

Of Counsel:
ASHFORD & WRISTON
A Limited Liability Law Partnership LLP

ROSEMARY T. FAZIO 2228-0
NAOMI U. KUWAYE 6648-0
MICAH P. K. AIU 10589-0
First Hawaiian Center, Suite 1400
999 Bishop Street
P. O. Box 131
Honolulu, Hawaii 96813
Tel. No.: (808) 539-0400

Electronically Filed
FIFTH CIRCUIT
5CC181000063
06-MAR-2020
01:46 PM

Attorneys for Defendant
DEPARTMENT OF WATER,
COUNTY OF KAUA'I

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KIA'I WAI O WAI'ALE'ALE, an
unincorporated community association,

Plaintiff,

vs.

DEPARTMENT OF WATER, COUNTY OF
KAUA'I, applicant and accepting agency of the
subject Environmental Assessment; and DOES
1-50,

Defendants.

) Civil No. 18-1-0063
) (Environmental Court)
)
) DEFENDANT DEPARTMENT OF
) WATER, COUNTY OF KAUAI'S REPLY
) MEMORANDUM IN SUPPORT OF ITS
) MOTION FOR SUMMARY JUDGMENT
) AS TO PLAINTIFF'S REMAINING
) COUNTS I, II, III, VII, AND X;
) DECLARATION OF MICAH P. K. AIU;
) EXHIBIT "A"; CERTIFICATE OF
) SERVICE
)
) Hearing:
) Date: February 18, 2020
) Time: 1:30 p.m.
) Judge: Honorable Kathleen N.A. Watanabe
)
) Trial Date: Not Set
)

DEFENDANT DEPARTMENT OF WATER, COUNTY OF KAUAI'S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT AS TO PLAINTIFF'S REMAINING COUNTS I, II, III, VII, AND X

I. INTRODUCTION

The instant Motion and Plaintiff KIAI WAI O WAIALEALE's ("Plaintiff") Memorandum in Opposition ("MIO") is limited to the issues moved upon in Counts I, II, III, VII, and X of the First Amended Complaint ("FAC"). Plaintiff's opposition again goes well beyond the scope of this Motion and the scope of this case. Plaintiff again raises issues not contained in the FAC and attempts to relitigating issues already decided upon. Plaintiff continues to fundamentally misunderstand the purpose of the Relief Line which is limited to addressing an existing hydraulic deficiency in the County's existing water distribution system. As stated in the Final EA, the Relief Line's purpose is to create a water system redundancy that will alleviate the capacity limitation caused by the inadequate segment of water transmission main on Kuhio Highway between Kapaia Bridge and Wilcox Medical Center. Final EA at pp. 6-7. This redundancy will also allow the County to maintain water service to customers in the event of problems with other transmission mains in the area, which especially benefits the County's critical customers such as the Wilcox Medical Center and Wilcox Elementary School. *Id.* The Final EA made it clear that there is no proposed increase in water withdrawal or storage with this project stating that

[t]he Relief Line **[would] not cause any changes to the existing water source or storage facilities nor will it cause any changes in the operation of such facilities.** The benefits of the Relief Line are associated with the improvement in transmission capacity.

No significant impacts to groundwater are anticipated during construction and operation of the proposed Relief Line.

See FEA at p. 14 (emphasis added); *see also* FEA p. 33 and 34.

As a preliminary matter, this Court should again disregard Plaintiff's continued attempts to conflate the County's Relief Line and the Grove Farm Development. As previously asserted and sustained by this Court, the Relief Line has utility separate and independent from the Grove Farm Development, and is neither a condition precedent to nor dependent on the Grove Farm Development Plan. Any attempt by Plaintiff to impune the Grove Farm Development's alleged failure to secure proper permits or leases should also be disregarded as beyond the scope. This Court should similarly disregard Plaintiff's alleged concerns that this Project might create the opportunity for future development which might require water. Environmental challenges to unknown future development and its water demands should be made at the time that project is being proposed. This Court should finally disregard Plaintiff's attempts to expand the scope of this case beyond the County's approval of the Relief Line. As stated in Plaintiff's FAC, "[t]his complaint for declaratory and injunction relief contesting the Kapaia Cane Haul Road Main – Final EA (FONSI) is based on the decision of defendant Department of Water, County of Kauai (KDOW) to approve a water transmission main . . ." FAC at ¶ 1. This case is not about the County's entire waterworks system.

II. ARGUMENT

A. The Term "Action" is Defined and Specifically Limits the Scope of the Project's Environmental Assessment

Plaintiff erroneously alleges that the "FEA does not provide a complete description of the environmental impacts of its water extraction and distribution system" as required under HRS Chapter 343 and HAR 11-200. *See* MIO at p. 15. Even the most liberal reading of HRS Chapter 343 and HAR 11-200 does not lead to this interpretation. HAR § 11-200-2 strictly defines "Action" as "any program or project **to be initiated by an agency or applicant.**" HAR § 11-200 generally requires the proposing agency, the County in this case, to evaluate whether the

“proposed action”, the upgraded Relief Line, has any significant impact on the environment. Here, the “proposed action” is limited to the installation of the Relief line that connects on each end to existing water transmission mains and is net neutral with respect to transmission, storage, and/or use of water. *See* FEA at p. 14; *see also* id. at p. 33, 34. The County is not required to evaluate its water system as it is not required by HRS Chapter 343 and HAR 11-200.¹

Accordingly, the Project’s Final EA meets all 12 of the content requirements under HAR § 11-200-10 for the “proposed action” specifically:

- Section 2.1 of the FAC contains a description and technical characteristics of the Relief Line.
- Section 2.2 of the FAC describes the purpose and need of the Relief Line.
- Section 4.2 of the FAC identifies cultural, historical, and/or natural resources that are found within the proposed area of the Relief Line, discussing the extent to which traditional and customary Native Hawaiian rights are exercised, and evaluates the extent to which those resources including those traditional and customary rights will be affected or impaired by the Relief Line.
- Section 5.1 of the FAC describes the potential impact the Relief Line could have on air quality and noise levels.
- Section 5.1 of the FAC evaluates the impact the Relief Line could have on flora and fauna in the affected area.
- Section 5.5 of the FAC discusses water resources of the impacted areas that the Relief Line would service including stating again that the “[t]he proposed Relief Line will increase water transmission capacity within the existing KDOW water system; however, it will not result in any increase of the withdrawal of any of the groundwater or surface water sources.” Exhibit “A” at p. 33.
- Section 6 of the FEA evaluates secondary and cumulative impacts and again recognizes that the “proposed Relief Line does not increase source and storage in

¹ *See National Wildlife Federation v. Appalachian Regional Com.*, 677 F.2d 883, 891 (D.C. Cir. 1981) (Denying that a programmatic EIS was required to be conducted for the construction of an additional portion of the Appalachian highways because the highways “have simply reached such a stage of completion that the programmatic EIS requirement can no longer practically apply.”). HRS § 343-5(b) states in relevant part that “[w]hen an agency proposes an **action** . . . the agency shall prepare an environmental assessment for the **action** at the earliest practicable time to determine whether an environmental impact statement shall be required. HAR § 11-200-2 defines “environmental assessment” as “a written evaluation that serves to provide sufficient evidence and analysis to determine whether an **action** may have a significant effect” and which defines “**action**” as “any program or project to be initiated by an agency or applicant.”

the Lihue area; the proposed Relief Line will not increase withdrawal of water.” Exhibit “A” at p. 34.

- Section 7 of the FEA considers two relevant alternatives.
- Section 8 of the FEA summarizes the reasons the County issued its finding of no significant negative impacts to the environment.

Plaintiff continues to have no reasonable basis for denying that the Final EA properly discussed the environmental impacts of the Relief Line. As was also true in *Price v. Obayashi*, 81 Hawaii 171, 182 n. 12, 914 P.2d 1364, 1375 n. 12 (1996), the Final EA was “compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved,” accordingly, Plaintiff and this Court should give “deference to the administrative agency’s expertise and experience in its particular field,” and is not to “substitute its judgment for that of the agency as to the environmental consequences of its action.” Furthermore, Plaintiff has not provided any evidence or legal support to assert that the Final EA’s findings and determinations with respect to the Relief Line’s impacts to natural and cultural resources were clearly erroneous.

B. The County Satisfied its Requirements to Receive, Consider, and Respond to Comments

Interestingly, Plaintiff never alleges that it submitted comments that were not incorporated into Appendix D of the Final EA. It also never alleges that its comments were not responded to. Plaintiff attempts to allude to some unfounded impropriety in the time it submitted comments, “as late as 6 p.m.” and the day in which the FEA was submitted to the Office of Environmental Quality Control, Department of Health, State of Hawaii. Such impropriety has not been established. Contrary to Plaintiff’s allegations, the Final EA thoughtfully considered every substantive comment received, including those made by Plaintiff and/or Plaintiff’s representatives. *See* Appendix D to the Final EA. Plaintiff’s dissatisfaction with the response it received and the County’s reasoned decision fails to meet the standard set forth in *Price v.*

Obayashi, supra. Plaintiff has not established that the County’s decision was arbitrary and/or capricious.

HRCF Rule 56 states that “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Here, the County has provided substantial support that it complied with the requirements under HRS Chapter 343 or HAR § 11-200. Plaintiff should now be required to come forward with specific facts that demonstrate that the County failed to properly consider relevant comments in its Finding of No Significant Impact to the environment by the Project and had it properly consider those comments the County would not have issued a Finding of No Significant Impact to the environment. Because Plaintiff’s allegations are factually unsupported and it has not demonstrated that the County has acted arbitrarily or capriciously, summary judgment as to Counts II and III should be granted in favor of the County.

C. The Project Itself Does Not Require a Water Lease or Permit

As made abundantly clear throughout the course of this litigation and in the Final EA, the “benefits of the Relief Line are associated with the improvement in transmission capacity. No significant impacts to groundwater are anticipated during construction and operation of the proposed Relief Line.” FEA at p. 14; *see also id.* at p. 33, 34. The Project is limited to the installation of a relief line that connects on each end to existing water transmission mains and is net neutral with respect to transmission, storage, and/or use of water. HAR 11-200 limits environmental assessments to “fully declare the environmental implications of the proposed action and shall discuss all **reasonably foreseeable consequences** of the action” (emphasis

added). The County reasonably determined and strictly limited the Relief Line's purpose to improving transmission capacity and not increasing water withdrawal, use, or storage. Thus, the County was not required to obtain a lease, permit, or license for water for the limited purposes of construction the Relief Line as its construction is wholly unrelated from water consumption and/or use. *Id.*

Plaintiff erroneously argues that the County is required to obtain a water lease from the BLNR to proceed with construction of the Relief Line. Plaintiff goes as far as to argue that the County is illegally distributing water to its residents and is required to do "an EIS on the total environmental impact of their water transport system." MIO at p.19. Stated more obviously, Plaintiff argues for all of the County's residents to go without water and a complete shutdown of the County's waterworks only and until such an EIS is conducted and a lease or permit is secured. Here, Plaintiff has not provided any legal authority or specific facts by affidavit or otherwise that the Project, as proposed in the Final EA, is required to obtain a lease or permit from the Department of Land and Natural Resources. Plaintiff's argument also assumes that the Department of Land and Natural Resources is wholly unaware of the County's waterworks operations and has turned a blinded-eye to requiring the County to obtain a lease. Plaintiff's allegations are factually unsupported especially recognizing that the County and the Department of Land and Natural Resources worked in conjunction to develop, and are currently in the process of updating, the Kauai Water Use and Development Plan Update.² Because Plaintiff has not come forth with specific facts as required by HRCF Rule 56 and because its assertions are unsupported by any legal authority, this Court should grant summary judgment in favor of the County as to Count VII.

² A copy of the Kauai Water Use and Development Plan can be found here: <http://files.hawaii.gov/dlnr/cwrm/planning/wudpka1990.pdf>

D. HRS § 171-58 Does Not Require the County to Obtain a Lease

Plaintiff erroneously disregards HRS § 54-12 which establishes a board of water supply for each county and HRS § 54-15 which empowers the board of each county to “**manage, control, and operate the waterworks of the county and all property thereof, for the purpose of supplying water to the public in the county**, and shall collect, receive, expend, and account for all sums of money derived from the operation thereof and all other monies provided for the use or benefit of the waterworks and all property used for or held in connection therewith” (emphasis added). Instead, Plaintiff incorrectly asserts, with no legal basis, that HRS § 171-58 overrides HRS § 54-15 and requires the County to obtain a water lease from BLNR. It is a canon of statutory interpretation that statutes should be interpreted in a way that renders them compatible, not contradictory. *State v. Arceo*, 84 Hawaii 1, 19, 928 P.2d 843, 861 (1996) (“the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality.”) (quoting *State v. Malufau*, 80 Hawaii 126, 137, 906 P.2d 612, 623 (1995) (citation and internal quotation marks omitted)).

HRS § 171-58 states that “the right to any mineral or surface or ground water shall not be included in any lease, agreement, or sale, this right being reserved to the State.” A plain and ordinary reading of this statute and the only logical and reasonable interpretation is that the State of Hawaii, solely, has the power to lease, sell, or otherwise contract for mineral or surface/ground water. Consistent with this interpretation is this jurisdiction’s recognition of appurtenant water rights and riparian water rights, in which owners of land appurtenant to or along a waterway have rights to use such water without the need for a lease. *See McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 191, 504 P.2d 1330, 1341 (1973). HRS § 171-58 does not regulate the County’s ability to disseminate water to its constituents. *Compare Emma Ah Ho v. Cobb*, 62 Haw. 546, 547, 617 P.2d 1208, 1210 (1980) (challenging the Board of Land and

Natural Resources decision to rent excess transmission capacity in the Molokai Irrigation System to Kaluakoi Corporation pursuant to HRS § 171-58).

Furthermore, to the extent that Plaintiff carelessly uses the terms lease and permit synonymously, the County is not required to obtain a water use permit from the Commission on Water Resource Management pursuant to HAR § 13-171³ because the Project is not located within a Water Management Area. *See* Exhibit “A”, Water Management Areas map from the Department of Land and Natural Resources, Commission on Water Resource Management.

E. This Court Should Disregard Theoretical Impacts Attributable to Increase in Water Withdrawals

It is abundantly clear from the Final EA and all of the pleadings in this matter that the Relief Line is not going to “cause any changes to the existing water source or storage facilities nor will it cause any changes in the operation of such facilities” and that “[n]o significant impacts to groundwater are anticipated during construction and operation of the proposed Relief Line.” FEA at p. 14; *see also* FEA at p. 33, 34. As stated in the Final EA, “[t]he proposed Relief Line alignment will begin at Kūhiō Highway at the intersection with `Ehiku Street where it will connect to an existing KDOW 16-inch diameter water main” and “then terminate at the Kapaia Cane Haul Road and Mā`alo Road intersection where it will connect to an existing KDOW 16-inch water main.” FEA at p. 9. The Relief Line does not connect to any water source, storage, transmission, or treatment facility, which directly refutes Plaintiff’s argument that the Relief Line increases water withdrawal from the surface or fresh water sources. Furthermore, this Court should disregard any prospective claims of increased water use as without merit and not ripe.

Rice v. Cayetano, 941 F. Supp. 1529, 1538 (D. Haw. 1996) (citations and internal quotation

³ HAR § 13-171-11 states, “No person shall make any withdrawal, diversion, impoundment, or consumptive use of water **in any designated water management area without first obtaining a permit from the commission**. However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water.”

marks omitted), rev'd on other grounds, 528 U.S. 495 (2000) (“Because ripeness is peculiarly a question of timing, the court must look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention.”).

F. Plaintiff Fails to Meet the Requirements for an Injunction

Plaintiff fails to show as required by Haw. R. Civ. Pro. 65(b) that injunctive relief is necessary to prevent “immediate and irreparable injury, loss, or damage.” The words “immediate” or “irreparable” are surprisingly absent from Plaintiff’s argument. Plaintiff has made no showing that there are “immediate” or “irreparable” harms likely to occur, which would warrant the issuance of a preliminary or permanent injunction.

III. CONCLUSION

It is clear that rather than challenge the actual merits of the Relief Line and its supporting Final EA, Plaintiff has used this litigation as an attempt to harass the County and cause the project unnecessary delay. This litigation is specifically limited to the merits of the Relief Line and whether the County has met its requirements under HRS Chapter 343 and HAR § 11-200 with respect to the Final EA and its issuance of the FONSI.

For the foregoing reasons, the County is entitled to have judgment entered in its favor as a matter of law as to the remaining Counts I, II, III, VII, and X of Plaintiff’s FAC.

DATED: Honolulu, Hawaii; March 6, 2020.

/s/ Micah P. K. Aiu

ROSEMARY T. FAZIO

NAOMI U. KUWAYE

MICAH P. K. AIU

Attorneys for Defendant

Department of Water, County of Kauai

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

KIA‘I WAI O WAI‘ALE‘ALE, an) Civil No. 18-1-0063
unincorporated community association,) (Environmental Court)
)
Plaintiff,) DECLARATION OF MICAH P. K. AIU
)
vs.)
)
DEPARTMENT OF WATER, COUNTY OF)
KAUA‘I, applicant and accepting agency of the)
subject Environmental Assessment; and DOES)
1-50,)
)
Defendants.)
_____)

DECLARATION OF MICAH P. K. AIU

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

MICAH P. K. AIU declares and avers under penalty of perjury as follows:

1. I am an attorney licensed to practice in the State of Hawaii. I am one of the attorneys with the law firm of Ashford & Wriston, LLP, which represents Defendant DEPARTMENT OF WATER, COUNTY OF KAUA‘I (the “County”) in the above-captioned matter.
2. I am competent to testify as to the matters set forth in this Declaration, and I make this Declaration based upon personal knowledge.
3. The Final Environmental Assessment and Finding of No Significant Impact, filed March 13, 2018, with exhibits and appendices, can be accessed at the following link:

http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2018-03-23-KA-FEA-Kapaia-Cane-Haul-Road-Main.pdf.

4. Exhibit “A” is a true and correct copy of the Water Management Areas in the State of Hawaii published by the Department of Land and Natural Resources, Commission on Water Resource Management.

I declare and state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, belief and understanding at this time.

EXECUTED: Honolulu, Hawaii; March 6, 2020.

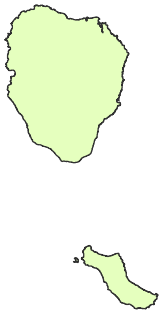
/s/ Micah P. K. Aiu

MICAH P. K. AIU

WATER MANAGEMENT AREAS

FOR GROUND WATER ONLY

 Water Management Areas



ISLAND OF OAHU

- North Sector
- Windward Sector
- Honolulu Sector
- Pearl Harbor Sector
- Central Sector

ISLAND OF MOLOKAI

- West Sector
- Central Sector
- Northeast Sector
- Southeast Sector

ISLAND OF MAUI

- Iao System



STATE OF HAWAII
Department of Land and Natural Resources
Commission on Water Resource Management

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

KIA'IWAI O WAI'ALE'ALE, an) Civil No. 18-1-0063
unincorporated community association,) (Environmental Court)
)
Plaintiff,) CERTIFICATE OF SERVICE
)
vs.)
)
DEPARTMENT OF WATER, COUNTY OF)
KAUA'I, applicant and accepting agency of the)
subject Environmental Assessment; et al.,)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was duly served through JEFS electronically on or about this date on the following party:

LINDA M.B. PAUL, ESQ.
LINDA M.B. PAUL ESQ. LLLC
815 Pahumele Place
Kailua, HI 96734

Attorney for Plaintiff
Kia'i Wai O Wai'ale'ale

DATED: Honolulu, Hawaii; March 6, 2020.

/s/ Micah P. K. Aiu

ROSEMARY T. FAZIO
NAOMI U. KUWAYE
MICAH P. K. AIU
Attorneys for Defendant
Department of Water, County of Kauai