



Defendants.

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT U.S. FISH  
AND WILDLIFE'S MOTION TO DISMISS COMPLAINT AND REPLY TO  
DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTION

In their Counter Motion to dismiss Plaintiff's Amended Complaint, Defendant United States Fish and Wildlife Service, hereinafter referred to as the "Service", audaciously asserts sovereign immunity for actions of the Service alleged by Plaintiff. The Service then asserts that Plaintiff fails to state a claim against the Service upon which relief can be granted, and asks for dismissal of this case on those grounds.

Plaintiff opposes these assertions of the Service and prays the Court grant the injunctive relief as requested in its March 23, 2010 Motion for Preliminary Injunction.

STATEMENT OF FACTS

The Service is engaged in mangrove eradication at Paki Bay, Onekahakaha, Pohoiki, and Honokahau Harbor by entering into a funding agreement with Defendant Malama o Puna, hereinafter referred to as MOP, which is doing this eradication in partnership with the Big Island Invasive Species Committee, hereinafter referred to as

BIISC. The Service is also a member/partner of BIISC, which is an unincorporated association according to Hawaii law, HRS 634-30, and is a legal entity subject to suit.

There was no environmental assessment done for this mangrove eradication. In addition, the method of eradication of the mangroves involves a controversial experimental procedure using herbicides to kill the mangroves and then leaving the dead, decaying trees to rot in place, rather than removing them from the site.

This experimental mangrove eradication project is being conducted with no permits other than a Special Management Area minor permit issued by the County of Hawaii for eradication of mangroves at Pohoiki and Onekahakaha Beach Parks and Paki Bay. There has been no opportunity for public comment or analysis of alternatives. These eradications are being done on Hawaii coastal conservation, shoreline lands, and with the known presence of endangered species in the area, creating a dead landscape consisting of acres of poisoned mangrove trees.

## ARGUMENT

### Argument #1 Categorical Exclusion Violation of NEPA

In paragraph 51 of the Amended Complaint, Plaintiff points out that the Service exempted this project from an environmental assessment using a retroactive Categorical Exclusion. See Exhibit M. Categorical Exclusions are defined by 40 U.S.C. 1508.4 under the National Environmental Policy Act (NEPA), 40 C.F.R. 1500-1508.

According to this statute, “*Categorical Exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required...Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.*” (Emphasis added)

Whether an action has “significant” environmental effects, and is therefore inappropriate for a Categorical Exclusion, depends on the context and intensity of the action. According to Sec. 1508.27(b), evaluating the intensity of an action should include: “(10) *Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.*”

As described in Plaintiff's Amended Complaint and in Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, numerous Hawaii environmental statutes were violated by allowing this eradication project to proceed. This constitutes a significant effect according to NEPA.

This fact and intention of NEPA to consider the Federal violation of State environmental laws to be significant is further reflected in the exceptions to Categorical Exclusions, defined for the Service in 516 DM 2 Appendix 2. The list of exceptions to

the use of a Categorical Exclusion are similar to that listed under Sec. 1508.27(b), including, “*2.10 Threaten to violate a Federal, State, local or tribal law or requirement imposed for the protection of the environment.*”

According to **40 CFR Sec.1500.6 Agency authority**, “*Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.*”

The use of a Categorical Exclusion for this project was clearly a violation of intent and letter of NEPA. This project should have had an environmental assessment, which stands to reason for a project to extirpate a species from Hawaii Island along sensitive shoreline, on conservation lands, with endangered species present, using Federal money, and involving an experiment using poison and leaving the trees to rot in place.

#### Argument #2 Retroactive Categorical Exclusion Violation of NEPA

In addition, the Categorical Exclusion was issued by the Service **months after the project began**. The purpose of NEPA is to assess an action for its potential

environmental impacts BEFORE the action is undertaken. A Categorical Exclusion is a determination that an environmental assessment is not needed. This needs to be decided at the earliest time in the process. 40 C.F.R. 1501.2 states, “*Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.*”

In short, a retroactive Categorical Exclusion to an environmental assessment is an oxymoron. It makes no sense to assess an action for environmental impacts *after* it is approved and performed. Assessments must precede proposed actions.

In addition, the Service could not have honestly and in good faith denied itself a Categorical Exclusion after the fact, since this would be self-incriminating. This makes the information on this retroactive Categorical Exclusion suspect to exaggeration, misstatement, and fraud. In no way does NEPA allow retroactive determinations, since this undermines the letter and intent of this environmental protection law. Clearly, the Service did not do its job in enforcing NEPA, which is in violation of 40 C.F.R. Sec. 1507.1 concerning compliance, which states, “*All agencies of the Federal Government shall comply with these regulations.*”

In addition, 40 C.F.R. Sec. 1500.3 regarding Mandate, states, “*Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental*

*Policy Act of 1969, as amended...The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law.”*

The Service severely failed in this regard in their retroactive issuance of a Categorical Exclusion, and in their issuance of a Categorical Exclusion despite the violation of Hawaii environmental statutes.

### Argument #3 Sovereign Immunity Waived By Statute

Given this violation of NEPA as stated above, the Plaintiff has a right to ask for injunctive relief. The ability to seek injunctive relief and a waiver of sovereign immunity are explicit in 40 C.F.R. Sec. 1500.3, where it states, *“It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury.”* (Emphasis added).

Plaintiff has described the irreparable injury this action poses to Plaintiff and will not repeat that here but refers the Court to Amended Complaint and Memorandum in Support of Motion for Preliminary Injunction.

Federal waiver of Sovereign Immunity is further expressed in the Administrative Procedure Act, 5 U.S.C. Sec. 702, Plaintiff has a right of review, stating, *“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by*

*agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.”*

It is the intent of the Plaintiff to obtain the names of the Federal officer(s) as part of the discovery process. They are currently named as Doe individuals in Amended Complaint.

5 U.S.C. Sec. 703 states, *“Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”*

The waiver of sovereign immunity and the right to injunctive relief is further described in 5 U.S.C. 705, which states, *“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury,*

*the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”*

5 U.S.C. 704 asserts subject matter jurisdiction in this court by asserting, “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.”

Scope of review is cited in 5 U.S.C. Sec. 706, which states, “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) *compel agency action unlawfully withheld or unreasonably delayed; and*
- (2) *hold unlawful and set aside agency action, findings, and conclusions found to be -*

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;...” (Emphasis added).

Plaintiff asserts that the Service was arbitrary, capricious and abused its discretion by failing to perform an environmental assessment, and then covering-up its error by issuing a fraudulent, retroactive Categorical Exclusion. They did not observe legal procedure. They do not have immunity for these abuses.

#### Argument #4 Fifth Amendment Violation of Due Process

Plaintiff has and will continue to suffer irreparable harm by being denied his Constitutional right to due process under the Fifth Amendment. Plaintiff's liberty to use and enjoy the environment has been denied by failure of the Service to offer public comment as part of an environmental assessment process. Plaintiff's life is also threatened as a result of physical injury by being struck in the head or face by dead branches from acres of mangroves left on the shoreline which may at any time enter the surf and ocean. Plaintiff is also threatened with illness from exposure to contaminated waters containing toxic substances released by the dying mangrove and the disturbed soil beneath them, and from pathogenic microorganisms flourishing on the decaying

mangroves and dead aquatic organisms that have succumbed to any adverse water conditions resulting from the use of the poison. Plaintiff thus has been deprived of Due Process by the Service for lack of an environmental assessment and the opportunity for public comment.

Public comment is an integral part of the NEPA process, and affords citizens an opportunity to participate in decisions that impact on their surroundings and affect their health and liberty. A Categorical Exclusion does not allow public comment. Funding a project and allowing it to proceed without an environmental assessment or Categorical Exclusion prior to the start of the project denies Plaintiff his right to participation in environmental management decisions and constitutes an irreparable harm to the Plaintiff and violation of his Fifth Amendment Due Process rights.

Argument #5 Sovereignty Waived in Proprietary Role

Additionally, apart from the above arguments, the Service is a member of BIISC, which is a proprietary interest. BIISC offers pest control services, a function that can be and is usually offered by individuals and corporations other than the government. The Service loses its sovereign immunity when it operates as a proprietary interest.

Theory #6 Removal to District Court Admission of Jurisdiction

It was the Service that removed this case from Circuit Court of the Third Circuit, State of Hawaii, to this Court. By removing the case, the Service has implicitly admitted that this Court has subject matter jurisdiction over the case. To now turn around and say

that this Court lacks subject matter jurisdiction and the case should be dismissed is disingenuous, subverts the goals of Justice, and should be estopped from doing so.

It is also another violation of Plaintiff's right to Due Process under the Fifth Amendment. The Service could have made this motion for dismissal on the basis of sovereign immunity when the case was still in Circuit Court. This has created an inconvenience and hardship for the Plaintiff, who lives on the Big Island and needs to travel to this Court for each hearing. It is also in violation of F.R.C.P. Rule 11(b)1.

Argument #7 Violations of the Endangered Species Act Waive Immunity

As stated in Amended Complaint # 71, as a result of no environmental assessment, there was no evaluation of the potential direct or indirect impacts on endangered species in the sites being poisoned. That there are endangered species in these areas is admitted by the Service in their Pesticide Use Proposal, submitted **retroactively** on 1/20/2010. See MOP Exhibit 26. While the Service admits of the presence of numerous endangered species in the areas, it completely ignores the presence or possible presence of the two nominated endangered arthropods described by the National Park Service's objections to the use of poisons at Honokohau. See #68-70 in Amended Complaint and Exhibit G, which explains how the poison used admitted on its label that oxygen depletion in the water following rapid defoliation from the poisoning can suffocate aquatic organisms.

Plaintiff notified the US EPA on 1/12/2010 that there were endangered species in

the areas being poisoned. Plaintiff was referred by the EPA to the local contact, Dean Higuchi, Hawaii-Pacific Press Officer/Congressional Liaison/Public Affairs Specialist, Honolulu, Hawaii. Plaintiff sent by email on 1/12/2010 to Mr. Higuchi, *“The BIISC is in the process of eradicating mangroves from the Big Island, experimenting with herbicide and leaving the poisoned trees in place to rot. **There was no environmental assessment for this project.** This project has been done with state money, from the Hawaii Tourism Authority, and Federal money, from the US Fish and Wildlife, and is being done on public land, shoreline, and in an MLCD. According to Malama o Puna, which is doing the poisoning as a BIISC partner, there was no EA. Can you please provide me with an EA exemption letter. In addition, please also provide EPA authorization for this project, **including the analysis of the area regarding endangered species, including the presence of stilts, Hawaiian mud hens, sea turtles, or other threatened or endangered species that may be impacted by this poisoning and eradication of the mangroves.**”*

Mr. Higuchi responded in an email dated 1/12/2010, *“EPA is not involved in this process, (sic) if there was a need for an EA, it may have been done via the US Fish (sic) and Wildlife Service as the project was funded by their Agency. I would contact the US FWS or the State Office of Environmental Quality Control as that particular state office would be the state agency to determine if an EA was necessary.”*

Plaintiff contacted the State Office of Environmental Quality Control, which

explained that they have nothing to do with enforcing or determining whether environmental assessments are needed.

Plaintiff then contacted Amy Miller and Janet Hashimoto of the US EPA Region 9 office, responsible for water quality. On 1/13/2010, Plaintiff sent them by email, *“I am forwarding to you both my emails with Dean Higuchi, of the Honolulu EPA office. This concerns the eradication of mangroves on the Big Island. The mangroves were poisoned with Aquamaster and Habitat herbicides, and left to rot in place. This is currently being done islandwide, and without any EA, including at beaches frequented by swimmers. It is funded by Hawaii state money, as well as money from the US Fish and Wildlife. There has been no public comment, and this project has not been NEPA compliant. The areas poisoned include conservation land and swimming areas, and no assessment has been made of the potential impact on native and endangered sea birds, turtles, bats, etc., or human populations. What will happen to water quality as these poisoned mangroves slowly decay?...I am shocked that the EPA was not part of this and did not have a chance to review this project. Is it EPA policy to ignore these infractions of NEPA and poisonings of our coastal land and beaches? I would like the EPA to investigate this poisoning of our mangroves, which were not invasive on the Big Island...”*

The response from Amy Miller was disappointing. By email on 1/13/2010 she said, *“...My office specifically enforces the Clean Water Act (CWA). My understanding*

*is that another office here at US EPA only reviews EIS and on some occasions EAs. EPA does not enforce NEPA requirements...”*

Plaintiff also contacted by phone the Service on or around 1/11/2010, speaking with Loyal A. Mehrhoff, Field Supervisor, Pacific Islands Fish and Wildlife Office, US Fish and Wildlife Service, who said has authority over this eradication project. Plaintiff expressed his concerns with the poisoning including its potential impact on endangered species. Mr. Mehrhoff did nothing to stop the project until 1/15/2010, when Plaintiff filed by email a request for information under the Freedom of Information Act. At that time, Mr. Mehrhoff temporarily stopped the poisoning.

Plaintiff received from Mr. Mehrhoff on 2/3/2010 the retroactive categorical exclusion and retroactive Pesticide Use Proposal. In the Categorical Exclusion, the Service responded to issues outlined in 516 DM 2 Appendix 2, which provides exceptions to Categorical Exclusions, that is, when Categorical Exclusions are not permitted and an environmental assessment must be done.

According to 516 DM 2 Appendix 2, exception 2.8 states, *“Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.”* In response to this exception, the Service stated in its Categorical Exclusion, *“No. A Pesticide Use Proposal (PUP) has been prepared for this project. Among other things, the PUP takes into consideration the potential effects of this project on listed*

*species, and resulted in a determination that the project will not likely adversely affect listed species (sic) these listed species: Hawaiian hawk, Hawaiian stilt, Hawaiian coot, Hawaiian duck, Hilo beach grass; and will have no affect on: Hawksbill Sea Turtle, Hawksbill Sea Turtle (sic), Hawaiian Monk Seal.”*

Realize that this PUP was dated 1/20/2010, stated it was for 2009, and was valid for a three (3) year period which started in 2008 and would end 12/31/2011! Much of the poisoning had already been done. This was clearly after the fact, and was fraudulent in that this is a **proposal** for pesticide use and must therefore precede the use of the pesticide.

In addition, the PUP fraudulently states that mangroves were listed on the EPA label for the product, Habitat. That is false. In fact, no poison has ever been used to kill mangroves, according to Ann Kobsa of Defendant Malama o Puna. This is an experiment and in violation of FIFRA.

With the green light on for the poisoning to proceed, Plaintiff concluded that this constituted an emergency under the Endangered Species Act, and began a civil suit under 16 U.S.C. 1540 (g)2(C), *“No action may be commenced under subparagraph (1) (C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a*

*significant risk to the well-being of any species of fish or wildlife or plants.”*

(Emphasis added.)

According to 16 U.S.C. 1540 (g) 3(A), “*Any suit under this subsection may be brought in the judicial district in which the violation occurs.*” Therefore, under the Endangered Species Act law Sovereign Immunity is waived, and this Court does have subject matter jurisdiction.

Argument #8 BIISC Association Taints Sovereign Immunity Claim

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.

While it is legal in some cases for governmental agencies to enter into agreements with and partner with private interests, in the case of BIISC these agencies are constituting BIISC as members of the unincorporated association, and are thereby self-dealing. Money from governmental and private sources are funneled through BIISC and paid back to private and government workers.

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. Plaintiff's request for an Entry of Default for BIISC has been delayed

due to objections from Defendants Malama o Puna and the County of Hawaii, asserting BIISC is not a legal entity. However, 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 #9 Remand to Circuit Court if No Subject Matter Jurisdiction

According to 28 U.S.C. 1447(c), a case removed to federal court and then found not to be within that court's jurisdiction shall be remanded to the state court. In addition, Plaintiff is entitled to payment for costs incurred as a result of the inappropriate removal. Plaintiff lives on the Big Island, and has had to fly to O'ahu to the district court. If this case is remanded, Plaintiff asks for payment of costs by the Service.

CONCLUSION

The Service has waived its right to sovereign immunity by statute through its violations of NEPA and by its arbitrary, capricious, and abuse of discretion acts. It has

acted as a proprietary interest through its association with BIISC. It has deprived Plaintiff of Due Process. It has violated numerous laws, including NEPA, the Endangered Species Act, Clean Water Act, FIFRA, and State of Hawaii environmental protection laws, and has engaged in conflicts of interest that have compromised the integrity of the environmental review process.

Plaintiff is seeking injunctive relief from the Service to prevent further irreparable harm to Plaintiff and his family, the environment, endangered species, and for the public good. In the interest of Justice, fairness, and to prevent continued irreparable harm to the Plaintiff and endangered species, the Court should deny the Service's motion for dismissal and issue a preliminary injunction to stop the mangrove eradication until this issue can be fully adjudicated and all Defendants identified and brought to Justice.

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

Dated: Hilo, Hawaii \_\_\_\_\_

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Sydney Ross Singer

Plaintiff, pro se

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

CERTIFICATE OF SERVICE RE  
PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
U.S. FISH AND WILDLIFE'S  
MOTION TO DISMISS  
COMPLAINT AND REPLY TO  
DEFENDANT'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION

HEARING DATE: APRIL 26, 2010

TIME: 10:00 AM

Judge: Hon. Seabright

Defendants.

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CERTIFICATE OF SERVICE RE PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT U.S. FISH AND WILDLIFE'S MOTION TO  
DISMISS COMPLAINT AND REPLY TO DEFENDANT'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

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SYDNEY ROSS SINGER

Plaintiff, pro se