

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SIERRA CLUB,	)	Civil No. 1CCV-25-2146 (LWC)
	)	(Agency Appeal) (Environmental Court)
Appellant,	)	
	)	
vs.	)	OPINION ON APPEAL
	)	
RYAN KANAKA'OLE in his official	)	
capacity as Acting Chair of the Board of	)	
Land and Natural Resources, BOARD	)	Oral Argument: June 25, 2026
OF LAND AND NATURAL	)	
RESOURCES, MAHI PONO, LLC,	)	Judge: Hon. Lisa W. Cataldo
EAST MAUI IRRIGATION COMPANY,	)	
LLC, and the COUNTY OF MAUI,	)	
	)	
Appellees.	)	
_____	)	

OPINION ON APPEAL

1. Sierra Club filed this appeal on December 30, 2025, pursuant to Hawai'i Revised Statutes ("**HRS**") § 91-14, challenging the decisions made by the Board of Land and Natural Resources ("**BLNR**") on December 12, 2025: (1) denying Sierra Club's request for a contested case hearing ("**CCH**") and (2) approving the continuation of a revocable permit ("**RP**") for 2026 ("**2026 RP**"), authorizing permittees Mahi Pono, LLC ("**Mahi Pono**"), and East Maui Irrigation Company, LLC ("**EMI**") to divert water from east Maui streams.

2. The permitted rights to divert millions of gallons of water from these streams have been governed by temporary RPs that have been renewed by BLNR every year, “as a matter of course,” for over twenty years. *Sierra Club v. Bd. of Land & Nat. Res.*, 156 Hawai‘i 382, 388, 575 P.3d 472, 478 (2025) (“*Sierra Club*”) (“BLNR’s annual renewals of the temporary permits appear to have given [permittees] a de facto two-decade lease.”); *Carmichael v. Bd. of Land & Nat. Res.*, 150 Hawai‘i 547, 554-55, 506 P.3d 211, 218-19 (2022).

3. In twenty years, BLNR has held a CCH on the East Maui RPs only once, and only after the Environmental Court in Civ. No. 1CCV-20-0001541, *Sierra Club v. BLNR*, modified the prior RPs for 2021 and ordered BLNR to hold a hearing “as soon as practicable.” Civ. No. 1CCV-20-0001541, Dkt. 400.^{1 2}

4. The Hawai‘i Supreme Court’s September 5, 2025, opinion in *Sierra Club* recognized that Sierra Club had standing to appeal BLNR’s decision to deny Sierra Club’s request for a CCH for the 2021 RP, and further held: (1) Sierra Club was entitled to a CCH as a matter of constitutional due process given (a) the importance of Sierra Club’s asserted protected property interest, (b) the changed circumstances between prior versions of the RPs and the challenged RPs, and (c) the continuation of the RPs

¹ The Supreme Court affirmed this decision in *Sierra Club*.

² The Environmental Court also ordered a CCH for the prior 2023 RPs in Civ. No. 1CCV-22-0001506, *Sierra Club v. BLNR*, at Dkts. 1595 and 1637, however this CCH was never conducted. BLNR delayed appointing a hearings officer for more than one year, see n.14 *infra*, until the Intermediate Court of Appeals granted a stay pending appeal in consolidated CAAP Nos. CAAP-24-0000113 & CAAP-24-0000114 on mootness grounds, then ultimately reversed, see CAAP-24-0000114 at Dkts. 69, 101, prior to the publication of *Sierra Club*. The Supreme Court accepted certiorari in SCWC-24-0000113, and its decision remains pending.

for over twenty years; and (2) Sierra Club's participation in a prior bench trial and BLNR public meetings did not provide reasonable protection from the risk of erroneous deprivation of its protected property interest. *Sierra Club*, 156 Hawai'i at 396-397, 575 P.3d at 486-487.

5. Just three months after the issuance of *Sierra Club*, on December 12, 2025, BLNR again summarily denied Sierra Club's request for a CCH for the 2026 RP, with then-Chair Chang stating that BLNR "weigh[ed] the different government interests, including ensuring uninterrupted water for municipal purposes . . . as well as supporting agriculture, balanced against the interests that have been asserted by . . . Sierra Club[.]" Dkt. 48, CROA at 0542-43.

6. The Chair's brief statement of the government's interests did not purport to deny Sierra Club's CCH request for lack of standing.³ Yet as in past appeals, BLNR again disputes Sierra Club's standing, and again disputes Sierra Club's entitlement to a CCH as a matter of constitutional due process.

SIERRA CLUB WAS ENTITLED TO A CCH AS A MATTER OF DUE PROCESS

7. It is well-settled that because the right to a "clean and healthful environment" is expressly protected by Haw. Const. art. XI § 9, courts apply a "**less rigorous** standing requirement . . . in environmental cases." *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 320, 167 P.3d 292, 313 (2007) (*Superferry*) (emphasis added). The "appellate courts of this state have generally recognized public interest

³ In fact, Chair Chang's motion to deny the written request for a CCH included remarks explicitly "recognizing that both Nā Moku and Sierra Club have interests and have asserted what their harms are – recreational use, impacts to customary practices." Dkt. 48, CROA at 0542.

concerns that **warrant the lowering of standing barriers** in . . . cases . . . pertaining to environmental concerns.” *Id.* (emphasis added) (citing *Citizens for Prot. of North Kohala Coastline v. County of Hawai‘i*, 91 Hawai‘i 94, 100–01, 979 P.2d 1120, 1126–27 (1999) (“Where the interests at stake are in the realm of environmental concerns, **we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.**”) (brackets and internal quotation marks removed, emphasis added). “[T]here [is] no requirement that the[] asserted injury be particular to the plaintiffs, and the court will recognize harms to plaintiff[']s environmental interests as injuries that may provide the basis for standing.” *Id.* (emphasis added).

Indeed, “[o]ne whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because **justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.**” *Mahuiki*, 65 Haw. at 512–13, 654 P.2d at 878 (quoting *East Diamond Head Association v. Zoning Board of Appeals*, 52 Haw. 518, 523 n. 5, 479 P.2d 796, 799 n. 5 (1971) (citations omitted)). See also [. . .] *Life of the Land*, 63 Haw. at 176–77, 623 P.2d at 441 (group members had standing to invoke judicial intervention of LUC’s decision “**even though they are neither owners nor adjoining owners of land reclassified** by the Land Use Commission in [its] boundary review”); *Life of the Land*, 61 Haw. at 8, 594 P.2d at 1082 (group members who lived in vicinity of reclassified properties and used the subject area for “diving, swimming, hiking, camping, sightseeing, horseback riding, exploring and hunting and for aesthetic, conservational, occupational, professional and academic pursuits,” were specially, personally and adversely affected by LUC’s decision for purposes of HRS § 91–14).

Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n, State of Hawai‘i, 94 Hawai‘i 31, 42–43, 7 P.3d 1068, 1079–80 (2000) (emphasis added).

8. This Court has already found that Sierra Club as an organization is experiencing irreparable harm in the form of insufficient streamflow, because (i) in 2022, the Commission on Water Resource Management (“**CWRM**”) recognized that several

East Maui streams are not experiencing sufficient streamflow to protect instream uses, (ii) CWRM ordered that extensive modifications be made to the EMI irrigation system as a result, and (iii) those modifications have not been completed. Dkt. 201 at 4-7. Those straightforward facts are enough to establish harm to the organization's recreational, aesthetic, spiritual, and cultural interests; inadequate streamflow is precisely the type of broad injury that need not be particularized in a way that differentiates the organization from members of the general public who use and enjoy the affected streams. EMI's failure to implement the ordered modifications was expressly identified as a source of Sierra Club's asserted injuries in its Petition for a CCH. See Dkt. 150, CROA at 9806.⁴

9. Sierra Club's recreational, aesthetic, spiritual, and cultural interests in East Maui streams constitute "a constitutionally protected property interest in a clean and healthful environment based on our state's constitution, article XI, section 9[.]" *Sierra Club* at 391, 575 P.3d at 481. Our courts

have long recognized that 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. If a party demonstrates a constitutionally protected property interest affected by a government agency's decision, that party has a due process right to notice and an opportunity to be heard **at a meaningful time and in a meaningful manner**.

. . .

⁴ Moreover, on October 29, 2025, just two months prior to BLNR's renewal decision for the 2026 RP, this Court issued its Opinion on Appeal in Civ. No. 1CCV-22-0000794, *Sierra Club v. BLNR*, which adopted instructions to BLNR, including: "[e]nsure that CWRM's interim instream flow standards are in place and fully implemented before allowing more water to be taken from east Maui streams." Civ. No. 1CCV-22-0000794, Dkt. 1514 at 4. The DLNR Staff Submittal for the 2026 RP reported this instruction, among others, for BLNR's consideration at its December 12, 2025 Meeting. Dkt. 30, CROA at 0009.

In *Sandy Beach*, th[e] court reiterated that determining what specific procedures are required to protect a party's due process rights involves the balancing of three factors: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the procedures actually used and the protective value of additional or alternative procedures; and (3) the government's interest, which includes the burden created by more procedure than what was given. 70 Haw. at 378, 773 P.2d at 261.

Sierra Club at 394–95, 575 P.3d at 484–85 (citations and quotation marks omitted) (citing *Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)).

10. This year, Appellees argue that no CCH was required for the 2026 RP as a matter of due process because (1) *Sierra Club's constitutionally protected property interest* is “limited,” (2) there is low risk of erroneous deprivation of that interest because of *Sierra Club's* past participation in public and stakeholder meetings, the bench trial held in Civ. No. 19-1-0019 and the Court-ordered 2021 CCH, and (3) the government has a prevailing interest in “ensuring the continued delivery of water to the County.” See Dkt. 346 at 10 at 17; Dkt. 348 at 25 (stating “*Sierra Club ha[s] already received years of process[.]*”) (emphasis added).

11. On the first *Sandy Beach* factor, Appellees' description of Sierra Club's aesthetic and recreational interests as "minimal" is entirely contrary to well-settled environmental case law⁵ and the express holdings of *Sierra Club*.⁶

12. On the second *Sandy Beach* factor, *Sierra Club* already held that "[t]he bench trial on the 2019 and 2020 RPs and BLNR's November 2020 public meeting on the RPs did not provide a sufficient safeguard and procedural protection of Sierra Club's constitutionally protected property interest from erroneous deprivation." *Sierra Club* at 395, 575 P.3d at 485.

13. Two new significant circumstances have arisen since the ROA that formed the basis for the decision in *Sierra Club*, but neither support the conclusion that a CCH was not required for the 2026 RP.

a. First, as noted previously, in 2021, BLNR held the Court-ordered CCH for the 2021 and 2022 RPs; however, this Court reversed the 2022 Board Decision arising out of the 2021 CCH on the express "finding that BLNR breached its public trust

⁵ The conservation mandates of Haw. Const. art. XI §§ 1 & 7 codified the public trust into Hawai'i State constitutional law. *In re Water Use Permit Applications (Waiāhole)*, 94 Hawai'i 97, 131, 9 P.3d 409, 443 (2000). The public trust recognizes "enduring public rights in trust resources separate from, and superior to, the prevailing private interests in the resources at any given time." *Id.* at 138, 9 P.3d at 450 (emphasis added). Among the constitutionally protected public trust uses is "the **maintenance of waters in their natural state**," which the Supreme Court expressly held "**constitutes a distinct 'use' under the water resources trust[,]. . . dispos[ing] of any portrayal of retention of waters in their natural state as 'waste.'**" *Waiāhole*, 94 Haw. at 136–37, 9 P.3d at 448–49 (citing *Reppun v. Bd. of Water Supply*, 65 Haw. 531, 560 n. 20, 656 P.2d 57, 76 n. 20 (describing Haw. Const. art. XI § 1 as an acknowledgment of the public interest in "a free-flowing stream for its own sake"))).

⁶ See *Sierra Club* at 396, 575 P.3d at 486 ("given the *importance* of the water resources at issue, and *Sierra Club's property interests at stake*, a BLNR public hearing was an inadequate safeguard and fell short of a contested case hearing's meaningful opportunity to be heard.")

duties because it failed to address and, as such, failed to protect traditional and customary Native Hawaiian rights/practices.” Civ. No. 1CCV-22-0000794, Dkt. 1514 at 3-4. Four years have passed since the reversed Decision with no further attempts at holding a CCH prior to BLNR authorizing continued water diversions from East Maui streams.

b. Second, in November 2022, CWRM adopted interim instream flow standards (“**IIFS**”) for streams in the Huelo region of East Maui. Dkts. 49-50, CROA at 0725-0733; Dkt. 53, CROA at 0786-0792. However, BLNR acknowledges in this appeal that “the specific modifications to diversion structures ordered by CWRM in November 2022 have not been completed and EMI is still seeking the requisite permits required to make the modifications.” Dkt. 24 at 13 ¶ 69. It is precisely this failure to implement CWRM’s ordered modifications that forms the basis for Sierra Club’s continued injury and standing for this appeal. See Dkt. 201 at 4-6.

14. BLNR’s argument that Sierra Club has been given “years of process” through its past litigation and through its submission of public testimony misses the mark entirely. What BLNR describes as “years of process,” Dkt. 348 at 25, is in fact years of Sierra Club fighting for its fundamental right to participate in important decision-making *after the fact*, not at the “meaningful time” required by due process. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai’i 376, 391, 363 P.3d 224, 239 (2015) (CCH procedures “are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made”) (emphasis in original); *Sierra Club* at 395–96, 575 P.3d at 485–86 (“adversarial testing of evidence and challenging of witnesses simply does not occur in a public meeting calling for

commentary”). The Supreme Court flatly rejected this same line of reasoning in *Sierra Club*. *Id.* at 395, 575 P.3d at 485.

15. On the third *Sandy Beach* factor, Appellees argue that BLNR appropriately “weigh[ed] the different government interests, including **ensuring uninterrupted water** for municipal purposes . . . as well as supporting agriculture[.]” Dkt. 48, CROA at 0543 (emphasis added); Dkt. 346 at 14.⁷

16. BLNR describing the governmental interest as “ensuring uninterrupted water” diversions is indicative of both (a) a misreading of Sierra Club’s request for a CCH, which did *not* request that water diversions be cut off or request that the RP be allowed to expire during the pendency of a CCH;⁸ and (b) an apparent misunderstanding that each year’s East Maui RP renewal is an “all or nothing” decision,

⁷ BLNR also argues that “Sierra Club’s asserted desire to cross-examine witnesses is not significant enough to put the Board and staff (and taxpayers) to the substantial time and expense of a contested case hearing.” Dkt. 348 at 25. This argument, too, was expressly rejected in *Sierra Club* at 397, 575 P.3d at 487. As Judge Crabtree wrote in 2021 (and as was affirmed in *Sierra Club*):

The court well understands the challenge of time and resources in ensuring due process; however, **minimizing or denying persons or organizations their established due process rights is not a solution** to those challenges. The related argument that due process rights should not apply to revocable permits because those permits are so short-lived that a [CCH] cannot be held quickly enough is also not persuasive, especially where the short-term permits are repeatedly extended.

Civ. No. 1CCV-20-0001541, *Sierra Club v. BLNR*, Dkt. 400 at 6 ¶ 11 (emphasis added).

⁸ Rather, Sierra Club requested “[a] cap [to] help ensure that too much water is not taken from streams.” Dkt. 150, CROA at 9808. Sierra Club represented that its proposal was “not [] to bankrupt Mahi Pono” or to let “all their crops die,” but rather to reduce the cap temporarily “*until these complicated issues are resolved*,” because that amount “is what [Mahi Pono] used in 2025, so [BLNR would] not [be] cutting ag off at the knees.” Dkt. 48, CROA at 523-24 (emphasis added).

with BLNR's only two choices being (1) approving continued diversions at the rate recommended by staff, or (2) allowing expiration of the RP and zero water diversions, including zero drinking water for Upcountry residents.⁹

17. To be sure, BLNR has a valid government interest in supporting diversified agriculture and ensuring municipal needs are met; but BLNR's articulation of this interest as *requiring* "uninterrupted water" diversions improperly framed the issue in a way that practically assured that Sierra Club's request for a CCH could not be granted, and the request for renewal of the RP could not be denied. On the contrary, despite the fact that these yearly RPs deal with "existing" diversions, BLNR must "take the initiative in planning . . . before demand . . . heightens the temptation simply to accept renewed diversions as a foregone conclusion." *Waiāhole*, 94 Hawai'i at 149, 9 P.3d at 461.

18. Given that the circumstances previously determined to entitle Sierra Club to a CCH on similar records have remained largely unchanged, Sierra Club was again entitled to a CCH prior to the issuance of the 2026 RP, as a matter of constitutional due process.

19. At oral argument, the Court asked counsel for BLNR, frankly, why BLNR has taken a seemingly entrenched position against holding a CCH on East Maui RPs. Counsel represented that since *Mauna Kea Anaina Hou*, 136 Hawai'i at 380, 363 P.3d at 228 (holding that BLNR's approval of a permit *before* a CCH was held violated due

⁹ As Mahi Pono and EMI articulate the issue, BLNR was "[c]onfronted with the [yearly] choice of (1) granting Sierra Club's request for a CCH and *cutting off the diversions* of water authorized by the 2025 RP; or (2) denying Sierra Club's request for a CCH and *ensuring the continued delivery of water* to the County for municipal and domestic purposes and central Maui for Mahi Pono's diversified agriculture crops." Dkt. 346 at 16-17 (emphasis added).

process), BLNR has taken the position that DLNR cannot simultaneously hold a CCH while granting a permit. Again, this framing of the issue presupposes that renewal of the temporary RP for an additional year *cannot* be denied under any circumstances. Moreover, in *Sierra Club* the Supreme Court expressly relied on *Mauna Kea Anaina Hou* in holding that “constitutional due process required that Sierra Club’s [CCH] should have been held prior to BLNR’s renewal of the RP[.]” *Sierra Club* at 398, 575 P.3d 472. If the issue is actually about allowing BLNR sufficient time to consider granting a CCH and arranging for that CCH to take place prior to a requested renewal, then the Court sees no reason why BLNR simply cannot place the RP renewal on its agenda earlier than the eve of the RP’s expiration, particularly “[g]iven the duration, magnitude, and nature of the uses authorized[.]” *Carmichael*, 150 Hawai‘i at 572, 506 P.3d at 236.

20. As in prior appeals, “constitutional due process required that Sierra Club’s contested case hearing should have been held *prior* to BLNR’s renewal of the RP[.]” in order to ensure that Sierra Club had an opportunity to be heard at a meaningful time. *Sierra Club* at 398, 575 P.3d at 488 (emphasis added).

BLNR’S RENEWAL OF THE RP FOR 2026 MUST BE REVERSED FOR
BREACH OF THE PUBLIC TRUST

21. Per HRS § 91-14(g)(1), (3), and (4), the Court may “reverse or modify [BLNR’s] decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: (1) [i]n violation of constitutional or statutory provisions; . . . (3) [m]ade upon unlawful procedure; [or] (4) [a]ffected by other error of law[.]”

22. Here, BLNR’s renewal decision for the 2026 RP must be reversed, because BLNR breached its public trust duties by (1) failing to render independent

findings for the identification and protection of Native Hawaiian traditional and customary practices, and (2) failing to operate with a presumption in favor of public use and access to the water resources at issue.

23. “Traditional and customary Native Hawaiian rights [] are a protected water use under the state water resources trust.” *Surface Water Use Permit Applications, Integration of Appurtenant Rts. & Amends. to Interim Instream Flow Standards*, 154 Hawai‘i 309, 349, 550 P.3d 1167, 1207 (2024). “[S]tate agencies . . . may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” *Ka Pa‘akai*, 94 Hawai‘i at 46, 7 P.3d at 1083.

24. “In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible,” when presented with a proposed RP renewal, BLNR

must—at a minimum—make specific findings and conclusions as to the following: (1) the identity and scope of “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by [BLNR] to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa‘akai, 94 Hawai‘i at 47, 7 P.3d at 1084 (footnotes omitted) (bold emphasis added).

25. On this appeal, BLNR argues that it did not violate its duties under *Ka Pa‘akai* because its 2026 RP renewal decision “incorporated and relied on” CWRM’s 2018 IIFS Decision and Order, which “identified potential traditional and customary practices related to the streams, acknowledged those practices to the extent there was evidence they existed (or assumed that they did), stated that the practices were harmed

by diversions, and then took actions in the form of setting IIFS to mitigate the harm.”
See Dkt. 348 at 30-31.

26. DLNR’s Staff Submittal for the December 12, 2025, Meeting recommended that BLNR “[a]dopt the findings of 2018 [CWRM] Decision and Order regarding traditional and customary practices.” Dkt. 30, CROA at 21.¹⁰ DLNR’s Staff Submittal reasoned that “[i]nstream uses, including traditional and customary practices, are protected by the IIFS. Thus, the diversions do not affect protected instream uses.” *Id.*, CROA at 19. There are at least two significant weaknesses in BLNR’s argument.

27. First, CWRM’s 2018 IIFS did not include several streams from the Huelo region that are covered by the 2026 RP. See *generally* Dkt. 112 (CWRM 2018 Decision). Those Huelo region streams were addressed by CWRM’s 2022 IIFS. See Dkts. 49-50 (CWRM 2022 Staff Submittal) and 53, CROA at 792 (CWRM 2022 Minutes) (adopting 2022 Staff Submittal).¹¹ Thus, even assuming that the setting of IIFS alone protects traditional practices—an assumption unsupported by any evidence—adopting findings from the 2018 Decision did not discharge BLNR’s obligation to identify

¹⁰ It is noteworthy that BLNR took no issue with the idea that adopting information compiled six years prior to the effective date of the RP would sufficiently discharge its public trust obligations, yet on this appeal BLNR essentially argues that Sierra Club must re-establish its standing anew every year, despite the organization being well known to the agency as a “stakeholder” on these recurring issues. See Dkt. 348, BLNR AB, at 13 (“The 2026 RP and recent predecessor RPs required monthly meetings by a stakeholder committee of which Sierra Club is a designated member and regular participant.”).

¹¹ BLNR purportedly conditioning the 2026 RP on compliance with CWRM’s 2022 IIFS for the Huelo region was also insufficient to protect traditional and customary practices given BLNR’s clear admission in this appeal that the ditch system modifications ordered pursuant to CWRM’s 2022 IIFS are not fully implemented.

traditional and customary practices that may be affected by diversions on Huelo region streams.

28. Second, reliance on CWRM's 2018 Decision and Order for an analysis on traditional and customary practices (1) impermissibly evades BLNR's affirmative obligation to conduct an independent analysis and (2) overlooks relevant information from EMI's own Final Environmental Impact Statement ("**FEIS**") for a proposed long-term water lease for the RP area, published and accepted by BLNR in 2021, and highlighted in DLNR's Staff Submittal for the 2026 RP. See Dkt. 30, CROA at 8. The Cultural Impact Analysis referenced in the FEIS is extensive and highlights the importance of all of the East Maui streams not only to traditional farming, fishing, subsistence, and gathering of native species, but also to cultural sites and mythology. See 2021 FEIS, Dkt. 55, CROA at 1177-1274.

29. For those reasons, BLNR did not discharge its public trust obligations, as mandated by *Ka Pa'akai*, to make findings (1) identifying the traditional and customary practices in the RP area, (2) identifying the extent to which they are impacted by stream diversions, and (3) the feasible action to be taken to reasonably protect them.

30. Additionally, per *Frankel v. Board of Land & Natural Resources*, 155 Hawai'i 358, 369–70, 564 P.3d 1157, 1168–69 (App. 2025),

Competing interests must be assessed on a case-by-case basis. **Any balancing between public and private purposes begins with a presumption in favor of public use, access, and enjoyment.** This is consistent with the 1978 Constitutional Convention delegates' definition of "conservation," which is "the *protection, improvement and use* of natural resources according to principles that will assure their *highest economic or social benefits*." In short, the object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of trust resources, with full recognition that **resource protection also constitutes 'use.'**

Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources. The trust also requires planning and decisionmaking from a global, long-term perspective.

Increasingly important is our supreme court's recognition that, although the public trust doctrine is elastic and responsive to ever-shifting conditions, **the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction.** If the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and **superior to**, the prevailing private interests in the resources at any given time.

It logically follows that **a higher level of scrutiny for private commercial uses applies.**

Finally, **where the record demonstrates considerable conflict or uncertainty in the evidence, the agency must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected.** In sum, the state 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. The agency's basis must be set forth with such clarity as to be understandable.

Frankel, 155 Hawai'i 358, 369–70, 564 P.3d 1157, 1168–69 (quoting *Waiāhole*, 94 Hawai'i at 142–64, 9 P.3d at 454–76) (quotation marks, brackets, and pin cites omitted) (emphasis in bold and underlines added). Indeed, the Supreme Court in *Waiāhole* expressly stated that “any balancing of competing interests in water . . . stops short of embracing private commercial use as a protected ‘trust purpose.’” *Waiāhole*, 94 Hawai'i at 138, 9 P.3d at 450.

31. In its Answering Brief, Mahi Pono cites to *Waiāhole* for the proposition that diversified agriculture is a protected trust purpose under Haw. Const. art. XI § 3. The

Waiāhole Court did state that “as a general matter, water use for diversified agriculture on land zoned for agriculture is consistent with the public interest. Such use fulfills state policies in favor of reasonable and beneficial water use, diversified agriculture, conservation of agricultural lands, and increased self-sufficiency of this state.”

Waiāhole, 94 Hawai‘i at 162, 9 P.3d at 474 (citing Haw. Const. art. XI, §§ 1 & 3; HRS § 174C–2(c)). That diversified agriculture is consistent with the public interest as a general policy matter, however, does not obligate the State or its agencies to authorize stream diversions for off-stream private use as a matter of course, or otherwise defeat the presumption in favor of public use and access. As the Supreme Court reiterated in *Carmichael*:

We find no merit in the [Appellees]’ argument that the BLNR’s 2014 continuation decision was issued in accordance with the public trust doctrine. As this court has held—and as the BLNR recognized in a 2007 order issued in the contested case proceedings—“**private commercial use**” is not “a protected ‘trust purpose.’” [*Waiāhole*], 94 Hawai‘i at 138, 9 P.3d at 450. Thus, the fact that some of the water would be used for public purposes does not necessarily justify the continued use of the remaining water for commercial purposes.

Carmichael, 150 Hawai‘i at 566 n.33, 506 P.3d at 230 n.33 (emphasis added).

32. At minimum,

where the record demonstrates considerable conflict or uncertainty in the evidence, the agency must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected. In sum, the state 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. The agency’s basis must be set forth with such clarity as to be understandable.

Frankel, 155 Hawai‘i at 370, 564 P.3d at 1169 (citations omitted). On this record, the underlying facts surrounding alleged impacts of the authorized stream diversions on

aesthetic, recreational, traditional, and cultural interests remain hotly contested. Before rejecting the opposing testimony submitted by Sierra Club that streams are still running dry even after CWRM's IIFS decisions,¹² BLNR was therefore required to make clear factual findings, particularly where Sierra Club's request for a CCH was denied. Because BLNR (1) did not begin with a presumption in favor of public use, and (2) did not articulate clear factual public trust findings addressing opposing evidence, the RP renewal also breached the public trust for these reasons.

33. In sum, because Sierra Club was entitled to a CCH *prior to* the renewal decision, the 2026 RP was already invalid for unlawful procedure. *See Sierra Club* at 399, 575 P.3d at 489 (noting “the Environmental Court was faced with RPs that had been renewed pursuant to a constitutionally unlawful procedure that had to be vacated.”). The renewal decision must also be reversed for breach of the public trust for failure to make independent findings on Native Hawaiian traditional and customary practices, and for failure to weigh competing interests with a presumption in favor of public use—at a minimum with clear factual findings.

ORDER

34. Based on the foregoing, pursuant to HRS § 91-14(g)(1), (3), and (4), the Court **REVERSES** BLNR's decision to renew the RP for 2026 and **REMANDS** to BLNR for the CCH required by due process to be held on the RP as soon as practicable.

¹² See Dkt. 42, CROA at 0212 (stating that “no one has assessed the impact of the diversions on the Huelo streams – where lo'i remain completely dry.”).

35. Given the repeated violations of due process and/or the public trust with respect to prior renewals of the RP at issue,¹³ and given the history of delays in prior RP appeals,¹⁴ the Court imposes the following deadlines and instructions regarding the scope and minimum requirements of the CCH.

a. To facilitate BLNR's conduct of the CCH as soon as practicable, BLNR shall schedule a prehearing conference, if desired per HAR § 13-1-36, no later than August 28, 2026; and convene the CCH no later than September 28, 2026;

b. If, per HAR § 13-1-32(b), BLNR determines that a hearings officer is to be appointed, BLNR shall appoint the hearings officer no later than September 4, 2026; ensure a prehearing conference is held no later than October 2, 2026; and ensure the CCH is convened no later than November 6, 2026.

¹³ *Carmichael*, 150 Hawai'i at 566, 506 P.3d 230 (stating that "BLNR continued the [RPs] 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.") (footnote omitted); Civ. No. 16-1-0052, *Nā Moku Aupuni O Ko'olau Hui v. BLNR*, Dkt. 102 (Court ruling that BLNR "improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku's request for a [CCH], failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A."); Civ. No. 1CCV-22-0000794, *Sierra Club v. BLNR*, Dkt. 1514 (Court reversing 2022 BLNR decision, finding that BLNR breached its public trust duties on five separate grounds); Civ. No. 1CCV-25-0000031, Dkt. 451 (finding "that BLNR renewed the RP for 2025 due to a constitutionally unlawful procedure").

¹⁴ *E.g.*, Civ. No. 1CCV-20-0001541, *Sierra Club v. BLNR*, Dkt. 291 (Court ordering CCH to be held "as soon as practicable" on May 28, 2021), Dkt. 418 (permittees noting that CCH had not been scheduled to begin until Dec. 8, 2021); Civ. No. 1CCV-22-0001506, *Sierra Club v. BLNR*, Dkt. 1595 (Court concluding that a CCH was required on June 16, 2023), Dkt. 1637 (Court formally remanding to BLNR with instructions to hold CCH on July 14, 2023), Dkt. 1859 (Sierra Club filing a motion to enforce court order on Aug. 22, 2024, on the grounds that BLNR had not yet convened the ordered CCH after the passage of more than one year); Civ. No. 1CCV-25-0000031, *Sierra Club v. BLNR*, Dkt. 432 (transcript of relevant Dec. 13, 2024 BLNR Meeting not completed and uploaded until Aug. 8, 2025).

Any party may request these deadlines to be moved, but the Court will modify this schedule only upon a showing of good cause.

c. Because the CCH will be held late in 2026, coinciding with the time required for the permittees to request renewal for 2027, the CCH shall address the RP for both calendar years **2026** and **2027**.

d. In rendering its final decision, BLNR must:

i. Ensure that CWRM's 2022 orders regarding modification of diversion structures are fully implemented before allowing an increase in the amount of water (i.e., an increase from the previous year's actual diversion amount) that may be diverted from east Maui streams; if the modifications are *not* fully implemented, then the applicant must explain to the satisfaction of BLNR, and BLNR must address in its decision:

1. Why the ordered modifications have been delayed;
2. The extent to which progress toward compliance has been made; and
3. How the applicant is mitigating non-compliant diversions to ensure continued streamflow in compliance with the IIFS.¹⁵

ii. Render clear and independent findings regarding Native Hawaiian traditional and customary practices.

¹⁵ The purpose of this instruction—modified from Sierra Club's original proposed instruction—is to mitigate harms to streamflow that continue to form the basis for Sierra Club's standing.

iii. Require the implementation of practical mitigation measures with the goal of maintaining or reducing current system losses, which are at 5.4%.¹⁶

e. If any party deems a status report necessary to inform the Court of any administrative proceedings, then any party may file a letter to that effect in the record and/or request a brief status conference.

f. If any of the above requirements are not met, then parties may be subject to an order to show cause as to why sanctions should not be imposed for non-compliance with the Court's order.

36. Pursuant to HRS §§ 604A-2 and 603-21.9, the Court exercises its general equity powers and inherent authority to **MODIFY** the 2026 RP during the pendency of the required CCH. *Sierra Club* at 400, 575 P.3d at 490; *Richardson v. Sport Shinko (Waikiki Corp.)*, 76 Haw. 494, 507, 880 P.2d 169, 182 (1994); *Jenkins v. Wise*, 58 Haw. 592, 598, 574 P.2d 1337, 1342 (1978).¹⁷ The RP is hereby modified as follows:

a. Surface Water Diversion Cap. Pursuant to this Court's prior Order Re: (1) Appellant Sierra Club's Motion to Stay a Portion of BLNR's Decision, Filed on January 26, 2026 [Dkt. 125] and (2) Appellant Sierra Club's Motion to Strike, Filed on

¹⁶ See Dkt. 348 at 10 n. 9; Dkt. 30, CROA at 0014 (DLNR staff calculated the current average system losses at approximately 5.4%). The 2026 RP currently allows system losses up to 22.7%; when 30 mgd of diversions are permitted, this allows significant losses up to 6.81 mgd.

¹⁷ As discussed in *Sierra Club*, as a matter of law, if the RP were to be vacated entirely, then the permittees would not be entitled to any continued water diversions at all. As a matter of equity, however, the Court may instead modify the RP, given the importance of the diverted water resources to the existing reliance interests of the County and the permittees. These reliance interests exist, of course, precisely because BLNR has renewed the RP at issue as a matter of course for over twenty years.

February 23, 2026 [Dkt. 174], filed on March 6, 2026 (Dkt. 201) (“**Stay Order**”), the Court granted Sierra Club’s motion to stay that portion of the 2026 RP “that authorized the diversion of 35.22 mgd of East Maui surface water (averaged annually) to Mahi Pono and EMI.” Dkt. 201 at 11 ¶ 4(a). In its place, the Court ordered “a surface water diversion cap of **30 mgd** (averaged monthly) from the East Maui streams subject to the RP.” *Id.* ¶ 4(b) (emphasis in original). This cap was not intended to “reduce or otherwise affect the County’s entitlement[.]” *Id.*¹⁸

By this Order, the Court sets a surface water diversion cap of **31.5 mgd** (averaged monthly)—including 6.5 mgd for the County’s municipal and domestic uses—which shall remain in effect through the conclusion of the CCH, up to the date and time that BLNR renders its final decision.¹⁹

If any party seeks to modify this cap, they may submit a motion to that effect at any time prior to the issuance of BLNR’s final decision. However, considerations regarding modification of this cap shall not modify the CCH schedule mandated above.

b. Expiration Date. Although the Court expects the CCH to be held expeditiously, the 2026 RP is currently set to expire on December 31, 2026, per HRS §

¹⁸ As clarified by the parties in the briefs for oral argument, the 2026 RP authorized the County to receive 6.5 mgd for municipal use, Dkt. 30, CROA at 0026, Dkt. 148, CROA at 009600, not the 6.25 mgd figure used by the Court in the Stay Order. See Dkt. 201 at 11, n.14.

¹⁹ As with BLNR’s original decision, this cap amount is a maximum that presumes compliance with CWRM’s IIFS decisions and orders. If actual stream conditions do not allow for 31.5 mgd to be diverted without meeting IIFS, then the permittees shall be required to reduce diversions further to comply with IIFS. See Dkt. 30, CROA at 0012. All additional protective conditions and reporting requirements originally ordered by BLNR, see *id.*, CROA at 0021-0025, also remain in effect for the duration of the RP.

171-55(a), which authorizes BLNR to renew temporary permits for “additional one year periods” only. Considering that this is a contested matter that will require careful attention from BLNR in conducting the CCH for calendar years 2026 and 2027 and in rendering its final decision after the receipt of evidence, the current expiration date may not allow for sufficient time to complete these tasks. Therefore, the Court exercises its equitable powers to **modify** the expiration date of the RP to the *earlier* of: (i) the date on which BLNR renders its substantive final decision on the RP for calendar years 2026 and 2027; (ii) July 16, 2027; or (iii) as may be further ordered by the Court.

37. At oral argument, the parties informed the Court that BLNR may be considering acting, imminently, on its long-stated intent to place the matter of a long-term lease of the water rights under the RP on its agenda,²⁰ or otherwise pursue a “set aside” to the County of Maui. If BLNR pursues the option of a long-term lease at public auction, then based on the parties’ representations, the Court understands that a separate CCH would be required. Because a long-term disposition is substantively different from a short-term RP, the Court therefore does not anticipate that the pursuit of a long-term disposition by lease via public auction will negate the requirement for the CCH ordered herein. If BLNR instead pursues a “set aside” to the County, then this Order may be mooted. If any party believes this Order to be mooted by any subsequent event, that party may file a motion.

²⁰ See Dkt. 30, CROA at 0009 (“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.”).

38. Pursuant to HRS § 91-14(i), this Court reserves jurisdiction as may be necessary to “appoint a master or monitor to ensure compliance with its orders.”

DATED: Honolulu, Hawai‘i, July 17, 2026.

/s/ Lisa W. Cataldo 

Judge of the Above-Entitled Court