

SYDNEY ROSS SINGER

Plaintiff, pro se

P.O. Box 1880

Pahoa, Hawaii 96778

(808) 935-5563

sydsinger@gmail.com

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STATE OF HAWAII

SYDNEY ROSS SINGER)

Plaintiff,)

vs.)

MALAMA O PUNA;)
DEPARTMENT OF LAND AND)
NATURAL RESOURCES OFFICE)
OF CONSERVATION AND)
COASTAL LANDS)
(DLNR/OCCL); COUNTY OF)
HAWAII; U.S. DEPARTMENT OF)
FISH AND WILDLIFE; BIG)
ISLAND INVASIVE SPECIES)
COMMITTEE; HAWAII TOURISM)
AUTHORITY; DOE)
CORPORATIONS 1-100; DOE)
PARTNERSHIPS 1-100; DOE)
ENTITIES 1-100; DOE)
INDIVIDUALS 1-100)

CIVIL NO. CV10-1-00153 JMS
KSC

PLAINTIFF'S REPLY TO
DEFENDANT MALAMA O
PUNA'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION;
CERTIFICATE OF SERVICE

HEARING DATE: APRIL 26, 2010

TIME: 10:00 AM

Judge: Hon. Seabright

Defendants.

PLAINTIFF'S REPLY TO DEFENDANT MALAMA O PUNA'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The response of Defendant Malama o Puna, hereinafter referred to as “MOP”, is inflammatory, irrelevant, and erroneous in many ways.

This lawsuit is not about the Plaintiff or his philosophy. The Plaintiff is not on trial here. MOP's ad hominem attack on Plaintiff is inflammatory, irrelevant, and immaterial.

This lawsuit is not about invasive species, per se.

It is not about whether mangroves should or should not be eradicated. However, in response to MOP's rant against the mangrove, Plaintiff offers this statement from the United States Forest Service.

In an article entitled, *Mangroves as alien species: the case of Hawaii*, by James A. Allen, USDA Forest Service, Institute of Pacific Islands Forestry, it states, “*Mangroves are playing some of the same roles in Hawaii for which they are valued in their native habitats, such as sediment retention, water quality improvement, and the production and export of organic matter. They may also be providing shoreline protection and other important goods and services.*”

It further states, “*Mangroves appear to have a generally positive influence on*

water quality in Hawaii. Sediment retention, for example, can be quite high in Hawaiian mangroves, and may contribute to improving the quality of offshore waters...On Molokai, turbidity was lower on coral reefs adjacent to mangroves than on reefs with no adjacent mangroves and a negative relationship was found between mangrove basal area and turbidity of adjacent waters (Bigelow et al., 1989). The authors attributed these patterns to effective sediment retention by mangroves. In addition to an apparent role in reducing suspended sediments, Walsh (1967) reported that the high nitrate and phosphate levels in Heeia Stream were reduced significantly in the upper reaches of the swamp, indicating that the mangroves may be serving as a sink for these nutrients.” (Global Ecology and Biogeography Letters (1998) 7, 61-71.)

This shows that the more mangroves there are, the lower the water turbidity, and the cleaner the water. This information directly contradicts MOP's negative characterization of mangroves as causing turbidity and water quality degradation. And nowhere in the article is the mangrove called, “invasive”.

However, the role of mangroves in the ecology of shoreline systems is not for this Court to decide.

This case is also not about the best way to control mangroves, assuming one would want to do so.

This case is about whether MOP can experiment with the environment at their own discretion, without public comment, without an environmental assessment or other

legally required permits, and in violation of Plaintiff's Constitutional rights.

ARGUMENTS

Argument #1 MOP is Conducting an Herbicide Experiment in Collusion with BIISC Associates

The admissions of Ann Kobsa in MOP's Exhibit 8, page 20, states that this use of poison to kill mangroves in Hawaii is experimental and has “never been done before”, and is “original research”. In an application to the U.S. Fish and Wildlife Foundation, Ann Kobsa of MOP stated, ***“This will be the first herbicide-based eradication effort of red mangrove that will have been attempted anywhere, to our knowledge, and as such, will be reportable as original research.”***

The results of this experiment are still not available, and it will take years of further observation and research to see what this poisoning of the shoreline and mangroves will do to the environment, although early results showed adverse effects.

The fact is, chemical experiments on sensitive shoreline conservation lands to eradicate mangroves is not routine maintenance, as the County of Hawaii contended in its exemption of this experiment from an environmental assessment (at two locations only), and in its issuance of a minimal, SMA minor permit, which is for activities that are expected to have no effect on the environment.

Of course, nobody, including MOP, the County of Hawaii, the DLNR, the U. S. Fish and Wildlife Service, or any other BIISC associates could ever know the outcome of the experiment prior to doing it. It could have devastating results. And since the results at Wai 'Opae are not yet known, repeating the experiment at Pohoiki, Paki Bay, Onekahakaha, and Honokohau is certainly no less risky than the first, ongoing experiment. This clearly does not follow the Precautionary Principle, which the State and County have recently been admonished to use in their environmental considerations, as described in Plaintiff's Memorandum in Support of Preliminary Injunction.

The admission that this use of a poison to kill mangroves is experimental and has never before been done supports Plaintiff's claim that this was in violation of Hawaii's Pesticide Law, and should have required an experimental use permit from the Hawaii Department of Agriculture. It is also a violation of FIFRA.

This use of poison as an environmental experiment was never reflected in any MOP permit application, and MOP therefore fraudulently presented their project to government agencies charged with review and permitting by not stating that this is an experiment.

The governmental agencies to which MOP presented its applications and information are BIISC associates, and BIISC already decided that this experiment would proceed. This collusion subverts and violates the law, deprives citizens of due process, and makes a farce and sham out of the environmental review and permitting process.

Argument #2 Other Information on the SMA Application Clearly False

Information provided to the County of Hawaii by MOP for an SMA minor permit were incorrect and misrepresented. Rather than repeat that information here, please see Plaintiff's Reply to County of Hawaii Memorandum Opposing Injunctive Relief.

Argument #3 MOP Created Public Nuisance by Leaving Trees To Rot and No Anti-Degradation Analysis

The DLNR had concerns about the use of poisons and leaving the dead trees to rot in place. In a letter from OCCL director Sam Lemmo, dated February 15, 2009, MOP is told that the poisoned trees need to be removed,“(t)o not become ocean wrack”. The letter is in MOP's Exhibit 22.

The letter states, *“Please note the following: If the mangrove removal were to require power tools, or were to result in significant ground disturbance, then the project would need a permit from the DLNR. OCCL notes that drill-and-inject methods will kill larger mangroves without creating a ground disturbance; **however, the dead hulks will have to be removed so that they don't become storm wrack.**”* (Emphasis added.)

And yet, MOP has decided to leave the trees to rot in place, anyway, in violation

of DLNR requirements. The DLNR OCCL has not enforced their “demands”.

In fact, DLNR demands were too weak. They excluded this experiment from needing a Conservation District Use Permit (CDUP) by calling it “noxious weed removal”, when it really should have been considered “tree removal”. According to HAR 13-5-22, P-12, concerning tree removal in this protected conservation district subzone, “*Removal of more than 5 trees, six inches or greater in diameter measured at ground level*” requires a Board of Land and Natural Resources permit, and possibly a management plan.

This is in addition to the fact that mangroves are not “noxious weeds” according to Hawaii statutes defining noxious weeds, as discussed in Amended Complaint.

In addition, MOP did not comply with Hawaii Department of Health Water Quality Branch request for an anti-degradation analysis to show compliance with Hawaii's Clean Water Act, HAR Section 11-54-1. See Exhibit L.

Argument #4 Statute of Limitations Not Violated

MOP stated that Plaintiff's right to relief under HRS 343 is invalid since the statute of limitation on filing a suit has expired. This is wrong. According to HRS 343-7, the time to sue is not measured from the time permits are issued or when entry permits are granted. According to the law, when there is no assessment and no exclusion

from the assessment, then judicial action must begin within 120 days of the **project commencing**.

As stated in HRS 343-7, “**§343-7 Limitation of actions.** (a) *Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency’s decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The council or office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by court action, may be adjudged aggrieved.”*

MOP did not do an environmental assessment or get an exemption letter from the DLNR, and an environmental assessment is required for a Conservation District Use Permit (CDUP). Therefore, their activities at Paki Bay beginning mid-October, 2009, and at Pohoiki beginning late December, 2009, were within 120 days of Plaintiff’s filing of his original Complaint, and are subject to suit under HRS 343. As of April 1, 2010, no poisoning has been done at Onekahakaha, although cutting of mangroves started in December. MOP is willing to wait on work at Honokohau because the National Park Service, which is responsible for the area, has refused to allow poisons.

Argument #5 MOP Not Harmed by Injunctive Relief

Defendant MOP complains that they will suffer if preliminary injunctive relief is granted to stop this poisoning until a proper environmental assessment is done. MOP worries that its workers will be harmed by walking on and around dead, decaying mangroves, whose roots could break and cause harm to the worker.

This admission of a hazard from the dead mangroves supports Plaintiff's plea for relief. What about the safety of people who live and play around these mangrove areas?

MOP's claim that a preliminary injunction would harm MOP by allowing mangroves to return to already poisoned areas is misleading. MOP is paid for mangrove removal services. Their contract does not ask that they return money if the mangroves return. In fact, MOP may financially benefit from the return of mangroves since this eventuality could be a source of additional funding.

MOP's claim that they need to complete their contract for mangrove eradication is also misleading, since their current activities are illegal and completely unpermitted.

The County's SMA minor permit requires all necessary permits and approvals be obtained from the federal, state, and county governments. The U.S. Fish and Wildlife Service admitted its responsibility to do a Pesticide Use Proposal (PUP) and Categorical Exclusion by submitting it near the end of January, 2010, two years too late. Until that

was done, the SMA minor permit was not valid, since it was predicated on MOP obtaining all permits and approvals, including from the federal government. Until NEPA was satisfied, the project should not have started, and everything MOP has done prior to the Service submitting its Categorical Exclusion was done illegally.

MOP has no right to perform illegal activities to complete a contract. This is a harm to the public and Plaintiff, not to MOP.

In addition, despite the retroactive, and therefore invalid, Categorical Exclusion from an environmental assessment by the Service, a CDUP is still required from the DLNR, even if BIISC associate DLNR did not perform its duties and demand a CDUP. Hence, the SMA minor permits are still not valid since state permits, which require an environmental assessment, have not been obtained.

Argument #6 Irreparable Harm to Plaintiff

There is an irreparable harm that the Plaintiff will suffer that was ignored by the Defendant. That is the irreparable harm of being denied one's right to be an active participant in environmental policy.

Plaintiff is harmed when decisions that affect the environment are made by a few well placed associates with their own agenda and there is no opportunity for the public to comment or have any input. This robs Plaintiff of being a stakeholder in his own

environment, exercising his rights as a citizen of a great State to enjoy a healthy environment and all the benefits it brings, and able to participate as a member, not of BIISC, but of this citizenry. It robs the Plaintiff of the right to a transparent and democratic environmental process. It denies Plaintiff his Constitutional right to due process, and Hawaii Constitutional environmental rights.

Plaintiff also suffers when he cannot go to the authorities for relief, since they are partners with predetermined agendas, funding, and design and do not act in good faith or fairness. Plaintiff cannot find fairness from a system run by colluding government workers, instead of by checks and balances of one government entity against another, as our Founders had shown is needed to preserve freedom, honesty, and integrity. This is an abuse of the Public Trust, and a deep harm to Plaintiff and the public.

Argument #7 Public Interest Served by Injunction

Defendant implies that the public interest in invasive species control outweighs all other interests. However, the ends do not justify the means. It is also in the public interest to see that environment policy is transparent, democratic, and fair. This interest is not in opposition to invasive species control. It means that such control is done with public involvement and informed consent, using Precautionary Principles, with fairness to all and special favors to none.

CONCLUSION

Defendant MOP admits that this poisoning of mangroves and leaving them to rot is an environmental experiment. They admit that no poison has ever been used to kill mangroves, admitting that this is an experiment with this herbicide. There was no formal determination of what endangered species might be impacted by this experiment with poisons along Hawaii's sensitive coastline environment. There was no public comment allowed or sought to see how this experiment impacts residents who use the areas being poisoned.

And, yet, MOP characterizes their activities as having no impact on the environment, a clearly self-serving and misleading characterization.

There was no environmental assessment, CDUP from the DLNR, and other agency approvals and permits to comply with the Clean Water Act, Endangered Species Act, FIFRA, and the Hawaii Pesticide Law for this experiment. This is in part due to MOP's fraudulent presentation of their experiment to officials. However, given the collusion between officials and MOP in their capacity as BIISC associates, some of the blame rests with the government, as well.

MOP must be held accountable. The poisoning must stop.

Plaintiff again prays this Court grant his Motion for Preliminary Injunction to stop

this abuse of power, of discretion, of the environment, of the law, of the Public Trust,
and of the public's Constitutional right to due process.

I declare under penalty of law that the foregoing is true and correct.

Dated: Hilo, Hawaii _____

Sydney Ross Singer

Plaintiff, pro se

INDIVIDUALS 1-100

Defendants.

CERTIFICATE OF SERVICE RE PLAINTIFF'S REPLY TO DEFENDANT
MALAMA O PUNA'S OPPOSITION TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

The hereby certify that true and correct copies of the the foregoing document has been served on Defendants by depositing same in the United States mail, postage prepaid, addressed as follows on April 12, 2010:

To: CADES SCHUTTE LLP

ELIJAH YIP

MITSUKO TAKAHASHI

1000 Bishop Street, Suite 1200

Honolulu, Hawaii 96813-4212

Attorneys for Defendant MALAMA O PUNA

MARK J. BENNETT, Attorney General of Hawaii

WILLIAM J. WYNHOFF, Deputy Attorney General

Department of the Attorney General

State of Hawaii

465 King Street, Suite 300

Honolulu, Hawaii 96813

Attorneys for STATE OF HAWAII

LINCOLN S.T. ASHIDA, Corporation Council

JOSEPH K. KAMELAMELA

MICHAEL J. UDOVIC

Deputies Corporation Council

County of Hawaii

Hilo Lagoon Center

101 Aupuni Street, Suite 325

Hilo, Hawaii 96720

Attorneys for Defendant COUNTY OF HAWAII

FLORENCE T. NAKAKUNI, United States Attorney, District of Hawaii

RACHEL S. MORIYAMA, Assistant U.S. Attorney

Room 6-100, PJKK Federal Building

300 Ala Moana Blvd.

Honolulu, Hawaii 96850

Attorneys for Defendant UNITED STATES FISH AND WILDLIFE SERVICE

Dated: _____ Hilo, Hawaii

SYDNEY ROSS SINGER

Plaintiff, pro se