JOSH GREEN, M.D.
GOVERNOR | KE KIAʻĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIAʻĀINA

STATE OF HAWAIʻI | KA MOKUʻĀINA ʻO HAWAIʻI
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA ʻOIHANA KUMUWAIWAI ʻĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RYAN K.P. KANAKAʻOLE
FIRST DEPUTY

DEAN D. UYENO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, March 12, 2024
2:00 PM
State Capitol, Conference Room 325 & Videoconference

In consideration of
SENATE BILL 3159, SENATE DRAFT 1
RELATING TO CONTESTED CASES

Senate Bill 3159, Senate Draft 1 proposes to clarify that a contested case hearing is not required when a tribunal has already issued a final decision and order in a contested case proceeding arising from the same factual situation that was not appealed, or where a court of last resort has already issued a final decision on the proceeding or on other substantially similar matters. **The Department of Land and Natural Resources (Department) supports this Administration measure.**

The Department requests that this Committee make an amendment to restore previous language deleted by the Senate Committee on Judiciary, which provided that a contested case may be denied when the cause of action, claim, controversy, issue, fact, or substantive law is identical or substantially similar to another administrative matter that has been finally adjudicated. Additionally, the Department requests that this Committee restore deleted language requiring that a denial of a contested case request identify the previous cause of action, claim, controversy, issue, fact, or substantive law and include findings that it was finally adjudicated. The Department requests amending page lines 1 through 6 as follows:

> (j) A contested case hearing may be denied when a requesting party alleges or raises a cause of action, claim, controversy, issue, fact, or substantive law that is identical**, substantially similar,** or arising from the same factual situation as another administrative matter that has been finally adjudicated as follows:

The Department further requests page 5, lines 18 through 21 be amended as follows:

> (k) A denial issued pursuant to this section shall **identify the previous administrative matter and reference the previous cause of action, claim, controversy, issue, fact, or substantive law and include findings that it was finally adjudicated** ~~include the agency's findings of facts and conclusions of law within the body of the decision; provided that a previous contested case may be utilized in whole or in part~~.

The Department believes that limiting the scope of the measure to identical matters would be too narrow. Under that scenario, even if there are minor, non-material differences that would not result in a different finding or decision from a matter that has been finally adjudicated, an agency would still be required to conduct a contested case hearing. For example, an owner in building A files a contested case request complaining that allowing the construction of building B seaward of building A blocks the owner's view plain. The case is adjudicated to finality and concludes the owner in building A does not have a legal right to a seaward view plain from his unit. If this legislation was limited to "identical" claims, another owner in building A living in a different unit on a different floor with a different view plain to the ocean may complain about its view plain being blocked, and the agency may again be required to hold another contested case proceeding for this owner and any other complaining unit owner in building A. This legislation seeks to limit these types of similar but not identical cases from seemingly endless litigation which can be extremely costly and time consuming for all parties. It is worth noting that the Legislature attempted to address the issue of multiple contested cases in Act 61, Session Laws of Hawaii 2014. Section 6 of Act 61, inter alia, limits the appeal of HCDA's final decision on a developer's proposal to develop lands directly to the Supreme Court and to only persons aggrieved by the decision.

This bill would prevent the re-litigation of decided matters in the contested case process, while also protecting due process of a party seeking a contested case for a matter that has not previously been adjudicated. The bill utilizes the same well-established criteria for the preclusion of relitigating issues in our courts and applies them to the administrative contested case process.[1] Requiring agencies to hold multiple contested case hearings on matters that are substantially similar impedes agencies from acting to address critical issues and is unduly burdensome on agency staff and financial resources. Additionally, having multiple contested cases on substantially similar matters could lead to conflicting decisions and greater legal ambiguity. Finally, the Department emphasizes that a party that believes they have been erroneously denied a contested case can still appeal such denial to the appropriate court.

Thank you for the opportunity to testify on this measure.

[1] From what staff understands, there does not appear to be any legal authority, either statutory or case law, that specifically applies the collateral estoppel or res judicata doctrines to administrative proceedings conducted pursuant to Chapter 91, Hawaii Revised Statutes.

SB-3159-SD-1
Submitted on: 3/11/2024 10:00:28 AM
Testimony for JHA on 3/12/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Russell Tsuji	Department of Land and Natural Resources	Support	Remotely Via Zoom

Comments:

Written testimony from DLNR previously submitted on another Capitol account. Request for a Zoom link for additional DLNR staff testifying remotely for SB3159 SD1.

EARTHJUSTICE

REPRESENTATIVE DAVID A. TARNAS, CHAIR
REPRESENTATIVE GREGG TAKAYAMA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

TESTIMONY IN **OPPOSITION** TO SENATE BILL 3159 SD1,
RELATING TO CONTESTED CASES

March 12, 2024, 2:00 p.m.
Room 325
State Capitol
415 South Beretania Street

Dear Chair Tarnas, Vice-Chair Takayama, and Members of the House Committee Judiciary & Hawaiian Affairs:

Earthjustice ***opposes* SB 3159 SD1**. First and fundamentally, based on our decades of direct practice and experience in the administrative process, this bill is **unnecessary** since Hawai'i case law already makes amply clear that parties cannot relitigate matters in agency proceedings. Further, even with the edits in the SD1, the language remains **vague and overbroad** and would contrarily lead to more litigation and delays and deny access to justice.

At the Chair's suggestion during the previous hearing on the companion bill, HB 2470, Earthjustice has attempted to communicate with DLNR to understand why this bill is necessary to begin with, as well as how it would address any purported need. While we have shared information with DLNR on the relevant legal principles (which we also provide in this testimony), we still have not received any helpful response. In the absence of open and meaningful information and dialogue on these issues, ***we continue to recommend that this bill be held***.

As we have previously shared with this Committee, the Hawai'i Supreme Court has already made clear in *Flores v. Board of Land and Natural Resources*, 143 Hawai'i 114, 424 P.3d 469 (2018), that parties do not have a right to multiple contested cases on the same matter where they already have been afforded a full and fair opportunity to participate in a contested case hearing. *See id.* at 126-28, 424 P.3d 481-83. The court recognized the duplicative administrative burden and the lack of further protective value of such additional proceedings. It is unclear how this bill relates to this already established law and what, if anything, it seeks to further contribute in this regard.

Further, it is settled that the legal principles of res judicata and collateral estoppel apply in the agency adjudication context, which makes it even clearer that parties cannot relitigate the same matter before an agency. The Hawai'i Supreme Court has long recognized: "The

doctrines of res judicata and collateral estoppel also apply to matters litigated before an administrative agency." *Santos v. State, Dept. of Transp.*, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982). We have also pointed this out to DLNR, yet have not received a meaningful response to why this bill is needed when the law is already clear.

If the purpose of the bill is to specifically "codify" the doctrine of res judicata in chapter 91 (which again, isn't necessary given the settled law), then the testimony, bill, and legislative commentary should precisely reflect that intent. The long-established standard for res judicata requires: (1) the issue decided in the prior adjudication is **identical** with the one in the current action; (2) there was a final judgment on the merits; and (3) the current party is in "privity" with the party in the prior adjudication. *Foytik v. Chandler*, 88 Hawai'i 307, 315, 966 P.2d 619, 627 (1998) (emphasis added). *See also Vest v. Bd. of Educ.*, 455 S.E.2d 781, 785 (W. Va. 1999) (emphasizing that the "**identicality** of the issues litigated is a key component to application of administrative res judicata or collateral estoppel") (emphasis added).

The original bill language provided for denial of a hearing where a party raises a "cause of action, claim, controversy, issue, fact, or substantive law that is identical or substantially similar" to another matter. The SD1 modifies "or substantially similar" to "or arising from the same factual situation." Both versions of this language go beyond the governing standard for res judicata. Such terms could be used to eliminate any number of valid and entitled legal processes where an agency claims a case includes an "issue" or "fact" that is "substantially similar" or "the same factual situation" as another case, which could even extend to separate proceedings in different agencies.

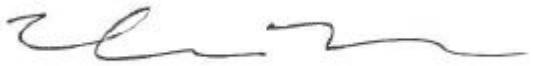
Based again on our decades of experience with agency proceedings, such expansive language is ripe for confusion and abuse. It also could be legally problematic where, for example, the Hawai'i Supreme Court has recognized that all agencies have constitutional duties to protect Native Hawaiian rights and public trust resources; yet this bill could purport to allow one agency to immunize all other agencies from being held accountable to their own duties. This would run afoul of these constitutional-level protections.

Finally, we continue to oppose the addition of agency proceedings to the "vexatious litigant" statute in section 3 of the bill. This amendment appears to include agencies in the definition of "court" in the statute, thus granting agencies the power to sanction and disqualify parties in litigation. This would be an unprecedented and inadvisable expansion of this law, which again could invite abuse and have a chilling effect on legitimate citizen participation in the administrative process.

In conclusion, the contested case process is meant to broaden citizen participation and access to justice, but SB 3159 SD1 goes overboard in the opposite direction. Because the bill is fundamentally unnecessary, as well as unclear and unproductive, Earthjustice opposes it and

respectfully requests that it be held. Mahalo nui for this opportunity to testify. Please do not hesitate to contact us with any further questions or for further information.

Isaac H. Moriwake, Esq.



Managing Attorney
Earthjustice, Mid-Pacific Office

SIERRA CLUB OF HAWAIʻI

HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

March 12, 2024 2:00 PM Conference Room 325

In OPPOSITION to SB3159 SD1: Relating to Contested Cases

Aloha Chair Tarnas, Vice Chair Takayama, and Members of the Committee,

On behalf of our over 20,000 members and supporters, the Sierra Club of Hawaiʻi **OPPOSES** SB3159 SD1, which would encourage agencies to withhold constitutional due process in favor of administrative convenience – forcing petitioners to resort to the court system to assert their constitutional rights, and/or chilling access to justice for those with the least means to litigate.

The Sierra Club of Hawaiʻi notes that the primary proponent of this measure, the Department of Land and Natural Resources (DLNR), has a long history of elevating administrative convenience over the clear constitutional due process rights of petitioners, including the Sierra Club. For example, in May 2021, the Environmental Court rejected the DLNR's denial of the Sierra Club's request for a contested case hearing in 2020, when the DLNR's issuance of revocable permits for East Maui failed to account for our members' traditional and customary rights, and their clearly established riparian, domestic, aesthetic, and recreational interests in East Maui's streams. Even after the May 28, 2021 order, the DLNR failed to hold a prehearing conference for over 5 months, and did not hold an evidentiary hearing to take testimony until December of that year. DLNR subsequently denied the Sierra Club's contested case hearing request on its approval of East Maui revocable permits in 2022, despite substantial new information regarding the impacts of these permits on our members' legal rights and interests. Unsurprisingly, the Environmental Court in June of 2023 rebuked the DLNR's summary 2022 dismissal of our contested case request, stating that the agency's denial of the Sierra Club's right to a meaningful opportunity to be heard **"offends the constitution,"** and again ordering that a contested case hearing be held. **As of today, nearly nine months later, the court-ordered contested case has yet to be initiated.**

Notably, rather than complying with the Environmental Court's 2023 order to hold a contested case in a timely manner, the DLNR and Attorney General have instead used their resources to exploit the Maui wildfire tragedy, and submit **patently false** claims about "insufficient water" in Central Maui to the Hawaiʻi Supreme Court,[1] in an attempt to roll back the Environmental Court

[1] Wayne Tanaka, *State-Aided Disaster Capitalism? Governor's administration targets stream, groundwater protection in the wake of Maui wildfires as water protectors fight back*, KA WAI OLA NEWS, Oct. 1, 2023, *available at* https://kawaiola.news/aina/state-aided-disaster-capitalism/.

judge's limitation on the amount of water that can be diverted from East Maui pending the completion of the still-uninitiated contested case.[2]

While this measure, as well as its companion, cannot legally override the constitutional rights of Hawai'i's citizens, it would nonetheless encourage the DLNR and potentially other agencies to adopt or continue the practice of summarily denying petitioners' access to meaningful due process in the assertion of their rights, for mere administrative convenience.[3] This potential is well illustrated by the DLNR's demonstrated willingness to violate or infringe upon the Sierra Club's constitutional rights through explicit out-of-hand denials of our legitimate contested case requests, and by unreasonably delaying contested case hearings for months after court orders that had rebuked such denials. This measure therefore would only result in legal confusion, additional and unnecessary litigation over constitutional due process issues, and the restriction of petitioners' access to justice – particularly for those petitioners who are least able to afford to litigate, simply to uphold their constitutional rights.

Accordingly, we respectfully urge the Committee to **HOLD** this measure. Mahalo nui for the opportunity to testify.

[2] The Environmental Court's modest 31.5 million gallon per day cap on East Maui stream diversions was specifically to "ensure compliance with its orders." First Circuit Court, Sierra Club v. BLNR, *et al*.; 1CCV-22-0001506 (JPC), Decision on Appeal; and Interim Modification of Permits Pursuant to HRS 91-14(g).
[3] The Sierra Club emphasizes that Hawai'i law already allows for the rejection of repeated contested case hearing requests or legal claims based on the same issues and facts already adjudicated, balancing the constitutional interests of petitioners with the administrative needs of agencies. *See, e.g.,* Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114 (2018).

EST. LIFE OF THE LAND 1970

P.O. Box 37158, Honolulu, Hawai`i 96837-0158
Phone: 927-0709 henry.lifeoftheland@gmail.com

COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Rep. David A. Tarnas, Chair
Rep. Gregg Takayama, Vice Chair

DATE: Tuesday, March 12, 2024
TIME: 2:00 PM
PLACE: Conference Room 325

SB 3159 Relating to Contested Cases **PLEASE HOLD**

Aloha Chair Tarnas, Vice Chair Takayama, and Members of the Committee.

Life of the Land, Hawai`i's own energy, environmental and community action group advocating for the people and `aina for 54 years. Life of the Land`s mission is to preserve and protect the life of the land through sound energy and land use policies and to promote open government through research, education, advocacy and, when necessary, litigation.

Life of the Land strongly opposes SB 3159 SD1

The original bill seeks to limit repeated contested case proceedings in which the issues are "substantially similar" to previous contested case proceedings. The amended bill, SB 3159 SD1, changes "or substantially similar" to "based upon the same or substantially similar facts, transaction, or occurrence."

Longstanding Hawai`i case law already is clear. Litigants can't reargue the same case. This bill proposes to expand this concept to "substantially similar" but not identical cases, where "substantially similar" is left at the discretion of the regulatory body to determine. The phrase "substantially similar" is vague, overly broad, and undefined. Its use would lead to more appeals and more litigation.

The Department of Land and Natural Resources submitted the only testimony in support of the bill. It is unclear why they believe the bill is needed or who would they want to be denied the right to request a contested case proceeding.

The proposed bill seeks to limit entities from protecting the public trust as articulated by the Hawai'i Supreme Court in its 2022 Paeahu decision.[1]

> *"We hold that the statutes governing the PUC's [Public Utilities Commission`s] PPA [power purchase agreement] review – HRS §§ 269-6(b) and 269-145.5(b) - reflect the core public trust principles: the State and its agencies must protect and promote the justified use of Hawai'i's natural beauty and natural resources.*
>
> *Thus, when there is no reasonable threat to a trust resource, satisfying those statutory provisions fulfills the PUC's obligations as trustee. But <u>when a project poses a reasonable threat</u>, the public trust principles require more from the PUC: the commission must assess that threat and make specific findings about the affected trust resource."*

[1] For Approval of Power Purchase Agreement for Renewable Dispatchable Generation with Paeahu Solar LLC. **SCOT-21-0000041**. Supreme Court of Hawai'i. MARCH 2, 2022. https://cases.justia.com/hawaii/supreme-court/2022-scot-21-0000041.pdf?ts=1646269347

Where public trust issues are involved, the PUC must consider them, regardless of whether another agency held a contested case proceeding on similar issues. The PUC`s examination of public trust issues and other externalities came about because of persistent community intervenors raising the issues. This transformation regarding what the PUC examines arose not from vexatious litigants but rather entities deeply concerned about the public trust.

The bill would grant agencies the power to sanction and disqualify “vexatious litigants.” This is a dangerous expansion of the power of agencies.

Please hold this bill.

Mahalo,

Henry Curtis
Executive Director

STARN · O'TOOLE · MARCUS & FISHER

A LAW CORPORATION

Tuesday, March 12, 2024, 2:00 P.M.

State of Hawai'i

House Committee on Judiciary & Hawaiian Affairs
State Capitol, Conference Room 325

JOINT TESTIMONY OF DUANE FISHER AND ERIC ROBINSON IN OPPOSITION TO SENATE BILL 3159, SD1 RELATING TO CONTESTED CASES

Dear Chair Tarnas, Vice Chair Takayama, and Committee Members:

Our firm is legal counsel for a variety of clients whose property and businesses are subject to administrative regulations and who may avail themselves of the contested case process. We practice in the areas of business and real estate law, including land use, conservation district, shoreline, and special management area issues. We offer this testimony in **opposition** to Senate Bill 3159, SD1.

SB3159, SD1 suffers from serious legal flaws. While we appreciate the desire to "prevent the exploitation of the contested case process" (reflected in DLNR's prior testimony on this bill), the bill violates the due process clauses of the Hawaii and U.S. Constitutions. Due process is violated because the bill would deny a person a contested case hearing, even though that person was not a party, or in privity with a party, to a prior contested cased hearing.

Moreover, the bill ***does not*** "utilize[] the same well-established criteria for the preclusion of relitigating issues in our courts and appl[y] them to the administrative contested case process." The two relevant legal doctrines for preclusion are (1) *res judicata* (claim preclusion) and (2) collateral estoppel (issue preclusion).[1] Notably, these doctrines ***already apply*** to the contested case process.[2]

Under Hawaii law, *res judicata* applies when: 1) the claim or cause of action asserted in the present action was or could have been asserted in the prior action, 2) ***the parties*** in the

[1] *See, e.g.*, *E. Sav. Bank, FSB v. Esteban*, 129 Hawai'i 154, 158, 296 P.3d 1062, 1066 (2013) ("Claim preclusion prohibits the parties or their privies from relitigating a previously adjudicated cause of action; issue preclusion, by contrast, prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action."); *Bremer v. Weeks*, 104 Hawai'i 43, 53, 85 P.3d 150, 160 (2004) (res judicata and collateral estoppel "are doctrines that limit a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy.").

[2] *Santos v. State, Dep't of Transp., Kauai Div.*, 64 Haw. 648, 653, 646 P.2d 962, 966 (1982) ("doctrines of res judicata and collateral estoppel also apply to matters litigated before an administrative agency").

present action ***are identical*** to, ***or in privity*** with, the parties in the prior action, and 3) a final judgment on the merits was rendered in the prior action.[3]

Collateral estoppel bars relitigation of an issue when: (1) the ***issue*** decided in the prior adjudication ***is identical*** to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the fact or issue decided in the prior adjudication was actually litigated, finally decided, and essential to the final judgment; and (4) the ***party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication***.[4]

Given that the legal doctrines of *res judicata* and collateral estoppel *already apply*, the bill does not serve to establish those doctrines. Instead, the bill effectively eliminates *res judicata* and collateral estoppel's requirement that the party in a current action be identical to (or in privity with) the party in the previous action. This is more expansive than the doctrines are in court and would allow an administrative agency to deny parties their due process on the basis that a similar contested case with a different party was already determined.

For contested cases arising out of enforcement actions, the bill's vexatious litigant provision does not make sense. The vexatious litigant statute, HRS chapter 634J, focuses on plaintiffs. The petitioners in contested cases arising out of enforcement actions are more akin to defendants than they are plaintiffs. They also have the burden of showing that they did not commit the alleged violations. Thus, the bill would codify a policy that alleged violators who lose five times in seven years are no longer allowed to defend themselves unless they are able to obtain a court's permission to do so. Even habitual offenders are constitutionally entitled to due process.

Thank you for the opportunity to provide testimony in opposition to SB3159, SD1. We respectfully ask that the Committee defer this bill.

Very truly yours,

Duane R. Fisher

Eric S. Robinson

[3] *See, e.g.*, *Dannenberg v. State*, 139 Hawai'i 39, 59, 383 P.3d 1177, 1197 (2016).
[4] *See, e.g.*, *id.* at 60, 383 P.3d at 1198.

David Kimo Frankel
1638-A Mikahala Way
Honolulu, HI 96816

March 12, 2024

TESTIMONY IN OPPOSITION TO SB 3159

Chair Tarnas and members of the House Judiciary and Hawaiian Affairs Committee,

The **only** reason for this bill is the Department of Land and Natural Resources' (DLNR) long-standing hostility to holding contested case hearings.

To date, the only agency that has supported this bill and its companion is DLNR. The Land Use Commission, the Department of Hawaiian Home Lands, the Department of Commerce and Consumer, and the Department of Health all routinely hold contested case hearings. But they aren't asking you to pass SB 3159. Only DLNR.

DLNR's chair and board routinely refuse to conduct case hearings. *See e.g., Kaleikini v. Thielen*, 124 Hawai'i 1, 237 P.3d 1067 (2010) (BLNR chair refused to hold contested case hearing required before approving the removal of burials); *Kilakila 'O Haleakalā v. Bd of Land & Natural Res.,* 131 Hawai'i 193, 317 P.3d 27 (2013) (BLNR approved conservation district use permit before holding a required contested case hearing); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015) (ditto). Earlier this year, the environmental court held:

> Back in 2016, Nā Moku argued it was improperly denied the right to a contested case hearing. The court first notes Judge Castagnetti ordered a contested case hearing back in 2016. See Dkt. 91, Exh. A. This court agrees for reasons including those stated in Nā Moku's Reply Brief—that is that Nā Moku's members asserted traditional and customary Native Hawaiian rights and practices, protected by Article XII, Section 7 of the Hawai'i Constitution, which constitutes a proper interest for purposes of a due process analysis in determining whether a hearing was required, see Dkt. 91 at 2-3—and independently finds it was a violation not to allow a contested case hearing. Further to the mootness issue, this court has seen BLNR's deny multiple requests for contested case hearings, so this issue is clearly capable of repetition. Review has also been evaded because BLNR has not been able to promptly hold a contested case hearing when ordered to. When we are dealing with one-year permits, this delay is a real problem, and it is now apparent to the court that what it once saw as moot is not moot. A clear issue exists where the permit "cannot stand" for lack of a contested case hearing. S*ee Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015)). Yet, BLNR argues the court exceeds its authority by stepping into the breach created when BLNR issues defective permits for lack of a contested case hearing, and then it takes BLNR substantial time to hold a contested case hearing, and by then the next year's permits are due or overdue. The phrase that comes to mind is "justice delayed is justice denied," and not "justice delayed is moot." Bottom line: the denial of Nā Moku 's request for a contested case hearing was a breach as claimed back in 2016, and it should be recognized in this case even if a contested case hearing for the calendar year 2016 can no longer be held.

The court also held, "In short, BLNR improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku's request for a contested case hearing, failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A." Final Judgment was entered on January 22, 2024. No one appealed. The environmental court has twice ordered BLNR to hold contested case hearings – one of which BLNR grudgingly held, issuing a decision after the applicable year was over. *See Sierra Club v. BLNR*, Civ. No 20-0001541 and *Sierra Club v. BLNR*, 1CCV-22-0001506.

DLNR is looking for excuses to deny holding contested case hearings. Just so long as a single fact is identical as in another administrative matter. That standard is absurd.

Existing case law already protects agencies from holding duplicative proceedings.

But DLNR's staff does not like being held judicially accountable. After all, the same staff member pushing this bill is the one whose decision the supreme court took to task in *Diamond v. Dobbin*, 132 Hawai`i 9, 16-17, 319 P.3d 1017, 1024-25 (2014). The courts have repeatedly condemned BLNR's failure to uphold the law when dealing with east Maui streams. This bill will make it more difficulty to drag DLNR into the 21st century.

Aloha,

/s/ David Kimo Frankel

NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai‘i 96813
Telephone: (808) 521-2302

ASHLEY K. OBREY 9199
Attorney for Appellant
NĀ MOKU AUPUNI O KO‘OLAU HUI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

NĀ MOKU AUPUNI O KO‘OLAU HUI, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, DAWN N.S. CHANG, in her official capacity as Chairperson of the Board of Land and Natural Resources, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION CO., LTD., COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY, HAWAI‘I FARM BUREAU FEDERATION, and MAUI TOMORROW, Appellees.	Civil No. 16-1-0052-01 JPC (Environmental Court) DLNR File No. 01-05-MA ORDER GRANTING IN PART AND DENYING IN PART APPELLANT NĀ MOKU AUPUNI O KO‘OLAU HUI’S MOTION FOR RULING AND REQUEST FOR ALTERNATIVE RELIEF HEARING: Date: November 6, 2023 Time: 1:30 p.m. Judge: Honorable Jeffrey P. Crabtree

ORDER GRANTING IN PART AND DENYING IN PART APPELLANT NĀ MOKU AUPUNI O KO‘OLAU HUI’S MOTION FOR RULING AND REQUEST FOR ALTERNATIVE RELIEF

This case arises from Appellee Board of Land and Natural Resources’ (“BLNR’s”) approvals of four revocable permits which authorized the diversion of over 100 million gallons of water a day out of East Maui streams and the use of 33,000 acres of state ceded lands. The water was diverted for various uses—some public uses but mostly for private agriculture (sugar cane until sugar cane was phased out).

In 2001, the RPs were placed in "holdover" status by BLNR, whereby the permits were essentially rolled over from year to year rather than undergoing any meaningful review. After the BLNR made its decision to continue the permits in 2014 for the 2015 calendar year, Appellant Nā Moku Aupuni O Koʻolau Hui ("Nā Moku") filed an original action in the circuit court, alleging that the renewal of A&B/EMI's RPs constituted applicant action proposing the use of State land and required the preparation of an environmental assessment under Hawaiʻi Revised Statutes ("HRS") Chapter 343. *See Carmichael v. Bd. of Land and Nat. Resources,* 150 Hawaiʻi 547, 555-57, 506 P.3d 211, 220-21 (2022).

The instant case challenged the BLNR's December 11, 2015 decision re-affirming the holdover status of the RPs for calendar year 2016. More specifically, it alleged that BLNR violated legal requirements by (1) improperly holding over the permits and maintaining the status quo without meaningful annual review under HRS chapter 343, HRS chapter 205A, and Article XII §7 of the Hawaiʻi State Constitution and *Ka Paʻakai Ka ʻĀina v. Land Use Comm'n*, 94 Hawaiʻi 31, 45, 7 P.3d. 1068, 1082 (2000), among other things, and (2) failing to conduct the contested case hearing requested by Nā Moku.

After this appeal was filed, the circuit court in *Carmichael* ruled that BLNR's holdover of the permits in 2014 violated HRS chapter 171. That ruling was appealed, and the instant case was "stayed pending the entry of final judgment on appeal in [*Carmichael*]." Dkt. 56

On March 3, 2022, the Hawaiʻi Supreme Court issued a decision in *Carmichael*. Judgment on appeal was entered on March 20, 2023.

On October 13, 2023, Nā Moku filed its Motion for Ruling and Request for Alternative Relief, Dkt. 71, asking this court to:

(1) Reverse BLNR's December 11, 2015 decision reaffirming the holdover status of the RPs for calendar year 2016;
(2) Determine that A&B had no right to take any water;
(3) Enter an order in this case that caps the amount of water that can be taken from the East Maui streams at 31.5 MGD until a contested case hearing is held at which Nā Moku is allowed to participate. In other words, Nā Moku asks the court to take the diversion cap it ordered in *Sierra Club v. BLNR*, 1 CCV-22- 0001506) and order it in this case also; and
(4) Allow Nā Moku to intervene in a contested case hearing the court already ordered in *Sierra Club v. BLNR*, 1 CCV-22-0001506 (which presumably will help set stream diversion limits for calendar year 2024).

On October 26, 2023, Appellee County of Maui Department of Water Supply filed its statement of no position. Dkt. 82. On October 27, 2023, BLNR and A&B/EMI filed their respective memoranda in opposition to the motion. Dkts. 84 & 89. On November 1, 2023, Nā Moku filed its reply brief.

The hearing on the motion was held on November 6, 2023. Present at the hearing were Ashley K. Obrey for Nā Moku, Deputy Attorney General Miranda Steed for BLNR, Trisha Akagi and Mallory Martin for A&B/EMI, and Bradley Sova (via Zoom) for County of Maui Dept of Water Supply

I. The Mootness Issue

BLNR and A&B/EMI argue this entire case is moot because of the *Carmichael* decision. Due to time constraints, the court will not summarize all the arguments in the briefing on this motion. The main argument is that *Carmichael'*s invalidation of BLNR's 2014 continuation of the hold-over RPs applies to all hold-over RPs, including BLNR's 2015 continuation for calendar year 2016 (the focus of this case). It is not contested that the RPs for the instant case are invalid under the reasoning of *Carmichael*. However, additional grounds were argued in this case which were not argued in *Carmichael*. Despite these distinctions, BLNR and A&B/EMI argue that since holdover RPs are invalid, this entire case is moot because no exception to the mootness doctrine applies. The court respectfully disagrees and hereby holds that not all of Nā Moku's arguments back in 2016 are moot simply because one ground for relief (the holdover RPs) was decided in *Carmichael*. The court's reasons are as argued by Nā Moku– essentially that other bases for relief were not decided in Carmichael and these issues are capable of repetition while evading review, and therefore the public interest exception applies. *See* Dkt. 91 at 4-6. If the trial court too willingly finds cases moot, it is much more difficult for an appellate court to issue whatever decisions and guidance it thinks is appropriate.

II. Nā Moku's Request for Reversal of BLNR's December 11, 2015 Decision Reaffirming the Holdover Status of the RPs for Calendar Year 2016

This request is GRANTED for the following reasons which go beyond *Carmichael*, together with reasons stated in other parts of this ruling:

A. Nā Moku Was Improperly Denied Its Right to a Contested Case Hearing

Back in 2016, Nā Moku argued it was improperly denied the right to a contested case hearing. The court first notes Judge Castagnetti ordered a contested case hearing back in 2016. *See* Dkt. 91, Exh. A. This court agrees for reasons including those stated in Nā Moku's Reply Brief—that is that Nā Moku's members asserted traditional and customary Native Hawaiian rights and practices, protected by Article XII, Section 7 of the Hawai'i Constitution, which constitutes a proper interest for purposes of a due process analysis in determining whether a hearing was required, *see* Dkt. 91 at 2-3—and independently finds it was a violation not to allow a contested case hearing. Further to the mootness issue, this court has seen BLNR's deny multiple requests for contested case hearings, so this issue is clearly capable of repetition. Review has also been evaded because BLNR has not been able to promptly hold a contested case hearing when ordered to. When we are dealing with one-year permits, this delay is a real problem, and it is now apparent to the court that what it once saw as moot is not moot. A clear issue exists where the permit "cannot stand" for lack of a contested case hearing. *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015)). Yet, BLNR argues the court exceeds its authority by stepping into the breach created when BLNR issues defective permits for lack of a contested case hearing, and then it takes BLNR substantial time to hold a contested case hearing, and by then the next year's permits are due or overdue. The phrase that comes to mind is "justice delayed is justice denied," and not "justice delayed is moot." Bottom line: the denial of Nā Moku 's request for a contested case hearing was a breach as claimed back in 2016, and it should be recognized in this case even if a contested case hearing for the calendar year 2016 can no longer be held.

B. BLNR Failed to Make Findings

Back in 2016, Nā Moku argued BLNR violated the Hawai'i State Constitution and HRS § 171-55. The basis was BLNR's failure to make findings of fact or conclusions of law that the continuing diversions were in the best interests of the state due to BLNR's lack of any meaningful review by allowing the permits to keep holding-over. The court agrees and so rules for the reasons stated in Nā Moku's Reply Brief—that is, that "BLNR should have determined—but did not—that the RPs were 'in the best interests of the State' before continuing them in 2014." Dkt. 91 at 3 (citing *Carmichael*, 150 Hawai'i at 566, 506 P.3d at 230; see also id. at 564, 506 P.3d at 228 ("Because the BLNR did not make factual findings or enter conclusions of law

positing that the permits served the State's best interests, the BLNR failed to demonstrate that it properly exercised the discretion vested in it by the constitution and the statute.")). This issue was a breach as claimed and it should be recognized in this case despite BLNR's claim that it is moot because it no longer issues permits without meaningful review.

C. BLNR Violated the Public Trust Doctrine

Back in 2016, Nā Moku argued BLNR violated the public trust doctrine when it re-affirmed the holdover status of the RPs. The gist of this argument was that private commercial use of public trust assets like stream water is not necessarily a protected use of trust assets. The court agrees and so rules for the reasons stated in Nā Moku 's Reply Brief—that is, that BLNR failed to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process[,]" as well as ignored the public trust doctrine mandates that BLNR "assure that the waters of our land are put to reasonable and beneficial uses" and "preserve the rights of present and future generations in the waters of the state." Dkt. 91 at 3-4 (citing *Kauai Springs v. Planning Comm'n*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014); *Carmichael*, 150 Hawai'i at 566 n.33, 506 P.3d at 230 n.33 (noting that "private commercial use" is not "a protected public trust purpose.")). This was a breach as claimed, and it should be recognized in this case. Further to the mootness argument, this issue not only could clearly arise in the future, it is currently arising regularly in the context of balancing the constitutional/public trust doctrine of Mahi Pono's diversified farming operations on Maui, which also implicate Article XI, Section 3 of the Hawai'i Constitution (conserve and protect agricultural lands and promote diversified agriculture). Time will tell if the issue is capable of repetition while evading review, but it is certainly possible.

D. BLNR Failed to Identify Native Hawaiian Traditional and Customary Practices

Back in 2016, Nā Moku argued BLNR breached its duty under Article XII, § 7 of the Hawai'i Constitution and case law by making no effort to identify native Hawaiian practices impaired by the continuation of the RPs. The court agrees and finds and concludes that BLNR did not do so. Further to the mootness argument, this issue clearly can arise again and can evade review, such as if a Native Hawaiian rights organization is denied standing, but a decision on appeal will come too late to allow the relief sought. The importance of recognizing Native

Hawaiian rights to stream water should not be diluted by calling the issue moot. This was a breach as claimed and it should be recognized in this case.

E. BLNR Violated HRS Chapter 205A

Back in 2016, Nā Moku argued BLNR breached its duties under HRS chapter 205A by not considering the values set by the Legislature in chapter 205A. It is clear that BLNR has an affirmative duty to consider these issues and simply did not do so when it affirmed the hold-over status of the RPs for calendar year 2016 without meaningful review. This was a breach as claimed and it should be recognized in this case.

In short, BLNR improperly authorized A&B to take water from the streams for 2016 when it denied Nā Moku's request for a contested case hearing, failed to make findings, breached its public trust duties, violated Article XII § 7, and violated HRS chapter 205A.

III. Nā Moku's Requests for Alternate Relief

A. Nā Moku's Request for Ruling that A&B/EMI "Had No Right to Take the Water"

The court denies this request for a potentially dispositive ruling without prejudice. It is correct to say BLNR improperly authorized A&B to take water from the streams. But to the court that is not the same thing as saying A&B had no right to take the water. When A&B/EMI took the water, it was "authorized" by law to take the water because of BLNR's permits. A finding that BLNR erred does not automatically mean A&B/EMI acted illegally. Nā Moku cites no persuasive legal authority that A&B/EMI as a matter of law had no right to take the water.

B. Nā Moku's Request for a Diversion Cap of 31.5 MGD

This request is denied. The court concludes that its equitable powers under HRS § 604A-2(b) do not give it the discretion to graft onto this case the 31.5 MGD cap ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506. For the court's reasons, *see* A&B/EMI's memorandum in opposition to Nā Moku's motion. *See* Dkt. 89 at 12-16 (sections 2, 3, and 4).

C. Nā Moku's Request to Intervene in Upcoming Contested Case Hearing Ordered by this Court in *Sierra Club v. BLNR*, 1CCV-22-0001506.

The court denies this request. The contested case hearing ordered in *Sierra Club v. BLNR*, 1CCV-22-0001506 is an entirely different proceeding covering multiple issues that were not part of the allegations in this case back in 2016. The court is not aware whether the request is ripe, *e.g.*, (a) whether Nā Moku has requested its own contested case hearing to accompany the

contested case hearing Sierra Club obtained, or (b) whether Nā Moku asked to intervene in Sierra Club's contested case hearing. The court concludes its equitable powers under HRS § 604A-2(b) do not give the court discretion to order intervention in an entirely different case under these circumstances.

Dated: Honolulu, Hawai'i, January 2, 2024 2023.

/s/ Jeffrey P. Crabtree

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION COMPANY, LLC, and COUNTY OF MAUI Appellees	CIVIL NO. 20-0001541 (Environmental Court) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Sierra Club appealed the Board of Land and Natural Resources' (**BLNR**) November 13, 2020 decisions that denied the Sierra Club's request for a contested case hearing and approved the continuation of revocable permits S-7263, S-7264, S-7265, and S-7266 ("permits at issue") that authorize the use of approximately 33,000 acres of public land and the diversion of up to 45 million gallons per day on average from dozens of east Maui streams.

The court reviewed the briefs, held oral arguments via Zoom on April 15, 2001, issued an interim decision on the appeal on May 28, 2021, and issued a ruling on the permits at issue on July 30, 2021. It also heard related motions and held status conferences with the parties. This order supersedes and formalizes the prior orders and resolves the immediate issues on appeal while retaining temporary jurisdiction as may be necessary to modify the court's order pending further events as described below. (Red text shows changes by Judge Crabtree).

FINDINGS OF FACT

1. In May 2000, BLNR authorized Alexander & Baldwin, Inc., and East Maui Irrigation, Ltd.'s (collectively "**A&B**") to use, pursuant to revocable permits 7263, 7264, 7265, and 7266 ("permits at issue"), approximately 33,000 acres of public land and to divert millions of gallons of water per day from the streams flowing through this area. JEFS:15 ANSW:2 and JEFS:1 NA:5 ¶36; JEFS:69-72.

2. The permits at issue have been repeatedly extended. JEFS:15 ANSW:2 and JEFS:1 NA:5 ¶40.

3. On October 1, 2020, A&B requested that BLNR renew the permits at issue for another year. JEFS:227 STIP:3.

4. On November 12, 2020, the Sierra Club filed its written petition for a contested case hearing on the continuation of the permits at issue. JEFS:15 ANSW:3 and JEFS:1 NA:10 ¶¶ 59-60.

5. On November 13, 2020, BLNR voted to deny the Sierra Club's request for a contested case hearing and voted to approve the continuation of the permits at issue. JEFS:15 ANSW:3 and JEFS:1 NA:10 ¶¶62 and 65; JEFS:53 CROA at 02:48:05.

6. BLNR denied the Sierra Club the opportunity to cross examine witnesses. JEFS:15 ANSW:3 and JEFS:1 NA:11 ¶63.

7. The permits at issue authorize A&B to take all the baseflow from 13 east Maui streams. JEFS:15 ANSW:2 and JEFS:1 NA:6 ¶43; JEFS:94 CROA:20, 30; JEFS 95 CROA:27; JEFS:117 CROA:28.

8. The Sierra Club has sufficiently demonstrated that it and its members are adversely affected by the continuation of the permits, the diversion of streams, and inadequate

permit conditions. JEFS:128 and JEFS:129; JEFS:130 CROA:6-10 and 78-91; JEFS:117 CROA:83; JEFS:94 CROA:15-16, 20, 30; JEFS:95 CROA:27.

9. The same parties were involved in a case that went to trial in which the Sierra Club challenged BLNR's decisions in 2018 and 2019 continuing these same permits. *Sierra Club v. BLNR*, Civ. No. 19-1-0019-01 JPC. This appeal involves some significantly different facts. More specifically, the Sierra Club had available to it new evidence on the permit renewals – information and issues that apparently arose after the trial. As just one example, DLNR's own Division of Aquatic Resources recommended that restoring four more of the streams should be a high priority. JEFS:32 CROA:6-9 and JEFS:130 CROA:6-10. In addition, more recent reports showed significantly less water was needed for off-stream uses than previously estimated, yet the proposal for the revocable permit extensions was to take more water out of the streams, not less. JEFS:33 CROA:14. A new issue of defining "waste" to expressly exclude system losses and evaporation was also up for consideration with the permits at issue. JEFS:31 CROA:14; JEFS:32 CROA:14 and JEFS:137 CROA:4. Previous CWRM findings recognized that when dealing with a hundred-year-old delivery system, part of the solution to needing less water from the streams and leaving more water in the streams requires investment to upgrade the ditch and storage systems. JEFS:114 CROA:23-24.

10. In its Interim Decision, the court set up a process and set a deadline for the parties to make requests on whether or not and how the court should modify the permits at issue. BLNR responded by asking the court to allow a Rule 54(b) certification and enter final judgment so an appeal could be filed, or in the alternative, grant an interlocutory appeal from the Interim Decision, or in the alternative, reconsider and amend the Interim Decision, or in the alternative stay enforcement of the court's order pending appeal. BLNR offered nothing in the

way of any options, plans, or specifics for how the permits can safely be modified to ensure the people of Maui continue to get the water they need pending the outcome of BLNR's contested case hearing (whether compelled by court order or on BLNR's own initiative). BLNR made clear however that A&B would no longer be authorized to distribute water if the permits were vacated. This representation continued after the court made clear at the hearing on 7/7/21 that there would be no immediate appeal or stay.

11. A&B joined most of BLNR's motion, but added a request that if the court would not permit an immediate appeal and issue a stay, then the court should leave the existing permits in place until they expire in late 2021. Like BLNR, A&B did not offer any specifics on how to safely modify the permits at issue for the period between the court vacating the permits and when the permits (presumably) are re-issued (or held-over or extended or continued) following a BLNR hearing that complies with constitutional requirements for a contested case hearing.

12. Maui County joined several but not all of BLNR's requests, and joined A&B's request that the permits remain in place if no stay was issued. Maui County also asked the court to ensure that the water needed for Upcountry Maui and the Kula Ag Park was delivered. The court stated on the record and repeats in this order that the court will do everything in its power to ensure those needs are met.

13. The Sierra Club was the only party which offered the court concrete and specific options and support for how to modify the defective permits and not leave a vacuum until BLNR conducts a contested case hearing. JEFS:321 MEO:11-14; JEFS:325 MEO:2.

14. Twenty-five million gallons of water per day from east Maui streams should be more than enough water to allow all the users the water that they require, while hopefully reducing apparent or potential waste. JEFS:39 CROA:10; JEFS:50:9; JEFS:33 CROA:14.

CONCLUSIONS OF LAW

1. These revocable permits are required to be renewed annually. HRS §§ 171-40, -55 and -58. The plain meaning of those laws is that annual review is required.

2. The BLNR's November 13, 2020 decisions were final decisions subject to review pursuant to HRS § 91-14.

3. Hawai'i recognizes the right to a clean and healthful environment "as defined by laws relating to environmental quality" including those laws related to protection of natural resources. Hawai'i State Constitution Article XI, section 9. Our supreme court has held this is a substantive right and a legitimate entitlement under state law. It therefore is a property interest protected by due process. *In re Maui Electric,* 141 Hawai'i 249, 260-61, 408 P.3d 1, 12-13 (2017). A protected property interest need not be tangible. *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019). *See also Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 881 P.2d 1210 (1994); *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015); *In Re Water Use Permit Applications*, 94 Hawai'i 97, 120 n.15, 9 P.3d 409, 432 n.15 (2000) ("*Waiāhole*"); *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 240-44, 287 P.3d 129, 141-45 (2012). The constitutional right at issue here ~~is an important right~~ is not discretionary and must be enforced by the court.

4. The court concludes that "laws relating to environmental quality" are implicated by the revocable permits at issue, including, but not limited to, HRS §§ 171-55 and/or 171-58, HRS chapter 343, and HRS chapter 205A. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010); HRS §§ 604A-2(a) and HRS 607-25.

5. The Sierra Club has also argued that 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. The court does not need to address this basis for a contested case hearing as the analysis pursuant to Article XI, section 9 is straightforward.

6. The court rejects the arguments that requiring contested case hearings based on the laws relating to environmental quality could mean that virtually everything BLNR decides could require contested case hearings and that BLNR does not have the necessary resources, and therefore due process cannot be so broadly required. 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 contested case hearing cannot be held quickly enough is also not persuasive, especially where the short-term permits are repeatedly extended.

7. Appellees' arguments that Sierra Club already got the required due process because water permits were litigated in a trial in this court in 2020 are not persuasive. Here, the permits at issue covered the year after the trial. Things change with time. More specifically, the Sierra Club had available to it new evidence on the permit renewals – information and issues which apparently arose after the trial. The new information and issues are relevant and are not insignificant. *See* FOF 9.

8. This case is not like *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018). The Sierra Club has not been afforded the opportunity to participate in a contested case hearing on the revocable permits and their impact. Moreover, the burden of proof in a contested case hearing over the continuation of revocable permits (*see e.g., Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 and *Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of*

Kaua'i, 133 Hawai'i 141, 174-75, 324 P.3d 951, 984-85 (2014)) is different than a trial over a breach of trust (*Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 233,140 P.3d 985, 1013 (2006)).

9. Our environmental law system has a goal that the decision-makers will hear from stake-holders before decisions are made, to help decision-makers reach sound policy decisions examined from multiple perspectives. Process is important. A contested case hearing plays an important role in our system of environmental protection. The new information and issues described above are relevant, and are not insignificant. A contested case hearing will allow all constitutional rights to be acknowledged and protected. We all stand to benefit from a thorough contested case hearing in which all interests are represented.

10. The Sierra Club has standing. JEFS:130 CROA:78-91; JEFS:128 and 129. *See e.g.*, *Maui Electric.*

11. The Sierra Club's constitutional due process rights were violated. A contested case hearing was required before the BLNR voted on November 13, 2020, to continue A&B's revocable permits for another year. *Mauna Kea*. This court will not allow the unconstitutional status quo to continue any longer.

12. Since the court concludes that Sierra Club had a property interest protected by due process rights under the Hawai'i Constitution as defined by laws relating to environmental quality, and since the court concludes those rights were prejudiced because of the BLNR's denial of a contested case hearing, the court may "reverse or modify" the BLNR's decision per HRS § 91-14(g).

13. This court had ordered that the revocable permits be vacated, but stayed the effective date of that order to give the parties an opportunity to explain whether and how the

permits can be modified to avoid chaos. As a general rule, when an agency fails to conduct a necessary contested case hearing, any approval it has issued is void. *Mauna Kea.*, 136 Hawai‘i at 380-81, 363 P.3d at 228-29; *Public Access Shoreline Hawaii 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).

14. This case is an exceptional case. The court does not wish to create unintended consequences or chaos by vacating the permits without knowing the practical consequences of such an order, especially when in a few months (absent further legal developments) there will likely be another hearing to extend the existing revocable permits or grant new revocable permits to replace the existing ones. The court will not risk a vacuum which causes hardship to those on Maui who rely on the water at issue. Given the equities of the situation, BLNR's representation that A&B would no longer be authorized to distribute water if the permits were vacated, and the need to ensure that Upcountry Maui continues to receive the water it has been receiving, this court will modify the permits instead of vacating them *in toto*.

ORDER

Pursuant to the above Findings of Fact and Conclusions of Law, and with good cause shown, it is hereby ordered that:

A. Given the equities, and pursuant to HRS §§ 91-14, 604A-2(b), the court's inherent equitable powers (*see Richardson v. Sport Shinko*, 76 Hawai`i 494, 507, 880 P.2d 169, 182 (1994) and *Jenkins v. Wise*, 58 Haw. 592, 598, 574 P.2d 1337, 1342 (1978)), and public trust principles, the permits at issue are modified to limit the total amount of water diverted by the

stream diversions to no more than 25 million gallons of water per day (averaged monthly) from east Maui streams (as measured at Honopou Stream). Any provision of the permits at issue contrary to the modification in this paragraph is hereby vacated. This limit shall remain in place until the anticipated contested case hearing is held and a decision rendered, or until further order of the court.

B. The court's Interim Decision vacating the permits at issue is stayed.

C. A&B's underlying **request** that the revocable permits be continued remains in effect. There need be no delay by BLNR requiring A&B to ask for new permits. A&B may supplement their prior/pending request for the permits at issue based on new information, if they choose to.

D. BLNR shall hold a new hearing on the permits at issue as soon as practicable. It shall be a contested case hearing assuming a proper request is made.

~~D. The Sierra Club is entitled to a contested case hearing on the continuation of the revocable permits. BLNR is ordered to hold a contested case hearing on the continuation of the revocable permits at issue. This court previously ordered BLNR to hold a contested case hearing "as soon as practicable." The court acknowledges that this term is insufficiently precise. Nevertheless, the court expects BLNR to act promptly in holding the contested case hearing.~~

E. The court retains / limited / jurisdiction to / further / modify the permits at issue if necessary. This retention of / limited / jurisdiction will last until / further order of the court, or until / the contested case hearing on the permits concludes / and a decision or order is issued.

If it appears to any party that the court's modification may or is leading to any shortage for the County, for Mahi Pono, or for other recognized beneficiaries, that party may immediately contact the court so that an expedited process can be set to hear and address any problems immediately.

Dated: Honolulu, Hawai'i, August 23, 2021.

/s/ Jeffrey P. Crabtree

Judge of the Above-Entitled Court

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SIERRA CLUB, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION COMPANY, LLC, and COUNTY OF MAUI Appellees	)	CIVIL NO. 1CCV-22-0001506 (Environmental Court) DECISION ON APPEAL AND ORDER

DECISION ON APPEAL AND ORDER

The Sierra Club appealed the Board of Land and Natural Resources' (**BLNR**) November 10, 2022 and December 9, 2022 decisions that denied the Sierra Club's request for a contested case hearing as well as BLNR's decision approving the continuation of revocable permits S-7263, S-7264, S-7265, and S-7266 for calendar year 2023. The revocable permits authorize Alexander & Baldwin, Inc., and East Maui Irrigation (collectively "**A&B**") to take 40.49 million gallons of water per day (**mgd**) from east Maui streams.

This court heard oral argument by all the parties, in person and on the record, on May 4, 2023. The court took the matter under advisement and reviewed the briefs and exhibits in detail based on the extensive and in-depth oral argument. This ruling is based on the following non-exclusive reasons. The court gave full consideration to all submittals. The court cannot discuss

every relevant exhibit, argument, or legal authority. That a particular point or fact is not mentioned does not mean the court did not consider it.

History and Status of Related Proceedings

While not directly relevant to the decision in this case, the court provides the following overview of related prior proceedings in the Environmental Court, to help give some context:

A. The revocable permits for calendar years 2019 and 2020

The revocable permits for 2019 and 2020 were litigated in Civ. No. 19-1-1000019. This was a direct action, not an agency appeal. Following an approximately two-week bench trial held in 2020, this division ruled for the defendants, essentially upholding the 45 mgd cap set by BLNR. That decision is currently before our appellate courts in *Sierra Club v. BLNR*, CAAP-22-0000063.

B. The revocable permits for calendar year 2021

BLNR approved the continuation of the revocable permits for calendar year 2021, again setting a 45 mgd cap on the stream diversions. However, BLNR refused the Sierra Club's request for a contested case hearing. In an agency appeal (1CCV-20-0001541), this division found the denial of a contested case hearing violated the Sierra Club's constitutional rights, and ordered BLNR to conduct a contested case hearing. Pursuant to HRS §§ 91-14(g), 604A-2(b) and the court's inherent equitable powers, the court also modified the revocable permits, capping the amount of water that could be diverted at 25 mgd, and later reducing that amount further to 20 mgd, effective until BLNR rendered its decision in the contested case. The court's decision on this agency appeal is currently before our appellate courts in *Sierra Club v. BLNR*, CAAP-22-0000516.

C. Some takeaways from the 2021 permit modifications

After ruling in 1CCV-20-0001541 that the permits needed to be vacated because of the failure to conduct a contested case hearing, the court invited the parties on May 28, 2021 (in the record of this case at JEFS:1405) to submit information to the court by June 30, 2021 on whether and how to modify the permits. On July 30, 2021, the court modified the revocable permits – capping the amount of water that could be taken at 25 mgd (averaged monthly) instead of BLNR's 45 mgd. JEFS:1454 and JEFS:1471. The court further reduced the 25 mgd cap to 20 mgd by order entered May 2, 2022. (JEFS:1533). On June 30, 2022, after conducting the court-ordered contested case hearing, BLNR issued its decision authorizing the continuation of the revocable permits and raising the cap back up to 45 mgd for the remaining calendar year 2022. JEFS:307.

From July 30, 2021 (when the court first modified the permits from 45 mgd to 25 mgd), to June 30, 2022 (when BLNR authorized the continuation of the revocable permits), and despite specific invitation to come back to court if more water was needed, none of the appellees came back to court to ask the court to increase the court-imposed cap. JEFS:204 SCROA:26-42. The court draws an inference from this sequence that despite the lowered cap, A&B got enough water from the streams to meet its actual needs. This does not necessarily mean the lower cap actually *saved* water. The court simply infers that the court's imposed caps of 25 mgd and then 20 mgd were apparently high enough to sustain A&B's needs from July 30, 2021 to June 30, 2022 -- a period of 11 months. Otherwise, the court concludes it is likely that A&B would have come back to court and asked for more water if it were truly needed.

D. <u>The revocable permits for calendar year 2022</u>

Following the court-ordered contested case hearing, BLNR authorized the continuation of the revocable permits in/for 2022 -- raising the cap back up to 45 mgd. JEFS:307. The Sierra

Club filed an appeal, challenging that decision (1CCV-22-0000794). This division held the appeal was moot, essentially because the 2022 permits had expired by the time the appeal was ripe for decision and because BLNR had already authorized the continuation of the permits for 2023. A motion for reconsideration of the court's mootness decision has been briefed and is currently under advisement in this division.

A Contested Case Was Required

BLNR first issued these four one-year revocable permits in 2000. *See Carmichael v. Bd. of Land & Nat. Res*., 150 Hawai'i 547, 553, 506 P.3d 211, 217 (2022); JEFS:573-576. The license area covered by the streams covers 33,000 acres of the east Maui watershed. *Carmichael*, 150 Hawai'i at 553, 506 P.3d at 217.

Sierra Club v. BLNR, 1CCV-20-0001541, currently before our appellate courts in CAAP-22-0000516, involved the same central issue as this case: BLNR's denial of a contested case hearing. This Division ruled that a contested case hearing was constitutionally required. The court took a long, fresh look at its prior decision and the reasons behind it, and carefully reviewed the appellate decisions discussed in its prior ruling, along with at least one new appellate case, *Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n*, 149 Hawai'i 304, 489 P.3d 408 (2021). While the court would rule the same way if it had discretion, the court concludes it has no discretion on this issue. The court concludes, as it did in 1CCV-20-0001541, that the requested contested case hearing was constitutionally required for these revocable permits for 2023 and that BLNR's decision "cannot stand." *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 381, 363 P.3d 224, 229 (2015).

Whether a constitutional right to a contested case hearing exists is decided by a two-step analysis. *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 125, 424 P.3d 469, 480 (2018).

First: is a particular property interest shown within the meaning of due process requirements? *Id*. Second, if a protected property interest exists, what specific procedures are required to protect that right? *Id*. *See also*, *In re Hawai'i Elec. Light Co.*, 145 Hawai'i 1, 16, 445 P.3d 673, 688 (2019), quoting *Sandy Beach Defense Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989) (citing *Aguilar v. Haw. Hous. Auth*., 55 Haw. 478, 495 (1974)).

"Property interest" is perhaps a misnomer, since "property" implies something solid, e.g., a thing with shape and mass. Our law is clear that a tangible thing is not required to establish a property interest for purposes of due process. "A protected property interest exists in a benefit -- *tangible or otherwise* – to which a party has a legitimate claim of entitlement." *In re Maui Electric,* 141 Hawai'i 249, 260, 408 P.3d 1, 12 (2017); *Hawai'i Elec.*, 145 Hawai'i at 16, 445 P.3d at 688 (emphasis added).

The rights of appellant Sierra Club's members are not merely inchoate, untethered expectations of aesthetic values. Its members live along and draw water from the streams in the license area for their own residential and farming purposes. They also enjoy the streams and forest in the license area for their own recreational, cultural, and spiritual importance. *See* JEFS: 66 at 433. The Sierra Club alleges these interests were harmed by the stream diversions authorized by the continuation of the revocable permits. *Id*. These claimed interests were supplemented by declarations and testimony incorporated from the November 10, 2022 BLNR meeting as well as "prior contested case hearing petitions, testimony, and the entire record in last year's contested case hearing." *Id*. *See also* JEFS:1057-1065. To the extent standing is disputed in this case, the court finds that the appellant has standing.

The Sierra Club claims "the right to a clean and healthful environment" pursuant to Article XI, section 9 of the Hawai'i State Constitution. This constitutional right includes an

express private cause of action. However, the right is not unrestricted and open-ended. The right to a clean and healthful environment is "defined by laws relating to environmental quality." Article XI, section 9 of the Hawai'i State Constitution.

Our supreme court has discussed what constitutes a law relating to environmental quality for purposes of the constitutional right to a clean and healthful environment on multiple occasions. The court expressly found that the Sierra Club (in *MECO*, 2017) and Life of the Land (in *Hawai'i Elec.*, 2019) each had a property interest protected by due process. *MECO*, 141 Hawai'i at 260-261; *Hawai'i Elec.,* 145 Hawai'i 1, 16-17. Both cases involved Public Utilities Commission (**PUC**) decisions which were made without a contested case hearing. In both cases, the court found that HRS chapter 269 was a law relating to environmental quality:

A. In *MECO*, a 3-2 decision, the court noted HRS § 269–6(b)'s requirement that the PUC reduce reliance on fossil fuels and consider greenhouse gas emissions. The court also noted that HRS § 269–27.2 (concerning the use of electricity generated from non-fossil fuels), and Part V (prescribing renewable portfolio standards) "would appear to be precisely the type of "laws relating to environmental quality" that article XI, section 9 references." *MECO*, 141 Hawai'i at 263, 408 P.3d at 15.

B. In *Hawai'i Elec*., the court (in a 5-0 decision) reiterated its *MECO* analysis and again relied on HRS Chapter 269 as a law relating to environmental quality. *Hawai'i Elec*., 145 Hawai'i at 16-17, 445 P.3d at 688.

C. (deleted by court in final version)

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Here, as in *MECO* and *Hawai'i Elec*., the Sierra Club has a constitutional right to a clean and healthful environment as defined by laws relating to environmental quality. More specifically, the 2023 permits at issue in this case were issued pursuant to HRS § 171-55. The court holds that in the context of stream diversions and public water/natural resources, HRS § 171-55 is a law relating to environmental quality. The court's reasons include:

A. Article XI, section 9 states that laws relating to environmental quality include laws relating to the "conservation, protection and enhancement of natural resources." In the context of this case -- involving the potential diversion of 40.49 mgd from multiple streams -- the court easily concludes that the conservation, protection, and enhancement of natural resources is at stake. *Cf. In Re Water Use Permit Applications*, 94 Hawai'i 97, 136, 9 P.3d 409, 448 (2000) ("*Waiāhole*").

B. The Legislature has granted original and exclusive jurisdiction of certain cases to the Environmental Court. *See*, HRS § 604A-2. This grant includes all proceedings arising under Title 12, broadly titled "Conservation and Resources." Title 12 covers HRS 171 through HRS 200D, including sub-titles for Public Lands, Water and Land Development, Mining and Minerals, Forestry and Wildlife, Aquatic Resources and Wildlife, and others. HRS § 171-55 is in Title 12. Since HRS Chapter 171 cases are within the Environmental Court's statutorily required original and exclusive jurisdiction, and since these particular revocable permits issued pursuant to HRS 171-55 clearly impact the conservation and protection of a natural resource, the court concludes that in the factual context of this case, HRS 171-55 is a law relating toenvironmental quality.

C. The Hawai'i Supreme Court has ruled that continuing revocable permits under HRS § 171-55 is subject to the Hawai'i Environmental Policy Act ("HEPA"). This is

because the permits allow for the occupation and use of state lands for the development, diversion, and use of water. *Carmichael*, 150 Hawai‘i at 568-71, 506 P.3d at 232-35. HEPA's application to prior versions of the same or similar revocable permits as in this case supports a finding that HRS chapter 171-55 is a law relating to environmental quality.

In addition to Chapter 171, another law relating to environmental quality is at issue in this case: HRS 205A, titled Coastal Zone management. That statute applies to all state agencies and so includes BLNR. It requires "full consideration" be given to "ecological, cultural, historic, esthetic, recreational, scenic, and open space values" along with needs for economic development. HRS 205A-4(a). In the same way *MECO* and *Electric Light Co.* required the PUC to consider greenhouse gas emissions under Chapter 269, BLNR is required by law to consider the objectives of HRS 205A in issuing revocable permits for the east Maui streams. Therefore, HRS Chapter 205A is a law "relating to environmental quality" for the purposes of establishing a protected property right under article XI, section 9. *See Kahoma*, 149 Hawai‘i at 313, 489 P.3d at 417. Since HRS 205A is a law relating to environmental quality, and since it applies to the revocable permits at issue, it provides further support for the court's conclusion that the right to a clean and healthful environment is a protected property right under the facts of this case.

The court declines to rule on appellant's argument that public trust principles are another basis of a protectable constitutional interest. The public trust doctrine arises from Article XI, section 1 (Conservation and Development of Resources) and section 7 (Water Resources). The appellant is correct that the public trust doctrine is a fundamental constitutional mandate in Hawai‘i. *Waiāhole*, 94 Hawai‘i 97, 146, 9 P.3d at 458. It is also correct that beneficiaries generally can enforce their constitutional rights. *Pele Def Fund v. Paty*, 73 Haw. 578, 837 P.2d

1247, 1264 (1992). However, the court is not aware of clear case law providing that the public trust doctrine under Article 1, sections 1 and 7, creates for trust beneficiaries a property interest for purposes of due process protections for the constitutional right to a clean and healthful environment under ArticleXI, section 9. Since the law on this issue is unclear to this court, and since this court's ruling relies on separate grounds, and since this issue appears to be a pure question of law which the appellate court can rule on *de novo* without the trial court making factual findings or credibility determinations, this trial court respectfully declines the appellant's request to rule on the issue at this time. Under these circumstances, it is more appropriate for the appellate courts to decide the issue if they so choose.

For the above reasons, the court hereby finds that under the first prong in *Flores*, the Sierra Club has a particular property interest within the meaning of the due process clause of the state constitution. Having satisfied the first prong of *Flores*, the court moves to the second prong: what specific procedures are required to protect that right.

The court agrees with appellees that a constitutional property interest does not automatically and always trigger a contested case hearing. Due process is flexible. The constitutionally required protections are dictated by the particular circumstances. *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261; *Mauna Kea*, 136 Hawai‘i at 389, 363 P.3d at 237.

The appellees primarily argue that a contested case hearing is not required because a) the revocable permits are temporary; b) BLNR already considered the evidence and "new evidence" the Sierra Club relies on; c) matters of great public importance should not be decided at a contested case hearing; d) cross-examination of witnesses is not a protected right; e) the Sierra Club's requests were already accommodated; f) Sierra Club is trying to re-litigate its previous lawsuits; and g) generally speaking, BLNR has already fulfilled its legal obligations and

considered all evidence that needs to be considered. Respectfully, the court disagrees that a contested case hearing is not necessary under the particular circumstances of this case. Those circumstances include the following, discussed at length in the briefing. The court makes no merits findings here. The court is just noting the numerous issues (including evidence not previously subject to cross examination) that Sierra Club would have likely fully disputed at a contested case hearing had it been given the opportunity:

i) the volume of water involved even though these are "temporary" 1-year permits, revocable on 30- days notice;

ii) the apparent availability of a significant amount of sustainable ground water – an issue Sierra Club was not allowed to develop at the BLNR's sunshine meeting;

iii) the potential importance of a pending CWRM decision, which BLNR allegedly refused to wait one week for;

iv) the issue of how much of the diverted water Mahi Pono actually needs and uses for its sustainable agriculture project;

v) the cost and timeline for implementing anti-loss measures such as placing liners in reservoirs that the diverted streamwater is stored in;

vi) the amount of water needed and used by the County of Maui for its up-country residents, business needs, and public uses such as fire suppression;

vii) the amount of preventable system losses (water wasted).

These are multi-faceted and complex issues, involving facts, policy, law, and substantial impact on the public interest. That is precisely why a contested case hearing is necessary: get the facts, exhibits, witnesses, arguments, and perspectives out on the table, subject to cross-examination, hearing full argument (not three minutes) and create a full and robust record. Do

that, and the chances increase for getting a solid, objective decision that protects our natural resources while also balancing legitimate needs to use those natural resources. The statutory policies and requirements involving contested case hearings in HRS chapter 91, the holdings and rationale in *In re ʻĪao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai‘i 228, 243-44, 287 P.3d 129, 144-45 (2012), a case involving public streams on Maui, and the importance of protecting the constitutional right to a clean and healthful environment in the context of our natural resources all lean heavily toward the need to hold a contested case hearing.

The most important legal authority to this court on the applicability and importance of a contested case hearing is the 5-0 opinion in *Mauna Kea*. Chief Justice Recktenwald wrote for the court:

> A "fair trial in a fair tribunal is a basic requirement of due process." *Sifagaloa v. Bd. of Trs. of Emps.' Ret. Sys.*, 74 Haw. 181, 189, 840 P.2d 367, 371 (1992) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). While the specifics of that guarantee can vary depending on the circumstances, in the instant case the Appellants were entitled to a contested case hearing and had unequivocally requested one before the Board voted on the permit at its February 2011 meeting. A contested case hearing is similar inmany 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 toensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.
>
> 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." *Sandy Beach Def. Fund v. City & Cnty.of Honolulu,* 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). The Board was on record in support of the project, and the permit itself was issued before evidence was taken and subject to adversarial testing before a neutral hearing officer. While UHH and the Board argue that the February 2011 decision was "preliminary" and subject to revision, the fact remains that the Board issued the permit prior to holding the contested case hearing. This procedure was improper, and was inconsistent with the statutory definition of a contested case as "a proceeding in which the legal rights, duties, or privileges of specificparties are required by law to be determined

after an opportunity for agency hearing." HRS § 91–1(5) (1993) (emphasis added).

Such a procedure lacked both the reality and appearance of justice. As this court noted in Sifagaloa:

> The Supreme Court teaches us ... that justice can "perform its high function in the best way [only if it satisfies] the 'appearance of justice.' " For in a popular government, "'justice must not only be done but must manifestly be seen to be done.' "

74 Haw. at 189–90, 840 P.2d at 371 (quoting *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954), and *Murchison*, 349 U.S. at 136, 75 S.Ct. 623).

> The process followed by the Board here did not meet these standards. 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 remandso 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 380-381, 363 P.3d at 228-29.

While not directly relevant to whether a contested case is required, the court adds its own experience for whatever value it may or may not have for the appellate courts. This Division of the Environmental Court has presided over cases involving east Maui stream permits seemingly non-stop for four years, including a lengthy trial, multiple agency appeals, and lengthy and complex hearings with thousands of pages of exhibits and heavy briefing. In the cases assigned to this Division involving Sierra Club's involvement in the east Maui streams revocable permits litigation, the court has received information and arguments from the Sierra Club. That information contributes materially to legitimate factual, legal, and policy discussions – whether or not the court is ultimately persuaded by it. The court has ruled against Sierra Club in some of these cases and has ruled against BLNR and A&B in some of these cases. These issues are *hard*. All the parties are motivated to one degree or another to protect our natural resources. But

they disagree on how much protection and at what cost. Factually, these are often issues that reasonable people can disagree on. The Sierra Club does not have all the answers. Neither does BLNR or A&B. (And neither does this court.) But it offends the constitution when BLNR dismisses Sierra Club's advocacy out of hand by denying them a meaningful opportunity to be heard – even if with good or neutral intentions (saving BLNR time and resources). The court is convinced BLNR's decisions will be stronger, and our community and natural environment will be better off if the parties can truly listen to one another and take each other's information and interests into honest account. This is not Pollyanna-ish. It's a reality that each party has some good points based on their own perspective and experience. The final product can be better when all of them have a seat at the table. Perhaps put another way: there may be cases where the concrete, real-life value of a contested case hearing is debatable. The court is 100% sure this case is not one of them. The court respectfully requests the parties pause, put down their swords, take a look around, and decide to engage with each other in good faith to protect our natural resources -- while also leaving room for sustainable uses of those natural resources for legitimate purposes in the public interest.

A contested case hearing is warranted given (1) the significant 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 of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

For the above reasons, the revocable permits "cannot stand" as is. *Mauna Kea*, 136 Hawai‘i at 381, 363 P.3d at 229. Accordingly, this court holds that BLNR must hold a

contested case hearing prior to rendering a decision on the continuation of the revocable permits for 2023.

The Revocable Permits Are Modified

> In 1CCV-20-0001541, the court noted:
>
> As a general rule, when an agency fails to conduct a necessary contested case hearing, any approval it has issued is void. *Mauna Kea.*, 136 Hawai‘i at 380-81, 363 P.3d at 228-29; *Public Access Shoreline Hawaii 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).
>
> This case is an exceptional case. The court does not wish to create unintended consequences or chaos by vacating the permits without knowing the practical consequences of such an order, especially when in a few months (absent further legal developments) there will likely be another hearing to extend the existing revocable permits or grant new revocable permits to replace the existing ones. The court will not risk a vacuum which causes hardship to those on Maui who rely on the water at issue.

As with the previous proceeding, the court chooses not to risk chaos or unintended consequences by voiding the revocable permits in their entirety. Doing so would potentially leave a legal vacuum until BLNR can issue new permits, which in turn could threaten reliable availability of necessary water. Instead, the court will again modify the permits as expressly allowed by HRS § 91-14(g) – and as authorized by HRS § 604A-2(b), the court's inherent equitable powers (*see Richardson v. Sport Shinko*, 76 Hawai`i 494, 507, 880 P.2d 169, 182 (1994), *Jenkins v. Wise*, 58 Haw. 592, 598, 574 P.2d 1337, 1342 (1978), and *Carmichael*, 150 Hawai‘i at 572, 506 P.3d at 236), and public trust principles.

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HRS § 91-14(g) expressly states:

> **Upon review of the record, the court may affirm the decision of the agency or 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** because the administrative findings, conclusions, decisions, or orders are:
>
> **(1) In violation of constitutional or statutory provisions;**
>
> **(2)** In excess of the statutory authority or jurisdiction of the agency;
>
> **(3) Made upon unlawful procedure;**
>
> **(4)** Affected by other error of law;
>
> **(5)** Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> **(6)** Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The court's June 16, 2023 ruling setting the cap at 31.5 MGD remains in place. Out of an abundance of caution, the court re-orders the 31.5 MGD cap in this more formal order (see, *infra*). Per the following chart, the court provides a snapshot of the users, amounts of water requested, amounts recommended, amounts actually used, amounts allowed by BLNR under the permits, and the amounts ordered by the court, together with explanatory footnotes.

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Category	BLNR's Amount	BLNR Staff Recommendation	Amount Actually Used/Contracted for	Court's Amount
Mahi Pono/ Diversified Ag	27.91	27.91	18[1]	27.91
County Dept. of Water Supply	6	6	6	6
County (Kula Ag Park)	1.5	1.5	1.5	1.5
Historic/ Industrial Uses	0.07	0.07	0.12	0.07
Other: (reservoir, dust, fire, etc.)	2.2	0	3.65	0[2]
Cushion	2.79	0	0	0[3]
Total	40.47	35.48	29.27	35.48
Available Groundwater	0	0	-4[4]	-4
Total	40.49[5]	35[6]	25.27	31.50 (rounded up)

[1] Based on counsel's oral representation.

[2] This use is drawn from the 7.5 mgd drawn by the County.

[3] The court concludes having a "cushion" which is untethered to any particularized, demonstrable need is not a reasonable and beneficial use of the public's natural resources, particularly when it well exceeds the historical *actual* uses. Mahi Pono's estimated need of 27.91 mgd already factors in a significant degree of uncertainty as to new plantings, crop maturation, etc. As a specific example, the 27.91 mgd includes a large estimate for the acreage of *planned* new plantings. This may change when updated information is provided as to *actual* new plantings, which the court hereby requests be submitted, along with any other updated factual information a party believes is relevant regarding actual use of water in late 2022 and thus far in 2023.

[4] The amount of sustainable ground water actually being pumped ranges from 2.96 to 4.95 per A&B's report ofquarterly averages.

[5] The court cannot reconcile the difference between BLNR's 40.47 and 40.49.

[6] The 35 was simply rounded down from 35.51 by BLNR staff.

Order

1. This matter is remanded 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"[7] on the continuation of the revocable permits.

2. The revocable permits are hereby modified with a new cap of 31.50 mgd (as shown in the table above), effective immediately, until BLNR renders a decision after the completion of the contested case, or further order of this court.

3. Pursuant to HRS § 91-14(i),[8] the court hereby retains jurisdiction to ensure compliance with its orders. The court may also appoint a special master or monitor in the future if circumstances warrant it.

4. Pursuant to HRS 604A-2(b),[9] the court will exercise its equitable powers as necessaryto receive and consider additional information and evidence, and promptly hold any necessary hearings to help the parties and the court with adaptive management practices until BLNR renders a decision after the completion of the contested case hearing or until further order of the court. The goal is to keep as much water in the streams as possible and be ready to modify the court's cap if necessary -- so that neither too much nor too little water is diverted from the streams while balancing Maui's legitimate water needs and preserving our natural resources.

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[7] *In re Interim Instream Flow Standards for Waikamoi*, 128 Hawai'i 497, 291 P.3d 395, 2012 Haw. App. LEXIS 1040, *12 (ICA 2012) (last sentence of the opinion).

[8] "Where a court remands a matter to an agency for the purpose of conducting a contested case hearing, the court may reserve jurisdiction and appoint a master or monitor to ensure compliance with its orders."

[9] "In any case in which it has jurisdiction, the environmental courts shall exercise general equity powers as authorized by law. Nothing in this chapter shall be construed to limit the jurisdiction and authority of any judge, designated as judge of an environmental court, to matters within the scope of this chapter."

This flexible approach is especially suitable with stream water, which can vary depending on factors such as weather, storage, unexpected needs, system losses, and time of year. For now, the court finds, concludes, and orders that a cap of 31.5 MGD is sufficient based on the evidence presented. The parties should not hesitate to come back with updated, current data (the court's current data is from late 2022), or new legal authority. The court will promptly make room on its calendar to hear appropriate requests to modify this order. This is especially, but not exclusively true, for the "municipal-and resident-water needs of the upcountry Maui community." *Carmichael*, 150 Hawai'i at 572, 506 P.3d at 236.

Dated: Honolulu, Hawai'i, July 14, 2023 2023.

/s/ Jeffrey P. Crabtree

JUDGE OF THE ABOVE-ENTITLED COURT

The court adds this information here to emphasize it is not a material factor in the court's decision. The court is aware, as Sierra Club points out, that this information was not part of the record on appeal and the court is to confine its review to the record. HRS 91-14(f). That said, the court sees nothing wrong with trying to understand on a human scale how much water we are talking about.

As the court noted on record at the hearing, a million gallons of water is not easy to visualize. So the court looked to respected institutional online sites to get a sense of how much water it is. The typical Olympic-sized swimming pool is 50 meters long, 25 meters wide, 2 meters deep, and holds about 660,000 gallons of water. Therefore, one million gallons of water is about 1.5 Olympic-sized swimming pools. If the court's math is correct, the 40.49 MGD approved for the 2023 revocable permits allows more than 61 Olympic-sized swimming pools full of water to be taken out of the streams per day (40,500,000 gallons per day divided by 660,000 gallons = 61.36). /Jeffrey.P.Crabtree