

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,

Plaintiff-Petitioner-Appellant,

v.

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

Defendant-Respondent-Appellee.

) APPEAL FROM THE CIRCUIT COURT OF
) THE FIFTH CIRCUIT (CIVIL NO.18-1-0063
) KNAW)

)
) PETITIONER-APPELLANT'S OPENING
) BRIEF; APPENDICES "A", "B", "C", "D"
) "E"; STATEMENT OF RELATED CASES;
) CERTIFICATE OF SERVICE

) APPEAL FROM THE SUMMARY
) JUDGMENTS ENTERED ON April 2, 2019
) (COUNT IV), October 3, 2019 (COUNTS V,
) VI, VIII and IX), and June 30, 2020
) (COUNTS I, II, III, VII and X), and FINAL
) JUDGMENT entered June 30, 2020
)

PETITIONER'S/APPELLANT'S OPENING BRIEF

APPENDIX

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

Come now Plaintiff-Petitioner-Appellant KIA‘I WAI O WAI‘ALE‘ALE (hereinafter "Appellant"), by and through counsel Linda M. B. Paul and hereby submits the Opening Brief of its Appeal to the Hawaii Intermediate Court of Appeals in accordance with Rules 4 and 28, Hawai`i Rules of Appellate Procedure ("HRAP").

Dated: Kailua, Hawaii, February 16, 2021

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<p>This is a challenge/appeal of a Final Environmental Assessment (FEA) and a Finding of No Significant Impact (FONSI) for an 18 “ Main water line segment that fails to disclose and assess the full extent of the significant environmental and cultural impacts that KDOW's augmented water system will cause by permanently removing and transporting unpermitted public trust water from Kauai's Wailua watershed and Lihue Basin aquifer to consumers.</p>	
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<p>authority and/or jurisdiction when it found that there were no genuine issues as to any material fact and granted all three of Appellee's Motions for Summary Judgment when the record clearly indicates that there are material factual disputes over the water volume increase.</p>	
<p>1. The Record clearly indicates that the parties dispute the material fact that Appellee's proposed installation of 9,000 feet of 18" Main water line, which augments 12" and 16" water line segments, will significantly increase its capacity to transmit unpermitted public trust water from the East and Southeast Kauai watersheds and aquifers to urban and commercial consumers.</p>	
<p>2. Summary judgment is appropriate only when no genuine issues of material fact are presented and the case can be decided solely as a matter of law. HRCF Rule 56; <i>Kajiya v. Dept of Water Supply</i>, 2 Haw. App. 221, 629 P.2d 635 (1981 Haw. App.)</p>	
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HRS § 343 and HAR § 11-200, which require disclosure and assessment of the full extent of the likely significant environmental impacts of its 18" Main project, which will augment transport of more unpermitted state water resources.

1. 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 significant environmental impacts of its 18" Main project on state public trust resources as required by HRS § 343 and HAR § 11-200-10(a) and 12(b).

2. Appellee, as the approving agency, accepted its own deficient FEA as drafted and granted itself a 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.

C. The Fifth Circuit Court erroneously granted Appellee summary judgment.....22 on Count IV when its FEA 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.

1. Appellee improperly segmented its FEA when it limited its environmental assessment of the Kapaia Cane Haul Road 18" Main water line project to the installation area immediately around a new 9000 foot segment without environmental review of its impact on the natural resources sustained by the waters it will take and transport away from the East and Southeast Kauai watershed.

2. The FEA failed to disclose and analyze the significant environmental impacts on upstream state forest reserve streams, wildlife and native Hawaiian ahupua`a tenants that will likely result from the permanent removal of additional unpermitted state water from the watershed to supply its augmented water transport system and downstream commercial and urban consumers.

3. The FEA indicates that the 18" Main water line segment is sized to be compatible with future 18" water line segments that will replace existing 12" and 16" lines and is a 'necessary precedent' for the larger project.

D. The Fifth Circuit Court erroneously granted Appellee summary judgment.....24 on Count VIII even though the FEA failed to disclose and assess the 18" Main project's impact on public trust water resources and the habitat of threatened and endangered species in violation of HRS §§ 195D, 343, HAR §11-200 and Hawaii's Constitution Article XI §1.

1. The natural resources of Kauai's East and Southeast watershed are public trust resources protected by HRS §195D-4 and the Hawaii Constitution Article XI §1 that are dependent on the water that Appellee's 18" Main project will transport to its customers and

Appellee, a political subdivision of the State, has an affirmative duty to conserve and protect Hawaii's public trust resources, yet its FEA did not disclose and assess the likely significant environmental impacts that its augmented water transport system will have on public trust resources.

2. 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).

3. 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.

E. The Fifth Circuit Court erroneously granted Appellee summary judgment.....28 on Count IX even though the FEA failed to comply with HRS § 343 and the Hawaii Constitution Article XII Section 7 by not disclosing, assessing and protecting the rights of the native Hawaiian ahupua`a tenants who will be impacted by the 18" Main project and its augmented water transport system.

1. Native Hawaiians conduct traditional and customary practices in and near the East and Southeast watersheds that are significantly impacted by Appellee's water withdrawal, transport and consumptive operations.

2. The FEA limited the scope of the proposed action that it assessed for impacts to traditional and customary Native Hawaiian practices to the project installation area around Kapaia Cane Haul Road and the Hanamā`ulu ahupua`a and failed to identify all the upstream cultural resources and traditional and customary practices that are likely to be significantly impacted in the ahupua`a of Wailua.

F. The Fifth Circuit Court erroneously granted Appellee summary judgment.....30 on Count VII even though the record indicates that Appellee does not deny that its water transport system is taking and transporting public trust water without a permit, lease or license from the State as required by HRS § 171-58 and without an EIS having ever been done.

1. Appellee has not applied for nor has BLNR granted Appellee a revocable permit, license or lease pursuant to HRS § 171-58 authorizing the taking and transporting of public trust water from Kauai's Wailua Watershed and Lihu`e Basin through its augmented water transport system.

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on Count II when Appellee’s flawed environmental assessment process violated HRS § 343 and HAR §11-200 review and comment requirements and Appellant’s substantive and procedural due process rights as guaranteed by the Hawaii Constitution Article XI § 5 when Appellee failed to follow noticed procedures for reviewing and considering all public comments before making its FONSI decision and submitting its FEA.

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The FEA (FONSI) failed to set forth sufficient information to be able to assess the likelihood of significant, substantial, adverse environmental impacts that the 18" Main water line, when added to the existing 12" and 16" water lines, will have on the Wailua watershed and Lihue Basin's surface and groundwater resources and the ecosystems, the natural resources and the cultural practices that rely on them.

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APPENDICES

(Appendices "A", "B", "D" - "E" to be filed separately as a supporting documents)

- App. A. Final Judgment in CIVIL NO. 18-1-0063 KNAW) filed on 06/30/2020.
(JIMS Dkt # 64)

- App. B. Orders of the Circuit Court of the Fifth Circuit entered on 04/02/2019
(RA Vol. 1 @ 306-307), 10/03/2019 (RA Vol. 2 @ 189-190), and 06/30/2010
(JIMS Dkt # 62)

- App. C. Relevant Parts of Statutes and Rules: HAR § 11-200-12.

- App. D State Commission on Water Resource Management (CWRM) 8/21/2018 Staff
Submittal water flow diagram. (RA Dkt #55 @ 61)

- App. E. KDOW Minutes for 1/28/2010. (Dkt. #56 pp 199-205)

KDOW Minutes for 12/17/2009. (RA Vol. 1 @ 267-273)

I. STATEMENT OF THE CASE

A. Nature of the Case

1. This case is about water. It is about how over the course of three decades the Kauai Department of Water (KDOW) took and transmitted an ever increasing amount of public trust water from the East and Southeast Kauai watershed and aquifer to private and commercial entities for their permanent use to the detriment of the public trust's beneficiaries without a permit, lease or license from the State of Hawaii and without ever doing a full assessment of the likely environmental impacts cause by those takings.

2. Plaintiff-Petitioner-Appellant KIA‘I WAI O WAI‘ALE‘ALE ("Appellant") is an unincorporated community association whose members use and enjoy the environs, cultural and natural resources, and waters of Wai'ale'ale, Waikoko, Ili'ili'ula, Iole, Waiaka, Waiahi. Kaulu and Palikea in the East and Southeast Kauai watershed 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)

3. On 04/23/2018, Appellant filed a complaint and request for declaratory and injunctive relief in the Environmental Court of the Fifth Circuit pursuant to Hawaii Revised Statutes ("HRS") § 343. The Complaint challenged the Kapaia Cane Haul Road Main -- Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) submitted and approved by Defendant-Respondent-Appellee KDOW ("Appellee") for a proposed 18" water main that will take and transport additional public trust water originating in state streams and aquifers to and for the permanent use and benefit of private entities. Appellant filed an Amended Challenge/Appeal/Complaint on 10/17/2018. (RA Vol. 1@ 113-139)

4. Appellee is organized under article XVII of the Kaua‘i County Charter (2012) and is the applicant and accepting agency of the subject of the FEA (FONSI) at issue in this complaint. (RA Vol. 1 @ 116) Appellee's 18" Main project requires state and county funding, which triggers 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 under HRS §171-58.

5. Appellant complained that as a result of the legally deficient FEA (FONSI) published in *The Environmental Notice* March 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 water transport project as required by HRS §§ 171-58 and 343-5. (RA Vol. 1 @ 113-139)

6. Appellant's complaint was also based on Appellee's violations of the public trust under HRS Chapter 195D-4 and violations of Article I section 5, Article XI section 1 and Article XII section 7 of the Constitution of Hawaii. (RA Vol. 1 @ 114-115, 120-130).

7. Appellant brings this appeal to challenge the Environmental Court's three orders granting summary judgment to Appellee on all counts of Appellant's complaint 5CC 18-1-0063(KNAW), filed on 04/02/2019, 10/03/2019, and 06/30/2020 respectively, true and correct copies of which are attached hereto as Exhibit "A", and Final Judgment filed on 06/30/2020, a true and correct copy of which is attached hereto as Exhibit "B". This appeal is brought pursuant to HRS §§171-58, 195D-4, 343, 602-57, 604A-2, 632-1 and 641-2(a), Rule 58 of the Hawaii Rules of Civil Procedure ("HRCP") and the Constitution of Hawaii.

B. Course and Disposition of the Proceedings

8. 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 OEQC's *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.

9. Appellant and its members submitted comments on the DEA until the end of 03/12/2018, the day comments were due. On that day, prior to the end of the comment period, Appellee approved a Final EA and FONSI for Water Plan 2020 Project No. PLH-35b and transmitted it to OEQC. (RA Vol.1 @ 170-248) It was published in the OEQC Bulletin on March 23, 2018.

10. Appellant filed an appeal/challenge/complaint on 4/23/2018, and a First Amended Challenge/Appeal/Complaint on 10/17/2018, in which Appellant raised claims challenging Appellee's FEA (FONSI) for its proposed 18" Main project pursuant to HRS §343 and HAR §11-200, its transport of state water in its 12", 16" and proposed 18" water lines without a permit, license or lease pursuant to HRS § 171-58, and violations of the public trust under HRS Chapter 195D-4 and Article I section 5, Article XI section 1 and article XII section 7 of the Constitution of Hawaii. (RA Vol. 1 @ 113-139). The Environmental Court had subject matter jurisdiction pursuant to HRS §§ 343-1, 343-2, 343-5, 343-7, 603-21.5, 603-21.9, 604A-2, 632-1 and the Constitution of Hawaii Article XI § 9.

11. 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 Lihu`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.
12. On 11/08/2018, Appellee filed its Answer to Appellant's First Amended Complaint. (RA Vol. 1 @ 143-152)
13. 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 appended an incomplete copy of the FEA to its motion. (RA Vol. 1 @ 170-248)

14. 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)

15. 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.

16. On 04/02/2019, the Fifth Circuit 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)

17. 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 (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.

18. 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.

19. On 10/03/2019, the Fifth 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)

20. 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)

21. 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)

22. 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.

23. On 06/23/2020, a hearing was held on Appellee's third motion for summary judgment. On 06/30/2020, the Fifth 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.

24. On 06/30/2020, the Fifth 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)

C. Facts Material to Questions and Points Presented

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. The East and Southeast Kaua`i's freshwater resources are vital to Appellant's need for fresh water and its abilities to conduct native Hawaiian traditional and customary practices, recreation, environmental appreciation, research interests, appreciation of protected habitat and endangered species, and aesthetic interests in the public trust resource area. 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)

26. 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)

27. 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)

28. The Līhu‘e Development Plan proposed that the Grove Farm master planned community would be served by the County’s Puhī-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. 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)

29. 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. Neither Grove Farm, Waiahi Water Company, nor Appellee holds a water lease or revocable permit from the BLNR authorizing their use of East and Southeast Kaua‘i’s freshwater resources. (RA Vol. 1 @ 118)

30. 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 the Līhu‘e Development Plan. (RA Vol.1 @ 175,182, 227-228, 232)

31. 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)

32. The proposed 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. (RA Vol. 1 @ 90)

33. Without providing any supporting evidence, the FEA asserts that the 18" Main will not cause any changes to the water sources, although Appellant's expert witness has refuted this. (RA Dkt #56 pp 191-193) Appellee identifies those sources as 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. The project proposes the use of state and county lands or funds, triggering compliance with environmental review requirements under HRS § 343-5(a)(1). (RA Vol. 1 @ 90)

35. On February 8, 2018, Appellee published its Draft EA and Anticipated Finding of No Significant Impact (AFONSI) in the *Environmental Notice*, which is published by the State Office of Environmental Quality Control (OEQC). Comments on the DEA-AFONSI were due by March 12, 2018. (RA Vol. 1 @ 85) (RA Vol. 2 @ 17)

36. Appellant and its members submitted timely comments on the DEA-AFONSI, including extensive exhibits, Board of Water Supply meeting minutes, and other documents, before and on March 12, 2018, up to 6:12 p.m. (RA Dkt #54 p. 37) Andrew Hood emailed a three pages of comments at 5 p.m. March 12, 2018. (RA Dkt # 54 pp 28-31) However Appellee's response to Mr. Hood, although dated March 12, 2018, actually responds to correspondence received from Mr. Hood on March 7, 2018. (RA Dkt # 54 pp 32-35).

37. The FEA consultants replied to comments by letters dated March 12, 2018, and submitted its FEA (FONSI) for the project by letter dated March 12, 2018, which was stamped "Received March 13, 2018" on the OEQC website. (RA Vol. 1 @ 170)

38. On March 23, 2018, the FEA (FONSI) for the project was published in OEQC's *Environmental Notice*, beginning a 30-day period to appeal the FONSI. Appellant filed a timely appeal/challenge/complaint on 4/23/2018. (RA Vol. 1 @ 8-28)

39. 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)

40. 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)).

41. 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)

42. 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)

43. 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)
44. As Appellee admits, the 18" diameter "Relief Line" will 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) Appellee's 16" water main has been transporting public trust waters that originate in the Wailua Watershed, state conservation district lands, namely the State Forest Reserve, and the Lihue Basin to and for the permanent use and benefit of private interests for decades. Its "Relief Line" is yet another expansion of its broad reaching water extraction and distribution system that so far has evaded comprehensive environmental review and permitting by BLNR.
45. The Wailua watershed and 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)

II. POINTS OF ERROR

1. 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 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 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*.
2. The Fifth 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.
3. The Fifth 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.

4. 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 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.

"[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.

5. The Fifth 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.

6. The Fifth 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.

7. The Fifth 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.

8. The Fifth 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*.

9. The Fifth 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.

III. STANDARD OF REVIEW

1. Mixed questions of law and fact are reviewed under the clearly erroneous standard because "the court's conclusions are dependent upon the facts themselves in each individual case." *Amfac v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 119, 839 P.2d 10, 29 (1992). See also *Dao v. Zoning Board of Appeals*, 144 Haw. 28, 39, 434 P.3d 1223, 1234 (App. 2019) A finding or mixed determination is erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) the appellate court has a firm and definite conviction that a mistake has been made. *DeVictoria v. H.B.K. Contractors*, 56 Haw. 552, 545 P.2d 692 (1976). "Substantial evidence" has been defined as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *In re Water Use Permit Applications (Waiahole I)*, 94 Haw. 97, 119, 9 P.3d 409, 431 (2000) (citations omitted).

2. Conclusions of law are freely reviewable under subsections (1), (2), and (4). *Waiahole I*, 94 Haw. at 119, 9 P.3d at 431. A review of a decision made by the Circuit Court upon its review

of an appeal from an agency's decision is a “secondary appeal” governed by HRS Chapter 602. Alleged errors of law are reviewed *de novo*. *Bremer v. Weeks*, 104 Haw. 43, 51, 85 P.3d 150, 158 (2004) (citing *Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd.*, 100 Haw. 97, 112, 58 P.3d 608, 623 (2002)). The *de novo* standard is also known as the “right/wrong” standard.

3. For agency determinations under the Hawaii Environmental Policy Act of 1974 (“HEPA”)¹, HRS Chapter 343, “the appropriate standard of review depends on the specific question under consideration.” *Sierra Club v. Dep't of Transp.* (“Superferry I”, 115 Haw. 299, 315, 167 p.3d 292, 308 (2007)). [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.

4. “A decision of an administrative agency is clearly erroneous if it is not supported by substantial evidence in the record, or if the court is left with a definite and firm conviction that a mistake has been made in view of the reliable, probative, and substantial evidence on the whole record.” *Homes Consultant Co., Inc. v. Agsalud*, 2 Haw. App. 421, 425, 633 P.2d 564, 568 (1981). (See also *Price v. Zoning Board of Appeals*, 77 Haw. 168, 176, 883 P.2d 629, 637 (1994) (citing 60 Hawaii 625, 629, 594 P.2d 612, 617 (1979)).

5. *In re Water Use Permit Applications (Waiahole I)*, 94 Haw. at 119, 9 P.3d at 431. “[T]he proper inquiry for determining the necessity of an EIS [is] based on the language of HRS § 343-5(c) . . . whether the proposed action will 'likely' have a significant effect on the environment” *Kepo`o v. Kane*, 106 Haw. 270, 289, 103 P.3d 939, 958 (2005). See also *Pele Def. Fund v. Dep't of Land & Natural Resources*, 141 Haw. 381, 409 P.3d 786 (Haw. App. 2018).

6. An administrative agency's findings of fact are reviewable for clear error under HRS § 91-14(g)(5). “An administrative agency's findings of fact will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or the appellate court, upon a thorough examination of the record, is left

¹ HEPA was patterned after the *National Environmental Policy Act of 1969 (NEPA)*, 42 U.S.C. § 4321 *et seq.* (2015). See *Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 306, 167 P.3d 292, 299 (2007)

with a definite and firm convictions that a mistake has been made." *Topliss v. Hawaii County Planning Comm'n*, 9 Haw. App. 377, 283, 842 P.2d 648, 653 (1993 Haw. App.) citing *Feliciano v. Board of Trustees*, 4 Haw. App. 26, 659 P.2d 77 (1983). See two-part test in *United States v. United States Gypsum Co.*, 33 U.S. 364, 395 (1948); *In re Hawaii Elec. Light Co.*, 60 Hawaii 625, 629, 594 P.2d 612, 617 (1979): Is the finding supported by substantial evidence, and even if it is and a reasonable person could agree with it, does the appellate court nevertheless have a firm conviction of mistake?

IV. ARGUMENT

A. The Fifth Circuit Court acted erroneously and in excess of its statutory authority and/or jurisdiction when it found that there were no genuine issues as to any material fact and granted all three of Appellee's Summary Motions when the Record clearly indicates that there is a genuine issue of material fact namely the parties dispute whether Appellee's proposed 18" Main water line, which augments 12" and 16" water line segments, will significantly increase its capacity to transmit unpermitted state water from the East and Southeast Kauai watersheds and aquifers to commercial and urban consumers.

1. The FEA stated that the 18" Main project would not result in the loss of any natural resources because the existing volume of water output from certain wells and the Waiahi SWTP would not increase, but did not comment on planned increased water output under the Līhu'e Development Plan. While Appellant has repeatedly insisted that there is no proposed increase in water withdrawal or storage with the project (RA Vol. 2 @ 11, 27, 179), the FEA also 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)

2. Appellee argues that the benefits of the Relief Line are associated with the "improvement in transmission capacity." (Dkt # 63 TR p.12 line 18) However, "capacity" in this instance 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)

3. Matt Rosener, a professional hydrologist and civil and water resources engineer reviewed the FEA and in his Declaration attached to Appellant's opposition to Appellee's summary motion on all remaining counts stated:

The FEA repeatedly makes the claim that the proposed Relief Line will not result in increased withdrawal from any groundwater or surface water sources. However, in light of Grove Farm's expansion approval for their Waiahi SWTP by the Kauai Board of Water Supply (ref. meeting minutes from 1/28/201 KDOW meeting), it seems highly likely that increased water transmission capacity through the proposed Relief Line will trigger subsequent development of water processing capacity. (ref. 03/03/2018 DOH inspection report for the Waiahi SWTP "facility is slated for an upgrade that will increase production capacity from 3.0 MGD to 4.77 MGD") [over 50% increase]

Meeting minutes from KDOW board meetings on 12/17/2009 [Ex. 5] and 1/28/2010 suggest that addressing the capacity limitation of the water main segment in question would lead to expansion of capacity at the Waiahi SWTP. While the FEA document states that the proposed Relief Line will not "induce unplanned development", it is likely to induce planned development and growth in this KDOW water service area by allowing increased transmission of water through the water main segment in question.

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.** The 12" diameter main segment in the existing system limits the transmission capacity to 3.05 MGD while meeting the Hawai'i Water System Standards maximum velocity requirement of 6 feet per second. If the proposed Relief Line is constructed, the new limiting main segments will be the 16" pipelines that the Relief Line would connect to at either end. The transmission capacity in this scenario would be 5.41 MGD which is 178% of the existing capacity of 3.05 MGD. This is also not insignificant. Future water demand estimates for Lihue-Puhi presented in KDOW's Water Plan 2020 are 4.07 MGD and 5.50 MGD for 2020 and 2050, respectively. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42) (RA Dkt # 63 p. 18 line 5) [Emphasis added.]

4. Mr. Rosener continues:

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)

Appellee offered no evidence to refute Mr. Rosener's engineering calculations and the FEA provides no calculations to back up the claim that the 18" Main will not take more water.

5. Mr. Rosener also reviewed the Instream Flow Standard Assessment Report for the Wailua hydrologic unit that was filed with CWRM. (RA Vol. 2 @ 119-143) He states in his Declaration with regard to the sources and storage of the water referred to in the FEA that the schematic map of the drainage area in the CWRM staff submittal of Aug. 21, 2018, p. 16, (RA Vol. 2 @ 134) demonstrates that:

[a] significant source of the water in the Kapaia Reservoir is from streams in the Wailua River drainage basin located north of the reservoir. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42)

6. Mr. Rosener observed that:

While the Waiahi SWTP may be considered a source of potable water to the KDOW Lihū`e-Kapa`a water system, the streams of East Kaua`i watershed are, in fact, the water sources that supply this system. The KDOW FEA did not evaluate whether or not there was any environmental impact to the East Kauai streams, the surrounding areas, their habitats, or the protected and endangered species identified in those areas with those streams.

7. Summary judgment is appropriate only when no genuine issues of material fact are presented and the case can be decided solely as a matter of law. HRCP Rule 56; *Kajiya v. Dept of Water Supply*, 2 Haw. App. 221, 629 P.2d 635 (1981 Haw. App.)

A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The court must view the evidence in the light most favorable to the non-moving party. A court must view all of the evidence and the inferences drawn there from in the light most favorable to the party opposing the motion. *Sierra Club v. Dep't of Transp.*, 115 Haw. 299, 313, 167 P.3d 292, 306 (2007)

"It should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." *Balthazar v. Verizon Hawaii, Inc.*, 109 Haw. 69, 72, 123 P.3d 194, 197 (Haw. 2005) (citations omitted). A party seeking summary judgment may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent. *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 772 P.2d 1187 (1989). In cases of public importance summary judgments should be granted sparingly, and never on limited and indefinite factual foundations. *Molokai Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 629 P.2d 1134 (1981). Summary disposition "is a drastic remedy which

must be cautiously invoked." *Mednick v. Davey*, 87 Haw. 450, 455, 959 P.2d 439, 444 (Haw. App. 1998). *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)):

8. Clearly there is a material factual dispute as to the whether or not Appellee's proposed 18" Main will result in an even greater volume of state-owned water being permanently taken from the East and Southeast Kauai watershed and aquifer for which no permit, lease or license has ever been granted by the BLNR (RA #59 TR p. 18 lines 14-17) nor has any environmental assessment ever been done on the environmental impacts of Appellee's water transport system as a whole. The Circuit Court erred in granting Appellee's motions for summary judgment on all counts.

B. The Fifth Circuit Court erroneously granted summary judgment on Counts I and III even though Appellee's FEA (FONSI) did not comply with HRS § 343 and HAR § 11-200, which require disclosure and assessment of the full extent of the likely significant environmental impacts that its water transport system will cause when a 9,000 foot segment of 18" water line augments existing 12" and 16" water lines that transport unpermitted public trust water from the East and Southeast Kauai watershed to consumers.

9. A Finding of No Significant Impact (FONSI) is easy to make if one doesn't 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) Appellant and its members use and enjoy the environs, the natural and cultural resources and the waters of Wai'ale'ale and its tributaries for native Hawaiian traditional and customary practices, domestic uses, recreation, research, environmental uses and aesthetic purposes. (RA Vol. 1 @ 116) The purpose of the 18" Main "Relief Line", which will augment the existing 12" and 16" lines, is to increase the capacity of Appellee's water transport system. That system transports public trust water from watersheds and aquifers to the Kapaia Reservoir, then to the Grove Farm SWTP (aka Waiahi SWTP) and then through 12" and 16" water lines to consumers for their permanent use. Unlike Hawaii in the past, unused stream water is not returned to the watershed at the end of the transport system.

10. The FEA did not assess whether the increased transport capacity to be achieved by the addition of an 18-inch Main "Relief Line" is likely to cause significant environmental impacts to the watershed streams, surrounding areas, habitats, and/or the protected and endangered species identified in those areas with those streams. HRS § 343 and HAR § 11-200-9(a)(3) requires an

applicant to “[p]repare an environmental assessment pursuant to section 11-200-10 of [HAR Chapter 11-200] and to assess direct, indirect, secondary, or cumulative impacts of its proposed action in order to determine whether the action could have a significant effect on the environment.” Appellee did not do this when it limited its FEA to the immediate construction area around 9,000 foot Relief Line project. (RA Vol. 1 @ 186-209)

11. HRS § 343-2 defines "environmental assessment" as: a written evaluation to determine whether an **action** may have a **significant effect** on the environment. "An environmental assessment must include the following: (1) a detailed description of the proposed action or project; (2) an evaluation of the direct, indirect, and cumulative impacts; (3) a discussion of alternatives to the proposed project or action; and (4) a description of any measures proposed to minimize potential impacts." *Kilakila*, 138 Haw. at 370, 382 P.3d at 182. HRS 343-2 also defines “significant impact” as:

the sum of effects 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 and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise set forth in section 11-200-12 of this chapter. [See Appendix "C"]

12. Appellee argues that the HRS 343-2 definition of “Action” specifically limits the **scope** of an environmental assessment and 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).

13. 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. *Umberger* held that: 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. *Umberger v. DLNR*, 140 Haw. 500, 517, 403 P.3d 277, 294 (2017)

14. The 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 surface or ground natural freshwater resources or any of the potential direct, secondary, indirect, or cumulative impacts of the increased consumption of those resources. Instead the FEA assessed only a few of the environmental impacts of its 18" Main project associated with the installation of the 9,000 ft water line segment. The water "sources" 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.² (RA Vol. 1 @ 202-203)

15. Appellee's FEA does not disclose and evaluate the significant environmental impacts of extracting and transporting water from the watershed streams and aquifers in violation of HAR § 11-200-12(b). All thirteen (13) of the HAR § 11-200-12 Significance Criteria apply to the project. (See Appendix "C")

16. Hydrologist and water resources engineer Matt Rosener, who worked on stream and watershed management issues on Kaua'i for more than 15 years, found the following:

Based on my review of the FEA and my personal knowledge of the stream sources of the water stored in the Kapaia Reservoir, there has not yet been an evaluation of the environmental impact to the source of the waters in the Kapaia Reservoir, and therefore the KDOW FONSI is without merit. Having walked for miles along the State land streams, Wai`ale`ale and Waikoko, on multiple occasions, I have personally observed the environmental impact and damage to the streams and their surroundings caused by the diversion of more than 13 million gallons of water per day (MGD), on average. While the Waiahi SWTP may be considered a source of potable water to the KDOW Lihue-Kapa`a water system, the streams of the East Kaua'i watershed are, in fact, the water sources that supply this system. (RA Dkt # 56 pp 191-193) (JIMS Dkt # 42)

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)

17. Mr. Rosener concludes:

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)

18. The insertion of an 18" diameter line sandwiched between two existing 16" lines suggests that Appellee intends to replace the remaining 16" lines in its system with 18" lines in the future, which will transport even more public trust water. Although in his response to Mr. Hood's March 7, 2018 letter Appellee's consultant claimed "[t]he Proposed Relief Line addresses existing inadequate transmission facilities and is not a commitment to larger actions." (RA Vol. 2 @ 181), the FEA states that "[t]he proposed Relief Line will have the added benefit of being sized to provide for future transmission needs." (RA Vol. 1 @ 187)

19. Appellee also asserts that the additional water that it eventually admitted that it needs to supply the larger transport line will come from the water sources it currently taps and claims that the "project does not cause any changes to existing sources" (RA Dkt #63 p. 7 line 21). Appellee offers no evidence to support this claim and the FEA does not provide any calculations that contradict those of Mr. Rosener's. Although the FEA does disclose the natural sources of the water that feeds its system, it does not assess the environmental impact of permanently taking water from the natural sources.

20. The FEA provides only a partial description and assessment of the environmental impacts of its water extraction and distribution system. The cumulative impacts disclosed in the FEA are limited to construction-related impacts on roadway or development projects - NOT the cumulative impacts on the natural sources of the water that is and will be transported through its augmented system. By transporting more and more water from natural sources through one new and larger line segment at a time and limiting its environmental assessment to the impacts around the new line segment's installation site Appellee's entire water transport system has escaped comprehensive environmental review. No EIS has ever been done on the environmental impacts of Appellee's water transport system on the watershed and groundwater sources of the water. This is a classic case of unlawful segmentation in violation of HRS § 343 and HAR §§11-200-7 & 12(b)(8).

21. In sum the FEA (FONSI) did not assess all the likely significant environmental impacts, evaluate the potential significance of each impact, or provide for detailed study of significant impacts on Kauai's natural fresh water resources that the 18" Main segment will transport, or any of the potential direct, secondary, indirect or cumulative impacts of current or increased consumption of those resources by its augmented water transport system as required by HRS § 343-2 and HAR § 11-200. It did not assess the impacts upstream of the project on the East and Southeast Kauai watershed, the Lihue basin ground water supply, the habitat of endangered species, and on native Hawaiian cultural practitioners or the downstream impacts of not returning the water to the now-dry streambeds.

C. The Fifth Circuit Court erroneously granted Appellee's motion for summary judgment on Count IV when its FEA (FONSI) 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.

22. Appellee improperly segmented its FEA when it limited its environmental assessment of the environmental impacts of the Kapaia Cane Haul Road 18" Main project to the installation of the 9000 ft water line segment and not on the increased volume of water it will transport and did not 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 watersheds to supply its water transport system and downstream commercial and urban consumers, including the Waiahi SWTP, and the Lihue Master Planned Community.³

23. The FEA addressed the Kapaia Cane Haul Road 18' Main water transport line plumbing and KDOW's water system, but not the original sources and final destination of the water the system transmits. Appellee alleges that "the Relief Line has utility separate and independent from that Development Plan, and is neither a condition precedent to nor dependent on the Development Plan." (RA Dkt # 59 p. 6 lines 1-7) Contrary to this assertion, the Board of Water Supply (BWS) meeting minutes from December 17, 2009 confirm that the addition of the 18" main is a necessary component of the plan to expand the capacity of the Waiahi SWTP.

Mr. Nishimura added that specifically there was the issue of the Ehiku line, and he felt that it was clear that there was a disagreement on that. He asked the applicant if they do

³ "Assessment limited to resources found within proposed project area." (RA Vol. 2 @ 75-76)

the expansion would it require this line to go in; Mr. Tresler replied, "yes." (RA Dkt #55 p. 5)

24. At the 12/17/2009 Board of Water Supply meeting the KDOW engineer and the Grove Farm manager each admitted that the 18" Main from the Ma`alo cane hall road to Ehiku is only required when the Waiahi SWTP expands in order to deliver the increased volume of water needed for the "Lihue Development Master Plan" and the Kapaa developments.⁴ (RA Vol. 1 @ 268-273)

25. 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. 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 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."

26. Appellee's FEA identifies the "source capacity" as the referent for its assessment of environmental impacts, namely 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 @ 202)

⁴ 12/17/2009 KDOW Board Meeting Minutes: "If the Board agrees to this expansion, there should be no request to pay for pipe transmission capacity needed to bring the water into the distribution system if it doesn't participate in the expansion." (RA Vol. 1 @ 269)

27. Although the FEA and Appellee admit that the original sources that feed these secondary sources are Kauai's freshwater streams, springs and ground water aquifers, which are public trust resources, the FEA does not assess the environmental impact of the 18" Main project on them. (Dkt #56 p. 204) Appellee contends that the streams and ground water that feed the Waiahi SWTP are "raw water sources" and not in need of environmental review. (Dkt #56 p. 14 Response #6) Even though the stream water diverted to tunnels and pumped water will not be returned to the watershed the FEA claims that the project would not irrevocably commit a natural resource because the water resources would be used for domestic purposes, although it acknowledged that the Lihu'e water system is used for commercial, industrial, and resort purposes as well as public and residential uses. (RA Vol. 1 @ 207)

28. The Hawaii Supreme Court has held that an EA is "an informational documents prepared by either the agency proposing an action or a private applicant which is used to evaluate the possible environmental effects of a proposed action." *Sierra Club*, 115 Haw. at 307, 167 P.3d at 300. "The purpose of HEPA and the legislature's intent in enacting HEPA indicate that it was not meant to be applied to a narrow set of activities." *Umberger* 140 Haw. at 515, 403 P.3d at

29. In sum there is insufficient information in Appellee's FEA to support its FONSI because the FEA is segmented and ignores the environmental impacts of the transport of water out of the Kauai Wailua watershed, the DLNR Forest Reserve and the East and Southeast Kauai aquifer to commercial and urban consumers that the proposed 18" Main will augment.

D. The Fifth Circuit Court's erroneously 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 the habitat of threatened and endangered species in violation not only of HRS § 343 and HAR § 11-200, but also Hawaii's Endangered Species Act HRS § 195D and Hawaii's Constitution Article XI § 1.

30. Appellee's FEA identified and addressed only the secondary water sources for its Lihu'e water system, namely tunnels, wells, a reservoir and a private surface water treatment plant (SWTP). (RA Vol. 1 @ 203) Each of these water "development" structures "source" their water from public trust springs, streams, and groundwater aquifers in the Wailua watershed conservation district lands that provide habitat for Hawaii's endangered species. (RA Vol. 2 @ 124, 131-132, 135, 137-138) (Dkt #55 p. 61) The natural resources of Kauai's East and Southeast watershed, which include the habitat of Hawaii's endangered and threatened wildlife,

are public trust resources protected by HRS §195D-4 and the Hawaii Constitution Article XI §1. See *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve, (Mauna Kea II)* 143 Haw. 379, 400, 431 P.3d 732, 773 (2018) "We therefore now hold that conservation district lands owned by the State, . . . , are public resources held in trust for the benefit of the people pursuant to Article XI, Section 1."

31. The FEA did not disclose and assess the environmental impacts of its proposed 18" Main water line on the public trust resources impacted by its augmented water transport system. (See *Kelly v. 1250 Oceanside Ptrns*, 111 Haw. at 222; 140 P.3d at 1002. "[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. at 422-23, 312 P.3d at 298-99.

32. On Aug. 21, 2018, the CWRM Staff sent a submittal to the Commission requesting it to consider 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 water transport system: WAILUA (2040): Waikoko Stream (Tributary of South Fork Wailua River) and WAILUA (2040): North Fork Wailua River (i.e., Wai‘ale‘ale Stream).⁵ (RA Vol. 2 @ 119-143)

33. 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,

⁵ 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 (RA Vol. 2 @ 120)

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 (RA Vol. 2 @ 127)

34. Appellee's proposed 18" Main line will increase the capacity of its water distribution system to transmit public trust waters originating in the Wailua watershed and state conservation district lands and the Lihuea Basin groundwater resources to private and commercial entities. These forest ecosystems, protected habitats and the endangered species that depend 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 wetland birds `alae`ula and `alae ke`oke`o, and the native Hawaiian stream gobies (o`opu).

35. HRS chapter 195D-4 Endangered species and threatened species provides that:

(a) Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the Endangered Species Act shall be deemed to be an endangered species under this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the Endangered Species Act shall be deemed to be a threatened species under this chapter. The department may determine, in accordance with this section, however, that any such threatened species is an endangered species throughout all or any portion of the range of such species within this State.⁶

36. Wai‘ale‘ale and Waikoko streams in their natural state provide mauka to makai streamflows year-round and as such 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), the U.S. Fish and Wildlife Service (USFWS) and private consultants have found few to no 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 (RA Vol. 2 @ 135)

⁶ HRS § 195D-2 "Endangered Species Act" means the Endangered Species Act of 1973, 87 Stat. 884, or as such Act may be subsequently amended.

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

38. Appellee failed to consider, protect and advance the public's rights in freshwater stream resources at every state of the planning and decision-making process of its 18" Main project by *inter alia* failing to prepare legally sufficient environmental review disclosure and assessment documents. In the absence of an EIS, there is insufficient material evidence to support a FONSI where there is no information in the FEA that the 18" Main project will not cause significant adverse impacts upon the natural resources upstream of the project in violation of the Hawaii Constitution Article XI § 1 and the Public Trust Doctrine. "Substantial evidence" has been defined as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." *Waiahole I*, 94 Haw. at 119, 9 P.3d at 431.

39. Appellee's project "to provide redundancy and reliability to KDOW's water system" will require the removal of even more public trust water from the Wailua watershed than it currently extracts. It has no permit, lease or license from BLNR that allows the current extraction and has never prepared an Environmental Impact Statement (EIS) for the current extraction. The continuing diversion of stream water and removal of groundwater from the aquifer that contributes to stream flow dewatering threatens endangered wildlife.

40. The FEA also did not assess whether a reduction in its stream dewatering to feed its water transport system might help restore habitat of native damselfly species, native aquatic species and the endangered Newcomb's snail nor did it disclose and assess the impacts on the watershed of its planned future increased water demand and output.

41. In sum Appellee did not perform its duties as a public trustee when it failed to consider, protect and advance the public's rights in freshwater and stream resources at every stage of the planning and decision-making process and failed to prepare adequate environmental review disclosure documents that assess all the significant adverse impacts that the 18" Main Project may have on freshwater resources and the ecosystems and cultural resources and practices that rely on them.

E. The Fifth Circuit Court erroneously granted Appellee's motion for summary judgment on Count IX even though the FEA (FONSI) failed to comply with HRS § 343 and the Hawaii Constitution Article XII Section 7 by not disclosing, assessing and protecting the rights of the native Hawaiian ahupua`a tenants impacted by its permanent stream diversions to supply water to its augmented water transport system.

42. The FEA limited the scope of the proposed action that it assessed for impacts to traditional and customary Native Hawaiian practices to the Kapaia Cane Haul Road project area and the Hanamā`ulu Ahupua`a and failed to identify all the cultural resources and traditional and customary practices that may be significantly impacted by the project.⁷

43. Wai`ale`ale, Waikoko, Waiahi, `Ili`ili`ula, I`ole, Hanamā`ulu, Waiaka, and Wailua streams are in the district of Puna and nā ahupua`a of Wailua, Hanamā`ulu, Kalapaki, Nawiliwili, Niumalu, and others. Appellant's members include Native Hawaiian residents of these ahupua`a who conduct traditional and customary practices in and near undeveloped watershed areas that are likely to be significantly impacted by Appellee's proposed 18" Main water withdrawal, transport and consumptive operations.

44. The region has tremendous historic and cultural importance and features prominently in Hawaiian spiritual practices. The waters carry the literal and spiritual nourishment from the mountain to the ocean that Hawaiian communities have relied upon for generations. The East and Southeast Kauai watershed stream dewatering to feed Appellee's water transport system have

⁷ ". . . we could not identify any valued cultural or natural resources within the proposed area" (RA Vol. 2 @ 21)

a negative effect on these practices and restoration of mauka to makai streamflow is critical to protecting Hawaiian culture. CWRM 8/21/2018 Staff Submittal (RA Vol. 2 @ 136)

45. Native Hawaiians' traditional and customary practices include the growing of kalo along streams in the Wailua stream complex among other practices related to those water resources. Cultural practitioners regard the Wai`ale`ale region as sacred for gathering, ceremonial and religious rites. The maintenance of instream flows is important for the protection of traditional and customary practices, as they support stream (e.g. hihiwai, `opae, o`opu) and riparian (vegetation) resources for gathering. CWRM 8/21/2018 Staff Submittal (RA Vol. 2 @ 131)

While the traditional Hawaiian ahupua`a concept is based on the premise of mauka-to-makai flow, it is difficult to fully represent the importance of surface water from Wai`ale`ale Stream to Kaua`i and Hawaiian culture. The region is highlighted in Hawaiian chants and in the Kumulipo, the Hawaiian creation story. The image of freshwater flowing mauka to makai is fundamental to both the physical and spiritual force which drives Hawaiian cultural practices. As such, the great historical and cultural importance of water from Mt. Wai`ale`ale contributing to surface flow in Wailua cannot be understated. CWRM 8/21/2018 Staff Submittal p. 13 (RA Vol. 2 @ 131)

46. HRS § 343 and HAR § 11-200-10 and 12 require both the applicant and the approving agency to identify cultural resources and traditional and customary practices, how these resources and practice may be affected, and feasible actions to reasonably protect Native Hawaiian rights, prior to approving the FEA for the project. *See e.g. Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 94 Haw. 31, 44-45, 7 P.3d 1068, 1081-1082 (2000).

47. A permitting agency must at a minimum make specific findings and conclusions as to the following: (1) the identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; and (2) the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action. *See e.g. Ka Pa'akai*, 94 Haw. at 35, 7 P.3d at 1072. While the FEA arguably disclosed native Hawaiian interests in the immediate neighborhood around the 9,000 ft water line installation area (RA Vol. 2 @ 154-157), it ignored the impacts of the proposed 18" Main project on the rights of native Hawaiians upstream and downstream of the project.

48. As a result the FEA does not set forth sufficient information to be able to assess the likelihood of substantial significant adverse impacts that the addition of the 18" water line

together with the 16" water line will have on the Wailua watershed and Lihue Basin's surface and groundwater resources and ecosystems and the cultural resources and practices that rely on them. Nevertheless Appellee granted its deficient FEA a FONSI and in so doing Appellee also did not comply with its obligations as the accepting agency pursuant to HRS § 343, HAR § 11-200-12 and the Hawaii Constitution. The Hawaii Constitution Article XII § 7 provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

F. The Fifth Circuit Court Order erroneously granted Appellee's motion for summary judgment on Count VII when the record indicates that Appellee does not deny that it is taking public trust water resources without a lease, license, or permit from the State of Hawaii pursuant to HRS §171-58, and which requires an EIS that has not been done.

49. Appellee has not applied for nor has BLNR granted Appellee a permit, lease or license pursuant to HRS § 171-58 authorizing stream diversions and groundwater withdrawals and transport of public trust water from Kauai's Wailua Watershed and Lihue Basin through its proposed 18" Main or the existing 12" and 16" main water lines. In response to Appellant's Count VII claim that Appellee was violating HRS § 171-58 by taking and transmitting public trust water without a permit, license, lease or an EIS, Appellee argues that it is not required to obtain a lease, permit, or license for the water that will flow through the 18" Main for the limited purpose of installing the Relief Line as its construction is wholly unrelated to water consumption or use. (Dkt # 63 TR p. 31 lines 5-6) However, the purpose of installing a larger diameter pipe is to "improve" Appellee's capacity to transport public trust water currently flowing through its 12" and 16" lines at the same location. (Dkt # 63 TR p. 12 line 18) The proposed 18" Main will hook up with those lines and Appellee has not denied that it does not have a permit, lease or license from BLNR to transmit state water through those lines to its commercial and urban customers.

50. Appellee asserts that Appellant has not provided any legal authority for the need for a lease, permit or license to use state water. However, in its amended complaint, in its response to Appellee's third summary motion and at the 06/23/2020, hearing (Dkt # 63 TR p. 32) Appellant cited statutes, caselaw and the Hawaii Constitution as legal authority. HRS § 171-58 controls the right to any surface or ground water and BLNR is the permitting and leasing authority. After the *McBryde* case in 1973 (54 Haw. 175), the adoption of the State Water Code HRS 174C in 1987,

the amended Hawaii Constitution in 1988, the *Repun* (65 Haw. 531) and *Robinson* (65 Haw. 641) cases in 1982, the *Waiahole* ditch cases in 2000 and 2004, *In Re 'Īao Ground Water Mgt Area* (128 Haw. 228) in 2012, *Kauai Springs* (130 Haw. 407) in 2013 and *Kauai Springs* (133 Haw. 141) in 2014, it is now well established that no person or entity has automatic vested rights in water in Hawaii.

51. Appellee KDOW, as a public trustee, has an "affirmative *duty* to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *In re Water Use Permit Applications (Waiahole I)*, 94 Haw. at 141, 9 P.3d at 453. *Kauai Springs* held that the public trust doctrine applies to all water resources without exception or distinction and the public trust doctrine takes precedent even over vested water rights. *Kauai Springs v. Planning Comm'n of Kauai*, 130 Haw. 407, 312 P.3d 283 (2013). See also *Kauai Springs v. Planning Comm'n of Kauai, Inc.*, 133 Haw. 141, 171-172, 324 P.3d 951, 981 (2014). See also *In re Gas., LLC*, 147 Haw. 186, 207, 465 P.3d 633, 654 (2020)

52. Appellee 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) However 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 pumped from aquifers without a lease or permit from the State. Appellee also argues that these provisions give counties appurtenant and riparian water rights and common law rights apply (RA Dkt # 63 p. 12 line 23), however it has made no claim to appurtenant or riparian rights to the stream and aquifer water that it is transporting through its water distribution system.

53. There is no language in §171-58 that exempts counties from its procedures and requirements, which includes 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 as a precondition to obtaining a lease. When Appellee applies for a lease, it will be required to complete an EIS, not a EA, on its total water transport system before the lease can be granted.

At the hearing on 09/18/2019, Appellant asked the court to require Appellee to do 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. 17 lines 10-23) The court did not do so.

54. In sum, Appellee cannot legally transport and use water from of the East and Southeast Kauai watershed without a permit, license or lease from BLNR. A water lease will grant Appellee the right, privilege, and authority to enter and go upon state lands for the purpose of developing, diverting, transporting, and using state-owned waters" through Appellee's existing water transport system and will allow for the continued operation of the Lihue water system to deliver water to residential, commercial, industrial, and resort consumers. It will also require Appellee to pay to the State fair market value for that water.

G. Appellee's flawed environmental review process violated HRS § 343 and HAR §11-200 requirements and Appellant's substantive and procedural due process rights as guaranteed by the Hawaii Constitution Article XI section 5 when is failed to follow noticed procedures for considering public comments prior to making its FONSI decision and submitting the FEA.

55. The HRS § 343 environmental review procedures do not merely entail "preparation of a document," but the "entire process of research, discussion, preparation of a statement, and review," which must involve, "at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for avoiding, minimizing, rectifying or reducing adverse impacts." HAR § 11-200-14.

56. HAR § 11-200-10 requires the applicant to prepare an environmental assessment that contains, at minimum,

[f]indings and reasons supporting the agency determination of anticipated determination;" and "[w]ritten comments and responses to the comments under the early consultation provisions . . ." HAR § 11-200-9(a)(8) requires the applicant (Appellee) to [r]eceive and respond to public comments" and "[f]or draft environmental assessments, the proposing agency shall revise the environmental assessment to incorporate public comments as appropriate, and append copies of comment letters and responses in the environmental assessment (the draft environmental assessment as revised, shall be filed as a final environmental assessment as described in section 11-200-11.2)"

57. After preparing a FEA, reviewing public and agency comments, and applying the significance criteria under HAR §11-200-12, the receiving agency (also Appellee) is required to issue a notice of determination in accordance with HAR § 11-200-9(a) and file the notice with OEQC. (See HAR §11-200-11.2(a).) HAR rules anticipate that the agency will review all public and agency comments, respond to each comment, determine whether incorporation of the comments and/or responses into the FEA would be appropriate, append the comments to the FEA, and determine whether and how each of the significance criteria under HAR §11-200-12 apply to the proposed action, prior to the agency's determination to notice its determination of a FONSI, and prior to submission to OEQC.

58. Appellant and its members submitted public comments up until 6 p.m. March 12, 2018, the last day of the comment period. Appellee's letter transmitting its FEA (FONSI) to OEQC was stamped March 12, 2018, although the FEA (FONSI) was stamped "Received March 13, 2018" by OEQC. OEQC published the FEA (FONSI) on March 13, 2018. See *Kilakila*, 138 Haw. at 370-371, 382 P.3d at 181-182: After the review period, the applicant is required to respond to public comments and finalize the draft environmental assessment, in that order. Appellee has admitted that it submitted its FEA (FONSI) to OEQC before the public comment period ended on March 12, 2018, but said that it knew what Appellant's members were going to say based on previous hearings and comments. (Dkt # 63 p 26 lines 19-25, p. 27 lines 1-4)

59. Because Appellee, as the accepting agency, did not follow the review and procedures required by law to ensure that environmental impacts are considered prior to agency decision making, the public has lost confidence in the integrity of the environmental review system. 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."

60. Appellee's flawed FEA (FONSI) process deprived Appellant and its members of their ability to meaningfully participate in the HRS § 343 procedures providing for meaningful public comment and agency response violated their statutory and constitutional rights. "[G]iving a person "a day in court" does not alone mean that a process is fair[.]" *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 389, 363 P.3d 224, 237 (2015) quoting *State v. Brown*, 70 Haw. 459, 463, 776 P.2d 1182, 1185 (1989) Appellee has failed its duty as a public trustee.

Appellant's constitutional right to a clean and healthful environment under the Hawaii Constitution Article XI § 9, and its right to substantive and procedural due process rights pursuant to Hawaii Constitution Article I § 5 have been violated by Appellee's actions and non action.

V. CONCLUSION

61. In sum the FEA did not include an full assessment of “the sum of effects 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” as required by HRS §343-2.

62. The FEA omitted any analysis of the upstream impacts of its 18" Main project on the East and Southeast Kauai watershed and state conservation district lands, the Lihue basin ground water supply, the habitat of endangered species, and on native Hawaiian cultural practitioners. The evidence in the Record reveals that Appellee granted itself a FONSI supported only by a recitation of the contents of its own deficient FEA without considering any fact beyond the scope of that document. “[T]he conscientious application of the EIS process as a whole . . . shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action.” HAR §11-200-14.

63. Appellee submitted an incomplete FEA that failed to set forth sufficient information to be able to assess the likelihood of significant, substantial adverse impacts that the 18" Main, when added to the 12" and 16" main water lines, will have on the Wailua watershed and Lihue Basin's surface and groundwater resources and the ecosystems and cultural resources and practices that rely on them. Appellee, as the approving agency, then accepted its own FEA as drafted and granted itself a FONSI. No independent agency review was done as to whether the FEA complied with HRS § 343 and the applicable HAR §§ 11-200 requirements. 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). In this case that did not happen and the Circuit Court grants of summary judgment as to all counts were erroneous.

IV. RELIEF REQUESTED

A. Appellant respectfully requests the Court to grant its appeal and reverse the Circuit Court's:

(1) Order Granting Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Appellant's Count IV, filed April 2, 2019;

(2) Order Granting Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Appellant's Counts V, VI, VIII and IX, filed October 3, 2019; and

(3) Order Granting Appellee Department of Water, County of Kauai's Motion for Summary Judgment as to Appellant's Counts I, II, III, VII, and X, filed June 30, 2020;

B. Appellant also respectfully requests the Court to:

(1) declare that Appellee violated HRS § 343 because its FEA does not comply with HAR § 11-200 requirements and the uncontested material facts do not support a FONSI;

(2) declare that Appellee 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 transport line 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;

(3) issue a temporary injunction on extraction and transport of public trust water from Kauai's East and Southeast watersheds and Lihu'e Basin to protect state resources until Appellee completes an EIS for its water transport system and the State of Hawaii grants it a lease, license 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)

(4) grant 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.

Dated: Kailua, Hawaii, February 16, 2021.

/s/ Linda M. B. Paul

LINDA M. B. PAUL, Esq.

Attorney for Plaintiff-Petitioner-Appellant

KIA'I WAI O WAI'ALE'ALE

VII
APPENDICES "A"-"E"

(Opening Brief Appendices "A", "B", "D" & "E" to be filed separately as supporting documents)

- App. "A" Final Judgment in CIVIL NO. 18-1-0063 KNAW) filed on 06/30/2020.
(JIMS Dkt # 64)
- App. "B" Orders of the Circuit Court of the Fifth Circuit entered on 04/02/2019
(RA Vol. 1 @ 306-307), 10/03/2019 (RA Vol. 2 @ 189-190), and 06/30/2010
(JIMS Dkt # 62)
- App. "C" Relevant Parts of Statutes and Rules: HAR § 11-200-12. (See pp. 37-38 below.)
- App. "D" State Commission on Water Resource Management (CWRM) 8/21/2018 Staff
Submittal water flow diagram. (RA Dkt #55 @ 61)
- App. "E" KDOW Minutes for 1/28/2010. (Dkt. #56 pp 199-205)
KDOW Minutes for 12/17/2009. (RA Vol. 1 @ 267-273)

VIII.
STATEMENT OF RELATED CASES

Appeal of *Carmichael v. Bd. of Land & Nat. Res.* CAAP-16-0000071(06-18-2019) Case raises the issue of the need for environmental review of the source waters in state streams on Maui as a prerequisite to DLNR's protracted renewals of Revocable Permits for the stream diversions. (Hawaii Supreme Court decision pending)

SCWC-16-0000071

IN THE SUPREME COURT OF THE STATE OF HAWAI

HEALOHA CARMICHAEL, et al., Petitioners/Plaintiffs-Appellees/Cross-Appellees/Cross-Appellants,
vs.

BOARD OF LAND & NATURAL RESOURCES, SUZANNE CASE, DEPARTMENT OF LAND & NATURAL RESOURCES, Respondents/Defendants-Appellees/Cross-Appellees/Cross-Appellants, and ALEXANDER & BALDWIN, INC., EAST MAUI IRRIGATION CO., LTD. and HAWAIIAN COMMERCIAL & SUGAR CO., Respondents/Defendants-Appellants/Cross-Appellees, and COUNTY OF MAUI, DEPARTMENT OF WATER SUPPLY, Respondent/Defendant-Appellee/Cross-Appellant/Cross-Appellee.

APPENDIX "C"

HAR § 11-200-12. Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action. (b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, the action shall be determined to have a significant effect on the environment if it *inter alia*:

- (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource; [stream flow, habitat]
- (2) Curtails the range of beneficial uses of the environment; [stream flow, habitat]
- (3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in HRS chapter 344 and any revisions thereof and amendments thereto, court decisions or executive orders; [conservation land policy: protect watershed]
- (4) Substantially affects the economic welfare, social welfare, and cultural practices of the community or State; [affects native Hawaiian cultural practices in the watershed]
- (7) Involves substantial degradation of environmental quality; [East and Southeast Kauai watershed stream flow]
- (8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions; [additional drawdown of water resources]
- (9) Substantially affects rare, threatened, or endangered species, or its habitat; [stream wetland is habitat for several endangered species including Newcomb's snail, an endemic damselfly and two endemic waterbirds]
- (11) Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area; geologically hazardous land, estuary, **fresh water**, or coastal waters;

HRS §171-58 Minerals and water rights. (a) Except as provided in this section 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; provided that the board may make provisions in the lease, agreement, or sale, for the payment of just compensation to the surface owner for improvements taken as a condition precedent to the exercise by the State of any reserved rights to enter, sever, and remove minerals or to capture, divert, or impound water.

(b) Disposition of mineral rights shall be in accordance with the laws relating to the disposition of mineral rights enacted or hereafter enacted by the legislature.

(c) Disposition of water rights may be made by lease at public auction as provided in this chapter or by permit for temporary use on a month-to-month basis under those conditions which will best serve the interests of the State and subject to a maximum term of one year and other restrictions under the law; provided that any disposition by lease shall be subject to disapproval

by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both in any regular or special session next following the date of disposition; provided further that after a certain land or water use has been authorized by the board subsequent to public hearings and conservation district use application and **environmental impact statement approvals**, water used in nonpolluting ways, for nonconsumptive purposes because it is returned to the same stream or other body of water from which it was drawn, essentially not affecting the volume and quality of water or biota in the stream or other body of water, may also be leased by the board with the prior approval of the governor and the prior authorization of the legislature by concurrent resolution.

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NO. CAAP 20-0000487

IN THE INTERMEDIATE COURT OF APPEALS
 OF THE STATE OF HAWAII

KIA`I WAI O WAI`ALE`ALE, an)	APPEAL FROM THE CIRCUIT COURT OF
unincorporated community association,)	THE FIFTH CIRCUIT (CIVIL NO. 18-1-
)	0063 KNAW)
Plaintiff-Petitioner-Appellant,)	
)	
vs.)	
)	
DEPARTMENT OF WATER, COUNTY OF)	CERTIFICATE OF SERVICE
KAUA`I, applicant and accepting agency of)	
the subject Environmental Assessment; DOES)	
1-50;)	
)	
Defendant-Respondent-Appellee.)	
)	
)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellants' Jurisdictional Statement and Certificate of Service was duly served this date by the JEFS system to the following party as listed below:

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