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SCHNITZER STEEL HAWAII CORP.

ORIGINAL

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SCHNITZER STEEL HAWAII CORP., a Delaware corporation,

Plaintiff,

vs.

ISLAND RECYCLING INC., a Hawai'i corporation, HAWAII STATE DEPARTMENT OF HEALTH, VIRGINIA PRESSLER, M.D., in her official capacity as Director of Health, and DOE ENTITIES 1-10,

Defendants.

CIVIL NO. 14-1-2195-10 (ECN)
(DECLARATORY JUDGMENT)

PLAINTIFF SCHNITZER STEEL HAWAII CORP.'S **REPLY MEMORANDUM** TO DEFENDANT ISLAND RECYCLING, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF SCHNITZER STEEL HAWAII CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED AUGUST 31, 2015, FILED SEPTEMBER 21, 2015; CERTIFICATE OF SERVICE

HEARING:
DATE: September 29, 2015
TIME: 10:30 a.m.
JUDGE: Honorable Edwin C. Nacino

No Trial Date Set

PLAINTIFF SCHNITZER STEEL HAWAII CORP.'S REPLY MEMORANDUM TO DEFENDANT ISLAND RECYCLING, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFF SCHNITZER STEEL HAWAII CORP.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED AUGUST 31, 2015, FILED SEPTEMBER 21, 2015

Plaintiff Schnitzer Steel Hawaii Corp. ("**Schnitzer**") replies to the Memorandum in Opposition to Plaintiff Schnitzer Steel Hawaii Corp.'s Motion for Partial Summary Judgment filed August 31, 2015, filed by Defendant Island Recycling, Inc. ("**IRI**") on September 21, 2015.

I. INTRODUCTION

No legitimate dispute exists as to the purpose and use of the drainage ditch on IRI's property. The planning documents show IRI's drainage ditch is part of a drainage system that transports storm runoff from the Kaomi Loop Subdivisions to the ocean. The design engineer has confirmed that the drainage system was designed and is still used to carry storm runoff through IRI's drainage ditch to the ocean. The drainage easements further corroborate the drainage purpose of IRI's drainage ditch. On numerous occasions, IRI has represented to the DOH that its drainage ditch carries storm runoff to the Pacific Ocean. Eyewitness testimony and photographs from two separate rain events in the last year indisputably prove that storm water does, in fact, flow into IRI's drainage ditch, through the culvert, to the beach and into the ocean.

IRI does not attempt to rebut this overwhelming evidence. Instead, it spends pages upon pages of its opposition brief on the law of easements. IRI appears to have lost sight of the relevant inquiry: *whether IRI's drainage ditch is a "drainage ditch" under Hawai'i Revised Statute Chapter 342D* ("**Chapter 342D**"), not the Third Restatement of Property Law. Whether IRI is violating the property rights of the easement holder has no effect on whether IRI's drainage ditch is state waters. And despite its voluminous recitation of property law, IRI has identified no case or treatise that has asserted—or even hinted—otherwise. Even if Hawai'i property laws were relevant, IRI admits that such laws only allow it to use the drainage easements so long as the use does not "unreasonably interfere" with the rights of the easement holders. IRI concedes that the drainage easements are intended to prevent flooding in the adjacent areas. IRI's stockpiling of the materials in the drainage ditch obstructs the flow of any water in the ditch, greatly increasing the risk of flooding. Thus, IRI's use argument is directly at odds with the purpose of the easement and is thus unreasonable. Moreover, the stockpiling of materials in the drainage ditch is in direct contravention of IRI's solid waste management permit ("**SWMP**") and thus, violates state environmental laws. An illegal use is per se unreasonable.

IRI also attempts to argue that because "there was no stated intent [in the easements] to burden Lot 32 with any obligations other than for the reasonable drainage requirements" of the adjacent lots, Chapter 342D cannot apply. This is a gross mischaracterization of the law.

According to IRI, its drainage ditch is only state waters if *IRI* and the easement holders say it is. Or conversely, private parties can convert a state waters into something else entirely merely by designating an easement. Contrary to what IRI believes, Chapter 342D is not optional. Chapter 342D imposes an absolute bar on the discharge any water pollutant into state waters *by anyone*, except for limited circumstances not applicable here. Haw. Rev. Stat. ("**HRS**") § 342D-50. IRI offers no support in Chapter 342D that the mere existence of an easement is one of those exceptions. That IRI is of the opinion that private parties must *consent* to Chapter 342D before their statutory obligations can be triggered is bizarre and irrational. IRI's positions demonstrate exactly why private enforcement is necessary—to prevent IRI's way of doing business that seeks to evade its clear duties under environmental laws designed to protect the general public.

The rest of IRI's arguments are similarly unavailing. IRI argues that because the statute defines a drainage ditch as "that facility used to carry storm runoff only," IRI's use of portions of the drainage ditch for landscaping purposes, somehow means that the drainage ditch cannot be a "drainage ditch" under the statute. However, DOH has already interpreted the term "only" to mean that it excludes drainage ditches used to carry sanitary sewage. Thus, even if DOH had approved IRI's use of the drainage ditch for landscaping purposes (which it did not), such approval does not transform the drainage ditch into something other than state waters. Moreover, the evidence relied upon by IRI is intentionally misleading in its efforts to confuse. IRI points to its solid waste management permit application as evidence that DOH has sanctioned IRI's landscaping in the ditch. IRI attaches only its site plan map and conveniently omits the rest of its application. The portion of the application discussing the landscaping areas indicates that the landscaping strip is located along the boundary of the ditch to filter storm water *before* it enters the drainage ditch. Moreover, its application contains numerous statements that storm water does flow into the drainage ditch and discharges into the Pacific Ocean.

Finally, IRI again advances its torturous argument that a "drainage ditch" falls within the regulatory definition "ditcesh and flumes," and thus must haves continuous flow under HAR § 11-54-1. This argument lacks support in both the statute and regulations. In November 2014, the DOH clarified its regulations by explicitly including the definition of a "drainage ditch" since it was already separately defined in the governing statute. Opp. to IRI MSJ at 5-6. IRI appears oblivious to the fact that prior to this amendment, DOH repeatedly stated that its existing regulations did not define "drainage ditch." When DOH did add the definition for "drainage

ditch" into its regulations, DOH implemented a definition that—consistent with the statute—simply states that a "drainage ditch" is a "facility that carries storm runoff only, not sanitary sewage." HAR § 11-54-1. A requirement for continuous flow appears nowhere in the definition.

Schnitzer has clearly met its burden of showing it is entitled to summary judgment as a matter of law. Based on the admissible evidence, there is no question that IRI's drainage ditch is a "facility used to carry storm runoff only." It is undeniably "state waters" under Chapter 342D despite Defendants' feeble efforts to muster misleading and unavailing arguments about easements and flow. The Court should grant Schnitzer's motion for partial summary judgment.

II. ARGUMENT

A. IRI Has Failed to Rebut the Overwhelming Evidence That Its Drainage Ditch Is A "Drainage Ditch" Under Chapter 342D

Under Chapter 342D, a "drainage ditch" is a "facility used to carry storm runoff only." HRS § 342D-1. HAR § 11-54-1 further clarified that a "drainage ditch" is "a facility used to carry storm runoff only, not sanitary sewage." The evidence that IRI's drainage ditch is "used to carry storm runoff only" is overwhelming, as set forth in the Motion. Planning documents prove that IRI's drainage ditch was designed to transport storm water from the subdivisions to the Pacific Ocean. Mot. at 10-12. The lead engineer in charge of the design and construction of the drainage system confirms that IRI's drainage ditch was designed and is still currently used to drain storm water from the Kaomi Loop subdivisions surrounding IRI's property. Palesh Decl.[1] at ¶¶ 10-15. Easements 212 and 2532 were designated in what is now IRI's drainage ditch expressly for drainage purposes.[2] Opp. to IRI MSJ at 14-17. Both IRI and DOH have repeatedly recognized IRI's drainage ditch is used to drain storm runoff from IRI's property to the ocean. Mot. at 9-14. IRI itself has submitted numerous documents containing flow charts and site plans showing its drainage ditch discharges runoff water directly to the Pacific Ocean. *Id.* at 5-7. IRI has labeled its drainage ditch as a "drainage ditch" in a use application. Ex. 12 at Bates No. 21.

IRI makes no real effort to dispute any of this evidence. It simply attempts to ignore that undeniable evidence and then proceed to manufacture colorable facts based on legal arguments that—as discussed below—have no basis in Chapter 342D or its implementing regulations.

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[1] The Palesh Declaration was filed with Schnitzer's Opposition to IRI's Motion for Summary Judgment re Drainage Ditch Filed Sept. 1, 2015, filed Sept. 21, 2015 ("**Opp. to IRI MSJ**").

[2] Documents obtained from the Land Court and Bureau of Conveyances show that IRI recorded **five** separate documents acknowledging Easements 212 and 2532 were used for drainage purposes. Opp. to IRI MSJ at 7-8. Schnitzer hereby incorporates its Opp to IRI's MSJ.

Indeed, IRI even admits that the easements on its drainage ditch are intended for drainage purposes to avoid flooding. IRI Opp. at 6, 8. Yet, nowhere does IRI address this admission or the many instances where IRI has undeniably represented that its drainage ditch is a "drainage ditch" that discharges storm runoff from its property to the Pacific Ocean. Absent a denial of these admissions against interest by IRI, they should be dispositive of Schnitzer's Motion.

Having alleged no mistake of fact, IRI cannot genuinely dispute its prior statements and diagrams in its prior applications that demonstrate conclusively that its drainage ditch carries storm water that discharges to the Pacific Ocean. Furthermore, IRI does not provide an explanation as to why it obtained a permit to discharge storm water into its drainage ditch if that drainage ditch was not within the scope of Chapter 342D. Nor does IRI explain why it was required to implement best management practices ("**BMPs**") to prevent discharge of pollutants into the drainage ditch from its paved and berm protected part of its property if DOH has no authority over the drainage ditch as state waters. *See* Ex. 5 at 7-2 (finding that IRI had failed to implement BMPs to prevent discharge into the drainage ditch); Opp. to DOH Joinder at 4-5 (which Opp. Schnitzer incorporates by reference here). IRI also does not dispute or even address the photographic evidence that shows storm water from a rainstorm flowing through its drainage ditch towards the ocean. IRI's claim that its drainage ditch is "*usually* dry" implicitly admits that at times its drainage ditch does in fact carry storm runoff. *See* IRI Opp. at 13. Based on the undisputed evidence, IRI's drainage ditch is clearly "used to carry storm runoff only." This is all that is required by the statute. *See* HRS § 342D-1. Fundamentally, IRI cannot dispute that under this straightforward construction of the statute and overwhelming evidence of historic practices that IRI's drainage ditch is not a "drainage ditch" under Chapter 342D.

B. The Drainage Ditch on IRI's Property Is Intended to Drain Storm Runoff

IRI's brief opens with the erroneous contention that Schnitzer "asserts for the first time in this litigation that two (2) drainage easements on [IRI's] property... constitute a "drainage ditch" and "state waters." IRI Opp. at 2. This is a misleading distortion of Schnitzer's position. Schnitzer's position always has been that IRI's drainage ditch is a "drainage ditch" under Chapter 342D, and thus, is state waters. Schnitzer has always maintained that no matter what the status is of the drainage *easements*—which IRI itself has tried to put at issue— those easements do not define or control whether IRI's drainage ditch is considered state waters. Whatever limited relevance the drainage *easements* have, they certainly support the overwhelming

evidence that the drainage ditch was intended for and is used to drain storm water runoff.

Here, there is no doubt the drainage easements were intended to carry storm runoff only. *See* IRI Opp. at 7. Yet, bizarrely, IRI appears to argue that a drainage ditch loses its status as a "drainage ditch" under Chapter 342D if it is *ever* used for any other purpose. *See* IRI Opp. at 7. This distortion is wrong. The DOH regulations are clear that a "drainage ditch" or a "facility used to carry storm runoff only" simply excludes a facilities used to transfer "sanitary sewage." Opp. to IRI Mot. at 9-10. Thus, the only relevant inquiry is whether IRI's drainage ditch is used to carry storm runoff. The answer is clearly and undeniably yes. *See supra* at § II(A).

Nevertheless, IRI tries to argue that notwithstanding clear statutory language prohibiting it from placing debris and materials in the drainage ditch, that the common law of property permits IRI to use its drainage ditch in a manner that ignores and circumvents Chapter 342D. This argument is legally irrelevant and incorrect as a matter of law. *See People v. Page*, 100 Cal. App. 252, 254, 279 P. 1059, 1060 (Cal. Ct. App. 1929) ("It is settled law that all laws applicable, in existence when a contract is made, form a part of it."). Despite providing pages reciting property law on easements, generally, IRI omits any discussion of the documents that reflect the actual easements on IRI's property and their intended purpose. Schnitzer's opposition to IRI's summary judgment motion contains numerous Land Court documents as exhibits that demonstrate that Easement 212 was designated for drainage purposes. Easement 212 was granted in favor of the City and County of Honolulu and gave the City and County "the right to ***discharge storm waters on Easement 212***." Opp. to IRI MSJ at 6 and Ex. M at 2. When the Kaomi Loop subdivisions were first developed, the drainage system that includes IRI's drainage ditch was designed and constructed to drain runoff from the subdivisions to the ocean. *Id.* at 6; Palesh Decl. at ¶¶ 5-14. Easement 2532, which runs along the back of several properties, including IRI's property, was designated to accommodate the increased storm water runoff from the development of the subdivisions. Opp. to IRI MSJ at 6-7. When IRI took possession of its property, it recorded multiple documents with the Land Court and Bureau of Conveyances identifying its property as being subject to Easements 212 and 2532, and acknowledging that the easements were restricted to drainage purposes. Opp. at IRI MSJ at 7-8. As recently as January 2013, IRI itself filed an Assignment of Rents confirming that Easements 212 and 2532 encumbered its property "for drainage purposes." *Id.* at 8 and Ex. U. Thus, in five separate documents filed by IRI, not one of them contemplated any use for Easements 212 and 2532 other

than for drainage purposes. The contemporaneous documents provide indisputable proof that the Easements 212 and 2532, which run along IRI's drainage ditch, were intended for the sole purpose of draining storm water runoff. For IRI to hide this evidence from the Court and argue a question of fact remains as to the intended purpose of the drainage easements is sanctionable.

C. IRI's Recitation of the Law on Servitudes Is Irrelevant

IRI avers that because it uses the *easements* for a purpose other than storm runoff, its drainage ditch is not a "drainage ditch" under Chapter 342D. However, IRI there is no language in Chapter 342D or HAR Chapter 11-54 to support such an argument. No private easement or contract can absolve IRI's liability for stockpiling and discharging debris, soil, and other materials as *per se* violations of the law in Chapter 342D. *See* Opp. to IRI MSJ at 14-17. IRI's assertion that it can escape the mandates of Chapter 342D merely by violating it would create a loophole so large that it would render the statute meaningless. *Id.* Such an absurd result cannot possibly be construed as a proper interpretation and application of Chapter 342D. *See State v. Diaz*, 128 Haw. 215, 224, 286 P.3d 824, 833 (2012) ("[T]he legislature is presumed not to intend an absurd result. . . ." (quotations and citation omitted)).

Lacking any support for its positions in the applicable statute and regulations, IRI also attempts to rely on the law of servitudes. However, these common law property concepts also fail in the face of a clear governing statute. First, property law cannot override or supplant obligations under Chapter 342D. HRS § 342D-19 plainly states that "[a]ll laws, ordinances, and rules inconsistent with this chapter shall be void and of no effect." Second, IRI's reliance on *Childs v. Harada* is both misleading and inapposite. *Childs* only dealt with a right-of-way easement between two private parties. *See generally, Childs v. Harada*, 130 Hawai'i 387, 311 P.3d 710 (App. 2013). The case has nothing to do with state waters, Chapter 342D, or HAR Chapter 11-54, and thus, cannot be construed as allowing IRI to expand its use of the drainage easements in a manner that is inconsistent with Chapter 342D. *See* Opp. to IRI MSJ at 16-17.

Third, IRI quotes the *Childs* opinion out of context in an attempt to mislead the Court. IRI cites *Childs* for its proposition that the owner of the property burdened by the easement may use the property "in any way that does not interfere with the easement holder's easement rights." IRI Opp. at 8. Based on this statement, IRI reasons that it can do whatever it wants with the drainage ditch, including stockpiling materials in the ditch. However, the language quoted by IRI was actually from a Colorado Supreme Court opinion that was part of the *Childs* court's

summary of the law in other jurisdictions. *Childs*, 130 Hawai'i at 401, 311 P.3d at 724 (quoting *Matoush v. Lovingood*, 177 P.3d 1262, 1273 (Colo. 2008)). Nowhere in *Childs* does the court ever adopt the *Matoush* court's statement as the rule in Hawai'i.

Fourth, even under IRI's contrived argument, IRI's expansion of the use of the drainage ditch must not "interfere unreasonably with the uses authorized by the easement." IRI Opp. at 8. IRI admits that the drainage easements are intended for drainage to prevent flooding. *Id.* In this case, IRI has placed construction equipment and large stockpiles of materials in the ditch that would impede or obstruct the flow of storm water through the ditch. Ex. 15 (first photograph); Ex. 5 at 16-18 (showing waste materials spilling into and stored in the drainage ditch). IRI's placement of materials and equipment in the drainage ditch substantially impairs drainage through the ditch, giving rise to risks of flooding. Palesh Decl. at ¶ 4. Because IRI's use of the drainage easements squarely conflicts with the flood prevention purpose of those easements, such use is unreasonable. *See Fleming v. Napili Kai, Ltd.*, 50 Haw. 66, 70, 430 P.2d 316, 319 (1967) (holding that defendants' use of an easement area by undertaking construction therein "unreasonably interfere[d]" with easement's purpose of providing plaintiff's ingress/egress). Moreover, IRI's storage of materials in the drainage ditch is a *per se* violation of Chapter 342D. A use that violates state law is an "unreasonable" interference.

IRI's bizarre argument that Schnitzer's efforts to compel compliance with Chapter 342D really seek "to radically change the existing law of easements and the rights and obligations of real property owners of Hawaii" is entirely without merit. IRI promotes incomprehensible excuses for a clear violation of the law by arguing that subjecting its drainage ditch to Chapter 342D would impose new, unknown liabilities on the easement holders. IRI Opp. at 9. In essence, IRI argues that because the adjacent lot owners have not affirmatively consented to the statutory obligations under Chapter 342D as part of their easement rights, such obligations should not apply. IRI offers no legal authority to support this assertion.[3] HRS § 342D-50 is an absolute bar on the discharge of pollutants except in certain circumstances specifically permitted under Chapter 342D or in compliance with a permit. Consent is not required for statutory obligations under Chapter 342D to apply. To the extent the "existing law of easements" is

[3] The only legal authority IRI cites in its discussion is a case that purportedly holds that "a dominant tenement has a legal duty to repair and maintain" an easement. *Id.* (citing *Levy v. Kimball*, 50 Haw. 497, 443 P.2d 142 (1968)). Even if IRI's characterization of this case is correct, it has no effect on the statutory obligations of a citizen under Chapter 342D.

inconsistent with Chapter 342D, such common law easement law would be "void and of no effect" on the public interest obligations under Chapter 342D. *See* HRS § 342D-19.

Finally, there is no basis for IRI to argue that if this Court confirmed that *IRI's* drainage ditch to be "state waters" under Chapter 342D that this would somehow convert *all* drainage easements "throughout the State" into state waters. *See* IRI Opp. at 10. The only question here is whether IRI's drainage ditch—based on the evidence specific to IRI's drainage ditch—is part of "state waters" under Chapter 342D. Despite IRI's "parade of horribles" excuses to avoid responsibility, the evidence proves that IRI's "drainage ditch" is governed by Chapter 342D.

D. IRI's SWMP Application Affirms the Drainage Ditch Is Used for Storm Runoff

IRI next attempts to argue that the inclusion of a "drainage area" in its SWMP site plan is evidence that its drainage ditch is used for some purpose other than to carry storm runoff. As previously discussed, even though *IRI itself* may decide to avoid its responsibilities under Chapter 342D by using the drainage ditch for *other* purposes, that does not change the fact that the drainage ditch is intended to be used for the drainage of storm waters. *See supra* at 4-6. Furthermore, contrary to IRIs' arguments, the SWMP application itself provides further support that the drainage ditch is used to carry storm runoff. Nowhere does the DOH authorize "the landscaping of Easement 2532." IRI Opp. at 10. Yet, IRI points to its site plan in its SWMP application that contains a few areas with shrubbery labeled along the boundaries of the drainage ditch.[4] *See* IRI Opp. at Ex. 2. Of course, IRI conveniently omits the rest of its SWMP application, including the portion of the application describing the proposed landscaping area. That SWMP application, received by DOH on October 2, 2014 containing the site plan in Exhibit 2 of IRI's opposition, states that "[s]torm water will be filtered through the landscaping strip ***before*** entering the drainage channel." Ex. 23 at Bates No. 30.[5] Thus, the application itself demonstrates not only that storm water will run into the main channel of the ditch, but that the water will be filtered by outlying shrubs and bushes *before* the water can enter the main central drainage channel along the center of the drainage ditch. *Id.* Furthermore, IRI concedes that its site plan says that Easement 2532 is "FOR DRAINAGE PURPOSES." IRI Opp. at 10.

[4] IRI repeatedly complains that Schnitzer cited IRI's SWMP issued under HRS Chapter 342H as evidence that IRI's drainage ditch is a "drainage ditch" under Chapter 342D. IRI Opp. at n.13, n.16. Yet, IRI relies on that very same SWMP to argue that IRI's drainage ditch is *not* a "drainage ditch" under Chapter 342D. *Id.* at 10-11.

[5] Exhibit 23 is attached to Schnitzer's Reply to IRI's Opposition to Schnitzer's Motion for Partial Summary Judgment

Easement 212 is similarly labeled as being "FOR DRAINAGE PURPOSES." *Id.* at Ex. 2. Critically, IRI's own application acknowledges that storm water flows into the drainage channel. *Id.* IRI's application further states:

> ***Surface runoff from the site sheet flows northeasterly and enters the existing drainage channel*** along the northeast boundary. ***Runoff further flows in the drainage channel toward Kaomi Loop***. Four 36" RCP drainage culverts underneath the Kaomi Loop direct the flow towards the Pacific Ocean through a sandy area.... ***Storm water flows into a drainage channel and then flows into the Pacific Ocean*** (See Drainage Plan).

Id. at Bats Nos. 30, 52. The drainage plan diagrams the flow of runoff across IRI's property, through the drainage ditch, underneath the culvert, and out to the ocean. *Id.* at Bates No. 63. The drainage plan labels the Pacific Ocean as the discharge point. *Id.* IRI's SWMP application is further proof that prior to this litigation, IRI repeatedly recognized its drainage ditch was intended, and currently is used, to carry storm water runoff. IRI cannot now assert otherwise.

E. "Drainage Ditch" and "Ditches and Flumes" Are Separate and Distinct Types of State Waters Under HAR Chapter 11-54

IRI also argues that "drainages ditches" must contain continuous flow because they fall into the category of "ditches and flumes" under HAR § 11-54-1. IRI Opp. at 11-12. Based on this contrived limitation, IRI argues its drainage ditch is not a "drainage ditch" because it is "typically dry," and thus does not have continuous flow. *Id.* at 13-14. As set forth in Schnitzer's opposition to IRI's MSJ, the plain language of the statute controls, and there is nothing in the statutory definition of "drainage ditch" that imposes a minimum flow requirement. *See* Opp to IRI MSJ at 9-10. IRI's attempt to add a requirement that the storm water only drainage ditch must always have continuous flow in order to be governed by Chapter 342D would legislate new provisions never intended to be included and wholly contrary to the purpose for storm water drainage ditches. The simple and unambiguous statutory definition or regulatory definition of "drainage ditch" is clearly defined to include IRI's drainage ditch. IRI's requirement for continuous flow also has no basis in common sense. Even the DOH appears to have abandoned such an absurd construction by not addressing it in its opposition. Clearly, drainage ditches are used to carry storm runoff. Water generated by storms are by their nature intermittent and not continuous. Opp. to IRI MSJ at 14. Therefore, IRI's requirement of perpetual, continuous flow of something that is inherently *not* perpetual or continuous is illogical and should be rejected.

IRI also points to the phrase "drain [outflowing] water from... user areas" from the

definition of "ditches and flumes" to argue that the regulations require "drainage ditches" to also be "ditches and flumes." But this ignores the critical fact that separate definitions exist for those uses which are independent of one another. In trying to overcome this fatal flaw in its logic, IRI unabashedly selects only a portion of the definition that fits into its argument while ignoring the rest. The entire definition of "ditches and flumes" reads:

> "Ditches and flumes" means fresh waters ***flowing continuously*** in artificial channels. They are ***used mainly for the purpose of irrigation*** and usually receive water from stream diversions. Ditches and flumes may be inflowing (carry water to reservoirs or user areas) or outflowing (drain water from reservoirs or user areas).

HAR § 11-54-1. The definition of "drainage ditch" reads "that facility used to carry storm runoff only, not sanitary sewage." *Id.* Ditches and flumes clearly require continuous flow, are not limited by the source of the water, and are used mainly for the purposes of irrigation. In contrast, a drainage ditch is not required to have continuous flow and its source of water is limited to storm water only. These definitions are inherently incompatible with one another. Opp. to IRI MSJ at 12. Reading "drainage ditch" into "ditches and flumes" would rewrite the statute and is therefore improper. *See Agsalud v. Blalack*, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985).

DOH adopted a definition that is consistent with the statutory definition of Chapter 342D and makes no mention of "continuous flow" or "ditches and flumes." HAR § 11-54-1. Taken together, these actions by DOH show that it has always understood that "ditches and flumes" and "drainage ditches" are separate and distinct types of state waters. DOH has never said otherwise.

III. CONCLUSION

The evidence that supports summary judgment that the drainage ditch on IRI's property is "state waters" is massive and undeniable. There should be no genuine dispute that summary judgment against IRI on that issue is appropriate based on the evidence presented here.

DATED: Honolulu, Hawai'i, September 24, 2015.

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