

## **I. INTRODUCTION**

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 *without*: 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. BLNR’s Answer admitting to paragraphs 1 and 109 of the complaint. BLNR failed to make an effort to obtain necessary facts for an informed decision and failed to protect public trust resources.

The Department of Land and Natural Resources (**DLNR**), BLNR and BLNR Chair Suzanne Case (collectively herein, “**BLNR Defendants**”) are fully aware that the diversion of water from east Maui streams can adversely affect native aquatic species, native stream habitat, ecosystem health, recreational values, natural beauty, and cultural uses. Exhibit G ¶¶35. Yet, they failed to take steps to obtain necessary information or impose conditions to protect native stream life; a dozen streams that the Commission on Water Resources Management (**CWRM**) has ignored for decades; Hanehoi and Honopou and Ho‘olawa streams; and the watershed. They also ignored the threat posed by invasive species and the littering of public lands.

## **II. UNDISPUTED FACTS**

The 33,000 acres of ceded land that BLNR allows A&B to use lie within the state conservation district. Exhibit N ¶¶6 and 12. BLNR admits that in making its decision, it did not understand the harm caused by A&B’s use of public lands and the diversion of dozens of streams. BLNR’s Answer admitting to paragraph 1 of the complaint.<sup>1</sup>

### **A. Stream Life**

DLNR’s 2005 Hawaii’s Comprehensive Wildlife Conservation Strategy identified stream diversions and insufficient in-stream flows as a key threat to species on Maui: Exhibit A at 6-52

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<sup>1</sup> The substantive and procedural injuries the Sierra Club and its members suffer are described in the declarations attached to its motion for partial summary judgment as to count 1 filed May 20, 2019 as well as the second declarations of Lucienne de Naie and Martha Townsend attached hereto. The injuries are caused by the diversion of water from streams, the threat of increased diversions, the continuation of the revocable permits, A&B’s use of public lands, and the BLNR Defendants’ failure to obtain necessary information and impose appropriate conditions necessary to protect public trust resources.

and 6-53. DLNR identified stream diversion as a threat to ‘o‘opu nākea, ‘o‘opu ‘alamo‘o, ‘o‘opu nōpili and opa‘ē kala‘ole. *Id.* pages after 6-53. In a May 17, 2010 letter to then-BLNR Chair Laura Thielen, Robert Nishimoto, the environmental program manager for the division of aquatic resources, wrote that “native animals are missing from a number of stream sections where they should naturally exist.” He also concluded: “The removal of stream diversions and the complete restoration of stream flow would be the best possible condition for native aquatic animals.” BLNR’s Answer ¶ 2 admitting to paragraph 29 of the complaint.

According to the U.S. Fish and Wildlife Service:

The long history of stream diversions by the EMI system on East Maui has created an array of impacts to trust resources, including both the native stream biota, other species which inhabit the adjacent upland forests, and nearshore marine ecosystems that rely on streams for nutrient inputs.

Exhibit B at 4.

BLNR Chair Suzanne Case testified under oath that the adverse impact of stream diversions on native aquatic species is dependent upon the stream flow and the amount of water diverted. Exhibit H at 19-20. The BLNR Defendants have admitted that information regarding the amount of water flowing naturally in a stream (without any diversions) and the amount actually diverted can be important in assessing whether the diversion adversely affects native aquatic species and habitat. Exhibit I ¶6. Yet, the BLNR Defendants do not know how much water naturally flowed in many of the streams and how much of that water A&B was, is, and will be diverting from each stream. Exhibit G at 9-11. Nor did BLNR seek such information. *Id.* at 20-24. Nor did the BLNR Defendants make any effort to ensure that the freshets upon which native species depend will flow below stream diversions. Exhibit G ¶¶ 2-3.

Not only do diversion structures reduce stream flow that native aquatic species require, but they can also cause significant harm to native aquatic species by blocking them from migrating upstream as well as entraining larvae flowing downstream. Declaration of Anne Dendel Brasher. Yet, the BLNR Defendants not seek information regarding which diversions cause the greatest threat of entrainment of native aquatic species Exhibit G ¶26. Nor did they seek information as to which diversions pose the greatest impediment to migration of these species. Exhibit N ¶10. Nor did BLNR require the removal or alteration of any stream modification structure within a clear timeframe. BLNR’s Answer admitting to paragraph 96 of the complaint.

**B. Twelve Streams Not Regulated by the June 2018 CWRM Order**

In 1988, CWRM adopted interim instream flow standards for all streams within east Maui. HAR §13-169-44. The standard was whatever was flowing on June 15, 1988. In response to petitions to establish instream flow standards for more than two dozen streams, in June 2018, CWRM finally established substantive standards for 24 streams. Exhibit D at 268-69. That proceeding, however, did not address the water flowing in twelve other streams that flow within the area covered by the revocable permits: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary),<sup>2</sup> Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries). *Id.* at 17-18 (FOF 58); BLNR’s Answer admitting to paragraph 41 of the complaint. BLNR has no idea how much water was flowing in these twelve streams as of June 15, 1988. Exhibit N ¶1; *see also* Exhibit F ¶2. Thus, the twelve streams have no meaningful instream flow standards. In its November 2018 decision, BLNR did not adopt any additional conditions to protect these twelve streams. Exhibits A and J. It failed to provide any protection for any of the native aquatic species that live in those streams, or the public use and enjoyment of these twelve streams (including uses by Sierra Club members). *Id.* It did not limit the amount of water that can be taken from these streams. *Id.* BLNR’s decision effectively authorizes A&B to divert significantly more water from these streams than it has been doing over the past two years.<sup>3</sup> The BLNR Defendants do not know how much water: was taken daily from each stream within the past two years, Exhibit G ¶9; was taken on average from each stream for the past two years, *id.* ¶10, or; A&B was proposing to take on average, or daily, or at a maximum from each stream in 2019, *id.* ¶11. Nor did BLNR seek such information. *Id.* ¶¶20-22. BLNR did not seek any information regarding what percentage of each stream’s flow was taken or was being proposed to be taken. *Id.* ¶24. Nor do the BLNR Defendants have any idea what the base flows of these twelve streams are. Exhibit N ¶¶3-4.

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<sup>2</sup> Please note that in Findings of Fact 58 and 60 of the June 2018 CWRM decision, CWRM refers to the stream as “Hanahana Stream.” The Hawai‘i Board on Geographic Names, however, refers to the stream as Hanawana. <http://files.hawaii.gov/dbedt/op/gis/bgn/placenames/HBGN%20-%20Maui%20-%20Official%20May%202018.pdf>.

<sup>3</sup> A&B is planning to increase the amount of water diverted from east Maui streams by 36% this year. In 2017 and 2018, A&B diverted no more than 25.75 million gallons on average daily. Exhibit F ¶¶ 8-9. In 2019, A&B plans to divert 35 million gallons daily. *Id.* ¶10.

**C. Ho‘olawa Stream**

One of the twelve streams that CWRM has ignored is Ho‘olawa Stream.<sup>4</sup> Ironically, this stream on occasion has too much water flowing because A&B takes water from other streams and dumps this diverted water into Ho‘olawa Stream. Exhibit K ¶12; Exhibit F ¶12.

**D. Hanehoi and Honopou Streams**

The 2018 CWRM decision orders Hanehoi and Honopou streams to be fully restored. Exhibit D at iv and 269. In fact, in April 2016, A&B issued a press release in which it announced that it was fully and permanently restoring water to Hanehoi stream. Exhibit L ¶6.

Yet, water is still diverted from these streams. Exhibit L ¶¶7, 9; Exhibit O ¶8; Second Declaration of Lucienne de Naie ¶23. When BLNR made its November 2018 decision, the BLNR Defendants did not know whether any water was still being diverted from Hanehoi and Honopou streams. Exhibit I ¶¶4-5. BLNR has no idea whether the diversions remain, how much water is still diverted from these streams, and what the impact is to the species that live (or would live) in these streams. BLNR’s Answer ¶3 claiming lack of information to respond to paragraphs 50-52 and 54-55 of the complaint; Exhibit M ¶¶3-4.

In its November 2018 decision, BLNR did not require that the diversion of water from Hanehoi and Honopou streams end within any specific timeframe. Exhibit G ¶5; Exhibits A and J. Nor did it require that the structures that impede the migration of aquatic species within Hanehoi and Honopou streams be removed or altered within any timeframe. Exhibit G ¶¶6-7.

**E. Invasive Species**

The BLNR Defendants admit that invasive species growing in east Maui are a threat to the watershed and native forest ecosystems. Exhibit G ¶34. Yet, prior to its November 2018 decisionmaking, the BLNR Defendants did not seek information regarding the extent to which invasive species were growing on these state lands. Exhibit G ¶28. Nor did BLNR require that A&B manage public lands to reduce the spread of invasive species. BLNR’s Answer admitting to paragraph 97 of the complaint.

**F. Garbage**

In November 2017, BLNR approved a continuation of the holdover permit for another year on the condition that “A&B needs to clean up their debris starting with more accessible

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<sup>4</sup> CWRM and A&B spell the stream as “Hoolawa”. Others use the okina.

areas and along streams.” Exhibit Q at 13. Yet, garbage, included discarded pipes, litter portions of the area encompassed by the revocable permits. De Naie Declaration ¶¶14-15. Prior to its decision, BLNR “did not independently verify whether A&B was complying with the terms of the holdover of the revocable permits.” BLNR’s Answer admitting to paragraph 85 of the complaint. Nor did the BLNR Defendants take any action to verify claims presented in photographs and testimony regarding debris littering the area. Exhibit I ¶ 3.

### **III. STANDARD OF REVIEW**

This court is very familiar with the standard for summary judgment pursuant to rule 56(c) of the Hawai‘i Rules of Civil Procedure. Public trust issues require the court to exercise its own independent judgment based on the facts of the case. *Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 221, 140 P.3d 985, 1001(2006). The Hawai‘i Supreme Court has explained that “the ultimate authority to interpret and defend the public trust in Hawai‘i rests with the courts of this state.” *In Re Water Use Permit Applications*, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000) (“*Waiāhole*”). Courts must “take a ‘close look’ at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action.” *Id.* at 144, 9 P.3d at 456. Decisions involving public trust resources require “a ‘higher level of scrutiny’ for private commercial uses such as those proposed in this case. In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.” *Id.* at 142, 9 P.3d 454. This Court must “strictly scrutinize the actions of government” where the government acts as a trustee. *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161 (1982).

### **IV. THE BLNR DEFENDANTS BREACHED THEIR TRUST DUTIES.**

“The BLNR is constitutionally mandated to conserve and protect Hawai‘i’s natural resources.” *Pila‘a 400, LLC v. Bd. of Land & Natural Res.*, 132 Hawai‘i 247, 250, 320 P.3d 912, 915 (2014). Pursuant to their constitutional obligations, the BLNR Defendants serve as trustees when rendering decisions that affect streams, public land and other natural resources. Article XI, section 7 of the state constitution requires BLNR “to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.” “The plain language of Article XI, Section 1 provides that all public natural resources, including land, are held in trust by the State for the benefit of the people.” *In re Conservation Dist. Use Application (CDUA)*, 143 Hawai‘i

379, 400, 431 P.3d 752, 773 (2018).<sup>5</sup> Article XII section 4 provides that ceded lands are held by the State as a public trust. The public trust doctrine governs BLNR decisionmaking. *See Kauai Springs, Inc. v. Planning Comm'n of the Cnty. of Kaua'i*, 133 Hawai'i 141, 171-72, 324 P.3d 951, 981-82 (2014).

The BLNR Defendants have sat on their hands for more than a decade without seeking the information needed to prudently evaluate the effects of A&B's use of public trust lands and water. The BLNR Defendants failed to impose conditions to protect native stream life and more than a dozen streams. They ignored the threat posed by invasive species and the garbage that A&B has left littering public lands. They failed to hold A&B to its burden of proof. They failed to justify their decision. And they failed to ensure that diverted stream water would be used in a reasonable and beneficial manner.

**A. The BLNR Defendants Failed to Seek Necessary Information.**

When an agency lacks data or information to discharge its duties pursuant to the public trust doctrine, the agency "must 'take the initiative' to obtain the information it needs." *In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 262, 287 P.3d 129, 163 (2012). Where studies are lacking, a trustee can require that water diverters pay for them. *Waiāhole*, 94 Hawai'i at 185, 9 P.3d at 497. To the prejudice of the Sierra Club and its members, the BLNR Defendants have sat on their hands for more than a decade without seeking the information needed to prudently evaluate the effects of A&B's use of public trust lands and water. Instead, BLNR has repeatedly continued A&B's revocable permits without obtaining necessary information. The BLNR Defendants need a plethora of information to uphold their trust duties, but they have never made any effort to obtain this information.

The BLNR Defendants admit that they have had the authority since 2001 to condition approval of the continuation of revocable permits on the requirement that A&B provide information regarding:

- a. how much water A&B had taken daily from each stream upon which it had a diversion;
- b. how much water A&B had taken on average from each stream upon which it had a diversion;
- c. what percentage of each stream's flow was being taken from each stream

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<sup>5</sup> The area encompassed by the revocable permits lies within the state conservation district. Exhibit N ¶6.

- upon which there was a diversion;
- d. which diversions cause the greatest threat of entrainment of native aquatic species;
- e. the extent to which invasive species were growing on the state lands covered by the revocable permits; and
- f. how much trash, including discarded pipes, remain littering the revocable permit parcels.

BLNR's Answer admitting to paragraph 83 of the complaint. Yet, BLNR has never exercised this authority.

It is undisputed that stream diversions can cause significant harm to stream life. Exhibits A and B; BLNR's Answer ¶ 2 admitting to paragraph 29 of the complaint; Brasher Declaration. Yet, the BLNR Defendants failed to "take the initiative to obtain the information" needed to protect stream life. *Iao*, 128 Hawai'i at 262, 287 P.3d at 163. To understand the impact caused by stream diversions, one needs to know the amount of water that flows naturally in a stream and the amount diverted. Exhibit H at 19-20; Exhibit I ¶6. Yet, the BLNR Defendants do not know how much water naturally flowed in many of the streams and how much of that water A&B was, is, and will be diverting from each stream. Exhibit G at 9-11. Nor did BLNR seek such information. *Id.* at 20-24.

Not only do diversion structures reduce stream flow that native aquatic species require, they can also cause significant harm to native aquatic species by blocking them from migrating upstream as well as entraining larvae flowing downstream. Brasher Declaration. Yet, the BLNR Defendants did not seek information regarding which diversions cause the greatest threat of entrainment of native aquatic species. Exhibit G ¶26. Nor did they seek information as to which diversions pose the greatest impediment to migration of these species. Exhibit N ¶10. As a trustee, BLNR was required to seek such information. Without basic information, BLNR could not begin to estimate the impact that the diversions have on native stream life. Without such information, BLNR could not – and in fact did not – impose conditions that would protect native aquatic species from the adverse impacts caused by diversions.

Nor did BLNR seek basic information regarding the twelve streams unaffected by CWRM's 2018 order. In establishing flow standards that protect streams in Windward O'ahu, both CWRM and the appellate courts have relied on estimates of pre-diversion stream flows as

well as base flows. *In Re Water Use Permit Applications*, 105 Hawai‘i 1, 9, 93 P.3d 643, 651 (2004); *In Re Water Use Permit Applications*, 130 Hawai‘i 346, 310 P.3d 1047 (ICA 2010). In this case, however, the BLNR Defendants do not know how much water naturally flowed in many of the streams and how much of that water A&B was, is, and will be diverting from each stream. Exhibit G at 9-11. Nor did BLNR seek such information. *Id.* ¶¶ 20-22 and 24. Nor do the BLNR Defendants have any idea what the base flows of the twelve streams that the 2018 CWRM decision did not touch. Exhibit N ¶¶2-4. Thus, BLNR authorized the diversion of water from dozens of streams without seeking to obtain basic information needed to protect them. Exhibit N ¶5.

BLNR has no idea whether two streams that CWRM ordered to be restored have in fact been restored. Exhibit I ¶¶ 4-5. It does not know whether the diversions remain on Hanehoi and Honopou streams, how much water is still diverted from these streams, and what the impact is to the species that live (or would live) in these streams. BLNR’s Answer ¶3 claiming lack of information to respond to paragraphs 50-52 and 54-55 of the complaint; Exhibit M ¶3-4. Yet, it gave A&B permission to take water from east Maui without attempting to learn whether these two streams have been fully restored, or when they would be.

The BLNR Defendants admit that invasive species growing in east Maui are a threat to the watershed and native forest ecosystems. Exhibit G ¶34. Yet, prior to the November 2018 decisionmaking, the BLNR Defendants did not seek information regarding the extent to which invasive species were growing on these state lands. Exhibit G ¶28.

The BLNR Defendants breached their trust duties when they failed to seek basic information necessary to protect trust resources.

**B. The BLNR Defendants Failed to Protect Many Streams and Instream Uses.**

BLNR “must apply a presumption in favor of public use, access, enjoyment, and resource protection.” *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983. It must determine whether the proposed use is consistent with public trust purpose of protecting and maintaining “waters in their natural state.” *Id.* at 172 and 174, 324 P.3d at 982 and 984. The BLNR Defendants must “take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” *Id.*

When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and

advancing public rights in the resource at every stage of the planning and decision-making process.

*Id.* at 173, 324 P.3d at 983 (internal citations omitted). And the BLNR Defendants must implement reasonable measures to mitigate impacts. *Id.*

The BLNR Defendants breached these duties when they failed to take necessary steps to protect stream life, the dozen streams not regulated by the 2018 CWRM order, Ho‘olawa Stream, Hanehoi Stream and Honopou Stream.

### **1. Stream Life**

The Hawai‘i Supreme Court has explained how stream diversions adversely affect native aquatic species:

Native Hawaiian amphidromous species exhibit "freshwater amphidromy," where spawning takes place in fresh water, and the newly hatched larvae are swept into the sea by stream currents. While in the sea, the larvae undergo development as zooplankton before returning to fresh water to grow to maturity. The Commission found that these species suffer in Na Wai ‘Eha due to the disruption of natural flow caused by the offstream water diversions; the diversions degrade or destroy habitat, diminish food sources, diminish larval drift by capturing eggs and larvae, and impair flows necessary to transport larvae to the ocean. The Commission also found that discharge of sufficient duration and volume is necessary to attract and accommodate upstream migration of post-larval fish, mollusks, and crustaceans; there is a direct correlation between stream volume and recruitment, such that increased streamflow correlates with increased recruitment at the stream mouth.

*Iao*, 128 Hawai‘i at 249, 287 P.3d at 150. Despite the widely recognized harm to amphidromous species that that stream diversions cause, the BLNR Defendants imposed no meaningful conditions to protect them. Without basic information, BLNR could not – and in fact did not – impose conditions that would protect native aquatic species from the adverse impacts caused by diversions. Although duty bound to apply “apply a presumption in favor of . . . resource protection” and to consider or impose “reasonable measures to mitigate the cumulative impact of existing and proposed diversions on” stream life, *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983, the BLNR Defendants made no effort to ensure that the freshets upon which native species depend will flow below stream diversions. Exhibit G ¶¶ 2-3. Nor did BLNR require the removal or alteration of any stream modification structure within a clear timeframe. BLNR’s Answer

admitting to paragraph 96 of the complaint.<sup>6</sup> By failing to make any meaningful effort to protect those native aquatic species that are adversely affected by diversions (including on those twelve streams unaffected by the 2018 CWRM Order), the BLNR Defendants breached their trust duties.

## **2. Twelve Streams Not Regulated by the June 2018 CWRM Order**

The Supreme Court has condemned attempts to allow water to be used without any determination of instream flow standards:

The tentative grant of water use permits without any determination of instream flow standards, conversely, presents the least desirable scenario: no assurance that public rights are receiving adequate provision, no genuine comprehensive planning process, and no modicum of certainty for permit applicants and grantees. Cf. *Concerned Citizens of Putnam County for Responsive Gov't v. St. John's River Water Management Dist.*, 622 So.2d 520, 523 (Fla.Ct.App.1993) ("[I]t is difficult . . . to imagine how the water supply can be managed without the establishment of minimums.").

*Waiāhole*, 94 Hawai‘i at 149, 9 P.3d at 461. An agency must “take the initiative in planning for the appropriate instream flows before demand for new uses heightens the temptation simply to accept renewed diversions as a foregone conclusion.” *Id.* The court criticized decisions that “could drain a stream dry incrementally, or leave a diverted stream dry in perpetuity, without ever determining the appropriate instream flows. Needless to say, we cannot accept such a proposition. *Id.* at 158, 9 P.3d at 471. The court criticized a “permissive view towards stream diversions, particularly while the instream flow standards remained in limbo.” *Id.* at 159, 9 P.3d at 472.

There are no meaningful instream flow standards for twelve east Maui streams: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries). HAR §13-169-44; Exhibit D at 17-18 (FOF 58); BLNR’s Answer admitting to paragraph 41 of the complaint; Exhibit N ¶1. In its November 2018 decision, BLNR did not adopt any additional conditions to protect these twelve streams. Exhibits A and J. It failed to provide any protection for any of the amphidromous species that live in those streams, or the public use and enjoyment of these twelve streams (including uses by Sierra Club members). *Id.* It

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<sup>6</sup> In contrast, the Environmental Protection Agency has enacted regulations to minimize the effect of entrainment in certain contexts. See e.g. *Riverkeeper, Inc. v. USEPA*, 358 F. 3d 174 (2nd Circuit 2004).

did not limit the amount of water that can be taken from these streams. *Id.* BLNR’s decision effectively authorizes A&B to divert significantly more water from these streams than it has been doing over the past two years. BLNR’s cavalier attitude towards the diversions on these twelve streams is precisely the conduct condemned by the Supreme Court in *Waiāhole*. By failing to impose any meaningful conditions that protect these twelve streams, the BLNR Defendants breached their trust duties.

### **3. Ho‘olawa Stream**

One of the twelve streams that CWRM has ignored is Ho‘olawa Stream. Ironically, this stream on occasion has too much water flowing because A&B takes from other streams and dumps this diverted water into Ho‘olawa Stream. Exhibit K ¶12; Exhibit F ¶12. Taking water from one stream – and causing harm to it, the streamlife dependent on it, and recreational uses of the stream – and dumping that water unnecessarily into another stream defies common sense and basic ecological principles. The unnecessary diversion of water from one or more streams and dumping that water into another stream is *per se* not reasonable or beneficial. Nevertheless, the BLNR Defendants made no effort to protect Ho‘olawa Stream in breach of their trust duties. Exhibits A and J.

### **4. Hanehoi and Honopou Streams**

The 2018 CWRM decision orders Hanehoi and Honopou streams to be fully restored. Exhibit D at iv and 269. In fact, in April 2016, A&B issued a press release in which it announced that it was fully and permanently restoring water to Hanehoi stream. Exhibit L ¶6.

Yet, water is still diverted from these streams. Exhibit L ¶¶7, 9; Exhibit O ¶8. In its November 2018 decision, BLNR did not require that the diversion of water from Hanehoi and Honopou streams end within any specific timeframe. Exhibit G ¶5; Exhibits A and J. Nor did it require that the structures that impede the migration of aquatic species within Hanehoi and Honopou streams be removed or altered within any specific timeframe. Exhibit G ¶¶6-7. BLNR’s failure to ensure that A&B timely restores these two streams is inconsistent with its duty to protect and maintain “waters in their natural state” and to implement reasonable mitigation measures. *Kauai Springs*, 133 Hawai‘i at 172-174, 324 P.3d at 982-84.

### **C. The BLNR Defendants Failed to Protect other Natural Resources.**

Not only did the BLNR Defendants fail to protect the streams, their recreational value, and aquatic life dependent upon them, but they also failed to protect public lands from harm.

“[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.” *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 475, 123 S. Ct 1126, 1133, 155 L. Ed. 2d 40, 51 (2003). The BLNR Defendants failed to fulfill the most basic role of a trustee of public lands of ensuring that their lessee takes actions to prevent harm to public land. In this case, that means controlling the recognized risk of invasive species and cleaning up trash.

The BLNR Defendants admit that invasive species growing in east Maui are a threat to the watershed and native forest ecosystems. Exhibit G ¶34. Yet, BLNR did not require that A&B manage public lands to reduce the spread of invasive species. BLNR’s Answer admitting to paragraph 97 of the complaint. Its neglect flies in the face of the Supreme Court’s admonishment that it “must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.” *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983.

The BLNR Defendants’ failure to protect public lands from the spread of invasive species is compounded by its failure to get A&B to actually clean up its mess. In November 2017, BLNR approved a continuation of the holdover permit for another year on the condition that “A&B needs to clean up their debris starting with more accessible areas and along streams.” Exhibit Q at 13. *See also* HRS §§339-4 and 708-829. BLNR is statutorily obligated to: prevent illegal activities on public lands, HRS § 171-7(2); and enforce permits that authorize the use of public land, HRS § 171-7(5). When BLNR fulfills these statutory obligations, it fulfills its duty of a trustee of public land. Yet, garbage, including discarded pipes, litters portions of the area encompassed by the revocable permits. De Naie Declaration ¶¶14-15. Prior to its decision, BLNR “did not independently verify whether A&B was complying with the terms of the holdover of the revocable permits.” BLNR’s Answer admitting to paragraph 85 of the complaint. Nor did the BLNR Defendants take any action to verify claims presented in photographs and testimony regarding debris littering the area. Exhibit I ¶ 3.

In ignoring the invasive species and trash that mar public land, the BLNR Defendants are allowing public trust property to fall into ruin on their watch.

**D. The BLNR Defendants Failed to Hold A&B to its Burden.**

“The applicant is obligated to demonstrate affirmatively that the proposed use will not affect a protected use, in other words, the absence of evidence that the proposed use would affect

a protected use is insufficient." *Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d 983 (internal quotation marks and brackets omitted). A&B failed to provide any evidence that its diversions would not harm any streams. A&B’s request to divert east Maui streams for another year is barely two and a half pages long. Exhibit E at 19-21. There is no evidence that DLNR asked A&B for evidence that its diversions were not causing any adverse impacts to any streams, stream life, or recreational uses. It certainly did not provide evidence as to the impact of diverting the twelve streams, the native species that live in them, or the instream uses made of: Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries). Sierra Club members make use of these streams.

Private commercial use is not protected by the public trust. The public trust has never been understood to safeguard rights of exclusive use for private commercial gain. The very meaning of the public trust is to recognize separate and enduring public rights in trust resources superior to any private interest. In accordance with the fundamental principles of the public trust and the fact that private commercial use is not one of the uses the public trust protects, a higher level of scrutiny is therefore employed when considering proposals for private commercial use.

*Kauai Springs*, 133 Hawai‘i at 173, 324 P.3d at 983 (internal quotation marks, brackets and citations omitted). BLNR failed to impose a higher level of scrutiny – or indeed any scrutiny – when it allowed A&B to take water from east Maui streams without first requiring that it provide evidence that its diversions would not cause harm to any and all of the streams.

In addition, the BLNR Defendants were required to ensure that all applicable requirements were “satisfactorily complied with prior to taking action on the subject permits.” *Kauai Springs*, 133 Hawai‘i at 177, 324 P.3d at 987. They should have ensured that A&B was complying with CWRM’s 2018 order. *Id.* at 177-79, 324 P.3d at 987-89. Yet, the BLNR Defendants made no effort to determine whether A&B had restored Hanehoi and Honopou streams as ordered by CWRM. Exhibit D at iv and 269; Exhibit I ¶¶ 4-5; Exhibit M ¶¶ 3-4; BLNR’s Answer ¶ 3 claiming lack of information to respond to paragraphs 50-52 and 54-55 of the complaint. In fact, many of the streams that CWRM ordered to be restored have not been restored. De Naie Declaration ¶¶ 22-23 – and BLNR’s order is feckless in ensuring A&B’s compliance with the 2018 CWRM order.

**E. The BLNR Defendants Failed to Properly Justify Their Decision.**

The BLNR Defendants also failed to properly justify BLNR's decision.

When an agency or other deciding body considers an application for permits under circumstances that requires the deciding body to perform as a public trustee to protect a public trust resource, the agency or other deciding body must make findings sufficient to enable an appellate court to track the steps that the agency took in reaching its decision. An agency is encouraged to be clear; clarity in the agency's decision is all the more essential ... where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.

*Kauai Springs*, 133 Hawai'i at 173-74, 324 P.3d at 983-84 (internal quotation marks and citations omitted). Nothing in BLNR's decision or the staff submittal provides the BLNR Defendants' justification for dewatering streams without regard to the impact to stream life, recreational uses, or natural beauty.

**F. The BLNR Defendants Failed to Ensure that Diverted Stream Water Would Be Used in a Reasonable and Beneficial Manner.**

Water diverted from streams must be put to "reasonable and beneficial use." *See Kauai Springs*, 133 Hawai'i at 172, 324 P.3d at 982. But it is BLNR's duty to (a) first determine that the proposed use is in fact "reasonable and beneficial" before authorizing the use, *Waiāhole*, 94 Hawai'i at 162, 9 P.3d at 474 ("permits should reflect actual water needs"); and (b) ensure that the water is actually being used in a "reasonable and beneficial" manner after authorizing the use.

The Hawai'i Supreme Court has condemned the use of boilerplate conditions that allow agencies to avoid engaging in necessary analysis. In *Ka Pa'akai O Ka'aina v. Land Use Com'n*, 94 Hawai'i 31, 49-52, 7 P.3d 1068, 1086-89 (2000), the state Land Use Commission (LUC) included boilerplate language conditioning approval on the required that a developer "preserve and protect any gathering and access rights of native Hawaiians." While at a superficial level the condition appears to be protective of constitutional rights, the Supreme Court concluded that the LUC's failure to actually identify those rights before approving an application violated its constitutional obligation.

The Supreme Court has also emphasized that the public trust duty requires that agencies "ensure that prescribed measures are actually being implemented." *Kelly*, 111 Hawai'i at 231, 140 P.3d at 1011. BLNR must ensure that such "reasonable and beneficial use" actually takes place. To that end, conditions must be enforceable.

In this case, the BLNR Defendants hoped to immunize their decision by incorporating boilerplate conditions that A&B's use of diverted stream water be put to "reasonable and beneficial use." Yet, there was no analysis as to how much water A&B actually needed – nor was any quantifiable limit incorporated as condition of approval. More importantly, the BLNR Defendants failed to impose any type of reporting requirement that would allow the BLNR Defendants to begin to assess whether the water was actually being used in a "reasonable and beneficial" manner. Nor are the BLNR Defendants assessing whether A&B is in fact using the water in a "reasonable and beneficial" manner. Exhibit N ¶8. A condition that the BLNR Defendants cannot and do not monitor and enforce fails to protect public trust resources.

The BLNR Defendants should have, at a minimum, required A&B to report monthly as to how the water is being used on average daily precisely, by whom, broken down into separate categories that include, but are not limited to: water taken from the east Maui RP area, water used by Maui County for domestic uses, Maui County's agricultural park, diversified agriculture (identifying the location, crop/commodity and user), reservoirs, and seepage/leakage.

Imposing a boilerplate condition that the applicant use the water in a "reasonable and beneficial" manner is not sufficient for the BLNR to uphold its trust duties – particularly when it fails to include any sort of requirement that the applicant routinely report precisely how the water is being used and when the agency fails to perform any sort of independent monitoring and assessment as to whether the water is actually being used in a "reasonable and beneficial" manner.

**V. THIS COURT SHOULD ORDER APPROPRIATE RELIEF.**

In light of these breaches of trust – and the long history of the diversion of water from east Maui streams – the Sierra Club requests that this court exercise its equitable powers to provide appropriate declaratory and injunctive relief.

First, this court should declare that BLNR breached its trust duties by *failing* to:

- seek information regarding:
  - a. the quantity of water that would flow in each stream without diversion as well as an estimate of how much water the applicant proposes to take;
  - b. which diversion structures cause the greatest threat of entrainment of native aquatic species;
  - c. which diversion structures pose the greatest impediment to migration of native

- aquatic species;
- d. the restoration status of Hanehoi and Honopou streams;
- e. the extent to which invasive species are spreading on the affected lands;
- f. A&B's compliance with the terms of its permits to clean up its garbage;
- provide any protection for the twelve streams unaffected by the 2018 CWRM Order (Kōlea Stream, Punaluu Stream, Kaaiea Stream, Oopuola Stream (Makanali tributary), Puehu Stream, Nailiilihaele Stream, Kailua Stream, Hanahana Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries));
- ensure that the freshets upon which native species depend will flow below stream diversions.
- take meaningful steps to protect native stream life (including on those twelve streams unaffected by the 2018 CWRM Order);
- ensure the restoration of Hanehoi and Honopou streams within a specific timeframe;
- require the removal or alteration of any stream modification structure within a clear timeframe;
- require that A&B manage the public lands it uses to reduce the spread of invasive species;
- take steps to ensure that A&B has cleaned up old pipes and other debris that litter public land;
- hold A&B to its burden to demonstrate affirmatively that its proposed use will not harm streams, recreational uses of them, or the life within them;
- properly justify its decision;
- require that A&B report how it is using the water it is taking from east Maui streams.

Second, this court should enjoin the BLNR Defendants from authorizing the diversion of more water from the revocable permit areas than A&B took from east Maui streams in 2017 and 2018<sup>7</sup> – and enjoin A&B from taking more water – unless and until:

- existing legal obligations are first fulfilled;
- the applicant upholds its burden in justifying the taking of more water;
- the BLNR Defendants estimate in good faith how much water would flow in each

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<sup>7</sup> In 2017 and 2018, A&B diverted no more than 25.75 million gallons on average daily. Exhibit F ¶¶ 8-9.

stream without diversion, how much is currently diverted, and how much more water is proposed to be diverted from each stream;

- 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 cause the greatest impediment to the migration of native aquatic species;
- the BLNR Defendants evaluate all the diversion structures and determine which diversion structures cause the greatest threat of entrainment of native aquatic species
- 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; and (b) pose the greatest harm to native aquatic species;
- the BLNR Defendants ensure that water is not diverted from any stream and dumped into Ho‘olawa Stream;
- 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 the 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 Stream (Ohanui tributary), Hoalua Stream, Waipio Stream, Mokupapa Stream, and Hoolawa Stream (Hoolawa ili and Hoolawa nui tributaries);
- A&B cleans up old pipe and other debris that remain on public land;
- the BLNR Defendants take steps to monitor and assess whether the diverted water is actually being used in a “reasonable and beneficial” manner;
- the applicant(s) report on a monthly basis how precisely the water is being used on average daily, by whom, broken down into separate categories that include, but are not limited to: water taken from the east Maui RP area, water used by Maui County for

domestic uses, Maui County's agricultural park, diversified agriculture (identifying the location, crop/commodity and user), reservoirs, and seepage/leakage.

The test "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." *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 117 Hawai'i 174, 212, 177 P.3d 884, 922 (2008). The "trial court has the plenary power to fashion a decree to conform to the equitable requirements of the situation." *Jenkins v. Wise*, 58 Haw. 592, 598, 574 P.2d 1337, 1342 (1978). The Sierra Club's proposed injunctive relief ensures that no more water is removed from east Maui than has been taken over the last two years. With this motion the Sierra Club seeks to maintain the status quo until public trust obligations are fulfilled. In other words, no more water can be diverted until existing legal obligations are fulfilled. *See Kauai Springs*, 133 Hawai'i at 177-79, 324 P.3d at 987-89.

Finally, this court should order mandatory injunctive relief requiring the BLNR Defendants seek penalties against A&B, pursuant to HRS §§ 171-6(12), (14), (15) and 171-7(2), (5), (7), and (8), for the garbage that remains on public land. Mandatory injunctive relief is appropriate when an agency fails to fulfill its affirmative duties. DLNR must execute its statutory duties "in a manner that fulfills the State's affirmative constitutional obligations." *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 413-15, 363 P.3d 224, 261-63 (2015) (concurring opinion of Justice Pollack, joined by Justice Wilson and McKenna). "Trust beneficiaries have the right to . . . **compel the performance of trust duties.**" *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192, 208 n.26, 891 P.2d 279, 295 n.26 (1995)(emphasis added); Restatement (Second) of Trusts § 199 (1959).

## **VI. CONCLUSION**

Because this case involves the exercise of the BLNR Defendant's trust duties with respect to both east Maui waters and land, this court must strictly scrutinize their actions. The BLNR Defendants have failed to take the most basic steps to protect public trust resources. For nearly two decades, they have refused to ask for critical information needed to manage these resources. They have neglected to impose conditions to protect native stream life. They have ignored a dozen streams that have illusory inflow stream standards. In its November 2018 decision, BLNR allowed water to be diverted from streams unnecessarily and then dumped into

Ho‘olawa Stream. It failed to impose a deadline for the full restoration of Hanehoi and Honopou streams. It ignored the threat posed by invasive species and the garbage that A&B has left littering public lands. It refused to hold A&B to its burden of proof. It failed to justify its decision. And it neglected to ensure that diverted stream water would be used in a reasonable and beneficial manner. The BLNR Defendants have overlooked the adverse effects that A&B’s use of public lands and waters have on native aquatic species, the watershed, recreational values, and natural beauty. In so doing, the BLNR Defendants breached their trust duty to act with “openness, diligence and foresight.” *Waiāhole*, 94 Hawai‘i at 143, 9 P.3d at 455. They have failed to

take the initiative in considering, protecting, and advancing public rights in the resources at every stage of the planning and decisionmaking process. Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact[.]

*Id.* (citations omitted).

Dated: Honolulu, Hawai‘i, July 22, 2019.

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