

SYDNEY ROSS SINGER

Plaintiff, pro se

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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)

CIVIL NO. CV10-1-00153 JMS
KSC

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
STATE OF HAWAII'S MOTION TO
DISMISS COMPLAINT AND REPLY
TO DEFENDANT'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 MEMORANDUM IN OPPOSITION TO DEFENDANT STATE OF HAWAII'S MOTION TO DISMISS COMPLAINT AND REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The issue is whether the Plaintiff can sue the State in District Court. The State asserts its Eleventh Amendment right to bar suit against the State in federal court and has moved to dismiss Amended Complaint on those grounds.

Plaintiff opposes this motion and asks that it be denied by this Court for the following reasons.

ARGUMENTS

Argument #1 Immunity Waived by Voluntarily Coming Into Federal Court

The State has waived its Eleventh Amendment rights by permitting this suit to be removed to federal court without objection.

The State waives immunity by voluntarily coming into federal court when State court also had jurisdiction. (531 F. Supp. 517).

That the State court had jurisdiction in this matter is a matter of law. Plaintiff's complaint against the State pertains to violations of State statutes related to environmental protection, including HRS 343-7, which expressly waives Sovereign Immunity for actions brought to challenge the lack of an environmental assessment.

The Plaintiff also has a right to judicial review to protect Plaintiff's environmental rights, according to Article XI Section 9 of the Constitution of Hawaii, which is also an express waiver of State's Sovereign Immunity.

The state court, therefore, had jurisdiction. Consequently, the State waived immunity by not objecting to removal into federal court.

Argument #2 Eleventh Amendment Waived by Statute

The State waives its Sovereignty Immunity to suit in District Court in HRS 661-1, which states, *“The several circuit courts of the State and, except as otherwise provided by a statute or rule, the several state district courts shall, subject to appeal as provided by law, have original jurisdiction to hear and determine the following matters, and, unless otherwise provided by law, shall determine all questions of fact involved without the interventions of a jury. (1) All claims against the State founded upon any statute of the State; or upon any regulation of an executive department...”*

Plaintiff's Amended Complaint asks for injunctive relief for the State's violation of Hawaii Administrative Rules and Hawaii Revised Statutes, as described in Amended

Complaint and Memorandum in Support of Preliminary Injunction. The State's district court, therefore, has jurisdiction over this matter.

Argument #3 Endangered Species Act Violation Abrogates Immunity

The State allowed the poisoning of mangroves along sensitive shoreline areas where known endangered species are located without regard to the protection of these species or of the impact this poisoning of the environment will have on these species, in violation of state and federal endangered species protection laws.

The State has violated the federal Endangered Species Act, which expressly abrogates sovereign immunity under the Eleventh Amendment. (471 F. Supp. 985).

Argument #4 Violation of Fourteenth Amendment Right to Due Process

The State's Motion for Dismissal based on the Eleventh Amendment violates the Plaintiff's Fourteenth Amendment right to procedural due process.

Plaintiff has brought suit against both the federal and state government, among other defendants, originating the suit in state court which has jurisdiction to hear the case. The State has no immunity in state court for this case, as described in arguments #1 and #2 above.

The federal government then removed the case to federal court and later asked for Sovereign Immunity. (See U.S. Fish and Wildlife Service's Motion for Dismissal.)

Once in federal court, the State then made a motion for dismissal asserting that the State cannot be sued in federal court. The State has not and did not object to this removal.

That the State's motion for dismissal on Eleventh Amendment grounds is merely a ruse is evident from the following.

The State used Eleventh Amendment immunity as a defense on page 8, Third Defense, in its March 16, 2010 reply to the Amended Complaint, when the case was still in state court. Such a defense has no relevance within the state court system, only in the federal court system. By inference we can conclude that the State expected this case to be removed to the federal court, reserving this Eleventh Amendment defense for use in that federal venue.

This means that the State expected or anticipated this case to be removed to federal court. The State, therefore, consented to its removal to federal court as a strategy of defense.

The Supreme Court did restrict Eleventh Amendment immunity, on procedural grounds, in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002). In this action the Court ruled that states could not claim Eleventh Amendment immunity when they voluntarily remove a case to federal court.

This Motion for Dismissal is clearly an attempt by the State to deny Plaintiff his Constitutional right to procedural due process and to avoid accepting responsibility for

its acts in violation of its own laws and federal laws encouraging and mandating public participation in environmental protection, such as HRS 343, and NEPA, in addition to Hawaii Constitutional protection of environmental rights under Article XI Section 9 and United States Constitutional protection of Fourteenth Amendment rights.

Argument #5 Due Process Violation

The State has violated Plaintiff's Fourteenth Amendment right to due process by violating State laws requiring an environmental assessment. This violation prevented the Plaintiff from being able to comment on or in any way participate in the decision to allow the poisoning of mangroves and leave them to rot, which threatens Plaintiff's life and abrogates Plaintiff's liberty.

The Eleventh Amendment cannot be used to violate the Fourteenth Amendment, and this Court has responsibility to protect Plaintiff's Fourteenth Amendment rights.

Argument #6 BIISC Association Taints Sovereign Claim

In this case the State is not only acting as a sovereign, but also is acting as a member of an unincorporated association with proprietary interests.

The Hawaii Department of Land and Natural Resources is a member of the unincorporated association Big Island Invasive Species Committee, hereinafter called "BIISC", which is also a Defendant in this case. BIISC offers pest control services, a

function that can be and usually is offered by individuals and corporations other than the government.

Through its membership in BIISC, the State has a conflict of interest in that it was responsible for the enforcement of statutes and rules that would have required BIISC and associated member Malama o Puna to do an environmental assessment and obtain a conservation district use permit from the Department of Land and Natural Resources. The State violated its own laws to allow its fellow BIISC members to proceed with this project without the scrutiny and mandated involvement of the public, proper environmental review, or proper environmental protection mandated by law.

The State did not operate as a sovereign when it looked the other way to allow its business associates in BIISC to proceed with their mangrove poisoning project. The State acted as an accomplice.

The State loses its sovereign immunity when it operates within the context of a proprietary interest that can be sued according to the laws set by Congress. A pest control service, which needs to obey environmental laws, can be expressly sued according to NEPA, the Endangered Species Act, and the Clean Water Act, in addition to tort claims. This means the State can be sued, waiving their immunity when they become a member of a proprietary pest control service such as BIISC.

In addition, Federal funding that goes to BIISC, as in this case from the United States Fish and Wildlife Service, is therefore going to State through its BIISC

membership. Some case law suggests that a waiver in sovereign immunity may be found in a State's acceptance of a federal grant. See *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 247 (1985).

The relationship between BIISC associates is complex, and a Memorandum of Agreement exists between BIISC associates. See Exhibit K. Federal, state, county and private money is given to BIISC, which shares the funds between various associates, private and governmental, without competitive bidding, and in violation of Conflict of Interest statutes, such as FAR 9.5.

Currently, BIISC associates have been asserting that BIISC is not a legal entity and not subject to suit or reporting to any authority, including reporting to the Internal Revenue Service. The laws of Hawaii define an unincorporated association as a legal entity, capable of being sued, and with proprietary interests. See HRS 634-30.

Much money and power are vested in this private, unincorporated association that has not been reporting its financial transactions and answers to no one. However, despite the identity of some of its members, BIISC does not have sovereign immunity. It follows that those sovereign entities working through BIISC lose their sovereignty in the context of their BIISC activities.

Argument #7 Remand, Not Dismiss

This Motion for Dismissal based on the Eleventh Amendment essentially strips the federal court of subject matter jurisdiction. However, according to 28 U.S.C. 1447(c), lack of subject matter jurisdiction by a district court following removal from state court should result in the case, not being dismissed, but being remanded to state court. Hence, dismissal should be denied on this basis and, if the arguments set forth herein do not prevail, the case should be remanded to the Third Circuit Court of the State of Hawaii, where it originated and where the court had jurisdiction.

CONCLUSION

Defendant's Motion for Dismissal should be denied because the State has waived its Sovereign Immunity by statute, has voluntarily entered federal court by not objecting to the removal, is acting in a proprietary capacity, has violated the Endangered Species Act, and such dismissal would deprive Plaintiff protection of due process under the Fourteenth Amendment.

In the alternative, if the Court finds there is a lack of subject matter jurisdiction, it should remand the case to the Circuit court from whence it was removed.

Plaintiff therefore respectfully requests that this Motion for Dismissal be denied.

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

Dated: Hilo, Hawaii _____

Sydney Ross Singer

Plaintiff, pro se

SYDNEY ROSS SINGER

Plaintiff, pro se

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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:

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Dated: _____ Hilo, Hawaii

SYDNEY ROSS SINGER

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