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

MAUI

Denial of Petition for Contested Case Hearing filed by the Sierra Club on November 17, 2022, Regarding November 10, 2022 Agenda Item D-5: *Continuation 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, for Water Use on the Island of Maui.*

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 November 10, 2022, under agenda item D-5, the Board approved as amended the continuation 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, (collectively the "Permittees") for water use on the Island of Maui. The Board received both oral and written testimony on the item from the Sierra Club of Hawaii (Sierra Club). During the meeting, Sierra Club verbally requested a contested case. The Board voted to deny the request for contested case and proceeded to approve staff's recommendation. On November 17, 2022, the Department received a written petition for contested case from Sierra Club filed via email. Sierra Club submitted a hard copy of the petition postmarked November 18, 2022 and which was received by the Department on November 21, 2022. 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). When a contested-case hearing is required by statute or administrative rule, the

analysis is simple. However, HRS Section 171-55 does not have a contested case requirement. Whether a contested-case hearing is required by constitutional due process is a much more complicated analysis. The petition identifies Article XI, Section 9, of the Hawaii State Constitution as the constitutional due process basis for Sierra Club 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 Hawai'i 114, 424 P.3d 479 (2018). 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*, 143 Hawai'i 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*, 143 Hawai'i at 125.

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." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. 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." *Id.* 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)).

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, 143 Hawai'i at 126-127.

<u>Step One: Sierra Club 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[.]" Sierra Club alleges that the Board's action violated the right of Sierra Club and its members to a clean and healthful environment including the conservation, protection and enhancement of natural resources. Sierra Club argues that these rights are constitutionally protected property interests under Article XI, Section 9 of the State Constitution. The First Circuit Court has previously ruled that the rights asserted by Sierra Club are constitutionally protected property interests in *Sierra Club v. BLNR*, Civ. No. 20-000154, an agency appeal regarding the Board's denial of Sierra Club's previous request for a contested case hearing for the same matter ("agency appeal"). The Board's attorneys disagreed with the Court's decision and appealed the ruling to the Intermediate Court of Appeals. The appeal has not yet been decided.

In the agency appeal, the Board's attorneys argued that the Sierra Club did not have an interest in the revocable permits which rose to the level of a constitutionally protected property interest. In its prior petition the Sierra Club similarly asserted the right to "a clean and healthful environment (including 'conservation, protection and enhancement of natural resources') as defined by HRS chapters 171, 343, and 205A."

Even though the Hawai'i Supreme Court found that the enjoyment of "a clean and healthful environment, *as defined by laws relating to environmental quality"* can constitute "property" interests within the meaning of the due process clause, (see *In re Hawai'i Elec. Light* Co., 145 Hawai'i 1, 16, 445 P.3d 673 , 688 (2019) (quoting Hawai'i State Constitution art. XI, sec. 9) (emphasis added)), the Board's power to continue the revocable permits comes from HRS § 171-55, a statute relating to land management, not environmental quality. Therefore, the Board's attorneys argued that *In re HELCO* is distinguishable. If the Sierra Club were entitled to a contested case in this instance, arguably, every decision the Board makes which relates to land management would be subject to a contested case.

Staff strongly agrees that HRS § 171-55 is not a law that relates to environmental quality but rather management of public lands. Sierra Club selectively refers to broad statements of policy and select provisions of Chapter 171, HRS as a basis to argue otherwise. However, a review of the provisions of Chapter 171, HRS reveals otherwise.

There are over 100 sections contained in Chapter 171, HRS. The majority of these provisions prescribe methods and conditions under which the Department may acquire, use and dispose of public lands. This includes leasing of public lands by public auction or direct negotiation, acquisition of land, determination of rent, sales of remnants, use of public lands for industrial, hotel and resort, and agricultural purposes. Most of these provisions do not impose additional requirements regarding environmental quality beyond what is already required by other statutes (such as Chapter 343, HRS). Given that Chapter 171, HRS is not a law relating to environmental quality, Sierra Club's interests do not rise to the level of a constitutionally protected property interest.

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

However, even if the Sierra Club has established that it is seeking to vindicate a constitutionally cognizable property interest, it is not entitled to a contested-case hearing under the current circumstances. Even if the Sierra Club asserts a constitutionally cognizable property interest, that is not the end of the inquiry as to whether a contested-case hearing is required. The Sierra Club must further meet the remaining criteria in the aforementioned *Flores* three-part test, to determine whether the Sierra Club received notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.

A party is not at risk of the erroneous deprivation of its protected interest when it has "already been afforded a full opportunity to participate in a contested case hearing and express [its] views and concerns on the matter," such that "the provision of an additional contested case hearing is [not] necessary to adequately safeguard against erroneous deprivation" of its rights. *Id.*, 143 Hawai'i at 127, 424 P.3d at 482. Flores essentially sought a distinct hearing "in order to express the same concerns, and to vindicate the same interests, that he previously raised in the [prior] contested case hearing[.]" *Id.* Thus, in *Flores,* the court held the appellant was not entitled to a contested case to challenge a Board decision because he had already "participated extensively" in a prior contested case hearing on a similar decision "by presenting evidence ... and arguments concerning the effect that the" challenged action would have in his protected rights. *Id.*, 143 Hawai'i at 127, 424 P.3d at 482.

The *Flores* court also noted that the appellant did not clarify the extent to which he would put forth evidence and arguments "materially different" from that which had already been proffered in the previous contested case. *Id.* "On this particular record," the *Flores* court wrote, "we are not convinced that an additional contested case hearing would offer any probable value in protecting against the erroneous deprivation of his interest[.]" *Id.*

In the agency appeal, the Board's attorneys argued that even if the Sierra Club had a cognizable property interest, it was not entitled to additional procedures when it already had gone through a prior trial in a direct action to protect those same interests, and that the agency appeal was analogous to the situation in *Flores.* Indeed, the Sierra Club had even more protection than a prior contested case. It had an entire trial before the First Circuit Court just a few months prior to the Board's November 13, 2020 decision. The direct action specifically challenged the issuance of the revocable permits to the Permittees for the year 2020. The State prevailed in that direct action.

Moreover, like the appellant in *Flores,* the Sierra Club did not clarify the extent to which it would put forth "materially different" evidence or arguments. As the Board's attorneys argued, "[t]o require [the Board] to hold a[] contested case hearing in such circumstances would require [the Board] to shoulder duplicative administrative burdens and comply with additional procedural requirements that would offer no further protective value." *Id.*, 143 Hawai'i at 128, 424 P.3d at 483.

Staff believes that the forgoing rationale is applicable in this instance. Given the factual circumstances of Sierra Club's current request, there is no risk of an erroneous deprivation of Sierra Club's interests here. The trial that focused on the continuation of the revocable permits for the year 2020 was decided in favor of the State, and Sierra Club has appealed that ruling to the

Intermediate Court of Appeals. Additionally, prior to the Board's November 10, 2022 decision, the Department proceeded with a contested case hearing as required by the agency appeal. The Sierra Club was provided an opportunity to present its case during that hearing, including introducing evidence, presenting its own witnesses, and questioning witnesses of other parties. As part of the contested case process, the Sierra Club also presented oral arguments before the Board for its consideration of the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision and Order. The Sierra Club has since appealed the Board's final order in the contested case to the First Circuit Court, providing them another opportunity to be heard.

The Department followed all applicable Sunshine Law requirements in providing the public notice of the November 10, 2022 Board meeting. Sierra Club was provided notice of the meeting and the staff submittal. The Sierra Club submitted written testimony on the agenda item. During the Board meeting, Sierra Club also provided oral testimony, and was given an extended amount of time to do so after protesting to the Board.

At the Board meeting, Sierra Club had the opportunity and did testify on the same issues raised in their present request to justify a contested case hearing, such as estimated water needs and system losses. Moreover, the Board did consider those issues in their decision making, reflected by amendments adopted as part of its approval. Staff notes that Sierra Club does not even claim to have new evidence that was not available and could not have been presented to the Board at its meeting on November 10, 2022.

Since the Board's decision, the Commission on Water Resource Management (CWRM), at its meeting on November 15, 2022, approved amended interim instream flow standards (IIFS) for the streams in the Huelo region. With this approval and CWRM's decision and order from 2018, all of the streams in the revocable permit areas now have amended IIFS. Consistent with the revocable permit conditions approved by the Board, the Permittees must limit diversions to comply with the IIFS. This is a significant step to ensure that both the water resource and public trust and instream uses of water are protected. Sierra Club initially filed the petition to amend the IIFS and was present at the CWRM meeting and offered both written and oral testimony. Additionally, the Commission adopted amendments proposed by Sierra Club in their approval of the amended IIFS.

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. Even in this one instance, Sierra Club has failed to justify why the Department of Land and Natural Resources should bear such costs and spend many hours of staff time on a contested-case hearing of extremely limited, if any, import, especially considering that the Department has already held a contested case on this same matter within the last year.

Sierra Club has been provided ample opportunity to participate in multiple hearings to advocate for the protection of their property interests. Furthermore, the record confirms that the Board considered the Sierra Club's testimony in their decision making. Therefore, Sierra Club has been

provided sufficient due process in this matter and is not entitled to an additional contested case simply because it does not agree with the Board's decision.

RECOMMENDATION

That the Board deny the Petition for a Contested Case Hearing filed by the Sierra Club of Hawaii on November 17, 2022.

Respectfully Submitted,

Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:

Suzanne D. Case, Chairperson

RT

STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

OFFICIAL USE ONLY	
Case No.	**Date Received**
Board Action Date / Item No.	**Division/Office**

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:

   Department of Land and Natural Resources
   Administrative Proceedings Office
   1151 Punchbowl Street, Room 130
   Honolulu, Hawaii 96813
   Phone: (808) 587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (http://dlnr.hawaii.gov/forms/contested-case-form/). Please review these rules before filing a petition.

3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.

4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a $100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

5. All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER (If there are multiple petitioners, use one form for each.)		
1. Name Sierra Club	**2. Contact Person** Wayne Tanaka	
3. Address P.O. Box 2577	**4. City** Honolulu	**5. State and ZIP** HI 96803
6. Email hawaii.chapter@sierraclub.org	**7. Phone** (808) 538-6616	**8. Fax**

B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	**10. Firm Name**	
11. Address [redacted]	**12. City** Honolulu	**13. State and ZIP** HI 96816
14. Email [redacted]	**15. Phone** [redacted]	**16. Fax**

EXHIBIT A

C. SUBJECT MATTER	
17. Board Action Being Contested Continuation of Revocable Permits S-7263, S-7264, S-7265 and S-7266 to ALEXANDER AND BALDWIN, INC., AND EAST MAUI IRRIGATION COMPANY, LLC FOR TAX MAP KEY (2) 1-1-001:044 and :050; (2) 2-9-014:001, 005, 011, 012 & 017; (2) 1-1-002:POR. 002; and (2) 1-2-004:005 & 007 FOR WATER USE ON THE ISLAND OF MAUI	
18. Board Action Date November 10, 2022	**19. Item No.** D-5
20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case	
21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection **Please see attached**	

22. Any Disagreement Petitioner May Have with an Application before the Board

Pleasse see attached

23. Any Relief Petitioner Seeks or Deems Itself Entitled to
The Sierra Club requests that numerous conditions be imposed.

24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest
The Sierra Club can bring to the BLNR's attention facts, documents and testimony. Its cross examination of the applicant's witnesses will reveal that statements it has made lack credibility. In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg, ~~397 U.S. at 269; In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 444, 83 P.3d 664, 706 (2004).~~

25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

☒ Check this box if Petitioner is submitting supporting documents with this form.

☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

Wayne Tanaka

Petitioner or Representative (Print Name) Signature

These attached pages supplement and are part of the Sierra Club's petition for a contested case hearing. BLNR should have ready access to the declarations, deposition testimony, trial testimony, and contested case hearing testimony, which the Sierra Club incorporates here by reference. The Sierra Club also incorporates its testimony for the November 10, 2022 BLNR meeting as well as its prior contested case hearing petitions, testimony, and the entire record in last year's contested case hearing.

BLNR should also have a copy of the Environmental Court's August 23, 2021 order that the BLNR's denial of its request for a contested case hearing in 2020 violated the Sierra Club's constitutional due process rights. "A contested case hearing was required before the BLNR voted on November 13, 2020, to continue A&B's revocable permits for another year. Mauna Kea. This court will not allow the unconstitutional status quo to continue any longer."

The Sierra Club is a membership organization advocating for the protection of our unique natural environment. The Sierra Club's mission includes protection of natural resources, including streams, native aquatic life, and native forests. Formed in 1968, the Hawai'i Chapter of the Sierra Club has thousands of members throughout the Hawaiian Islands. The Sierra Club's members are directly affected by the continuation of the revocable permits. They live along and draw water from the streams in the license area for residential and farming purposes. They enjoy the streams and forest in the license area for their recreational, cultural, and spiritual importance. This includes, but is not limited to, hiking, fishing, swimming, and other recreational uses in and around the streams of the proposed license area. The Sierra Club's interests are harmed by these diversions, poor management, and waste of water. The Sierra Club's and its members' interest in hiking to east Maui streams, experiencing them flow freely, seeing native aquatic life in them, and enjoying nature is undermined by BLNR's rubberstamping of the continuation of the

revocable permits without appropriate conditions, and in A&B's continued diversion of streams and littering the landscape. Our members have seen streams run dry for long periods of time while A&B has diverted them. The diversions harm the native stream life that Sierra Club members enjoy. These diversions harm our members' ability to use and enjoy free-flowing streams. Sierra Club members are also affected by trash that litters the landscape and the spread of invasive species. In addition, BLNR has never clarified whether the permits give A&B an exclusive right to occupy the land; i.e. to exclude others. To the extent that the permit allows A&B to exclude Sierra Club members from hiking on state land (in violation of HRS §171-26), their rights are adversely affected.

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

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

Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994) (emphasis added). BLNR's vote granted legal rights and privileges to a private diverter and affected the rights of the Sierra Club, despite its objections.

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

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

Article XI, section 9 of the Hawai'i State Constitution states:

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

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

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

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

The Hawai'i Supreme Court has concluded that the "Sierra Club's interest in its right to a clean and healthful environment, as defined by laws relating to environmental quality, is a property interest protected by due process, as it is a substantive right guaranteed by the Hawai'i Constitution." *Hawai'i Elec.*, 145 Hawai'i at 16, 445 P.3d at 688. In *Maui Elec.*, the supreme court held that the Public Utilities Commission violated the Sierra Club's due process rights by approving a power purchase agreement between a utility company and a producer of electricity without holding a contested case hearing to consider the environmental impacts of approving the agreement as required by an environmental statute, HRS chapter 269. *Maui Elec.*, 141 Hawai'i at 260-65, 408 P.3d at 12-17. In this case, the BLNR violated the Sierra Club's due process rights by voting to authorize the continued diversion of east Maui streams and the use of state land without holding a contested case hearing to consider the environmental impacts of the authorization as required by numerous statutes. The Sierra Club and its members have the right

to a clean and healthful environment (including "conservation, protection and enhancement of natural resources") as defined by HRS chapters 171 and 205A —just as the Sierra Club had rights pursuant to HRS chapter 269 in *Maui Elec.*

a. HRS Chapter 171 is a law relating to environmental quality.

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

First, in determining whether a law is related to environmental quality, the Hawai'i Supreme Court has relied on the legislature's identification of laws related to environmental quality when it enacted of HRS § 607-25. *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 410, 235 P.3d 1103, 1122 (2010). Each chapter cited in HRS § 607-25 "implements the guarantee of a clean and healthful environment established by article XI, section 9." *Id. See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105. HRS § 607-25(c) identifies HRS chapter 171.

Second, the legislature specified that all cases arising from title 12—of which HRS chapter 171 is a part—are subject to the jurisdiction of the environmental court. HRS § 604A-2(a). Title 12 is itself titled "Conservation and Resources." This legislative determination also demonstrates that this law that governs the use of the state land is a law relating to environmental quality.

Third, HRS chapter 171 implements Hawai'i State Constitution Art. XI, section 2, which reads in relevant part: "The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law." This provision was drafted by the framers of the first state constitution in 1950 and went into effect at statehood. The framers were concerned about "the preservation of certain natural resources. . . . Hence, the

importance of placing fairly rigid restrictions on the administration of these assets." Committee of the Whole Report No. 22 in 1 Proceedings of the Constitutional Convention of Hawaii of 1950 at 335 (1950). Pursuant to Article XI section 2, the 1962 state legislature codified the laws that govern the administration and management of the state's lands into RLH chapter 103A, which later became HRS chapter 171. *See* 1963 Supplement to Revised Laws of Hawaii 1955 at 485; Act 32, 1962 Session Laws of Haw. Thus, HRS chapter 171 is a law relating to the preservation of natural resources.

Fourth, HRS chapter 171 relates to the "conservation, protection and enhancement of natural resources." HRS § 171-58(c) allows certain uses that do not affect "the volume and quality of water or biota in the stream." HRS § 171-58(e) requires that a lessee "develop and implement a watershed management plan" that prevents "the degradation of surface water and ground water quality[.]" *See also* Senate Stand. Com Rep. 2984, 1990 Senate Journal at 1217. *See also* HRS § 171-26.

Finally, just as HRS chapter 269 required consideration of environmental factors, HRS § 171-55 requires that BLNR consider conditions that serve the best interests of the State. These interests obviously include "resource protection." *Waiāhole*, 94 Hawai'i at 136, 9 P.3d at 448; *id.* at 97, 137, 9 P.3d at 449; ("public interest in a free-flowing stream for its own sake"); *Robinson v. Ariyoshi,* 65 Haw. 641, 674-76, 658 P.2d 287, 310-11 (upholding the public interest in the "purity and flow," "continued existence," and "preservation" of the waters of the state)(1982); *Reppun v. Board of Water Supply*, 65 Haw. 531, 560 n.20, 656 P.2d 57, 76 n.20 (1982) (acknowledging the public interest in "a free-flowing stream for its own sake"). There can be no question that HRS chapter 171 is a law relating to environmental quality, including the "conservation, protection and enhancement of natural resources."

of gallons of water taken from public streams.

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

In rendering any decision made pursuant to HRS chapter 171, the BLNR must also comply with HRS chapter 205A. HRS § 205A-4(a) requires that BLNR "give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development." The "right to a clean and healthful environment includes the right that specific consideration be given to" ecological values. *Maui Elec.*, 141 Hawai'i at 265, 408 P.3d at 17. Moreover, the objectives and policies of HRS chapter 205A are binding on BLNR's actions and BLNR must enforce them. HRS §§ 205A-4(b) and -5. These objectives and policies call for BLNR to:

- "Protect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems." HRS § 205A-2(b)(4)(A);
- "Exercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources." HRS § 205A-2(c)(4)(A); and
- "Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs." HRS § 205A-2(c)(4)(D).

The Hawai'i Supreme Court has held that "HRS ch. 205A is a law 'relating to environmental quality' for the purposes of article XI, section 9." *Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n*, 149 Hawai'i 304, 313, 489 P.3d 408, 417 (2021).

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

The Sierra Club and its members also enjoy constitutionally protected rights as beneficiaries of the public trust pursuant to Article XI section 1, Article XI section 7, and Article

XII section 4 of the State Constitution. "[T]he people of this state have elevated the public trust doctrine to the level of a constitutional mandate." *Waiāhole*, 94 Hawai'i at 131, 9 P.3d at 443. "We therefore hold that article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." *Id.* at 1131-32, 9 P.3d at 443-44. The *Waiāhole* court recognized that our constitution and case law emphasize "the right of the people to have the waters protected for their use." *Waiāhole*, 94 Hawai'i at 146, 9 P.3d at 458. Similarly, the supreme court held that the citizens of the state "must have a means to mandate compliance" with Article XII § 4 of the state constitution. *Pele Def Fund v. Paty*, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992).

The Sierra Club and its members have the right to ensure that the natural resources, ceded lands, streams, and other public trust resources identified in these constitutional provisions are protected. They cannot be deprived of the rights secured by these constitutional provisions without due process. These constitutional provisions afford members of the public the right to enforce them. *See e.g.*, *Waiāhole*, 94 Hawai'i at 120 n.15, 9 P.3d at 432 n.15 ("constitutional due process mandates a hearing in both instances because of the individual instream and offstream 'rights, duties, and privileges' at stake"); *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 140 P.3d 985 (2006); *Pele Def Fund v. Paty*; and *Ching v. Case*, 145 Hawai'i 148, 173 and 176, 449 P.3d 1146, 1171 and 1174 (2019) (beneficiaries of the article XII section 4 ceded land trust possess constitutional rights to enforce it). Members of the public are beneficiaries of the trust. As such, their constitutional interests are adversely affected when the BLNR allows water to be diverted from streams in ways that cause significant harm.

In a similar case involving the diversion of public streams, the supreme court held that a contested case was required because (1) the decision involved "significant and thorough analysis

and factfinding"; (2) the ramifications of the decision "could offend the public trust, and is simply too important to deprive parties of due process and judicial review"; and (3) the decision would affect individual rights. *'Iao*, 128 Hawai'i at 243-44, 287 P.3d at 144-45. These three factors also mandate a contested case hearing on the continuation of the revocable permits. First, like *'Iao*, BLNR was required to decide whether the permit served "the best interests of the State." HRS § 171-55. It was also required to "give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development." HRS § 205A-4(a). Pursuant to HRS §§ 205A-4(b) and -5, BLNR must "[p]rotect valuable coastal ecosystems from disruption and minimize adverse impacts on all coastal ecosystems," HRS § 205A-2(b)(4)(A),"[e]xercise an overall conservation ethic and practice stewardship in the protection, use and development of coastal resources," HRS § 205A-2(c)(4)(A), and "[m]inimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversions, channelization, and similar land and water uses, recognizing competing water needs." HRS § 205A-2(c)(4)(D). These requirements are virtually identical to the *'Iao* analysis. Second, BLNR's decision will "directly affect downstream and off-stream interests." *'Iao*, 128 Hawai'i at 243, 287 P.3d at 144. Because BLNR is disposing of water from public streams, an erroneous decision "could offend the public trust." *'Iao*, 128 Hawai'i at 244, 287 P.3d at 145. In fact, the permits authorize A&B to take and waste a significant amount of water east Maui streams. Finally, the revocable permits "matter" and will have immediate impacts on individual water users. *Id.* As the Sierra Club has pointed out in its petition and accompanying declarations that these permits adversely affect its members in a substantial way. Just as the Maui Tomorrow Foundation had a right to a contested case hearing regarding the diversion of central Maui streams in *'Iao*, so too does the Sierra Club have a right

to one regarding the diversion of streams in east Maui.

In *Mauna Kea*, the supreme court ordered a contested case hearing on whether a telescope could be built on conservation district land: "Given the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing, a contested case hearing was 'required by law'[.]" *Mauna Kea*, 136 Hawai'i at 390, 363 P.3d at 238. Similarly given the "substantive right guaranteed to each person by article XI, section 9," *Maui Elec*, 141 Hawai'i at 261, 408 P.3d at 13, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording the Sierra Club a contested case hearing, a contested case hearing was required by law.

II. <u>There is Value in Having a Contested Case Hearing.</u>

The Sierra Club will bring to BLNR's attention important new data and facts that were unavailable at last year's contested case hearing. Some of this data directly contradicts the data relied upon in that contested case decision. For example, Mahi Pono exaggerated its use of water it calls historic/industrial uses by an order of magnitude. New quarterly reports reveal the extent of system losses. CWRM staff produced a new report that determined that Mahi Pono's water needs are exaggerated. In its rush to make a decision, BLNR effectively cut the rent charged to A&B in half, apparently without knowing the consequences of its action.

BLNR has a substantial interest in conducting a contested case hearing. BLNR is already constitutionally bound to make its decision "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455. BLNR must ensure that public trust resources are

protected. *Id.*; *Pila'a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai'i 247, 250, 320 P.3d 912, 915 (2014) ("The BLNR is constitutionally mandated to conserve and protect Hawai'i's natural resources."). It is also statutorily bound to give full consideration of ecological values. HRS § 205A-4(a). A contested case allows BLNR to fulfill its obligations through the development of a complete record, cross examination of witnesses, thorough analysis of the evidence, and specific findings of fact.