

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

(Civil No. 10-1-0036, Circuit Court  
of the Third Circuit, State of Hawaii)

MOTION FOR PRELIMINARY  
INJUNCTION; MEMORANDUM  
IN SUPPORT OF MOTION;  
EXHIBIT J; CERTIFICATE OF  
SERVICE

Rule 16 Scheduling Conference:  
June 14, 2010

Time: 9AM

Judge: HON. SEABRIGHT

Defendants.

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MOTION FOR PRELIMINARY INJUNCTION

Plaintiff hereby makes a motion that the Court grant a preliminary injunction against Defendants to cease and desist from using any herbicides or poisons or any other means to kill mangroves on the island of Hawaii until this matter can be fully adjudicated.

This motion is made pursuant to FRCP 7(b), 65(a)1 and 65(d) and Rule LR 7.2 (d), and is based on attached memorandum in support of motion and the records and files of this action.

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

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(Civil No. 10-1-0036, Circuit Court  
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MALAMA O PUNA, et al.

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MEMORANDUM IN SUPPORT

Defendants.

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OF MOTION

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## MEMORANDUM IN SUPPORT OF MOTION

### **I. BACKGROUND**

Plaintiff is a resident of the County of Hawaii and has brought this lawsuit as a private attorney general to stop the illegal poisoning of sensitive shoreline conservation lands as part of a mangrove eradication project until an environmental assessment is conducted and legally required permits are issued.

This poisoning, already of more than 30 acres, is using an herbicide that is not labeled for use on mangroves, and is being done in sensitive shoreline conservation areas that are known to have nominated, threatened or endangered species which could be harmed directly and/or indirectly by the poison. The poisoned trees are being left to rot in place, creating dead zones in the water, scum on the water's surface, a blighted viewplane of the coastline, and health and safety risks to the public using these coastal waters for swimming, snorkeling, surfing and boating.

Plaintiff can no longer use these recreational areas for fear of health and safety impacts. Water quality testing is not being done to determine the extent of the pollution caused by this mangrove poisoning and eradication. No signs are posted notifying the public of this poisoning currently being done at Pohoiki, despite the fact that it is a popular beach park with children frequently playing and swimming among the mangroves. Many residents, including Plaintiff, eat fish caught in this area.

The Amended Complaint and Petition for Preliminary and Permanent Injunction, filed on February 16, 2010 in Hawaii Third Circuit Court and subsequently removed to this United States District Court, outlines numerous violations by Defendants of Hawaii and Federal statutes relating to environmental protection, environmental assessments, endangered species protection, and the use of

pesticides in the eradication of mangroves from the Island of Hawaii. Plaintiff hereby again avers and asserts all claims made in that initial document.

## **II. NO ENVIRONMENTAL ASSESSMENT**

This eradication project was approved with only one permit type, a County of Hawaii SMA minor permit. There was no environmental assessment or opportunity for public comment. This was in violation of HEPA, HRS 343, HAR 11-200, NEPA, 40 USC 1500.1(b) and(c), 42 USC 4321-4327, 516 DM 1.6, 516 DM 2 Appendix 2, and other Hawaii statutes as described in Amended Complaint.

## **III. ENDANGERED SPECIES AND WATER QUALITY THREATENED**

As described in Amended Complaint # 17-19 and Exhibit D, according to the US Forest Service's Institute of Pacific Island Forestry, which has been monitoring the impacts of the mangrove eradication at Wai 'Opae Marine Life Conservation District, native fish populations are declining as a result of the poisoning and eradication of the mangroves. The Forest Service concludes that mangroves provide important habitat for native fish species, and recommends that more information on the impacts of the poisoning is needed before further eradication of mangroves is conducted.

However, the poisoning has continued, nonetheless, and these findings are being ignored by Defendants.

In addition, there are endangered species in the mangrove areas being poisoned, including the Hawaiian duck, Hawaiian coot, Hawaiian stilt, Hawaiian monk seal, Hawksbill sea turtle, and Green sea turtle. The Pesticide Use Proposal, issued retroactively by US Fish and Wildlife, stated that there was no concern that the poison used, Habitat, would affect these endangered species, based on the reasoning that, "Habitat is not likely to be acutely toxic to fish, aquatic invertebrates, or

terrestrial organism including birds or mammals, because it's method of action is to suppress enzymes found only in plants, not animals.”

However, the **secondary impacts of the poison on these endangered species was completely ignored.** These secondary impacts include the poisoning and destruction of vegetation, plankton, and algae consumed directly by the endangered species, such as limu consumed by sea turtles. In addition, this vegetation, algae and plankton are necessary to feed small fish, crustaceans, and arthropods that serve as a food source for endangered species such as stilts, coots, ducks and monk seals. The vegetation, including the mangroves, also provide important habitat for fish fry and other small aquatic life to hide from predators.

Poisoning the bottom of the food chain, which this herbicide is doing, can have unpredictable and wide ranging impacts. Hence, the use of this poison poses a threat to endangered species in violation of 16 USC 1536(a)2 and HRS 159D, relating to the protection of endangered species.

In addition, as described in the Amended Complaint #31 and Exhibit G, there are 2 nominated endangered arthropods at the mangrove area in Honokohau. These arthropods, which were completely ignored by the Defendants, may also be at Pohoiki, Paki Bay, and Onekahakaha, and may be affected by the adverse changes in water quality resulting from the poisoning. According to the Habitat label, as described in Amended Complaint #69, “Treatment of aquatic weeds may result in oxygen depletion or loss due to decomposition of dead plants. This oxygen loss may cause the suffocation of some aquatic organisms.”

These actions violate HAR 11-54-1.1 and 11-54-3, 11-54-4, HRS 342D-1, 342d-4, 342D-5, 40CFR131.12, dealing with water quality anti-degradation.

#### **IV. POTENTIAL HUMAN HEALTH IMPACTS**

After applying the poison, the mangroves shed all their leaves within about 7-10 days, according to the label. This leaf drop is a health concern to the Hawaii Department of Health, since it could create water quality degradation as the leaves decay, as described in Amended Complaint #58 and Exhibit H. There may also be additional water quality degradation from the decay of dead fish and other aquatic organisms that suffocate from the resulting oxygen depletion or loss. This can lead to the production of potentially harmful anaerobic microorganisms and other pathogens that pose a threat to human health.

The production of a brown scum on the water following the poisoning at Wai 'Opae was shown in Exhibit F, and is shown in Exhibit J, a photograph taken at Pohoiki after the poisoning done there since this lawsuit was filed.

It is scientifically known that mangrove destruction can cause the release of heavy metals and other pollutants, none of which is being tested for at any of these poisoning sites. No water quality testing is being done at these poisoned sites, apart from fish counts at Wai 'Opae which show reduced native fish populations suggesting reduced water quality. This means the public is at risk from exposure to potentially pathogenic microorganisms, toxins, pollutants, heavy metals, and other decay products resulting from mangrove destruction and leaving the trees to rot.

Additionally, a safety hazard exists as dead tree parts break and enter the surf. No plan has been made to remove the dead trees or mitigate this hazard. Defendant Malama o Puna has admitted that this hazard exists. In a letter on May 8, 2009 to Alec Wong, Branch Chief of Clean Water Branch, State of Hawaii Department of Health, Ann Kobsa for Malama o Puna stated, "As a safety precaution, we are

planning to cut and remove the mangroves that are growing in the surf at Pohoiki to eliminate the hazard of having dead trees in the water with the surfers.” In a follow-up letter dated June 29, 2009, Ann Kobsa for Malama o Puna stated, “In response to your concerns and those of the OCCL and County of Hawaii's Planning Department, we have revised our eradication plan such that we will not cut down any trees, therefore, no trimming, stock piling, chipping, staging, or disposing will occur.” Therefore, the admitted public safety hazard described will exist at Pohoiki and at other sites as a result of this poisoning of trees and leaving them to rot in place.

## **V. CURRENT PERMIT IS NOT VALID**

The SMA minor permits for the eradication of mangroves at Paki Bay, Pohoiki, and Onekahakaha are, “(s)ubject to the following conditions...The applicant shall secure all necessary approvals and permits from other affected federal, state, and county agencies as necessary to comply with all applicable laws and regulations.”

These permits are not valid since the required environmental assessment was not performed, and a use permit from the DLNR OCCL was not obtained. In fact, this action should have required an SMA major permit, according to the County of Hawaii Planning Commission Rules of Practice and Procedure, Rule 9-10 F and H.

## **VI. CONFLICT OF INTEREST AMONG DEFENDANTS**

Defendants Malama o Puna, US Fish and Wildlife, DLNR OCCL, and the County of Hawaii are all partners in the Big Island Invasive Species Committee (BIISC). US Fish and Wildlife is providing the funding and did not require an environmental assessment, the County of Hawaii allowed this poisoning of sensitive coastline conservation lands with only an SMA minor permit and exempted the project from an environmental assessment, the DLNR OCCL exempted the project from needing a permit or environmental assessment, and Malama o Puna received the

funds and shared these funds with BIISC.

These agencies and organizations, through their BIISC partnership, act in coordination with one another and establish goals, agendas, and projects before any environmental assessments or public comment. As a result of the contrivance between these various federal, state, and county governmental agencies and private entities, the checks and balances that are meant to protect the public and environment from irresponsible and harmful actions have been lost, and these agencies are not acting in good faith.

A citizen lawsuit under the private attorney general doctrine is the only recourse to save the environment and the interests of the public from this poisoning of mangroves and leaving them to rot in place along our sensitive shoreline conservation lands.

## **VII. THE POISONING CONTINUES**

On January 15, Plaintiff asked US Fish and Wildlife for information under the Freedom of Information Act. That afternoon, Loyal Mehrhoff of US Fish and Wildlife called Plaintiff on the phone on or around 5:30 PM to tell Plaintiff that he was halting eradication work on the mangroves.

However, the work was resumed within a short time. An email from Loyal Mehrhoff of US Fish and Wildlife, dated January 29, 2010, states, “Two weeks ago I let you know that we halted work on the mangrove projects to review their compliance documents. At least one of those projects is being cleared for resumption of work... Other projects are still pending review and have not be approved for resumption of work.”

By February 8, Plaintiff was informed by US Fish and Wildlife that work was allowed to resume at Pohoiki, Onekahakaha, and Paki Bay.

Once Plaintiff filed suit, US Fish and Wildlife again stopped the work. According to an email from Loyal Mehrhoff, dated February 12, 2010, he states, “Just an update to let you know that we are still reviewing some of the issues you brought up on the phone. We have asked that the three mangrove projects we have given an OK to be temporarily paused while we complete this.”

However, Malama o Puna continues to poison mangroves at Pohoiki, despite US Fish and Wildlife's request. Poisoning has continued into March.

Additionally, according to DLNR OCCL's Response to Amended Complaint, it is admitted that poisoning may continue.

## **VII. PUBLIC TRUST AND THE PROCAUTIONARY PRINCIPLE**

The Hawaii Constitution Section XI subsection 1 provides: *"For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of all people."*

The precautionary principle requires long-term vision and mandates that government entities favor caution and conservation in any case in which information is uncertain. The burden of proving that its proposed use is consistent with the sustainable health of the ecosystem falls on the party proposing to use the resource.

In the Hawaii Supreme Court 2003 Waiahole Ditch Decision (Water Use Permit Applications, 94 Hawaii 97; 9 P.3d 409, 2000), the court said, “The duty to protect public water resources is a categorical imperative and the precondition to all

subsequent considerations, for without such underlying protection the natural environment could, at some point, be irrevocably harmed and the duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses could be endangered.”

The Court in Hawaii not only reinforced the public trust doctrine but argued that the precautionary principle was essential for implementing the doctrine. “... (w)here there are present or potential threats of serious damage, lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation. In addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.” (Emphasis added.)

When a group of activists, scholars, scientists, and lawyers convened at the Wingspread Conference in Racine, Wisconsin in 1998, the group produced this statement on the precautionary principle:

*...When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action. In this context the proponent of an activity, rather than the public, should bear the burden of proof. (Joel Tickner, et al, *The Precautionary Principle in Action: A Handbook* (1st ed.), 2.)*

In 1992, the United States became bound to use the precautionary principle when the federal government signed and ratified the Rio Declaration. Although the United States had not expressly cited the precautionary principle in federal laws or policies, its presence is evident in several federal environmental statutes:

- *National Environmental Policy Act is precautionary in two ways: 1) It emphasizes foresight and attention to consequences by requiring an environmental impact assessment for any federally funded project, and 2) it mandates consideration of alternatives including a “no-action” alternative. NEPA is one of the best national examples of precautionary action.*
- *The Clean Water Act established strict goals in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."*

In its final report, the U.S. Commission on Ocean Policy recommended the adoption of a precautionary approach to managing the ocean environment. (USCOP, 2004).

Given that this eradication project has not been properly reviewed by an environmental assessment, and given that this project involves sensitive shoreline and conservation land which also serves as habitat for nominated, threatened and endangered species, and given that the control of mangroves with poison is being tested at these sites, and give that the outcome of these tests has already shown that native fish are adversely impacted by the eradication, and given that these poisoned waters pose a threat to human health and reduce the use and enjoyment of the environment, therefore this eradication of mangroves should not be allowed to continue according to the Precautionary Principle.

## **VIII. SUMMARY**

In view of the reasoning set forth above and in the Amended Complaint, Plaintiff respectfully begs the Court to grant his request for a preliminary injunction until this matter can be properly adjudicated. Plaintiff makes this request with the following in mind:

1. Defendants will not be harmed in any way by delaying their poisoning and eradication efforts until this issue can be decided by this Court. However,

Plaintiff, the environment, endangered species, and the general public will continue to be harmed if this poisoning proceeds.

2. Plaintiff believes he will prevail based on the laws and statutes that have been violated as set forth above and in the Amended Complaint, and in conformity with the Precautionary Principle.
3. Continuation of the poisoning will cause irreparable and irrevocable harm to a sensitive shoreline environment that is home to numerous native and endangered species.
4. Continuation of the poisoning will cause a blight to our beautiful shoreline, leaving dead, leafless, rotting trees to mar the coastline for decades as silent testimony to this illegal and unjustifiable environmental assault.
5. Plaintiff and his family will personally suffer since we live near and frequently use these shoreline resources which are under assault, irrevocably depriving us of the benefits and enjoyment of the environment as provided by state and federal environmental protection laws and the Constitution of Hawaii.
6. Plaintiff and other citizens of this State of Hawaii will suffer irrevocable harm if this poisoning and eradication are not enjoined by preliminary injunction by being denied their right to an open and participatory process of environmental management, as prescribed by numerous state and federal laws calling for public participation in environmental management, including 42 USC 4371, 40 USC 1500.1(b) and 1500.2, and HRS 343(1) and (3). In effect, Defendants have disenfranchised the public from the environmental process by allowing this eradication and poisoning to occur without any opportunity for public comment or due process.
7. This preliminary injunction is necessary to allow this Court the time needed to decide on the merits of this lawsuit while protecting the environment and its plants, animals and humans from further assault by poisons and this mangrove

eradication.

## **IX. CONCLUSION**

Without a preliminary injunction, Defendants will not stop poisoning the shoreline to kill mangroves. This additional destruction will be irreversible, irreparable, a blight on our shoreline, and may have caused extremely serious damage to endangered species and humans using these areas.

Plaintiff, therefore, begs the court to grant this preliminary injunction.

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

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CERTIFICATE OF SERVICE

Judge: HON. SEABRIGHT

ENTITIES 1-100; DOE  
INDIVIDUALS 1-100

Defendants.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the motion for preliminary injunction, Memorandum in support of motion, and Exhibits J and K, have been served on Defendants by depositing same in the United States mail, postage prepaid, addressed as follows on March 22, 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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