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and Nā Kia‘i Kai

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

PŌ‘AI WAI OLA/WEST KAUA‘I) CIVIL NO.
WATERSHED ALLIANCE, an) (Environmental Court)
unincorporated association, and NĀ KIA‘I)
KAI, an unincorporated association,) COMPLAINT FOR DECLARATORY
) AND INJUNCTIVE RELIEF; EXHIBITS
Plaintiffs,) “A” - “C”; SUMMONS
)
v.)
)
BOARD OF LAND AND NATURAL)
RESOURCES, STATE OF HAWAI‘I, and)
DEPARTMENT OF LAND AND)
NATURAL RESOURCES, STATE OF)
HAWAI‘I,)
)
Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Pō‘ai Wai Ola/West Kaua‘i Watershed Alliance (“Pō‘ai Wai Ola”) and Nā Kia‘i Kai (collectively, “Plaintiffs”), by and through their attorneys, Earthjustice, complain of Defendant Board of Land and Natural Resources, State of Hawai‘i (“Board” or “BLNR”) and Defendant Department of Land and Natural Resources, State of Hawai‘i (“DLNR”) (collectively, “Defendants”) as follows:

INTRODUCTION

1. This action seeks review and relief against Defendants’ violations of the Hawai‘i Environmental Policy Act (“HEPA”), Hawai‘i Revised Statutes (“HRS”) chapter 343, in failing to require an environmental impact statement (“EIS”) for a major hydro project proposed in West Kaua‘i by Kaua‘i Island Utility Cooperative (“KIUC”) and AES West Kaua‘i Energy Project LLC’s (“AES”). The proposed action in this case is the construction and operation of a massive and complex, once-in-a-lifetime project that will seek a long-term 65-year water lease to divert 11 million gallons of water per day (“mgd”) from Waimea River, much of which is currently proposed to be dumped on a faraway plain, into drainage ditches that pollute the ocean with contaminant-laden sediment.

2. Rather than faithfully comply with HEPA’s mandate that an EIS must be prepared for any proposed action that “may” have a significant impact on the environment, the outgoing DLNR Chair—without any notice, input, or approval of the Board or any public hearing—rushed a rubberstamp approval of the final environmental assessment (“EA”) and finding of no significant impact (“FONSI”) for the proposed project, notwithstanding that the final EA disregarded and distorted its disclosure and analysis of impacts in an attempt to justify a FONSI.

3. Defendants' failure to require an EIS for the proposed hydro project violates the letter and purpose of HEPA and its implementing regulations. Moreover, the DLNR Chair's approval of the final EA and FONSI under a purported blanket delegation of authority from the Board to the chairperson in 2015 to approve of any and all FONSI's under HEPA also violates the letter and purpose of HEPA, as well as fundamental requirements of administrative procedure and due process. Defendants' violations in this case nullify HEPA's fundamental purpose: to "ensure that environmental concerns are given appropriate consideration in decision making" so that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole." HRS § 343-1.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to HRS §§ 343-7, 603-21.5, 603-21.9, 604A-2, HRS chapter 632, and article XI, § 9 of the Hawai'i Constitution.

5. Venue properly lies in this judicial circuit pursuant to HRS § 603-36(5) because the claims for relief arose in this circuit and because it is the location where the Defendants are domiciled.

PARTIES

Plaintiffs

6. Plaintiff Pō'ai Wai Ola is a community-based organization of residents in West Kaua'i. Pō'ai Wai Ola members are cultural practitioners, mahi'ai (farmers), and fresh water and reef lawai'a (fishers). Their roots in the West Kaua'i ahupua'a span many generations, and their 'ohana (families) continue to own land, live, work, recreate, and practice their culture in

and around the Waimea River system and West Kaua‘i marine environment, and in areas specifically affected by KIUC’s and AES’s proposed hydro project.

7. Pō‘ai Wai Ola members rely on and use Waimea River flows and the West Kaua‘i marine environment for a host of public trust uses including, but not limited to, fishing and gathering, kalo farming, recreation, research and education, aesthetic enjoyment, spiritual practices, and the exercise of Native Hawaiian cultural rights and values.

8. Pō‘ai Wai Ola’s mission is to address water issues affecting West Kaua‘i – including the protection of Waimea River, one of the largest rivers in Hawai‘i, which runs through the famous “Grand Canyon of the Pacific.” Pō‘ai Wai Ola is dedicated to managing and conserving water resources for present and future generations and protecting the long-term sustainability and health of the entire Waimea River system from its mauka headwaters to makai nearshore marine areas. Pō‘ai Wai Ola members care about how the proposed hydro project will affect their local watersheds and nearshore marine ecosystems and want their local community concerns to be meaningfully included in lasting decisions directly affecting their community.

9. All of Pō‘ai Wai Ola’s members are also KIUC members and ratepayers who stand to be affected by the structure and details of the proposed hydro project—although the on-the-ground impacts of the project will directly affect the West Kaua‘i community, including Pō‘ai Wai Ola and its members.

10. Pō‘ai Wai Ola has engaged in related legal processes directly bearing on the proposed project for the better part of a decade. Pō‘ai Wai Ola members have participated in proceedings before the state Commission on Water Resource Management (“CWRM”) regarding the protection and restoration of instream flows in the Waimea River system and management and oversight of diversions for offstream uses, including commercial agriculture and

hydropower. Pō‘ai Wai Ola members have also participated in proceedings before the state Public Utilities Commission (“PUC”) regarding the power purchase agreement and development agreement for the proposed hydro project.

11. Pō‘ai Wai Ola members’ cultural, recreational, educational, aesthetic, spiritual and subsistence interests are harmed by Defendants’ failure to ensure full and proper disclosure of the proposed project’s harmful environmental and cultural impacts and available mitigation and alternatives, because the proposed project would be allowed to move forward without candid and transparent consideration and analysis of these issues.

12. Plaintiff Nā Kia‘i Kai is a community-based organization established by West Kaua‘i residents, including Native Hawaiian fishers and cultural practitioners, to protect West Kaua‘i’s river and coastal waters, humans, and aquatic life.

13. Nā Kia‘i Kai’s members live, work, recreate, and practice their culture in and around West Kaua‘i, and extensively use West Kaua‘i’s river and ocean waters for subsistence fishing to feed their families, as they have done for generations, as well as for swimming and surfing. A healthy river and nearshore ocean environment and good water quality are essential for Nā Kia‘i Kai members to engage in fishing, limu (seaweed) gathering, and other subsistence activities, and to pass on these cultural traditions to the next generation.

14. Nā Kia‘i Kai’s members’ kupuna, or ancestors, have passed down stories about the abundance of limu and spawning areas for fish that no longer exist. Clean river and ocean waters are critical for Native Hawaiian ceremonial practices, including cleansing ceremonies such as hi‘uwai. A healthy river and nearshore environment and good water quality are necessary for Nā Kia‘i Kai’s members to fully participate in recreational activities like swimming and surfing without harm or fear of harm to their health or the health of their children.

15. Nā Kia‘i Kai has actively engaged for years in litigation in federal court to address discharges of polluted water from the Mānā Plain drainage ditch system, which the proposed hydro project seeks to use to dump excess diverted stream flow into the ocean. The discharge of polluted waters from the various outfalls of the Mānā Plain drainage ditch system into the ocean occurs in close proximity to popular beaches including Barking Sands Beach, Majors Bay, Mānā Beach (the stretch of shore between Kekaha Park and Majors Bay), MacArthur Beach Park, and Kīkīaola Harbor. Nā Kia‘i Kai’s members use these beaches for aesthetic, recreational, spiritual, cultural and subsistence fishing and gathering purposes.

16. In 2016, Nā Kia‘i Kai brought a federal Clean Water Act lawsuit against the state Agribusiness Development Corporation (“ADC”) for discharges from the Mānā Plain drainage system without a pollution control permit. The court found that the drainage system adds pesticide-laden sediment to the water it transports and transfers to the ocean and ruled that the discharges from the drainage system is unlawful without a federal Clean Water Act permit. *See Nā Kia‘i Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Hawai‘i 2019). To date, no permits have been approved, and Nā Kia‘i Kai continues to be engaged in litigation to enforce the court’s ruling.

17. Nā Kia‘i Kai’s members are concerned about how the proposed hydro project will affect their local watersheds, nearshore marine ecosystems, and aquatic life used for subsistence gathering and fishing practices, as well as the proposed project’s impact on their enjoyment of West Kaua‘i’s river and nearshore waters and their ability to engage in cultural and ceremonial practices that require clean water and healthy aquatic resources. Nā Kia‘i Kai’s members want their local community concerns to be meaningfully included in lasting decisions directly affecting their community.

18. All of Nā Kia‘i Kai’s members are also KIUC members and ratepayers who stand to be affected by the structure and details of the proposed hydro project—although the on-the-ground impacts of the project will directly affect the West Kaua‘i community, including Nā Kia‘i Kai and its members.

19. Nā Kia‘i Kai’s members’ aesthetic, recreational, spiritual, cultural, and subsistence interests in West Kaua‘i’s nearshore waters are harmed by Defendants’ failure to ensure full and proper disclosure of the proposed project’s harmful environmental and cultural impacts and available mitigation and alternatives, because the proposed project would be allowed to move forward without candid and transparent consideration and analysis of these issues.

20. Defendants’ acceptance of KIUC’s final EA and FONSI unlawfully allows KIUC’s and AES’s proposed hydro project to avoid preparing an EIS fully disclosing and analyzing the proposed project’s harmful environmental and cultural impacts and available mitigation and alternatives, as HEPA requires. The failure to require an EIS impairs Pō‘ai Wai Ola’s, Nā Kia‘i Kai’s and their members’ individual and organizational interests in using, enjoying, and protecting the ecological and cultural resources in the Waimea River system and the West Kaua‘i nearshore marine ecosystem.

21. Defendants’ failure to fully and properly assess the environmental impacts of the proposed hydro project in an EIS as HEPA requires deprives Pō‘ai Wai Ola, Nā Kia‘i Kai, and their members, the broader West Kaua‘i community and general public, and approving agencies of the information and analysis that would be generated and provided through a valid HEPA process and threatens the further development, construction, and operation of the proposed hydro project without the information disclosure, community input and engagement, and analysis of

environmental and cultural impacts and mitigation measures and alternatives that HEPA mandates.

Defendants

22. Defendant DLNR is responsible for managing, administering, and exercising control over the State’s water resources, ocean waters, and coastal areas, including the State’s aquatic life and aquatic resources. HRS §§ 171-3, 171-58.

23. Defendant BLNR is the executive board that heads DLNR. *Id.* §§ 26-15(a), 171-3(a). BLNR is charged with exercising and performing “every power and duty conferred by law and required to be performed” by DLNR. *Id.* § 26-38; *see also id.* § 171-6 (“[T]he board of land and natural resources shall have the powers and functions granted to the heads of departments.”)

24. BLNR’s powers and duties broadly include the authority to “adopt rules”; “appoint hearing officers to conduct public hearings”; bring enforcement actions; and establish “restrictions, requirements, or conditions . . . relating to the use of particular land being disposed of, the terms of sale, lease, license, or permit, and the qualifications of any person to draw, bid, or negotiate for public land.” *Id.* § 171-6. Under HRS chapter 171, “land” is defined to include “all interests therein and natural resources including water.” *Id.* § 171-1.

25. BLNR is specifically and expressly responsible for issuing long-term water leases pursuant to HRS § 171-58. Disposition of water rights may be made by lease at public action “subsequent to public hearings and conservation district use application and environmental impact statement approvals.” *Id.* § 171-58(c).

26. The diversion of water from Waimea River is a central and integral part of KIUC’s and AES’s hydro proposal. KIUC and AES will seek a long-term 65-year water lease from BLNR to divert a multi-year rolling average of 11 mgd of water into the Kōke‘e Ditch

Irrigation System. The purpose of KIUC’s environmental review document is to provide information to BLNR for when it considers whether to issue a long-term water lease and other necessary approvals.

27. BLNR is the “agency that issues an approval prior to implementation of an applicant action,” i.e., the approval of a long-term water lease for the project’s proposed water diversions, along with various other approvals for the use of state lands for the project including a Conservation District Use Permit and management plan. BLNR is thus the acknowledged and undisputed lead “approving agency” for this proposed hydro project under HEPA. Haw. Admin. R (“HAR”) § 11-200.1-2. As the “approving agency,” BLNR is responsible for determining “whether the anticipated effects constitute a significant effect” and “the need for an EIS.” Office of Environmental Quality Control, State of Hawai‘i, *Guide to the Implementation and Practice of the Hawaii Environmental Policy Act* 14, 16 (2004), available at https://files.hawaii.gov/dbedt/erp/OEQC_Guidance/2012-GUIDE-to-the-Implementation-and-Practice-of-the-HEPA.pdf; *see also* HRS § 343-5(e).

28. Under article XI, sections 1 and 7 of the Hawai‘i Constitution, Defendants have public trust duties to conserve and protect the state’s natural resources, including water, for present and future generations. *See Kaua‘i Springs, Inc. v. Planning Comm’n*, 133 Hawai‘i 141, 172, 324 P.3d 951, 982 (2014).

29. Under article XII, section 7 of the Hawai‘i Constitution, Defendants are “obligated to protect customary and traditional rights to the extent feasible.” *Public Access Shoreline Haw. v. Haw. Planning Comm’n*, 79 Hawai‘i 425, 437, 903 P.2d 1246, 1258 (1995); *see also Ka Pa‘akai o ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 35, 7 P.3d 1068, 1072 (2000).

LEGAL FRAMEWORK

30. HRS chapter 343, entitled “Environmental Impact Statements” and also known as the Hawai‘i Environmental Policy Act or HEPA, is the cornerstone of Hawai‘i’s statutory environmental protections. The express purpose of HEPA is to “establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making.” *Id.* § 343-1.

31. Process is the bedrock principle underlying HEPA. The legislature found that the environmental review process “will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions.” *Id.* “[T]he process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.” *Id.*

32. Timing is critical to the HEPA process. Environmental review shall occur “at the earliest practicable time,” before a proposed action may proceed, to “assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed action prior to decision-making.” HAR § 11-200.1-1(b). Environmental review documents “must be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.” *Citizens for Protection of N. Kohala Coastline v. Cnty. of Hawai‘i*, 91 Hawai‘i 94, 105, 979 P.2d 1120, 1131 (1999) (cleaned up).

33. HEPA applies to nine categories of actions, including those that propose the “use of state . . . lands,” or “any use within any land classified as a conservation district . . . under [HRS] chapter 205.” HRS § 343-5(a)(1), (2). Whenever any person (termed an “applicant”) proposes a covered action that requires agency approval, the approving agency “shall assess the significance of the potential impacts of the action to determine the level of environmental review necessary for the action.” HRS § 343-2; HAR § 11-200.1-14(b).

34. HEPA requires the preparation of an EIS for any action that “*may* have a significant effect on the environment.” HRS § 343-5(c) (emphasis added). The Hawai‘i Supreme Court has made clear that under the “may have a significant effect” standard, “plaintiffs need not show that significant effects will in fact occur but instead need only raise substantial questions whether a project may have a significant effect.” *Unite Here! Local 5 v. City & Cnty. of Honolulu*, 123 Hawai‘i 150, 178, 231 P.3d 423, 451 (2010) (cleaned up).

35. A “significant effect” is defined as “the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.” HRS § 343-2; *see also* HAR § 11-200.1-2.

36. In determining whether an action may have a significant impact on the environment, “the agency shall consider every phase of a proposed action, the expected impacts, and the proposed mitigation measures.” HAR § 11-200.1-13(b). The agency must consider certain “significance criteria” outlined in HAR § 11-200.1-13. “[A]n action *shall be determined to have a significant effect on the environment if it may*,” among other factors:

- (1) Irrevocably commit a natural, cultural, or historic resource;
- (2) Curtail the range of beneficial uses of the environment;
...
- (4) Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community and State;
...
- (6) Involve adverse secondary impacts, such as population changes or effects on public facilities;
- (7) Involve a substantial degradation of environmental quality;
- (8) Be individually limited but cumulatively have substantial adverse effect upon the environment or involves a commitment for larger actions;
...
- (10) Have a substantial adverse effect on air or water quality or ambient noise levels; [or]
- (11) Have a substantial adverse effect on or be likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters.

HAR § 11-200.1-13(b). The criteria are expressly listed in the disjunctive. Thus, the existence of a single factor is sufficient to require preparation of an EIS. *See id.*

37. An EIS is “an informational document . . . which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” HRS § 343-2. Content requirements inform the substance of an EIS and are set forth in HAR §§ 11-200.1-24, -27.

38. An EIS generally must “fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action,” as well as “responsible opposing views, if any, on significant environmental issues raised by the

proposal.” *Id.* § 11-200.1-24(a). An EIS must discuss “significant . . . adverse impacts,” including cumulative impacts and secondary impacts, as well as proposed mitigation measures and alternatives considered. *Id.* §§ 11-200.1-24(d)(2), (3), (4). “Impacts” may include “ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative.” *Id.* § 11-200.1-2.

39. An EIS must also contain a “discussion of the alternative of no action as well as reasonable alternatives that could attain the objectives of the action,” including “a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions,” with particular attention to “alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks of the action.” *Id.* § 11-200.1-24(h).

40. An EIS shall also include analysis of the probable impact of the proposed action on the environment, including “consideration of all consequences on the environment, including direct and indirect effects” and “[t]he interrelationships and cumulative environmental impacts of the proposed action and other related actions.” *Id.* § 11-200.1-24(l). The EIS shall address “all probable adverse environmental effects that cannot be avoided,” including any adverse effects such as water extraction and pollution, and shall clearly set forth “the rationale for proceeding with a proposed action, notwithstanding unavoidable effects.” *Id.* § 11-200.1-24(o).

41. Acceptance of a required final EIS is “a condition precedent to approval of the request and commencement of the proposed action.” HRS § 343-5(e).

42. If an applicant or approving agency anticipates that a proposed action will not have a significant effect on the environment, a draft EA may be prepared and submitted for public review and comment. *See* HAR §§ 11-200.1-2 (defining draft environmental assessment); -14(d), -19. Such an EA must be prepared “at the earliest practicable time to determine whether an environmental impact statement shall be required.” HRS §§ 343-2, -5(e).

43. Alternatively, if the agency determines that an EIS is likely to be required, “the agency may authorize the applicant to choose not to prepare an environmental assessment and instead prepare an environmental impact statement.” *Id.* § 343-5(e).

44. The content requirements of an EA are far less comprehensive than that of an EIS. *Compare* HAR §§ 11-200.1-18, -21, *with id.* §§ 11-200.1-24, -27. HEPA defines an EA as “a written evaluation to determine whether an action may have a significant effect.” HRS § 343-2. Content requirements that inform the substance of an EA are set forth in HAR §§ 11-200.1-18, -21.

45. An EA generally must contain a “general description of the action’s technical, economic, social, cultural, historical, and environmental characteristics,” as well as a “summary description of the affected environment,” “identification and analysis of impacts and alternatives considered,” and “proposed mitigation measures.” *Id.* §§ 11-200.1-18(d), -21.

46. With regard to the preparation of EAs and EISs, HEPA’s implementing rules prioritize “substance of the information conveyed” rather than the particular form or length of the document. HAR § 11-200.1-1(c)(1). “EAs, and EISs are meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action.” *Id.* § 11-200.1-1(c).

47. Whenever an applicant proposes an action, “the authority for requiring an EA or EIS, making a determination regarding any required EA, and accepting any required EIS shall rest with the approving agency that initially received and agreed to process the request for an approval.” *Id.* § 11-200.1-7(c); *see also* HRS § 343-5.

48. After preparing, or causing to be prepared, a final EA, reviewing any public and agency comments, and applying the significance criteria in HAR § 11-200.1-13, the approving agency shall issue either a notice of a FONSI or an EIS preparation notice (“EISPN”). HAR § 11-200.1-22(a).

49. If the approving agency determines that a proposed action is not likely to have a significant effect, it shall issue a notice of a FONSI. *Id.* § 11-200.1-22(b). A “finding of no significant impact” is defined as “a determination based on an environmental assessment that the subject action will not have a significant effect and, therefore, will not require the preparation of an environmental impact statement.” HRS § 343-2. If, however, the approving agency determines that a proposed action “*may* have a significant effect, it *shall* issue an EISPN.” HAR § 11-200.1-22(c) (emphasis added); HRS § 343-5(e)(3). An EISPN is “a determination that an action may have a significant effect on the environment and, therefore, will require the preparation of an EIS.” HAR § 11-200.1-2.

50. The agency shall file notice of the agency’s determination with the office of planning and sustainable development, which, in turn, publishes the agency’s determination for the public’s information. HRS § 343-5(e). The notice “shall indicate,” among other information, the “[r]easons supporting the determination.” HAR § 11-200.1-22(e).

51. HEPA provides for judicial challenge of a determination that an EIS is not required for a proposed action within 30 days after the public has been informed of the determination. HRS § 343-7(b).

BACKGROUND FACTS

Natural and Cultural Significance of the Waimea River System

52. The Waimea River watershed encompasses 85.9 square miles in West Kaua‘i. It contains 38 streams totaling 276.4 miles in length, as well as 8 waterfalls. Waimea Canyon, renowned as the “Grand Canyon of the Pacific,” is the “longest, deepest, and most complex of a number of valleys” radiating from Kaua‘i’s central mountain, Mount Wai‘ale‘ale. Waimea River has carved its course more than 2,800 feet in depth below the canyon’s rim.

53. Waimea River is one of the largest rivers on Kaua‘i and in the state. The river travels generally north to south, collecting surface flows from various northern headwaters and tributaries that flow down from the Alaka‘i Swamp, and from lower eastern tributaries, before flowing into Waimea Bay.

54. Waimea River’s major northern tributaries include: (1) Po‘omau Stream, which combines numerous headwater streams including Kaua‘ikinanā, Kawaikōi, and Waiakōali Streams; (2) Waiahulu Stream, which combines Kōke‘e Stream and other headwater streams; (3) Koai‘e Stream, and (4) Wai‘alae Stream. The major lower tributaries from the east include Mokihana Stream and Makaweli River.

55. As documented in historical treatises such as *Native Planters*, the Waimea River watershed—from the fertile Waimea Delta to the upland Po‘omau headwater region—was home to thriving Native Hawaiian communities. Lo‘i terracing followed along the main Waimea River

eight to ten miles inland, wherever lands were tillable. Lo‘i and ‘auwai extended many more miles into upper tributaries such as Wai‘alae and Koai‘e Streams.

56. All along Waimea River’s inland reaches and tributaries, kua‘āina (person from the country) established “large and very nearly self-sufficient” communities. Backland lo‘i produced several rare and unique varieties of taro, including Ha‘o-kea, “a fast-maturing taro variety adapted to cold stream water and shallow soil,” and Ha-kalo-a-‘Ola, named after an ancient ali‘i (chief), which grows in highly inaccessible areas.

57. An extensive native forest blanketed the upland region of Waimea and produced many plants and trees traditionally used for subsistence and cultural practices, several of which are associated with stream flows.

58. Native stream life was abundant in the Waimea waterways and sustained the community. Waimea River’s upland headwater streams abounded in ‘ōpae (shrimp) and the prized fresh-water fish, the ‘o‘opu (gobies).

59. The comprehensive Hawai‘i Stream Assessment (“HSA”) prepared by the National Park Service for CWRM in 1990 recognized Waimea River as a place of high cultural significance, exhibiting four of five National Register of Historic Places criteria. The HSA further recognized Waimea River’s riparian, cultural, and recreational resources as “outstanding.”

60. Waimea River is the lifeblood for a host of protected instream public trust uses. The Waimea River system traditionally supported extensive kalo cultivation from the delta and far into the valley, which a century of plantation-era diversions widely diminished. In the lower valley, community members continue to exercise traditional and customary water rights in

growing kalo and other domestic crops, supplied by limited flows through the ancient ‘auwai called Kīkīaola, also known as the Menehune Ditch.

61. Longtime kama‘āina community members have also observed a decline in the abundance of native stream life in the Waimea River system from a century of plantation-era ditch diversions. Scientific evaluations of the river have similarly observed markedly diminished stream life and habitat compared to undiverted, healthy streams.

62. Longtime kama‘āina community members also attest that their ability to recreate in the Waimea River has deteriorated or vanished as the weak river flows continue and cause more and more silt to fill the river bed. In the early- to mid-20th century, the river was deep enough to allow recreational boats to travel upstream, and as recently as the 1990s, community members would frequent a popular 15-foot-deep swimming hole under the swinging bridge near the Waimea-Makaweli fork. Today, the swimming hole is buried, and often only a thin layer of water covers the silt-laden river bed.

63. The Waimea River system is legendary in Hawaiian tradition and central to the community’s cultural identity. Healthy river flows are vital to the perpetuation of Native Hawaiian cultural and spiritual practices and values, such as ritual blessings and the preservation of culturally significant landmarks and sacred sites.

64. Enhancing and maintaining instream flows toward their natural levels is necessary to support the entire Waimea River ecosystem from mauka to makai, including interconnected wetlands, estuaries, and riparian areas. Recreational opportunities, aesthetic values, revived native stream resources, and traditional and customary Native Hawaiian rights are dependent on greater sustained downstream flows.

Historical Plantation Diversion and Drainage Systems

65. The Kekaha Sugar plantation started in the 1870s and, by the 1930s, was leasing over 7,000 acres from the government.

66. To grow its crops, Kekaha Sugar converted the vast coastal marshlands in Kekaha and Mānā by filling in low areas and draining and pumping the water out into the ocean.

67. In the 1920s, Kekaha Sugar constructed the Mānā Plain Storm Drainage System, a network of about 40 miles of earthen, unlined canals and ocean outfalls and two pumping stations at Kawai‘ele and Nohili. Water flowing through these plantation-era dirt drainage ditches pick up sediment, pesticides, heavy metals, and other soil contaminants before being discharged into the ocean. These drainage pumps continue to operate today to keep much of the makai plains from reverting back to wetlands.

68. In the early 1900s, having impaired its initial groundwater wells from overuse, Kekaha Sugar turned to develop Waimea River surface water.

69. In 1907, Kekaha Sugar completed construction of the Kekaha Ditch, which diverts flows from the middle reaches of the Waimea River and transports the water to the makai lands in the Kekaha-Mānā Plain. The Kekaha Ditch system comprised 28 miles of ditches and tunnels and diverted an average flow of around 30 mgd. *See* attached Exhibit A (diagram of Kekaha Ditch).

70. In 1926, Kekaha Sugar completed construction of the Kōke‘e Ditch, which diverts flows from headwater streams of the Waimea River, including Waiakōali, Kawaikōi, Kōke‘e, and Kaua‘ikinanā Streams, and transports the water to higher-elevation mauka lands, portions of which are owned by the state Department of Hawaiian Homelands (“DHHL”). The Kōke‘e

Ditch system comprised 21 miles of ditches and tunnels and diverted an average flow of around 13 mgd. *See* attached Exhibit B (diagram of Kōke‘e Ditch).

71. Kekaha Sugar also installed two hydropower plants along the course of the Kekaha Ditch System to generate electricity using water being transported through the ditch to agricultural end uses. The plantation used the electricity to support its operations and sell surplus power to the electric utility.

72. For a century, the Kekaha and Kōke‘e Ditches drained much of Waimea River’s flow, leaving the river dry or at a trickle for long stretches below the diversions and allowing only shallow flows to reach the lower reaches in Waimea Valley, which became buried in brown silt.

73. Kekaha Sugar closed in 2000. In 2003, ADC assumed management of the former plantation lands and delegated management of the ditch systems and drainage infrastructure to Kekaha Agriculture Association (“KAA”), an association of agricultural tenants.

74. Even after the closure of the plantation, KAA continued to maximize diversions of Waimea River flows despite the wholesale reduction in agricultural end uses. KAA ran the diverted river flows through the legacy hydro plants and sold the “free” electricity to KIUC. The remaining flows were dumped in gulches and drainage canals along the Mānā Plain and discharged into the ocean.

75. Since the close of Kekaha Sugar over two decades ago, the agricultural tenants under ADC/KAA have cultivated only a fraction of the plantation’s former lands, in far less land- and water-intensive crops. For the last five years, the actual irrigation needs on the Mānā Plain averaged only around 1 to 2 mgd.

KIUC's and AES's Proposed Hydro Project

76. KIUC, in partnership with international energy company AES, is proposing to develop a hydro project that would rebuild the Kōke'e Ditch System to divert up to 26 mgd from Waimea River to generate hydro power, for an average of 11 mgd over the life of the project. The 11 mgd average diversion amounts to over four billion gallons of water a year, from a watershed that is expected to see far less rainfall according to state projections.

77. The proposed 11 mgd average diversion is enough water to fill around 17 Olympic-sized swimming pools every day, while 26 mgd would fill 40 of those pools.

78. KIUC touts its hydro proposal as a historic "legacy Project" that may serve Kaua'i "for 100 years or more." It would be "the first Project of its kind in the world." With an expected lifespan of 50 to 80 years, it would outlast most of the lifetimes of the present generations.

79. KIUC had initially pursued the proposed project on its own, but realized that the scale of the proposal was well beyond its financial means. Thus, in or around 2020, it sought financial assistance from AES.

80. KIUC entered into development and power purchase agreements with AES in which AES would finance, construct, operate, and maintain the project, and KIUC would pay AES charges for duration of the project, which would be passed on to KIUC's ratepayers. KIUC would pay AES almost \$9,000,000 per year, adding up to hundreds of millions of dollars over the duration of the obligation of up to 50 years or more. KIUC would also have opportunities at various times throughout the decades-long obligation to purchase the project from AES at "fair market value."

81. KIUC has described and promoted its proposed project as an integrated hydropower and agricultural irrigation project that will serve and benefit both purposes. Water diversion is an integral part of the proposed project. To this end, KIUC and AES will seek a long-term (65-year) water lease from the State under HRS chapter 171 to divert an average of 11 mgd of flow from Waimea River headwater streams (Waiakōali, Kawaikōi, Kaua‘ikinanā, and Kōke‘e Streams) via the Kōke‘e Ditch System.

82. The proposed hydro project includes two interconnected operations: a pumped-storage component, and a flow-through component. *See* attached Exhibit C (diagrams of the proposed project).

83. The proposed pumped storage system simply involves circulating around 55 million gallons of water in a “closed loop” between two reservoirs—one in the higher-elevation mauka lands supplied by the Kōke‘e Ditch, and the other at low elevation on the Mānā Plain. Solar power is used to pump water from the lower reservoir to the upper reservoir during the day, then the water can be released downhill at night to generate energy through a 35 megawatt (“MW”) powerhouse.

84. This closed-loop pumped storage system only requires water to refill the reservoirs and make up for any minimal system losses through seepage or evaporation. It does not require constant stream diversions, nor is the diverted water dumped or wasted.

85. The second component of the proposed hydro project is the flow-through component, also described as the “store and release” or “hydropower-only” component. This component would use the 11 mgd average flow (up to 26 mgd) diverted from Waimea River via the Kōke‘e Ditch System.

86. The diverted flow would run through two hydroelectric turbines (one 4 MW and one 20 MW) and would be available to supply irrigation needs for agricultural uses on DHHL and ADC lands. But any and all unused excess water beyond actual, available agricultural water needs would be flowed all the way through and discharged out the end of the system and onto the Mānā Plain. According to KIUC's latest estimate, even after supplying all identified potential agricultural needs including all the water reserved for potential DHHL agricultural homesteading uses, the proposed project will still discharge up to 18.55 mgd.

87. As a practical impact, any and all water diverted for the flow-through component of the proposed project would be irretrievably removed from Waimea River and not returned. Further, any diverted water not used for actual agricultural end uses would be dumped out of the system, far outside the Waimea River watershed and onto the distant Mānā Plain.

88. The proposed project would discharge the excess flows to the existing Mānā Plain drainage system of open dirt ditches and ocean outfalls, adding to the system's impacts of collecting and carrying sediment and other contaminants into the ocean.

89. As KIUC often highlights, the proposed project is unique from any other renewable project in Hawai'i or elsewhere. Unlike other types of renewable energy projects, the proposed hydro project directly depends on the use of public trust water resources. The technical and economic considerations of the project's proposed design and operations are thus legally and practically inseparable from environmental and cultural impacts on public trust water resources.

2017 Waimea Watershed Agreement

90. In July 2013, Pō'ai Wai Ola filed a petition to amend the interim instream flow standards ("IIFS") for Waimea River and complaint against waste with CWRM. The legal action sought to restore flow historically diverted by the plantation-era Kōke'e and Kekaha Ditch

Systems and challenged the ongoing diversion and dumping of Waimea River flows long after the closure of the Kekaha Sugar plantation.

91. Various parties, including Pō‘ai Wai Ola, KIUC, ADC/KAA, and DHHL, engaged in a mediation process facilitated by mediator Robbie Alm. On April 18, 2017, the parties entered into the Waimea Watershed Agreement (“Watershed Agreement”), which CWRM approved and ordered on May 16, 2017.

92. At the time, the Watershed Agreement was understood and promoted as a “win-win-win” framework providing for the protection and restoration of Waimea River flows and also for the pono (right, just) and efficient use of water in an envisioned modern system integrating both energy production and agricultural irrigation.

93. The Watershed Agreement’s guiding principles include that “[a]ny diversion of water from a stream *must be justified with no more water taken than is needed* for other beneficial uses, and even then, *the health of the stream must be preserved at all times*. All waters not needed at any given time belong in the stream and the IIFS numbers are the *minimum* amounts to be provided.” (Emphasis added.)

94. The Watershed Agreement included a framework for KIUC to pursue due diligence on a potential energy project, which was to include engineering, biological, and archaeological studies and compliance with various government permits and approvals, including the HEPA environmental review process.

95. The Watershed Agreement expressly recognized that KIUC “will need to obtain a number of permits and approvals from various governmental agencies, and *compliance with the requirements of HRS Chapter 343 will be necessary prior to agency action* on those permits and approvals.” (Emphasis added.)

96. Under the Watershed Agreement, the contemplated hydro project was “intended to serve both energy and agricultural uses which will enable the Commission to review the water needs of both [Kōke‘e and Kekaha Ditch] systems with the goal of reducing the diversion of water into the Kekaha Ditch System.” The Watershed Agreement did not specify, let alone approve, any plan or proposal to divert and dump river flow for the proposed hydro project apart from actual agricultural needs at the end of the pipe.

97. The Watershed Agreement outlined two phases. Phase 1 provided for the immediate restoration of flows to the “maximum extent possible” where not needed for actual agricultural uses and the installation of monitoring gages and diversion modifications to enable and ensure the restoration of flows.

98. Phase 2 would apply if KIUC’s proposed project was completed, in which case the project would receive from the Kōke‘e Ditch system an average of 11 mgd to support its integrated purpose of generating hydro power and supplying agricultural needs, including agricultural homesteads on DHHL’s mauka lands and any agriculture on ADC makai lands on the Mānā Plain.

99. Although the Watershed Agreement went into effect over five years ago, the required monitoring and modifications under Phase 1 have not yet been completed, and controversy continues whether flows have been restored to the maximum extent possible in compliance with the Watershed Agreement.

100. The Watershed Agreement also recognized the issue of the interactions between the Kōke‘e Ditch and Kekaha Ditch diversions, particularly the concerns over whether both ditches would continue diverting streamflows, both purportedly for hydro generation and agriculture, after the contemplated KIUC project starts taking water. In response to this concern

that diversions by two different entities purporting to serve the same agricultural end uses would result in duplicative and wasteful diversions and excess discharges, the Watershed Agreement included various safeguards. These included re-opener provisions to revisit the mandated streamflow levels to “take into account the energy and agricultural uses served by the KIUC project.”

101. The Watershed Agreement expected that all these interrelated factors and impacts would be fully disclosed, analyzed, and mitigated in expressly recognizing that “compliance with the requirements of HRS Chapter 343 will be necessary prior to agency action.”

Follow-Up Agreement

102. On December 31, 2020, before any environmental review document was produced, KIUC filed an application with the PUC seeking approval of its development and power purchase contracts with AES for its proposed hydro project. Pō‘ai Wai Ola intervened in the PUC docket.

103. The PUC initially indicated that it would not grant any of KIUC’s requests for approvals until HEPA review was complete. But in response to overt pressure from KIUC including an asserted deadline ultimatum based on the then-existing time limit of the federal tax credit (which has since been extended), the PUC granted KIUC’s requested approvals on December 1, 2021, while the HEPA review process was still ongoing. Pō‘ai Wai Ola appealed.

104. On July 26, 2022, Pō‘ai Wai Ola and KIUC entered into a settlement agreement, again facilitated by mediator Robbie Alm, resolving Pō‘ai Wai Ola’s appeal (“Follow-Up Agreement”). The Follow-Up Agreement sets forth various understandings, commitments, and agreements between Pō‘ai Wai Ola and KIUC including the commitment to coordinate and integrate “all water uses, energy uses, and agricultural uses . . . so as to maximize the beneficial

use of these waters; to minimize any ‘waste’ of waters particularly if there is no agriculture or insufficient agriculture to use the water being diverted into the system; to account for fluctuations in agricultural use of the water due to climate change; to minimize any discharge of pollution into the ocean; and to maximize the continuing restoration of as much water as possible into the natural streams.”

105. KIUC and Pō‘ai Wai Ola also committed to developing operating protocols for the proposed hydro project that would ensure “the use of the water by the non-pumped storage portion of the project be matched by DHHL uses, and other agricultural or other mutually acceptable end uses of water on a 1:1 basis.” In line with the 1:1 use goal, “the protocols should minimize reliance on the Kekaha Ditch waters, minimize operational losses in the ditch systems, maximize continuing restoration of instream flows, and avoid waste generally.”

106. The commitments in the Follow-Up Agreement, which are legally binding on KIUC, are not mentioned or discussed at all in KIUC’s final EA. This does not comply with the Follow-Up Agreement, nor does it comply with HEPA, which requires full and transparent disclosure and analysis of the proposal as it actually is intended and required to operate.

HEPA Review Process

107. It is undisputed that HEPA applies to KIUC’s and AES’s proposed hydro project, which uses state lands and lands within the conservation district .

108. In January 2019, KIUC prepared a Draft EISPN for its proposed hydro project. But the Draft EISPN was never published. Instead, in the latter half of 2019, KIUC decided that, rather than proceeding directly to preparing an EIS, it would pursue the route of preparing an initial EA.

109. In August 2020, Pō‘ai Wai Ola participated in early consultation for the pending environmental review process, flagging various questions and concerns regarding the contemplated hydro project, including the suggestion that KIUC “please consider a meaningful range of mitigation measures and alternatives that would reveal how the project could be optimally tailored to minimize its impacts.”

110. Pō‘ai Wai Ola also specifically recommended that KIUC should conduct an EIS given “the very nature of the project—which would be the largest pumped storage operation in the state, diverting flows from Waimea River to supply a sizable portion of the island’s total electricity demand.” Pō‘ai Wai Ola cautioned KIUC that it was “implausible” that the proposed project’s impacts “could be considered anything but significant” and urged KIUC that committing to an EIS at the outset “would avoid any potential inclination or temptation to downplay the impacts to justify a FONSI and would also avoid any potential questions later over whether an EIS should have been prepared.”

111. Despite such urgings from Pō‘ai Wai Ola and the larger West Kaua‘i community, KIUC insisted on proceeding with the preparation of an EA.

112. As more details of the proposed hydro project began to be revealed to the community, Pō‘ai Wai Ola learned that KIUC and AES were intending to divert Waimea River flows regardless of actual needs for agricultural end uses and simply dump up to 26 mgd of water into the Mānā Plain drainage system. Such extraction and dumping of river flow for hydro generation is exactly the type of legacy practice that Pō‘ai Wai Ola challenged in its original waste complaint with CWRM.

113. On June 25, 2021, Pō‘ai Wai Ola provided comments on an advance copy of the draft EA from KIUC, again raising numerous concerns about the environmental and cultural

impacts of removing and dumping river flows, as well as the potential cumulative impacts of diversions by both the Kōke'e and Kekaha Ditch Systems, both purportedly for agriculture and hydropower.

114. On August 23, 2021, KIUC's draft EA and anticipated FONSI was published in *The Environmental Notice*.

115. By letter dated September 22, 2021, Pō'ai Wai Ola submitted comments on KIUC's published draft EA, reiterating their concerns that still remained ignored and unaddressed in the document.

116. For example, despite recognizing that the closure of the Kōke'e Ditch and removal of diversion structures would be beneficial to native biota, the draft EA failed to consider how the long-term removal of 11 mgd would curtail instream uses and values, including ecosystem health and Native Hawaiian rights, and preclude long-term restoration and revival of stream ecosystems.

117. The draft EA also failed to address the secondary and cumulative impacts of the discharges from the flow-through component of the proposed project. The draft EA acknowledged that diverted flows not used for agriculture would be dumped into the Mānā drainage system, but ignored how the addition of up to 26 mgd of water flowing and scouring through this system of open dirt ditches would contribute to the system's pollution impacts on coastal and nearshore ecosystems. The draft EA also contained little or no analysis of agricultural water needs now or in the future, and whether and how water diversions would be coordinated and integrated with any agriculture, but simply presumed that any unused excess water would be dumped, while failing to analyze the impacts of such discharges and reasonable alternatives and mitigation.

118. The draft EA further failed to address the cumulative impacts of diversions from Waimea River by both the Kōke‘e and Kekaha Ditches, both purportedly for agricultural and energy uses. The Watershed Agreement makes clear that future diversions of Waimea River in Phase 2 would depend on how the proposed hydro project diversions are fully and effectively integrated into the irrigation delivery system on the Mānā Plain. The draft EA contains no information on the proposed interactions between the Kōke‘e and Kekaha Ditches and fails to disclose and analyze the cumulative impacts of both ditch systems diverting and dumping river flows.

119. Again, Pō‘ai Wai Ola urged KIUC to prepare an EIS for the project because “there is no question that a project of such historic scale and complexity” not only “may” but *will* have a significant impact on the environment.

120. Based on the draft EA and comments from community members and government agencies, DLNR staff concluded it was unclear whether the proposed project would result in significant impacts. Instead of requiring an EIS, however, DLNR suggested that KIUC prepare another draft EA. The comments on the initial draft EA were never published and disclosed to the public.

121. On September 8, 2022, KIUC’s second draft EA and anticipated FONSI was published in *The Environmental Notice*.

122. By letter dated October 10, 2022, Pō‘ai Wai Ola again submitted comments on KIUC’s second draft EA, reiterating that the fundamental concerns it raised continued to be ignored and unaddressed. Pō‘ai Wai Ola further pointed out that the second draft EA completely failed to mention or acknowledge the legally binding commitments in the Follow-Up Agreement,

or to integrate those commitments in any analysis of the project's proposed design and operations, as well as alternatives and mitigation measures.

123. In its October 2022 comment letter, Pō'ai Wai Ola again urged the preparation of an EIS to enable a full analysis of impacts and alternatives and incorporate the understandings and commitments in the Follow-Up Agreement to minimize waste and pollution discharges. Nā Kia'i Kai also submitted comments on KIUC's second draft EA, similarly calling for the preparation of an EIS and raising concerns and objections over the second draft EA's failure to address the impacts to Waimea River and West Kaua'i fisheries of diverting flows from the river and dumping them into the Mānā Plain drainage system.

124. On January 8, 2023, the final EA and FONSI was published in *The Environmental Notice*. According to the public notice, the outgoing DLNR Chair Suzanne Case issued the FONSI on December 22, 2022, pursuant to a general delegation of authority from BLNR to its chair seven years ago, in 2015.

125. On September 25, 2015, BLNR had approved a recommendation to delegate blanket authority to the chairperson to issue FONSI for EAs submitted for state land dispositions or projects on state lands. The 2015 delegation also authorized the chairperson to issue exemptions for actions on state lands that are identified in the department-wide exemption list as categories of actions that "will probably have minimal or no significant effects on the environment." HRS § 343-6(a)(2).

126. The 2015 delegation of the authority to issue exemptions is tied to and limited by the agency's established list of exemptions (which is approved by the environmental council, *see* HAR § 11-200.1-16(d)). It is also limited to only those "land dispositions and actions that have

been delegated to the Chairperson.” That is, only if approval of the underlying action has been delegated to the chair, then the chair may also declare those actions exempt from HEPA.

127. In contrast, the delegation of authority to the chairperson to issue FONSI was proposed to the Board in blanket and indefinite terms as a “delegation of authority from the Board to the Chairperson to review EAs and make FONSI determinations, when appropriate.” The 2015 delegation included no details on when it may be “appropriate” for the chairperson to make the FONSI determination on behalf of the Board. And the final delegation language the Board approved did not include the “when appropriate” language, or any other specific or general limiting terms or conditions.

128. Although Governor Green had already appointed a new DLNR chairperson in early December 2022, DLNR staff communications indicate that Chair Case “want[ed] to sign off on this [final EA] before she leaves the Department,” by using the seven-year-old delegation to issue a FONSI and sidestep any Board review or consideration in a public hearing. To this end, DLNR staff expedited review of the final EA during the winter holidays, without a public hearing or Board notice or review, so that Chair Case could rubberstamp KIUC’s final EA and issue a FONSI as one of her final acts as outgoing DLNR Chair.

129. The Chair’s half-page letter transmitting the final EA and FONSI for public notice provided no reasons supporting the Chair’s FONSI determination.

130. The final EA suffers from the same fundamental flaws as the first and second draft EAs in failing to disclose and analyze direct, secondary, and cumulative impacts from the long-term removal of 11 mgd from Waimea River, the discharge of excess flows onto the Mānā Plain and into the ocean, and the interactions with existing and future Kekaha Ditch diversions.

131. The final EA also fails to analyze a full range of alternatives and mitigation measures to address potential impacts. In one page, the final EA dismisses one alternative variation of the project limited to pumped-storage operations only, but fails to consider and analyze other alternative designs and operations for the proposed project that would match diversions with any actual agricultural end uses and minimize waste, dumping, and pollution discharges.

132. In contrast, an EIS would not only ensure a full analysis of alternatives and mitigation, but would also require “a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions” and discussion of “mitigation measures proposed to avoid, minimize, rectify, or reduce impacts.” HAR § 11-200.1-24.

FIRST CLAIM FOR RELIEF

(Failure to Require an EIS)

133. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

134. Defendants’ failure to require an EIS and issue an EISPN for the proposed hydro project violates HEPA’s requirement to prepare an EIS if the proposed action “may” have a significant impact on the environment. Based on the significance factors under the HEPA rules, the proposed project certainly “may” have a significant impact on the environment and, thus, requires an EIS.

135. To avoid the requirement to prepare an EIS, the final EA improperly and unlawfully disregarded and distorted the full range of direct, secondary, and cumulative impacts of the proposed project and failed to consider and analyze reasonable alternatives and mitigation measures, in violation of the letter and purpose of HEPA and its implementing rules.

136. An actual controversy exists between Plaintiffs and Defendants concerning Defendants' violation of HEPA in failing to require an EIS and instead accepting only an EA and FONSI.

SECOND CLAIM FOR RELIEF

(Invalid Acceptance of EA/FONSI)

137. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

138. The outgoing DLNR chairperson's acceptance of the final EA and FONSI for the proposed hydro project violated the letter and purpose of HEPA.

139. The chairperson failed to provide any FONSI determination including findings and reasons for supporting the determination, as specifically and expressly required in HAR § 11-200.1-22(e).

140. The blanket, unlimited, and unconditional delegation of authority from the Board to its chairperson for approving any and all EAs and FONSI, on its face and as applied in this case, violates HEPA. It also violates fundamental requirements of administrative procedure under the Hawai'i Administrative Procedures Act, HRS chapter 91, and due process under article I, section 5 and article XI, sections 1 and 9 of the Hawai'i Constitution.

141. HRS § 171-58 specifically designates BLNR as the responsible entity for issuing long-term water leases. Nothing in this statute suggests that BLNR can delegate such decisions, and BLNR has not sought any such delegation for this or any other case involving a long-term water lease. Likewise, HEPA does not allow BLNR as the approving and accepting agency to delegate the decision whether to require an EIS or instead accept only an EA and FONSI. Given that BLNR is the agency responsible for approving any water lease for the proposed hydro

project, the delegation of the decision whether to require an EIS or accept an EA and FONSI violated the letter and purpose of HEPA, by depriving BLNR of its ability and duty to review the information provided and determine whether it is acceptable for HEPA's purpose of informing BLNR's decision making.

142. An actual controversy exists between Plaintiffs and Defendants concerning Defendants' violation of HEPA in failing to ensure that environmental concerns are given appropriate consideration by BLNR, the agency tasked with issuing the underlying approval for the project.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:
 - (A) Defendants have violated and are violating HEPA by failing to require an EIS and issue an EISPN for the proposed hydro project;
 - (B) The DLNR chairperson's acceptance of the final EA and FONSI fails to comply with HEPA and its implementing rules and is otherwise legally improper and invalid.
2. Enter appropriate injunctive relief to ensure that Defendants comply with HEPA and to prevent Defendants from issuing approvals for the proposed project or otherwise allowing it to proceed until that compliance occurs.
3. Retain continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein;
4. Issue such additional judicial determinations and orders as may be necessary to effectuate the foregoing;

5. Award Plaintiffs the cost of the suit herein, including reasonable expert witness and attorneys' fees; and

6. Provide such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

DATED: Honolulu, Hawai'i, February 6, 2023.

/s/ Elena L. Bryant

ISAAC H. MORIWAKE

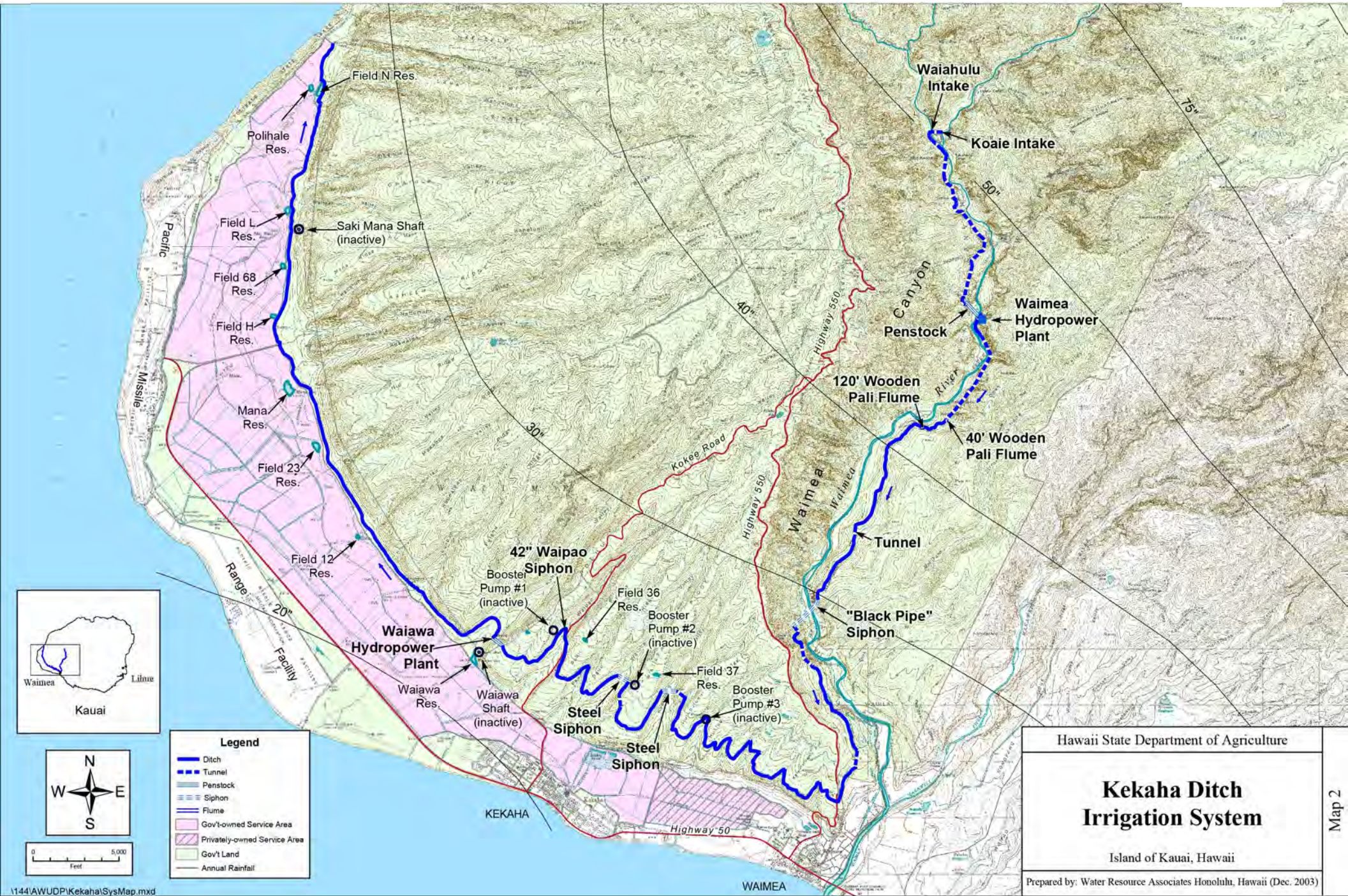
ELENA L. BRYANT

EARTHJUSTICE

Attorneys for Plaintiffs

Pō'ai Wai Ola/West Kaua'i Watershed Alliance

and Nā Kia'i Kai



Hawaii State Department of Agriculture

**Kekaha Ditch
Irrigation System**

Island of Kauai, Hawaii

Prepared by: Water Resource Associates Honolulu, Hawaii (Dec. 2003)

Map 2

EXHIBIT A

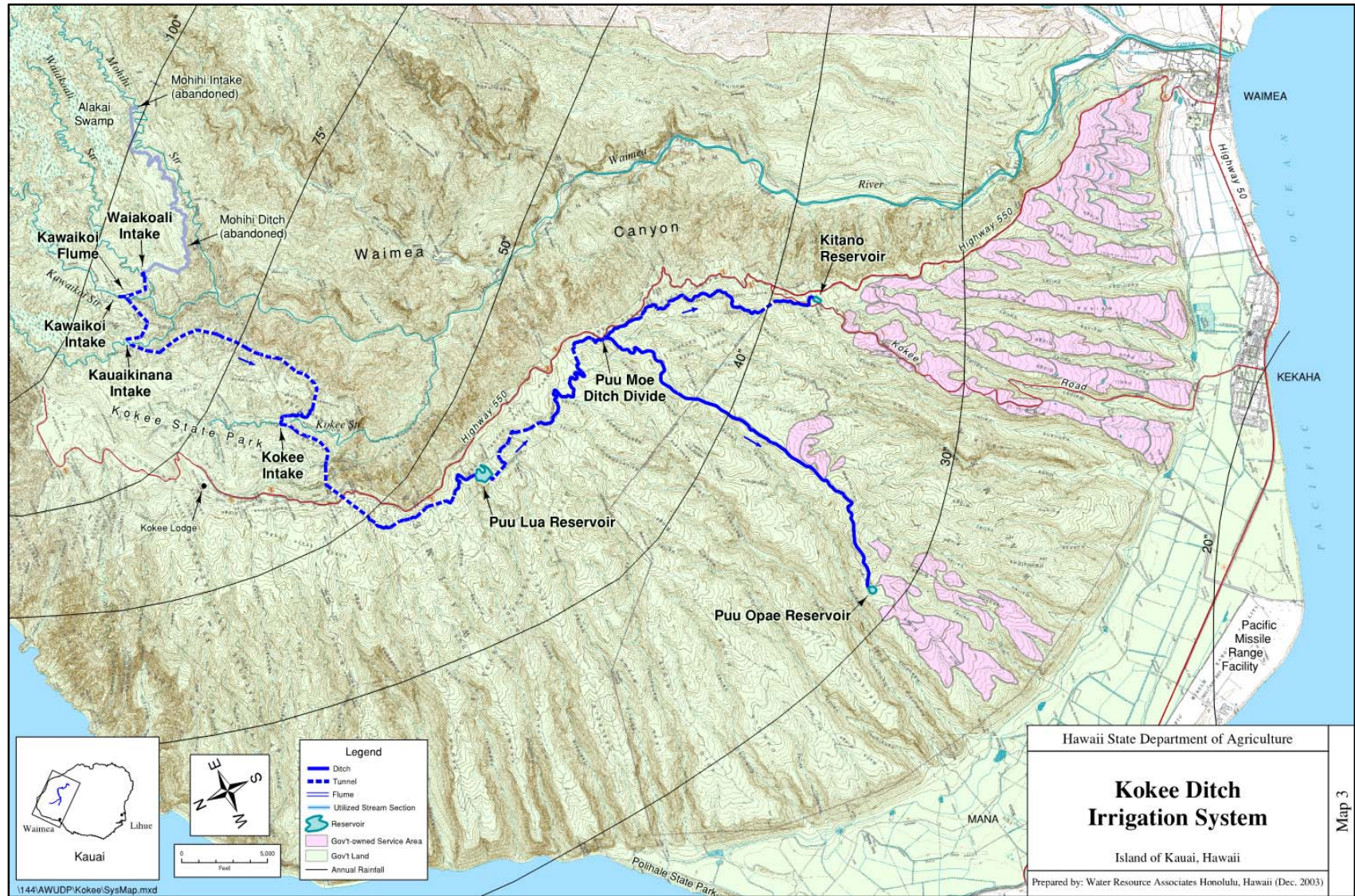


Figure 1-1. Project Location Map

Figure 2.3. Water Flow Diagram for Store and Release Hydroelectric Operation and Irrigation Delivery

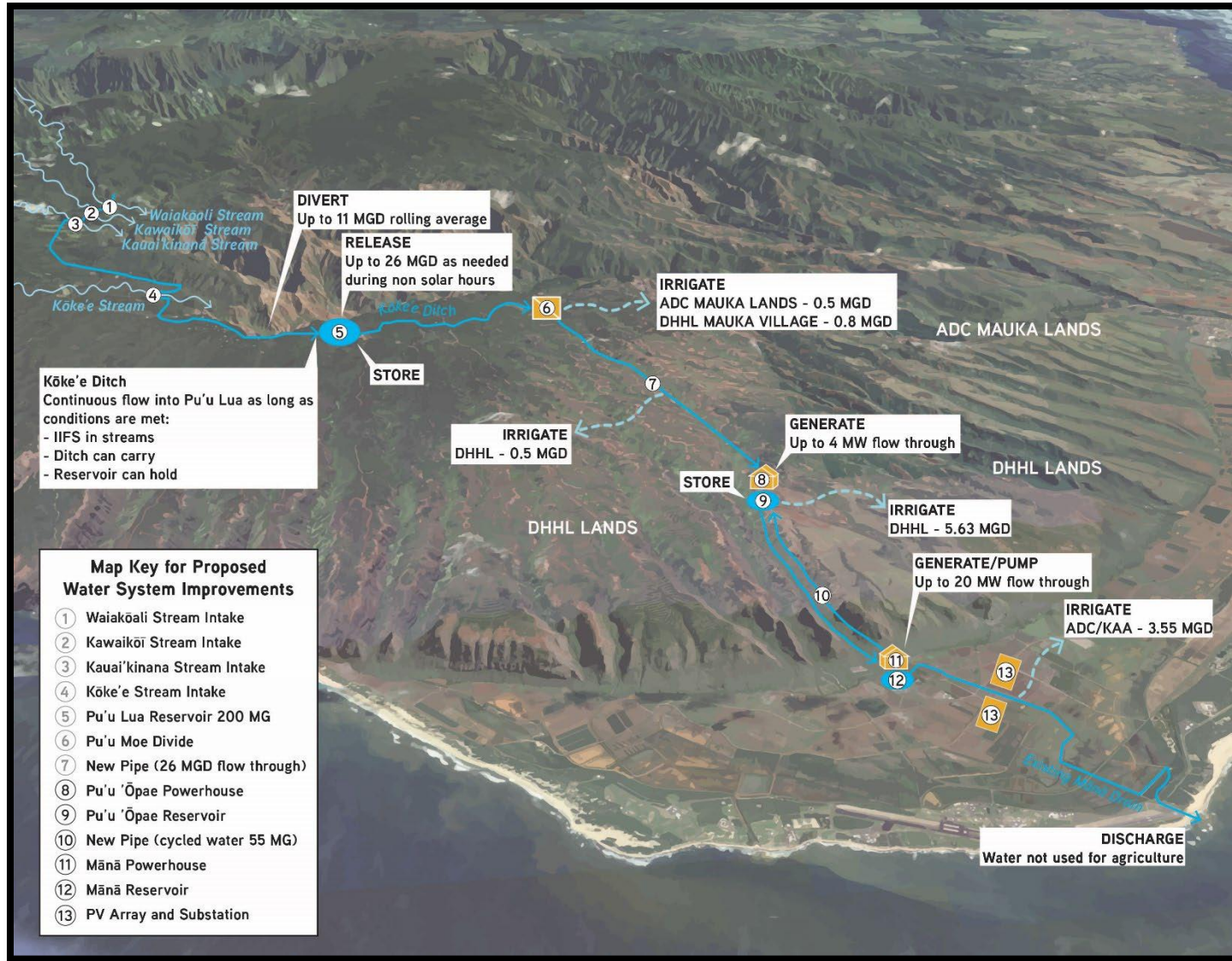


EXHIBIT C

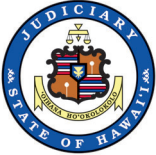

Figure 2.5. Project Location Map



Project Location Map

West Kaua'i Energy Project – Kaua'i, Hawai'i



STATE OF HAWAI'I CIRCUIT COURT OF THE FIRST CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER
PLAINTIFF PŌ'AI WAI OLA/WEST KAUA'I WATERSHED ALLIANCE, and NĀ KIA'I KAI	VS.	DEFENDANT(S) BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I and DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I
PLAINTIFF'S NAME & ADDRESS, TEL. NO. Isaac H. Moriwake and Elena L. Bryant Earthjustice 850 Richards Street, #400 Honolulu, HI 96813 (808) 599-2436		
<p>TO THE ABOVE-NAMED DEFENDANT(S)</p> <p>You are hereby summoned and required to file with the court and serve upon</p> <p>Isaac H. Moriwake and Elena L. Bryant EARTHJUSTICE</p> <hr/> <p>plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.</p> <p>THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.</p> <p>A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</p>		
The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http://www.courts.state.hi.us	Effective Date of 28-Oct-2019 Signed by: /s/ Patsy Nakamoto Clerk, 1st Circuit, State of Hawai'i 	
 In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.		