Form 6

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT STATE OF HAWAII

CIVIL APPEAL DOCKETING STATEMENT

KIA‘I WAI O WAI‘ALE‘ALE,

Trial Court Docket Number

Plaintiff-Petitioner-Appellant, CIVIL NO. 18-1-0063 (KNAW)

vs. Is this a Cross-Appeal? NO

DEPARTMENT OF WATER, COUNTY OF

KAUA`I, applicant and accepting agency of the Has this matter previously been

subject Environmental Assessment; DOES 1-50, before the Hawai`i Appellate Courts?

Defendants-Respondents-Appellees. NO

**TRIAL COURT DISPOSITION**

1. STAGE OF THE PROCEEDINGS

X After Trial

2. RELIEF

X Other: Plaintiff-Petitioner-Appellant requests the Intermediate Court of Appeals to:

(a) Reverse the Fifth Circuit Court's:

(1) Order Granting Defendant-Respondent-Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Plaintiff's Count IV, filed April 2, 2019, a copy of which is attached hereto as Exhibit "A";

(2) Order Granting Defendant Department of Water, County of Kauai's Motion for Summary Judgment as to Plaintiff's Counts V, VI, VIII and IX, filed October 3, 2019, a copy of which is attached hereto as Exhibit "B";

(3) Order Granting Defendant Department of Water, County of Kauai's Motion for Summary Judgment as to Plaintiff's Counts I, II, III, VII, and X, filed June 30, 2020, a copy of which is attached hereto as Exhibit "C";

(b) Declare that the uncontested facts in this case do not support a Finding of No Significant Impact (FONSI) and that Defendant Department of Water, County of Kauai's is required to prepare an Environmental Impact Statement (EIS) pursuant to HRS §343-2 and HAR §11-200-11.2 and obtain a lease, license or revocable permit to use state water pursuant to HRS §171-58 before applying for any state or county permits for its proposed Kapaia Cane Haul Road 18" Main water transmission line located at Tax Map Key (TMK) Nos. (4) 3-8-018:001; and ʻEhiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009 in Līhuʻe, Kaua‘i;

(c) Issue a temporary injunction on stream water diversions in the Kauai's East and Southeast watersheds to protect streams and threatened and endangered species until Defendant completes an EIS for its water transport system and the State of Hawaii grants it a lease, license or revocable permit authorizing Defendant’s extraction and transport of public trust water from Kauai’s East and Southeast watersheds and Lihu`e Basin as required by HRS §171-58(c)(3)

(d) Grant Plaintiff-Petitioner-Appellant's attorney's fees and costs pursuant to the private attorney general doctrine and provide for such other relief as is just and proper.

DESCRIPTION OF NATURE OF ACTION AND RESULT IN THE TRIAL COURT & AGENCY

On 02/08/2018, Defendant published a Draft Environmental Assessment (DEA) and an Anticipated Finding of No Significant Impact (AFONSI) for its Kapaia Cane Haul Road 18" Main water transmission line project in OEQC's Environmental Notice. The project is located at Tax Map Key (TMK) Nos. (4) 3-8-018:001 and ʻEhiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009 in Līhuʻe, Kaua‘i. Plaintiff and its members, who include Kauai residents and Native Hawaiian beneficiaries of East and Southeast Kauai’s freshwater resources, submitted comments up until the end of 03/12/2018, the day comments were due. On that day Defendant approved a Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) prior to the end of the comment period.

On 10/17/2018, Plaintiff filed its First Amended Complaint challenging Defendant's FEA-FONSI for its proposed 18" Main project pursuant to HRS §343 and HAR §11-200 because:

1. it fails to fully disclose and assess the full extent of the significant environmental and cultural impacts that are highly likely to result from Defendant's permanent removal and transport of public trust water from Kauai's East and Southeast watersheds and Lihu`e Basin through its proposed 18 “ Main water transmission line. If Defendant's proposed 18” Main line is constructed, its water transmission capacity will increase to approximately 9.9 MGD (combined new 18” and existing 12” lines), which is 325% of the existing 3.05 MGD currently being transported, and the new limiting main segments will be the 16” lines that the 18" "Relief Line" would connect to at either end increasing transmission capacity to 5.41 MGD, which is 178% of the existing capacity, which is not an insignificant increase;

2. it is improperly segmented and fails to describe and evaluate all of the significant adverse environmental impacts that will be caused by the proposed 18” Main Project, including the direct, indirect, secondary, and cumulative as well as the short-term and long-term effects as required by HRS §343 and HAR §§11-200-7, 10 and 12;

3. Defendant's proposed 18" Main line will transport public trust waters diverted from state conservation district streams and pumped from state aquifers without a lease, license or permit from the Board of Land and Natural Resources (BLNR) in violation of HRS §171-58 and without any Environmental Impact Statement (EIS) for Defendant’s entire water extraction and transport system ever having been done as required by HRS §171-58(c)(3);

4. the FEA-FONSI violates HRS §195D-4 and the Constitution of Hawaii Article XI Section 1 for failing to disclose and assess the proposed 18" Main line project's significant environmental impacts on public trust freshwater resources and threatened and endangered species in the East and Southeast Kauai watersheds;

5. the FEA-FONSI violates the Hawaii Constitution Article XII Section 7 for failing to disclose and assess the significant adverse impacts on native Hawaiian ahupua`a tenants affected by Defendant's stream diversion and water withdrawal and transport projects; and

6. Defendant's flawed environmental review process violated Plaintiff’s members' substantive and procedural due process rights under the Hawaii Constitution Article I Section 5 when Defendant granted itself a FONSI before the public comment period was over.

On 01/16/2019, Defendant filed a motion for partial summary judgment as to Plaintiff's Count IV, which claims that Defendant segmented its FEA in violation of HRS §343 and HAR §11-200-7 by failing to disclose and assess the significant upstream and downstream environmental impacts of its proposed 18" water main project. Plaintiff filed a response and memorandum in opposition together with Exhibits "1"-"2". A hearing was held on 03/13/2019. On 04/02/2019, the Fifth Circuit Court granted Defendant's Motion for Summary Judgment as to Plaintiff's Count IV. The Court made no findings.

On Sept. 13, 2019, Defendant filed a motion for partial summary judgment as to Plaintiff's Counts V, VI, VIII, and IX, which claim that Defendant's FEA-FONSI violated HRS §343-2 and HAR §11-200-12 when it failed to disclose and assess indirect, secondary and cumulative impacts and long term effects on the environment of Defendant's improvements in its capacity to

transport state water from all sources, failed to provide an alternative that would reduce the amount of water taken from the watersheds in violation of HAR §11-200-9(c), failed to disclose and assess the project's significant environmental impact on public trust sources in violation of HRS §195D-4 and the Hawaii Constitution Article XI Section 1, and failed to disclose, assess and protect the rights of the native Hawaiian ahupua`a tenants affected by its stream diversions that will channel water to its 18" Main line in violation of Article XII Section 7. Plaintiff filed a response and memorandum in opposition together with Exhibits "1"-"5'. A hearing was held on 09/18/2019. On 10/03/2019, the Fifth Circuit Court granted Defendant's Motion for Summary Judgment as to Plaintiff's Counts V, VI, VIII and IX. The Court made no findings.

On 01/08/2020, Defendant filed a motion for partial summary judgment as to Plaintiff's Counts I, II, III, VII, and X, which claim that Defendant's FEA does not comply with HRS § 343-2 and HAR §11-200-10 & 12 EA content requirements, which require describing and evaluating the sum of the significant effects and total impact of the 18” Main project on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State, and claim Defendant's flawed environmental review process violated Plaintiff’s members' substantive and procedural due process rights by granting itself a FONSI before the public comment period was over, and claim that Defendant is continuing to violate HRS § 171-58 by taking and transporting state water without a lease, license or permit from the State, and include a request for a temporary injunction on Defendant's stream water diversions from Kauai’s East and Southeast watersheds until Defendant completes an EIS for its water extraction and transport system and obtains a lease, license or revocable permit from the State of Hawaii authorizing its use of public trust water, including, but not limited to the diversion of stream water from the watersheds, the pumping of water from Kauai's aquifers and the transmission of public trust water out of the watersheds.

On 03/03/2020, Plaintiff filed a response and memorandum in opposition to the motion together with a declaration from expert witness Matt Rossner and Exhibits "A"-"C". A hearing was held on 06/23/2020. Defendant proffered no expert witnesses either in its Reply or at the hearing to counter Mr. Rossner's expert testimony that the 18" Main line will take more water.

On 06/30/2020, the Fifth Circuit Court granted Defendant's Motion for Summary Judgment as to Plaintiff's Counts I, II, III, VII, and X. The Court found that there were no genuine issues as to any material fact and that the Environmental Assessment that was done was sufficient and there was no need for an Environmental Impact Statement.

On 06/30/2020, the Fifth Circuit Court entered Final Judgment in favor of Defendant Department of Water, County of Kauai and against Plaintiff Kia`i Wai as to all claims asserted in Plaintiff's First Amended Complaint for Declaratory, Injunctive and Other Relief, filed 10/17/2018.

ANTICIPATED ISSUES PROPOSED TO BE RAISED ON APPEAL

1. Whether the Fifth Circuit Court made a pure error of law when it found on 06/30/2020, that there were no genuine issues as to any material fact and that Defendant's Environmental Assessment that was done was sufficient and there was no need for an Environmental Impact Statement, when the record clearly indicates *inter alia* that there was and is a factual dispute as to whether Defendant's Kapaia Cane Haul Road proposed 18" Main water line when added to its existing 12" Main water line will significantly increase its capacity to transport state water from the East and Southeast Kauai watersheds and aquifers to consumers without a lease, license, or permit and Defendant countered that the additional water it admitted that it needs to supply the larger transmission line will come from the water sources it currently taps even though the sources of that water are the East and Southeast Kauai watersheds and aquifers. The standard of review on questions of pure errors of law is *de novo.*

2. Whether the Fifth Circuit Court's Order filed 04/02/2019, was clearly erroneous and a pure error of law and acted in excess of its statutory authority and/or jurisdiction when it granted Defendant's motion for summary judgment on Count IV when Defendant's FEA-FONSI on its face indicates that it was improperly segmented in violation of HRS §343 and HAR §§11-200-7 & 12(b)(8), which require that component actions that are increments of a larger total undertaking are to be treated as a single action (no segmentation) when the FEA limited its environmental assessment of the environmental impacts of the 18" Main project to the immediate water transmission line installation area and failed to address the significant impacts to upstream state forest reserve streams, threatened and endangered wildlife and native Hawaiian ahupua`a tenants that will likely result from the permanent removal of even more unpermitted state water from the East and Southeast Kauai watersheds to supply Defendant's water transport system.

"[An agency's] conclusion of law is reviewed under the clearly erroneous standard because the conclusion is dependent on the facts and circumstances of the particular case." *Pele Def. Fund,* 141 Haw. 381(2018)quoting *Kilakila `O Haleakala v. Univ. of Hawaii*, 138 Haw. 364, 375-76, 382 P.3d 176, 187-88 (2016) in turn quoting *Sierra Club v. Dep't of Transp.,* 115 Haw. 299, 315, 167 P.3d 292, 308 (2007). The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

3. Whether the Fifth Circuit Court's Order filed 10/03/2019, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on Counts VandVI when the FEA-FONSI failed to include sufficient and required alternatives including reducing the amount of state water taken to supply its system and failed to include information required by HRS §343 and HAR §11-200. The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard. *See Price v. Obayashi Hawaii Corp., 81 Hawai'i 171, 182, 914 P.2d 1364, 1375 (1996)*(citing *Life of Land v. Ariyoshi, 59 Haw. 156, 164, 577 P.2d 1116 (1978))*:

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth *sufficient information*to enable the decision-maker to considerfully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. *Price, 81 Hawai'i at 183, 914 P.2d at 1376* (quoting *Life of the Land, 59 Haw. at 164-65, 577 P.2d at 1121*). Although this case presents the question of the sufficiency of the State's compliance with regulations regarding an EA rather than an EIS, we recognize the same latitude in the HAR given to the accepting agency over EISs for EAs, and apply the same standard in evaluating EAs. *Price, 81 Hawai'i at 182-83, 914 P.3d at 1375-76*.

4. Whether the Fifth Circuit Court's Order filed 10/03/2019, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on Count VIII when the FEA-FONSI failed to disclose and assess the project's impact on public trust water resources and threatened and endangered species in violation not only of HRS §343 and HAR §11-200, but also HRS §195D-4 and the Constitution of Hawaii Article XI Section 1. The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

5. Whether the Fifth Circuit Court's Order filed 10/03/2019, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on Count IX when the FEA-FONSI on its face indicates that it violates Hawaii Constitution Article XII Section 7 because it failed to disclose, assess and protect the rights of the native Hawaiian ahupua`a tenants affected by its stream diversions that channel water to its water transport system. The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

6. Whether the Fifth Circuit Court's Order filed 06/30/2020, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on as to Count Iwhen the FEA-FONSI fails to describe and evaluate the full extent, cumulative and overall significant impacts of the 18” Main project on the quality of the environment, including the direct, indirect, secondary, and cumulative as well as the short-term and long-term effects as required by HRS §343 and HAR §11-200. The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

7. Whether the Fifth Circuit Court's Order filed 06/30/2020, was a pure error of law when it granted Defendant's motion for summary judgment on Count II when Defendant’s flawed environmental review process violated HRS §343 and HAR §11-200 requirements and plaintiff’s substantive and procedural due process rights. "Whether or not an agency has followed proper procedures or considered the appropriate factors in making its determination is a question of law, and will be reviewed de novo." *Sierra Club*, 115 Haw. at 315, 167 P.3d at 308.

8. Whether the Fifth Circuit Court's Order filed June 30, 2020, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on Count IIIwhen the FEA-FONSI did not satisfy the HRS § 343 and HAR § 11-200 environmental assessment content requirements, which require describing and evaluating the sum of the significant effects and total impact of the 18” Main project on the quality of the environment. The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

9. Whether the Fifth Circuit Court Order filed 06/30/2020, was a pure error of law when it granted Defendant's motion for summary judgment on Count VII when the record indicates that Defendant is taking public trust water resources without a lease, license, or permit from the State of Hawaii and an EIS as required by HRS §171-58 and Defendant did and does not deny that it has none. The standard of review on questions of pure errors of law is *de novo.*

10. Whether the Fifth Circuit Court Order filed 06/30/2020, was clearly erroneous and a pure error of law when it granted Defendant's motion for summary judgment on Count X when the record shows that a temporary injunction on stream water diversions in the Kauai's East and Southeast watersheds is needed to protect public trust resources until such time as Defendant completes an EIS for its water transport system and BLNR grants it a water lease or revocable permit authorizing Defendant’s extraction and transport of public trust water from Kauai’s East and Southeast watersheds and Lihu`e Basin as required by HRS §171-58(c)(3). The standard of review on mixed questions of fact and law is *de novo*, the "right/wrong" standard.

DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:

\_No\_ Likelihood of a motion to expedite the appeal.

\_No\_ Likelihood of a motions to stay appeal pending resolution of a related case.

\_No\_ Other procedural complexities. If so, please identify them.

APPELLANT'S NAME:

KIA‘I WAI O WAI‘ALE‘ALE

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I CERTIFY THAT A COPY OF THIS CIVIL APPEAL DOCKETING STATEMENT WAS SERVED ON EACH PARTY/COUNSEL SHOWN ON THE ATTACHED SERVICE LIST.

/s/Linda M. B. Paul\_\_\_\_\_\_\_\_\_\_ \_\_July 29, 2020\_\_\_\_ \_\_\_\_

Signature Date