFS. A status update is provided in the table attached as Exhibit C. Also included in Exhibit C is a copy of the section of the CWRM order relating to the removal of artificial structures.

- c.** Update on removal of trash, unused man-made structures, equipment and debris that serve no useful purpose, including documenting any reports of such items received from the Department, other public or private entities, and members of the general public and action taken by Permittee to remove the reported items.

Status: See above response to #8 of Conditions per 11/9/18 Staff Submittal and also Exhibit D.

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- d. The method and timeline for discontinuing the diversion of water from Waipi'o and Haneho'i streams into Ho'olawa stream, including status updates on implementation.***

Status: As the stream levels fluctuate during times of inclement weather, EMI personnel are dispatched to manually control the intake gates for the prevention of excess stream water inflow to the ditch. As for Haneho'i, all intakes have been sealed (per the 2018 D&O) therefore no water enters the ditch from this stream. In regards to Waipi'o stream, EMI personnel manually control the intakes on the ditch to prevent excess flow from entering the ditch. Thus, all flows to the ditch are delivered to and used by Mahi Pono and the County of Maui. The flows are no longer controlled into Hoolawa stream.

- 2. The permittee may not divert an amount of water per month exceeding an average of 45mgd, further subject to all water diverted shall be for reasonable and beneficial uses.***

Status: The third quarter need for water from the East Maui streams has averaged approximately 18.9 million gallons per day (MGD), and only that amount of water is being diverted from the East Maui watershed. The year-to-date need for water from the East Maui streams has averaged 23.3 MGD. This amount continues to be well within the bounds of the 2018 IIFS decision concerning 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, historical industrial/non-agricultural use, and agricultural uses in Central Maui, on lands now owned and managed by Mahi Pono.

- 3. For RP S-7266, the area identified as the Hanawi Natural Area Reserve shall be removed from the revocable permit premises. Additionally, A&B/EMI shall continue discussions with DOFAW to identify additional forest reserve lands to be removed from the license areas to be implemented in connection with the issuance of a water lease, if any, or sooner.***

Status: Representatives from EMI and DOFAW held two meetings so far this year to discuss general logistics related to the potential removal of forest reserve acreages from the license area. These meetings were held on March 18th and September 24th. The initial meeting included an exchange of information related to access routes and a discussion relating to potential impacts on EMI's operations as a result of a reduction in the license area. The most recent meeting in September furthered this discussion, and focused on certain access routes in greater detail. Future meetings will be scheduled as more information becomes available, and as COVID restrictions ease in the upcoming months.

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AMENDMENTS PER MINUTES OF 10/11/19 BLNR MEETING:

- 1. Mahi Pono is to advise any third-party lessee's, that any decisions they make is based on availability of water on a month-to-month basis renewed annually unless there is a permanent lease***

Status: All third-party lessees have been informed through existing language in their lease agreements that the availability of water is subject to change based on various conditions, one of which would be the nature of the water availability from East Maui through an annually renewed revocable permit or an eventual permanent lease.

- 2. the (14) streams outside of the IIFFS (sic) area continue to be cleaned of debris and Applicant is to provide a status report every three months to Staff***

Status: EMI has continued to remove debris and trash from stream areas. These efforts include locations surrounding the streams located outside of the IIFS area. Attached as Exhibit D are pictures of debris removed during Q3 2020.

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EXHIBIT A – MONTHLY WATER USAGE

All Figures in Millions of Gallons per Day (“MGD”)

<i>Month</i>	<i>East Maui Water @ Honopou</i>	<i>County of Maui DWS¹</i>	<i>County of Maui Ag Park²</i>	<i>Diversified Agriculture³</i>	<i>Historic/Industrial Uses⁴</i>	<i>Reservoir/Fire Protection/ Evaporation/Dust Control/ Hydroelectric⁵</i>
July	16.8	3.2	0.45	2.6	1.1	9.47
August	19.7	2.5	0.46	2.5	1.1	13.20
September	20.1	3.4	0.69	2.4	1.1	12.49
QUARTERLY AVERAGE	18.9	3.0	0.5	2.5	1.1	11.7

1. The numbers in this column are based on reports received from the County of Maui and have not been independently verified by EMI. Operationally, a minimum of approximately 6 MGD must be reliably conveyed to / made available to the County each and every day so that the County has flexibility regarding when to run its plan depending upon weather conditions, demand, water available from its Piiholo plant, etc. Water conveyed by EMI but not used by the County is redirected by EMI to reservoirs located on the former plantation.
2. The numbers in this column are based on reports received from the County and have not been independently verified by EMI. Operationally, a minimum of approximately 1.5 MGD must be reliably conveyed to / made available to the County each and every day so that the County can be flexible regarding how to meet the needs of the Ag Park. Water conveyed by EMI but not used by the County is redirected by EMI to reservoirs located on the former plantation.
3. Diversified Ag includes the users/uses described in Exhibit B.
4. Historical/Industrial Uses are uses other than plantation and A&B uses that have historically relied on water from the EMI system. These include uses by entities located either adjacent to or within the boundaries of the farm and are further described in Exhibit B.
5. The numbers in this column include water not separately accounted for in the columns to the left. The EMI system is operated in a manner that ensures continuous water availability in the reservoirs to meet the County's needs for fire protection for brush fires, the risk of which has increased due to the reduction of the irrigated acreage following the cessation of sugar cultivation, but is decreasing as Mahi Pono continues to implement its farm plan. System losses (generally in the form of seepage and evaporation) are also included in this column. The water used by the Mahi Pono's hydroelectric system is non-consumptive and is returned to the ditch and re-used consumptively by one of the other uses.

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EXHIBIT B – WATER USAGE SPECIFICS

Diversified Agriculture Users

Entity	Crop	Location (TMK)	Field	Acreage
<i>Mahi Pono</i>	Coffee	250030030000	301	95
<i>Mahi Pono</i>	Citrus	380010010000	604	356
<i>Mahi Pono</i>	Citrus	380010010000	605	225
<i>Mahi Pono</i>	Citrus	380040010000	803A	208
<i>Mahi Pono</i>	Pongamia	380040010000	803B	32
<i>Mahi Pono</i>	Avocado	380040010000	803C	8
<i>Mahi Pono</i>	Papaya	380030020000	807	22
<i>Maui Best (Tenant)</i>	Sweet Potato	250010010000	408	281
<i>Maui Best (Tenant)</i>	Sweet Potato	250010010000	409	180
TOTAL				1,407

Historic / Industrial Uses

Water Users	Source / Delivery Point	Water User's Location	Relationship to EMI / A&B / Mahi Pono	Use
HC&D, LLC and subtenant Maui Paving (Camp 10 Puunene Quarry)	Haiku Ditch & 702 Cistern South of Pulehu Rd	3-8-001-001 3-8-003-004 3-8-003-021	Tenant	Restrooms, concrete batching, fire suppression, and dust control
Imua Energy Maui, LLC, dba Maui EKO Systems LLC (Tenant of County Central Maui Landfill)	Pumped from Haiku Ditch	3-8-003-019	Gov't Tenant	General Use for Compost Operation
HC&S Mill Area Fire Suppression	702 Cistern	3-8-006-001 CPR #1	A&B - Owned	Fire suppression for ag offices & Puunene Post Office
New Leaf Ranch (Non-Profit)	702 Cistern	3-8-006-029	Tenant	Irrigation water for non-profit providing ag-related work opportunities and training as mental health & substance use dependency treatment
Maui Demolition & Construction Landfill (Decoite Trucking)	Reservoir 91	3-8-005-002	Tenant	Tank & Standpipe for Irrigation & Dust Control
Costo Maddela	Haiku Ditch	3-8-001-001	Tenant	Pasture & Animal Water
Harriet, Michael, & Jordan Santos	Kauhikoa Ditch	2-5-001-018 & 019	Tenant	Pasture & Animal Water
Leonard Pagan	Kauhikoa Ditch	2-5-002-001	Tenant	Pasture & Animal Water
Harry Cambra	Kauhikoa Ditch	2-5-003-026, 027, 036, 037, 038	Tenant	Pasture & Animal Water

EXHIBIT C – CWRM ORDER STATUS UPDATE

Section i, j, & k from CWRM D&O

i. It is intended that diversion structures only need to be modified to the degree necessary to accomplish the amended IIFS and to allow for passage of stream biota, if needed.

j. This Order does not require that every diversion on every tributary be removed or modified, the Commission is only looking at modifications to main stem and major diversions to accomplish the amended IIFS set forth above. The Commission also recognizes that it is not the purpose of this proceeding to determine how the diversions will be modified. That issue will be before the Commission in a subsequent process.

k. The intent of the Commission is to allow for the continued use and viability of the EMI Ditch system and will not require the complete removal of diversions unless necessary to achieve the IIFS.

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EXHIBIT C – CWRM ORDER STATUS UPDATE (Continued)

IIFS STREAM UPDATE

Stream Name	Restoration Status	BRQSO of IIFS (cfs)	IIFS Value (cfs)	IIFS Location	Current Status
Makapipi	Full	1.3	n/a	Above Hana Highway	Gate removed, water flowing downstream below intake
Hanawi	Connectivity	4.6	0.92	Below Hana Highway	Gate open, water flowing downstream below intake
Kapaula	Connectivity	2.8	0.56	On diversion at Koolau Ditch	Main gate open, water flowing downstream below intake
Waiaaka	None	0.77	0.77	Above Hana Highway	Gate open, water flowing downstream below intake
Pa'akea	Connectivity	0.9	0.18	At Hana Highway	Intake gate closed, water flowing downstream over dam
Waiohue	Full	5	n/a	At Hana Highway	Intake gate closed, sluiceway removed. All water flowing downstream.
Puakaka	Connectivity	1.1	0.2	Above Hana Highway	Gate open, water flowing downstream below intake
Kopiliua	H90	5	3.2	Below Hana Highway	Main gates open, ditch control gates closed. Water flowing downstream.
East Wailuaki	H90	5.8	3.7	At Hana Highway	Gates open, water flowing downstream below intake
West Wailuaki	Full	6	n/a	Above Hana Highway	Gates open, water flowing downstream below intake
Wailuanui	Full	6.1	n/a	At Hana Highway	All intakes sealed (Category 1) water flowing downstream below intake
Ohi'a/Maunu	None	4.7	n/a	None	No diversion
Waiokamilo	Full	3.9	n/a	Below diversion at Koolau Ditch	All intakes closed, water flowing downstream
Palauhulu	Full	11	n/a	Above Hana Highway	All water either passing intakes or flowing out of the Kano sluice gate. Water flowing downstream.
Pihana	Full	14	n/a	Above Hana Highway	Intake sealed, water flowing downstream.
Nu'ualila	Connectivity	0.28	2.2	To Be Determined	Intake gate closed, water flowing downstream over dam
Honomanu	H90	4.2	4.2	Above Hana Highway	All 4 diversion sluice gates are open, water flowing downstream
Punalau/Koia	H90	4.5	2.9	Above Hana Highway	Sluice gate open, water flowing downstream below intake
Hai'upu'ena	Connectivity	4.9	1.36	Below Hana Highway	Intake gate closed, water flowing downstream, dam will require modification
Puhoikamoa	Connectivity	8.4	1.1	Below Hana Highway	Intake gate will be used to ensure water flowing downstream, intake dam will require significant modification
Wahinepe	None	0.9	0.9	Above Hana Highway	No diversion, water flowing downstream.
Wakemoi	H90	6.7	3.8	Center ditch sluiceway gate open.	Water flowing downstream.
Hanaho'i	Full	2.54	n/a	Upstream of Lower Ditch	Intakes sealed, water flowing downstream.
Huelo (Puuu'u)	Full	1.47	n/a	Downstream of Haiku Ditch	Lowrise intake will require significant modifications & corresponding permit approvals. Haiku intake sealed
Honopou	Full	6.5	n/a	Below Hana Highway	Three sluice gates open, one intake sealed. One of two Waiohio intakes sealed, water flowing downstream

EXHIBIT D – EMI TRASH REMOVAL



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EXHIBIT D – EMI TRASH REMOVAL (Continued)



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EXHIBIT D – EMI TRASH REMOVAL (Continued)

