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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

- a) Nahiku license area:
  - 1. Makapipi Stream
  - 2. Hanawī Stream
  - 3. Kapaula Stream
  
- b) Keanae license area:
  - 4. Waiaaka Stream
  - 5. Pa'akea Stream
  - 6. Waiohue Stream
  - 7. Kopiliula Stream
  - 8. Pua'aka'a Stream (a tributary of Kopiliula)
  - 9. East Wailuaiki Stream
  - 10. West Wailuaiki Stream
  - 11. Wailuanui Stream (and Waikani waterfall)
  - 12. Kualani (or Hamau) Stream (a tributary of Waiokamilo stream)
  - 13. Waiokamilo Stream
  - 14. Ohia (or Waianu) Stream (never diverted by A&B/EMI)
  - 15. Palauhulu Stream (and its tributaries Hauoli Wahine and Kano)
  - 16. Pi'ina'au Stream (joins with Palauhulu before reaching the ocean)
  
- c) Honomanū license area:
  - 17. Nua'ailua Stream
  - 18. Honomanū Stream
  - 19. Punalau Stream (and its tributaries Kōlea and Ulunui)
  - 20. Ha'ipua'ena Stream
  
- d) Huelo license area:
  - 21. Puohokamoa Stream
  - 22. Wahinepe'e Stream
  - 23. Waikamoi Stream (and its tributary Alo)
  - 24. Kōlea Stream
  - 25. Punaluu Stream
  - 26. Kaaiea Stream
  - 27. Oopuola Stream (and its tributary Makanali)
  - 28. Puehu Stream
  - 29. Naililihaele Stream
  - 30. Kailua Stream
  - 31. Hanahana Stream (and its tributary Ohanui)
  - 32. Hoalua Stream
  - 33. Hanehoi Stream (Huelo, also known as Puolua Stream, is a tributary of Hanehoi Stream)
  - 34. Waipio Stream
  - 35. Mokupapa Stream
  - 36. Hoolawa Stream (and its tributary Hoolawa ili and Hoolawa nui)
  - 37. Honopou Stream (and its tributary Puniawa)

**Exhibit J-14 at pp. 40-41.**

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

7. **The leases.**

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

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

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

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

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

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

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

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

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

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

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



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

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

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

**Exhibit J-14 at p. 18.**

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

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

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

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

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

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

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

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

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

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

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

The FAC had three counts:

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

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

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

**COUNT 2**

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

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

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

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

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

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

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

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

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

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

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

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

## PRAYER FOR RELIEF

The plaintiff asks for the following relief:

- A. Declare that the defendants violated HRS chapter 343
- B. Declare that BLNR, DLNR and Chair Case breached their public trust duties.
- C. Declare that BLNR, DLNR and Chair Case violated their HRS chapter 205A obligations.
- D. Declare invalid the BLNR's November 2018 and October 2019 decisions approving the holdover of Revocable Permits S-7263 (Tax Map Key (2) 1-1-001:044), S-7264 (Tax Map Keys (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) and S-7265 (Tax Map Key (2) 1-1-002:por. 002) to Alexander and Baldwin, Inc., and S-7266 (Tax Map Keys (2) 1-2-004:005 & 007) to East Maui Irrigation Company, Limited.
- E. Based on the balancing of the harms, enjoin Alexander and Baldwin, Inc. and East Maui Irrigation Company LLC from taking more than 25.75 million gallons of water on any day from East Maui (as measured at Honopou Stream) until completion of the HRS chapter 343 process and the proper issuance of a permit, license or lease from the BLNR.
- F. Enjoin the BLNR Defendants from authorizing the diversion of more water from the revocable permit areas than 25.75 million gallons of water daily from east Maui streams – and enjoin A&B from taking more water – unless and until:
  - existing legal obligations are first fulfilled;
  - the applicant(s) upholds its burden in justifying the taking of more water;
  - the BLNR Defendants estimate in good faith how much water would flow in each stream without diversion, how much is currently diverted, and how much more water is proposed to be diverted from each stream;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

J. Setting the 45 MGD limit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

K. The Parham report.

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

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

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

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

L. The feasibility of alternative sources of water.

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

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



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

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

**Exhibit J-20 at p. 177.**

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

M. Balancing recreational uses with off-stream uses.

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

N. Negative impacts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **CONCLUSIONS OF LAW**

#### **A. The Public Trust Duties.**

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

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

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3. Haw. Const. art. XI, § 1 states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

Ching, 145 Hawai’i at 177–78.

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

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

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

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

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

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

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

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

57. Relief.

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

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

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

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

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

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

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

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

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

### **DECISION AND ORDER**

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

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

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

/s/ Jeffrey P. Crabtree



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Judge of the Above-Entitled Court

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