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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR)	CIVIL NO. 1-24-00204
HAWAI‘I and CENTER FOR)	
BIOLOGICAL DIVERSITY,)	COMPLAINT FOR
)	DECLARATORY AND
Plaintiffs,)	INJUNCTIVE RELIEF
)	
v.)	
)	
BRE ICONIC GWR OWNER LLC)	
)	
Defendant.)	
)	
)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Conservation Council for Hawai'i and Center for Biological Diversity (collectively "the Conservation Groups") hereby complain of the actions of Defendant BRE Iconic GWR Owner LLC ("Defendant") as follows:

INTRODUCTION

1. Attraction to artificial lights is a major threat to the continued survival and recovery of the Hawaiian petrel (*Pterodroma sandwichensis*), which is endemic to the Hawaiian Islands and protected as an endangered species pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*

2. During the fledging season (from mid-September to mid-December), Hawaiian petrels heading to sea for the first time are drawn to artificial lights, circling them until they fall to the ground from exhaustion or strike nearby objects. Even if uninjured, fledglings are unable to take off again and are vulnerable to predation, vehicle collisions, starvation, and dehydration while on the ground. Adult birds, which are present on the island of Maui from February through December, are also attracted to lights and may suffer injury and death as a result.

3. The Conservation Groups are informed and believe, and on the basis thereof allege, that, from January 2008 to December 2023, at least eighteen (18) Hawaiian petrels—an average of one bird each year—were attracted to artificial lights at the Grand Wailea Resort Hotel & Spa ("Grand Wailea") on Maui, were

grounded due to light attraction, and were subsequently discovered. At least one of these birds died.

4. The Conservation Groups are further informed and believe, and on the basis thereof allege, that other Hawaiian petrels that were never found have been attracted to artificial lights at the Grand Wailea, resulting in their grounding, and that the grounded birds that were not found likely perished. While there are multiple sources of bright light on Maui, the Grand Wailea's property stands out among all hotels as a high-take zone.

5. The Conservation Groups bring this action to protect the Hawaiian petrel by compelling Defendant's compliance with its mandatory duties under the ESA. Specifically, as described more fully herein, the Conservation Groups seek a declaratory judgment that, in the absence of a lawful incidental take permit, Defendant's operation of the Grand Wailea violates the ESA's prohibition on unpermitted "take" of a federally listed species. The Conservation Groups also seek appropriate injunctive relief to protect Hawaiian petrels on Maui from further harm from Defendant's illegal activities.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the claims for relief in this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States); 16 U.S.C. § 1540(c) (action arising under the ESA); 16 U.S.C. §

1540(g) (citizen suit provisions of the ESA); and 28 U.S.C. §§ 2201-2202 (power to issue declaratory judgments in cases of actual controversy).

7. On January 25, 2024, the Conservation Groups mailed to the Secretary of Interior a notice of intent to sue detailing the violations of law alleged herein. The Secretary of Interior received the notice letter on February 1, 2024.

8. On January 25, 2024, the Conservation Groups hand delivered to Defendant's registered agent a notice of intent to sue detailing the violations of law alleged herein.

9. At least sixty days have elapsed since the Conservation Groups gave notice of their intent to sue, as required by ESA section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2)(A).

10. The Conservation Groups have formally demanded that Defendant bring the Grand Wailea's operations into compliance with the ESA, but Defendant has failed and refused, and continues to fail and refuse, to do so. An actual controversy therefore exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

11. Venue lies properly in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b) and (c) because the violations are occurring here, a substantial part of the events or omissions giving rise to the claim occurred here, and Defendant resides here.

PARTIES

12. Plaintiff Conservation Council for Hawai‘i (“CCH”) is a non-profit citizens’ organization based in Hawai‘i with approximately 3,800 members in Hawai‘i, the United States mainland, and foreign countries. CCH is the Hawai‘i affiliate of the National Wildlife Federation, a non-profit membership organization with over 6 million members and supporters nationwide. CCH’s mission is to protect native Hawaiian species, including the Hawaiian petrel, and to restore native Hawaiian ecosystems for future generations.

13. To protect its interests in Hawaiian petrels and the interests of its members and staff, CCH filed lawsuits in 2010 to protect the species from death and injury associated with the activities of the Kaua‘i Island Utility Cooperative (“KIUC”) and the St. Regis Princeville Resort, including, but not limited to, harm associated with attraction to bright lights at facilities owned and operated by those defendants. CCH’s lawsuit against KIUC resulted in KIUC securing incidental take permit coverage for its harmful activities, while CCH’s lawsuit against the St. Regis culminated in a settlement pursuant to which the resort implemented measures to reduce seabird attraction, committed to secure incidental take permit coverage, and made monthly contributions to fund projects to benefit the imperiled seabirds. The St. Regis has since obtained incidental take permit coverage.

14. Since 2017, CCH also has been involved in efforts, including litigation, to protect Hawaiian petrels and other ESA-listed seabirds from harm associated with the bright lights at the State of Hawai‘i Department of Transportation’s (“HDOT”) harbors and airports on Maui, Lāna‘i, and Kaua‘i. HDOT obtained incidental take permit coverage for take of imperiled seabirds, including Hawaiian petrels, at its Kaua‘i facilities, and modified its lighting to minimize take.

15. In 2019, CCH filed a lawsuit against the County of Maui for implementing a project to replace high pressure sodium streetlights with light-emitting diode (“LED”) fixtures without first analyzing the impacts of the LED lights on threatened and endangered wildlife, including the Hawaiian petrel, as required by the Hawai‘i Environmental Policy Act, Hawai‘i Revised Statutes chapter 343. As a result of this lawsuit, CCH secured an injunction halting the replacement project pending the County’s review of the environmental effects of LED lights on imperiled wildlife, and consideration of less harmful alternatives. The County also agreed to dim the LED streetlights that were installed before the lawsuit was filed to minimize harm to wildlife, including Hawaiian petrels.

16. On February 7, 2022, CCH filed suit against Defendant for the unauthorized take of Hawaiian petrels by light attraction at the Grand Wailea. *See Conservation Council for Hawai‘i, et al. v. BRE Iconic GWR Owner LLC, et al.*,

Civil No. 1:22-cv-00054-DKW-WRP (the “2022 Lawsuit”). The 2022 Lawsuit culminated in a settlement pursuant to which the Grand Wailea implemented light minimization measures to reduce the likelihood of Hawaiian petrel take at the resort.

17. In addition to undertaking litigation to protect Hawaiian petrels from injury and death, CCH and its members frequently advocate for management activities that protect and rehabilitate Hawaiian petrel breeding habitat to promote the continued survival and hoped-for recovery of the species. For example, CCH was involved in the creation of two Natural Area Reserves that protect Hawaiian petrel breeding and nesting habitat from predators and invasive species: Hono o Nā Pali on Kaua‘i and Nakula on Maui. CCH and its members also regularly advocate for funding to remove and exclude feral sheep, goats, deer, and pigs from suitable habitat on state lands, as feral ungulates eat seabird eggs and chicks and destroy the native vegetation that imperiled seabirds need to establish their nesting colonies. Similarly, CCH and its members advocate for increased funding and management activities to remove alien vegetation that endangers native Hawaiian ecosystems that Hawaiian petrels use for breeding and nesting activities.

18. To increase public support for wildlife protection and habitat restoration, CCH conducts educational programs about Hawai‘i’s imperiled wildlife. For example, as part of their Manu Kai (Seabird) Campaign, CCH

educates children about Hawai‘i’s seabirds – including the Hawaiian petrel – and the many threats that they face.

19. CCH members include wildlife biologists, Native Hawaiian cultural practitioners, fishers, educators, artists, community leaders and others who study, observe, photograph, research, and enjoy the Hawaiian petrel in the wild on a regular and ongoing basis. CCH members who live outside of Hawai‘i visit the islands to observe and enjoy Hawai‘i’s native wildlife, including Hawaiian petrels. CCH’s members and staff derive scientific, cultural, recreational, conservation, and aesthetic benefits from the existence of these animals in the wild. CCH brings this action on behalf of itself and its adversely affected members and staff.

20. Plaintiff Center for Biological Diversity (“the Center”) is a non-profit environmental organization founded in 1989 and dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center is incorporated in California and headquartered in Tucson, Arizona, with field offices throughout the United States and Mexico, including in Honolulu, Hawai‘i. The Center has 89,610 members (including members who reside in Hawai‘i) dedicated to the protection and restoration of endangered species and wild places.

21. To protect its interests in Hawaiian petrels and the interests of its members and staff, the Center joined with CCH to file lawsuits in 2010 to protect

Hawaiian petrels from death and injury associated with the activities of KIUC and the St. Regis, as described above. KIUC and the St. Regis both subsequently modified their lights and obtained incidental take permit coverage.

22. In 2016, the Center sent a notice of intent to sue the Kōke'e Air Force Station on Kaua'i after its lighting killed more than a dozen endangered seabirds, including Hawaiian petrels. To avoid future incidents, base managers agreed to operate under nearly totally dark conditions moving forward.

23. Since 2017, the Center has partnered with CCH in efforts, including litigation, to protect Hawaiian petrels from harm associated with the bright lights at HDOT harbors and airports on Maui, Lāna'i, and Kaua'i, as described above.

24. The Center was also a plaintiff in the 2022 Lawsuit against Defendant which resulted in measures to reduce light attraction and benefit Hawaiian petrels.

25. The Center's members and staff regularly spend time on Maui for seabird observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members and staff have researched, studied, visited, observed, or attempted to observe, photographed, or attempted to photograph, and sought protection for Hawaiian petrels on Maui. The Center's members and staff intend to continue to research, study, visit, observe, photograph, and seek protection for these species in the future. The Center's members and staff derive scientific, recreational, conservation, and aesthetic

benefits from the existence of these animals in the wild. The Center brings this action on behalf of itself and its adversely affected members and staff.

26. The above-described scientific, recreational, conservation, cultural, educational, and aesthetic interests of the Conservation Groups and their respective members, have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by Defendant's continued refusal to comply with its obligations under the ESA, as is more fully set forth below. The individual interests of the Conservation Groups' members as well as the Conservation Groups' organizational interests are thus directly and adversely affected by Defendant's unlawful actions.

27. Defendant BRE Iconic GWR Owner LLC is a limited liability company formed under Delaware law that is the Grand Wailea's owner and has control over, or is otherwise responsible for, the Grand Wailea's operations, including, but not limited to, the resort's use of lights that attract and take endangered Hawaiian petrels.

LEGAL FRAMEWORK

28. “[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). In

furtherance of Congress' goal to conserve species, the ESA generally prohibits the "take" of any species listed as endangered. 16 U.S.C. § 1538(a)(1)(B).

29. The ESA's prohibition on "take" includes actions that "harass," "harm" and "kill" protected species. 16 U.S.C. § 1532(19). The ESA's regulations define "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. "Harm" is defined as "an act which actually kills or injures wildlife." *Id.*

30. To comply with the ESA, Defendant's activities may not "take" any endangered Hawaiian petrel unless Defendant first obtains and complies with the terms of an incidental take permit in accordance with ESA section 10(a), 16 U.S.C. § 1539(a).

31. The U.S. Fish and Wildlife Service ("USFWS") may not issue an incidental take permit unless it first concludes that a permit applicant's activities will not "appreciably reduce the likelihood of the survival and recovery of [any endangered or threatened] species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv).

32. The ESA further conditions the issuance of an incidental take permit on the applicant developing and committing to implement a habitat conservation plan that, among other things, minimizes and mitigates the impacts of any

incidental take of endangered species to the maximum extent practicable. 16
U.S.C. § 1539(a)(2)(A)(ii), (B)(ii).

BACKGROUND FACTS

Hawaiian Petrels



Photo: Daniel Webster

33. The Hawaiian petrel is an endemic Hawaiian seabird that forages widely across the central, northern, and eastern Pacific Ocean for squid, fish, and crustaceans, spending most of its first six years of life at sea. Hawaiian petrels were listed as an endangered species in 1967.¹

34. Satellite-tagged petrels have been tracked traveling more than 10,000 kilometers on a single foraging trip to and from their breeding colonies in the main Hawaiian Islands. During nesting season, when Hawaiian petrels return to Hawai‘i

¹ At the time of listing, the species was known as the Hawaiian dark-rumped petrel (*Pterodroma phaeopygia sandwichensis*). See 50 C.F.R. § 17.11.

to mate and lay eggs, young adults can be heard making a distinctive, nocturnal “oo-ah-oo” call as they ride along coastal updrafts, which is the origin of their name in Hawaiian: ‘Ua‘u.

35. Once common across the archipelago, remnant breeding colonies are now confirmed on only the islands of Maui, Kaua‘i, Lāna‘i, and Hawai‘i, with possible breeding colonies on O‘ahu and Moloka‘i. The largest existing Hawaiian petrel breeding colonies are located on Maui, in Haleakalā crater, directly upslope from the Grand Wailea, and on Lāna‘i, across the ‘Au‘au Channel from the Grand Wailea. The Haleakalā breeding colony is estimated to number around 2,500 nesting burrows, and anywhere from 1,750 to 1,875 pairs likely breed at Haleakalā each year.

36. Hawaiian petrels have a low reproductive rate. They do not breed until five or six years of age, and may not breed every year once mature. Further, each pair only produces one egg per year.

37. Male and female parents share in both the incubation of their egg and the feeding of their chick. After a chick hatches, its parents briefly stay and protect the chick before beginning a routine of extended ocean foraging and feeding of the chick.

38. On Maui, Hawaiian petrels begin arriving on breeding grounds to pair off in mid-February. Egg-laying generally occurs in April and May, and chicks

hatch in July and August. After the chicks have gained enough weight to survive, approximately 90 to 120 days after hatching, the parents will abandon the nest and leave the nesting colony until the next breeding season.

39. Fledging begins in late September. To successfully fledge and reach the ocean, chicks must navigate from inland breeding colonies and out to sea without becoming attracted to and grounded by artificial lights. By December, adult and successful fledglings have departed the island.

40. Protection of known breeding colonies, and island-specific metapopulations, is critical to the survival of the species.

The Grand Wailea's Operations "Take" Listed Seabirds

41. Defendant lacks an incidental take permit for the take of Hawaiian petrels associated with operations at the Grand Wailea. In the absence of a valid incidental take permit, each endangered Hawaiian petrel that is killed, injured, or otherwise "taken" by Defendant's operations at the resort constitutes an independent violation of ESA section 9, 16 U.S.C. § 1538.

42. The Conservation Groups are informed and believe, and on the basis thereof allege, that artificial lights at the Grand Wailea attract Hawaiian petrels, disorienting the birds and causing them to circle the lights until they fall to the ground from exhaustion or strike buildings or other features on the property.

43. Because it is nearly impossible for Hawaiian petrels to become airborne from low-lying, coastal areas such as the Grand Wailea property, Hawaiian petrels grounded by lights at the resort will die unless discovered and rescued by humans.

44. Between January 2008 and December 2023, an average of one (1) grounded Hawaiian petrel was found on the Grand Wailea's property each year.

45. More specifically, between January 2008 and December 2021, the Maui Nui Seabird Recovery Project ("MNSRP")—an organization dedicated to advancing the conservation and recovery of Hawai'i's native seabirds, which operates a grounded seabird hotline—recovered fifteen (15) Hawaiian petrel fledglings from the Grand Wailea, one of which died shortly after being recovered.

46. As discussed above, on February 7, 2022, the Conservation Groups filed suit against Defendant for the unauthorized take of Hawaiian petrels by light attraction at the Grand Wailea.

47. On October 21, 2022, the parties entered into a settlement agreement to resolve this earlier litigation ("Settlement Agreement"). Under the Settlement Agreement, Defendant carried out seabird protection measures that included, but were not limited to, (i) implementing a suite of agreed-upon physical and operational modifications to reduce the amount of light emitting from the property

during the Hawaiian petrel fledging season, and (ii) hiring two biologists to search the property for downed seabirds during the 2022 and 2023 fledging seasons.

48. Defendant also agreed to provide a written report to USFWS within forty-eight hours of discovering a grounded Hawaiian petrel at the Grand Wailea, and to forward a copy of the written report to the Conservation Groups.

49. As documented by Defendant's biologist searchers during the 2022 and 2023 fledging seasons, even after implementation of the lighting minimization measures required under the Settlement Agreement, artificial lights at the Grand Wailea continue to attract and ground Hawaiian petrels.

50. On October 26, 2022, Defendant's biologist searchers recovered a grounded Hawaiian petrel from near the fourth-floor elevator of one of the Grand Wailea's guestroom towers.

51. On October 14, 2023, Defendant's biologist searchers recovered a grounded Hawaiian petrel near one of the Grand Wailea's pools.

52. On November 16, 2023, Defendant's biologist searchers recovered a grounded Hawaiian petrel from near the first-floor elevators of one of the Grand Wailea's guestroom towers. This petrel's wing was fractured, likely because it collided with the building after being distracted by the resort's lights.

53. The Conservation Groups are informed and believe, and on the basis thereof allege, that the available data regarding Hawaiian petrel fallout at the

Grand Wailea reflect only the tip of the iceberg with respect to the harm caused by artificial lights at the Grand Wailea between January 2008 and December 2023. Studies of fallout from light attraction involving Hawaiian petrels on Kaua‘i have concluded that, even where there are dedicated searches, downed birds often go undetected. Where there are no dedicated searches, and reports of downed seabirds depend on random discoveries by hotel staff and guests, as was the case at the Grand Wailea prior to the Settlement Agreement, very few grounded Hawaiian petrels are ever discovered and reported.

54. Seabirds that that are disoriented by artificial lighting may crash into the nearby ocean or thick vegetation where they will not be discovered. Grounded seabirds that are eaten by predators before they are discovered are likewise excluded from data documenting grounding incidents at the Grand Wailea.

55. The Conservation Groups are further informed and believe, and on the basis thereof allege, that the Hawaiian petrels that are grounded by Grand Wailea’s lights and are not discovered usually perish.

56. The Conservation Groups are further informed and believe, and on the basis thereof allege, that the location of the Grand Wailea in a major flyway for fledglings departing nesting colonies on the slopes of Haleakalā make it impossible for the resort to eliminate the take of Hawaiian petrels without shutting off all nighttime lighting during the fledging season.

57. In the absence of a valid incidental take permit, Defendant has been violating, and continues to violate, the ESA.

CLAIM FOR RELIEF

(VIOLATION OF ESA PROHIBITION ON UNAUTHORIZED TAKE)

58. The Conservation Groups reallege and incorporate by this reference the preceding paragraphs of this Complaint.

59. Defendant's activities at the Grand Wailea have "taken" and will continue to "take" endangered Hawaiian petrels without incidental take permit coverage. This unauthorized "take" has violated and is violating the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21.

PRAYER FOR RELIEF

WHEREFORE, the Conservation Groups respectfully request that the Court:

1. Enter a declaratory judgment that Defendant has violated and is violating the Endangered Species Act by taking listed species without incidental take authorization;
2. Issue appropriate injunctive relief;
3. Award the Conservation Groups the costs of this litigation, including reasonable attorney and expert witness fees; and
4. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai‘i, May 2, 2024.

Respectfully submitted,

/s/ David L. Henkin

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