

David Kimo Frankel 5791
1638-A Mikahala Way
Honolulu, HI 96816
(808) 345-5451
davidkimofrankel@gmail.com

Electronically Filed
FIRST CIRCUIT
1CC191000019
06-DEC-2019
03:23 PM

Attorney for the Sierra Club

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.)	FIRST AMENDED COMPLAINT
)	
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, COUNTY)	
OF MAUI, MAHI PONO, LLC and MAHI)	
PONO HOLDINGS, LLC)	
)	
Defendants.)	

FIRST AMENDED COMPLAINT

INTRODUCTION

1. 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.

JURISDICTION

2. This Court has jurisdiction over the claims for relief in this action pursuant to HRS §§ 205A-6, 343-7(b), 603-21.5, 632-1, 661-1 and, and Article XI §§ 1, 7 and 9 and Article XII § 4 of the Constitution of the State of Hawai'i.

3. The environmental court has exclusive jurisdiction over this case pursuant to HRS § 604A-2 because this proceeding arises in part under HRS chapters 343 and HRS title 12.

PLAINTIFF

4. Plaintiff Sierra Club is a 501(c)(4) nonprofit corporation registered to do business in the State of Hawai'i, with its principal place of business in Hawai'i at 1164 Bishop Street, suite 1512, Honolulu, HI 96813.

5. The Sierra Club's mission is to explore, enjoy and protect the wild places of the earth.

6. One of the Sierra Club's purposes is the protection of natural resources, including our streams and native aquatic life.

7. The Sierra Club and its members seek to preserve and enjoy free-flowing streams.

8. Sierra Club members enjoy the beauty of free-flowing streams.

9. Sierra Club members enjoy the benefits of a healthy stream ecosystem in which stream habitat supports native aquatic life.

10. Sierra Club members are beneficiaries of public trust obligations imposed upon government agencies and officials, including BLNR.

11. Sierra Club members hike along streams that have been or are diverted by A&B pursuant to the 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) and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) (“**revocable permits**”).

12. Sierra Club members recreate in and next to streams that have been, are, or may be diverted by A&B pursuant to the continuation of the revocable permits.

13. Sierra Club members have observed the conditions that adversely affect stream habitat within the areas covered by the revocable permits.

14. The Sierra Club and its members would be adversely affected if the revocable permits were held over for another year.

15. The Sierra Club and its members are harmed by the debris that litters the landscape within the revocable permit areas.

DEFENDANTS

16. Defendant Department of Land and Natural Resources (**DLNR**) is the state agency charged with managing and administering the public lands of the State pursuant to HRS § 26-15(b) and HRS chapter 171.

17. Defendant BLNR heads DLNR pursuant to HRS § 26-15 and is an agency of the State of Hawai`i.

18. Defendant Suzanne Case is the Chairperson of the BLNR and is named in her official capacity.

19. The main offices for DLNR, BLNR and Chair Case are in Honolulu.

20. Defendant Alexander & Baldwin, Inc. is a for-profit corporation engaged in real

estate development in Hawai‘i.

21. Alexander & Baldwin, Inc’s main office is in Honolulu.

22. Defendant East Maui Irrigation Company, LLC is registered to do business in Hawai‘i.

23. Defendant East Maui Irrigation Company, LLC is the converted form of East Maui Irrigation Co., Ltd, which received a permit to transport water diverted from East Maui streams to Central Maui.

24. In its articles of organization, Defendant East Maui Irrigation Company, LLC states that its initial principal office, its mailing address and its agent address are in Honolulu.

GENERAL FACTUAL ALLEGATIONS

25. BLNR has been approving authorizations to A&B to use approximately 33,000 acres of state land and take millions of gallons of water daily from East Maui streams therein since 1986.

26. BLNR has granted these authorizations annually since 1986 – except for the year 2004.

27. In 2000, BLNR approved 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.

28. In November 2009, DLNR’s division of aquatic resources produced a report titled “The Use of Hawaiian Stream Habitat Evaluation Procedure to Provide Biological Resource Assessment in Support of Instream Flow Standards for East Maui Streams.”

28. According to DLNR's division of aquatic resources report titled "The Use of Hawaiian Stream Habitat Evaluation Procedure to Provide Biological Resource Assessment in Support of Instream Flow Standards for East Maui Streams":

- a. "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."
- b. "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."
- c. "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."
- d. "From a management perspective, the maintenance of adequate stream flow from upstream adult habitat to the stream mouth is critical for amphidromous animals."
- e. "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."
- f. "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.”

29. In a May 17, 2010 letter to then-BLNR Chair Laura Thielen, Robert Nishimoto, the environmental program manager for the division of aquatic resources, wrote that “native animals are missing from a number of stream sections where they should naturally exist.” He also concluded: “The removal of stream diversions and the complete restoration of stream flow would be the best possible condition for native aquatic animals.”

30. 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.

31. BLNR has never required that A&B first use water from its own land before taking water from state land in East Maui.

32. In November 2017, when BLNR voted to continue the holdover of the revocable permits, it included a condition that A&B clean up its debris.

33. In 2018 and 2019, garbage, including discarded pipes, littered portions of the revocable permit parcels.

33a. In October 2018, A&B reported that it had removed one tractor, and there was little other debris identified.

33b. In September 2019, A&B reported that EMI removed several hundred feet of old pipe, several old wooden gates, remnant pieces of steel and concrete, and two large tractors.

Commission on Water Resource Management (CWRM)

34. In May 2001, Nā Moku ‘Aupuni ‘O Koolau Hui, Beatrice Kepani Kekahuna, Marjorie Wallett, and Elizabeth Lehua Lapenia filed a petition with CWRM to amend the interim instream flow standard for 27 East Maui streams.

35. The Sierra Club was not a party to the contested case that resulted from the Nā Moku petition.

36. In June 2018, CWRM finally established new minimum instream flow standards for these streams.

37. The 2018 CWRM decision ordered restoration of free flowing water to ten streams, including Hanehoi and Honopou -- with no diversions authorized for A&B for those ten streams.

38. The 2018 CWRM decision set a minimum instream flow standard for five streams at 64% of the median base flow.

39. The 2018 CWRM decision set even lower minimum instream flow standards for another seven streams.

40. The 2018 CWRM decision did not consider setting instream flow standards for other streams in East Maui that were not part of the 2001 petitions including Puakea Stream, 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).

41. The 2018 CWRM decision did not set an instream flow standard for other streams that are diverted in East Maui including Puakea Stream, 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).

42. In setting minimum instream flow standards, CWRM did not impose a burden of

proof on any of the parties.

43. The 2018 CWRM decision recognized that authorizing how much water will be allowed to be diverted offstream once the instream flow standards are met is the purview of BLNR.

44. Native aquatic life in East Maui depend on the flashiness of streams (from rain events).

45. For those streams that are not fully restored by the 2018 CWRM decision, the minimum instream flows do not guarantee that anything above minimum baseflows – including flashy surges of water from rain events – will flow below stream diversions.

46. For those streams that are not fully restored by the 2018 CWRM decision, the minimum instream flows do not prevent the remaining diversions from entraining native aquatic species.

Hanehoi Stream

47. In April 2016, Alexander & Baldwin, Inc. issued a press release in which it announced that it was fully and permanently restoring water to a number of streams in East Maui including Hanehoi.

48. On April 21, 2016 Alexander & Baldwin, Inc. filed a document with CWRM in which it committed to the abandonment of all diversions on a number of streams including Hanehoi.

49. The 2018 CWRM decision ordered full restoration of Hanehoi Stream.

50. In 2019, Hanehoi Stream still had diversion structures on it that impeded the ability of aquatic species to migrate.

51. Hanehoi Stream has not been fully restored.

52. A&B continues to divert water from Hanehoi and has taken no substantive on-the-ground steps to end the diversions from this stream.

Honopou Stream

53. Honopou Stream is one of the streams that CWRM ordered be fully restored.

54. An overhanging diversion leaving no pathway for native aquatic species to migrate upstream was on Honopu Stream.

55. Diversions remained on Honopou Stream in 2019.

BLNR's 2018 Decisionmaking

56. At the November 9, 2018 BLNR meeting in Honolulu on the holdover of revocable permits, the Sierra Club requested a contested case hearing.

57. The Sierra Club followed up its oral request for a contested case hearing with a timely written request for a contested case hearing on November 19, 2018.

58. Alexander & Baldwin, Inc. objected to the Sierra Club's request for a contested case hearing.

59. At its December 7, 2018 meeting in Honolulu, BLNR voted to deny the Sierra Club's request for a contested case hearing.

60. Plaintiff's claims for relief arose from acts and/or omissions which occurred in the City and County of Honolulu, State of Hawai'i.

61. Prior to its November 9, 2018 decisionmaking on the holdover of revocable permits, BLNR did not review, prepare, or accept an environmental assessment (EA) or EIS analyzing the impact of the revocable permits and the diversion of millions of gallons of water daily from East Maui streams.

62. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable

permits, 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.

63. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know how much water A&B had taken on average from each stream upon which it had a diversion for the past two years.

64. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know how much more water A&B is proposing to take or is authorized to take on average, or daily, or at a maximum from each stream upon which it had a diversion.

65. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know how much more water in total, A&B is proposing to take or can take pursuant to the holdover authorization in 2019.

66. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know what percentage of each stream's flow was being taken, or was being proposed to take, from each stream upon which there was a diversion.

67. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know whether A&B was fully complying with CWRM's 2018 decision.

68. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know the cost to A&B to obtain water from alternative sources.

69. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know which diversions cause the greatest threat of entrainment of native aquatic species.

70. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know what the impact to native aquatic species is when stream flow is

restored to only 64% of median base flow rather than when a stream is free-flowing.

71. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know the extent to which invasive species were growing on the state lands covered by the revocable permits.

72. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not know how much trash, including discarded pipes, remain littering the revocable permit parcels.

73. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding how much water A&B had taken daily from each stream upon which it had a diversion for the past two years.

74. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding how much water A&B had taken on average from each stream upon which it had a diversion for the past two years.

75. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding how much more water A&B is proposing to take on average, or daily, or at a maximum from each stream upon which it had a diversion.

76. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding how much more water in total, A&B is proposing to take or can take pursuant to the holdover authorization in 2019.

77. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding what percentage of each stream's flow was being taken, or was being proposed to take, from each stream upon which there was a diversion.

78. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable

permits, BLNR did not seek information regarding the cost to A&B to obtain water from alternative sources.

79. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding which diversions cause the greatest threat of entrainment of native aquatic species.

80. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding what the impact to native aquatic species is when stream flow is restored to only 64% of median base flow rather than when a stream is free-flowing.

81. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding the extent to which invasive species were growing on the state lands covered by the revocable permits.

82. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not seek information regarding how much trash, including discarded pipes, remain littering the revocable permit parcels.

83. BLNR has had the authority since 2001 to condition its 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. the cost to A&B to obtain water from alternative sources;
- e. which diversions cause the greatest threat of entrainment of native aquatic species;
- f. what the impact to native aquatic species is when stream flow is restored to only 64% of median base flow rather than when a stream is free-flowing;
- g. the extent to which invasive species were growing on the state lands covered by the revocable permits; and
- h. how much trash, including discarded pipes, remain littering the revocable permit parcels.

84. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not prepare or review a systematic analysis of each stream modification within the revocable permit area to evaluate whether native species can successfully migrate past the modifications.

85. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not independently verify whether A&B was complying with the terms of the holdover of the revocable permits.

86. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not independently verify whether A&B was complying with the terms of the 2018 CWRM decision.

87. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not assess the quality of the streams that were not part of the 2018 CWRM decision.

88. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable

permits, BLNR did not determine how much water A&B was diverting from each stream.

89. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not consider the impact of the diversions on the streams and aquatic life.

90. Prior to its November 9, 2018 decisionmaking on the holdover of the revocable permits, BLNR did not assess whether the permits could adversely affect the ability of members of the Sierra Club to hike on these public lands.

91. The November 2018 decision to holdover the revocable permits did not cap the amount of water that can be taken out of East Maui.

92. The November 2018 decision to holdover the revocable permits did not ensure the flashiness of those streams which still have diversions on them.

93. The November 2018 decision to holdover the revocable permits did not require that A&B monitor how much water it takes from each stream.

94. The November 2018 decision to holdover the revocable permits did not require that A&B measure how much water flows in each stream from which it diverts water.

95. The November 2018 decision to holdover the revocable permits did not limit the amount of water that can be taken from 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).

96. The November 2018 decision to holdover the revocable permits did not require the removal or alteration of any stream modification structure within a clear timeframe

97. The November 2018 decision to holdover the revocable permits did not require A&B to manage public lands to reduce the spread of invasive species.

98. The November 2018 decision to holdover the revocable permits did not ensure access to trails on public land.

BLNR's October 2019 Decisionmaking

98a. On October 11, 2019, BLNR voted to continue the revocable permits for another year.

- (i) In its October 2019 decision, BLNR took no action to protect the flow of water within, aquatic life in, or recreational uses of, Puakea Stream, Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Naililihale Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries).
- (ii) According to A&B's consultant James Parham, 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%.
- (iii) The ditch system completely dewateres the thirteen streams 60% of the time, leaving no water at all directly below the diversions on these 13 streams most of the time.
- (iv) In its October 2019 decision, BLNR took no action to address diversion structures that interfere with native aquatic species (blocking migration upstream as well as entraining larvae), facilitate mosquito breeding, take water temporarily from streams (even if the water is not removed from the ahupua'a), threaten the safety of recreational users of public land, or mar a natural environment.

- (v) In its October 2019 decision, BLNR did not require that A&B address or manage invasive species on public land within the revocable permit area.
- (vi) In its October 2019 decision, BLNR did not require measurements of the quantity of water being removed from any of the streams.
- (vii) In its October 2019 decision, BLNR did not require that the applicant notify the community or downstream users prior to engaging in stream work.
- (viii) BLNR's October 2019 decision was made without the benefit of a final environmental impact statement.
- (ix) BLNR approved the continuation of the revocable permits in October 2019 even though A&B reported that up to a million gallons of east Maui water were used daily for restrooms and for concrete.
- (x) BLNR approved the continuation of the revocable permits in October 2019 without knowing how many gallons of water the crops that have been planted in Central Maui need daily on average.
- (xi) BLNR approved the continuation of the revocable permits in October 2019 without knowing what percentage of each stream's flow was being taken, or was proposed to be taken from each stream upon which there is a diversion.
- (xii) BLNR approved the continuation of the revocable permits in October 2019 without knowing which diversion structures pose the greatest threat to native aquatic species, facilitate mosquito breeding, threaten the safety of recreational users of public land, or mar the natural environment.

(xiii) In its October 2019 decision, BLNR did not discuss or consider the availability of water from alternative sources.

98b. On October 11, 2019, the Sierra Club requested a contested case hearing on the continuation of the revocable permits for another year.

98c. On October 11, 2019, the BLNR voted to deny the Sierra Club's request for a contested case hearing.

98d. The Sierra Club followed up on its oral request for a contested case hearing with a written request for a contested case hearing on October 18, 2019.

COUNT 1

(Defendants Violated HRS Chapter 343)

99. Plaintiff hereby realleges and incorporate by reference all the above allegations.

100. An EIS is required for the lease of the approximately 33,000 acres and diversion of water from the streams that cross this land.

101. An EIS is required for the approval of a holdover of a revocable permit of the approximately 33,000 acres and diversion of water from the streams that cross this land.

102. On October 24, 2018, A&B formally requested that BLNR authorize holdover of the revocable permits.

103. In 2003, the First Circuit Court concluded in a decision that is binding on the defendants that "the proposal for a 30-year lease of any or all excess water that may exist after there finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, does not constitute a minimal or no significant effect on the environment."

104. In 2007, the BLNR issued an order regarding ongoing stream diversions in which it observed, "All parties now concede that an EA (and potentially an environmental impact

statement (“EIS”) must be prepared[.]”

105. In 2007, BLNR directed DLNR “to take all administrative steps necessary to . . . prepare an EA in accordance with HRS Chapter 343.”

106. In July 2016, BLNR ordered A&B to prepare an EIS.

107. A&B still has not submitted a final EIS to BLNR.

108. There is no factual or legal basis to support the proposition that A&B could not have commenced the HRS chapter 343 process long before the 2018 CWRM decision.

109. Since 2000, none of the defendants have prepared an EA or an EIS regarding the use of these 33,000 acres of state land and the diversion of millions of gallons of water from East Maui streams.

110. The action does not qualify under any exemption pursuant to HAR § 11-200-(8)(a).

111. The use of more than 33,000 acres and the diversions authorized by the revocable permits have a significant environmental impact.

112. By failing to review, prepare, or accept an EIS analyzing the impact of the revocable permits and the diversion of millions of gallons of water daily from East Maui streams prior to its decisionmaking, BLNR violated HRS chapter 343.

113. By failing prepare an EIS analyzing the impact of the revocable permits and the diversion of millions of gallons of water daily from East Maui streams when it proposed holding over its revocable permits for another year, A&B violated HRS chapter 343.

COUNT 2

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

114. Plaintiff hereby realleges and incorporate 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.

COUNT 3

(BLNR, DLNR and Chair Case Violated Their HRS Chapter 205A Obligations)

124. Plaintiff hereby realleges and incorporate by reference all the above allegations.

125. HRS §§ 205A-4, 205A-5, and 205A-2(b)(4)(A) require that BLNR, DLNR and Chair Case protect valuable coastal ecosystems, from disruption and minimize adverse impacts on all coastal ecosystems.

126. HRS §§ 205A-4, 205A-5, 205A-2(c)(4) require that BLNR, DLNR and Chair Case minimize disruption or degradation of coastal water ecosystems by effective regulation of

stream diversions, channelization, and similar land and water uses, recognizing competing water needs.

127. BLNR, DLNR and Chair Case breached their statutory obligations.

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;

- 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.

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.

Dated: Honolulu, Hawai'i, December 6, 2019.

/s/ David Kimo Frankel

Attorney for the Sierra Club