

telescopes on the summit of Mauna Kea on the island of Hawaii (the "outrigger telescopes project"). In the Complaint, OHA asks this court to order that Defendants prepare an environmental impact statement ("EIS") for the outrigger telescopes project, as well as for all other federally funded projects affecting Mauna Kea, and to enjoin further activity by Defendants in connection with the telescopes on Mauna Kea pending the resolution of the EIS process. OHA also asks this court to declare that Defendants violated NEPA, the NHPA, and HEPA, and to award litigation costs.

This court previously granted judgment on the pleadings to Defendant Kudritzki on the HEPA claim against him. Plaintiff OHA now moves for partial summary judgment on the NEPA and NHPA claims against O'Keefe. The motion is DENIED.

O'Keefe has moved to strike or, in the alternative, amend portions of OHA's Statement of Facts. Kudritzki joins in O'Keefe's motion. The motion is DENIED.¹

II. BACKGROUND FACTS.

The factual background for this motion was set forth in this court's Order Granting in Part and Denying in Part Defendant Rolf-Peter Kudritzki's Motion for Judgment on the Pleadings,

¹O'Keefe also sought leave to file a surreply, which this court denied.

filed on October 31, 2002, and is supplemented herein only as necessary.

The proposed site of the outrigger telescopes project is the W. M. Keck Observatory (the "Keck Observatory"), which is operated by the California Association for Research in Astronomy ("CARA"), a nonprofit corporation associated with the California Institute of Technology ("Caltech") and the University of California.² The Keck Observatory currently has two existing 10-meter telescopes known as Keck I and Keck II. The outrigger telescopes are 1.8 meters in diameter, and NASA plans to place them around the two existing telescopes.

In the present motion, OHA alleges that the National Aeronautics and Space Administration ("NASA"), which O'Keefe heads, committed to the outrigger telescopes project before completing an environmental assessment ("EA") as required under NEPA and before initiating the consultation process required by section 106 of the NHPA ("section 106"). 16 U.S.C. § 470f. Specifically, OHA alleges that NASA entered into three agreements with CARA in 1994, 1997, 1998 (the "1994 agreement," the "1997 agreement," and the "1998 agreement") (collectively "the three agreements"), to "plan, design, and construct the world's

²The State of Hawaii owns the land on which the Keck Observatory is located and leases the land to the University of Hawaii, which in turn subleases the site to Caltech.

strongest land-based interferometer, including the outrigger telescopes." Pl.'s Mem. at 2-3. OHA further alleges that NASA spent millions of dollars on the outrigger telescopes project before completing an EA for the project. OHA claims that NASA's previous commitments and expenditure of funds with respect to the outrigger telescopes project biased NASA's preparation of the EA. OHA says that NASA eliminated alternative sites for the outrigger telescopes based on economic viability, a criterion that was certain to weigh in favor of the Keck Observatory site given the "tens of millions [NASA spent] on design, planning, permitting and equipment." Id. at 13-14.

Under the 1994 agreement, NASA awarded approximately \$44 million to Caltech, to be paid over six years, for a project titled the "Keck Observatory Collaboration." The 1994 agreement states, in part, that "Caltech agrees that development of adaptive optic and interferometric capabilities, including . . . outrigger telescopes, is an integral part of CARA's future development plans for the Keck Observatory." According to Carl Pilcher, the Acting Program Executive for the Keck Observatory, the 1994 agreement provided only partial funding of the construction of the second Keck telescope, and was "separate and distinct from the Outrigger Telescopes Project." Pilcher Decl. ¶ 3. Pilcher also states that the clause referring to "outrigger

telescopes" relates only to CARA's future plans and "does not involve any NASA funding or any commitment for future funding by NASA." Id.

Under the 1997 agreement, NASA agreed to fund Phase 1 of a three-phase program (the "baseline plan") to develop a "large infrared interferometer" using "two Keck telescopes, supplemented by additional outrigger telescopes[,] as an interferometer." Phase 1 consisted of "site tests, design studies, application for permits, and procurement of equipment for adaptive optics on the Keck I telescope." The 1997 agreement stated that Phase 2 was to involve the installation of test telescopes which would be used to connect the two existing Keck telescopes, and Phase 3 was to add four outrigger telescopes. No funding was provided for Phases 2 or 3 under the 1997 agreement, which contained a provision stating that NASA was under no obligation to provide additional funds. According to Pilcher, the description of Phases 1, 2, and 3 of the program constituted a "baseline plan," which was subject to change for "many reasons," including whether Congress approved funding for the program.

Under the 1998 agreement, NASA agreed to make payments in connection with each milestone in Phases 2 and 3 of the baseline plan. The milestones listed in the 1998 agreement

included "complet[ion of] Outrigger telescope project description for permitting purposes" in October 1997, "complet[ion of] plan for outrigger telescope design and contracting process" in November 1997, "distribut[ion of] outrigger telescope design requirements to selected vendors" in January 1998, "place[ment] of critical design contracts for outrigger telescopes" in May 1998, and "review [of] outrigger dome design" in August 1998.

NASA claims that the milestones relating to the outrigger telescopes were not specific to the outrigger telescopes' installation on the Mauna Kea site, but that the 1998 agreement contemplated only the offsite development of the outrigger telescopes.

III. STANDARD OF REVIEW.

A. Standard of Review on Motion for Summary Judgment.

Summary judgment shall be granted when:

the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); see also Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of summary judgment is to identify and dispose of factually

unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See id. at 323. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000).

All evidence and inferences must be construed in the light most favorable to the nonmoving party. T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987). Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. Id. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." Id.

B. Standard of Review on Motion to Strike.

Rule 12(f) states that a court may strike from any pleading any insufficient defense or any redundant, immaterial,

impertinent, or scandalous matter. Fed. R. Civ. P. 12(f).
Motions to strike under Rule 12(f) are "viewed with disfavor and infrequently granted." 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1380 (2d ed. 1990).
There is "considerable overlap between the concepts of 'impertinent' and 'immaterial' matter." Id. One test for impertinence and immateriality asks whether proof concerning the challenged matter could be received at trial; if not, then the matter is immaterial and impertinent. Id.

IV. ANALYSIS.

OHA contends that NASA violated NEPA and the NHPA because it had already committed to the outrigger telescopes project when it initiated the EA and section 106 processes. OHA alleges that NASA began the EA and section 106 processes only after it had already committed millions of dollars to preparing the Mauna Kea site for the outrigger telescopes, in violation of NEPA's timing requirements and the NHPA's "good faith effort" requirement. Therefore, OHA contends, partial summary judgment on both the NEPA and NHPA claims against O'Keefe is appropriate.

A. There Is a Genuine Issue of Material Fact as to Whether NASA Violated NEPA.

NEPA requires that an EA be prepared "early enough so that it can serve practically as an important contribution to the

decisionmaking process and will not be used to rationalize or justify decisions already made," as "[p]roper timing is one of NEPA's central themes." Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) (quoting 40 C.F.R. § 1505.5 (1987)). Regulations promulgated by the Council on Environmental Quality ("CEQ") state that the NEPA process should be integrated with other planning "at the earliest possible time." Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000) (quoting 40 C.F.R. § 1501.2).

According to NASA regulations, "[m]ajor NASA activities . . . generally have four distinct phases: The conceptual study phase; the detailed planning/definition phase; the development/construction phase; and the operation phase. (Other NASA activities have fewer, less well-defined phases, but can still be characterized by phases representing general or feasibility study, detailed planning or definition, and implementation.)" 14 C.F.R. § 1216.304. NASA regulations provide that an EA must be completed "prior to the decision to proceed from the conceptual study phase to the detailed planning/definition phase of the proposed action." Id. at § 1216.304(a).

The Ninth Circuit has held that NEPA requires agencies to prepare NEPA documents "before any irreversible and

irretrievable commitment of resources." Conner v. Burford, 848 F.2d 1441, 1446 (9th Cir. 1988). For instance, Metcalf v. Daley held that a federal agency violated NEPA when it prepared an EA and issued a finding of no significant impact ("FONSI") with regard to the Makah Indian Tribe's proposal to resume whaling only after entering into two agreements with the Tribe to support the proposal. 214 F.3d at 1142.

In its memorandum in support of its motion, OHA relies on Metcalf, as well as on the CEQ and NASA regulations, to argue that the 1994, 1997, and 1998 agreements show that NASA made an "irreversible and irretrievable commitment" of millions of dollars to the outrigger telescopes project. OHA also argues that, as in Metcalf, NASA's previous commitment of resources tainted the EA process so that the criteria used by NASA in its evaluation of alternatives to the Mauna Kea site were biased.

There are, however, genuine issues of material fact as to whether NASA had committed to the outrigger telescopes project prior to its initiation of the NEPA and NHPA processes. None of the three agreements cited by OHA, on their face, constitutes a clear commitment to the outrigger telescopes project. Although the 1994 agreement referred to "outrigger telescopes," it did so in a clause describing Caltech's understanding of future development plans, not NASA's commitment to those plans. The

1994 agreement involved no commitment of funds to the outrigger telescopes project specifically and contained a specific disclaimer that NASA did not promise any future funds or support. The 1997 agreement described the phases of the proposed baseline plan, Phase 3 of which involved the installation of outrigger telescopes. However, NASA's commitment of funds and support under the 1997 agreement was limited to Phase 1.

Although the 1998 agreement contained specific funding commitments related to Phases 2 and 3, including the construction of the outrigger telescopes themselves, it does not, on its face, commit funds to installing the outrigger telescopes on the Mauna Kea site specifically. Pilcher has stated that the funding of Phase 2 was independently justifiable, apart from the funding of Phase 3. Pilcher Decl. ¶ 5. NASA has offered evidence that, while "offsite development and assembly of four outrigger telescopes [are] nearing completion," NASA has neither "undertaken" nor "accomplished" any site-specific construction and installation with respect to the outrigger telescopes. Id. at ¶ 6 (emphasis added). NASA has also offered evidence that the offsite development and assembly of the outrigger telescopes did not otherwise constitute "an irreversible and irretrievable commitment" by NASA to install those outrigger telescopes at the Keck Observatory site. For instance, Pilcher stated that the

four outrigger telescopes that are being assembled offsite could be used for other purposes, including being placed at an alternate site. Id. at ¶ 7.

Therefore, although the three agreements, taken together, indicate that NASA was considering installing the outrigger telescopes at the Keck Observatory, the present record does not establish that NASA had passed the "go-no go stage" of the outrigger telescopes project when it issued its final EA in December 2000. See Andrus v. Sierra Club, 442 U.S. 347, 351 (1979); see also 40 C.F.R. § 1502.5. The Ninth Circuit has emphasized that Metcalf "does not stand for the general proposition that an agency cannot begin preliminary consideration of an action without first preparing an EA, or that an agency must always prepare an EA before it can lend support to any proposal." Metcalf, 214 F.3d at 1145. "[A]n agency can formulate a proposal or even identify a preferred course of action before completing an EIS." Id. (quoting Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1185 (9th Cir. 1997)). Accordingly, summary judgment cannot be granted based only on the fact, established by the three agreements, that NASA was, at a minimum, contemplating the installation of the outrigger telescopes at the Keck Observatory.

Because it is unclear whether NASA made a commitment to the outrigger telescopes project by entering into the three agreements, there is also a genuine issue of material fact as to whether the EA process was biased, as OHA claims. Metcalf held that, "because of the Federal Defendants' prior written commitment to the Makah [Indian Tribe] and concrete efforts on their behalf, the EA was slanted in favor of a [FONSI]." 214 F.3d at 1144. OHA argues that, as in Metcalf, "the die had already been cast" by the time NASA issued its EA, and that this court should require that NASA "perform an objective EA or EIS." Pl.'s Mem. at 14. As discussed above, however, the present record does not establish that NASA made a prior commitment to the outrigger telescopes project before it drafted and issued its EA regarding that project. Therefore, OHA has not shown that NASA made an "irretrievable and irreversible commitment of resources" to the outrigger telescopes project.

At the hearing, OHA contended for the first time that, because NASA has issued its own regulations regarding the timing of an EA, the "irretrievable and irreversible commitment" standard expressed in Metcalf is not applicable in this case. Rather, OHA argued, the relevant inquiry for this court is only whether NASA complied with its own regulations, which state that the EA must be prepared "prior to the decision to proceed from

the conceptual study phase to the detailed planning/definition phase of the proposed action." 14 C.F.R. § 1216.304.³ OHA contends that the 1998 agreement clearly establishes that NASA moved to the detailed planning/definition phase of the proposed action without first preparing an EA. See Pl.'s Reply at 7. As discussed above, however, there are genuine issues of material fact regarding the status of the outrigger telescopes project at the time of the 1998 agreement. The 1998 agreement alone does not establish that NASA had moved to the "detailed planning/definition phase" of its proposed installation of the outrigger telescopes at the Mauna Kea site. Therefore, factual questions remain as to whether NASA violated its own regulations. Whether focusing on the Metcalf standard or the NASA regulations, this court cannot conclude on the present record that OHA is entitled to judgment as a matter of law on the NEPA claim against O'Keefe.

³In its memorandum in support of the motion, OHA does not appear to make a distinction between the timing requirements imposed by the CEQ regulations, NASA regulations, and the standard used by the Ninth Circuit in Metcalf. Although OHA devotes a portion of its reply brief to its argument that NASA violated its own regulations specifically, OHA also argues in its reply brief that NASA made an "irreversible and irretrievable commitment of resources" (the Metcalf standard). Nowhere in its reply brief does OHA argue that Metcalf is inapplicable.

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B. There Is a Genuine Issue of Material Fact as to Whether NASA Violated the NHPA.

Under section 106 of the NHPA, federal agencies must consult with Native Hawaiian organizations that attach religious and cultural significance to the site of a federal undertaking to take into account the effect of that undertaking on the site. 16 U.S.C. §§ 470a(d)(6)(B), 470f. Regulations promulgated under the NHPA require agencies to complete the section 106 process in a timely manner:

The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit [the] agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

36 C.F.R. § 800.1(c).

The regulations also state that the section 106 process requires that NASA make a "reasonable and good faith effort" to identify historic properties within the "area of proposed effects" of a project. Id. at § 800.4(b). Under the NHPA, NASA

"must make a reasonable and good faith effort to . . . assess the effects of the [outrigger telescopes project] on any eligible historic properties found, determine whether the effect will be adverse, and avoid or mitigate any adverse effects." Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 804 (9th Cir. 1999) (internal citations omitted).

Because there are genuine issues of fact as to whether NASA's agreements prior to its initiation and completion of the section 106 process constituted a commitment to the installation of the outrigger telescopes project on Mauna Kea, summary judgment is denied on the NHPA claim. As OHA's arguments on the NHPA claim against NASA are premised on the same facts underlying its motion with respect to the NEPA claim, OHA has not demonstrated that the section 106 process was impermissibly tainted by NASA's previous agreements with CARA or by NASA's previous expenditures.

C. Defendants' Motion to Strike or Amend Is Denied.

Defendants move to strike or, in the alternative, amend portions of OHA's Statement of Facts on the grounds that certain statements are erroneous, unsupported by the documents, irrelevant, or based on evidence not in the record. This court does not find that any of those statements are "redundant, immaterial, impertinent, or scandalous" within the meaning of

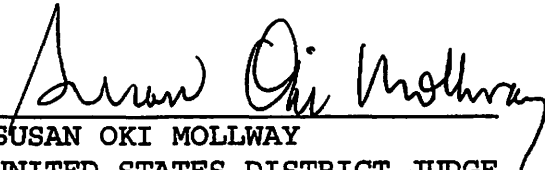
Rule 12(f). Of course, Statements of Facts submitted by parties are evaluated and weighed appropriately in light of such concerns as are raised by Defendants in their motion, but this court has found no prejudice or other grounds warranting the disfavored remedy of striking matters from a pleading.

V. CONCLUSION.

For the foregoing reasons, the court denies both OHA's motion for partial summary judgment and Defendants' motion to strike or, in the alternative, amend OHA's Statement of Facts. The issues raised by OHA's motion remain for further adjudication.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 20, 2002.


SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

OHA v. O'Keefe et al., Civ. No. 02-00227 SOM-BMK; Order Denying Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Motion to Strike or, in the Alternative, Amend Portions of Plaintiff's Statement of Facts.