

## SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (“Agreement”) is made and entered into as of this 7th day of August, 2024, by and between CONSERVATION COUNCIL FOR HAWAI‘I and CENTER FOR BIOLOGICAL DIVERSITY (together, “Plaintiffs”) and BRE ICONIC GWR LLC (“Defendant”). Defendant and Plaintiffs are referred collectively herein as “the Parties.”

A. On October 21, 2022, the Parties entered into a Settlement Agreement and Release (“2022 Settlement Agreement”). The 2022 Settlement Agreement resolved Plaintiffs’ February 7, 2022 Complaint filed in the United States District Court for the District of Hawai‘i, captioned *Conservation Council for Hawai‘i, et al. v. BRE Iconic GWR Owner LLC, et al.*, Civil No. 1:22-cv-00054-DKW-WRP, in which Plaintiffs alleged a cause of action against Defendant under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), alleging unauthorized take of the Hawaiian petrel (*Pterodroma sandwichensis*) (“Hawaiian Petrel”) associated with lighting at the Grand Wailea Resort Hotel & Spa located at 3850 Wailea Alanui Dr., Wailea, Hawai‘i and further described as Tax Map Key numbers 2-2-1-008-109, 2-2-1-008-138 and 2-2-1-008-142 (“Resort”).

B. Paragraph 14(b) of the 2022 Settlement Agreement, entitled Reservation of Rights states: “Plaintiffs will not bring any New Claims after December 15, 2023, and prior to December 15, 2026, unless (i) one or more grounded Hawaiian Petrels are discovered at the Resort subsequent to the execution of this [2022 Settlement] Agreement or (ii) this [2022 Settlement] Agreement has terminated . . . .”

C. Paragraph 25 of the 2022 Settlement Agreement, entitled Termination of Agreement, states, in relevant part: “This [2022 Settlement] Agreement shall terminate upon the earlier of: (a) December 15, 2026; (b) Plaintiffs’ filing of a new lawsuit against Defendant and/or

Released Parties regarding take of Hawaii Petrels due to the Resort's lighting; (c) if the Resort is no longer owned by Defendant, its affiliates, parents or subsidiaries; or (d) if Defendant signs the commitment to obtain an incidental take permit ... and provides a copy of the Commitment to Plaintiffs.”

D. Plaintiffs allege that during the 2022 and 2023 Hawaiian Petrel fledging seasons, three grounded Hawaiian Petrels were discovered at the Resort.

E. On May 2, 2024, Plaintiffs filed a Complaint in the United States District Court for the District of Hawai'i, captioned *Conservation Council for Hawai'i, et al. v. BRE Iconic GWR Owner LLC*, Civil No. 1:24-CV-00204-LEK-RT, alleging that “Defendant’s operation of the Grand Wailea violates the ESA’s prohibition on unpermitted ‘take’ of a federally listed species.”

F. Defendant denies any liability to Plaintiffs.

G. Without any admission of law or fact, to avoid the time and expense of litigation, the Parties wish to settle the claims raised in Plaintiffs’ May 2, 2024 Complaint and all of the issues which could have been raised by Plaintiffs concerning alleged unauthorized take of Hawaiian Petrels at the Resort.

NOW, THEREFORE, the Parties agree as follows:

1. Good Faith Efforts Promptly to Obtain an Incidental Take Permit. Defendant agrees to make good faith efforts promptly to obtain an incidental take permit from the United States Fish and Wildlife Service (“USFWS”) for the incidental take of Hawaiian Petrels at the Resort (“ITP”), pursuant to Section 10 of the ESA and the USFWS’s implementing regulations.

2. Monthly Payments by Defendant

a. Defendant agrees to make monthly payments in the sum of \$5,000 per month to the National Fish and Wildlife Foundation (“NFWF”), into a NFWF fund not objectionable to USFWS, for one or more projects to benefit Hawaiian Petrels in the County of Maui (“Payments”).

b. Monthly Payments shall commence on September 1, 2024, and continue monthly until the USFWS issues an ITP to Defendant for the incidental take of Hawaiian Petrels at the Resort.

c. The Payments are not “advance mitigation credit” payments. Accordingly, Defendant will not seek any credit or offset for payments made before the ITP is issued as part of its ITP process.

d. By signing this Agreement, the Parties certify that no payment for a project to benefit Hawaiian Petrels in the County of Maui will be requested from NFWF or received from NFWF by the Parties, any of their respective parents or subsidiaries, or any organization controlled by any of the Parties’ board members.

e. The Monthly Payments to NFWF shall temporarily cease and be re-directed as set forth herein in the event one of the following occurs concerning unauthorized take of Hawaiian Petrels due to the Resort’s lighting, other than at the request or prompting of Defendant or its respective affiliated companies, parent companies, subsidiaries, trustees, officers, directors, stockholders, affiliates, employees, agents, or attorneys: (1) a citizen suit is filed by any person pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. 1540(g); (2) enforcement action by the United States government pursuant to 16 U.S.C. § 1540; or (3) enforcement action by the State of Hawai‘i pursuant to Hawai‘i Revised Statutes Chapter 195D (items (1), (2) and

(3) are referred to, individually and collectively, as the “Enforcement Action”). In the event of an Enforcement Action, the Monthly Payments thereafter shall be redirected and made to the clerk of the United States District Court of the District of Hawai‘i (“Clerk”) until final resolution of the Enforcement Action, including but not limited to resolution by settlement, plea, stipulated dismissal, dismissal by the court, final judgment, or appellate decision. In the event that the Enforcement Action is resolved by settlement, plea or penalty, the Monthly Payments shall be reduced by any amounts paid by Defendant for any settlement, plea or penalty for any project to benefit Hawaiian Petrels in the County of Maui, other than payments for projects on the Resort’s premises or payments made to Defendant or its affiliated companies, parent companies, subsidiaries, trustees, officers, directors, stockholders, affiliates, employees, agents, or attorneys (“Monthly Payment Reduction”). The Parties agree that the Court will have the authority to resolve any dispute over the amount of any Monthly Payment Reduction. Within ten (10) business days after final resolution of the Enforcement Action, the Clerk shall pay to NFWF all Monthly Payments received from Defendant during the pendency of the Enforcement Action, less any Monthly Payment Reduction, with a request that the funds be used for one or more projects to benefit Hawaiian Petrels in the County of Maui. On the first day of the month following final resolution of the Enforcement Action, Defendant shall continue paying Monthly Payments to NFWF, less any Monthly Payment Reduction.

f. Defendant shall notify Plaintiffs of each payment to NFWF described in Section 2 of this Agreement within five (5) calendar days of the payment.

3. Lighting Minimization Measures

a. Defendant shall implement the lighting minimization measures described in **Exhibit A** and **Exhibit B** hereto (collectively the “Lighting Minimization Measures”). In the

event of any conflict between the measures described in Exhibits A and B or in paragraph 4 of this Agreement, Defendant will implement the measures that both minimize lighting and its blue-light content to the greatest extent practicable. For purposes of this Agreement, the term “practicable” shall include, (1) outdoor lighting fixtures, and bulbs available for purchase in the United States commercial market, (2) installation with commercially reasonable timelines and costs; and (3) avoidance of unnecessary triggers for construction permits (not including electrical permits) and that do not require a Special Management Area permit.

b. If Defendant contends that any of the Lighting Minimization Measures cause a safety issue for guests or employees, the Parties will confer in a good faith attempt to find a mutually acceptable solution. If the Parties are unable to reach agreement, the Court will have the authority to make the final decision regarding any dispute. Defendant shall have no obligation to confer with Plaintiffs regarding modification of lighting (1) to meet IESNA standards for lighting described in paragraphs 4 or 5 of Exhibit A or (2) for safety and security for lighting described in paragraph 6 of Exhibit A.

c. While this Agreement remains in effect, any new or modified lighting that Defendant installs at the Resort (including, but not limited to, any lighting changes associated with renovations or new construction) must be consistent with paragraphs 1, 4, 6, 13, and 21 of Exhibit A and the “Guidelines for Adjusting Lighting at Facilities” in Appendix E of the Kauai Seabird Habitat Conservation Plan dated May 20, 2020 (“KSHCP Lighting Guidelines”), a copy of which is attached to this agreement as **Exhibit C**.

4. Compliance with the Maui County Lighting Ordinance

a. On or before July 1, 2025, Defendant will replace existing outdoor lighting fixtures in its South Parking garage with outdoor lighting fixtures that comply with Maui County Code § 20.35.060.D.

b. The Parties agree to work together in good faith to identify solutions to reduce the emission of blue light from outdoor lighting fixtures at the Resort. Defendant shall work in good faith with Plaintiffs, through counsel, to identify outdoor lighting fixtures at the Resort that can be retrofitted or replaced with new lamps, bulbs or fixtures that comply with Maui County Code § 20.35.060.D and are practicable to implement.

c. The Parties agree that, if there are practicable solutions to retrofit or replace the Resort's outdoor lighting fixtures, or to install filters, to comply with Maui County Code § 20.35.060.D, Defendant will make good faith efforts to implement those solutions on or before September 1, 2025. If it is not practicable for Defendant to implement any identified solution by September 1, 2025, Defendant will implement that solution as soon thereafter as practicable. Defendant's obligation to implement identified solutions to comply with Maui County Code § 20.35.060.D is contingent on that code provision remaining effective and applicable to the Resort.

d. If the Parties are unable to reach agreement regarding whether implementing any solution to retrofit or replace the Resort's outdoor lighting fixtures to comply with Maui County Code § 20.35.060.D is practicable, the Court will have authority to make the final decision regarding any dispute.

e. Defendant will make good faith efforts to comply with Maui County Code § 20.35.060.E by September 1, 2025, if it is practicable to do so. If not, Defendant will comply as soon thereafter as practicable.

f. The parties agree that Defendant's compliance or noncompliance with Maui County Code § 20.35.060.E shall be solely determined by Maui County.

5. Hawaiian Petrel Searchers. Defendant will hire two biologists ("Biologist Searchers") and two additional searchers who are not biologists ("Additional Searchers") to conduct daily systematic searches for grounded Hawaiian Petrels at the Resort each year from September 15 to December 15 (the "Fledging Season"). Defendant will prioritize hiring biologists recommended by Linda Elliott of Hawai'i Wildlife Center. Defendant will use its reasonable best efforts to hire two Biologist Searchers by September 15, 2024. If Defendant cannot secure Biologist Searchers by September 15, 2024, Defendant may hire searchers who are not biologists for the 2024 Fledging Season.

a. Within five (5) days of hiring any Biologist Searcher or Additional Searcher, Defendant will notify Plaintiffs of the searcher's name and background.

b. Prior to the start of each Fledging Season, the Biologist Searchers and Additional Searchers will be trained by Dr. Adrian Gall of ABR, Inc. on search techniques for Hawaiian Petrels and the proper handling of grounded Hawaiian Petrels.

c. Based on protocols developed in consultation with USFWS, Dr. Adrian Gall of ABR, Inc. will conduct an assessment of the efficacy of seabird searches at the Resort.

Defendant will make good faith efforts to have the assessment take place during the 2024 Fledging Season. Within five (5) calendar days after the completion of any searcher efficacy assessment, Defendant shall notify Plaintiffs of the completion of the assessment.

6. Equipment for Searchers. Defendant will provide searchers with night vision binoculars and infrared cameras to assist in their daily visual searches and maximize search efforts.

7. Handling of Grounded Hawaiian Petrels. Defendant will comply with the most recent version of the USFWS's written instructions regarding the protocol for handling any grounded Hawaiian Petrel that is discovered on the Resort's property.

8. Reporting of Grounded Hawaiian Petrels. For any grounded Hawaiian Petrel at the Resort, Defendant shall provide a written incident report to the USFWS within forty-eight (48) hours of the bird's discovery ("Written Incident Report"). Defendant shall provide a copy of each Written Incident Report to Plaintiffs within five (5) calendar days of providing notification to the USFWS.

9. Predator Control. Defendant shall trap and remove rats, mongoose, and feral cats from the Resort, and shall ensure that trapped rats, mongoose, and feral cats are not released back into the wild.

10. Notification/Reporting. Defendant shall provide the notifications and reports required in this Agreement via electronic mail to Plaintiffs' attorney of record: David L. Henkin, Earthjustice, 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813; [dhenkin@earthjustice.org](mailto:dhenkin@earthjustice.org). Plaintiffs may, by written notice to Defendant's counsel of record: Lisa A. Bail ([lbail@goodsill.com](mailto:lbail@goodsill.com)), change their designated notice recipient or address.

11. Attorneys' Fees and Costs. The Parties will attempt to resolve by agreement Plaintiffs' claim for an award of attorneys' fees and costs. If, within 60 days of the execution of the Agreement, the Parties cannot reach agreement on an award, the Parties agree to seek the Court's resolution of the issue by motion.



12. Stay and Dismissal of Lawsuit. Upon execution of this Agreement, the Parties will lodge with the Court a stipulation in the form attached hereto as Exhibit D to stay this litigation in its entirety but for (1) resolution of Plaintiffs' claim for an award of attorneys' fees and costs as provided in paragraph 11, above; and (2) enforcement of this Agreement. Within fourteen (14) days after the resolution of Plaintiffs' claim for an award of attorneys' fees and costs, by agreement or Court order, the Parties shall execute a Stipulation of Dismissal With Prejudice of all claims by Plaintiff against Defendant in the form attached hereto as Exhibit E. It is understood that the stipulation for dismissal will recite a request that the Court retain jurisdiction to interpret and enforce this Agreement and any disputes arising hereunder.

13. Release and Covenant Not to Sue. Plaintiffs release the Released Parties from all known and unknown claims and causes of action which they raised or could have raised concerning unauthorized take of Hawaiian Petrels due to the Resort's lighting, including but not limited to those claims set forth in Civil No. 1:24-cv-00204-LEK-RT. "Released Parties" shall mean Defendant and GW Manager LLC and their respective affiliated companies, parent companies, successors, assigns, subsidiaries, trustees, officers, directors, stockholders, affiliates, employees, agents, and attorneys as well as future owners or operators of the Resort. Plaintiffs hereby covenant and agree not to bring any action or claims against Defendant or Released Parties related to take of Hawaiian Petrels due to the Resort's lighting. Plaintiffs also covenant and agree they will not encourage or prompt any person or entity to commence or pursue any action or other proceeding based upon any claim or cause of action released in this Agreement. Plaintiffs hereby covenant and agree not to bring any action or claims against Defendant or Released Parties related to take, in the past or in the future, of Hawaiian Petrels at the Resort without an ITP. Nothing in this paragraph shall preclude Plaintiffs from bringing a legal

challenge to any ITP, bringing a legal challenge to any future take of Hawaiian Petrels at the Resort that is alleged not to comply with the conditions or terms of any ITP, or responding to subpoenas or court orders.

14. Use of Agreement.

a. This Agreement constitutes a compromise of disputed claims. This Agreement shall not constitute an admission or adjudication with respect to any allegation made by any party. Moreover, Defendant denies any liability with respect to Plaintiffs' claims, and nothing contained in this Agreement shall be construed as an admission of liability. Further, this Agreement shall not constitute an acknowledgement by Plaintiffs that there was no wrongdoing, misconduct or liability.

b. This Agreement supersedes the 2022 Settlement Agreement, dated October 21, 2022, in its entirety. The 2022 Settlement Agreement terminated on May 2, 2024, is of no further force or effect, and the Parties shall have no further obligation to each other thereunder.

15. No Admission. This Agreement shall not constitute an admission by Plaintiffs that Defendant's compliance with the Agreement satisfies Defendant's obligations under the ESA or any other applicable law.

16. No Third-Party Benefit. This Agreement is not made for the benefit of any person or entity except the Parties, except as specifically set forth in this Agreement.

17. Independent Representation. Each party hereto represents and agrees that it has consulted with and been advised by separate legal counsel before entering into this Agreement, or that it has had an opportunity to do so, and is entering into this Agreement upon due consideration of its own position, and not on the basis of advice of any other party or counsel to any other party to this Agreement. In addition, the Parties agree and acknowledge that each party

is and will remain represented by counsel in this matter and that legal representation extends to the employees of each party in addition to GW Manager and its affiliates.

18. Warranty of Authority. Each party signing this Agreement warrants and represents that it has authority to execute this Agreement on behalf of itself and that this Agreement has been duly and validly authorized and constitutes a legally binding and enforceable obligation with respect to itself.

19. Complete Agreement. This Agreement contains the entire agreement between and among the Parties and its terms are contractual and not mere recitals.

20. Governing Law/Interpretation. This Agreement shall (a) be construed and enforced pursuant to the laws of the State of Hawai'i; (b) be considered as having been drafted by all Parties hereto, and shall not be construed or interpreted against any party, but shall be construed and interpreted in accordance with the fair import of its terms and conditions; and (c) be binding on the Parties and inure to the benefit of Plaintiffs and their respective parent companies, subsidiaries, trustees, officers, directors, stockholders, affiliates, and agents, and Released Parties.

21. Alteration of the Agreement. This Agreement shall not be altered, amended, modified or otherwise changed in any respect, or particular whatsoever, except in a writing duly executed by the Parties hereto or by court order. Each and every party acknowledges and agrees that such party will make no claim, at any time or place, that this Agreement has been orally altered or modified in any respect whatsoever.

22. Counterpart, Facsimile and Scanned Signatures. This Agreement may be executed in counterparts. Facsimile and scanned signatures shall have the same effect as original signatures and may be substituted in lieu thereof and will be binding upon the Parties herein.

23. Acknowledgment. The Parties acknowledge that the terms of this Agreement have been read, that its provisions are fully understood, that it has been approved by their counsel or that the Parties have had the opportunity to have this Agreement reviewed and approved by legal counsel but have determined not to do so, and that this Agreement has been duly signed by the Parties herein as their free act and deed.

24. Enforcement. The Parties agree that the United States District Court for the District of Hawai‘i shall have jurisdiction to enforce this Agreement.

25. Termination of Agreement. This Agreement shall terminate upon the earlier of: (a) USFWS issuing an ITP for the incidental take of Hawaiian Petrels at the Resort; or (b) if the Resort is no longer owned by Defendant. Notwithstanding the foregoing, this Agreement shall not terminate if the Resort is owned by any entity other than Defendant (“New Owner”), and the New Owner is substituted for Defendant, assuming all Defendant’s obligations under the Agreement for purposes of enforcement of the Agreement in federal court. The Parties agree to reasonably cooperate on promptly effectuating any substitution of any New Owner for Defendant.

IN WITNESS WHEREOF, the Parties hereto execute this Agreement effective on August 7, 2024.

Dated: August 7, 2024

CONSERVATION COUNCIL FOR HAWAI'I



By Jonnetta Peters  
Its Executive Director

CENTER FOR BIOLOGICAL DIVERSITY

Dated: August 7, 2024

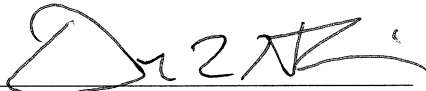
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Its \_\_\_\_\_

BRE ICONIC GWR OWNER LLC

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED AS TO FORM:



DAVID L. HENKIN  
LEINĀ'ALA L. LEY  
MAHESH CLEVELAND

Dated: August 7, 2024

Attorneys for Plaintiffs  
CONSERVATION COUNCIL  
FOR HAWAI'I and CENTER FOR  
BIOLOGICAL DIVERSITY

Dated: August 7, 2024

\_\_\_\_\_  
LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K.N. KIDO

Attorneys for Defendant  
BRE ICONIC GWR OWNER LLC

IN WITNESS WHEREOF, the Parties hereto execute this Agreement effective on August 7, 2024.

CONSERVATION COUNCIL FOR HAWAI'I

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY



Dated: August 7, 2024

By Maxx Phillips  
Its Hawai'i and Pacific Islands Director

BRE ICONIC GWR OWNER LLC

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
DAVID L. HENKIN  
LEINĀ'ALA L. LEY  
MAHESH CLEVELAND

Dated: August 7, 2024

Attorneys for Plaintiffs  
CONSERVATION COUNCIL  
FOR HAWAI'I and CENTER FOR  
BIOLOGICAL DIVERSITY

\_\_\_\_\_  
LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K.N. KIDO

Dated: August 7, 2024

Attorneys for Defendant  
BRE ICONIC GWR OWNER LLC

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CONSERVATION COUNCIL FOR HAWAI'I

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

BRE ICONIC GWR OWNER LLC

Dated: August 7, 2024

By Ken Smith  
Its Chief Operating Officer

APPROVED AS TO FORM:

\_\_\_\_\_  
DAVID L. HENKIN  
LEINĀ'ALA L. LEY  
MAHESH CLEVELAND

Dated: August 7, 2024

Attorneys for Plaintiffs  
CONSERVATION COUNCIL  
FOR HAWAI'I and CENTER FOR  
BIOLOGICAL DIVERSITY

\_\_\_\_\_  
LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K.N. KIDO

Dated: August 7, 2024

Attorneys for Defendant  
BRE ICONIC GWR OWNER LLC

IN WITNESS WHEREOF, the Parties hereto execute this Agreement effective on August 7, 2024.

CONSERVATION COUNCIL FOR HAWAI'I

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

Dated: August 7, 2024

By \_\_\_\_\_  
Its \_\_\_\_\_

BRE ICONIC GWR OWNER LLC

Dated: August 7, 2024

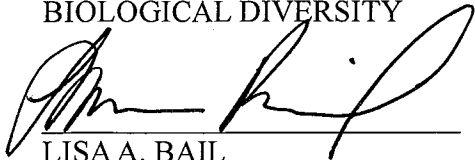
By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
DAVID L. HENKIN  
LEINĀ'ALA L. LEY  
MAHESH CLEVELAND

Dated: August 7, 2024

Attorneys for Plaintiffs  
CONSERVATION COUNCIL  
FOR HAWAI'I and CENTER FOR  
BIOLOGICAL DIVERSITY



\_\_\_\_\_  
LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K.N. KIDO

Dated: August 7, 2024

Attorneys for Defendant  
BRE ICONIC GWR OWNER LLC



## LIGHTING MINIMIZATION MEASURES

Defendant has or will implement the following lighting minimization measures at Grand Wailea:

1. Defendant has removed all outdoor mercury vapor and metal halide luminaires.
2. Between September 15 and December 15, (Outdoor Light Emitting Diode (LED) luminaires that will be turned on at night will be fully shielded and down directed. “Fully shielded” means the lighting fixture is constructed so that it does not shine light above a 90-degree horizontal plane.
3. Nighttime outdoor events between September 15 and December 15 (*e.g.*, concerts, weddings), shall use only lighting that is fully shielded, down directed, and positioned as to not reflect off of the ocean or other water source.
4. From September 15 to December 15, all underwater pool lights, including the Reflection Pool, will be green and will be at minimum levels to meet recommendations of the Illuminating Engineering Society of North American (“IESNA”).
5. From September 15 to December 15, all tiki torches will be turned off by 11 p.m. unless required to meet IESNA lighting recommendations.
6. From September 15 to December 15, all floodlights will be off except floodlights that are necessary for safety and security. Floodlights that are left on shall be fully shielded and down directed. This agreement shall not prohibit the use of fully shielded and down-directed PAR floodlights (pictured below) that are necessary for safety and security:



7. Between September 15 and December 15, the U.S. flag will either be removed each evening, or fully shielded and down directed lights will be used to illuminate the flag.
8. Defendant will either ensure that the walkway signboard light is turned off for the period from September 15 to December 15, or will request that the Wailea Association turn off this light. All other vegetation lighting will comply with the “Guidelines for Adjusting Lighting at Facilities” in Appendix E of the Kauai Seabird Habitat Conservation Plan dated May 20, 2020 (“KSHCP Lighting Guidelines”), a copy of which is attached to this agreement as Exhibit D.
9. From September 15 to December 15, the clock light in the Seaside Chapel will be turned off, and the interior chapel lights will be turned off at night when the Seaside Chapel is not in use for evening functions.

10. The lights in the four pavilions behind the Reflection Pool have been removed.
11. The spotlights on the central building housing the Grand Dining Room Maui (pink circle) have been removed.

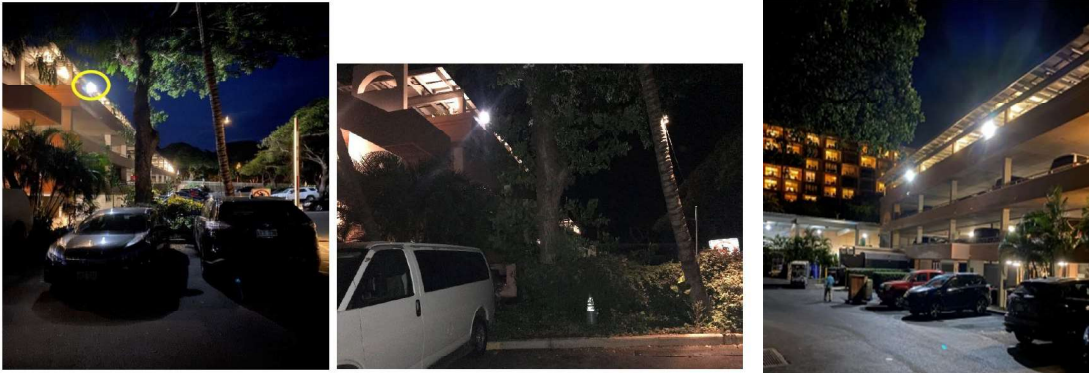


12. From September 15 to December 15, the upwards facing lights on the Humuhumunukunukuapua‘a thatched roofs will be turned off. The center spotlight has been removed.



13. Unshielded pathway lighting has been replaced with fully shielded and down directed light fixtures.
14. All exterior guest room corridor wall sconces in the hallway of the guest wings (Wailea Wing, Chapel Wing, Lagoon Wing, and Haleakala Wing) will be turned off for the period from September 15 to December 15. This agreement shall not prohibit recessed down directed lights over guest room doors.
15. For the Kihei North parking structure, from September 15 to December 15, Defendant will either turn off all lights on the top level of the structure or use fully shielded down directed fixtures so long as the Kihei North parking structure has not been covered with solar panels.

16. The top level of the Makena South parking garage has been covered with solar panels, and the floodlights in the following photos previously used to illuminate the employee parking lot have been removed:



17. Prior to September 15, 2022 illumination for the employee parking lot near the Makena South parking garage will be fully shielded down directed fixtures mounted in trees in the employee parking lot.
18. The ceiling of the Entry Port Cochere has been painted so that it is opaque, and shall either remain painted or be replaced with an opaque ceiling material.
19. On or before September 15, 2022 the carriage house lights near the Reflection Pool will be replaced with fully shielded down directed fixtures.
20. From September 15 to December 15, Defendant will provide flyers and/or room hangers to guests regarding seabird attraction, will ask guests to minimize lighting by closing blinds and turning off lanai lights at night, and will provide guests with instructions to report grounded seabirds to security.
21. From September 15 through December 15, Defendant will implement measures to decrease the visibility of interior lights as recommended in Section 1.9 of the KSHCP Lighting Guidelines or turn off lights for dining, and banquet areas.
22. No later than September 15, 2023, Defendant will repaint with matte paint all externally visible doors and corridors of the guest wings (Wailea Wing, Chapel Wing, Lagoon Wing, and Haleakala Wing). Nothing in this paragraph shall require the repainting of glass doors or guest room lanais.

**Exhibit 3-c**  
**Resort Facility Alterations**

*Completed (unless otherwise noted as "in progress")  
On-Resort Alterations as of 9/15/22*

1. Entry Cocheres: the two entry cochere domed ceilings have been covered or painted.
2. Open-air Elevator Control Rooms: Remove, re-design, or turn off lights during the seabird fledging season so they do not illuminate at night.
3. Chapel: Turned off the chapel steeple clock lighting during Hawaii Seabird fledging season.
4. Oceanside Loading Garage: Remove or shield lights on oceanside loading garage where bright interior ceiling lights strongly illuminate the surrounding area.
5. Maintenance/Employee Work Area (southeast corner of property): Shield or remove unshielded wall sconces.
6. Southern Garage: the top level has been covered with solar panels, and the floodlights previously used to illuminate the employee parking lot have been removed.
7. Sidewalk Lighting by Southern Garage: lighting has been replaced with fully shielded down directed fixtures mounted in trees in the employee parking lot.
8. Gardens, Flag and Artwork: we have removed, redesigned, or turned all lighting shining upwards or horizontally to illuminate gardens, trees, flags, and grounds artwork off during the Hawaii Seabird fledging season.
9. Pathway Lighting: Unshielded pathway lighting has been replaced with fully shielded fixtures.
10. Beachside pathway lighting should remain as close to the ground or below vegetation height to avoid illuminating the water.
11. Closed Restaurant (north side of property): Remove small floodlight that reflects off the water at the closed restaurant.
12. Fountains and Pools: all in-water lighting will be green lighting as to not attract birds. The lights in the four pavilions behind the Reflection Pool have been removed.
13. All pool lighting will be at minimum levels to meet safety recommendations of the Illuminating Engineering Society of North American.

14. Retail Hallway: Turn off nighttime lighting or shield/block the lighting along the ocean facing retail hallway during the seabird fledging season to reduce visibility from the shoreline.
15. Resort Corridors: all exterior guest room corridor wall sconces on the mountain-side of the hallway of the guest wings (Wailea Wing, Chapel Wing, Lagoon Wing, and Haleakala Wing) are turned off. We are in the process of reducing the reflective glare of room entry doors by repainting with matte paint all externally visible doors and corridors of the mountain-side of guest wings (Wailea Wing, Chapel Wing, Lagoon Wing, and Haleakala Wing).
16. North Parking Garage: Turn off unshielded wall sconces on the north parking garage decks and stairways. Continue to fully turn off all lights on the upper decks (Enterprise rental car deck) during the seabird fledging season.

## **APPENDIX E: Guidelines for Adjusting Lighting at Facilities**

### **1. Guidelines for Adjusting Lighting at Facilities**

This appendix provides detailed guidelines to inform minimization measures that can be customized to address an array of possible lighting issues at Participant facilities. A lighting minimization plan to achieve the maximum extent practicable will be included in each Participant PIP.

These guidelines represent best available science at the time of KSHCP permit issuance. Over the life of the plan, likely new information and new technologies will be available, and this appendix may be updated accordingly.

Not all lighting guidelines are appropriate for all types of facilities. Some represent long term, infrastructure solutions, and others may be implemented on a seasonal basis.

#### **1.1. Deactivate Non-Essential Lights**

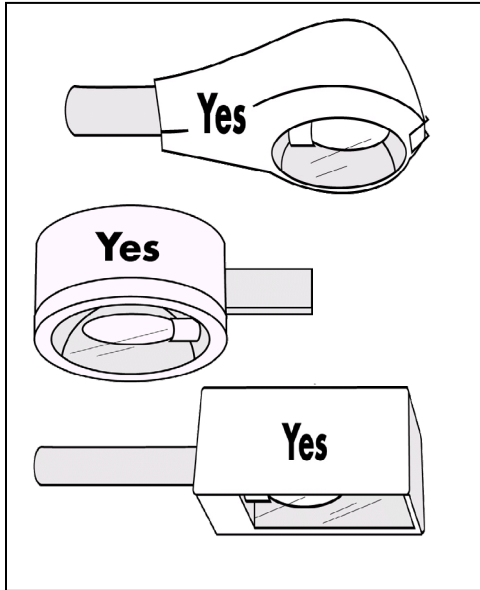
Prioritization of seabird and honu light attraction minimization measures involves evaluating light needs to determine if non-essential lights can be deactivated during the seabird fallout season (September 15 to December 15) and turtle nesting season (May 15-December 15). Deactivating the lights avoids the potential for light attraction that those lights could otherwise cause. Turning off a subset of lights, both unshielded and shielded, during the fallout season (September 15 to December 15) can assist with minimizing the risk of seabird light attraction, if those lights are not necessary. In their PIPs, Applicants must provide rationale for any facility lights that cannot be deactivated during seabird fallout season, and detail what other minimization practices will be implemented on lights that will remain illuminated. The regulatory agencies will review the evaluation and justification as provided in applicant PIPs.

Similarly, turning out lights that shine directly on beaches during the turtle nesting season (May 15-December 15) can prevent hatchling disorientation. Avoid use of the following lamp styles on beachside or shore perpendicular to sides of a structure: private balcony lights, up lights; decorative lighting, not necessary for human safety or security; pond lights; and beach lighting. Timers or other similar devices should be used to ensure the selected lights remain off during the turtle nesting season. This measure may require the installation of independent light switches. Conversely, to prevent accidental activation, light fixtures can be removed for lights that will no longer be needed at a facility.

#### **1.2. Install Full Cut-off Light Fixtures**

A full cut-off fixture refers to a light fixture which does not shine light above a 90 degree horizontal plane. For lights necessary to be activated, full cut-off fixtures provide an effective measure to achieve light minimization because they prevent light from shining directly upward.

These types of lights house the light bulb up within the fixture so that no bulb protrudes below (Figure 1). Such fixtures must be mounted at appropriate angle so they point directly down to the ground. Many light manufacturers provide light fixture information along with the light specifications to indicate if a fixture is a full cut-off design. The International Dark Sky Association ([www.darksky.org](http://www.darksky.org)) is a good source for information on full cut-off lights and provides additional references to light engineering resources and light manufactures.



**Figure 1:** Examples of full cut-off light fixtures. Source: [www.darksky.org](http://www.darksky.org).

Along shorelines, exterior fixtures on the seaward (makai) and the shore perpendicular sides of the building (and on the landward side of the building if they are visible from the beach) should be down-lit fixtures, fully shielded and full cut-off, louvered, or recessed fixtures that do not have reflective inner surfaces. These fixtures should use low wattage bulbs (e.g., < 50w). All exterior fixtures on the landward (mauka) side of the building should be directed downward only (Witherington & Martin 2003).

### 1.3. Shielding Light Fixtures

This minimization measure aims to achieve the functional equivalent of a full cut-off light fixture by installing a shield, visor, hood or similar on an existing light fixture to prevent light from shining upward and reducing trespass. In addition to the shielding, to achieve the functional equivalent of a full cut-off fixture, a light fixture should be adjusted so that it points directly down perpendicular to the ground to create a level, horizontal plane between the fixture and the ground, and have the bulb housed within the light fixture (Figures 2 & 3). Reed

et al. (1985) suggest that in areas where other light sources are rare, the shielding of principal lights would likely have a larger effect in decreasing seabird light attraction.



Figure 2: Installation of an appropriately sized floodlight shield. Source: [www.darksky.org](http://www.darksky.org).

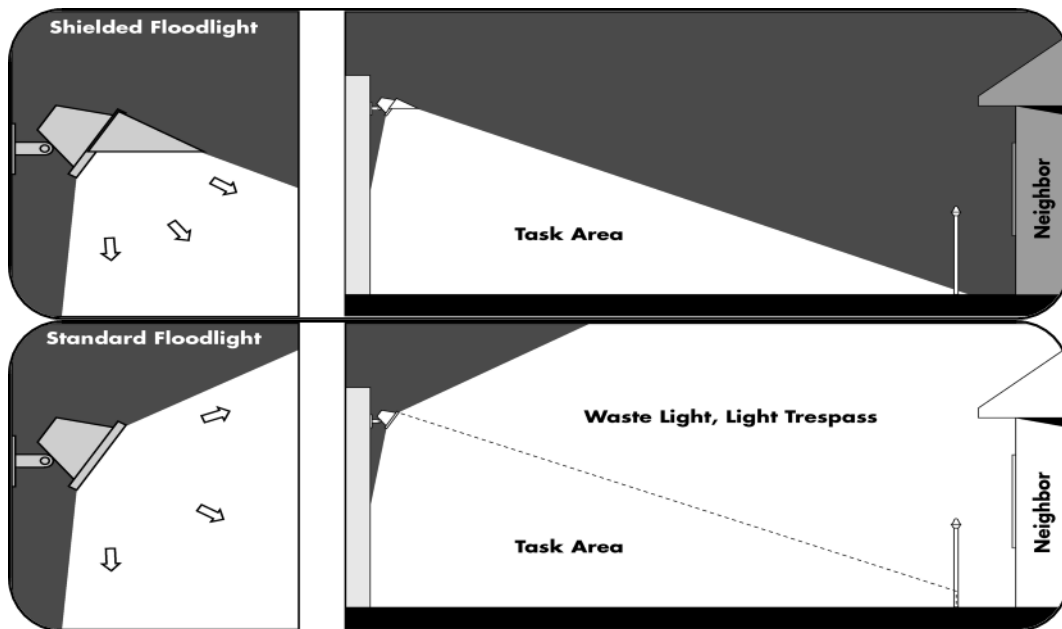


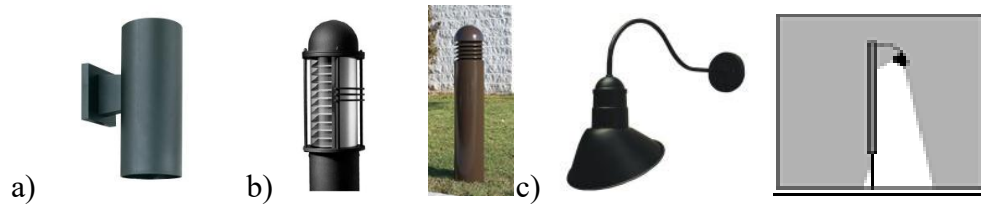
Figure 3: Before and after effects of shielding and light management designed to minimize light attraction risk to seabirds and to decrease light pollution. Source: [www.darksky.org](http://www.darksky.org).

#### 1.4. Angle Lights Downward

Angling and repositioning lights presents a potential alternative to shielding or replacing light fixtures and may be sufficient to make lights fully cut-off and eliminate light shining horizontally and vertically (Figure 4). To achieve the functional equivalent of a full cut-off fixture, a light fixture should be adjusted so that it points directly down perpendicular to the ground to create



a level, horizontal plane between the fixture and the ground, and have the bulb housed within the light fixture. Tree strap downlights may be used to minimize seabird light attraction unless turtles may be present on the adjacent beach.



**Figure 1-: (a) Wall mount cylinder down-light, (b) bollards with downward-directed louvers, and (c) sign lights angled downward. From [http://myfwc.com/media/418417/SeaTurtle\\_LightingGuidelines.pdf](http://myfwc.com/media/418417/SeaTurtle_LightingGuidelines.pdf) (FWC 2011).**

### **1.5. Place Lights Under Eaves**

Light fixtures placed under building eaves can achieve the functional equivalent of a full cut-off fixture. The architectural eave acts as shield to prevent light from shining directly upward.

### **1.6. Shift Lighting According to the Moon Phase**

This minimization measure addresses lighting for which the need, or purpose, for the lighting can be shifted in timing each year to coincide with the moon phase. Because a reduction in light attraction has been correlated with the full phase of the moon (Reed et al. 1985; Telfer et al. 1987) lights for essential functions, and for which that function can be shifted in timing, should coincide with the full phase of the moon and avoid the dark phase of the moon. It is important to note that a full moon that is obscured by heavy cloud cover could simulate the dark phase of the moon. By not activating those lights during the dark phase of the moon the effect of those lights is reduced. Examples of activities that could be minimized with this measure include scheduling of night time events, such as festivals or sporting events.

### **1.7. Install Motion Sensors for Motion-activated Lighting**

Motion sensors switch lights on only when triggered, thereby limiting the time that the light stays on and reducing its potential for seabird light attraction. If a sensor light is required for security purposes, the light equipped with the sensor should be at low light levels. For example, Light Emitting Diode (LED) streetlights and parking lot lights can be activated when needed and dim when no activity is detected nearby. However for those fixtures, full cut-off designs or the functional equivalents are recommended because of the possibility of light attraction occurring when the motion-sensor light is activated or in the event that the motion sensor equipment malfunctions and the light remains on.

Where motion sensors are impractical (eg at sporting events), stadium lights should be turned off as soon as the public leaves the stadium.

### **1.8. Decrease Lighting Levels**

This measure addresses lowering light intensity levels (e.g., measured in lumens) while still meeting the need to safely complete tasks and serve the purpose of the light. Guidance on standards for the appropriate lighting level for a particular light function should be followed as provided by the appropriate agency or professional and technical organization. For example the Illuminating Engineering Society of North America (IESNA) provides recommendations for light levels for several applications including parking lots, walkways, and roads. In addition individual entities may have standards and best practices for lighting needs.

For many applications where lighting is needed, brighter lighting may not always provide the best lighting for the needed function. It is often the case where reduced lighting levels can provide for the needed function of the lighting. For example, for security purposes overly bright lights tend to create blind spots, or very dark shadows, outside the lit area that preclude effective visibility. Well placed, but reduced lighting can provide for more effective security. Therefore, when Participants seek to enhance onsite visibility for security, while reducing risk to seabirds, the appropriate reduction of light levels (along with shielding and re-angling lights) forms a starting point to accomplish both purposes.

### **1.9. Decrease Visibility of Interior Lights**

Facilities with large and/or numerous windows, tall building profiles, or large glass facades may also pose a risk of light attraction to Covered Seabirds on Kaua'i. The following measures are based, in part, on efforts in cities in Canada and the mainland USA to decrease harmful effects of buildings on birds and apply to seabirds in that they can decrease the amount of light escaping from within buildings (City of Toronto 2007; Evans Ogden 2002):

- Install screens or shades over large windows that are lowered nightly during the fallout season;
- Modify buildings and decrease or eliminate light glow from within a facility;
- Create glass opacity to prevent the escape of internal light. Tinted glass or film with a visible light transmittance value of 45 percent or less should be applied to all windows and doors within line of sight of the beach;
- Install physical screens outside a building;
- Install landscaping in front of large windows;
- Close all window blinds after daylight hours until sunrise;
- Stagger the operation of lights in the evening or morning hours so that not all lights are turned on at once; and
- Maximize the number of offices or indoor rooms that turn off all lights after sunset;

- Place reminder notices on switches to turn out lights or draw curtains/blinds in oceanfront rooms. This should include coastal areas that are on the perpendicular sides of the structure;
  - a. Turn off room and lanai lighting that are not needed;
  - b. Relocate moveable lamps away from windows that are visible from the beach; and
  - c. Close opaque curtains or blinds after dark to block inside light from shining outside.

### **1.10. Use Light-less Technologies**

Where conditions and facility needs permit, technologies that do not use light, such as closed-circuit television (CCT) with infrared illuminators, may be effectively employed to “see” at night thus enabling some of the lights to be turned off. For example, any fenced areas or the dark sides of facilities can be monitored with CCT so that lights do not need to be used or installed.

### **1.11. Plant Vegetation Around Lights to Reduce Light Visibility**

Trees and shrubs can be planted so that they over-arch lights or shield side visibility of lights along the coast or along a ridge, for example. Whether the lights are mounted on 20-foot poles, walkways, or within landscaped areas, having adjacent or overarching vegetation would further reduce the risk of seabird light attraction that any residual light scatter may pose. Long-term planning and maintenance of screening vegetation is encouraged, where appropriate to the uses and needs of the affected lights.

### **1.12. Lower Height of Lights**

Light that is low in height has potential to reduce the effect of light attraction because lower lights may be less visible to passing seabirds. Installing ground-level lighting, such as along walkways, and reducing pole height can decrease light waste and trespass.

### **1.13. Use Longer Light Wavelengths**

In coastal areas, use of acceptable lights such as: LPS 18w, 35w, red, orange or amber LEDs (true red, orange or amber diodes, but not filters), true red neon, and other lighting sources that produce light wavelengths of 560 nm or longer (Witherington et al. 2014). Long wavelength lights, e.g., those that produce light that measures greater than 560 nanometers on

a spectroscope, are required for all construction visible from and adjacent to sea turtle nesting beaches. Turtles are most sensitive to short wavelengths of light, probably because they live in a marine environment that filters out long wavelengths. Green turtles are least attracted to longer wavelength light in the yellow-orange to red end of the spectrum (630 to 700 nm) (Witherington and Martin 2000). In the absence of other light sources, however, turtles may still be attracted to long wavelength light.

Filters designed to exclude transmission of short wavelengths (<570nm) can be fitted to high pressure sodium (HPS) vapor lights. Such filters have been found to be effective at avoiding disruption of nesting females (Salmon, 2006) but even filtered HPS light has been found to attract hatchlings, although not as strongly as unfiltered HPS lights (Sella et al, 2006). Filtering alone is thus not sufficient to avoid attraction and disruption of hatchling orientation. Bright white light fixtures, such as metal halide, halogen, fluorescent, mercury vapor and incandescent lamps, are not approved for beachside or shore perpendicular sides of a structure. Limited use of shorter wavelength lights may be approved in areas where direct and indirect light or glow could not possibly be visible from the beach due to installation of opaque “light fencing” (see below).

DAVID L. HENKIN #6876  
LEINĀ‘ALA L. LEY #9710  
MAHESH CLEVELAND #11023  
EARTHJUSTICE  
850 Richards Street, Suite 400  
Honolulu, Hawai‘i 96813  
T: (808) 599-2436  
Email: dhenkin@earthjustice.org  
lley@earthjustice.org  
mcleland@earthjustice.org

Attorneys for Plaintiffs\*

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR	)	CIVIL NO. 1:24-cv-00204-LEK-RT
HAWAI‘I and CENTER FOR	)	
BIOLOGICAL DIVERSITY,	)	STIPULATION FOR STAY; ORDER
	)	
Plaintiffs,	)	
	)	<u>Trial Date:</u> None
v.	)	<u>Judge:</u> Hon. Leslie E. Kobayashi
	)	
BRE ICONIC GWR OWNER LLC,	)	
	)	
Defendant.	)	

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STIPULATION FOR STAY

IT IS HEREBY STIPULATED by and between Plaintiffs

CONSERVATION COUNCIL OF HAWAI‘I and CENTER FOR BIOLOGICAL

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\* Pursuant to Local Rule 10.2(b), please refer to the signature page for the complete list of parties represented.

DIVERSITY (“Plaintiffs”) and Defendant BRE ICONIC GWR OWNER LLC (“Defendant”), by and through their respective counsel, that the Court stay this litigation in its entirety other than resolution of:

1. Plaintiffs’ claim for an award of attorneys’ fees and costs as provided in paragraphs 11 and 12 of the Settlement Agreement between Plaintiffs and Defendant dated August 7, 2024 (“Agreement”), which is incorporated herein by reference; and
2. Any motion to enforce the Agreement.

DATED: Honolulu, Hawai‘i, August \_\_\_\_, 2024.

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DAVID L. HENKIN  
LEINĀ‘ALA L. LEY  
MAHESH CLEVELAND  
EARTHJUSTICE  
Attorneys for Plaintiffs  
Conservation Council for Hawai‘i  
and Center for Biological Diversity

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LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K. KIDO  
Attorneys for Defendant  
BRE Iconic GWR Owner LLC

APPROVED AND SO ORDERED

DATED:

*Conservation Council for Hawai'i, et al. v. BRE Iconic GWR Owner LLC*; Civil No. 1:24-cv-00204-LEK-RT; STIPULATION FOR STAY; ORDER

DAVID L. HENKIN #6876  
LEINĀ‘ALA L. LEY #9710  
MAHESH CLEVELAND #11023  
EARTHJUSTICE  
850 Richards Street, Suite 400  
Honolulu, Hawai‘i 96813  
T: (808) 599-2436  
Email: dhenkin@earthjustice.org  
lley@earthjustice.org  
mcleland@earthjustice.org

Attorneys for Plaintiffs\*

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR	)	CIVIL NO. 1:24-cv-00204-LEK-RT
HAWAI‘I and CENTER FOR	)	
BIOLOGICAL DIVERSITY,	)	STIPULATION FOR DISMISSAL
	)	WITH PREJUDICE OF ALL
Plaintiffs,	)	CLAIMS; ORDER
	)	
v.	)	
	)	<u>Trial Date:</u> None
BRE ICONIC GWR OWNER LLC,	)	<u>Judge:</u> Hon. Leslie E. Kobayashi
	)	
Defendant.	)	

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STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS

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\* Pursuant to Local Rule 10.2(b), please refer to the signature page for the complete list of parties represented.



IT IS HEREBY STIPULATED by and between Plaintiffs  
CONSERVATION COUNCIL OF HAWAI'I and CENTER FOR BIOLOGICAL  
DIVERSITY ("Plaintiffs") and Defendant BRE ICONIC GWR OWNER LLC  
("Defendant"), by and through their respective counsel, pursuant to Rule 41(a)(2)  
of the Federal Rules of Civil Procedure, that all of Plaintiffs' claims against  
Defendant in the above-captioned matter be dismissed with prejudice, on the terms  
set forth in the Settlement Agreement between Plaintiffs and Defendant dated  
August 7, 2024 ("Agreement"), which is incorporated herein by reference.

IT IS FURTHER STIPULATED by and between Plaintiffs and Defendant  
that this Court has jurisdiction to interpret and enforce the Agreement. *See*  
*Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1991).

DATED: Honolulu, Hawai'i, \_\_\_\_\_, 2024.

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DAVID L. HENKIN  
LEINĀ'ALA L. LEY  
MAHESH CLEVELAND  
EARTHJUSTICE  
Attorneys for Plaintiffs  
Conservation Council for Hawai'i  
and Center for Biological Diversity

---

LISA A. BAIL  
DAVID J. HOFTIEZER  
STACY Y. MA  
NICHOLAS K. KIDO  
Attorneys for Defendant  
BRE Iconic GWR Owner LLC

APPROVED AND SO ORDERED

DATED:

*Conservation Council for Hawai‘i, et al. v. BRE Iconic GWR Owner LLC*; Civil No. 1:24-cv-00204-LEK-RT; STIPULATION FOR DISMISSAL WITH PREJUDICE OF ALL CLAIMS; ORDER