

LINDA M. B. PAUL ESQ. #5354

LINDA M. B. PAUL ESQ LLLC  
815 Pahumele Place  
Kailua, Hawai'i 96734  
Telephone: (808) 262-6859  
Mobile: (808) 347-8825  
Email: linpaul@aloha.net

Attorney for PLAINTIFF  
KIA'I WAI O WAI'ALE'ALE

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KIA'I WAI O WAI'ALE'ALE, an	)	CIVIL NO.18-1-0063
unincorporated community association,	)	(Environmental Court)
	)	
Plaintiff,	)	FIRST AMENDED COMPLAINT FOR
vs.	)	DECLARATORY, INJUNCTIVE, AND
	)	OTHER RELIEF; SUMMONS;
DEPARTMENT OF WATER, COUNTY OF	)	DECLARATION OF LINDA M. B. PAUL;
KAUA'I, applicant and accepting agency of the	)	CERTIFICATE OF SERVICE
subject Environmental Assessment; <del>GROVE</del>	)	
<del>FARM COMPANY, INC., property owner;</del>	)	
<del>DEPARTMENT OF PUBLIC WORKS,</del>	)	
<del>COUNTY OF KAUA'I, property owner;</del>	)	
<del>DEPARTMENT OF TRANSPORTATION,</del>	)	
<del>HIGHWAYS DIVISION, STATE OF</del>	)	Judge: Honorable Kathleen N. A. Watanabe
<del>HAWAII, property owner; and DOES 1-50;</del>	)	
	)	
Defendants.	)	No Trial Date Set

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff KIA'I WAI O WAI'ALE'ALE, an unincorporated community association (hereinafter, "Plaintiff"), by and through its attorney Linda M. B. Paul, Attorney at Law, brings this complaint against above-named Defendants seeking declaratory, injunctive, and other relief brought pursuant to the Hawaii Environmental Policy Act ("HEPA"), codified in Hawaii Revised

Statutes ("HRS") Chapter 343, and Chapter 171-58, Chapter 195D-4, and the Constitution of Hawaii article XI section 1, and article XII section 7. Plaintiff avers and alleges as follows:

1. This complaint for declaratory and injunctive relief contesting the Kapaia Cane Haul Road Main -- Final EA (FONSI) is based on the decision of defendant DEPARTMENT OF WATER, COUNTY OF KAUA'I (KDOW) to approve a water transmission main that will send public trust waters on state lands to and for the permanent use and benefit of ~~defendant~~ GROVE FARM COMPANY, INC. (GROVE FARM). As a result of the flawed Final Environmental Assessment (Final EA) and Finding of No Significant Impact (FONSI), published March 23, 2018, in *The Environmental Notice*, the full extent of the environmental impacts of this project have not been assessed that would have informed the Board of Land & Natural Resources of the State of Hawaii and other public agencies prior to granting leases and/or permits for this project as required by HRS §343.

2. This complaint for declaratory and injunctive relief is also based on the decision of defendant KDOW to approve a water diversion and transmission project utilizing state lands and water even though neither GROVE FARM or its subsidiaries, nor KDOW holds a water lease or revocable permit from the State Board of Land and Natural Resources (BLNR) authorizing their use of southeast Kaua'i's freshwater resources pursuant to HRS §171-58.

3. This complaint is also based on violations by defendants of HRS Chapter 195D-4 and the Constitution of Hawaii article XI section 1 and article XII section 7.

**I. Jurisdiction and Venue.**

1. This Court has subject matter jurisdiction over Plaintiff's claims for relief in this action 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 section 9.

2. Article X I section 9 provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

3. Article XVI section 16 provides: "The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."

4. On February 8, 2018, defendant KDOW published its Draft EA and Anticipated FONSI for the construction of a 9,000 foot long, 18-inch diameter water transmission line that connects two existing 16 inch transmission lines (project) to address the lack of capacity within the Līhu‘e water system to serve the Līhu‘e Development Plan. The construction and operation of this project will require additional state and county approvals and support for the Project.

5. Comments on the Draft EA were due by March 12, 2018.

6. Plaintiff and members submitted comments, including extensive exhibits, meeting minutes, and other documents, before March 12, 2018 and as late as 6:00 pm on March 12, 2018.

7. By letter dated March 12, 2018, KDOW submitted its Final EA and FONSI for the project, which were stamped "received March 13, 2018" on the OEQC website.

8. "The Kapaia Cane Haul Road Main - Final EA (FONSI)" was published in the OEQC's *The Environmental Notice* on March 23, 2018.

9. An actual controversy exists between Plaintiff and Defendants and action in this court is necessary to resolve that controversy.

10. The conduct, acts and/or omissions alleged herein occurred in the State of Hawaii. The property at issue is located in in Līhu‘e, Kaua‘i at Tax Map Key (TMK) Nos. (4) 3-8-018:001; and ‘Ehiku and Kūhiō Highway, plats (4) 3-8-015, -007, and -009

11. Defendant KDOW owns a portion of the subject property and is the draft EA agency applicant and the approving authority of the Final EA (FONSI). ~~Defendant GROVE FARM also owns a portions of the subject property and is the beneficiary of the FONSI. GROVE FARM does business in the State of Hawaii, whose business address is located at 3-1850 Kaumuali‘i Highway, Līhu‘e, HI 96766.~~

12. The venue is proper in this Court pursuant to HRS § 603-36 since Plaintiff's claims for relief arise from the subject property, which is located in the above-captioned judicial circuit.

13. This complaint for declaratory and injunctive relief is in accordance with the Hawaii Rules of Civil Procedure and is based *inter alia* on the provisions of HRS Chapters 343, 171-58; 195D-4, and the Constitution of Hawaii article XI section 1, and article XII section 7.

14. HRS §343-5(a) except as otherwise provided, an environmental assessment shall be required for actions that:

(1) Propose the use of state or county lands or the use of state or county funds, other than

funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b).

15. Acceptance of a required assessment is a "condition precedent":

(a) To the commencement or implementation of a proposed project, HRS §343-5(c); HAR §11-200-23(d);

(b) To the use of state lands or funds in implementing the proposed action, HRS §343-5(b); HAR §11-200-23(c); and (c) To the issuance of approvals or entitlements for the project, HRS §343-5(c); HAR §11-200-23(d).

"Acceptance" refers to:

- a. the acceptance of an EIS,
- b. the entry of a FONSI,
- c. an exemption determination.

16. Venue properly lies in the Circuit Court of the Fifth Circuit pursuant to HRS §§ 604A-2, 603-36(5), and 632-1 because claims for relief are based on events arising in this circuit and Defendant's actions take place in this circuit and invoke the jurisdiction of the environmental court.

## **II. Parties**

17. Plaintiff KIA'I WAI O WAI'ALE'ALE (Kia'i Wai) is an unincorporated association composed of Kaua'i residents who are beneficiaries of the freshwater resources of the island of Kaua'i, including Wai'ale'ale, Waikoko, Waiahi, 'Ili'ili'ula, I'ole, Hanamā'ulu, Waiaka, and Wailua streams. Plaintiff and its members use and enjoy the environs, cultural and natural resources, and waters of Wai'ale'ale and its tributaries 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 its tributaries as public trust resources for all the communities of Kaua'i.

18. Defendant DEPARTMENT OF WATER, COUNTY OF KAUA'I (KDOW) is organized under article XVII of the Kaua'i County Charter (2012) and is the agency applicant of the subject Environmental Assessment (EA) at issue in this complaint.

19. ~~Defendant GROVE FARM COMPANY, INC. (GROVE FARM) has been identified as a property owner of the subject property of the Final EA (FONSI). Waiahi Water Company, LLC is a division of GROVE FARM. Waiahi Surface Water Treatment Plant (Waiahi SWTP) is owned and operated by the Waiahi Water Company, LLC.~~

20. ~~Defendant DEPARTMENT OF PUBLIC WORKS, COUNTY OF KAUAI has been identified as a property owner of the subject property of the Final EA (FONSI).~~

21. ~~Defendant DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION, STATE OF HAWAII has been identified as a property owner of the subject property of the Final EA (FONSI).~~

22. Additional Defendants Does 1-50 (Doe Defendants) are persons or entities who may be liable to Plaintiff or may have an interest in the matter or issues pending, whose identities and capacities are presently unknown to Plaintiff. Plaintiff has reviewed public records, state and federal statutes, and other documents, but is unable to ascertain whether or not all parties liable to Plaintiffs are named therein. Plaintiff will identify such Doe 1-50 Defendants when their names and capacities are ascertained. Plaintiff is informed and believes and thereon alleges that some of these Doe Defendants and at all times relevant herein, were, in some manner, presently unknown to Plaintiff, engaged in or responsible for the intentional or negligent acts, breaches or omissions alleged herein, or were in some manner responsible for the damages to Plaintiff and the public, as alleged herein.

### **III. Background Facts**

23. Plaintiff and its members are residents and beneficiaries of 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.

24. Southeast Kaua'i's freshwater resources are vital to Plaintiff'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.

25. 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 Plaintiffs' native Hawaiian traditional and customary practices.

26. Southeast Kaua‘i’s surface and ground water resources are highly articulated, such that removal of surface water could impact ground water aquifers, and vice versa.

27. Kaua‘i’s environment, ground waters, air, nearshore ocean, cultural resources, and historic sites are public trust resources.

28. Existing surface-water diversion systems in southeast Kauai 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.

29. The County represented that in 1994 the Līhu‘e-Hanamā‘ulu Master Planned Community (Līhu‘e Development Plan) proposed by Amfac/JMB Hawai‘i, Inc. received approval and the successor-in-interest to the planned community, GROVE FARM, which is now required to participate in the funding and development of water sources, storage, and transmission facilities for the Līhu‘e Development Plan.

30. The Līhu‘e water system services residential, commercial, industrial, and resort uses, and not only domestic and public uses.

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

32. The Waiahi SWTP is owned and operated by the Waiahi Water Company, LLC, a division of Grove Farm.

33. KDOW 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.

34. In previous years, KDOW has paid GROVE FARM approximately \$2 million per year for use of 2.75 mgd.

35. Neither GROVE FARM, Waiahi Water Company, nor KDOW holds a water lease or revocable permit from the BLNR authorizing their use of southeast Kaua‘i’s freshwater resources.

36. Defendants proposed to construct a 9,000 foot long, 18-inch water transmission line that connects between two existing 16 inch transmission lines (project) to address the lack of capacity within the Līhu‘e water system to serve the Līhu‘e Development Plan.

37. The project is proposed to be 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.

38. The project proposes the use of state and county lands or funds, thereby triggering compliance with environmental review requirements under HRS chapter 343-5(a)(1).

39. Defendants have represented that the project would entail no increase in the “source capacity” of ground or surface water resources, identifying those sources as various water development projects, reservoirs, wells and treatment plants, and not natural sources such as freshwater streams, aquifers, or springs.

40. Defendants’ identified water sources in the KDOW EA 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. Each of these water development structures “source” their water from springs, streams, and groundwater aquifers.

41. The project proposes to trench and install 9,000 feet of a new 18 inch diameter pipe, adding it alongside an existing 16 inch diameter pipe to convey water from sources along Mā‘alo cane haul road, specifically Pukaki Well, Hanamaulu Well Nos. 3 and 4, and the Waiahi SWTP.

42. 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.

43. Defendants state that implementation of the Līhu‘e Development Plan would cause a decrease in water system pressures and flows. However, existing pressures at other areas in the Līhu‘e water system exceed the maximum under average day demands.

44. Defendants state that the proposed project will alleviate the capacity limitation caused by the inadequate segment of water transmission main on the portion of the Līhu‘e water system along Kūhiō Highway and Kapaia Bridge on Wilcox Medical Center.

45. On February 8, 2018, KDOW published its Draft Environmental Assessment (DEA) and Anticipated Finding of No Significant Impact (AFNSI) in the Environmental Notice, which is published by the State Office of Environmental Quality Control (OEQC).

46. Comments on the DEA-AFNSI were due by March 12, 2018.

47. Plaintiff and members submitted comments on the DEA-AFNSI, including extensive exhibits, meeting minutes, and other documents, before and on March 12, 2018.

48. The FEA consultants replied to comments by letters dated March 12, 2018.

49. KDOW submitted its FEA (FONSI) for the project by letter dated March 12, 2018, which was stamped "Received March 13, 2018" on the OEQC website.

50. On March 23, 2018, the FEA-FONSI for the project was published in OEQC's Environmental Notice, beginning a 30 period in which to appeal the FONSI.

#### IV. **Claims for Relief.**

#### **COUNT I – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 FOR FAILURE TO ASSESS ENVIRONMENTAL EFFECTS OF A PROJECT THAT USES PUBLIC TRUST RESOURCES LOCATED ON STATE AND COUNTY LANDS**

51. Plaintiff realleges and incorporates by reference herein each and every allegation contained in the preceding paragraphs of this Complaint.

52. Plaintiff is aggrieved by Defendants' failure to comply with applicable provisions of HRS chapter 343 and HAR chapter 11-200.

53. The purpose of HRS chapter 343 is to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. HRS §343-1.

54. KDOW accepted the FEA determination that an environmental impact statement (EIS) was not required for a project situated on state and county lands within thirty-days of the publication of the Environmental Notice containing KDOW's FONSI determination.

55. HRS 343-(5) provides that (a) Except as otherwise provided, an environmental assessment shall be required for actions that:

- (1) Propose the use of state or county lands or the use of state or county funds, other than funds to be used for feasibility or planning studies for possible future programs or projects that the agency has not approved, adopted, or funded, or funds to be used for the acquisition of unimproved real property; provided that the agency shall consider



environmental factors and available alternatives in its feasibility or planning studies; provided further that an environmental assessment for proposed uses under section 205-2(d)(11) or 205-4.5(a)(13) shall only be required pursuant to section 205-5(b).

56. In determining whether the proposed action may have a “significant effect” on the environment, thereby requiring an EIS, the agency must consider the “sum of effects on the quality of the environment,” encompassing “every phase of the 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.” HRS § 343-2; HAR § 11-200-12(b). “Environment” means “humanity’s surroundings, inclusive of all the physical, economic, cultural, and social conditions” of the affected area. HAR § 11-200-2. “Effects” include ecological, aesthetic, historic, cultural, economic, social, and health impacts, including those resulting from actions that the agency on balance believes will be beneficial. *Id.*

57. Significant effects are constituted from “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.” HRS §343-2. Pursuant to HAR §11-200-2, significant effects also mean any action *inter alia* that:

- (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;
- (2) Curtails the range of beneficial uses of the environment;
- (3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders; . . .
- (7) Involves a substantial degradation of environmental quality;
- (8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
- (9) Substantially affects a rare, threatened, or endangered species, or its habitat; . . .
- (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; . . . .

HAR § 11-200-12(c).

58. HAR § 11-200-9(a)(3) requires Defendants to “[p]repare an environmental assessment pursuant to section 11-200-10 of [HAR chapter 11-200] which shall also identify

potential impacts, evaluate the potential significance of each impact, and provide for detailed study of significant impacts[.]”

59. Defendants were required 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.

60. The FEA (FONSI) did not identify potential impacts, evaluate the potential significance of each impact, or provide for detailed study of significant impacts on Southeast Kaua‘i’s surface or ground natural freshwater resources, nor any of the potential direct, secondary, indirect, or cumulative impacts of increased consumption of those resources.

61. The FEA (FONSI) rather identified “source capacity” in existing reservoir or wells as the referent for its assessment of environmental impacts.

62. The water “sources” identified consisted in water development structures, such as wells, ditches, tunnels, and a surface water treatment plant, which are not “natural resources.”

63. The FEA-FONSI stated that the project would not irrevocably commit a natural resource because the water resources would be used for domestic purposes, but it acknowledged that the Līhu‘e water system is used for commercial, industrial, and resort purposes as well as public and residential uses.

64. The FEA (FONSI) stated that the 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 known future increased water output under the Līhu‘e Development Plan.

65. The FEA (FONSI) did not include an 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.” HRS §343-2

66. KDOW failed to assess all the potential significant impacts of its proposed project prior to determining and noticing its FONSI.

67. Plaintiff is entitled to judicial review of the County’s FEA (FONSI) and determination that a full EIS was not required in regard to the project. HRS § 343-7(b).

68. Plaintiff seeks an order invalidating the County's FEA (FONSI), noticed on March 23, 2018.

COUNT II – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 REQUIREMENTS THAT FONSI DETERMINATION OCCUR AFTER FEA PREPARATION

69. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

70. 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. “[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.

71. HAR § 11-200-9(a)(8) required the County to “[r]eceive and response 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)[.]”

72. After preparing a FEA, reviewing public and agency comments, and applying the significance criteria under HAR §11-200-12, KDOW was required to issue a notice of determination in accordance with HAR § 11-200-9(a) and file the notice with OEQC. HAR §11-200-11.2.

73. EIS 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.

74. Agencies are required to take a “hard look” at environmental impact disclosure documents prior to accepting them.

75. Plaintiff submitted public comments up until the end of the day of March 12, 2018, which is the same date on KDOW’s letter transmitting its FEA (FONSI). The FEA (FONSI) was stamped "Received March 13, 2018" and published on the OEQC website.

76. On the face of its submittal letter to OEQC and the FEA (FONSI), KDOW submitted the FEA (FONSI) before it was finalized and published.

77. KDOW accepted the FEA before it was finalized and published.

78. KDOW could not have considered all facts and issues raised by comments submitted on the DEA, some filed as late as 6 p.m. and thereafter, responded to those comments as intended by the law, and filed a FEA (FONSI) published the next day on March 13, 2018.

79. KDOW’s failure to adequately consider all the comments and potential significant environmental impacts prior to determining that a FONSI was appropriate deprived Plaintiffs of procedures and review required by law to ensure that environmental impacts are considered prior to agency decision making.

80. Plaintiff seeks an order declaring the FEA (FONSI) did not consider and satisfactorily respond to all comments received during the review of the DEA for the project and is therefore invalid.

### COUNT III – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 ENVIRONMENTAL ASSESSMENT CONTENT REQUIREMENTS

81. Plaintiff realleges and incorporate by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

82. HAR § 11-200-10 required KDOW to prepare an environmental assessment that contained, 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 . . .”

83. The FEA included a “memo to file” written by KDOW’s consultant and addressed to the State Commission on Water Resources Management (CWRM) that included a note referencing a “telephone meeting with CWRM” and “[i]nput from CWRM was received and incorporated, to the extent possible, in the draft EA.” No written response from CWRM was included in the FEA.

84. The FEA recited applicable CWRM rules concerning interim instream flow standards for Kaua‘i and that CWRM “was consulted with and provided input, in regards to water resources during the development of this Draft EA; see Chapter 8, Consultation.”

85. The FEA relied on unspecified findings and reasons from the CWRM consultation and referenced its “copy of the correspondence” with CWRM in responding to four of the Plaintiffs’ substantive comments.

86. KDOW relied upon CWRM consultation in issuing its FONSI and was therefore required to prepare an environmental assessment that included the findings and reasons obtained during consultation with CWRM in support of its FONSI.

87. KDOW alleged reliance on findings and reasons obtained through consultation with CWRM, but did not include those findings and reasons in the FEA.

88. Plaintiff seeks an order declaring KDOW’s FEA (FONSI) lacked contents required under HAR § 11-200-10 and therefore requests the court to declare that the FEA (FONSI) did not adequately describe identifiable environmental impacts, did not satisfactorily respond to comments received during the review of the DEA and is therefore invalid.

#### COUNT IV – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 PROHIBITIONS AGAINST SEGMENTATION

89. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

90. Where an agency or applicant proposes multiple or phased actions, HAR §11-200-7 provides:

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.

91. “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.” *See Sierra*

*Club v. Dep't of Transp.*, 115 Hawai'i 299, 338, 167 P.3d 292, 331 (2007), *as corrected* (Oct. 10, 2007).

92. Improper segmentation occurs where a second action that is part of the larger project and is a 'necessary precedent' for the development has been isolated as a component of the development for environmental assessment.

93. KDOW acknowledged that the project is required to provide transmission facilities for the Grove Farm Līhu'e Development Plan's master planned community.

94. KDOW's project was a necessary precedent for the development of the Grove Farm Līhu'e Development Plan master planned community.

95. The FEA did not consider the potential environmental effects of the implementation of the Grove Farm Līhu'e Development Plan master planned community.

96. The FEA did not represent full environmental review of the proposed action and is deficient under HRS chapter 343.

97. Plaintiff seeks an order declaring KDOW's FEA (FONSI) was impermissibly segmented and is therefore invalid.

COUNT V – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 FOR FAILURE TO HAVE PRESENTED SUFFICIENT ALTERNATIVES

98. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

99. HAR § 11-200-9(c) provides, "For agency or applicant actions, the proposing agency or the approving agency, as appropriate, shall analyze alternatives, in addition to the proposed action in the environmental assessment."

100. The FEA (FONSI) indicated the purpose and need for the project concerned relieving inadequate capacity in the Līhu'e water system and specifically that the project "is necessary to meet the WSS standards (6 FPS max flow criteria) with current sources along Maalo Road."

101. The FEA (FONSI) did not analyze reasonable alternatives, such as the installation of appurtenant hydraulic fixtures, including pressure relief valves or pressure reduction valves, knowing there was a need for the increase in capacity as the Grove Farm Līhu'e Development Plan requires.

102. An alternative consisting in the installation of appurtenant hydraulic fixtures would alleviate potential significant impacts of increasing the capacity of the Līhu‘e water system, but KDOW did not provide such an alternative.

103. Plaintiff seeks a declaratory judgment stating that the FEA should not have been accepted because it failed to consider all reasonable alternatives.

**COUNT VI – VIOLATION OF HRS CHAPTER 343 AND HAR §11-200 FOR FAILURE TO INCLUDE REQUIRED INFORMATION**

104. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

105. The FEA required minimum contents, including a description of the project’s technical, economic, social, and environmental characteristics; identification of impacts and alternatives considered; and findings and reasons supporting KDOW’s FONSI.

106. The FEA failed to include a description of how the 18-inch proposed relief line will be used or any findings and reasons supporting the conclusion that the existing 16-inch transmission line is inadequate.

107. The FEA failed to include a description of the impacts and alternatives to the project’s proposed use of the natural sources of water for the Līhu‘e Water System.

108. The FEA failed to discuss the impacts on surface water resources and only indicated that “no significant” impacts to ground water are anticipated “during construction”.

109. The failure to include required information in the FEA deprived Plaintiff of its ability to meaningfully participate in HRS chapter 343 procedures involving public comment on the FEA.

110. Plaintiff seeks a declaratory judgment stating that the FEA was inadequate because it failed to include all content required under HAR § 11-200-10.

**COUNT VII – VIOLATION OF HRS § 171-58 FOR FAILING TO OBTAIN A LEASE PRIOR TO GRANTING RIGHTS TO USE STATE LAND AND PUBLIC WATER RESOURCES**

111. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

112. Legal authorization for the use of water resources is provided under HRS § 171-58, which governs water leases and revocable permits issued by BLNR.

113. §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.

114. Water resources subject to the water purchase agreement between KDOW and Grove Farm are not authorized to be consumed or used under any BLNR water lease or revocable permit.

115. ~~Defendant~~ GROVE FARM delivers from the Waiahi SWTP to KDOW for use in the Līhu'e water system.

116. The Waiahi SWTP obtains water from the Kāpaia reservoir, into which flows waters from at least the Hanamā'ulu stream, amongst other freshwater resources.

117. Water diverted to the Waiahi SWTP and to the Līhu'e water system are delivered for consumptive residential, public, commercial, industrial, and resort uses.

118. Neither GROVE FARM or its subsidiaries, nor KDOW holds a water lease or revocable permit from the BLNR authorizing their use of southeast Kaua'i's freshwater resources.

119. Plaintiffs seek a declaratory judgment stating that water resources that are necessary and subject to the proposed action are unlawfully being consumed outside of a BLNR water lease or revocable permit.

COUNT VIII – VIOLATION OF HRS § 195D-4, HRS § 343 AND THE CONSTITUTION OF HAWAII ART. XI § 1 FOR FAILING TO PROVIDE AN ASSESSMENT OF THE PROJECT'S IMPACT ON PUBLIC TRUST RESOURCES

120. Plaintiff realleges and incorporates herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

121. 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).

122. 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.

(b) In addition to the species that have been determined to be endangered or threatened pursuant to the Endangered Species Act, the department, by rules adopted pursuant to chapter 91, may determine any indigenous species of aquatic life, wildlife, or land plant to be an endangered species or a threatened species because of any of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; . . . .

123. Kaua‘i’s southeast surface and groundwater resources, and the ecosystems, protected habitats and endangered species, and cultural practices that rely on them, are public trust resources.

124. The Constitution of Hawaii article XI 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]

125. The County and its agencies as political subdivisions of the State have an affirmative duty to conserve and protect Hawaii’s public trust resources, including Kaua‘i’s threatened and endangered species and its freshwater resources, pursuant to article XI, § 1.

126. Defendants have 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 by *inter alia* failing to prepare adequate environmental review disclosure documents.

127. Defendants have failed to assess the significant adverse impacts that the project and the Grove Farm Lihu‘e Development Plan may have on freshwater resources, and the ecosystems and cultural resources and practices that rely on them.

128. In the absence of an EA/EIS, there is no substantial evidence to support a FONSI where there is no information in the DEA that the stream water diversion and transmission project will not cause substantial adverse impact upon the natural resources of the project area in violation of Haw. Const. art. XI, § 1 and the Public Trust Doctrine.

129. Defendants have failed their duty as a public trustee.

130. Plaintiff seeks a declaratory judgment against Defendants' violation of its obligations as a public trustee by reason that it has failed to prepare adequate environmental impact disclosure documents and conduct an Environmental Assessment in compliance with the laws of the State of Hawai'i.

**COUNT IX – VIOLATION OF CONSTITUTION OF HAWAII ART. XII §7 FOR FAILING TO PROTECT ALL RIGHTS OF THE NATIVE HAWAIIAN AHUPUA`A TENANTS AFFECTED BY THIS STREAM DIVERSION PROJECT**

131. Plaintiff realleges and incorporates herein by reference each and every allegation contained in preceding paragraphs of this Complaint.

132. Hawai'i Constitution article XII, § 7 provides that 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.

133. 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.

134. Plaintiff's members include native Hawaiian residents of these ahupua`a.

135. Native Hawaiian members of Plaintiff's groups conduct traditional and customary practices in and near undeveloped areas that may be significantly affected by Defendants' proposed and ongoing water diversion and consumptive operations.

136. Native Hawaiian members' traditional and customary practices include the growing of kalo along streams, including the Wailua stream complex, amongst other practices related to those water resources.

137. Stream throughout the Puna district are connected to the Kapaia reservoir via a complicated, interconnected network of diversions and altered and natural stream flows.

138. Diversion and reduction in natural flows to Wailua stream complex has left Native Hawaiian members' auwai dry.

139. Water must be trucked in to continue native Hawaiian traditional and customary kalo growing practices at some affected areas.

140. KDOW was required 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. *Ka Pa'akai O Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

141. The project insufficiently defined the scope of the proposed action and project area, and therefore failed to identify cultural resources and traditional and customary practices that may be significantly impacted by the project.

142. Plaintiff seeks a declaratory judgment stating that Plaintiff's Native Hawaiian members' constitutional rights to native Hawaiian traditional and customary practices have been violated by Defendants' conduct.

#### COUNT X – INJUNCTIVE RELIEF

143. Plaintiff realleges and incorporates by reference herein each and every allegation contained in preceding paragraphs of this Complaint.

144. KDOW is engaging in unlawful conduct by proceeding on the FEA (FONSI).

145. Plaintiff's constitutional right to clean and healthful environment, native Hawaiian traditional and customary rights, and right to due process has and will be violated by Defendants' conduct.

146. By failing to have appropriately considered the environmental impacts of its proposed action, KDOW threatens imminent harm to the environment and communities of Kaua'i.

147. There is no adequate remedy at law for violations of the right to clean and healthful environment and the right to due process.

148. Public policy strongly supports the right to a clean and healthful environment. It requires assessment of impacts to the natural resources and is not satisfied by a mere consideration of potential impacts to water development structures, surface water treatment plants, reservoirs and wells. Limiting the assessment to the later does not protect for native

Hawaiian traditional and customary practices and resources, and proper implementation of environmental review procedures.

149. Plaintiff seeks to enjoin the Defendants and its agents and employees, and all persons acting under, in concert with, or for them from any conduct in furtherance of the determination of the project to have no significant impact on the environment until such time as Chapter 343, HRS has been adequately and properly complied with.

**V. Relief Requested**

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Enter a declaratory judgment:
  - a) Declaring that KDOW violated HRS chapter 343 by failing to assess impacts to the natural environment and not only the source capacity of water development structures;
  - b) Declaring that KDOW violated HRS chapter 343 environmental review procedures by determining the project's environmental impacts prior to the finalization and publication of the final environmental assessment;
  - c) Declaring that KDOW violated HRS chapter 343 by failing to include findings and reasons supporting KDOW's determinations; and,
  - d) Declaring that KDOW violated HRS chapter 343 by improperly segmenting the project, which is a necessary precedent for the implementation of the Grove Farm Līhu'e Development Plan;
  - e) Declaring that KDOW violated their obligations of public trustees by failing to prepare adequate environmental disclosure documents and conduct an assessment of the impact to the natural resources prior to decision making;
  - f) Declaring that KDOW's FEA was inadequate because it failed to identify and analyze reasonable alternatives;
  - g) Declaring that KDOW's FEA was inadequate because it failed to include all content required under HAR § 11-200-10;
  - h) Declaring that water resources that are necessary and subject to the proposed action are unlawfully being consumed outside of a BLNR water lease or revocable

permit.

2. For a temporary, preliminary and/or permanent injunction enjoining Defendants, and their employees, agents, and representatives, and any other persons acting in concert with them, under their authority, or with their approval, from making any further steps towards implementation of the project until compliance with all applicable laws is achieved;

3. For the Court to retain continuing jurisdiction to review KDOW's compliance with all judgments and orders entered herein.

4. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing.

5. For the costs of suit herein, including reasonable attorneys' fees; and

6. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiff and Defendants.

DATED: Kailua, Hawaii, October 16, 2018.

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LINDA M. B. PAUL, Attorney for Plaintiff  
KIA'I WAI O WAI'ALE'ALE