

Electronically Filed
Supreme Court
SCAP-20-0000487
01-JUN-2021
10:10 AM
Dkt. 1 AT

NO. CAAP-20-0000487

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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

Petitioner -Plaintiff- Appellant,

v.

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

Respondent - Defendant- Appellee.

) Civil No. 18-1-0063 KNAW
) (Environmental Court)
)
)
) PETITIONER-APPELLANT'S REQUEST
) FOR TRANSFER TO THE HAWAII
) SUPREME COURT
)
) APPEAL FROM THE ORDERS AND
) FINAL JUDGMENT OF THE CIRCUIT
) COURT OF THE FIFTH CIRCUIT IN CIVIL
) NO.18-1-0063 KNAW
)
)

**PETITIONER-APPELLANT'S REQUEST FOR TRANSFER TO THE HAWAII
SUPREME COURT**

I. REQUEST FOR TRANSFER TO THE HAWAII SUPREME COURT

Comes now Petitioner- Plaintiff-Appellant KIA‘I WAI O WAI‘ALE‘ALE (hereinafter
"Appellant"), by and through counsel Linda M. B. Paul and hereby submit their Request for

Transfer of this appeal to the Hawaii Supreme Court in accordance with Rule 40.2, Hawai'i Rules of Appellate Procedure ("H.R.A.P.") and H.R.S. §602-58 (a)(1) and (b)(1).

II. STATEMENT OF PRIOR PROCEEDINGS

1. Appellant has appealed the Fifth Circuit Court's three orders granting summary judgment to Respondent - Defendant- Appellee DEPARTMENT OF WATER, COUNTY OF KAUA'I (hereinafter "Appellee") on all counts of Appellant's complaint 5CC 18-1-0063 (KNAW), which were filed on 04/02/2019, 10/03/2019, and 06/30/2020 respectively, and Final Judgment, which was filed on 06/30/2020. Appellant challenged Appellee's Final Environmental Assessment (FEA) and a Finding of No Significant Impact (FONSI) pursuant to HRS §§343, 171-58, 195D-4 and the Constitution of Hawaii article XI section 1, and article XII section 7 because its segmented FEA (FONSI) failed to disclose and assess the full extent of the significant, substantial, adverse environmental and cultural impacts that Appellee's proposed 18 " Main water line segment, when added to its existing 12" and 16" water lines, will cause by permanently removing and transporting to consumers even more unpermitted public trust water from Kauai's Wailua watershed and Lihue Basin's surface and groundwater resources. (RA Vol. 1 @ 113-114).

2. No Environmental Impact Statement (EIS) has ever been done that addresses the environmental impacts to East Wailua watershed's ecosystems, natural resources and cultural practices that rely on the freshwater resources taken by Appellee's water extraction and transmission system since it was first installed in the 1990s and will be transported by its proposed 18" Main water line.

3. Appellant is an unincorporated community association whose members use and enjoy the environs, cultural and natural resources, and waters of East and Southeast Wailua: Wai'ale'ale,

Waikoko, Ili'ili'ula, Iole, Waiaka, Waiahi. Kaulu and Palikea for native Hawaiian traditional and customary practices, domestic uses, recreation, research, environmental uses, and aesthetic purposes. Kia' i Wai seeks to protect the waters of Wai' ale' ale and the other named and unknown name streams as public trust resources for all the communities of Kauai. (RA Vol. 1 @ 262)

4. Appellee is organized under article XVII of the Kaua'i County Charter (2012) and is the county agency who drafted, accepted and approved the subject FEA (FONSI) at issue in this complaint. (RA Vol. 1 @ 116) Appellee's 18" Main project involves state land and county funding, which trigger HRS § 343-5. Appellee has no permit, lease or license from the Board of Land & Natural Resources of the State of Hawaii (BLNR) to take state waters as required by HRS §171-58.

5. On 02/08/2018, Appellee 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 the State Office of Environmental Quality Control's (OEQC) *The Environmental Notice* (RA Vol. 1 @ 90). The project is located at Tax Map Key (TMK) Nos. (4) 3-8-018:001 and 'Ehiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009 in Līhu'e, Kaua'i.

6. Appellant and its members submitted timely comments on the DEA (AFONSI), including extensive exhibits, relevant Board of Water Supply meeting minutes, and other documents before and on 03/12/2018, up to 6:12 p.m. (RA Dkt #54 p. 37) (RA Vol. 1 @ 85) (RA Vol. 2 @ 17) Andrew Hood, a hydraulic engineer, emailed his comments at 5 p.m. on 03/12/2018. (RA Dkt # 54 pp 28-31) However Appellee's response to Mr. Hood, although dated 03/12/2018, actually

responds to correspondence received earlier from Mr. Hood on 03/07/2018. (RA Dkt # 54 pp 32-35).

7. The FEA consultants submitted the FEA (FONSI) for the project by letter dated 03/12/2018, which was stamped "Received March 13, 2018" on the OEQC website. (RA Vol. 1 @ 170) The FEA (FONSI) was published in OEQC's *Environmental Notice* on 03/23/2018 beginning a 30-day period to appeal the FONSI.

8. Appellant filed a complaint for declaratory, injunctive and other relief in the Environmental Court of the Fifth Circuit on 04/23/2018, and a first amended complaint for declaratory, injunctive and other relief on 10/17/2018. (RA Vol. 1 @ 113-139)

9. Appellant complained that as a result of the legally deficient FEA (FONSI) published in *The Environmental Notice* on 03/23/2018 the full extent of the significant environmental impacts of this project was not assessed that would have informed the BLNR and other public agencies prior to granting permits for Appellee's proposed "water transmission relief line" as required by HRS §§ 171-58 and 343-5. (RA Vol. 1 @ 113-139)

10. Appellant claimed *inter alia* that the FEA (FONSI):

a. failed to fully disclose and assess the full extent of the significant environmental and cultural impacts that are likely to result from Appellee's permanent removal and transport of public trust water from Kauai's East and Southeast watersheds and Lihū'e Basin through its proposed 18" Main water transport line as required by HRS § 343;

b. was improperly segmented and failed 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;

c. 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 watershed;

d. 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 Appellee's stream diversion and water withdrawal and transport projects;

e. Appellee'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 Appellee's entire water extraction and transport system ever having been done as required by HRS §171-58(c)(3); and

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

11. On 11/08/2018, Appellee filed its Answer to Appellant's First Amended Complaint. (RA Vol. 1 @ 143-152)

12. On 01/16/2019, Appellee filed a motion for partial summary judgment as to Appellant's Count IV, which claims that the FEA was improperly segmented in violation of HRS §343 and HAR §§11-200-7 & 12(b)(8) by failing to disclose and assess the significant upstream and downstream environmental impacts of its proposed 18" water main project. (RA Vol.1 @ 154-169) Appellee claimed in its motion that its "Relief Line has utility separate and independent from that [Grove Farm] Development Plan, and is neither a condition precedent to nor dependent

on the Development Plan." However, in OEQC's *Environmental Notice* published on 09/08/2016, Appellee's previous DEA for the Kapaia Cane Haul Road 18" Main states that the reason for the addition of the 18" Main line was to meet the increased capacity needs for the real estate development existing and planned for the Grove Farm Development Plan community.¹ Appellee appended an incomplete copy of the 03/23/2018 FEA (FONSI) to its motion. (RA Vol. 1 @ 170-248)

13. On 03/05/2019, Appellant filed a memorandum in opposition with Exhibits "1"- "2", which included (1) the State Commission on Water Resource Management's (CWRM) schematic of the flow of water from the State of Hawaii DLNR Forest Reserve to the Waiahi Surface Water Treatment Plant (SWTP) and from there to Appellee's water transport line and (2) the 12/17/2009, Board of Water Supply meeting minutes documenting the "Relief Line" as part of the plan to expand the SWTP and disclosing Appellee's position that in order to expand the plant "the line needs to be installed now". (Appendix "E")(RA Vol. 1 @ 251-273)

14. On 03/08/2019, Appellee filed its Reply Memorandum in Support of its Motion for partial summary judgment as to Count IV. (RA Vol. 1 @ 276-285) A hearing was held on the Motion on 03/13/2019.

15. On 04/02/2019, the Court filed its Order Granting Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Appellant's Count IV. (RA Vol. 1 @ 306-307)

16. On 08/13/2019, Appellee filed a motion for partial summary judgment as to Appellant's Counts V, VI, VIII, and IX (RA Vol. 2 @ 5-31), in which Appellant claims that Appellee's FEA

¹ On 09/08/2016 the OEQC published a DEA for the Kapaia Cane Haul Road 18" Main project that was subsequently withdrawn. See http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2016-09-08-KA-DEA-Kapaia-Cane-Haul-Road-Main.pdf. "The project is needed because the existing transmission facilities along Kūhiō Highway from Ma'alo Road to the Līhu'e area are not adequate to utilize the capacity from the Waiahi surface water treatment plant (SWTP) for the planned affordable housing development of the Līhu'e area." DEA p. 8: "The DOW wishes to increase potable water capacity in the Lihu'e area to satisfy existing and future potable water needs."

(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 Appellee's augmentation of 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.

17. On 09/10/2019, Appellant filed a memorandum in opposition to Appellee's motion for summary judgment as to Counts V, VI, VIII, and IX together with Exhibits "1"-5', which included CWRM's 08/21/2018 Staff Submittal, the U.S.F.W.S. 03/12/2018 Memo on the Newcomb's snail habitat in East Kauai, the State's Aug. 2015 Kauai Source Water Assessment Program Report, and the relationship of the Koloa F well to the Kauai aquifer. (RA Vol. 2 @ 93-159) On 09/13/2019, Appellee filed its reply memorandum in support of its motion. (RA Vol. 2 @ 162-182) A hearing was held on 09/18/2019.

18. On 10/03/2019, the Circuit Court filed its Order Granting Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Appellant's Counts V, VI, VIII and IX. (RA Vol. 2 @ 189-190)

19. On 01/08/2020, Appellee filed a motion for partial summary judgment as to Appellant's remaining Counts I, II, III, VII, and X that claim the FEA does not comply with HRS § 343-2 and HAR §11-200-10 and 12 environmental assessment content requirements, Appellee's flawed environmental review process violated Appellant's members' substantive and procedural due

process rights by granting itself a FONSI before the public comment period was over, and Appellee is continuing to violate HRS § 171-58 by taking and transporting state water without a lease, license or permit from the State, and included a request for a temporary injunction on Appellee's stream water diversions from Kauai's East and Southeast watersheds until Appellee completes an Environmental Impact Statement (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 transport of public trust water out of the watersheds. (RA Dkt #56 pp. 27-162)(JIMS Dkt # 37)

20. On 03/03/2020, Appellant filed a memorandum in opposition to the motion together with a declaration from expert witness Matt Rosener and Exhibits "A"- "C", which included the Regular Minutes of the Board of Water Supply, County of Kauai, at which the expansion of the SWTP for which the relief line is a necessary component was approved. (RA Dkt #56 pp. 163-212) (JIMS Dkt # 42, 01/28/2010, Minutes, pp. 1, 7-12)

21. On 03/06/2020, Appellee filed its reply memorandum. (JIMS Dkt # 44) Appellee proffered no expert witnesses either in its Reply or at the June 23, 2020 hearing on its motion to counter Mr. Rosener's expert testimony that the 18" Main line will take more water.

22. On 06/23/2020, a hearing was held on Appellee's third motion for summary judgment. On 06/30/2020, the Circuit Court granted Appellee's Motion for Summary Judgment as to Appellant's Counts I, II, III, VII, and X. (JIMS Dkt # 62) 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.

23. On 06/30/2020, the Circuit Court entered Final Judgment in favor of Appellee KDOW and against Appellant Kia`i Wai as to all claims asserted in Appellant's First Amended Complaint for Declaratory, Injunctive and Other Relief. (JIMS Dkt #64)

III. RELEVANT FACTS

24. Appellee proposes to trench and install 9,000 feet of new 18" diameter pipe augmenting a 12" segment between two existing 16" diameter segments that convey water from sources along Mā`alo cane haul road, specifically Pukaki Well, Well Nos. 3 and 4, and the Waiahi SWTP, to address the lack of capacity within the Līhu`e water system to serve downstream consumers. (RA Vol.1 @ 175,182, 227-228, 232) The installation site is located at Tax Map Key (TMK) Nos. (4) 3-8-018:001; and `Ehiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009 in Līhu`e, Kaua`i. (RA Vol. 1 @ 90) The project proposes the use of state or county lands or the use of state or county funds, triggering compliance with environmental review requirements under HRS § 343-5(a)(1). (RA Vol. 1 @ 90)

25. Appellant and its members include residents and beneficiaries of East and Southeast Kaua`i's freshwater resources, including waters originating in Wai`ale`ale, Waikoko, Waiahi, `Ili`ili`ula, I`ole, Hanamā`ulu, Waiaka, and Wailua streams. In their testimony and in their complaint Appellants attested as to how they would be personally and adversely affected by Appellant's proposed 18" Main enhancement of Kauai's water transmission system and that the East and Southeast Kaua`i's freshwater resources are vital to their need for fresh water and ability to conduct native Hawaiian traditional and customary practices, recreation, environmental appreciation, research interests, appreciation of protected habitat and endangered species, and aesthetic interests.

26. Kaua‘i’s environment, ground waters, air, near-shore ocean, cultural resources, and historic sites are public trust resources. Dewatering of streams, in certain part or for certain times of the year, reductions in flow, heightened stream water temperature, and other consequences of water resource diversion and consumption may substantially impact endangered and threatened native species and Appellants’ native Hawaiian traditional and customary practices. (RA Vol. 1 @ 113-139)

27. East and Southeast Kaua‘i’s surface and ground water resources are highly articulated, such that removal of surface water may impact ground water aquifers, and vice versa. Existing surface water diversion systems are vast and complex, and the degree to which they alter the flow of streams is uncertain due to limited data available for the diversion systems and intakes that are currently in operation. Surface water from streams mixed with groundwater pumped from wells is transported across drainage basins. In some heavily developed areas, streams are used as conduits for transporting water between several pass-through reservoirs, leaving no single reach of the stream with unregulated flow. (RA Vol. 1 @ 113-139)

28. The Līhu‘e water system services residential, commercial, industrial, and resort uses as well as public and residential uses. The FEA states that in 1994:

Grove Farm Company, Inc. ("Grove Farm"), as the successor in interest to Amfac/JMB Hawaii, Inc., is required to participate in the funding and development of water source, storage, and transport facilities for the Lihue Development Plan. (RA Vol. 2 @ 42)

29. The Līhu‘e Development Plan proposed that the Grove Farm master planned community would be served by the County’s Puhi-Līhu‘e-Hanamā‘ulu-Kapa‘a water system (Līhu‘e water system), which is a public water system utilizing groundwater and surface water sources and treated water from the Waiahi SWTP, aka Grove Farm SWTP.

30. The Waiahi SWTP is owned and operated by the Waiahi Water Company, LLC, a division of Grove Farm. The Waiahi SWTP has a capacity of 3.0 mgd, which it drains from the Kapaia Reservoir, a reservoir created by the damming of Hanamaulu stream. (RA Vol. 1 @ 118-119, 180-181, 203-206, 210)

31. Appellee pays Grove Farm for use of, at minimum, 2 million gallons per day (mgd) of water treated from the Waiahi SWTP for use in the Līhu‘e water system. In previous years, Appellee has paid Grove Farm approximately \$2 million per year for use of 2.75 mgd.

None of these three entities has a water lease, license or revocable permit from the BLNR authorizing their use of East and Southeast Kaua‘i’s freshwater resources. (RA Vol. 1 @ 118)

32. The Water Master Plan identified a decrease in system pressures and flows as a result of the Lihue Development Plan unless transmission and distribution improvements were provided. (RA Vol. 1 @ 181) The FEA states that the proposed project will alleviate the capacity limitation caused by the inadequate 12" segment of water line on the portion of the Līhu‘e water system along Kūhio Highway and Kapaia Bridge to Wilcox Medical Center. (RA Vol. 1 @ 203-204, 221, 223)

33. Appellee identifies as its water sources various water development projects, reservoirs, wells and treatment plants, and not their natural sources, which are the freshwater streams, aquifers, and springs of the Kauai watershed. (RA Vol. 1 @ 210, 221)

34. Appellee’s FEA identified water sources for the Līhu‘e water system include: Puhī Well Nos. 1, 3, 4, 5A and 5B; Kalepa Ridge Well, Kilohaha Well Nos. A, B, and I; Līhu‘e Grammar School Well; Garlinghouse Tunnel; Pukaki Well; Hanamā‘ulu Well Nos. 3 and 4; Makaleha Tunnel, Noalepe Tunnel; Kapa‘a Homestead Well Nos. 1 and 2; Nonou Well Nos. B and C; Wailua Homestead Well Nos. A and B; and the Waiahi SWTP. (RA Vol. 1 @ 119, 203, 237)

35. Each of these water development structures “source” their water from springs, streams, and aquifers in the East Kauai watershed. (RA Dkt # 55 @ 61) The FEA did not assess the environmental impacts of its 18" Main water project on the State's public trust resources in the Wailua watershed and the Lihue Basin. (*See Kelly v. 1250 Oceanside Ptnrs*, 111 Haw. 205, 222; 140 P.3d 985, 1002 (2006) "[T]he public trust doctrine applies to all water resources without exception or distinction." See also *Kauai Springs v. Planning Comm'n of Kauai*, 130 Haw. 407, 422-23, 312 P.3d 283, 298-99 (2013)).

36. On Aug. 21, 2018, the CWRM Staff sent a submittal to the Commission requesting it to consider the recommendations for amending the interim instream flow standards (IFS) for two streams contained within the Wailua surface water hydrologic unit in East Kaua‘i that are located in the Wailua watershed and whose waters are transported by Appellee 's Lihue system:

WAILUA (2040): Waikoko Stream (Tributary of South Fork Wailua River)

WAILUA (2040): North Fork Wailua River (i.e., Wai‘ale‘ale Stream) (RA Dkt # 55 @ 61)

37. The CWRM Staff Submittal made the following findings:

In the 2000 appellate ruling on the first Waiāhole Ditch Contested Case Decision and Order (“*Waiāhole I*”), the Hawai‘i Supreme Court emphasized that “instream flow standards serve as the primary mechanism by which the Commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows.” 94 Haw. 97, 148, 9 P.3d 409, 460. The Code defines an instream flow standard as a “quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.” See HRS § 174C-3 (“Definitions”). In considering a petition to amend an interim instream flow standard, the Code directs the Commission to “weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses.” HRS §174C-71(2)(D). CWRM Staff Submittal 08/21/2018 p. 2. (RA Vol. 2 @ 120)

“Instream use” means beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the

stream. Instream uses include, but are not limited to: 1) Maintenance of fish and wildlife habitats; 2) Outdoor recreational activities; 3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation; 4) Aesthetic values such as waterfalls and scenic waterways; 5) Navigation; 6) Instream hydropower generation; 7) Maintenance of water quality; 8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and 9) The protection of traditional and customary Hawaiian rights. CWRM Staff Submittal p. 2 (RA Vol. 2 @ 120)

“Noninstream use” means the use of stream water that is diverted or removed from its stream channel and includes the use of stream water outside of the channel for domestic, agricultural, and industrial purposes. CWRM Staff Submittal p. 2 (RA Vol. 2 @ 120)

Other instream uses that must be considered include maintenance of water quality (e.g., temperature, dissolved oxygen, turbidity), instream hydropower, and ecosystem services (e.g., supporting riparian species of value, streambank stability, biogeochemical cycling, groundwater recharge, impacts to estuaries). CWRM Staff Submittal p. 14 (RA Vol. 2 @ 120)

38. The CWRM Staff Submittal includes a list of the public trust purposes for water:

(1) water in its natural state; (2) water for traditional and customary practices; (3) water for domestic uses; (4) water for the Department of Hawaiian Home Lands, must be protected whenever feasible. There are no absolute priorities amongst the public trust purposes. In considering noninstream uses, the Commission must weigh competing public and private water uses on a case-by-case basis. In allowing for noninstream uses, the “object is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes ‘use’.” *In re Waiola O Molokai*, 103 Hawai‘i 401, 430, 83 P.3d 664, 693 (2004). The process requires weighing the present or potential instream and noninstream uses based upon best available information. CWRM Staff Submittal p. 9 (RA Vol. 2 @ 127)

39. The Wailua watershed, the Lihue Basin's surface and groundwater resources, and the ecosystems, protected habitats and endangered species, and cultural practices that rely on them are public trust resources. The waters of Wai‘ale‘ale are an essential component of the habitat of several threatened species including the highly endangered endemic Newcomb's tree snail, the

endemic damselfly, the endemic wetland birds `alae`ula and `alae ke`oke`o, and the native Hawaiian stream gobies (o`opu):

Wai`ale`ale and Waikoko streams would naturally provide mauka to makai streamflow year-round and as such, could provide substantial habitat for freshwater fauna. It is likely that native species, including `o`opu nōpili (*Sicyopterus stimpsoni*), `o`opu alamo`o (*Lentipes concolor*), `o`opu nākea (*Awaous stamineus*), and `ōpae kala`ole (*Atyoida bisulcata*) once inhabited these stream reaches. However, previous surveys by the Division of Aquatic Resources (DAR), U.S. Fish and Wildlife Service, and private consultants, have found few to zero native species in the Wai`ale`ale and Waikoko streams. The long-term diversion of water from these streams and the introduction of non-native species have had a strong negative impact on the community of native species. CWRM 8/21/2018 Staff Submittal p. 17 (RA Vol. 2 @ 135)

IV. POINTS OF ERROR TO BE RAISED AND ARGUED

40. The 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 Appellee '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 Appellee's Kapaia Cane Haul Road proposed 18" Main water line segment when connected to the existing 16" water lines 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 Appellee countered that the additional water it admitted that it needs to supply the larger-in-diameter transport line will come from the water sources it currently taps even though the natural sources of that water are the watersheds and aquifers. The standard of review on questions of pure errors of law is *de novo*.

41. The Circuit Court's Order filed 06/30/2020, was clearly erroneous and a pure error of law when it granted Appellee 's motion for summary judgment on as to Count I when 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.

42. The Circuit Court's Order filed June 30, 2020, was clearly erroneous and a pure error of law when it granted Appellee 's motion for summary judgment on Count III when 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.

43. The 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 Appellee's motion for summary judgment on Count IV when Appellee '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 9000 foot water line segment installation and 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 Appellee's water transport system.

44. "[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.

45. The Circuit Court's Order filed 10/03/2019, was clearly erroneous and a pure error of law when it granted Appellee'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.

46. The Circuit Court Order filed 06/30/2020, was clearly erroneous and a pure error of law when it granted Appellee'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 Appellee completes an EIS for its water transport system and BLNR grants it a water lease or revocable permit authorizing Appellee'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.

47. The Circuit Court's Order filed 10/03/2019, was clearly erroneous and a pure error of law when it granted Appellee '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.

48. The Circuit Court Order filed 06/30/2020, was a pure error of law when it granted Appellee's motion for summary judgment on Count VII when the record indicates that Appellee 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 Appellee did and does not deny that it has none. The standard of review on questions of pure errors of law is *de novo*.

49. The Circuit Court's Order filed 06/30/2020, was a pure error of law when it granted Appellee 's motion for summary judgment on Count II when Appellee's flawed environmental review process violated HRS §343 and HAR §11-200 requirements and Appellant'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.

V. STATUTORY QUALIFICATIONS FOR TRANSFER TO THE SUPREME COURT PURSUANT TO H.R.S. §602-58 (a)(1) and (b)(1).

H.R.S. §602-58(a)(1)

H.R.S. §602-58 Application for transfer to the supreme court. (a) The supreme court . . . shall grant an application to transfer any case within the jurisdiction of the intermediate court of appeals to the supreme court upon the grounds that the case involves: (1) A question of imperative or fundamental public importance;

50. There are four questions of imperative and fundamental public importance in this case:

Question One: If the engineering evidence in the Record on Appeal demonstrates that Appellee's proposed 18" main water line segment will **not** transport any more public trust water than its water system currently transports, does it trigger an Environmental Impact Statement (EIS) as to the significant environmental impacts on public trust resources that will be deprived

of the water transported in the new water line if an EIS has never been done on Appellee's water transport system, and if not what would?

Question Two: Must the Final Environmental Assessment (FEA) for the installation of Appellee's proposed 18" Main water transmission line segment include the significant environmental impacts on the upstream sources of the water that the new line will transport to consumers?

Question Three: Does HRS § 54-12 and 15, which empowers the counties to “manage, control, and operate the waterworks of the county, and all property thereof, for the purposes of supplying water to the public in the county,” exempt a county from compliance with HRS §171-58?

Question Four: If the 18" Main water line applicant and the FEA approving agency are the same entity, does the inherent conflict of interest violate the purpose and intent of the Hawaii Environmental Policy Act (HEPA) and the public's substantive and procedural due process rights under Hawaii's Constitution as a matter of law?

Question One: If the engineering evidence in the Record on Appeal demonstrates that Appellee's proposed 18" main water line segment will not transport any more public trust water than its water system currently transports, does it trigger an Environmental Impact Statement (EIS) as to the significant environmental impacts on public trust resources that will be deprived of the water transported by the new water line if an EIS has never been done on Appellee's water transport system, and if not what would?

51. Appellee proposes to install 9,000 feet of 18" diameter water line, a "relief line", to augment its existing 12" and 16" water lines, which have been conveying public trust waters originating in the Wailua Watershed, the State Forest Reserve and the Lihue Basin aquifer to the Kapaia Reservoir, then on to the Grove Farm Surface Water Treatment Plant (aka Waiahi SWTP) and then to consumers for their permanent use for decades. Unused stream water is not returned to the watershed. No EIS has ever been done on the environmental impact of Appellee's water transmission system and neither Appellee nor any of the other users have a permit, lease or license from the State to take and use public trust waters under HRS §171-58. The new 18"

water line segment is yet another piecemeal expansion of Appellee's extensive water extraction and transportation system that so far has evaded comprehensive environmental review and permitting by BLNR.

52. Appellee asserts that its proposed 18" water main "Relief Line" will not transport more water; rather it is to improve the hydraulic efficiency of its existing water distribution system (RA Dkt # 63 TR p. 12 line 18) and relieve inadequate capacity in its Lihue water system. (RA Dkt # 63 TR p. 5 line 25, p. 12 line 18). However, its FEA provides no engineering calculations to back up the claim that the new larger-in-diameter 18" Main will not move more water.

53. "Capacity" in this case means the volume of liquid a container can hold and "improvement in capacity", as confirmed in the Board of Water minutes, means that the purpose of the Relief Line is to increase the volume of water that can be transmitted by Appellee's water transport lines. (Dkt #55 pages 5, 7-8) The FEA states:

The proposed Relief Line will improve the existing system in this service area by removing the current capacity limitation. The proposed Relief Line will have the added benefit of being sized to provide for future transmission needs." (RA Vol. 1 @ 187)

54. Appellee offered no evidence to refute the testimony of expert witness hydrologist and civil and water resources engineer Matt Rosener who declared and his calculations demonstrated that

If the proposed 18" Relief Line is constructed as planned, the new transmission capacity for this water system segment will be approximately 9.90 MGD (combined new 18" and existing 12" lines) which is 325% of the existing 3.05 MGD (12" limiting main). This is not insignificant. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42) (RA Dkt # 63 p. 18 line 5) [Emphasis added.]

The 12" diameter main segment in the existing system limits the transmission capacity to 3.05 MGD. If the proposed 18" Relief Line is constructed, the new limiting main segments will be the 16" pipelines that the Relief Line would connect to at either end. ... [increasing transmission capacity to] 5.41 MGD, which is 178% of the existing capacity. This is also not insignificant. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42)

55. Even if that is true that the proposed 18" Main will not transport more water Appellee has not applied for nor has BLNR granted it a revocable permit, license or lease pursuant to HRS § 171-58 authorizing its current take and transport of public trust water from Kauai's Wailua Watershed and Lihue Basin through its water transmission system. HRS §171-58(c)(3) requires an EIS as a precondition to obtaining a lease, license or permit.

Question Two: Must the Final Environmental Assessment (FEA) for the installation of Appellee's proposed 18" Main water transmission line segment include the significant environmental impacts on the upstream sources of the water that the new line will transport to consumers?

56. Before Appellee takes and transports anymore public trust water from the State's watershed and ground water resources with or without a lease, license or permit from the State it needs an FEA that addresses all the significant environmental impacts of its 18"Main project on East and Southeast Kauai's public trust resources. The FEA (FONSI) at issue in this case does not comply with HRS §343 and HAR §§11-200 because it does not assess the significant environmental impacts of its water delivery system on the upstream watershed and groundwater sources of the water that it plans to transport inside its new 18" Main.

57. The Circuit Court erroneously granted Appellee summary judgment as to all counts even though Appellee '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). Its environmental assessment is limited to the 9000 foot water line segment installation area and fails to address the likely significant environmental impacts to upstream state forest reserve streams, threatened and endangered wildlife and native Hawaiian ahupua`a tenants that have never been assessed and will continue to result from the permanent removal of public trust water from the East and Southeast Kauai watersheds to supply Appellee's water transport system.

58. HRS §343 and HAR §§11-200-7 & 12(b)(8) require that component actions that are increments of a larger total undertaking are to be treated as a single action i.e. no segmentation. Appellee argues that the HRS 343-2 definition of “Action” specifically limits the **scope** of an environmental assessment of its Project to the 9,000 ft 18" Main "Relief Line" segment of its water transport system. (RA Vol. 1 @ 158 fn 3) However, the “Action” definition does not include any limiting language: “Action” means “any program or project to be initiated by any agency or applicant.” Established rules guide statutory interpretation:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, or sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. *Peterson v. Hawaii Elec. Light Co., Inc.*, 85 Haw. 322, 327-28, 944 P.2d 1265, 1270-71 (1997), superseded on other grounds by HRS § 269-15-5 (Supp. 1999) (block quotation format, brackets, citations, and quotation marks omitted).

59. Improper segmentation occurs where an action, which is part of the larger project, is a ‘necessary precedent’ for the larger project and has been treated as a stand alone, isolated project in an environmental assessment. The purpose of a water main is to transport water. It serves no purpose if it is empty. The primary impacts caused by the 18" Main will be felt at the sources of that water. The temporary impacts caused by disturbance of the soil where the new 18" waterline will be buried are minor compared to the impacts of removing the water that the line will carry from its source streams and aquifers to consumers.

60. HAR § 11-200-10(a) requires a general description of all of the action's technical, economic, social, and environmental characteristics, not just some of them. See *Umberger v. DLNR*, 140 Haw. 500, 517, 403 P.3d 277, 294 (2017):

the properly defined activity for the purposes of the HEPA analysis must encompass the outer limits of what the permits allow and not only the most restrictive hypothetical manner in which the permits may be used.

61. Where an agency or applicant engages in multiple or phased actions, HAR §11-200-7 provides that a group of actions proposed by an agency or an applicant shall be treated as a single action when:

- (1) The component actions are phases or increments of a larger total undertaking;
- (2) An individual project is a necessary precedent for a larger project;
- (3) An individual project represents a commitment to a larger project; or
- (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

See *Kahana Sunset*, 86 Haw. 66, 74, 947 P.2d 378, 386 (1997). As in *Kahana*, the proposed 18" Main is part of KDOW's larger water transport system. It has no independent utility. It would not be constructed except as part of the larger system. Isolating the installation of a 9,000 ft segment for environmental review is an improper segmentation of the project. See also *Sierra Club*, 115 Haw. at 338, 167 P.3d at 331: "Rules like HAR § 11-200-7 are meant to keep applicants or agencies from escaping full environmental review by pursuing projects in a piecemeal fashion."

62. Appellee's FEA did not identify potential impacts, evaluate the potential significance of each impact, or provide for detailed study of significant impacts on East and Southeast Kauai's natural freshwater surface and ground water resources or any of the potential direct, secondary, indirect, or cumulative impacts of the consumption of those resources. The waters of Wai'ale'ale are an essential component of the habitat of several threatened species, including the highly endangered endemic Newcomb's tree snail, endemic damselfly species and the wetland birds `alae`ula and `alae ke`oke`o, the endangered nene, and the native Hawaiian stream gobies

(o`opu). Appellee did not assess the impact of dewatering streams to feed its transport system on native, endemic and endangered species in the DLNR Forest Reserve and whether maintaining natural water levels would restore the habitat of these species.

63. Instead the FEA assessed only a few of the environmental impacts of its proposed 18" Main project associated with the installation of the 9,000 ft water line segment. The water "sources" it identified for purposes of significant impact analysis are water "development" structures, such as wells, ditches, tunnels, and a surface water treatment plant, not the original sources in the watershed even though the FEA acknowledges the natural water sources that it did not assess.² (RA Vol. 1 @ 202-203)

Question Three: Does HRS § 54-12 and 15, which empowers the counties to “manage, control, and operate the waterworks of the county, and all property thereof, for the purposes of supplying water to the public in the county,” exempt a county from compliance with HRS §171-58?

64. Hawaii's waters are public trust resources. HRS §171-58 requires a lease, license, or permit from the State of Hawaii and an EIS before they can be used. Appellee does not deny that it has none, rather it argues that because HRS § 54-12 and 15 empowers the counties to “manage, control, and operate the waterworks of the county, and all property thereof, for the purposes of supplying water to the public in the county,” it is exempt from compliance with HRS §171-58 and it can divert stream water and pump ground water to supply its waterworks without a permit or lease from the owner of that water. (Dkt # 56 pp. 49-50)

65. The ordinary meaning of the words “manage, control, and operate” do not authorize Appellee to appropriate public trust water diverted from conservation district streams and

² *"The water comes from ground water (underground) and surface water sources. Ground water comes from rain that falls in the mountain filters through the ground into formations called aquifers."* FEA pp. 29-30 citing the County of Kaua'i, Department of Water 2016 *Water Quality Report for the Lihu 'e-Kapa 'a Water System*. (RA Vol. 1 @ 202-203)

pumped from state aquifers without a lease, license or permit from the State. Appellee also argues that the HRS § 54-12 and 15 provisions give counties appurtenant and riparian water rights and that "[b]ecause this is not a water management area, therefore, common law rights apply" (RA Dkt # 63 p. 12 line 23). However, Appellant made no water management area claim and Appellee has made no claim to appurtenant or riparian rights to the stream and aquifer water that it is transporting through its water distribution system.

66. There is no language in §171-58 that exempts counties from its requirements and procedures, which include completing a conservation district use application for water taken from state conservation district land and an EIS disclosing and analyzing the significant environmental effects that are likely to result from that taking. HRS §171-58(c)(3) requires an EIS, not an EA, as a precondition to obtaining a lease. At the hearing on 09/18/2019, Appellant asked the court to require Appellee to complete an EIS on the total environmental impact of their water transport system, of which the 18" Main is yet another addition. (Dkt #61 TR p. 20 lines 18-22) The court did not do so.

Question Four: If the 18" Main applicant and the FEA approving agency are the same entity, does the inherent conflict of interest violate the purpose and intent of the Hawaii Environmental Policy Act (HEPA) and the public's substantive and procedural due process rights under Hawaii's Constitution as a matter of law?

67. Appellee as the applicant, submitted an incomplete FEA that failed to disclose and assess all the direct, indirect, secondary, and cumulative as well as the short-term and long-term likely significant environmental impacts of its 18" Main project on public trust resources as required by HRS § 343 and HAR § 11-200-10(a) and 12(b).³ Then Appellee, as the approving agency,

³ An *EA* must fully assess the cumulative impacts of a project. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 603 (9th Cir. 2010). A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably

accepted its own deficient FEA as drafted and granted itself a Finding of No Significant Impact (FONSI). No independent agency review was done as to whether the FEA complied with HRS § 343 and addressed all the applicable HAR §§ 11-200 requirements.

68. The purpose of HEPA is "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." HRS §343-1. That was not done in this case. A FONSI is easy to make if it is not in a reviewing agency's interest to look at what is being impacted, namely the East and Southeast Kauai watersheds and the DLNR Forest Reserve. (RA Dkt # 55 p. 61) (RA Dkt #47 p.79) Appellee is in the business of supplying water to consumers. However, Appellee, as a political subdivision of the State of Hawaii, has an affirmative duty to conserve and protect Hawaii's public trust resources, including the State's freshwater resources and threatened and endangered species and their habitat pursuant to the Constitution of Hawaii Article XI, which provides:

Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people. [Add Const Con 1978 and election Nov 7, 1978]

See *Mauna Kea II*, 143 Haw. at 400, 431 P.3d at 773: "The plain language of Article XI, Section 1 further requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the

foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

other in a manner consistent with their conservation." quoting *Waiahole I*, 94 Haw. at 139, 9 P.3d at 451.

69. Mr. Rosener testified that:

Given the potential for this project to 1) trigger other water system development and 2) result in continued inter-basin water transfer from several stream sources, including those under current water appropriation contested case status, it seems that potential impacts to stream water sources should have been evaluated by KDOW and their consultant in the environmental review process. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42)

See *Sierra Club*, 115 Hawai'i at 308, 167 P.3d at 301; *In re Gas Co.*, 147 Haw. 186, 207, 465 P.3d 633, 654 (2020) citing *Mauna Kea II*, 143 Haw. at 387, 431 P.3d at 760: "a state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution." Agencies are required to take a "hard look" at environmental impact disclosure documents prior to accepting them. See *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 182 n.12, 914 P.2d 1364, 1375 n.12 (1996) quoting *Stop H-3 Ass'n v. Lewis*, 538 F. Supp. 149, 159 (D. Haw. 1982). Clearly Appellee's inherent conflict of interest violates the purpose and intent of HEPA and it should have turned over review to the appropriate state agency, in this case the State of Hawaii's Department of Land and Natural Resources. That did not happen and the Circuit Court three orders granting summary judgment as to all counts were erroneous.

VI. CONCLUSION

70. This case involves four questions of fundamental public importance regarding the enforcement of Hawaii's Environmental Policy Act and the requirements of HRS §171-58. Appellee's failure to fully address the highly likely significant environmental impacts of its unpermitted use of state water over many years, its self serving and unsupported FONSI and the unlawful segmentation of its FEA undermines the very purpose of Hawaii's Environmental Policy Act. Transfer to the Hawaii Supreme Court is imperative because Appellee's conduct has

set a dangerous precedent for future unpermitted taking and use of public trust water resources without comprehensive environmental review throughout the entire State of Hawaii. Appellant respectfully requests a ruling on this case by the Hawaii Supreme Court.

Dated: Kailua, Hawaii, June 1, 2021.

/s/ Linda M. B. Paul
LINDA M. B. PAUL
Attorney for Petitioner-Plaintiff-Appellant
KIA'I WAI O WAI'ALE'ALE

LINDA M. B. PAUL, Esq. #5354
815 Pahumele Place
Kailua, HI 96734
Telephone: (808) 262-6859
Mobile: (808) 347-8825
Email: linpaul@aloha.net

No. CAAP-20-0000487
IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KIA`I WAI O WAI`ALE`ALE, an unincorporated community association,)	PETITIONER'S REQUEST FOR
)	TRANSFER OF APPEAL TO THE
)	HAWAII SUPREME COURT
Petitioner-Plaintiff-Appellant,)	
)	APPEAL FROM THE CIRCUIT COURT
vs.)	OF THE FIFTH CIRCUIT (CIVIL NO.
)	18-1-0063 KNAW)
DEPARTMENT OF WATER, COUNTY OF)	
KAUA`I, applicant and accepting agency of the)	
subject Environmental Assessment,)	
)	CERTIFICATE OF SERVICE
Respondent-Defendant-Appellee.)	
<hr/>)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Request for Transfer of Appeal to the Hawaii Supreme Court was duly served this date by the JEFS system to the following listed below:

Rosemary T. Fazio
Naomi U. Kuwaye
Nicholas G. Altuzarra

Ashford & Wriston, LLP
First Hawaiian Center, Ste 1400
999 Bishop Street
Honolulu, HI 96813
Ph: (808) 539-0415
rfazio@awlaw.com

Attorneys for Respondent-Defendant-Appellee
Department of Water, County of Kauai

DATED: Kailua, Hawai`i, June 1, 2021.

/s/ Linda M. B. Paul
LINDA M. B. PAUL
Attorney for Petitioner-Plaintiff-Appellant
KIA`I WAI O WAI`ALE`ALE