

FILED
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Susan Fukuda
 Clerk
 Second Judicial Circuit

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

THE SIERRA CLUB, a California
 non-profit corporation
 registered to do business in
 the State of Hawai'i; MAUI
 TOMORROW, INC., a Hawai'i non-
 profit corporation; and the
 KAHULUI HARBOR COALITION, an
 unincorporated association,

Plaintiffs,

vs.

THE DEPARTMENT OF TRANSPORTATION
 OF THE STATE OF HAWAI'I; RODNEY
 HARAGA, in his capacity as
 Director of the DEPARTMENT OF
 TRANSPORTATION OF THE STATE OF
 HAWAI'I; BARRY FUKUNAGA, in his
 capacity as Director of Harbors
 of the DEPARTMENT OF
 TRANSPORTATION OF THE STATE OF
 HAWAI'I and HAWAI'I SUPERFERRY,
 INC.,

Defendants.

) CIVIL NO. 05-1-0114(3)
) (Declaratory Judgment)
)
) ORDER GRANTING PLAINTIFFS'
) MOTION TO ENFORCE JUDGMENT
) REQUIRING ENVIRONMENTAL
) ASSESSMENT BY PROHIBITING
) IMPLEMENTATION OF HAWAII
) SUPERFERRY PROJECT, FOR
) TEMPORARY, PRELIMINARY
) AND/OR PERMANENT
) INJUNCTION; CERTIFICATE OF
) SERVICE

**ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT
 REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING
 IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT,
 FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION**

The Motion to Enforce Judgment Requiring Environmental
 Assessment by Prohibiting Implementation of Hawaii Superferry

Project, for Temporary, Preliminary and/or Permanent Injunction of Plaintiffs THE SIERRA CLUB, MAUI TOMORROW, INC., and KAHULUI HARBOR COALITION ("Plaintiffs") came on for hearing on August 29, 2007, for evidentiary hearings from September 10 - 14, 17 - 21, 24 - 28, 2007 and from October 1 - 5, for oral argument on October 8, 2007 and for decision on October 9, 2007 before the above Court. Plaintiffs were represented by Isaac Hall, Esq. Defendants the STATE OF HAWAI'I DEPARTMENT OF TRANSPORTATION, BARRY FUKUNAGA, and MICHAEL FORMBY, in their official capacities {"HDOT"}, were represented by Deputy Attorney General, William J. Wynhoff, Esq. Defendant HAWAII SUPERFERRY, INC. was represented by Lisa J. Munger, Esq, Lisa A. Bail, Esq., Bruce L. Lamon, Esq. and John R. Lacy, Esq. Based upon the record and file to date, the argument of counsel and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

A. Plaintiffs' request for a permanent injunction is hereby granted as follows:

1. This Court has granted summary judgment in favor of Plaintiffs on the claim requiring the preparation of an Environmental Assessment, pursuant to Hawai'i Revised Statutes ("HRS") Chapter 343.

2. By HRS § 343-5:

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of proposed action.

3. By HRS Chapter 343, acceptance of a required statement is a "condition precedent":

a. To the commencement or implementation of a proposed project, HRS § 343-5(c); Hawai'i Administrative Rules ("HAR") § 11-200-23(d); and

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); *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005); *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997).

4. "Acceptance" refers to:

a. the acceptance of an EIS,

b. the entry of a FONSI, *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005), and/or,

c. an Exemption Determination, *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997).

5. There is now no "acceptance" of this project pursuant to HRS Chapter 343.

6. The proposed action or project is:

a. The barges to load and unload vehicles and passengers between the Hawaii Superferry, Inc. ("HSF") and Pier 2 at the Kahului Harbor in Kahului, Maui, Hawai'i;

b. Operational support to accommodate the HSF, including the provision of utilities (water, power and lighting); security fencing (separating the premises granted to HSF from other state lands at harbors); pavement striping (of the roadways from the Piers connecting to local highways as well as the staging areas for ticketing and inspection of passengers and vehicles); the placement of boarding gangway ramps; and the installation of tents at inspection points or customer waiting areas (for passenger terminals);

c. The state lands granted by HDOT to HSF to use for the HSF project at the Kahului Harbor located at Kahului, Maui, Hawai'i;

d. The HSF project at the Kahului Harbor or action that is facilitated by the harbor improvements at the Kahului Harbor, since these harbor improvements are a condition precedent or prerequisite to HSF operations. *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997); *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i*, 91 Haw. 94, 105, 979 P2d 1120 (1999).

7. Based upon the foregoing, HDOT and HSF and their subordinates, agents, attorneys, and all other persons acting in concert or participation with them who have actual knowledge of this Order, are hereby prohibited from implementing the project or using the barge, the operational support and/or the state

lands described in paragraphs 6. a. - d. above for the Hawaii Superferry project while the Environmental Assessment, referenced in paragraph 1. above, is being prepared and until the environmental review process required by HRS Chapter 343 and the underlying regulations, HAR §§ 11-200-1 et. seq., has been lawfully concluded.

8. In the alternative, in *Life of the Land v. Ariyoshi*, 57 Haw. 249, 252, 553 P.2d 464, 466 (1976), the Hawai'i Supreme Court adopted a three-prong test for determining whether injunctive relief should be granted:

(1) Is the Plaintiff likely to prevail on the merits? (2) Does the balance of irreparable damage favor the issuance of a temporary injunction? (3) Does the public interest support granting the injunction?

In *Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 630 P.2d 646, 649 (1981), the Intermediate Court of Appeals for the State of Hawai'i, citing the *Life of the Land* test, noted the flexible manner in which the balancing is to take place:

[t]he greater the probability the party seeking the injunction is likely to prevail on the merits, the less he has to show that the balance of irreparable damage favors issuance of the injunction.

2 Haw. App. at 276.

The first two factors are balanced as if they are part of one continuum. The moving party is required to demonstrate:

... either a combination of probable success and the possibility of irreparable injury or that

serious questions are raised and the balance of hardship tips strongly in his favor. (Emphasis added.)

Wm. Inglis and Sons Baking Co. v. ITT Continental Banking Co., 526 F.2d 86, 88 (9th Cir. 1975); Hawaii Psychiatric Society v. Ariyoshi, 481 F. Supp. 1082 (D.C. Haw. 1979). Either showing will sustain a preliminary injunction, Aquirre v. Chula Vista Sanitary Service, 542 F. 2d 779, 781 (9th Cir. 1977).

a. The Court finds and concludes that Plaintiffs have already prevailed on the merits since summary judgment has been granted in favor of Plaintiffs on their claim that an environmental assessment must be prepared.

b. The Court finds and concludes that the balance of irreparable damage favors the issuance of a permanent injunction in this case as Plaintiffs have demonstrated the possibility of irreparable injury with respect to the environmental impacts of Hawaii Superferry operations on natural resources, protected species, increased introduction of invasive species and causing social and cultural impacts.

c. The Court finds and concludes that the public interest in implementing the environmental review process supports the granting of this permanent injunction in this case.

9. Based upon the foregoing, the Court further orders as follows:

a. A permanent injunction is hereby issued prohibiting Defendant HSF from using the barge attached to Pier 2

at the Kahului Harbor, in Kahului, Maui, Hawai'i or any of "premises" or state lands granted by HDOT to HSF at the Kahului Harbor for the passenger terminal, for inspection and ticketing and for roadways to and from Pier 2 and the non-harbor Kahului roadway system.

b. A permanent injunction is hereby issued prohibiting HDOT from permitting HSF from using the barge attached to Pier 2 at the Kahului Harbor or any of "premises" or state lands granted by HDOT to HSF at the Kahului Harbor for the passenger terminal, for inspection and ticketing and for roadways to and from Pier 2 and the non-harbor Kahului roadway system.

c. This permanent injunction shall remain in full, force and effect while the Environmental Assessment, referenced in paragraph 1. above, is being prepared and until the environmental review process required by HRS Chapter 343 and the underlying regulations, HAR §§ 11-200-1 et. seq., has been lawfully concluded.

B. As it relates to the Kahului Harbor in Kahului, Maui, Hawai'i, the Harbors Operating Agreement entered into on the 7th day of September, 2005 between the State of Hawai'i, Department of Transportation and Hawaii Superferry, Inc., as amended on the 25th of October, 2005, is hereby declared void because it was not preceded by the requisite environmental assessment which was a condition precedent to approval of the

request and commencement of the proposed action. HRS § 343-5.

C. Counsel for Plaintiffs shall promptly prepare, circulate for approval and submit to the Court findings of fact and conclusions of law, pursuant to HRCF Rule 52 (a), constituting the grounds for the actions granting the permanent injunction and other relief set forth above.

D. Plaintiffs, as the prevailing parties, may, by separate motion, file a request for the reimbursement of their reasonable attorney's fees and costs incurred in this case.

DATED: Wailuku, Hawaii, October 9, 2007.



Judge of the Above-Entitled Court

I hereby certify that a copy of the within was served this 9th day of October, 2007, by facsimile, and will be served on the 10th day of October, 2007, by United States mail, on:

Isaac Hall, Esq.
William Wynhoff, Esq., DAG
Lisa Woods Munger, Esq.



Clerk