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N. MARTINS, CLERK  
SECOND JUDICIAL CIRCUIT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

MĀLAMA KAKANILUA, an unincorporated	)	Civil No. 17-1-0311(3)
association, CLARE H. APANA, and	)	(Environmental Court)
KANILOA LANI KAMAUNU	)	
	)	PRELIMINARY INJUNCTION
Plaintiffs	)	
	)	
vs.	)	
	)	
MAUI LANI PARTNERS, a domestic	)	
partnership,	)	
	)	
Defendant.	)	

**PRELIMINARY INJUNCTION**

INTRODUCTION

On July 27, 2017, Plaintiffs filed their complaint alleging violations of HRS chapter 6E (Count I) among other claims related to MLP's sand mining operations and disturbances of significant historic, archaeological, and cultural sites at Maui Lani Phase IX (Phase IX), located at TMK (2) 3-8-007:153 (por.).

Also on July 27, 2017, Plaintiffs filed a motion for a preliminary injunction based on violations of HRS chapter 6E under Count I and Plaintiffs filed an Ex Parte Motion for a Temporary Ten Day Stay Order, which was delivered to MLP on the same day.

By letter dated July 31, 2017, MLP's counsel sent a letter to this Court indicating its position against allegations in the complaint.

On August 2, 2017, this Court granted Plaintiffs Ex Parte Motion for a Ten Day Stay (TRO).

On August 8, 2010, former defendant the State Historic Preservation Division of the State Department of Land and Natural Resources (SHPD) stipulated to not being a necessary or indispensable party to the claims made or relief prayed for in this case and to its dismissal from this action.

On August 9, 2017, MLP filed a motion to dissolve the TRO.

I hereby certify that this is a full, true and correct copy of the original.

  
Clerk, Second Judicial Circuit

On August 10, 2017, MLP filed its opposition to Plaintiffs' motion for a preliminary injunction.

On August 11, 2017, the County of Maui stipulated to not being a necessary or indispensable party to the claims made or relief prayed for in this case and to its dismissal from this action.

On August 11, 2017, this Court held a hearing on Plaintiffs' motion for a preliminary injunction. MLP sought an evidentiary hearing on the motion. This Court accommodated MLP's request and immediately initiated evidentiary proceedings.

On August 11, 23, 28, and 30, 2017 and September 1 and 8, 2017, evidentiary hearings were held on Plaintiffs' preliminary injunction motion on Count I.

At the August 23, 2017 hearing, MLP represented that it would not conduct any further ground disturbing activities so long as the County or SHPD did not impose further best management practice (BMP) requirements. MLP further agreed to bring to this Court's attention any such new BMP requirements.

The following Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order are based on parties' filings, respective witness testimonies and exhibits presented during the evidentiary hearing held on August 11, 23, 28, 30, and September 1 and 8, 2017. Exhibits were received into evidence during the hearing. If any statement denominated a COL is more properly considered an FOF, then it should be treated as an FOF. Conversely, if any statement denominated as an FOF is more properly considered a COL, then it should be treated as a COL.

#### FINDINGS OF FACT

1. Plaintiff MĀLAMA KAKANILUA, is an unincorporated association that was formed many years ago to protect 'iwi, burials, and other historic and archeologically significant sites in Maui. Mālama Kakanilua is named for Kakanilua, a historic and famous battle that occurred in the sandhills of Wailuku. It was founded in 2006 or 2007.

2. Plaintiff CLARE H. APANA is kanaka maoli, conducts cultural practices at Kalua sandhills, those practices are related to a responsibility to family, are connected through cultural education or family, and. involve taking responsibility or care for the location. Apana has taken responsibility for speaking for the protection of the protection of our iwi kupuna and for the culture in the area that she lives in. Apana is a trained practitioner of native Hawaiian traditional and customary practices associated with this land, spirituality, and resolution of cultural and spiritual disturbances.

3. Plaintiff KANILOA LANI KAMAUNU (Kamaunu) is a resident of Wailuku moku and a lineal descendant of Owa 'ili, which lies within the Kalua sandhills. Kamaunu is also a member of Mālama Kakanilua. He engages in cultural practices at the Kalua sandhills to fulfill cultural and religious needs of himself and his family including Phase IX. His practices were learned from elders; he is connected to the Kalua sandhills because he is related to people who lived there and are buried there. He has taken responsibility for the care of the area for non-commercial, cultural purposes, and his practices are consistent with Hawaiian custom.

4. Jennifer Noelani Ahia is kanaka maoli, a Native Hawaiian traditional and customary practitioner and member of Mālama Kakanilua. Ahia's cultural practices include ho'okupu, oli, and prayer.

5. Continued unmonitored ground disturbing activities at Phase IX would harm Plaintiffs' and Plaintiff's members' cultural practices. The potential for unmonitored grading material containing human remains being removed from the site and being processed into cement constitute a grave threat of irreparable harm.

6. Intrusions into burials are considered extremely offensive and disrespectful—an act of violence and degradation directed at the deceased individual, the living family members, and the larger community associated with the burial.” *Kaleikini v. Yoshioka*, 128 Hawai'i 53, 283 P.3d 60 (2012)

7. Defendant Maui Lani Partners' consultant, Archaeological Services Hawaii (ASH) prepared two archaeological assessments (AAs) for the Phase IX site in 2007 and 2010.

8. The 2010 AA stated, “archaeological monitoring shall be conducted during all construction-related activities. Prior to commencing any construction activities, a monitoring plan shall be prepared for review and approval by SHPD.”

9. In 2013, ASH prepared an Archaeological Monitoring Plan for the Phase IX project site work (AMP).

10. The AMP states that archaeological monitoring at the Phase IX project site was “highly warranted” due to the numerous primary burial features and secondarily deposited human skeletal remains within the Maui Lani landholdings.

11. The AMP imposed special conditions on Maui Lani Partners' operations, including requirements that “all grading activities will be monitored full time[,]” “[n]o sand will be excavated directly out of the ground and loaded into trucks[,]” and the protocol requires “[o]ne archaeological monitor per piece of ground disturbing equipment.”

12. The AMP also states in relevant part:

The construction plans call for excavations ranging from 2-30 feet in depth and all grading activities will be monitored full time. The procedures will consist of grading the sand with a dozer and pushing it into a monitored stockpile. At that point, the stockpile can be loaded out. No sand will be excavated directly out of the ground and loaded into trucks. This procedure does not allow full inspection of the sand matrices.

13. MLP's Phase IX AMP states: "In the event that human remains are inadvertently exposed during this undertaking, the procedures for the inadvertent discovery of human skeletal remains pursuant to Chapter 6E-43.6 and HAR 13-300-40 will be instituted."

14. In accepting the 2013 AMP for Phase IX operations in a letter dated November 26, 2014, State Historic Preservation Division of the Department of Land and Natural Resources, State of Hawai'i (SHPD) specified "[m]onitoring will occur for all grading/ filling activities including those associated with installation of all utilities within the subdivision, as well as lateral connection to main lines within the Maui Lani Parkway road."

15. SHPD specified that Phase IX "[e]xcavations will range from 2-30 feet in depth, and all grading activities will be monitored full-time. One archaeologist monitor per piece of ground-disturbing equipment is the protocol for this monitoring project."

16. SHPD's November 26, 2014 letter also specified that if the project extends beyond one year in duration, annual interim monitoring reports should be submitted.

17. No monitoring reports for Phase IX operations were submitted to SHPD since issuance of SHPD approval of the AMP on November 26, 2014.

18. Since 2014, at least five inadvertent discoveries of burials have been made at the Phase IX site.

19. On February 22, 2017, grading activity was occurring at Phase IX and ground disturbing equipment was being operated but no archaeological monitor was present on site.

20. On April 29, 2017, grading activity was occurring at Phase IX and ground disturbing equipment was being operated by no archaeological monitor was present on site.

21. On June 26, 2017, grading activity was occurring at Phase IX at the request of the County of Maui and ground disturbing equipment was being operated but no archaeological monitor was present on site. The activity included moving stockpiled materials as well as material from previously undisturbed ground.

22. The operators of the ground disturbing equipment did not maliciously intent to violate the AMP.

## CONCLUSIONS OF LAW

A. Plaintiffs had standing to bring their claim before this Court.

B. Count I was properly before this Court pursuant to HRS §6E-13(b), which provides:

Any person may maintain an action in an environmental court having jurisdiction where the alleged violation occurred for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration, or transfer of the property or burial site.

C. Plaintiffs' Count I meets the threefold test for granting injunctive relief, which requires consideration of: "(1) whether the plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction." *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai'i*, 117 Hawai'i 174, 211, 177 P.3d 884, 922 (2008) (citations omitted).

D. Plaintiffs' will likely prevail on the merits under Count I because MLP has not fully complied with its AMP at Phase IX. Complete and strict compliance with the AMP was expected in light of the imminent risk of irreparable harms and the serious nature of the site in question. Credible testimony established that Defendant's heavy machine operator was disturbing not only previously stockpiled material, but also fresh soil that was not stockpiled.

E. The balance of irreparable damage favors the issuance of Plaintiffs' requested preliminary injunction. This balance considers that five inadvertent discoveries thus far have been found on the Phase IX site after SHPD approved the 2010 Archaeological Assessment, which required archaeological monitoring for all construction-related activities. Further, disturbance of burial sites will produce substantial, irreparable harm. Disturbance of the remains of ancestors creates tremendous anguish and anxiety to Plaintiffs.

F. There will be little risk of harm, expense, or inconvenience to Defendant.

G. The irreparable harm at issue in these proceedings relates to the unnecessary degree of disturbance of burials and human remains that may occur in the absence of strict compliance with the AMP.

H. The balance of harms fall in favor of granting Plaintiffs' requested injunction.

I. In addition to the Court's finding of a likelihood of success on the merits of Count I, the great degree of potential irreparable harm otherwise lessens Plaintiffs' burden to establish a likelihood of prevailing on the merits. *See Penn v. Transportation Lease Hawaii, Ltd.*, 2 Haw. App. 272, 630 P.2d 646 (1981) ("The more the balance of irreparable damage favors issuance of the

injunction, the less the party seeking the injunction has to show the likelihood of his success on the merits.”).

J. The public interest is satisfied with the injunctive relief ordered by this Court. This Order will provide confidence in strict compliance with the AMP, and this compliance will be accomplished in a manner that is safe and inexpensive and provides access to immediate judicial relief in the event of potential violation of the AMP.

K. The Court considered the appointment of a special master to supervise Defendant’s compliance. In light of the potential significant litigation likely to surround that appointment, added cost for Defendant, and sufficiency of its grant of emergency access to judicial relief to alleged violations, the Court has determined that appointment of a special master is unnecessary under the circumstances of this case.

#### DECISION AND ORDER

Based upon the motion, the memoranda for and against the motion, the evidence, argument of the parties as well as the record herein,

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

- (1) Plaintiffs’ Motion for Preliminary Injunction (Count I) is granted.
- (2) The Court enjoins Defendant from activities that involve disturbing previously undisturbed ground, or the removal of soil from the site, whether after stockpiled or freshly from the ground, unless the following conditions are met:
  - (a) Defendant must be within in full compliance with all terms and conditions of the AMP, including all regulations and provisions listed within the AMP. Defendant’s compliance with the AMP is already required and does not impose additional burdens;
  - (b) Defendant must notify Plaintiffs’ designated representative or legal counsel at least 48 hours before Defendant causes the disturbance of ground or removal of soil from the Phase IX site. This notification procedure will ensure that there is a written or electronic record of Defendant’s activities and Plaintiffs’ receipt of notification of the same. It is reasonable to conclude that Defendant’s construction and ground-disturbing activities would require advance planning of at least 48 hours and therefore the imposition of this notification requirement does not impose an undue burden on Defendant.
  - (c) After such notification to Plaintiff’s representative, Defendant must authorize the presence of Plaintiffs’ chosen representative observer on the Phase IX site and provide the representative with an unobstructed view of the ground disturbing activities at a safe

