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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

SIERRA CLUB,	)	Civil No. 1CCV-25-0000031 (LWC)
	)	
Appellant,	)	(Environmental Court)
vs.	)	
	)	SIERRA CLUB’S OPENING BRIEF;
DAWN CHANG in her official capacity as	)	DECLARATION OF COUNSEL;
Chairperson of the Board of Land and	)	EXHIBITS A-D
Natural Resources, BOARD OF LAND	)	
AND NATURAL RESOURCES,	)	
ALEXANDER & BALDWIN, INC., EAST	)	Judge: Honorable Lisa W. Cataldo
MAUI IRRIGATION COMPANY, LLC,	)	
and COUNTY OF MAUI, DEPARTMENT	)	
OF WATER SUPPLY	)	
	)	
Appellees	)	

**SIERRA CLUB’S OPENING BRIEF**

For decades, those who rely on healthy stream flow have been fighting to restore water to east Maui streams. With Nā Moku Aupuni O Ko‘olau Hui taking the lead, they have asked for relief from the Board of Land and Natural Resources (**BLNR**), sued BLNR, petitioned the Commission on Water Resource Management (**CWRM**), and demanded contested case hearings. See e.g., *Maui Tomorrow v. BLNR*, 110 Hawai‘i 234, 236-41, 131 P.3d 517, 519-24 (2006), *In re Interim Instream Flow Standards for Waikamoi*, 128 Hawai‘i 497, 291 P.3d 395 (ICA 2012), attached as Exhibit A, *Carmichael v. BLNR*, 150 Hawai‘i 547, 553-59, 506 P.3d 211, 217-23 (2022), and *BLNR v. Crabtree*, 154 Hawai‘i 113, 115, 547 P.3d 446, 448 (2024). The Hawai‘i Supreme Court has described BLNR’s approval of these permits “without scrutiny” as “particularly troubling,” *Carmichael*, 150 Hawai‘i at 566-67, 506 P.3d at 230-31, and BLNR’s claims regarding limiting diversions as “so manifestly and palpably without merit, so as to

indicate bad faith.” *Crabtree*, 154 Hawai‘i at 119, 547 P.3d at 452 (cleaned up).

In December 2024, BLNR had a plethora of new data that undermined the basis for earlier decisions. Significant new information demonstrated that (1) more water needed to flow in some streams; (2) much less water is needed than previously claimed; and (3) millions of gallons of water are available from other sources to supplement irrigation needs. Nevertheless, BLNR denied the Sierra Club’s request for a contested case hearing. BLNR denied the Sierra Club the ability to cross examine witnesses about this new evidence and the credibility of their prior statements in light of the new evidence. Instead, BLNR voted to grant Alexander and Baldwin, Inc., and East Maui Irrigation Company (collectively herein “**A&B**”) another revocable permit that allows A&B to drain streams dry. In so doing, it failed to require implementation of the Commission on Water Resource Management’s (**CWRM**) order regarding stream restoration before allowing even more water to be taken; gave A&B more water than is needed; neglected to reduce the allocation to A&B given water available from other sources; and failed to render necessary findings regarding traditional and customary practices.

## **I. QUESTIONS PRESENTED FOR DECISION**

1. Does the significant new evidence that emerged since the 2021-22 contested case hearing require a new formal contested case hearing on the issuance of a revocable permit that authorizes A&B to drain many east Maui streams dry in 2025?
2. Did BLNR violate its public trust and statutory duties in rendering its decision?
3. Given the violation of the Sierra Club’s due process rights, and the egregious errors in its decisionmaking, how should BLNR’s approval of the permit be modified until completion of that contested case hearing, and what other relief should be provided?

## **II. STATEMENT OF FACTS**

### **A. Context**

The East Maui Irrigation Ditch System was constructed more than a century ago to take all the baseflow from three dozen east Maui streams, dewatering them completely 70-80% of the time.<sup>1</sup> Historically, the diversions drained the streams dry, destroying habitat for native species, impairing recreational values, and preventing Hawaiians from exercising their traditional and customary practices.<sup>2</sup> Nothing limits A&B from taking all the water from a dozen of the three

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<sup>1</sup> Dkt 74 at 19 & 36; Dkt 83 at 12, 13, 44-47; Dkt 247 at 20 & 30.

<sup>2</sup> *Id.*; Dkt 83 at 74; Dkt 156 at 32; Dkt 240 at 12-19; Dkt 248 at 15; Dkt 246 at 3; Dkt 257 at 3-4;

dozen streams that flow through public land in east Maui.<sup>3</sup> Generally, EMI ditches run perpendicular to, and beneath, the stream channel. The water in the streams drops through grates that drain the streams dry—unless it rains a lot:<sup>4</sup>



The full diversion of a dozen streams in the Huelo area of east Maui reduces the available stream habitat in those streams by 88.2%.<sup>5</sup>

Traditionally, the water was primarily used to irrigate A&B’s sugar in central Maui, with a tiny fraction provided to Maui County for domestic and agricultural purposes.<sup>6</sup> With the closure of A&B’s sugar plantation, and sale in 2018 of its central Maui lands to Mahi Pono, A&B has been providing water for Mahi Pono’s new and expanding agricultural operations.<sup>7</sup>

Before delivering any water for irrigation, however, the EMI system first provides water to the County’s Kamole Water Treatment Plant.<sup>8</sup> Water that is not taken by the County flows to Mahi Pono’s reservoirs and the County’s Kula Agricultural Park.<sup>9</sup>

## **B. The Sierra Club’s Interests**

The Sierra Club’s mission includes protection of natural resources, including streams and

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Dkt 219; Dkt 263-269; Dkt 276-278.

<sup>3</sup> Dkt 167 at 10-11; Dkt 295 at 57.

<sup>4</sup> Dkt 247 at 20 and Dkt 259. *See also* Dkt 156 at 12. Because many of these streams are “gaining” streams, eventually groundwater seeps back into the stream bed. But lengthy stretches of the streambed are left dry below the various unmodified intakes.

<sup>5</sup> Dkt 83 at 74.

<sup>6</sup> Dkt 74 at 202-03 (FOF 686).

<sup>7</sup> Dkt 164 at 14; Dkt 199 at Dkt 74 at 32 (FOF 29); Dkt 258. Mahi Pono has **not** applied for the permit. It is not a party to this case. Mahi Pono is separate corporate entity, but is represented by A&B’s attorneys. Dkt 293 at 10 & 13; Dkt 295 at 61.

<sup>8</sup> Dkt 164 at 39 (FOFs 98 & 99).

<sup>9</sup> *Id.*; *See also* Dkt 56 at 40.

native aquatic life. The Sierra Club is a membership organization advocating for the protection of our unique natural environment. The Sierra Club’s members are directly affected by the continuation of the revocable permits. The Sierra Club leads hikes to and along the east Maui streams that A&B diverts pursuant to the revocable permits. Its members enjoy hiking to and along east Maui streams. They are adversely impacted by the diversion of water from these streams. The diversions harm the native stream life that Sierra Club members enjoy. Sierra Club members have observed streams run dry for long periods of time.<sup>10</sup> The diversion of the Huelo streams harms riparian uses, recreational uses, and aquatic habitat.<sup>11</sup>

### **C. The Revocable Permits**

Since 1985, BLNR has authorized A&B to drain streams dry through revocable permits even though for decades BLNR (a) refused to hold a contested case hearing on the permits despite repeated requests;<sup>12</sup> (b) failed to render legally-mandated findings;<sup>13</sup> and (c) failed to ensure completion of an environmental impact statement (EIS).<sup>14</sup> “BLNR continued the revocable permits for more than ten years —using a sweeping process that applied to hundreds of other permits—without scrutiny and without an adequate explanation as to why a continuance served the best interests of the State.” *Carmichael*, 150 Hawai‘i at 566, 506 P.3d at 230. All that time, A&B took as much water from east Maui streams as it wanted.

While the permit issued pursuant to HRS § 171-55 lasts just one year, it will continue to be renewed. BLNR made it explicit: “The revocable permit is temporary in nature intended to allow continuing existing uses of water **until** a long-term water license can be issued via public auction.”<sup>15</sup>

### **D. Related Proceedings, Justice Delayed, Justice Denied**

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<sup>10</sup> *See generally* Dkt 68; Dkt 219; Dkt 263-269; Dkt 276-278.

<sup>11</sup> Dkt 156 at 32.

<sup>12</sup> Dkt 251 at 2; Dkt 285 at 3 (BLNR’s answer admitting to paragraphs 38 and 39 of the statement of the case found at Dkt 284 at 7); Dkt 253; Dkt 254; Dkt 255.

<sup>13</sup> *Carmichael*, 150 Hawai‘i at 566, 506 P.3d at 230. (“Because the BLNR did not make any findings of fact or conclusions of law demonstrating that the revocable permits ‘serve[d] the best interests of the State,’ the BLNR did not comply with HRS § 171-55 or its public trust obligations.”).

<sup>14</sup> “The A&B Defendants' "action" undoubtedly "use[s]" state land within the meaning of HRS § 343-5(a)(1).” *Id.* at 590, 506 P.3d at 235. The EIS was not completed until September 2021. Dkt 78 at 8.

<sup>15</sup> Dkt 56 at 4.

- In 2019, the Sierra Club sued over the continuation of the permits for **2019 and 2020** as violations of the public trust doctrine and HRS chapter 205A. The Sierra Club lost after an August 2020 trial. It has been waiting for a decision in its appeal in CAAP-22-0000063 for nearly three years.

- The Sierra Club appealed BLNR's denial of the Sierra Club's request for a contested case hearing on the continuation of the revocable permits for **2021**. The Environmental Court ordered that BLNR hold a contested case hearing and capped the amount of water that could be taken from east Maui streams.<sup>16</sup> The Intermediate Court of Appeals (**ICA**) vacated that decision, but the supreme court accepted the Sierra Club's application for writ of certiorari. *Sierra Club v. BLNR*, 154 Hawai'i 264, 550 P.3d 230 (App. 2024), *cert. granted* No. SCWC-22-000516. The ICA's decision is not in effect. Rules 36(c) and 41 of the Hawai'i Rules of Appellate Procedure.

- BLNR held the court-ordered contested case hearing in December 2021 regarding the revocable permits for 2021 and **2022**. It issued its decision at the end of June 2022, giving A&B more water than even A&B requested. The Sierra Club promptly appealed. The Environmental Court held that the appeal was moot. The ICA held that the Environmental Court erred in denying the Sierra Club's appeal based on mootness and remanded to the Environmental Court to address the merits of the appeal. This court heard oral arguments on April 30. *Sierra Club v. BLNR et. al.*, 1CCV-22-0000794 LWC. Its ruling in that case could affect this one.

- The Sierra Club appealed BLNR's denial of the Sierra Club's request for a contested case hearing on the continuation of the revocable permits for **2023**. Once again, the Environmental Court ordered that BLNR hold a contested case hearing and capped the amount of water that could be taken from east Maui streams.<sup>17</sup> For more than a year, BLNR did not commence a contested case hearing on the revocable permits for 2023 despite being ordered to do so by the Environmental Court.<sup>18</sup> The ICA once again reversed the Environmental Court's order. *Sierra Club v. BLNR*, CAAP-24-0000113 and -114 (April 30, 2025). The Sierra Club will be asking the supreme court to review that decision.

- In December 2023, the Sierra Club requested a contested case hearing (orally and in writing) on the revocable permit for 2024. BLNR, however, refused to consider that request for a

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<sup>16</sup> Dkt 242.

<sup>17</sup> Dkt 299.

<sup>18</sup> Exhibit B at 16-33.

year. It finally considered the Sierra Club's petition in December 2024 – two weeks before that permit would expire.<sup>19</sup>

### **E. CWRM**

Thirty six streams flow within the revocable permit area.<sup>20</sup> Nā Moku asked CWRM to set new in-stream flow standards for approximately two-thirds of these streams in 2001.<sup>21</sup>

Seventeen years later, in 2018, CWRM finally required that: (a) no water be taken from nine streams and a major tributary; (b) a minimum of 64% of each stream's median baseflow (the minimum viable flow necessary to provide suitable habitat conditions for recruitment, growth and reproduction of native stream animals) continue to flow in five streams; and (c) 20% of a stream's baseflow remain in approximately seven streams (to ensure stream connectivity).<sup>22</sup>

On November 15, 2022, CWRM approved a staff submittal regarding a dozen Huelo streams unaddressed by CWRM in 2018.<sup>23</sup> CWRM recognized that “there is need to ensure downstream flows” in Ho‘olawa, Waipi‘o, Hānawana, Nailiilihaele, ‘O‘opuola, and Kailua streams.<sup>24</sup> “[A]dditional flow must be provided to meet recognized instream uses of water.”<sup>25</sup>

CWM approved a “summary of recommendations to protect instream uses” that identifies more than two dozen necessary modifications to diversion structures.<sup>26</sup> Yet, these modifications to diversion structures have not been completed.<sup>27</sup> Until these diversion structures are modified, A&B has the right to drain Ho‘olawa, Waipi‘o, Hānawana, Nailiilihaele, ‘O‘opuola, and Kailua streams dry, and there is no assurance of adequate downstream flows in these streams.<sup>28</sup>

### **F December 2024 Meeting**

At the December 13, 2024 BLNR meeting on the issuance of a new revocable permit for 2025, the Sierra Club highlighted significant new information that had emerged since the last contested case hearing:

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<sup>19</sup> Dkt 58; Exhibit B at 29-33.

<sup>20</sup> Dkt 74 at 40-41 (FOF 58); Dkt 83 at 44-47.

<sup>21</sup> Dkt 74 at 25.

<sup>22</sup> Dkt 74 at 20-22, 40-41, 285-288, 291-92.

<sup>23</sup> Dkt 158 at 14. Dkt 74 at 40-41 (FOF 58) (In 2018, CWRM did not address the streams that are not underlined in FOF 58); Dkt 155 at 4.

<sup>24</sup> Dkt 156 at 32.

<sup>25</sup> *Id.*

<sup>26</sup> Dkt 156 at 32-38.

<sup>27</sup> Dkt 34 at 13 ¶ 55. In fact, no work on the ground has taken place at all.

<sup>28</sup> Dkt 156 at 32; Dkt 167 at 10-11; Dkt 295 at 57.

In 2022, the Water Commission adopted a staff submittal that recognized “the use of between 7.3 cfs and 9.3 cfs (4.7 and 6.0 mgd) of brackish groundwater available from the Paia aquifer system.” It noted that “there is approximately 4.5 mgd available from the Paia aquifer system, where most of Mahi Pono wells are located.”<sup>29</sup>

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This year, it has pumped an average of 5.44 mgd. It pumped 4.84 mgd of groundwater in the second quarter of 2023; 8.48 mgd in the third quarter of 2023; and 9.94 mgd of groundwater in the fourth quarter.<sup>30</sup>

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31.3 mgd flows in twelve Huelo streams half the time (Q50).<sup>9</sup> CWRM ordered that 13.5 mgd of water remain in six of these streams. Yet, none of the diversion structures have been modified for these six streams! CWRM ordered their modification two years ago. Not only is the 13.5 mgd being taken out of streams that CWRM said need the water, but approximately 8 mgd of that water sits in reservoirs, unused.<sup>31</sup>

The Sierra Club compiled and summarized the old and new data.<sup>32</sup> It incorporated its testimony in its petition for a contested case hearing and highlighted the new information.<sup>33</sup>

Nevertheless, BLNR voted to deny the Sierra Club’s oral and written requests for a contested case hearing and to issue the revocable permit to A&B for another year to facilitate the expansion of commercial agricultural operations.<sup>34</sup> It authorized A&B to drain some of the Huelo streams dry. It refused to require implementation of CWRM’s order regarding stream restoration before allowing even more water to be taken; gave A&B more water than is needed; neglected to reduce the allocation to A&B given the availability of water from other sources; and failed to render necessary findings regarding traditional and customary practices. To its credit, however, BLNR did not provide A&B with a buffer. It also finally recognized that the County did not need 7.5 mgd daily. BLNR allocated only 5.25 mgd for the County of Maui Department of Water Supply Kamole Treatment Plant and the County Kula Agricultural Park.<sup>35</sup> Doing so allowed 2.25 mgd of water that was not being used (7.5-5.25) to remain in streams.<sup>36</sup> But it still provided 2.69 mgd more than the 2.56 mgd the County uses on average (5.25-2.56).<sup>37</sup> And failed to ensure that

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<sup>29</sup> Dkt 61 at 2.

<sup>30</sup> Dkt 61 at 3.

<sup>31</sup> Dkt 61 at 5.

<sup>32</sup> Dkt 61 at 7-8.

<sup>33</sup> Dkt 68 at 2, 3 and 5.

<sup>34</sup> Dkt 59 at 11-12; Dkt 68; Dkt 34 at 2 ¶ 2, at 11 ¶¶43-44, and at 12 ¶¶ 49-50; Dkt 63 at 4.

<sup>35</sup> Dkt 59 at 12.

<sup>36</sup> Dkt 56 at 7.

<sup>37</sup> Dkt 56 at 7 (“the County of Maui has an overall average use of 2.01 mgd for the Department

the surplus water would be used.

### **G. Significant New Information**

Significant new information demonstrated that (1) more water needed to flow in some streams; (2) much less water is needed for irrigation than previously claimed; (3) millions of gallons of water are available from groundwater to supplement irrigation needs; (4) extra water allocated to the County can be used for irrigation; and (5) A&B had invented out of whole cloth its need for 1.1 mgd for “historic/industrial” uses.

#### **1. Streams**

At the August 2020 trial, the Sierra Club argued that BLNR failed to provide any protection to 13 streams.<sup>38</sup> The Environmental Court disagreed that protection was needed. Based on testimony from Ayron Strauch, Ph.D., the Environmental Court ruled that there are other streams that are more ecologically important.<sup>39</sup> The Sierra Club is challenging the court’s ruling on appeal.

At the December 2021 contested case hearing, Dr. Strauch dramatically changed his opinion.<sup>40</sup> BLNR, however, did not change its mind.<sup>41</sup>

After that contested case hearing, CWRM, in November 2022, recognized that “there is need to ensure downstream flows” in Ho‘olawa, Waipi‘o, Hānawana, Nailiilihale, ‘O‘opuola, and Kailua streams.<sup>42</sup> “[A]dditional flow must be provided to meet recognized instream uses of water.”<sup>43</sup> The modifications that are needed to ensure downstream flows have not been made.<sup>44</sup>

#### **2. Irrigation**

A&B’s 2021 EIS projected that citrus and macadamia nut crops would require 5,089 gallons per acre per day.<sup>45</sup> The EIS estimated that 65.88 mgd of surface water and 16.47 mgd of ground water would eventually be needed for irrigation in Central Maui .<sup>46</sup>

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of Water Supply and 0.55 mgd for the Kula Agricultural Park”)

<sup>38</sup> Dkt 287 at 51, 78-82, 135, 181-84.

<sup>39</sup> Dkt 167 at 22, 30-31.

<sup>40</sup> Dkt 295 at 39, 49, 57.

<sup>41</sup> Dkt 165 at 18-23.

<sup>42</sup> Dkt 156 at 32.

<sup>43</sup> *Id.*

<sup>44</sup> Dkt 34 at 13 ¶ 55. In fact, no work on the ground has taken place at all.

<sup>45</sup> Dkt 78 at 39 and 114.

<sup>46</sup> Dkt 78 at 114

In November 2022, CWRM determined that A&B’s irrigation needs were exaggerated. CWRM determined that only 41.3-49 mgd is needed for irrigation at full build-out (many years from now).<sup>47</sup>

On November 22, 2024, A&B submitted to BLNR an August 5, 2024 Crop Irrigation Water Requirements Estimates for Mahi Pono, Maui Hawaii prepared by the Hawai‘i irrigation water requirement expert.<sup>48</sup> Dr. Fares concluded that citrus in central Maui requires 2,536 gallons per acre day – **not** 5,089.<sup>49</sup> Approximately 9,008 acres of Mahi Pono’s 10,587 acres were planted with citrus crops<sup>50</sup> – that is more than 85%. Dr. Fares estimated that macadamia requires only 2,366 gallons per acre per day; and coffee requires only 2,583 gallons per acre per day.<sup>51</sup> Mahi Pono had 448 acres of macadamia and 399 acres of coffee.<sup>52</sup> None of Mahi Pono’s pastureland was irrigated.<sup>53</sup>

### 3. Groundwater

At the August 2020 trial, the Sierra Club argued that BLNR failed to require A&B to disclose why it would be impractical to use groundwater in conjunction with water from east Maui streams.<sup>54</sup> In fact, CWRM previously assumed that irrigation needs in Central Maui would be partially met from groundwater.<sup>55</sup> It estimated that 17.84 mgd of groundwater could be used to irrigate crops in central Maui.<sup>56</sup> But the Environmental Court disagreed, ruling 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.”<sup>57</sup> The Sierra Club is challenging the court’s ruling on appeal.

During the December 2021 contested case hearing, the Sierra Club highlighted A&B’s new final EIS that disclosed for the first time that the “sustainable yield”<sup>58</sup> of the aquifers from

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<sup>47</sup> Dkt 156 at 24.

<sup>48</sup> Dkt 63 at 5 & 9.

<sup>49</sup> Dkt 63 at 15 & 24.

<sup>50</sup> Dkt 34 at 15 ¶ 66.

<sup>51</sup> Dkt 63 at 24.

<sup>52</sup> Dkt 56 at 41.

<sup>53</sup> Dkt 56 at 41.

<sup>54</sup> Dkt 287 at 51, 84, 135, 159, 174.

<sup>55</sup> Dkt 74 at 221 (FOF 750), 232-33 (FOFs 794 & 795), 236 (FOF 810), 280 (FOF 119).

<sup>56</sup> Dkt 74 at 221 (FOF 750).

<sup>57</sup> Dkt 167 at 26 (FOF M3).

<sup>58</sup> The “sustainable yield” means “the maximum rate at which water may be withdrawn from a

which it has pumped groundwater is 32 mgd.<sup>59</sup> A&B’s EIS calls for pumping 16.47 mgd of groundwater for irrigation.<sup>60</sup> Moreover, Mahi Pono routinely pumped more than 4 mgd of groundwater.<sup>61</sup> Yet, inexplicably, at the conclusion of the contested case hearing, BLNR found, “No new evidence was heard during the hearing indicating that pumping groundwater from the aquifer is a reasonable alternative source of water for Central Maui.”<sup>62</sup>

In 2022, CWRM adopted a staff submittal that recognized “the use of between 7.3 cfs and 9.3 cfs (4.7 and 6.0 mgd) of brackish groundwater available from the Paia aquifer system.”<sup>63</sup> It noted that “there is approximately 4.5 mgd available from the Paia aquifer system, where most of Mahi Pono wells are located.”<sup>64</sup> More than 20 mgd are available from the Haiku aquifer.<sup>65</sup>

At BLNR’s December 2024 meeting, CWRM testified that Mahi Pono has been using an average of 6.4 mgd of groundwater to supplement surface water – and that there is approximately 0.627 mgd of unpumped availability to expand groundwater use from the aquifer system, where most of Mahi Pono wells are located.<sup>66</sup> The Maui Department of Water Supply recommended that “groundwater . . . in the Paia and Kahului aquifers should be considered for non-potable agricultural irrigation use.”<sup>67</sup> New data show that the groundwater being pumped is not too salty to be used for irrigation.<sup>68</sup>

#### 4. Unused County Water

For years, A&B and BLNR have claimed that the County has needed 7.5 mgd.<sup>69</sup> But the

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water source without impairing the utility or quality of the water source as determined by the commission.” HRS § 174C-3. A&B’s EIS concluded, “maximum pumping **exceeding** the SY of 32 mgd would **eventually** increase salinity of the water drawn from the wells. At that point, pumping rates would need to be reduced to protect the aquifers.” Dkt 78 at 124.

<sup>59</sup> Dkt 78 at 124.

<sup>60</sup> Dkt 78 at 114 Table 2-2.

<sup>61</sup> *See e.g.*, Dkt 323 at 18.

<sup>62</sup> Dkt 165 at 4 (FOF 124).

<sup>63</sup> Dkt 156 at 24

<sup>64</sup> *Id.* at 28.

<sup>65</sup> Dkt 156 at 27.

<sup>66</sup> Dkt 63 at 35. *See also* Dkt 56 at 39 (fifth column).

<sup>67</sup> Dkt 63 at 81.

<sup>68</sup> Groundwater from wells have chloride (or sodium) levels below 250 mg/L. Dkt 56 at 34. The supreme court observed that water with less than 250 mg/L is not even considered brackish. *See Lāna ‘ians for Sensible Growth v. Land Use Commission*, 146 Hawai‘i 496, 500-01, 463 P.3d 1153, 1157-58 (2020).

<sup>69</sup> Dkt 164 at 36 (FOF 86); Dkt 198 at 5; Dkt 56 at 7.

data never supported that claim.<sup>70</sup> The County Department of Water Supply and the Kula Agricultural Park have never used more than 5 mgd in any month.<sup>71</sup>

In December 2024, the Department of Land and Natural Resources examined the data and concluded that the County uses on average of 2.56 mgd.<sup>72</sup> The County finally conceded that “up to 5 mgd allocation on a monthly basis will be sufficient for DWS, as long as additional water will be provided per the 2018 agreement with EMI on those days when DWS requires it. On those days, Mahi Pono can rely on water stored in reservoirs and groundwater to make up the difference.”<sup>73</sup>

By allocating the County 5.25 mgd when the County, on average only uses 2.56 mgd, that means that on average, 2.69 mgd of water is not used daily. Those 2.69 mgd of water are therefore available for irrigation.<sup>74</sup>

#### 5. Historic/Industrial Uses

At the August 2020 trial, the Sierra Club argued that BLNR had failed to require that A&B prove how it was and would be using the water.<sup>75</sup> Responding to a Sierra Club interrogatory, A&B declared under oath that 1 mgd was used for “historic/industrial” purposes.<sup>76</sup>

At the December 2021 contested case hearing, A&B claimed that “historic/industrial” uses required 1.1 mgd.<sup>77</sup> The Sierra Club argued that there was no basis for the 1.1 mgd figure.<sup>78</sup> BLNR did not care.<sup>79</sup>

Once meters were installed, by November 2022 BLNR had data showing that A&B had never been using 1.1 mgd for “historic/industrial” uses; and that only 40,000 gallons (or .04 mgd) was needed.<sup>80</sup> A&B had inflated its use and need for water from east Maui streams by

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<sup>70</sup> Dkt 164 at 36 (FOF 88) and at 38 (FOF 94).; Dkt 56 at 7 (“the County of Maui has an overall average use of 2.01 mgd for the Department of Water Supply and 0.55 mgd for the Kula Agricultural Park”)

<sup>71</sup> Dkt 61 at 7-8 (third and fourth columns).

<sup>72</sup> Dkt 56 at 7 (“the County of Maui has an overall average use of 2.01 mgd for the Department of Water Supply and 0.55 mgd for the Kula Agricultural Park”)

<sup>73</sup> Dkt 63 at 82.

<sup>74</sup> Dkt 164 at 39 (FOFs 98 & 99). *See also* Dkt 56 at 40; Dkt 63 at 82.

<sup>75</sup> Dkt 287 at 51, 73, 84, 86, 135, 158.

<sup>76</sup> Dkt 271 at 7.

<sup>77</sup> Dkt 214 at 23, 30 & 70.

<sup>78</sup> Dkt 215 at 5-6.

<sup>79</sup> Dkt 164 at 41(FOF 107)

<sup>80</sup> Dkt 56 at 39; Dkt 61 at 7-8; Dkt 323 at 18.

more than an order of magnitude.

### III. ARGUMENT

BLNR improperly denied the Sierra Club's request for a contested case hearing. BLNR breached its duties in authorizing the permit. This court should provide appropriate relief.

#### A. The Sierra Club Had a Right to a Contested Case Hearing.

"The Administrative Procedure Act<sup>81</sup> is a remedial statute designed to give citizens a fair opportunity to be heard before the official of the agency who is charged with passing on that case." *Hawai'i Laborer's Training Ctr. v. Agsalud*, 65 Haw. 257, 260, 650 P.2d 574, 576 (1982). One of the more common means of assuring that citizens are heard is through a formal contested case hearing on a permit application before a decision is granted. The Hawai'i Supreme Court has concluded that constitutional due process mandated a contested case at least seven times in environmental cases: *Pele Defense Fund v. Puna Geothermal Venture* ("*PDF v. PGV*"), 77 Hawai'i 64, 881 P.2d 1210 (1994), *In Re Water Use Permit Applications* ("*Waiāhole*"), 94 Hawai'i 97, 120 n.15, 9 P.3d 409, 432 n.15 (2000) ; *In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 287 P.3d 129 (2012); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015); *In re Maui Electric*, 141 Hawai'i 249, 408 P.3d 1 (2017); *Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n*, 149 Hawai'i 304, 489 P.3d 408 (2021); and *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 445 P.3d 673 (2019).

The supreme court has concluded that constitutional due process required a contested case hearing when determining how much water can be taken from a stream that adversely affects others. *Waiāhole*, 94 Hawai'i at 120 n.15, 9 P.3d at 432 n.15, and *'Īao*, 128 Hawai'i at 240-44, 287 P.3d at 141-45. It held that a formal contested case hearing was required over the diversion of streams because (1) the decision involved "significant and thorough analysis and factfinding"; (2) the ramifications of the decision "could offend the public trust, and is simply too important to deprive parties of due process and judicial review . . . [t]he check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res"; and (3) the decision would affect "individual rights." *'Īao*, 128 Hawai'i at 243-44, 287 P.3d at 144-45. *'Īao* established *interim* instream flow standards and this case is

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<sup>81</sup> Also referred to as the Hawai'i Administrative Procedure Act, HAPA, or HRS chapter 91.

about *temporary* permits that have lasted two decades. *See also Waikamoi*, Appendix A.

The court

conducts a two-step analysis to determine whether there was a due process right to a contested case hearing, considering: (1) whether the particular interest which the claimant seeks to protect by a hearing is 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it.

*Kahoma*, 149 Hawai'i at 312, 489 P.3d at 416. The Sierra Club was entitled to a contested case hearing. BLNR's approval of the diversion of water from east Maui streams directly affects the Sierra Club, its members, and their constitutionally protected interests. Even though a contested case hearing took place in 2021, a contested case hearing was warranted for A&B's new request to continue the permits for a new year. After all, BLNR's public trust duties required it to reassess previous diversions pursuant and newly available evidence undermined BLNR's previous decisions. The Sierra Club was entitled to cross examine witnesses regarding the significant new evidence.

1. The Sierra Club and Its Members' Rights Are Constitutionally Protected.

Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled. . . . **Furthermore, as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other persons who have followed the agency's rules governing participation in contested cases.**

*PDF v. PGV*, 77 Hawai'i at 68, 881 P.2d at 1214 (emphasis added). In *PDF v. PGV*, a developer of a geothermal powerplant applied to a government agency for a clean air permit authorizing construction. Although no statute or agency rule required a public hearing, *PDF v. PGV*, 77 Hawai'i at 66 and n.6, 881 P.2d at 1212 and n.6, the supreme court held that constitutional due process required a hearing. *Id.* at 68, 881 P.2d at 1214. In this case, without a permit from BLNR, A&B could not take water from streams flowing through the areas covered by the revocable permits for its private, commercial purpose. "The A&B Defendants' 'action' required approval from the BLNR in the form of a revocable permit issued or continued pursuant to HRS § 171-55." *Carmichael*, 150 Hawai'i at 570, 506 P.3d at 234. BLNR's vote granted legal rights and privileges to a private diverter and adversely affected the Sierra Club's rights.

Constitutional due process required that the Sierra Club be given a contested case hearing

with all the required procedural protections. The property interests that the Sierra Club seeks to protect in a contested case hearing are founded upon two independent sources of law: Article XI section 9 of the state constitution, and constitutionally protected public trust rights.

- a. The Sierra Club and Its Members' Rights Pursuant to Article XI Section 9 of the State Constitution Are a Protectable Property Interest.

Article XI section 9 was the constitutional basis in *Maui Electric*, *Hawai'i Elec*, and *Kahoma*. Article XI, section 9 of the Hawai'i State Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and **conservation, protection and enhancement of natural resources**. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

(Emphasis added). This right “is a substantive right,” which “is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.” *Maui Elec.*, 141 Hawai'i at 260-61, 408 P.3d at 12-13.

Thus, where a source of state law—such as article XI, section 9—grants any party a substantive right to a benefit—such as a clean and healthful environment—that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in *Ala Loop* is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality.

*Id.* at 264, 408 P.3d at 16.

The Hawai'i Supreme Court has concluded that the “Sierra Club’s interest in its right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution.” *Hawai'i Elec.*, 145 Hawai'i at 16, 445 P.3d at 688. In *Maui Elec.*, the supreme court held that the PUC violated the Sierra Club’s due process rights by approving a power purchase agreement between a utility company and a producer of electricity without holding a contested case hearing to consider the environmental impacts of approving the agreement as required by an environmental statute, HRS chapter 269. *Maui Elec.*, 141 Hawai'i at 260-65, 408 P.3d at 12-17. The supreme court employed this same analysis in *Hawai'i Elec.* and *Kahoma*. In this case, the BLNR violated the Sierra Club’s due process rights by voting to authorize the

continued diversion of east Maui streams without holding a contested case hearing to consider conservation matters as required by two statutes.

The Sierra Club and its members have the right to a clean and healthful environment (including “conservation, protection and enhancement of natural resources”) as defined by HRS chapters 171 and 205A – just as it had rights pursuant to HRS chapter 269 in *Maui Elec.*

i. HRS chapter 171 is a law relating to environmental quality.

HRS chapter 171 is a law relating to environmental quality, including the “conservation, protection and enhancement of natural resources.”

In determining whether a law is related to environmental quality, the Hawai‘i Supreme Court has relied on the legislature’s identification of laws related to environmental quality when it enacted of HRS § 607-25. *City. of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 410, 235 P.3d 1103, 1122 (2010).<sup>82</sup> In an extended discussion, the supreme court explained that the legislature’s identification of a law within the ambit of HRS § 607-25 means that it is intended to implement the constitutional “guarantee of a clean and healthful environment established by article XI, section 9.” *Id. See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105; *see also Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417 (examining HRS § 607-25 to find that HRS chapter 205A is also a law relating to environmental quality). Thus, the citation of HRS chapter 171 in HRS § 607-25(c) renders it a law relating to environmental quality, including conservation, protection, and enhancement of natural resources.

In addition, the legislature specified that all cases arising from title 12—of which HRS chapter 171 is a part—are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). In fact, HRS title 12 is entitled “Conservation and Resources.” This legislative determination also demonstrates that this law that governs the use of the state’s public trust natural resources is a law relating to environmental quality.

Just as HRS chapter 269 required consideration of environmental factors in *Maui Elec.*, HRS § 171-55 explicitly requires that BLNR consider the “best interests” of the State. The legislature has identified some of these best interests: “prevention of the degradation of surface water and ground water quality to the extent that degradation can be avoided using reasonable

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<sup>82</sup> *Kahoma* states that the supreme court abrogated portions of *Ala Loop*. *Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417. A careful reading of both *Ala Loop* and *Tax Found. v. State*, 144 Hawai‘i 175, 439 P.3d 127 (2019) reveals that nothing in *Ala Loop* has been abrogated.

management practices,” HRS §§ 171-58(e) and (f); “Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems,” HRS § 205A-2(b)(4)(A); “Exercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources,” HRS § 205A-2(c)(4)(A); and “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,” HRS § 205A-2(c)(4)(D). These best interests also include “resource protection.” *Waiāhole*, 94 Hawai‘i at 136, 9 P.3d at 448; *id.* at 97, 137, 9 P.3d at 449 (“public interest in a free-flowing stream for its own sake”); *Robinson v. Ariyoshi*, 65 Haw. 641, 674-76, 658 P.2d 287, 310-11 (1982) (upholding the public interest in the “purity and flow,” “continued existence,” and “preservation” of the waters of the state); *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (acknowledging the public interest in “a free-flowing stream for its own sake”). There can be no question that HRS chapter 171 is a law relating to environmental quality, including the “conservation, protection and enhancement of natural resources.”

ii. HRS chapter 205A is a law relating to environmental quality.

“HRS ch. 205A is a law ‘relating to environmental quality’ for the purposes of article XI, section 9.” *Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417.

The plain language of HRS chapter 205A, its intent, and legislative history demonstrate that in rendering any decision made pursuant to HRS chapter 171 (the scope of BLNR’s authority), the BLNR must also comply with HRS chapter 205A. HRS § 205A-4(b) states: “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(b) states “All agencies shall enforce the objectives and policies of this chapter and any rules adopted pursuant to this chapter.” HRS chapter 205A explicitly applies to all state agencies, including BLNR. HRS § 205A-1 defines an agency as “any agency, board, commission, department, or officer of a county government or the state government, including the authority as defined in part II.” (Emphasis added.). The plain language of HRS § 205A-2(a) provides, “The objectives and policies in [HRS § 205A-2] shall apply to **all parts** of [HRS chapter 205A]”—not just part III. Finally, HRS § 205A-4(a) requires that BLNR “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.”

In 1993, the legislature amended the definition of “coastal zone management area” to include “**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 (emphasis added). The Senate Committee on Planning, Land and Water Use Management explained, the bill removed the “exclusion of state forest reserve lands from the definition of “coastal zone management areas.” S. Stand Comm Rep. No. 1142, 1993 Senate Journal at 1189 “This bill would expand the coastal zone management area to include **the entire land mass of the State.**” *Id.* (emphasis added). The permits authorize the use of land and streams in the forest reserve. Dkt 80 at 98.

In 1977, when HRS chapter 205A was enacted, the Senate Committee on Economic Development’s report on the final language of the legislation explicitly noted that “policies, objectives, and guidelines of the bill shall be binding on state and county agencies within the coastal zone management area.” S. Stand Comm Rep No. 779, 1977 Senate Journal at 1187.

These objectives and policies call for BLNR to: “Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems.” HRS § 205A-2(b)(4)(A); “Exercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources.” HRS § 205A-2(c)(4)(A); and “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.” HRS § 205A-2(c)(4)(D). Just as the PUC was required to consider greenhouse emissions pursuant to HRS § 269-6(b), *Maui Elec.*, 141 Hawai‘i at 261, 408 P.3d at 13, BLNR is required to consider these objectives and policies in rendering a decision. Given the diversions’ reduction in the size of the freshwater plume that draws animals to a stream from the ocean,<sup>83</sup> BLNR was required to minimize adverse impacts and degradation of coastal water ecosystems. HRS § 205A-2(b)(4)(A) and -2(c)(4)(D). Given its duty to exercise a conservation ethic, HRS §§ 205A-2(c)(4)(A), it was duty-bound to reduce waste. The Sierra Club was denied an opportunity to cross examine witnesses to demonstrate that the revocable permit (without adequate conditions) is inconsistent with HRS chapter 205A’s objectives and policies. Moreover, BLNR is required to “give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space

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<sup>83</sup> Dkt 247 at 8-10.

values[.]” HRS § 205A-4(a). The “right to a clean and healthful environment includes the right that specific consideration be given to” ecological values. *See Maui Elec.*, 141 Hawai‘i at 265, 408 P.3d at 17. The Sierra Club is entitled to ensure that proper consideration is given.

In acting pursuant to HRS § 171-55, BLNR was statutorily bound to act in a manner consistent with the objectives and policies articulated in HRS § 205A-2. In other words, the authority provided by HRS § 171-55 is not unfettered; HRS §§ 205A-2, -4, and -5 constrain BLNR’s authority.

b. The Sierra Club and Its Members Rights as Trust Beneficiaries are a Protectable Constitutional Interest Pursuant to Public Trust Law.

The Sierra Club and its members also enjoy constitutionally protected rights as beneficiaries of the public trust pursuant to Article XI section 1, Article XI section 7, and Article XII section 4 of the State Constitution. “[T]he people of this state have elevated the public trust doctrine to the level of a constitutional mandate.” *Waiāhole*, 94 Hawai‘i at 131, 9 P.3d at 443. “We therefore hold that article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.” *Id.* at 1131-32, 9 P.3d at 443-44. The *Waiāhole* court recognized that our constitution and case law emphasize “the right of the people to have the waters protected for their use.” *Waiāhole*, 94 Hawai‘i at 146, 9 P.3d at 458. Similarly, the supreme court held that the citizens of the state “must have a means to mandate compliance” with Article XII § 4 of the state constitution. *Pele Def Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992). These constitutional provisions afford members of the public the right to enforce them. *See e.g., Waiāhole*, 94 Hawai‘i at 120 n.15, 9 P.3d at 432 n.15 (“constitutional due process mandates a hearing in both instances because of the individual instream and offstream ‘rights, duties, and privileges’ at stake”); *Ching v. Case*, 145 Hawai‘i 148, 173 and 176, 449 P.3d 1146, 1171 and 1174 (2019) (beneficiaries of the article XII section 4 ceded land trust possess constitutional rights to enforce it); *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 140 P.3d 985 (2006).

Potential adverse impacts to public trust resources are of significant constitutional dimension deserving protection. *Īao*, 128 Hawai‘i at 244, 287 P.3d at 145 (“ramifications . . . could offend the public trust, and is simply too important to deprive parties of due process and judicial review.”). Trust beneficiaries must have the ability to ensure that a trustee acts consistent with its trust duties. *Pele Def. Fund v. Paty*, 73 Haw. at 605, 837 P.2d at 1264; *Ching*, 145

Hawai‘i at 173 and 176, 449 P.3d at 1171 and 1174. The ability to ensure that constitutional duties are properly discharged is a protectable constitutional interest. *See also Kilakila ‘O Haleakalā v. BLNR*, 131 Hawai‘i 193, 202-3, 214, 317 P.3d 27, 46-47 (2013) (Acoba, J., concurring) and *‘Īao*, 128 Hawai‘i 228, 278-82, 287 P.3d 129, 179-183 (Acoba, J., concurring). Members of the public are beneficiaries of the trust. As such, their constitutional interests are adversely affected when the BLNR allows water to be diverted from streams in ways that cause significant harm. The Sierra Club and its members have the right to ensure that the natural resources, ceded lands, streams, and other public trust resources identified in these constitutional provisions are protected. They cannot be deprived of the rights secured by these constitutional provisions without due process.

2. The Sierra Club is Entitled to a Contested Case Hearing.

The second part of the two-step analysis to determine the necessity of a contested case hearing is a consideration of the specific procedures needed to protect the constitutionally protected property interest. *Kahoma*, 149 Hawai‘i at 312, 489 P.3d at 416 (2021).

Older supreme court decisions hold that when HRS chapter 91 applies, the legislature has already determined the process due when constitutional interests are affected. The legislature detailed the procedures to be employed in HRS §§ 91-9—91-13. *See Town v. Land Use Commission*, 55 Haw. 538, 548-49, 524 P.2d 84, 91-92 (1974). As the supreme court explained, “it is unnecessary for us to determine what procedures are constitutionally required. The requisite procedures were invoked by statute[.]” *PDF v. PGV*, 77 Hawai‘i at 68 n.9, 881 P.2d at 1214 n.9. Similarly, the court held, “The adjudicatory procedures of the Hawaii Administrative Procedure Act apply to hearings which an agency is constitutionally required to provide.” *Bush v. Hawaiian Homes Com'n*, 76 Hawai‘i 128, 135, 870 P.2d 1272, 1279 (1994). Once it is determined that constitutional rights are implicated,

such a holding would automatically invoke the adjudicatory procedures of the HAPA as the measure of the hearings to which the plaintiffs are entitled, for an agency is required to follow those procedures in all 'contested cases.' HRS § 91-(5) defines a contested case as 'a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.' Since rights, duties, or privileges 'required by law' to be determined after a hearing include those required by constitutional right to be so determined, a holding to this effect favorable to the plaintiffs would necessarily implicate the specific adjudicatory provision of the HAPA as the measure of their procedural rights.

*Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 496, 522 P.2d 1255, 1267 (1974) (internal citation omitted). BLNR’s decision granted legal rights and privileges to A&B. *See* HRS § 91-1. Thus, BLNR was required to hold a contested case hearing with all the procedural protections articulated in HRS §§ 91-9—91-13 prior to deciding whether to authorize the continuation of the revocable permits for another year. *Town*, 55 Haw. at 548-49, 524 P.2d at 91-92; *Mauna Kea*.

The supreme court began to employ a three-factor test in case in which HRS chapter 91 was inapplicable. *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*, 70 Haw. 361, 368, 773 P.2d 250, 255-56 (1989).<sup>84</sup> Overlooking the rationale of *Town*, *Bush*, *Aguiar*, and *PDF v. PGV*, more recently the supreme court has considered three factors in determining whether a contested case is required:

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

*Maui Elec.*, 141 Hawai‘i at 265, 408 P.3d at 17. Although the Sierra Club does not believe that the recent trend of employing the three-factor test is warranted here, each of those factors weighed in favor of a contested case hearing in this case.

a. The diversions adversely affect the Sierra Club and its members.

BLNR’s decision to renew the permits directly affects the Sierra Club and its members. “The private interest to be affected in this case is the right to a clean and healthful environment, which is a substantive right guaranteed by the Hawai‘i Constitution.” *Maui Elec.*, 141 Hawai‘i at 265, 408 P.3d at 17.

The Standing Committee Report from the 1978 Constitutional Convention specifically observed that “a clean and healthful environment is an important right of every citizen and that this right deserves constitutional protection.” Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 689 (emphasis added).

*Maui Elec.*, 141 Hawai‘i at 263, 408 P.3d at 15. Similarly, the *Kahoma* court explicitly characterized the private interest at stake: “Here, the private interest was PPKAA’s constitutional

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<sup>84</sup> The case involved a decision made by the City Council, to which HRS chapter 91 did not apply. *Medeiros v. Haw. Cnty. Planning Comm’n*, 8 Haw. App. 183, 194, 797 P.2d 59, 65 (1990) involved a legislative provision that specifically exempted geothermal permits from the contested case hearing provisions of HAPA.

right to a clean and healthful environment.” *Kahoma*, 149 Hawai‘i at 313-14, 489 P.3d 417-18. This right includes the right in this case to (1) consideration of the states best interests, including protection of free-flowing streams, pursuant to HRS § 171-55; (2) full consideration of ecological values pursuant to HRS § 205A-4(a); (3) protection of coastal ecosystems (including streams) from disruption pursuant to HRS § 205A-2(b)(4)(A); (4) a conservation ethic to reduce waste, HRS §§ 205A-2(c)(4)(A); and (5) effective regulation of stream diversions that minimizes disruption or degradation of coastal water ecosystems pursuant to HRS § 205A-2(c)(4)(D). The Sierra Club also enjoys constitutionally protected interests in ensuring that public trust resources are properly managed. The Sierra Club and its members’ enjoyment of public land and streams in east Maui is dependent on BLNR holding A&B to its burden of proof and properly performing its public trust and statutory tasks. In fact, water may only be transferred out of the watershed of origin when not injurious to others. *Robinson*, 65 Haw. at 649 n. 8, 658 P.2d at 295 n.8.

b. The risk of erroneous deprivation is high.

“The risks of an erroneous deprivation are high in this case absent the protections provided by a contested case hearing, particularly in light of” the impact on streams “and the absence of other proceedings in which Sierra Club could have a meaningful opportunity to be heard concerning” the continuation of the revocable permits, the impact on stream ecology and the waste of stream water. *See Maui Elec.* 141 Hawai‘i at 266, 408 P.3d at 18. The ramifications of an erroneous decision on the revocable permits authorizing the diversion of streams “could offend the public trust, and is simply too important to deprive parties of due process and judicial review.” *‘Īao*, 128 Hawai‘i at 244, 287 P.3d at 145.

The risk here is one that actually occurred. BLNR rendered a decision without properly considering the factors that the legislature mandated BLNR to consider. BLNR rendered a decision without considering how the diversions reduce the size of the freshwater plume that draws animals to a stream from the ocean<sup>85</sup> as required by HRS chapter 205A. It did so without considering how to minimize adverse impacts and degradation of coastal water ecosystems as required by HRS chapter 205A. It authorized the diversion of all the baseflow from a dozen east Maui streams even though CWRM concluded that there was a “need to ensure downstream flows . . . sufficient for aquatic habitat in the Ho‘olawa, Nailiilihaele, and ‘O‘opuola hydrologic units.”<sup>86</sup>

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<sup>85</sup> Dkt 247 at 8-10.

<sup>86</sup> Dkt 156 at 32.

It did so despite the injury to riparian and recreational users.<sup>87</sup>

“By voting on the permit before the contested case hearing was held, the Board denied the Appellants their due process right to be heard at ‘a meaningful time and in a meaningful manner.’” *Mauna Kea* 136 Hawai‘i at 380, 363 P.3d at 228. “A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.” *Mauna Kea*, 136 Hawai‘i at 380, 363 P.3d at 228. “These procedures are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made.” *Id* at 391, 363 P.3d at 239.

i. Opportunity to testify is insufficient.

The opportunity afforded the Sierra Club to testify at BLNR’s meeting is not an adequate substitute for a contested case hearing. The supreme court held that a contested case hearing was required in *Hawai‘i Elec.* even when the contested case hearing requestor was granted “limited participant status.” *Hawai‘i Elec.*, 145 Hawai‘i at 6 and 17-18, 445 P.3d at 678, and 689-90. Moreover, the supreme court has held that the ability to testify at a public open meeting is no substitute for a contested case hearing. The contested case petitioners in *Mauna Kea* and *Kahoma* were given ample opportunity to testify. *Mauna Kea*, 136 Hawai‘i at 381-82, 363 P.3d at 229-30; *Kahoma*, 149 Hawai‘i at 308, 489 P.3d at 412. Nevertheless, a contested case hearing was required. The Sierra Club was denied the right to cross examine any witness. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *In re Wai‘ola O Moloka‘i, Inc.*, 103 Hawai‘i 401, 444, 83 P.3d 664, 706 (2004).

Where an ascertainment of the truth is more likely through the use of a trial-type hearing, it should be used at some point in the administrative process. Real expertise will not be hindered but strengthened by its exposure to the fire of cross-examination, rebuttal evidence, and argument. An examination or inspection by an expert is simply no substitute for a trial-type hearing except, perhaps, in certain limited circumstances.

*Mortensen v. Board of Trustees of Employees' Retirement System*, 52 Haw. 212 , 220, 473 P.2d 866, 871-72 (1970). *See also Jencks v. United States*, 353 U.S. 657, 667 (1957) and HRS § 91-

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<sup>87</sup> *Id.* *See Robinson*, 65 Haw. at 649 n. 8, 658 P.2d at 295 n.8.

10(3). The Sierra Club was barred from cross examining A&B about its use of groundwater, irrigation requirements, the delay in implementing CWRM requirements, and the credibility of its previous claims.

ii. Previous contested case hearing is insufficient.

The supreme court recognized that new evidence can command a new contested case hearing related to one previously conducted. *Flores v. Bd. of Land & Natural Res.*, 143 Hawai‘i 114, 127, 424 P.3d 469, 482 (2018). Kalani Flores had already participated extensively in a separate contested case hearing before BLNR on the issuance of a permit that would authorize the construction of a thirty-meter telescope on Mauna Kea. *Id.* Flores wanted another contested case hearing on BLNR’s consent of a sublease for construction of the same telescope. In the first contested case hearing, Flores submitted the sublease into evidence. *Id.* The supreme court emphasized that Flores had not clarified “the extent to which, if BLNR held a contested case hearing on the Consent, he would put forth **evidence** and arguments **materially different** from that which he already proffered at the CDUP contested case hearing.” *Id.* (emphasis added). The court observed that

because the Sublease provides that TIO "shall use the Subleased Premises solely to construct and operate the TMT Facilities" and specifies that "[t]he construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of [the CDUP] ... and any amended or subsequent [CDUP]," the potential impact of the Sublease on Flores's asserted interests would appear to **overlap entirely** with the potential impact of the CDUP.

*Id.* n. 7. The court concluded, “On this particular record, we are not convinced that an additional contested case hearing would offer any probable value in protecting against the erroneous deprivation of his interest in engaging in traditional Native Hawaiian cultural practices on Mauna Kea. *Id.* at 127, 424 P.3d at 482.

A contested case for the 2025 revocable permit is necessary even though the legal issues related to the revocable permits for 2025 are similar to the issues raised in the August 2020 trial and the 2021-22 contested case hearing.

First, the issue is continuation of the revocable permits for different year. HRS § 171-55 requires that BLNR make a new decision each year. “BLNR's continuation decisions for revocable permits apply for only one calendar year at a time.” *Carmichael*, 150 Hawai‘i at 561, 506 P.3d at 225. It is a new decision, involving new facts, for a new year.

Second, the public trust duty requires BLNR to “reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes.” *Waiāhole*, 94 Hawai‘i at 149, 9 P.3d at 461. BLNR’s “constitutional obligations are ongoing, regardless of the nature of the proceeding.” *In re Gas Co.*, 147 Hawai‘i 186, 207, 465 P.3d 633, 654 (2020). “[T]he state has a continuing duty to monitor the use of trust property, even if the use of the property has not changed.” *Id.*

Third, even the results of trials can be set aside when “newly discovered evidence which by due diligence could not have been discovered in time” becomes available. *See* Rule 60(b)(2) of the Hawai‘i Rules of Civil Procedure. Similarly, a contested case hearing was required because of the new evidence. New evidence undermines BLNR’s findings in its June 2022 decision. BLNR had significant new evidence (not previously available) that demonstrated: (1) A&B is asking for more water to facilitate the expansion of agricultural operations even though water has not be restored to streams that CWRM determined require more water; (2) far less water is required for irrigation than previously claimed; (3) groundwater is available that can reduce the need for water from east Maui streams; (4) more than 2 mgd allocated to the County is not used on average and is wasted; (5) twenty times less water is needed for “historic/industrial uses” than A&B had previously claimed. A contested case would have allowed the Sierra Club to cross examine CWRM and A&B representatives regarding the new information. Instead, the Sierra Club was barred from cross examining witnesses about: (1) the time it will take to implement the measures that CWRM required for the Huelo streams; (2) the quantity of water really needed for irrigation; (3) the reliability of groundwater for irrigation; (4) the ability to use water stored in the reservoirs; (5) the fate of all that water in prior years that A&B claimed was being used for “historic/ industrial uses”; and (6) the credibility of A&B’s witnesses in light of the new evidence.

c. BLNR has substantial interests in conducting a contested case.

BLNR has substantial interests in conducting a contested case hearing.<sup>88</sup> BLNR “must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai‘i constitution.” *Gas Co.*, 147 Hawai‘i at 207, 465 P.3d at 654. BLNR’s “constitutional obligations are ongoing, regardless of the nature of the proceeding.” *Id.* [T]he state has a

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<sup>88</sup> *See* Dkt 299 at 14.

continuing duty to monitor the use of trust property, even if the use of the property has not changed.” *Id.* BLNR is already constitutionally bound to make its decision “with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. It must reassess prior decisions and must consider actions it can take to undo harm. *Waiāhole*, 94 Hawai‘i at 149-50, 9 P.3d at 461-62. It is also “already statutorily required to consider” the state’s best interests and ecological values pursuant to HRS § 171-55 and HRS § 205A-4. *See Maui Elec.*, 141 Hawai‘i at 266, 408, P.3d at 18. When critical information is missing, BLNR is required to “take the initiative to obtain the information it needs.” *‘Īao*, 128 Hawai‘i at 262, 287 P.3d at 163. A contested case hearing would allow BLNR to fulfill these duties. A contested case hearing allows for cross examination and the development of a complete record. There is no evidence in the administrative record that the burden of holding a contested case hearing would be substantial. It is certainly less of a burden than a trial. “[R]equiring relitigation of agency decisions is inefficient and imposes an increased burden on the State in contrast to resolving the challenge in the initial decision-making process.” *Maui Elec.*, 141 Hawai‘i at 267, 408 P.3d at 19.

**B. BLNR’s Decision to Issue the Permit is Replete with Error.**

Not only did BLNR violate the Sierra Club’s due process rights by refusing to hold a formal contested case hearing, but it also breached its public trust duties, violated HRS chapter 205A, and failed to investigate and protect traditional and customary practices. These errors are obvious even though the Sierra Club did not have an opportunity to create a complete record to address other issues through a contested case hearing.

1. BLNR Allowed A&B to Drain Streams Dry.

The public trust doctrine requires the “**availability and existence** of its water resources for **present** and future generations.” *In re Nā Wai ‘Ehā*, 154 Hawai‘i 309, 339, 550 P.3d 1167, 1197 (2024) (emphasis added). BLNR has a constitutional trust duty to protect the flow of streams. *Id.* at 343, 550 P.3d at 1201; *Pila ‘a 400, LLC v. BLNR*, 132 Hawai‘i 247, 250, 320 P.3d 912, 915 (2014) (“The BLNR is constitutionally mandated to conserve and protect Hawai‘i’s natural resources.”). As a trustee, BLNR must **preserve the rights of present** and future generations in waters of the state.” *Kauai Springs, Inc. v. Planning Comm’n of the Cnty. of Kaua‘i*, 133 Hawai‘i 141, 173, 324 P.3d 951, 983 (2014) (emphasis added). It was required to “apply a presumption in favor of public use, access, enjoyment, and resource protection.” *Id.*

Instream standards should provide meaningful protection before diversions are increased. *Waiāhole*, 94 Hawai‘i at 148-49, 159, 9 P.3d at 460-61, 471. Taking all the baseflow from a stream and leaving it dry 70-80% of the time is legally irreconcilable “with results that are consistent with the protection and perpetuation of the resource.” *Waiāhole*, 94 Hawai‘i at 141 n.40, 9 P.3d at 453 n.40.

HRS chapter 205A requires that BLNR: “Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems,” HRS § 205A-2(b)(4)(A); “Exercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources,” HRS § 205A-2(c)(4)(A); and “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.” HRS § 205A-2(c)(4)(D).

Yet, BLNR authorized A&B to drain Ho‘olawa, Waipi‘o, Hānawana, Nailiilihaele, ‘O‘opuola, and Kailua streams dry.<sup>89</sup> It did this while facilitating the expansion of a commercial agricultural enterprise.<sup>90</sup>

2. BLNR Failed to Ensure CWRM’s Requirements were Fulfilled.

The public trust doctrine prohibits an agency from issuing a permit until it ensures that the prescribed measures are actually being implemented. *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006). CWRM identified two dozen necessary modifications to diversion structures.<sup>91</sup> Yet, BLNR made no effort to ensure that these modifications to diversion structures had been completed<sup>92</sup> -- while facilitating the expansion of a commercial agricultural enterprise.

3. BLNR Allocated Far More Water for Irrigation Than Needed.

“Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.” *Kauai Springs*, 133 Hawai‘i at 174, 324 P.3d at 984.

It is generally understood that in Hawai‘i diversified agriculture requires no more than

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<sup>89</sup> Dkt 156 at 32; Dkt 167 at 10-11; Dkt 295 at 57.

<sup>90</sup> Dkt 63 at 4.

<sup>91</sup> Dkt 156 at 32-38.

<sup>92</sup> Dkt 34 at 13 ¶ 55. In fact, no work on the ground has taken place at all.

2,500 gallons per acre per day. A&B's Meredith Ching testified under oath, "the normal diversified ag standard is 2,500 acres – gallons per acre per day."<sup>93</sup> CWRM's 2021 Nā Wai 'Ehā decision limited the use of stream water for irrigation to 2,500 gallons per day.<sup>94</sup> Mahi Pono itself entered into a November 2019 Stipulation Regarding SWUPA 2206 limiting its use to 2,500 gallons per acre per day on nearby land.<sup>95</sup> CWRM concluded that 2,500 gallons per cultivated acre per day was a reasonable amount of water to be used for agriculture in Central O'ahu. *In re Water Use Permit Applications*, 105 Hawai'i 1, 7 & 21, 93 P.3d 643, 649 & 663 (2004).

Shortly before BLNR's 2024 meeting, Mahi Pono's own expert, Dr. Fares, estimated that citrus, which comprises more than 85% of the acres, requires 2,536 gallons per acre day.<sup>96</sup> Macadamia requires only 2,366 gallons per acre per day; while coffee requires a bit more, 2,583 gallons per acre per day.<sup>97</sup>

Nevertheless, BLNR allocated 3,263 gallons per acre per day.<sup>98</sup> That is far more than is needed for irrigation.

4. BLNR Failed to Account for the Availability of Alternative Sources of Water.

On multiple occasions, the supreme court has "expounded on the necessity of considering alternative sources of water in balancing the distribution of a scarce public trust resource." *In re Kukui (Molokai), Inc.*, 116 Hawai'i 481, 495, 174 P.3d 320, 334 (2007); *Kauai Springs*, 133 Hawai'i at 174, 324 P.3d at 984; *Waiāhole*, 94 Hawai'i at 165 and 171, 9 P.3d at 477 and 483; *In re Water Use Permit Applications (Waiāhole II)*, 105 Hawai'i 1, 16, 93 P.3d 643, 658 (2004); *In re Kukui (Molokai), Inc.*, 116 Hawai'i 481, 496, 174 P.3d 320, 335 (2007); *'Īao*, 128 Hawai'i at 258-62, 287 P.3d at 159-63; *Nā Wai 'Ehā*, 154 Hawai'i at 353-54, 550 P.3d at 1211-12.

It is uncontroverted that millions of gallons of groundwater can be **sustainably** pumped. CWRM has testified that 7 mgd of groundwater can be pumped for irrigation.<sup>99</sup> A&B's

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<sup>93</sup> Dkt 275 at 32.

<sup>94</sup> Dkt 230 at 287 (COL 95) and Dkt 231 at 6 & 11.

<sup>95</sup> Dkt 229 at 5.

<sup>96</sup> Dkt 63 at 15 & 24; Dkt 34 at 15 ¶ 66.

<sup>97</sup> Dkt 63 at 24.

<sup>98</sup> Dkt 59 at 11.

<sup>99</sup> Dkt 63 at 35.

own plans call for using 16.47 mgd of groundwater to irrigate crops in central Maui.<sup>100</sup> BLNR failed to recognize all the groundwater available to supplement irrigation, thereby reducing the amount of water needed from east Maui streams.

BLNR also failed to reduce the amount of east Maui stream water allocated for irrigation by the average amount of water that the County does not use. The water that the County does not use should not be wasted. There is no reason why it cannot be used for irrigation.<sup>101</sup> There are days that the County will use less water. That extra water flows into reservoirs that can be used for irrigation at a later time.<sup>102</sup> The County agrees that this makes sense.<sup>103</sup>

BLNR neglected to reduce the allocation of east Maui stream water by the amount of groundwater that can be sustainably pumped and the millions of gallons of water that the County does not use on average daily.

5. BLNR Failed to Render Findings on Traditional and Customary Practices.

The supreme court has consistently voided decisions when agencies fail to assess and protect traditional and customary practices. *Ka Pa 'akai O Ka 'aina v. Land Use Comm'n*, 94 Hawai'i 31, 53, 7 P.3d. 1068, 1090 (2000); *In re Waiola*, 103 Hawai'i at 442, 83 P.3d at 705; *Īao*, 128 Hawai'i at 248-49, 287 P.3d at 149-150; *Nā Wai 'Ehā*, 154 Hawai'i at 349-51, 338, 550 P.3d at 1207-09. BLNR made no findings regarding the impact that depriving streams of water has on traditional and customary practices that require water flowing in them.

C. This Court Must Provide Multi-Faceted Relief.

When an agency violates constitutional due process and renders a decision upon unlawful procedure, the court can “remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced.” HRS § 91-1-4(g). Given the violation of the Sierra Club’s due process rights, this court must exercise its authority pursuant to HRS §§ 91-14(g), 603-21.9(1) and (6), and 604A-2. Moreover, given BLNR’s and A&B’s track record, this court must exercise its equitable

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<sup>100</sup> Dkt 78 at 114 Table 2-2.

<sup>101</sup> Before delivering any water for irrigation, the EMI system first provides water to the County’s Kamole Water Treatment Plant. Dkt 164 at 39 (FOFs 98 & 99).

<sup>102</sup> *Id.*; *See also* Dkt 56 at 40.

<sup>103</sup> Dkt 63 at 82. “[U]p to 5 mgd allocation on a monthly basis will be sufficient for DWS, as long as additional water will be provided per the 2018 agreement with EMI on those days when DWS requires it. On those days, Mahi Pono can rely on water stored in reservoirs and groundwater to make up the difference.”

authority pursuant to *Richardson v. Sport Shinko*, 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994), *Fleming v. Napili Kai, Ltd*, 50 Haw. 66, 70, 430 P.2d 316, 319 (1967), and public trust principles.

This court should (a) order BLNR to hold a contested case hearing with the goal of completing it by October 30, 2025 (b) modify BLNR's decision pending completion of a contested case hearing and (c) provide ample instructions to BLNR.

1. Remand this Case and Order BLNR to Hold a Contested Case Hearing.

This court should remand this case to BLNR with instructions to grant the Sierra Club's petition "and to conduct a contested case hearing pursuant to HRS chapter 91 and in accordance with state law" on the revocable permit. *See Waikamoi*, (last sentence of the opinion), Exhibit A.

But that alone will not be sufficient.

Given BLNR's pattern of foot-dragging (*e.g.*, never acting on Nā Moku's request for a contested case hearing on the revocable permit in 2001, refusing for over a year to comply with this court's June 2023 order to hold a contested case hearing, and refusing to consider the Sierra Club's request for a contested case hearing on the revocable permit for 2024 until that year's permit was about to expire), this court should order that a prehearing conference for the contested case hearing take place before July 30 and that BLNR endeavor to complete the contested case hearing and issue a decision by October 30.

Nor will ordering a contested case hearing and setting deadlines be sufficient.

2. Modify BLNR's Decision.

As a general rule, when an agency fails to conduct a necessary contested case hearing, any approval it has issued is void.

Quite simply, the Board put the cart before the horse when it issued the permit before the request for a contested case hearing was resolved and the hearing was held. Accordingly, the permit cannot stand. We therefore vacate the judgment of the circuit court and the permit issued by the Board, and remand so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion.

*Mauna Kea*, 136 Hawai'i at 380-81, 363 P.3d at 228-29. *See also Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 429, 903 P.2d 1246, 1250 (1995) (affirming the circuit court's decision voiding permit granted without conducting a contested case hearing) and *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 445 P.3d 673 (2019)

(vacating Public Utilities Commission decision made without conducting a contested case hearing). Similarly, when agencies violate the law, their approvals are vacated. *Hui Alaloe v. Planning Comm'n*, 68 Haw. 135, 137, 705 P.2d 1042, 1044 (1985); *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 519-520, 654 P.2d 874,882-3 (1982); *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai'i 66, 947 P.2d 378 (1997); *Kepo`o v. Kane*, 106 Hawai'i 270, 103 P.3d 939 (2005); *Town*, 55 Haw. at 545, 524 P.2d at 89; and *Leslie v. Board of Appeals*, 109 Hawai'i 384, 126 P.3d 1071 (2006).

In this case, however, hardship could result if this court vacated the permits entirely and water to upcountry residents was completely cut off. Therefore, this court can exercise its equitable powers to modify BLNR's decision. HRS § 91-14(g) provides that the court "may reverse or **modify the decision** and order **if the substantial rights of the petitioners may have been prejudiced** because the administrative findings, conclusions, **decisions, or orders**" violate the law. "Where an administrative agency, by the failure to follow its rules, prejudices the substantial rights of a party before it, it may be necessary for the court, under the power to modify the decision and order of the agency, to fashion relief appropriately remedying the prejudice caused." *Nakamine v. Board of Trustees of Employees' Retirement System*, 65 Haw. 251, 255, 649 P.2d 1162, 1165 (1982). The *Carmichael* court recommended the exercise of "equitable power as it pertains to the municipal-and residential-water needs of the upcountry Maui community." *Carmichael*, 150 Hawai'i at 572, 506 P.3d at 236. This court needs to mold its order "to satisfy the requirement of this particular case and thereby conserve the equities of all of the parties." *Fleming*, 50 Haw. at 70, 430 P.2d at 319.

This court cannot leave BLNR's decision undisturbed. First, CWRM concluded that "additional flow must be provided" to a half-dozen streams.<sup>104</sup> Yet, BLNR took no steps to ensure that more water flows in these streams. In fact, its decision allows A&B to take all the baseflow from these Huelo streams. Second, BLNR's December 2024 decision allows A&B to take even more water than it had been taking. BLNR facilitated the expansion of commercial operations while ignoring the need for more water to remain in streams. Third, leaving BLNR's decision undisturbed provides no incentive for A&B and BLNR to expeditiously complete the contested case hearing. Allowing A&B to continue to drain streams dry while BLNR delays

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<sup>104</sup> Dkt 156 at 32; Dkt 158 at 14.

holding a contested case serves A&B's interests. But not the public's. Fourth, leaving BLNR's decision to remain in effect unmodified is inconsistent with *Mauna Kea* and *Hawai'i Elec.* There is no case in which a court has allowed an agency's decision to remain in effect that prejudiced another party's substantial rights. Leaving BLNR's decision undisturbed would leave the Sierra Club's constitutional rights in limbo as A&B takes more water from east Maui streams.

Until the completion of a contested case hearing, this court should reduce the amount of water that A&B can take from east Maui streams. A cap that is set low enough serves to (a) prevent the harm to our streams from being exacerbated, *see* HRS § 205A-2(b)(4)(A); (b) encourage A&B to expeditiously modify the diversion structures that CWRM ordered years ago, *see* HRS § 205A-2(c)(4)(d); (c) create an incentive for A&B to reduce system losses, *see* HRS § 205A-2(c)(4)(A); and (d) keep more water in east Maui streams, *Reppun*, 65 Haw. at 560 n.20, 656 P.2d at 76 n.20 ("can it be said that there is no public interest in a free-flowing stream for its own sake?"). The cap should not accommodate expansion of agricultural operations. "[D]emand 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.

This court has repeatedly limited the amount of water that A&B can take from streams when BLNR has refused to hold a contested case hearing. This court limited the amount that A&B could take to 25, 20 and 31.5 mgd.<sup>105</sup>

In setting a cap, this court must consider four critical issues:

a. Allocate 2,536 gpad for irrigation.

This court should rely on Mahi Pono's expert, Dr. Fares. Citrus, which comprises more than 85% of the acres, requires 2,536 gallons per acre day.<sup>106</sup> Macadamia requires only 2,366 gallons per acre per day; while coffee requires a bit more, 2,583 gallons per acre per day.<sup>107</sup> An allocation of this nature discourages Mahi Pono from planting thirsty crops that require de-watering of public streams. As of September 30, 2024, 10,587 acres were cultivated.<sup>108</sup>

b. Recognize that the other "uses" do not use much water.

The last column of A&B's quarterly reports<sup>109</sup> lumps together what A&B refers to as

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<sup>105</sup> Dkt 242 at 9-10; Dkt 291 at 3; Dkt 299 at 16-18.

<sup>106</sup> Dkt 63 at 15 & 24; Dkt 34 at 15 ¶ 66.

<sup>107</sup> Dkt 63 at 24.

<sup>108</sup> Dkt 56 at 42.

<sup>109</sup> *See e.g.*, Dkt 56 at 39.

“Reservoir / Seepage / Fire Protection / Evaporation / Dust Control / Hydroelectric.”

*Reservoir:* A reservoir is **not** a use of water. That is where water is *reserved* for future use. If the reservoirs were lined, water would be used much more efficiently.

*Fire Protection:* Fighting a fire may require 144,000 gallons – not millions of gallons per day.<sup>110</sup>

*Dust control:* .048 mgd.<sup>111</sup>

*Hydroelectricity:* No water is used for hydroelectricity.<sup>112</sup>

*System losses (evaporation and seepage):* A significant amount of water is lost through seepage of water through the unlined, century-old reservoirs. Since the Sierra Club started suing, system losses have been significantly reduced. At one time, system losses constituted more than 80% of the water taken from east Maui streams. Now, system losses average less than 12%.<sup>113</sup> DLNR staff calculated that system losses in 2024 had been reduced to 7.6%.<sup>114</sup> In 2023, A&B recognized that it could keep system losses to less than 12%. Exhibit C at 7 n. 1 & 2.

*Historic / Industrial* uses are a separate category. Those uses average .04 mgd.<sup>115</sup>

c. Account for the availability of groundwater for irrigation.

The court should reduce the amount of east Maui stream water allocated for irrigation by the amount of groundwater that can be sustainably pumped.

CWRM has testified that 7 mgd of groundwater can be pumped for irrigation.<sup>116</sup> A&B’s own plans call for using 16.47 mgd of groundwater to irrigate crops in central Maui.<sup>117</sup> It is reasonable to expect that irrigation needs in Central Maui be met with 7 mgd of groundwater – at least for this year.

d. Account for the availability of water unused by the County.

This court should also reduce the amount of east Maui stream water allocated for

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<sup>110</sup> Dkt 165 at 2 (FOF 114). *See also Crabtree*, 154 Hawai‘i at 118, 115, 547 P.3d at 451 (“the County represented it used 37,000 gallons of water over approximately five days of fighting the fires”); *see also* Dkt 56 at 33.

<sup>111</sup> Dkt 164 at 42.

<sup>112</sup> Dkt 165 at 2 (FOF 113); Dkt 56 at 34.

<sup>113</sup> Dkt 56 at 39. The last column of A&B’s usage reports is the water that is not separately accounted. That column divided by the Diversified Agriculture column averages less than 12%.

<sup>114</sup> Dkt 56 at 8 n.4.

<sup>115</sup> Dkt 56 at 39.

<sup>116</sup> Dkt 63 at 35.

<sup>117</sup> Dkt 78 at 114 Table 2-2.

irrigation by the average amount of water that the County does not use. The water that the County does not use should not be wasted. It should be used for irrigation.

On average, the County only uses 2.01 mgd for the Department of Water Supply and .55 mgd for the Kula Agricultural Park.<sup>118</sup> By allocating the County 5.25 mgd when the County, on average only uses 2.56 mgd, that means that on average, 2.69 mgd of water is not used daily. Those 2.69 mgd of water are therefore available for irrigation.

The 2.56 mgd that the County uses is an average. There are days that the County will use less water. That extra water flows into reservoirs that can be used for irrigation at a later time. The County agree that this makes sense.<sup>119</sup> When the County uses an additional 1 or 2 mgd, there will be less water available for irrigation. But that should pose no problem. First, there is extra water stored in the reservoirs. Second, the crops do not need irrigation daily. During the August 2023 Maui wildfires, irrigation was shut down for two days – demonstrating that even on hot, dry days, crops can survive for two days without any water. Exhibit D at 23 ¶6. Third, if there is insufficient water and the crops suffer, Mahi Pono can recover any losses from A&B.<sup>120</sup>

e. Calculate the cap

BLNR allocated water in the following manner.

County	5.25 mgd	
Agriculture	33.55 mgd	(3,263 gpad x 10,587 acres (+ more for expansion) -1 mgd
<u>TOTAL</u>	<u>38.80 mgd</u> <sup>121</sup>	

This court should limit the allocation of water from east Maui streams as follows:

County	5.25 mgd	
Agriculture	26.85 mgd	(2,536 gpad x 10,587 acres)
Other uses	.09 mgd	
System losses	3.22 mgd	(12% of irrigation, Exhibit C at 7 n. 1 & 2)
Groundwater	- 7 mgd	(available for irrigation)
Unused County water	- 2.69 mgd	(available for irrigation)
<u>TOTAL</u>	<u>25.72 mgd.</u>	

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<sup>118</sup> Dkt 56 at 7 and at 39.

<sup>119</sup> Dkt 63 at 82.

<sup>120</sup> Dkt 258 at 11-12 & 52.

<sup>121</sup> See Dkt 59 at 11-12; Dkt 56 at 5-7.

3. Provide Instructions to BLNR.

HRS § 91-14(g) authorizes this court to remand the case with instructions for further proceedings. This court should instruct BLNR that it must:

- (1) Ensure that CWRM's orders regarding modification of diversion structures are fully implemented before allowing more water to be taken from east Maui streams than was taken in 2024;
- (2) Reduce the amount of east Maui stream water allocated for irrigation by (a) the amount of groundwater that can be sustainably pumped, and (b) the average amount of water that the County does not use;
- (3) Render necessary findings regarding traditional and customary practices; and
- (4) Include within the scope of the contested case hearing, the revocable permit for 2026 if the contested case hearing for 2025 is not likely to conclude before December 2025 and the Sierra Club requests a contested case hearing for 2026.

Dated: Honolulu, Hawai'i, May 12, 2025.

/s/ David Kimo Frankel  
Attorney for the Sierra Club

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,	)	Civil No. 1CCV-25-0000031
	)	(Environmental Court)
Appellant,	)	
vs.	)	DECLARATION OF COUNSEL
	)	
DAWN CHANG in her official capacity as	)	
Chairperson of the Board of Land and	)	
Natural Resources, BOARD OF LAND	)	
AND NATURAL RESOURCES,	)	
ALEXANDER & BALDWIN, INC., EAST	)	
MAUI IRRIGATION COMPANY, LLC,	)	
and COUNTY OF MAUI, DEPARTMENT	)	
OF WATER SUPPLY	)	
	)	
Appellees	)	

**DECLARATION OF COUNSEL**

I, David Kimo Frankel, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. Exhibit A is the unpublished memorandum opinion in *In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula & Hanawi Streams*, 2012 Haw. App. LEXIS 1040; 128 Haw. 497; 291 P.3d 395 (November 30, 2012).

3. Exhibits B-D are from documents in *Sierra Club v. BLNR*, Civ. No. 1CCV-22-0001506 and are filed pursuant to the April 14, 2025 Stipulation Regarding Record on Appeal and Order, Dkt 192.

4. Exhibit B is Dkt 1859 from Civ. No. 1CCV-22-0001506.

5. Exhibit C is Dkt 1780 from Civ. No. 1CCV-22-0001506.

6. Exhibit D is Dkt 1728 from Civ. No. 1CCV-22-0001506.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Honolulu, Hawai'i, May 12, 2025.

/s/ David Kimo Frankel  
Attorney for the Sierra Club