STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2022

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

HAWAII ISLAND

Denial of Petition for Contested Case Hearing filed by the Department of Hawaiian Home Lands on August 22, 2022, Regarding August 12, 2022 Agenda Item D-2, *Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Pi`ihonua, South Hilo, Island of Hawaii, Tax Map Key: (3) 2-6-009; 2-6-029; and Acceptance of Wailuku Watershed Management Plan.*

Pursuant to Section 92-5(a) (4), Hawaii Revised Statutes (HRS), the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

BACKGROUND

At its meeting on August 12, 2022 under agenda item D-2, the Board approved the sale of a license at public auction for the non-consumptive use of water from the Wailuku River, Island of Hawaii, for hydroelectric generation purposes and accepted the proposed Wailuku Watershed Management Plan, pursuant to Section 171-58, Hawaii Revised Statutes (HRS). The use of water for hydroelectric generation would increase renewable energy for the Island of Hawaii and further the State's renewable energy goals set forth in Act 95, Session Laws of Hawaii 2015. As part of its approval, the Board accepted the fair market upset rent determined by independent appraisal. The appraisal was done by a licensed appraiser and reviewed and accepted by the Department. The appraisal was conducted consistent with the USPAP standards.

The Board received both oral and written testimony from the Department of Hawaiian Home Lands (DHHL). During the meeting, DHHL verbally requested a contested case. Following an executive session, the Board voted to deny the request for contested case and proceeded to approve staff's recommendation. On August 22, 2022, the Department received DHHL's written petition for contested case from DHHL. A copy of the contested case petition is attached as **Exhibit A**.

DISCUSSION

An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or

(3) constitutional due process. Mauna Kea Anaina Hou v. BLNR, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015). Neither the statutes nor rules require the contested case that is requested by DHHL and DHHL concedes this in its petition. And DHHL is not entitled to a contested case under a constitutional due process examination. The petition identifies Article XII, Section 1, of the Hawaii State Constitution as the sole constitutional due process basis for DHHL being entitled to a contested case.

There is a two-step process in determining whether a person is entitled to a contested-case hearing under constitutional due process. First, a court must consider "whether the particular interest which claimant seeks to protect by a hearing is 'property' within the meaning of the due process clauses of the federal and state constitutions." Flores v. BLNR, 143 Hawaii 114 (2018) at 125. Second, if a court "concludes that the interest is 'property,' th[e] court analyzes what specific procedures are required to protect it." Id.

Step one merely requires the court to determine whether an appellant seeks to protect a constitutionally cognizable property interest. Flores at 125. To have such a property interest, a person "must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Sandy Beach Def. Fund v. City & County. of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests "are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" Flores at 125.

If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to step two, the Hawai'i Supreme Court has been careful to emphasize that "[d]ue process is not a fixed concept requiring a specific procedural course in every situation." Sandy Beach, 70 Haw. at 378, 773 P.2d at 261. Due process "is flexible and calls for such procedural protections as the particular situation demands." Id. (quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)). The touchstone of due process is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Id.

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

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

Flores at 126-127.

<u>Step One: DHHL Fails to Identify a Constitutionally Cognizable Property Interest</u>

HAR § 13-1-29(b) provides that a formal petition for a contested-case hearing must include, among other things, a statement of "[t]he nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case[.]" DHHL's petition alleges that the use of the appraised upset rent value as approved by the Board will inhibit its ability to obtain entitled revenues to support the Native Hawaiian Rehabilitation Fund (NHRF) from the 30% of State receipts derived from water licenses pursuant to Article XII, Section I of the Hawaii State Constitution. Rather, DHHL argues that the appraised upset rent would result in lower revenues than DHHL wants.[1] However, DHHL does not have a property interest in dictating how the appraised value is derived by the licensed appraiser. And, DHHL's percentage of water lease rents is not affected by the Board's August 12, 2022 action.

With respect to the substance of its claim, DHHL implies that the Board's action would result in less revenue that the NHRF. The appraised upset rent value is simply the minimum amount, and not (necessarily) the water license rent amount. As discussed above, pursuant to HRS Section 171-17, the upset rent was determined by an independent appraisal, with a disinterested appraiser exercising their professional expertise and judgment to determine the fair market value. Conversely, DHHL has not provided an independent appraisal and in any event has not argued or articulated that the appraisal is wrong or deficient in any way. DHHL wishes the appraised upset rent value was higher. That does not entitle DHHL to a contested case and is inconsistent with the statute. Ultimately, the rent owed under the license will be determined by winning bid at public auction which can be no less than the value determined by appraisal.

DHHL also takes issue with the Board's acceptance of the watershed management plan. However, contrary to their claims, DHHL was provided an opportunity to be heard at a meaningful time and in a meaningful manner on this issue. As noted previously, DHHL attended and provided testimony on this matter when it was considered by the Board. Furthermore, DHHL's assertion that the acceptance of the watershed management plan, and an appropriate contribution to support its implementation should be subject to rulemaking, is not correct. At its meeting on October 11, 2019, under agenda item D-2, the Board approved the minimum content of a watershed management plan pursuant to HRS Section 171-58(e). The staff submittal for that item noted that the issue was addressed by the Legislature when the requirement was adopted in 1990. A House Standing Committee Report (SCRep. 752-90) explicitly stated that the Board can prescribe the minimum content of a watershed management plan without adopting rules pursuant to Chapter 91, HRS. The Committee found that "watershed management practices are site specific and rule establishment would not be productive". In any event, this is not an issue that gives rise to a contested case.

Step Two: Even if DHHL Identified a Constitutionally Cognizable Property Interest, It Is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

For the sake of argument, even if DHHL established that it has a constitutionally protected property interest, DHHL is not entitled to a contested-case hearing. The touchstone of due process is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner before

[1] In support of that position, DHHL argues that the appraised upset rent results in a substantially lower rent than the a "shared net benefit" fee approach apparently preferred by DHHL.

governmental deprivation of a significant property interest." Sandy Beach, 70 Haw. at 378, 773 P.2d at 261. To determine what process is due, the administrative agency must examine and balance three factors:

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

Flores at 126-127.

First, regarding DHHL's potential interest that may be affected by the Board's action (30% of State receipts derived from water licenses), the specific injury to that interest from the Board action is not clearly articulated in the petition. DHHL provides no specific claim of injury as to the appraised upset rent and the acceptance of the watershed management plan, except the belief that DHHL will be deprived of their perceived "fair share" of water license revenues. Again, DHHL's percentage of State receipts derived from a water license is not affected at all., DHHL does not even assert that the appraised upset rent value is somehow in error or an otherwise flawed appraisal methodology, simply that it could result in less revenue than other potential methodologies preferred by DHHL that have not been validated by an appraisal. Furthermore, a contested case hearing would not be the proper forum to resolve this issue, as a decision by the Board to adopt DHHL's proposed alternative methodology appears to be antithetical to the various provisions of Chapter 171, HRS that address the determination of fair market value.

HRS Section 171-17 and other provisions of the chapter provide much deference to a qualified, disinterested appraiser to determine fair market value.[2] The First Circuit Court in Department of Hawaiian Home Lands v. State of Hawaii, Board of Land and Natural Resources, 1CCV-22-0000176, noted that "DHHL's interests whether in protecting or maximizing its income from water rights income is a purely governmental interest, not a private interest". As long as DHHL is paid its 30% share of the water license rent received, regardless of the actual amount, the constitutional obligations to DHHL's beneficiaries have been satisfied. There is no obligation to maximize rent for DHHL's benefit.

DHHL seeks relief by requesting the Board to adopt rulemaking procedures for the watershed management contribution or as an alternative, consider the contribution as part of the receipts derived from the water license. As previously noted, when this provision was enacted, it was the intent of the Legislature to not subject this process to rulemaking. Additionally, DHHL mischaracterizes this as a "fee". However, the contribution provided by the license for watershed management plan implementation is not a fee. Rather, it is a fair share contribution determined by the specific watershed management plan and the purpose and amount of water used by the licensee. While the licensee may fulfill this obligation by a monetary contribution, it could also be fulfilled

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[2] Staff notes that while DHHL has advocated for its methodology for over a year, it has not provided any analysis by an appraiser supporting that either its proposed methodology is indicative of fair market value; or that the Board's approved guidance is somehow not.

by providing in-kind services or cost sharing on specific watershed management projects. Furthermore, if DHHL still believes rulemaking is required, despite being contrary to legislative intent, a contested case hearing is not the proper forum to determine that issue.

Second, there is no risk of an erroneous deprivation of any DHHL interest here. The Department followed all applicable Sunshine Law requirements in providing the public notice of the meeting. DHHL was provided notice of the meeting, including the staff submittal, and submitted testimony in opposition to the agenda item. Additionally, the DHHL staff testified in person at the meeting. DHHL was afforded a substantial opportunity to be heard by providing written and oral testimony. And again, a contested case could not change the result because the appraised upset rent value was determined by appraisal, which has not even been challenged by DHHL.

Third, the governmental interest, including the burden that holding a contested case hearing would entail, weighs very heavily in favor of rejecting the contested case petition. Contested case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources, the Board, and its attorneys. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested case hearings and may go into the many tens of thousands of dollars, once again not counting staff and attorney time.

Therefore, for these reasons, DHHL is not entitled to a contested case hearing.

RECOMMENDATION:

That the Board deny the Petition for a Contested Case Hearing filed by Department of Hawaiian Home Lands on August 8, 2022.

Respectfully Submitted,

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APPROVED FOR SUBMITTAL:

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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing on the Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Pi'ihonua, South Hilo, Island of Hawai'i, Tax Map Key: (3) 2-6-009; 2-6-029; and Acceptance of the Wailuku Watershed Management Plan	Case No. CCH_____ PETITION FOR CONTESTED CASE HEARING; CERTIFICATE OF SERVICE

PETITION FOR CONTESTED CASE HEARING

The Department of Hawaiian Home Lands, State of Hawai'i ("DHHL"), made an oral request for a contested case hearing during the Board of Land and Natural Resources' ("BLNR") August 12, 2022 meeting, with respect to the proposed action to authorize the Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Pi'ihonua, South Hilo, Island of Hawai'i, Tax Map Key: (3)

EXHIBIT A

2-6-009; 2-6-029; and Acceptance of the Wailuku Watershed Management Plan.[1] DHHL's oral request for a contested case hearing was denied by BLNR. Pursuant to Hawaii Administrative Rules ("HAR") § 13-1-29.1, the BLNR may deny a request when it is "clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law, that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding." The bases for DHHL's contested case hearing request are as follows:

I. The Proposed Guidance Will Inhibit DHHL's Ability to Obtain Revenues to Which it is Entitled Under Article XII, § 1 of the Hawai'i State Constitution

A. Thirty Percent of State Receipts Derived from Water Licenses Must Go to the Native Hawaiian Rehabilitation Fund.

Pursuant to Article XII, § 1 of the Hawai'i State Constitution, thirty percent of the state receipts derived from lands previously cultivated as sugarcane lands under any other provision of law and from water licenses shall be deposited into the Native Hawaiian Rehabilitation Fund ("NHRF"). DHHL is mandated to use this fund "for the rehabilitation of native Hawaiians which shall include but not be limited to the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians [including native Hawaiian families and homestead communities] are thereby improved and perpetuated." Stand. Comm. Rep. No. 56, 2 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 635.[2] When the Hawaiian Home Lands Trust was first established in 1921, sugar was the

[1] Board of Land and Natural Resources DLNR, *10.22.2021 Board of Land and Natural Resources Meeting*, YOUTUBE (Aug. 12, 2022) https://www.youtube.com/watch?v=ba82fBCP_kY (38:59).

[2] "This fund will allow the Hawaiian [H]omes [C]ommission to more economically utilize Hawaiian homestead lands…This fund is not designed to relieve the State of its responsibilities to the people of Hawai['i outside the Hawaiian [H]omes [C]ommission." Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, 1 Proceedings, at 422.

dominant industry in the islands and water license fees were one of the two sources of funding for DHHL.

To reflect the adoption of Article XII, § 1 of the Hawai'i State Constitution, section 213(i) of the Hawaiian Homes Commission Act, 1920, as amended ("HHCA") recognizes that thirty percent of the state receipts derived from the leasing of cultivated sugarcane lands under any provision of law or from water licenses shall be transferred to the NHRF.

B. The Hawaiian Homes Commission and DHHL Have Fiduciary Obligations to Administer the Hawaiian Home Lands in the Sole Interest of Native Hawaiian Beneficiaries.

In 1920, Congress enacted the HHCA, which set aside approximately 203,500 acres of public lands for a homesteading program for native Hawaiians; these lands were given the status of Hawaiian home lands to be held in trust. Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 336-38, 640 P.2d 1161, 1167-68 (1982). The Hawaiian home lands were to be under the control of the Hawaiian Homes Commission ("Commission"). Id. When Hawai'i entered the Union, the State acquired title to the Hawaiian home lands. Kepo'o v. Watson, 87 Hawai'i 91, 97-98 952 P.2d 379, 385-86 (1998). Both legal title and management responsibilities over Hawaiian home lands rest with the State. Id. DHHL, led by the Commission, is the state agency charged with administering the Hawaiian home lands.

Additionally, Hawai'i's appellate courts have consistently recognized a heightened duty of care owed to native Hawaiians. See, e.g., Public Access Shoreline Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 620-32, 837 P.2d 1247, 1272 (1992); Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 7-8, 656 P.2d 745, 749 (1982). Hawai'i courts have viewed matter impacting the interest of DHHL's native Hawaiian beneficiaries as significant enough of a public interest that a contested case hearing should be held.

In administering the Hawaiian home lands, the Commission and DHHL's fiduciary duties include (1) the obligation to administer the trust solely in the interest of the beneficiary and (2) the use of reasonable skill and care to make the trust property productive. Ahuna, 64 Haw. at 340, 640 P.2d at 1169. Further, a trustee is expected to invest the trust corpus in a manner which would produce income from which to carry out trust objectives. In fulfilling that investment function, a trustee is required to deal with the trust assets in accordance with the prudent investor standard. Therefore, the Commission and DHHL have the obligation to maximize the trust property after consideration of public trust needs, including the proceeds from the NHRF towards the betterment of native Hawaiians.

C. The Calculation of the Watershed Management Fee Does Not Provide a Fair, Transparent, and Effective Formula.

DLNR's watershed management fee is an improper carveout from DHHL's entitlement to thirty percent of all receipts derived from water licenses. Moreover, the watershed management fee is being imposed here without having first gone through administrative rulemaking.

Rulemaking is required when establishing a policy of general and prospective applicability to all individuals who may apply for leases in the future. See Aguiar v. Hawaii Hous. Auth., 55 Haw. 478, 487-88, 522 P.2d 1255, 1262 (1974); Aluli v. Lewin, 73 Haw. 56, 61, 828 P.2d 802, 805 (1992) ("Without established written standards by rules, no one can know whether permit applications will be reviewed fairly and consistently and whether considerations to grant or deny a permit will serve the purpose of the statute or are unlawful."). Failure to comply with the rulemaking provisions in chapter 91, HRS, will leave any formula adopted by BLNR on questionable legal footing, and thus, would not advance BLNR's goal of facilitating

compliance with HRS § 171-58(e).[3] Decisions involving public rights to a public trust resource must be made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of the State. See In re Waiāhole Combined Contested Case Hearing ("Waiāhole I"), 94 Hawai'i 97, 143, 9 P.3d 409, 456 (2000).

Rulemaking requirements under chapter 91, HRS, has the objective to "provide for public participation in the rule-making process, by allowing any interested person to petition for a change in the rules as well as to participate in a public hearing." In the creation and calculation of the watershed management fee, DLNR relied on an unwritten, unadopted policy and/or rule in violation of HRS § 91-1(4).[4]

The current watershed management fee, which impacts all prospective water lessees, has no clear criteria. Most importantly, the watershed management fee is not considered to be part of the funds derived from the water license issued – and, therefore, not subject to distribution to either DHHL or the Office of Hawaiian Affairs. There is no basis to leave the watershed management fee outside of the calculation for determining total receipts derived from a water lease. Article XII, § 1 of the Hawai'i State Constitution is clear; DHHL is entitled to "[t]hirty

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[3] HRS § 171-58(e) provides:

> Any new lease of water rights shall contain a covenant that requires the lessee and the department of land and natural resources to jointly develop and implement a watershed management plan. The board shall not approve any new lease of water rights without the foregoing covenant or a watershed management plan. The board shall prescribe the minimum content of a watershed management plan; provided that the watershed management plan shall require the prevention of the degradation of surface water and ground water quality to the extent that degradation can be avoided using reasonable management practices.

[4] HRS 91-1(4) defines a rule as an:

> [A]gency statement of general or particular applicability and future effect that implements, interprets[,] or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of our procedures available to the public.

percent of the state receipts derived from the leasing of sugarcane lands under any provision of law or from water licenses" (emphasis added). Here, the watershed management fee is clearly derived from the subject water lease. Without the water lease, there would be no fee. The imposition of the fee impacts both recipients of water leases and licenses and those who are entitled to the receipts derived therefrom, including DHHL. The creation and calculation of the watershed management fee is a rule, not an internal regulation that affects only internal management and clearly affects the private rights or procedures available to the public.

A rule shall be considered "invalid if it finds that it...was adopted without compliance with statutory rule-making procedures." See HRS § 91-7(b); see also Otani v. Contractors License Bd., 51 Haw. 673, 676, 466 P.2d 1009, 1011 (1970). DLNR's rule in the calculation of their watershed management fee was adopted without complying with the process of rulemaking as outlined in HRS § 91-3. Ensuring a consistent application of the watershed management fee through appropriate rulemaking will ensure valuation of public trust water resources is conducted with an appropriate level of objectivity and with a full consideration of the wide-ranging interests and values for our water - particularly considering the State's fiduciary and constitutional obligations under the HHCA.

D. The Pricing Mechanism Chosen by HELCO Would Deprive the NHRF from Necessary Funds.

On August 16, 2016, Hawaiian Electric Light Company ("HELCO") submitted an application to DLNR for an application for a long-term water lease. Specifically, HELCO requested a sixty-five (65) year lease to continue to divert water from the Wailuku River for a non-consumptive use to continue to operate the Waiau and Pu'u'eo hydroelectric facilities located alongside the Wailuku River.

One of the remaining approval issues needed to complete this project is to determine a proper price and execute a lease. HELCO noted various pricing mechanisms that could be applied to properly price the lease. HELCO included a consideration of rates charged by the Federal Energy Regulatory Commission ("FERC"), which were developed for massive hydroelectric and irrigation projects on the United States continent. The FERC rates for a water lease are 1/1000 of a dollar per kilowatt hour. By HELCO's own calculations, this would generate a lease payment to the State of $17,556.52 per year; payment into NHRF at the rate HELCO proposes for the next sixty-five years would be $5,266.95 annually.

HELCO also included the "shared net benefit" fee approach. In that method, the benefit of using hydropower to produce electricity is compared to the avoided cost of generation from other existing sources, and the financial benefit of that is "shared" by evenly splitting the savings between the water lessee and operator. The use of hydropower as opposed to the existing generation would save $509,077.30 annually, and that benefit could be shared equally between the ratepayers and the State, for an annual lease rate of $254,538.65; under this scenario, where the benefit is equally shared between the ratepayers and the State, payment into NHRF for the next sixty-five (65) years would be $76,361.56 annually.

II. The Legal Authority Under Which the Proceeding, Hearing or Action is to be Held or Made.

A contested case hearing is "one that (1) required by law and (2) determines the rights, duties, and privileges of specific parties." In re Application of Maui Elec. Co., 141 Hawai'i 249, 258, 408 P.3d 1, 10 (2017). For a contested case hearing to be required by law, "it must be required by (1) agency rule, (2) statute, or (3) constitutional due process." Mauna Kea Ainana Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015). Here, BLNR

erred in denying DHHL's request for a contested case because constitutional due process requires such a hearing.

In deciding whether a person has a constitutional right to a contested case hearing, BLNR must first consider whether the particular interest which a claimant seeks to protect by a hearing is property within the meaning of due process clauses. Flores v. Bd. of Land & Nat. Res., 143 Hawai'i 114, 125,424 P.3d 469, 480 (2018). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement." Id. Legitimate claims of entitlement that constitute property interests are "created and dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" Id. (quoting In re Maui Elec. Co., 141 Hawai'i 249, 260, 408 P.3d 1, 12 (2017)).

DHHL clearly has a property interest in receiving thirty percent of income from water licenses. Dept. of Hawaiian Home Lands v. Bd. of Land & Nat. Res.; Dept. of Land & Nat. Res., Civ. No. 1CCV-22-0000176, [Proposed] Findings of Fact, Conclusion of Law, and Order Affirming the Board of Land and Natural Resources' January 14, 2022 Decision Denying Appellant State of Hawai'i Department of Hawaiian Home Lands' Request for a Contested Case Hearing ("Proposed Final Order") 4 (Aug. 18, 2022). The HHCA prioritizes DHHL's water needs over the interests of BLNR water license holders. See HHCA §§ 213(i), 221(b). DHHL is the sole custodian of NHRF and is the only party with a legitimate claim of entitlement to the thirty percent of water receipts allocated to NHRF. Further, Hawai'i courts have consistently recognized a heightened duty of care owed to native Hawaiians and have viewed matters impacting the interests of DHHL's native Hawaiian beneficiaries as significant enough of a public interest tha a contested case hearing should be held. See, e.g., Public Access Shoreline

Hawai'i v. Hawai'i Cnty. Planning Comm'n, 79 Hawai'i 425, 451, 903 P.2d 1246, 1272 (1995); Pele Def. Fund v. Paty, 73 Haw. 578, 620-32, 837 P.2d 1247, 1272 (1992).

An agency is often in the position of deciding issues that affect multiple stakeholders and implicate constitutional rights and duties. See, e.g., In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 231, 287 P.3d 129, 132 (2012). Thus, "an agency bears a significant responsibility of ensuring that its actions and decision honor the constitutional rights of those directly affected by its decision." Mauna Kea Anaina Hou, 136 Hawai'i at 414, 363 P.3d at 262. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i State Constitution when such rights are implicated by agency action or decision. Id. at 415, 363 P.3d at 263 (citing Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000)).

DHHL's constitutionally created property interest is a significant interest that demands the procedural protections offered through a contested case hearing. The next step of the required analysis would be to determine whether a contested case hearing is required to protect that interest. Flores, 143 Hawai'i at 126-127, 424 P.3d at 481-82. This requires BLNR to consider and balance three factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of the interest through the procedures actually used, and the probable value of other safeguards; and (3) the governmental interest, including the burden imposed by additional safeguards. Id.

DHHL has a private, property interest affected by this proceeding: its proportion of income derived from the subject water lease. A private interest is construed as "a benefit which one is entitled to receive by statute, creating a constitutionally-protected property interest." Aguiar, 55 Haw. at 496, 522 P.2d at 1267. "Constitutional due process protections mandate a

hearing whenever the claimant seeks to protect a 'property interest;' in other words, constitutional due process protections extend whenever there is a benefit to which the claimant is legitimately entitled. Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). A property interest is considered sufficiently substantial so as to trigger due process protections where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases. See id. at 68, 881 PP.2d at 1214. DHHL has a private property interest that would trigger due process protections as DLNR is considering the sale of a water license at public auction that could adversely affect the constitutionally protected rights of other interested parties, including DHHL as a recipient of the funds derived from the water license. See In re 'Iao Ground Water Management High-Level Source Water Use Permit App. ("'Iao"), 128 Hawai'i 228, 287 P.3d 129 (2012). If DLNR's watershed management fee is not considered to be "receipts derived ... from water licenses," DHHL's entitlement is reduced drastically. Because DHHL's revenues are adversely implicated from the sale of the water license granted by BLNR, DHHL has an interest to be protected in the hearing.

As to the second factor, there is a significant risk that DHHL's interests will be erroneously denied through approval of the sale of the water license and the imposition of the watershed management fee. The basic elements of procedural due process require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). DHHL was not provided a prior public opportunity to offer its opinion on the DLNR's authorization of the watershed management fee at

a meaningful time or meaningful manner. See id. Any application of a watershed manageent fee for its water leases must be evenhanded, rest on statutorily acceptable criteria, and authored under rulemaking provisions of chapter 91, HRS. See Aguiar, 55 Haw. at 493, 522 P.2d at 1265. While DHHL appreciates DLNR's responsibilities towards the maintenance of watershed function and water yield to maintain the biological integrity of our watersheds, DLNR (as a sister agency of State) holds fiduciary duties towards their constitutional obligations to native Hawaiians in making its trust property productive. See Ahuna, 64 Haw. at 340, 640 P.2d at1169.

DHHL has previously provided DLNR staff with an alternative methodology that set a minimum selling price for any water leases issued under HRS § 171-58 to ensure that DHHL has equitable revenue from any waters leased in the State to fund NHRF. This methodology ensures that any disposition of water rights by the State must comply with HRS § 171-58 and that no water rights may be disposed of for less than a certain percentage of the cost of the least expensive alternative source of water of similar quality and purpose. However, DHHL has not had a previous opportunity to present its alternative methodology to BLNR to explain how its methodology would meet the State's fiduciary duty to native Hawaiians. A contested case hearing would provide the only venue to examine the appropriate protections for a matter that affects a constitutionally entitled allocation of funds, while simultaneously effectuating the values of the public trust that would be befitting for the compelling interests at stake. DLNR's authorization of the sale of the water license using a methodology that would substantially decrease the amount provided to NHRF would require the additional process of a contested case.

Considering the third factor, DHHL has a strong interest in holding a contested case hearing to ensure that the State (1) provides DHHL its fair share of receipts derived from water leases and (2) provides the public, including all prospective water lessees and licensees, with a

clear basis for creating a watershed management fee and criteria for calculating such a fee. Any burden imposed on BLNR by the procedures that they must follow is vastly outweighed by the safeguards afforded to the State acting as a trustee to native Hawaiians pursuant to the Hawai'i State Constitution and the HHCA.

III. The Relief Sought By DHHL

In lieu of the approval of action described in the subject Submittal Item, DHHL respectfully requests BLNR to adopt rulemaking procedures for the watershed management fee, which appears to shield a material amount of income derived from calculations of DHHL's revenue entitlement. In the alternative, DHHL respectfully requests BLNR consider the watershed management fee as part of the "receipts derived … from water licenses" contemplated under Article XII, § 1 of the Hawai'i State Constitution. DHHL continues to provide its concerns over BLNR's methodology that utilizes the FERC rate and has previously proposed a methodology that would prohibit the disposition of water rights for less than a certain percentage of the cost of the least expensive alternative water sources of similar quality and purpose, except for water leases and licenses issued for instream traditional and customary native Hawaiian practices.

IV. DHHL's Contested Case Hearing Request Serves the Public Interest

The State has a trust obligation to administer the Hawaiian home lands in the sole interest of native Hawaiian beneficiaries. As the agency responsible for implementing this trust obligation, DHHL has a fiduciary duty to properly carry out the obligations of the HHCA as discussed above. This includes administering the NHRF, which is used towards the improvement of the educational, economic, political, social, and cultural processes for its beneficiaries. The

State's compliance with its trust obligations, DLNR's proper management of the public trust corpus, and DHHL's performance of its fiduciary duties are all undeniably in the public interest.

V. Conclusion

For these reasons, Petitioners respectfully request BLNR grant a contested case hearing on the action.

DATED: Honolulu, Hawai'i, August 22, 2022.

/s/ Alyssa-Marie Y. Kau
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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing on the Sale of Water License at Public Auction for the Non-Consumptive Use of Water from the Wailuku River for Hydroelectric Generation Purposes, Pi'ihonua, South Hilo, Island of Hawai'i, Tax Map Key: (3) 2-6-009; 2-6-029; and Acceptance of the Wailuku Watershed Management Plan	Case No. CCH_____ PETITION FOR CONTESTED CASE HEARING; CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above captioned document was served upon the following individuals by hand-delivery and email at the address listed below:

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