

**IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI‘I**

DAISY MITCHELL; REBECCA MELENDEZ,

Petitioners,

vs.

KAMEHAMEHA SCHOOLS (BISHOP ESTATE); HAWAII COUNTY
PLANNING, JEFF DARROW, IN HIS OFFICIAL CAPACITY AS
DIRECTOR; MARISSA HARMAN, IN HER PROFESSIONAL &
OFFICIAL CAPACITY; G70; KAWIKA MCKEAGUE, IN HIS
OFFICIAL CAPACITY; JANE DOES 1-20; DOE CORPORATIONS
1-20; DOE ENTITIES 1-20; AND DOE GOVERNMENTAL UNITS 1-20,

Respondents.

CIVIL NO. 3CCV-25-0000438
(Declaratory Judgment)

PETITIONERS' RESPONSE AND OPPOSITION TO RESPONDENTS
KAMEHAMEHA SCHOOLS AND MARISSA HARMAN'S JOINDER TO
RESPONDENTS G70 AND KAWIKA MCKEAGUE'S MOTION TO DISMISS
FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT. 55, 65]

Hearing Date: June 15, 2026

Time: 2:00 p.m.

Judge: Honorable Kauanoë Jackson

I. INTRODUCTION

Petitioners Daisy Mitchell and Rebecca Melendez, appearing pro se, respectfully submit this Response and Opposition to the Joinder (Dkt. 65) filed by Respondents Crystal Kaulani Rose, Jennifer Noelani Goodyear-Ka'ōpua, Michelle M. Ka'uhane, Eric K. Yeaman, and Elliot Kawaiho'olana Mills as Trustees of the Estate of Bernice Pauahi Bishop dba Kamehameha Schools, and Marissa Harman in her Professional and Official Capacity (collectively "KS Respondents"). The Joinder seeks dismissal of Petitioners' First Amended Petition for Judicial Review by adopting and incorporating the arguments of Respondents G70 and Kawika McKeague's Motion to Dismiss (Dkt. 55).

The Joinder does not present independent factual allegations or legal arguments. It expressly adopts by reference the arguments asserted by G70 and McKeague. Accordingly, Petitioners incorporate herein their opposition to that Motion to Dismiss and submit that dismissal of any Respondent is not warranted. For the reasons set forth below, both the Motion to Dismiss and the Joinder thereto should be denied.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim is disfavored under Hawai‘i law. The Court must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving party. Dismissal is improper unless it appears beyond doubt that Petitioners can prove no set of facts in support of their claims that would entitle them to relief. *Au v. Au*, 63 Haw. 263, 267 (1981). This standard is especially significant here, where the claims arise under remedial environmental protection statutes and self-executing constitutional provisions that Hawai‘i courts have consistently construed liberally in favor of environmental review and public participation.

III. THE JOINDER PRESENTS NO INDEPENDENT GROUNDS FOR DISMISSAL

KS Respondents' Joinder expressly adopts and incorporates by reference the facts, arguments, and authorities of G70 and McKeague's Motion to Dismiss. Because the Joinder advances no independent legal or factual basis for dismissal, it rises and falls with the underlying Motion. As set forth herein, that Motion should be denied, and the Joinder must therefore be denied as well.

IV. G70 AND KAWIKA MCKEAGUE ARE PROPERLY NAMED RESPONDENTS

The First Amended Petition specifically alleges that Respondents G70 and Kawika McKeague were directly involved in the preparation, development, and submission of the challenged Final Environmental Impact Statement ("FEIS") that forms the basis of this action. The record reflects that G70 was retained by Kamehameha Schools to prepare and submit the FEIS, and that Respondent Kawika McKeague, as President of G70, personally signed and transmitted the FEIS transmittal letter dated August 26, 2025, thereby presenting the document as complete and ready for agency review and acceptance under HRS Chapter 343 and HAR Chapter 11-200.1. (First Amended Petition, p. 29; Ex. B-20.) By executing that transmittal letter, McKeague authorized the submission of the FEIS and presented it as sufficient for purposes of environmental review. Every omission, deficiency, and failure of disclosure contained in that document was advanced for agency reliance under his signature and authority as President of G70.

Petitioners further allege that the FEIS contains omissions, deficiencies, and failures of disclosure material to the environmental review process governed by HRS Chapter 343. Whether those allegations are ultimately proven is a matter for determination on the merits, not on a motion

to dismiss. At this stage, Petitioners need only allege facts sufficient to state a plausible claim — and McKeague's own signature on the transmittal letter, as documented in Exhibit B-20, establishes beyond dispute that he played a direct and central role in submitting the challenged document.

At the pleading stage, Petitioners need only allege facts sufficient to state a plausible claim for relief. The First Amended Petition alleges specific, documented deficiencies in the FEIS and identifies the roles of all Respondents — including G70 and McKeague — in its preparation and submission. Those allegations are more than sufficient to withstand a motion to dismiss.

V. THIS COURT HAS JURISDICTION UNDER HRS §343-7(c)

HRS §343-7(c) expressly confers jurisdiction upon this Court to review agency actions related to an Environmental Impact Statement. The statute authorizes any aggrieved person to seek judicial review of an agency's acceptance and reliance upon an FEIS. HRS §343-5(c) further provides that acceptance of a required final EIS "shall be a condition precedent to approval of the request and commencement of the proposed action." Because acceptance of the FEIS is both a legal predicate for and an integral step in the approval process, it constitutes a reviewable agency action under §343-7(c).

Respondents cite *Price v. Obayashi*, 81 Hawai‘i 171, 914 P.2d 1364 (1996), and *Kaupiko v. Board of Land and Natural Resources*, 154 Hawai‘i 456, 555 P.3d 143 (2024). Those decisions arose from materially different factual circumstances and do not hold that a petition for judicial review under HRS §343-7(c) is categorically barred where petitioners have alleged specific and documented deficiencies in an accepted FEIS, have demonstrated particularized injury to constitutionally protected rights, and have participated directly in the environmental review process. Those cases do not compel dismissal here.

Respondents also rely upon *Sensible Traffic Alternatives v. FTA*, 307 F. Supp. 2d 1149, 1160 (D. Haw. 2004), a federal district court decision interpreting NEPA — the federal environmental review statute. That decision has no binding authority over proceedings under Hawai‘i's Hawaii Environmental Policy Act ("HEPA"), HRS Chapter 343, which has its own independent statutory framework and is grounded in the Hawai‘i Constitution. Federal NEPA standards do not govern judicial review under HRS §343-7(c).

VI. PETITIONERS HAVE STANDING AS AGGRIEVED PERSONS UNDER HRS §343-

7

HRS §343-7 authorizes judicial review upon petition by "any person aggrieved" by an agency action. Both Petitioners satisfy this standard.

Petitioner Daisy Mitchell

Petitioner Daisy Mitchell is a lineal descendant with ancestral ties to Keauhou Bay who regularly exercises traditional and customary Kanaka Maoli protocols within the Bay's shoreline and nearshore marine areas. These constitutionally protected rights are recognized under Article XII, Section 7 of the Hawai'i Constitution and the framework established in *Ka Pa 'akai o Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31 (2000). The FEIS's failure to identify, analyze, and protect those specific practices constitutes a concrete, particularized, and imminent harm sufficient to establish standing.

Petitioner Rebecca Melendez

Petitioner Rebecca Melendez has a longstanding, continuous, and deeply personal connection to Keauhou Bay spanning nearly three decades. She is an aggrieved person within the meaning of HRS §343-7, and her standing is firmly established by the following documented facts.

Rebecca's professional connection to Keauhou Bay began in approximately 1997, when she was hired as a deckhand aboard the Fair Wind II, operated by Fairwind Inc., which departs from and returns to Keauhou Bay. As confirmed in the letter of Captain Mitch Stauffer (Exhibit D-5), she worked for Fairwind Inc. as crew for over two years beginning around 1997. She subsequently worked as a deckhand, snorkel guide, and lifeguard aboard other vessels operating from Keauhou Bay, including Hawaii Island and Ocean Adventures, Dolphin Discoveries, and Sea Quest. Between approximately 2010 and 2012, she worked as a kayak guide and paddleboard rental operator with Ocean Safaris Kayak Adventures, based at Keauhou Bay, as confirmed by the statement of Chuck Lathrop (Exhibit D-7), who personally observed her leading kayak tours departing from and returning to Keauhou Bay during that period. From approximately 2014 through 2025, she served as a SNUBA instructor and guide aboard Fairwind Inc. vessels — the Fair Wind II and the Hula Kai — both of which operate out of Keauhou Bay, as confirmed by the letters of Captain Mitch Stauffer (Exhibit D-5) and Brian Heustis, owner of the SNUBA company (Exhibit D-6). Brian Heustis, for whom Rebecca worked for over ten years, described her as possessing a deep, specialized understanding of the local environment of Keauhou Bay. Captain Mitch Stauffer personally worked with Rebecca for over 10 years being based in Keauhou Bay.

From approximately 2012 until August 2025, Rebecca lived at 78-7108 Kamehameha III Road, Kailua-Kona, Hawai'i 96740 — a residence situated at the base of Kamehameha III Road, directly on Keauhou Bay. She did not leave voluntarily. The family who owned the property needed the unit for a family member, and Rebecca vacated in approximately August 2025. Her departure was a matter of family circumstance and does not diminish her longstanding connection to the Bay or her stake in this proceeding. Her residence at that address is confirmed by Amazon shipping records from 2016, 2020, and 2025 showing deliveries to that address (Exhibits D-1, D-

2, D-3), and corroborated by Chuck Lathrop, who was personally present when Rebecca moved into that home around 2012 and observed her living and working in the Bay continuously for many years thereafter (Exhibit D-7).

Rebecca has worked on the water at Keauhou Bay in multiple professional roles for the better part of three decades. She lived directly on the Bay for approximately thirteen years. She participated directly in the FEIS comment process, personally met with Respondent Harman on two occasions to present scientific documentation and environmental concerns, and submitted formal written comments during the DEIS comment period transmitting two public petitions — containing 6,198 and 444 signatures respectively — together with scientific reports addressing cumulative environmental impacts. The proposed development is not an abstract concern to her. It is a direct threat to the bay that has been the center of her professional life since 1997 and her home for over a decade.

These facts establish concrete, particularized, and longstanding injury sufficient to confer aggrieved person status and standing under HRS §343-7

VII. THE FIRST AMENDED PETITION STATES LEGALLY COGNIZABLE CLAIMS

A. The FEIS Fails the Statutory Definition of "Acceptance" Under HRS §343-2

Under HRS §343-2, "Acceptance" requires a formal determination that the FEIS adequately describes identifiable environmental impacts and satisfactorily responds to comments received during review. The First Amended Petition alleges — with specific factual support — that the accepted FEIS fails each prong of this definition. Specifically, the Petition alleges the FEIS:

- (1) Failed to disclose or analyze Keauhou Bay's designation as a U.S. EPA impaired water body under Clean Water Act §303(d) — despite publicly available assessment data identifying Keauhou Bay (Assessment Unit HI713293) as 'Impaired (Issues Identified)' and 303(d) listed in the State's Integrated Report — and instead referred only to a general 'RI Impaired Water' designation, thereby misleading the public and withholding material environmental information required under HRS §343-2, §343-5, and HAR §11-200.1-23. The FEIS contains no meaningful evaluation of how this impaired status affects baseline environmental conditions, cumulative water quality degradation, or the Project's potential contribution to existing impairment — despite the FEIS itself acknowledging the presence of stormwater drainage infrastructure associated with the project area, and despite Petitioner Melendez having expressly identified Keauhou Bay's EPA impaired water status in her written DEIS comments, accompanied by extensive scientific documentation of stormwater runoff, elevated nutrient levels, and submarine groundwater discharge as pathways for pollutants directly into the Bay. Under Clean Water Act §303(d), further degradation of an

- already impaired water body triggers heightened legal obligations, including Total Maximum Daily Load ('TMDL') analysis, which the FEIS wholly fails to address. (First Amended Petition, pp. 10, 15, 77-78; Exhibits B-15-1 through B-15-5, B-19-1, B-19-2, B-19-3, B-5-8-1 through B-5-8-6, R-4);
- (2) Failed to conduct a meaningful cumulative impact analysis of stormwater runoff, wastewater generation, sedimentation, and long-term coastal intensification — instead evaluating impacts in segmented categories rather than assessing their combined effects — and failed to provide quantified sediment modeling, measure or compare baseline marine conditions against projected runoff and wastewater inputs, or conduct an integrated cumulative coastal system analysis, despite the administrative record containing credible scientific submissions and documented public testimony specifically identifying these deficiencies, and despite publicly documented drought conditions, water conservation notices, power generation shortages, and aquifer oversight concerns demonstrating that baseline resource stress already exists on Hawai‘i Island. This failure does not satisfy the heightened analytical duty required under Hawai‘i's public trust doctrine as articulated in *In re Water Use Permit Applications (Waiāhole Ditch)*, 94 Hawai‘i 97 (2000), or the 'hard look' required under HRS Chapter 343. (First Amended Petition, pp. 12, 14-15, 22-23; Exhibits M-1 through M-13, M-15 through M-17, M-18, M-19, M-20, M-21, M-22 through M-25);
- (3) Deferred the constitutionally required Ka Pa‘akai analysis of traditional and customary Kanaka Maoli rights to a later SMA permitting stage rather than completing it prior to FEIS acceptance — despite the FEIS itself expressly stating 'although not required for the acceptance of the EIS, a Ka Pa‘akai analysis will be required for obtaining the SMA permit for the Project' — in direct violation of Article XII, Section 7 of the Hawai‘i Constitution, the three-part analytical framework mandated by *Ka Pa‘akai o ka ‘Āina v. Land Use Commission*, 94 Hawai‘i 31 (2000), HRS §343-2, HRS §343-5(b), HAR §11-200.1-1, HAR §11-200.1-13, and HAR §11-200.1-14, all of which require that cultural impact analysis be completed during the environmental review process and not deferred to future permitting stages. (First Amended Petition, pp. 15, 19, 30, 83; Exhibits B-11-1, B-11-2, B-11-3, B-12-1 through B-12-4, A-1-14, A-4-13, A-4-14, A-4-15, A-4-27, A-4-28);
- (4) Contained a material inconsistency between the documented 101-unit water allocation confirmed by the Department of Water Supply pursuant to an executed Water Agreement dated April 4, 2012, and the 150-unit project scope analyzed for environmental impact purposes in the FEIS — a discrepancy the FEIS never reconciles — despite the FEIS's own acknowledgment that the project will generate an average water demand of approximately 97,466 gallons per day, and despite the administrative record confirming that the project's water demand substantially exceeds existing allocations and depends on speculative future approvals. Because water demand, wastewater generation, runoff volume, and cumulative aquifer impacts

all scale directly with unit count, this material inconsistency undermines the adequacy of the entire environmental analysis. (First Amended Petition, pp. 18, 64-65; Exhibits B-6-1, B-6-2, B-7-1, B-7-2, B-8, A-5-2, A-5-3);

- (5) Failed to adequately evaluate impacts on documented endangered and threatened marine species, including the endangered Hawaiian monk seal (*Neomonachus schauinslandi*), the federally protected Hawaiian green sea turtle (honu, *Chelonia mydas*), and reef manta rays (*Mobula alfredi*) known to congregate in the Keauhou Bay area at the well-known 'Manta Village' aggregation site — where artificial lighting attracts plankton and supports consistent nighttime feeding activity — despite the FEIS's own acknowledgment that both the Hawaiian monk seal and green sea turtle are regularly reported from Kona waters, and despite documented evidence of a Hawaiian monk seal hauled out directly on the Keauhou Bay beach landing and a green sea turtle actively swimming within the Bay. (First Amended Petition, pp. 11, 66-67; Exhibits B-14-1, B-14-2, B-14-3, B-17-1, B-17-2, B-18-2, B-18-11, B-18-12, B-18-13); and

- (6) Omitted and misrepresented the substance of public comment submissions transmitted during the DEIS comment period — including by falsely characterizing Petitioner Melendez's formal written comment submission as containing only 1,681 signatures active for only eight days, when in fact it transmitted two public petitions containing 6,198 and 444 signatures respectively at the time of submission, thereby omitting or misrepresenting at least 4,517 signatures that were part of the materials transmitted — and by failing to acknowledge, summarize, or meaningfully respond to the two attached scientific reports addressing sediment transport, turbidity increases, coral stress, nutrient loading, wastewater impacts, and long-term degradation of nearshore marine ecosystems, all of which were expressly transmitted to Respondent Harman via email during the DEIS comment period and formed part of the administrative record. Under HRS §343-2, an agency may accept a Final Environmental Impact Statement only if the document adequately describes the proposed action and satisfactorily responds to substantive comments received during review. The FEIS fails both requirements. (First Amended Petition, pp. 20-22, 77-78; Exhibits R-1-1, R-2-1 through R-2-2, R-4-1 through R-4-56, R-4-132 through R-4-140, R-4-141 through R-4-152, R-6-2 through R-6-7, M-21).

- (7) Misrepresented cultural consultation results by presenting the administrative record in a manner that created the misleading impression of cultural concurrence and community support for the proposed bungalow resort, when in fact no documented consultation statement in the record expresses support for resort construction — and specifically by presenting the consultation record of cultural practitioner Barbara Nobriga in a manner that obscures her subsequent written testimony during the comment period expressly stating that she does not support the bungalow resort, despite the FEIS separately noting that she could not be reached for an approved

interview summary. The consultation record reflects that every documented cultural consultee instead emphasized protection of the Bay, preservation of fishing practices, shoreline access, and continued community use. (First Amended Petition, pp. 19, 85; Exhibits B-2-1, B-2-12, B-2-13, B-2-14, B-1-6, B-1-7); and

- (8) Relied upon and repeatedly cited a nonexistent 'Purpose and Need' section — specifically Section 2.7 of the FEIS — in responding to public comments and justifying the project, despite the fact that although Section 2.7 is listed in the FEIS Table of Contents, it does not appear anywhere in the body of the document, with Chapter 2 terminating at Section 2.6.2 and proceeding directly to Chapter 3 without including the sections identified in the Table of Contents. This is not a clerical error — Respondents affirmatively relied upon a section that does not exist to justify the project's purpose, revenue rationale, and development objectives, thereby depriving the public of the foundational framework through which project objectives, alternatives, and impact analysis are evaluated, and rendering the FEIS internally inconsistent on its face and incapable of serving as a reliable administrative record under HRS Chapter 343. (First Amended Petition, pp. 30-31; Exhibits B-1-10, B-1-11, B-1-12, B-1-13, B-1-14, B-1-15, B-1-16, A-5-4)."

These are not conclusory allegations. They are grounded in the administrative record, supported by documentary evidence, and specifically referenced throughout the First Amended Petition. They more than suffice to state a legally cognizable claim under HRS Chapter 343.

B. The Constitutional Claims Are Well-Founded and Not Subject to Dismissal

The First Amended Petition asserts violations of self-executing provisions of the Hawai'i Constitution that impose affirmative fiduciary duties upon state agencies. (First Amended Petition, pp. 4-5.)

Article XII, Section 7 of the Hawai'i Constitution mandates protection of traditional and customary Kanaka Maoli rights. The Hawai'i Supreme Court held in *Ka Pa'akai o Ka 'Āina v. Land Use Commission*, 94 Hawai'i 31 (2000), that agencies must make specific findings regarding the identity and scope of valued cultural resources in the affected area, the extent to which traditional and customary rights will be affected or impaired, and the feasible action required to reasonably protect those rights — and that generalized preservation language is insufficient. (First Amended Petition, p. 4; Exhibits A-4-13, A-4-14, A-4-15.)

Article XI, Sections 1 and 7 of the Hawai'i Constitution declare that all public natural resources are held in trust by the State for the benefit of present and future generations and impose an affirmative obligation to protect, control, and regulate water resources. (First Amended Petition, p. 4; Exhibits A-4-1, A-4-2.) The Hawai'i Supreme Court confirmed in *In re Water Use Permit*

Applications (Waiāhole Ditch), 94 Hawai‘i 97 (2000), that the State bears an affirmative duty to take the public trust into account in planning and allocation decisions, to protect public trust uses whenever feasible, and that the public trust doctrine is fiduciary in nature — duties that are ongoing and cannot be abdicated. (First Amended Petition, p. 5; Exhibits A-4-3, A-4-5, A-4-6, A-4-17.) Furthermore, Article XI guarantees each person the right to a clean and healthful environment enforceable in court. (Exhibits A-1-10, A-1-12, A-1-13.) Article XII, Section 7 is separately documented at Exhibit A-1-14.

These provisions are self-executing and enforceable in court independent of any statutory framework. (First Amended Petition, pp. 4-5.) Acceptance of an FEIS that fails to apply the Ka Pa‘akai framework, satisfy the State's affirmative public trust obligations under Article XI, and apply the heightened scrutiny required under Waiāhole is arbitrary, capricious, and contrary to these constitutional mandates. (First Amended Petition, pp. 5-6; Exhibits A-4-5, A-4-6, A-4-17, M-25.) Under Waiāhole, public trust protection is not a passive balancing test — the burden rests upon the applicant to justify uses that may impair public trust resources, not upon the public to prove harm after the fact. Where impairment of water resources is not justified consistent with constitutional obligations, protection must prevail. The Hawai‘i Supreme Court has further expressly rejected agency rubber-stamping of incomplete environmental review. Acceptance of an FEIS that omits baseline deficiencies, defers required cultural analysis, misrepresents public comments, and fails to evaluate cumulative impacts to public trust resources at Keauhou Bay is precisely the type of arbitrary and capricious agency action that these constitutional provisions are designed to prevent. These claims are grounded in the administrative record, supported by the petition's factual allegations, and cannot be dismissed at the pleading stage.

The Hawai‘i Supreme Court confirmed in *In re Water Use Permit Applications (Waiāhole Ditch)*, 94 Hawai‘i 97 (2000), that the public trust doctrine imposes a heightened, affirmative duty of protection upon agencies — not a passive balancing test. The State bears an affirmative duty to take the public trust into account in planning and allocation decisions and to protect public trust uses whenever feasible, and this duty is not discretionary — it applies even where private interests are involved, because as the Court held, 'there is, as there always has been, a superior public interest in this natural bounty.' Where uncertainty exists regarding environmental or cultural harm, agencies may not lawfully advance actions that risk impairment of protected resources, and may not rubber-stamp incomplete or misleading environmental review. Where public trust water and coastal resources are implicated, agencies must justify any potential impairment — the burden rests upon the applicant, not the public to prove harm after the fact. Acceptance of an FEIS that fails to apply this standard to Keauhou Bay — omitting endangered species analysis, deferring required cultural analysis, misrepresenting public comments, and failing to evaluate cumulative impacts to public trust coastal and water resources — is arbitrary, capricious, and constitutionally deficient, rendering agency acceptance and reliance upon it unlawful. These claims are grounded in the administrative record and cannot be dismissed at the pleading stage. (First Amended Petition, pp. 5, 39-40; Exhibits A-4-1, A-4-2, A-4-3, A-4-4, A-4-5, A-4-6, A-4-9, A-4-10, A-4-17.

C. KS Respondents' Fiduciary Obligations Raise Substantive Questions of Law

The First Amended Petition specifically alleges that Kamehameha Schools, as trustee of the Bishop Estate, is legally bound to administer trust lands strictly in accordance with the Last Will and Testament of Princess Bernice Pauahi Bishop — which expressly limits the leasing, selling and use of trust lands to uses 'for the purposes aforesaid,' namely the support and education of beneficiaries with preference to Native Hawaiians — and the fiduciary duties imposed under HRS Chapter 554D, including the duty of loyalty (§554D-802, Ex. A-3-6), prudent administration (§554D-804, Ex. A-3-7), control and protection of trust property (§554D-809, Ex. A-3-9), duty to administer the trust (§554D-801, Ex. A-3-10), and trust purposes (§554D-404, Ex. A-3-5). (First Amended Petition, p. 17; Ex. C-1; Exs. A-3-5 through A-3-10.) Despite these binding constraints, the FEIS characterizes KS as simply 'a large private landowner in the State of Hawai‘i' without acknowledging that it holds these lands subject to the Will of Princess Bernice Pauahi Bishop or that its use of those lands is constrained by charitable trust purposes and fiduciary obligations. The FEIS contains no trust-purpose analysis demonstrating that conversion of trust lands to private luxury lodging is 'for the purposes aforesaid' as required by the Will, and does not disclose how trustees determined that this revenue-optimization strategy satisfies their statutory fiduciary duties. (First Amended Petition, pp. 24-25; Ex. C-1; Exs. A-3-5 through A-3-10, A-5-7.) These allegations raise substantive legal questions regarding the lawfulness of KS's exercise of trust authority over these lands that are entirely inappropriate for resolution on a motion to dismiss.

First Amended Petition further alleges that unresolved historical and legal questions concerning title to Keauhou II preclude lawful advancement of development until lawful ownership and authority are clearly established within the administrative record. Historical land records demonstrate that title to Keauhou II originates from Royal Patent No. 7844, issued to King Kamehameha V (Lot Kapuāiwa), granting land in North Kona known as Keauhou II in fee simple. (First Amended Petition, pp. 55-58; Exhibits B-4-1-1 through B-4-1-3, B-4-5-2, B-4-6, B-4-7.) Spatial records maintained by the Office of Hawaiian Affairs KIPUKA Database identify the Land Award attributed to Kamehameha, Lota as located in North Kona within the ahupua‘a of Keauhou II, yet those records reflect multiple non-contiguous parcels rather than a single continuous tract — raising unresolved questions about the scope and boundaries of the original grant. (Exhibits B-4-6, B-4-7.) The FEIS contains no chain-of-title analysis, parcel-level ownership disclosure, or reconciliation of these gaps, nor does it address whether potential heirs or lines of descent associated with the Royal Patent were identified, evaluated, or considered prior to approval. (Exhibits B-23, B-4-4-1, B-4-4-2, B-4-4-3, A-1-22.) Furthermore, Congress has acknowledged through United States Public Law 103-150 that the overthrow of the Kingdom of Hawai‘i was unlawful and did not extinguish Native Hawaiian claims to their lands. (Exhibits A-4-20, A-4-21.) Under these circumstances, and consistent with the principle established in *Ka Pa‘akai o Ka ‘Āina v. Land Use Commission* that agencies may not defer their obligations and must address them at the time of decision-making, Petitioners respectfully submit that this Court should order a formal and independent investigation into the complete chain of title, historical ownership, succession, and lawful authority underlying Keauhou II — including review of Royal Patent No. 7844 and all subsequent conveyances — and that no further development, permitting, or agency approval affecting these lands should proceed unless and until Respondents demonstrate, through competent evidence and full disclosure in the administrative record, that lawful title and authority have been clearly and verifiably established. (First Amended Petition, pp. 55-58; Exhibits B-4-1-1 through

B-4-1-3, B-4-4-1 through B-4-4-3, B-4-5-2, B-4-6, B-4-7, B-23, A-1-22, A-4-20, A-4-21, A-4-27, A-4-28.)

VIII. CONCLUSION

For the foregoing reasons, Petitioners Daisy Mitchell and Rebecca Melendez respectfully request that this Court deny the Motion to Dismiss (Dkt. 55) and deny the Joinder thereto (Dkt. 65), and permit this matter to proceed on its merits.

This case is not a generalized grievance. It arises from a specific, documented, and administratively established record demonstrating that the Final Environmental Impact Statement accepted for the proposed Keauhou Bay bungalow resort development is materially deficient in eight distinct and independently sufficient respects — each grounded in the administrative record, supported by documentary evidence, and specifically referenced throughout the First Amended Petition. The FEIS fails the statutory definition of acceptance under HRS §343-2, violates self-executing constitutional mandates under Article XI and Article XII of the Hawai‘i Constitution, and was advanced by Respondents who had actual notice of its deficiencies.

Petitioners are not asking this Court to decide the merits today. They are asking only that this Court allow the case to proceed — as Hawaii law requires — so that these documented deficiencies may be fully examined. Under *Au v. Au*, 63 Haw. 263 (1981), dismissal is improper unless it appears beyond doubt that Petitioners can prove no set of facts that would entitle them to relief. That standard cannot be met here. The administrative record itself — including the FEIS's own admissions regarding deferred Ka Pa‘akai analysis, the false signature count, the nonexistent Section 2.7, the unreconciled water allocation, and the characterization of a charitable trust as a private landowner — demonstrates that the claims are not only plausible but directly supported by Respondents' own documents.

Keauhou Bay is not merely a development site. It is the birthplace of King Kamehameha III, a federally recognized impaired water body, a documented habitat for endangered and threatened marine species, a site of active traditional and customary Kanaka Maoli protocols, and a public trust resource that Hawai‘i's Constitution requires the State to protect for present and future generations. The lands at issue derive from a Kingdom-era Royal Patent whose chain of title has never been examined or disclosed in the environmental record. The charitable trust that seeks to develop these lands has not demonstrated — in any document before this Court — that this commercial bungalow resort is authorized by the Will of Princess Bernice Pauahi Bishop or consistent with the fiduciary obligations that bind it.

Petitioners further submit that KS Respondents' Joinder must be denied for the independent reason that it advances no argument of its own. It is a joinder in name only — a procedural vehicle

that rises and falls entirely with the underlying Motion to Dismiss. Because that Motion should be denied, the Joinder must be denied as well.

The public trust doctrine, the Ka Pa‘akai framework, and the Waiāhole Ditch principles exist precisely for situations like this one — where a proposed development of culturally and ecologically sensitive shoreline lands is advanced through an environmental review process that omits, defers, and misrepresents material information. The burden under Hawai‘i constitutional law rests upon the applicant to justify impairment of public trust resources — not upon Petitioners to prove harm after the fact. That burden has not been met.

WHEREFORE, Petitioners respectfully request that this Court grant the following relief:

Petitioners respectfully request that this Court:

- (1) Deny the Motion to Dismiss filed by Respondents G70 and Kawika McKeague (Dkt. 55);
- (2) Deny the Joinder filed by KS Respondents and Marissa Harman (Dkt. 65);
- (3) Allow this matter to proceed on its merits;
- (4) Order a formal and independent investigation into the complete chain of title, historical ownership, succession, and lawful authority underlying Keauhou II, including review of Royal Patent No. 7844 and all subsequent conveyances; and
- (5) Grant such other and further relief as this Court deems just and proper to protect Keauhou Bay, preserve public trust resources, safeguard traditional and customary Kanaka Maoli rights, and ensure compliance with Hawai‘i law.

DATED: Kailua-Kona, Hawai'i, _____, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of PETITIONERS' RESPONSE AND OPPOSITION TO RESPONDENTS KAMEHAMEHA SCHOOLS AND MARISSA HARMAN'S JOINDER TO RESPONDENTS G70 AND KAWIKA MCKEAGUE'S MOTION TO DISMISS FIRST AMENDED PETITION FOR JUDICIAL REVIEW [DKT. 55, 65] were served upon the following parties by U.S. Mail, postage prepaid, on the dates indicated below:

Served May 8, 2026, via U.S. Mail (same day as filing):

HAWAII COUNTY PLANNING DEPARTMENT and JEFF DARROW
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720

Served May 18, 2026, via U.S. Mail (same day as filing):

KAMEHAMEHA SCHOOLS and MARISSA HARMAN
567 South King Street
Honolulu, Hawai'i 96813

G70 and KAWIKA MCKEAGUE
111 South King Street, Suite 176
Honolulu, Hawai'i 96813

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Kailua-Kona, Hawai'i, _____, 2026.

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