

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII`I

CLARENCE CHING and MARY MAXINE) CIVIL NO. 14-1-1085-04 GWBC
KAHAULELIO,) (Declaratory Judgment)
)
Plaintiffs,)
vs.)
) FINDINGS OF FACT, CONCLUSIONS
SUZANNE CASE, in her official) OF LAW AND ORDER; NOTICE OF
capacity as Chairperson of the) ENTRY
Board of Land and Natural)
Resources and state historic)
preservation officer, BOARD OF)
LAND AND NATURAL RESOURCES,) Jury-waived trial:
DEPARTMENT OF LAND AND NATURAL) Dates: Sept. 29, 30, Oct. 1,
RESOURCES,) and 2, 2015
) Time: 8:30 a.m.
Defendants.) Judge: Gary W.B. Chang
)
)

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The above-entitled action came on for jury-waived trial before the Honorable Gary W.B. Chang, in his courtroom, on September 29, 30, October 1, and 2, 2015, plaintiffs CLARENCE

CHING and MARY MAXINE KAHAULELIO [hereinafter "**Plaintiffs**"]
being represented by David Kimo Frankel, Esq., and Summer L.H.
Sylva, Esq., and defendants SUZANNE CASE, BOARD OF LAND AND
NATURAL RESOURCES, and DEPARTMENT OF LAND AND NATURAL RESOURCES
[hereinafter collectively "**Defendants**"] being represented by
Daniel A. Morris, Esq., Deputy Attorney General.

The court having heard the evidence and argument of counsel
and good cause appearing therefor, the court hereby makes the
following findings of fact and conclusions of law and order.

FINDINGS OF FACT:

Parties:

1. If any of these findings of fact are conclusions of
law, then they shall be so construed.
2. Plaintiffs Clarence Ching and Mary Maxine Kahalelio are
residents of the State of Hawaii. They have in the past and are
currently actively engaged in cultural practices upon the
Pohakuloa Training Area that is the subject of this action.
Cultural practices may include, but are not necessarily limited
to, (1) song, dance, and chant about Pohakuloa and its history,
(2) walking upon the lands at Pohakuloa, feeling, showing, and
experiencing reverence, respect, and celebration of said lands,
(3) honoring the rich cultural history, significance of, and
sacredness of Pohakuloa, Hualalai, Mauna Loa, and Mauna Kea,

(4) enjoying the native plants, animals, and insects that reside in Pohakuloa, and (5) recognizing what a precious cultural jewel Pohakuloa is to all of the people of Hawaii and their ancestors.

3. Defendant Suzanne Case is the chair of the Board of Land and Natural Resources and the State Historic Preservation Officer. She is sued in her official capacities. Suzanne Case's predecessor was William Aila Jr.

4. Defendant Board of Land and Natural Resources [hereinafter "**Board**"] is an administrative board that heads the official business of the Department of Land and Natural Resources for the State of Hawaii.

5. Defendant Department of Land and Natural Resources [hereinafter "**DLNR**"] is a cabinet level department of the executive branch of the State of Hawaii. The DLNR manages and administers the public lands for the State of Hawaii. The DLNR's mission is to enhance, protect, conserve, and manage Hawaii's unique and limited natural, cultural, and historic resources held in public trust for current and future generations of the people of, and visitors to, Hawaii nei in partnership with others from the public and private sectors.

Introduction:

6. This is a declaratory judgment action in which Plaintiffs seek a determination of Defendants' obligations, if any, to maintain and care for the leased lands under a government lease of public ceded lands at Pohakuloa on Hawaii Island. The lease that is involved in the instant action is State General Lease No. S-3849 [hereinafter "**Said Lease**"]. The State of Hawaii is the owner of these leased ceded lands.

7. Under Said Lease, the State of Hawaii (as lessor) leased three parcels of land in the Pohakuloa area on the Island of Hawaii to the United States of America ["**USA**"] to use for military training. Some of the training included live ammunition fire into a specific area referred to as the "Impact Area."

8. Defendant William Aila Jr., in his official capacity as the then-chair of DLNR, believes that military training activities have caused damage to public land, natural resources, and cultural sites in Hawaii.

9. According to the website maintained by the State's Kaho'olawe Island Reserve Commission at <http://kahoolawe.hawaii.gov/history.shtml>, the U.S. Navy did not clear all unexploded ordinance from 25% of the surface of the island and these areas remain unsafe.

10. Defendant Case's predecessor William Aila Jr. through the federal court's decision in *Malama Makua v. Rumsfeld*, 163 F. Supp. 2d 1202 (D. Haw. 2001) and subsequent decisions in that same case (*Malama Makua v. Gates*, 2008 U.S. Dist. LEXIS 19201 (D. Haw. Mar. 11, 2008) and *Malama Makua v. Gates*, 2009, U.S. Dist. LEXIS 5050 (D. Haw. Jan. 23, 2009)), is aware of the difficulties encountered in getting the federal military to clean up the unexploded ordnance in Makua.

11. Defendant William Aila Jr., in his official capacity as the then-chair of DLNR, is aware that the military has failed to clean up all the ordnance remaining after the military's use of the land it leased in Waikane Valley.

12. All of the information and knowledge acquired by and known to William Aila Jr. is imputed to Defendants.

13. Plaintiffs, in the past and currently, use the subject lands at Pohakuloa for Hawaiian cultural purposes.

14. The USA uses the Pohakuloa Impact Area portions of the leased lands for live fire training grounds. As a result, Plaintiffs allege that the amount of ordnance remnants, debris, and trash strewn about the subject leased lands are not insignificant.

15. Plaintiffs have filed this lawsuit to determine whether the Defendants have any obligation to maintain and/or clear the leased lands of said ordinance remnants and trash or otherwise cause the same to be accomplished.

16. It should be noted that lessee USA under Said Lease is not a party to this action since Plaintiffs are not seeking any relief directly against lessee USA.

The Lease:

17. In August 1964, the State of Hawaii, represented by the Board, entered into a sixty-five (65) year lease with the USA, which lease is designated as State General Lease No. S-3849 (also referred to herein as "Said Lease"), to use three parcels of land consisting of 22,971 acres of land at Pohakuloa on Hawaii Island for military training purposes for the total cost of one dollar (\$1.00) for the entire 65 year lease period ending on August 16, 2029. [Hereinafter "**Subject Lands**".]

18. The lease contained the following provisions of particular significance herein:

9. In recognition of public use of the demised premises, the [USA] shall make every reasonable effort to . . . remove or deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the said public, whichever is sooner.

. . . .

14. In recognition of the limited amount of land available for public use, of the importance of forest reserves and watersheds in Hawaii, and of the necessity for preventing or controlling erosion, the [USA] hereby agrees that, commensurate with training activities, it will take reasonable action during its use of the premises herein demised to prevent unnecessary damage to or destruction of vegetation, wildlife and forest cover, geological features and related natural resources and improvements constructed by the Lessor, help preserve the natural beauty of the premises, avoid pollution or contamination of all ground and surface waters and remove or bury all trash, garbage and other waste materials resulting from [USA] use of the said premises.

.

18. The Lessor hereby agrees that, commensurate with the public use of the premises herein demised, it will take reasonable action during the use of the said premises by the general public, to remove or bury trash, garbage and other waste materials resulting from use of the said premises by the general public.

19. Subject to obtaining advance clearance from the plans and training office of the [USA's] controlling agency . . . officials and employees of the Lessor shall have the right to enter upon the demised premises at all reasonable times to conduct any operations that will not unduly interfere with activities of the [USA] under the terms of this lease; provided, however, that such advance clearance shall not be unreasonably withheld.

19. The lease is silent with respect to any extension of the lease term. Therefore, at this time, the lease terminates by its express terms on August 16, 2029, the end of the 65 year lease period. However, nothing in the lease prohibits the parties thereto from extending the lease term by mutual agreement.

20. The Subject Lands are public, ceded lands, and are

owned by the State of Hawaii. As such, the Subject Lands are part of the public lands trust. Public trust lands are state-owned lands that are held for the use and benefit of the people in general of the State of Hawaii. The State of Hawaii is the trustee of these public lands in the public trust. The trustee of the public lands trust has the highest duty to preserve and maintain the trust lands. This duty is broadly coined in the concept of "malama `aina"--to care for the land.

21. The USA has allowed for inspections of the Subject Lands. However, only a minimal number of inspections by the State of the Subject Lands have occurred to date.

22. In 1964, the lawyers representing the Board during the negotiation of Said Lease with the USA expressed a desire to have the USA include in Said Lease a provision that required the USA to restore the leased premises upon termination of the lease. Ultimately, the lease did not include such a provision. At best, the USA agreed to include paragraphs 9, 14, 18, and 19 in Said Lease.

23. Paragraph 9 obligates the USA to make every reasonable effort to remove or deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the public.

24. Paragraph 14 obligates the USA to take reasonable action to avoid pollution or contamination of the lease premises

and to remove or bury trash, garbage, and other waste materials resulting from the USA's use of the leased premises.

25. Paragraphs 18 and 19 provides for various rights of entry by the Defendants.

26. Apparently, the negotiations between the State and the USA regarding the Pohakuloa lands were very broad, covering the full range of options, including the possible transfer to the federal government of title to the subject Pohakuloa leased lands. The State of Hawaii eventually elected not to deed title to the Subject Lands to the federal government. Instead, the State chose to enter into a 65 year lease for the Subject Lands. The State thought that a lease, instead of a deed, offered the State greater control over the condition of the land because a lease protects the public interest in the Subject Lands since the State will get the land back after the lease expires. J.M. Souza, Jr., stated this in his March 9, 1965 letter to James J. Detor, the Head of the Land Management Division of DLNR.

27. The State of Hawaii never abandoned its interest in protecting and preserving the condition of the Subject Lands. On or before April 4, 1973, in connection with a maneuver permit applied for by the federal military, Tom K. Tagawa, a State Forester from DLNR, recommended that, as a condition to the issuance of such a permit to the military, the State demand that the military "clean up debris." By letter dated June 28, 1974,

James J. Detor, a Programs Administrator for DLNR, wrote to defendant BLNR and recommended that the BLNR grant the maneuver permit, subject to certain conditions. One of the conditions is to clean up all materials the military deposits upon the land:

The [military] shall, within a reasonable time after completion of the maneuvers, remove all equipment or other materials placed by it in the permit area, and shall remove, bury or otherwise satisfactorily dispose of all trash, garbage, etc., resulting from the permitted uses

Condition of Subject Lands:

28. The USA has in the past, and currently does, engage in military training exercises upon the Subject Lands. This area is generally referred to as the Pohakuloa Training Area ["PTA"]. The training includes live fire training that uses live and blank ammunition as well as live explosive munitions.

29. Cultural monitors, who spent extensive time on State lands at the PTA, observed military debris, including unexploded ordnance and spent shell casings, scattered across the Subject Lands.

30. Defendants are aware that there is a possibility that unexploded ordnance (UXO) and munitions and explosives of concern (MEC) are present on the state-owned ceded PTA Subject Lands.

31. A November 2010 report was prepared by the United States Army Corps of Engineers, and is entitled "Final- Archaeological and Cultural Monitoring of Construction of Battle Area Complex (BAX) for Stryker Brigade Combat Team (SBCT), Pohakuloa Training Area, Hawai'i Island, Hawai'i." It addressed the conditions upon the PTA and some of the cultural concerns. This report (exhibit 27) included the following observations and recommendation from cultural monitors:

6.2 History

Information regarding song, dance, and chant passed down through many generations will express the most profound understanding of such a wonderful place. This is a profound understanding that gives life, that gives respect, and that builds relationships with what we know as our environment, our elements, and our God.

In oral traditions of the Hawaiians, the high peaks are considered to be a place for the Gods. These peaks and places are very sacred. Mauna Kea, Mauna Loa, and Hualalai are the peaks that border Pohakuloa Training Area (PTA).

From the ice age until today, many people, native vegetation and animals have lived in PTA. It has also been recorded and written that many functions and events occurred in PTA. The native ua`u bird, feral pigs and ungulate ["hoofed"] animals became the permanent residents. High concentrations of native plants and insects live here. At one time, it was the residency of a great leader and chief `Umi and his army.

Exh. 27 at 67.

6.3.1 Introduction

The perspective and understanding of the land to the Hawaiian People is the base of our existence,

resources, generally food and the resources are all connected. The `aina (land) means plentiful "food." To develop unconsciously, to destroy and to misuse the land in ways that are not good for the land is not appreciated. The land is a God, an entity of energy that has life and gives life.

The questions are asked: "Why do they have to train here in Hawaii" and "how is the training done?" As we experienced on Kaho`olawe Island, Makua Valley, and other places in Hawaii, impacts of the military are critical. The land will never be the same. Some areas will never be used again, and all areas are considered hazardous.

Id. at 68.

6.3.2 Impacts

The Military has been operating for half a century at Pohakuloa. Their impacts are damaging in many ways. Training of military causes displacement of native vegetation and destroying of land that will never be safe for future generations.

Ungulates have overpopulated the land (figure 57). The lack of control of ungulates leads to an imbalance of the land, animals, and people. The result of an imbalance causes deficiency of, or a lack of, a system that doesn't work for the community of all plants, animals and people.

Id.

6.3.3 Archaeology Sites

There are varieties of sites in PTA BAX that have been protected and cared for with temporary fencing. Policies and procedures need to be developed and/or reviewed to be in accordance with cultural input. Proper cultural procedures and policies in place will provide a sense of integrity and respect for the

archaeological sites and the valuable flora and fauna for the life of the living.

Id.

6.3.5 Recommendations

. . . .

As cultural monitors we would like to see military impacts stopped at Pohakuloa as well as other places in Hawaii. Thoughts of training with environment friendly munitions might be something to explore.

Reforestation and ungulate control projects are strongly suggested to remedy damages already done to the land in BAX area. The Military needs to implement some kind of cleanup process as part of their training in PTA. Remnants of military trash is everywhere.

Id. at 72 (emphasis added).

6.3.6 Expressions

. . . .

My name is Leina`ala Benson. My husband and I raised our children in Honaunau Being of Hawaiian ancestry and having a "war veteran" father, allows me to have a view of this project on both sides of the spectrum. I understand the need to have our young men and women trained for service. I also feel the need to conserve what is left of our native resources.

. . . .

I can't even begin to explain the dire need for mass ungulate control. In the past 8 months I have observed the increase of this population by at least one third. They are destroying our precious native ecosystem. Immediate attention to this matter is imperative to the restoration in order for native plants that inhabit these beautiful mountains to have their chance to thrive again. Another major concern is the military debris that is left behind after training including unexploded ordinance that is carelessly discarded. There is a need to have some type of cleanup plan implemented in the military training process.

Id. at 73 (emphasis added).

32. Four (4) years later, a September 2014 report entitled "Archaeological and Cultural Monitoring Report for Activities Related to Construction of the Proposed Battle Area Complex (BAX) for the Stryker Brigade Combat Team (SBCT), U.S. Army Pohakuloa Training Area (PTA), Island of Hawai`i, Hawai`i TMK: (3) 4-4-016:005" [hereinafter this report is referred to herein as "**2014 Cultural Monitoring Report**" or "**2014 CMR**"] was prepared for the United States Army Corps of Engineers, Honolulu District, by Cultural Surveys Hawai`i, Inc. [hereinafter "**CSH**"]. This report was prepared after CSH completed monitoring fieldwork in connection with the proposed construction of a Battle Area Complex (BAX) within the PTA. Some relevant findings or recommendations in the 2014 CMR includes the following.

Remnants of live fire training are present within the BAX, including stationary targets, junk cars, an old tank, crudely built rock shelters, and miscellaneous military rubbish. Spent ammunition is scattered across the landscape.

Exhibit 38 at 5.

While many people have expressed that they generally support the training of our troops, there is ongoing concern that such training should necessarily require destruction of the land.

The impact of the live fire training extends beyond the limits of the Impact Area. For example, materials such as white phosphorous can travel well beyond the projectile impact site, and UXO [unexploded ordinance] can be transported unintentionally from one

area to another. . . . This lease . . . requires the land to be restored to its original state when returned. This cannot occur if the land remains so littered with UXO that it is unsafe for anyone to go on the land. If this is the case, the land will be rendered unusable forever—one eighth of our island will become unavailable for use by any of our future generations. This is not acceptable nor could it be construed in any way to be in compliance with the Statehood compact.

Therefore, in order for the Army to meet the lease termination deadline, **we strongly recommend** the Army begin now to seek funding to initiate a serious cleanup effort throughout the leased training areas bounding the impact areas: that major impact/UXO areas be subjected to thorough cleanup

Id. at 75-76 (emphasis added) (bold in original).

33. The recommendation to begin seeking funding to initiate serious clean up is of particular significance because paragraph 32 of the Said Lease states: "The Lessor's compliance with any obligations which may be placed on it by this lease shall be subject to the availability of funds and/or personnel." Therefore, the foresight to consider the availability of federal funds to undertake any clean up activity is a significant consideration in any effort or plan to clear the Subject Lands of the military training remnants and trash.

34. In addition to the Subject Lands, there are lands that appear to have been used as a former bazooka range Munitions Response Site [hereinafter "**MRS**"] from 1950 through the mid-1960s—this use predates the inception of the Said Lease.

35. In a draft document entitled "Action Memorandum for the Time Critical Removal Action," that was prepared in March 2015 by the United States Army Garrison at Wheeler Army Airfield on Schofield Barracks in Wahiawa, Oahu, Hawaii, it was reported that the Former Bazooka Range MRS is located at the Pohakuloa Training Area. As of the March 2015 draft report, the bazooka range was designated as a non-operational range and is off limits to training units. However, notwithstanding this "non-operational" status, the bazooka range was apparently used as a military maneuver area through the early 2000s. During a site inspection of the bazooka range area that was jointly conducted by DLNR and the Army in 2014, the area was found to be "heavily contaminated on the surface with material potentially presenting an explosive hazard (MPPEH) and munition debris (MD)." (Emphasis added.) A subsequent inspection by two military explosive ordinance disposal units found that the following types of ordinance were observed to be present:

1. M29A2 training rounds with dummy M405 fuse,
2. Practice 81mm mortars, and
3. High explosive anti-tank (HEAT) rifle grenades.

Other suspected fired ordinance at the bazooka range area also included:

1. M28A2 bazooka rounds with M404 fuse, and
2. M30 white phosphorus (WP) bazooka rounds.

The Army noted that the sheer densities and quantities of ordinance that are present on the ground at the former bazooka range area "coupled with the accessibility to the public make for the potential for significant danger to public health and welfare." The estimated cost of remediating the danger as of March 2015 was \$2,353,000. Of course, costs would have significantly increased as of the date of the instant decision. The Army recommended that the removal of ordinance danger because of the significant possibility that ordinance exists at the former bazooka range area that "presents an imminent and substantial endangerment to public health, or welfare, or the environment."

36. The Defendants are aware that military training activities on the Subject Lands pose a significant and substantial risk of harm or damage to Said Lands, and persons who may foreseeably come upon Said Lands, which includes harm or damage to the cultural use of the Subject Lands.

37. In a March 13, 2013 memorandum from Steve Bergfeld (Acting Hawaii Branch Manager for DLNR) to Kevin Moore (State Lands Assistant Administrator), DLNR stated: "PTA should sweep the lands North of the saddle road for UXO and remove any UXO found at their expense to make the area safe for the public."

38. A true and correct copy of the Final Environmental Impact Statement for Construction and Operation of an Infantry

Platoon Battle Course at Pohakuloa Training Area (March 2013)

[hereinafter "**Final EIS**"] can be found at

[http://www.garrison.hawaii.army.mil/pta Peis/documents.htm](http://www.garrison.hawaii.army.mil/pta%20Peis/documents.htm).

39. Page ES-8 of the Final EIS states: "Decades of using PTA as a training area have introduced a significant risk of encountering MEC/UXO. MEC/UXO is known to exist in the impact area and is expected to be encountered during range construction activities; but there is also a medium risk of finding MEC/UXO outside the impact area."

40. The types of weapons that have been used at Pohakuloa Training Area may include small arms, grenades, machine guns, shotguns, antitank weapons, howitzers, mortars, field artillery, air defense artillery, explosives, rockets, missiles, and/or weapons using ammunition containing depleted uranium.

41. Page 3-64 of the Final EIS states: "Past and current activities at PTA have resulted in contamination of soil by explosives and other chemicals."

42. The Army has applied to the Nuclear Regulatory Commission for a license to possess Davy Crockett M101 spotting round depleted uranium on ranges at the Pohakuloa Training Area.

43. Defendants are aware that military training activities on the Subject Lands that deposit live or dummy ordinance or debris upon the Subject Lands pose a risk to public health,

safety, and welfare, as well as to the Plaintiffs' cultural interests in the Subject Lands.

44. Defendants are aware of challenges in securing action (not just representations and assurances) from the military to fully comply with provisions of Said Lease that are intended to (1) maintain the condition of the Subject Lands or (2) enable Defendants to malama `aina the Subject Lands.

45. Proper stewardship of the Subject Lands pursuant to Defendants' public land trust duties include, but are not necessarily limited to, periodic and meaningful inspection and monitoring of the military training activities and their aftermath upon the Subject Lands and reasonably accurate documentation of such activities and the effects of such activities to achieve transparency of Defendants' inspection and monitoring actions.

46. Inspections inform and educate Defendants about the nature and extent of the activities taking place in the PTA and the effects of such activities upon the Subject Lands and enable the Defendants to effect compliance with lease terms and safeguard the condition and integrity of state lands. Inspections must occur with a reasonable frequency that will enable Defendants to meet their obligations to malama `aina the Subject Lands.

INSPECTION OF SUBJECT LANDS:

47. An inspection of the Subject Lands by Defendants was conducted on December 19, 1984. The "Inspection Report for General Leases" for that 1984 inspection stated the following:

FINDINGS

1. Property being used for Military training purposes per lease terms.

INSPECTED BY: /s/ Samuel Lee

Exhibit 13.

48. An inspection of the Subject Lands appears to have been conducted ten years later in 1994. The "Inspection Report for General Leases" for that 1994 inspection stated the following:

FINDINGS

(Blank)

INSPECTED BY: (Blank)

Exhibit 14.

49. The complaint was filed in the instant lawsuit on April 28, 2014. The first amended complaint was filed herein on May 12, 2014.

50. Defendants removed the instant case to federal court on May 29, 2014. The federal court remanded the case back to state court on August 22, 2014.

51. Defendants filed their answer to first amended complaint herein on September 19, 2014.

52. Then, Defendants caused an inspection of the Subject Lands to be conducted on December 23, 2014. Unlike the Inspection Reports from 1984 and 1994, the Inspection Report for the December 2014 inspection was not as sparse as compared to those from 1984 and 1994. The 2014 Inspection Report (Exhibit 16) contained much more information. After noting that the condition of the leased premises were "not satisfactory," the Report proceeded to quote, verbatim, the text of paragraphs 9 and 14 of the Said Lease. Then, the Report continued to posit a number of remarks that can be summarized as follows (language in quotation marks are taken, verbatim, directly from the Report):

- a. [Verbatim from Report:] "Army personnel explained that areas used for combat training are regularly inspected and cleaned up after the exercise is complete. It was speculated that [the area located adjacent to the Daniel K. Inouye Highway fka Saddle Road] may have been used for night training and the material found may have been overlooked and will be remediated."

Court's findings (not in report): The court finds that this comment by the Army personnel is contradicted by other entries in this Report

(which are noted hereinbelow). Contrary to the representation that the Army "regularly inspected and cleaned up after the exercise is complete," the Report appears to indicate that a significant amount of debris and ammunition remnants remain present upon the Subject Lands. This obviously calls into question the veracity and reliability of the Army's representation in the Report that the areas of military exercises and training are "regularly" cleaned up.

- b. [Verbatim from Report:] "The first location was a former bazooka target range. . . . spent shell casings found at the target site. . . . The debris area was extensive and the army indicated it will take several months to properly restore the area to a condition acceptable to DLNR."

Court's findings (not in report): This is an example of a representation in the Report that is inconsistent with the representation that the Army "regularly" cleans up an area after an exercise is completed. Obviously, these shell casings were not cleaned up after the training exercise was completed.

- c. [Verbatim from Report:] "Another location brought to staff's attention was a shooting range where many derelict vehicles were brought in for live fire targets. Staff was told this area will also be cleaned up with the removal and proper disposal of the vehicles."

Court's findings (not in report): This is another example of a representation in the Report that is inconsistent with the representation that the Army "regularly" cleaned up an area after an exercise is completed. Obviously, these derelict vehicles were not cleaned up after the training exercise was completed.

- d. [Verbatim from Report:] "A third location brought to staff's attention was an area used for the dumping of spent artillery shells. This area will also be cleared of all ordinance debris and miscellaneous material."

Court's findings (not in report): This is another example of a representation in the Report that is inconsistent with the representation that the Army "regularly" cleaned up an area after an exercise is completed. Obviously, these spent artillery shells were not cleaned up after the training exercise was completed.

53. DLNR has not met its informal goal of inspecting the Subject Lands once every two (2) years. Additionally, DLNR has also not provided adequate documentation of any inspection efforts so as to provide rudimentary transparency into the DLNR's efforts to inspect the Subject Lands so that it can malama `aina.

54. Defendants do not appear to be well-informed of the state of military training exercises and its effects upon the Subject Lands. The lack of regular, meaningful inspection and monitoring of the Subject Lands by Defendants have contributed toward Defendants' failure to malama `aina the Subject Lands under the Said Lease.

55. Defendants have failed to execute their rights and obligations under paragraphs 9, 14, 18, and 19 of the Said Lease, to the extent that those paragraphs enable Defendants to malama `aina the Subject Lands.

56. As of the date the instant lawsuit was filed (April 28, 2014), Defendants have failed to preserve and protect the Subject Lands as required by their duties as a trustee of the public land trust. Defendants have failed to malama `aina the Subject Lands under the Said Lease. These failures constitute a breach of Defendants' trust duties that apply to the Subject Lands. This failure has harmed, impaired, diminished, or otherwise adversely affected Plaintiffs' cultural interests in the Subject Lands. Plaintiffs have been harmed by said failures of the Defendants.

57. Plaintiff Clarence Ching has hiked through various areas within the Subject Lands. One of his cultural practices is to malama `aina the Subject Lands to the extent that he is able. (The court notes that plaintiff Ching's ability to malama

`aina the Subject Lands is very different from the duty of Defendants to malama `aina those lands, by virtue of the fact that plaintiff Ching is not a trustee of the public land trust of which the Subject Lands are a part. Plaintiff Ching's interest in providing malama `aina to the Subject Lands is to the extent that he is an individual cultural practitioner, not the State trustee.) The `aina is of crucial importance to him, his culture, and to his well-being. The `aina is irreplaceable to him. The `aina is the foundation of his cultural and spiritual identity as a Hawaiian. It is part of his ohana. The land and the natural environment is alive, respected, and treasured. Hawaii's state motto embodies a recognition of the significance of `aina to the people of Hawaii.

58. Plaintiff Clarence Ching has a deep and abiding personal and ancestral attachment to the Subject Lands. He is part Hawaiian by his ethnicity and lineage, who engages in traditional and customary practices within and around the Subject Lands. Mr. Ching is a descendant of chiefs, who at one time exercised dominion over Pohakuloa, walking the same `aina over which he, Mr. Ching, now walks and seeks protection.

59. While hiking upon the Subject Lands, plaintiff Clarence Ching has come across spent rifle casings, machine gun cartridge links, unfired blanks, and other military ammunition and other discarded debris. His ability to enjoy the beauty,

majesty, and aura of the Subject Lands without fear or concern for risks to his health, to engage in the cultural practices of his ancestors, and to ensure the long-term health of the `aina have been impaired by the littering of and damage to the landscape, vegetation, animals, and insects of the Subject Lands while under Defendants' watch.

60. Plaintiff Mary Maxine Kahaulelio is a native Hawaiian with at least fifty percent (50%) Hawaiian ancestry by her ethnicity and lineage. She lives in Waimea on Hawaii Island on Hawaiian Home Lands in a community not far from the Subject Lands. Plaintiff Kahaulelio has participated in Hawaiian cultural ceremonies at Pohakuloa. The `aina is central to her existence. Part of her kuleana is to be a steward of the land. It hurts Ms. Kahaulelio to see Defendants' failure to discharge their duties as a trustee of the public land trust for the Subject Lands. This results in the desecration of the Subject Lands. Her ability to enjoy the beauty, majesty, and aura of Pohakuloa, engage in the cultural practices of her ancestors on the Subject Lands, and ensure the long-term health of the `aina has been impaired by the littering of and damage to the landscape of the Subject Lands while under the Defendants' watch.

CONCLUSIONS OF LAW

1. If any of these conclusions of law are findings of fact, then they shall be so construed.

2. The Plaintiffs have standing to enforce their breach of trust claim.

3. Plaintiffs are asserting a state-law breach of land trust claim against Defendants for failing to carry out its duty as a state land trust trustee with respect to the Pohakuloa lands.

4. Lessee United States of America is not a party to this action because the state-law land trust claim does not assert any claim for relief against the United States of America or otherwise necessarily raise any federal or breach of contract issues against it. The Plaintiffs are only asking that the Defendants fulfill their obligations to Plaintiffs to satisfy their trust duties.

5. The United States of America is not an indispensable party to the resolution of this case.

6. All public land natural resources are held in trust by the State for the benefit of the people of the State of Hawaii.

7. The Subject Lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian

Homes Commission Act, 1920, as amended, shall be, and are held by the State as a public trust for native Hawaiians and the general public of the State of Hawaii.

8. Ceded lands are held by the State as a public trust for Plaintiffs and others. The Subject Lands are ceded lands of the State.

9. Defendants are trustees of State ceded lands for the benefit of the general public of the State of Hawaii.

10. As trustees, Defendants owe a high standard of care when managing public trust ceded lands.

11. As trustees, Defendants owe an undivided duty of loyalty to the people of the State of Hawaii and to the Plaintiffs as beneficiaries of the ceded lands trust.

12. As trustees, Defendants' trust duties include, but are not necessarily limited to, the Defendants' reasonable efforts to achieve the following: (a) preserve and protect trust property and (b) take a reasonable, proactive role in the management and protection of trust property. In exercising these duties, Defendants have a duty to consider the cumulative effects of current usage of the Pohakuloa lands for military training and the use of live ammunition and the running of heavy military vehicles and other equipment upon the condition of the land and upon the indigenous plants, animals, and insects, as

well as the invasion to Plaintiffs' cultural interests in the Subject Lands.

13. As trustees of the public ceded lands trust, these duties and obligations described hereinabove, that are owed by Defendants, are collectively referred to as being included as part of Defendants' duty to malama `aina the Subject Lands. The Defendants' duty to malama `aina the Subject Lands is not an absolute duty or a guarantee. Instead, the Defendants have an obligation as trustees to use their best reasonable efforts to discharge their duties and obligations. If factors beyond their control (such as congressional and presidential funding approval) prevent Defendants from achieving their plan objectives under the law, that must be considered in determining whether Defendants, or any of them, have discharged or breached their trustee duties under the law. Any determination regarding whether Defendants met their obligations as trustees of a public land trust must necessarily be a qualitative determination made upon a determination of all relevant factors, not just a mechanical formulation. Any such determination is not a decision that is free from difficulty. Sincerity and genuineness of good faith actions are factors to be considered, as well as actions, obstacles, and considerations that are shown to be pretextual. There was no evidence admitted in this trial to indicate that lack of congressional or presidential

appropriation or approval is preventing anyone from undertaking any action to remove remnants of military training or other trash from the Subject Lands.

14. As trustees, the Defendants are obligated to use reasonable efforts to ensure that Said Lease provisions that affect or impact the condition of ceded lands and all living things thereon are being followed and discharged. The State's obligations and duties under Said Lease augment Defendants' trust duties to malama `aina. This duty to malama `aina includes both the duty to determine whether a lessee is in compliance with the terms of its lease (through monitoring and inspections) and to follow up to effect compliance once there is evidence that provisions of the lease are not being followed.

15. The BLNR, through its chairperson, is also obligated to enforce leases that constitute a disposition of public lands under HRS § 171-7(5): "Except as otherwise provide by law the [BLNR] through the chairperson shall: . . . (5) Enforce contracts respecting . . . leases . . . or other disposition of public lands"

16. Defendants are obligated to enforce provisions of Said Lease with the United States of America for the subject Pohakuloa lands, particularly as any such provision implicated Defendants' duty to malama `aina those lands.

17. As part of their trust duties herein, Defendants were obligated to enforce paragraphs 9, 14, 18, and 19 of the Said Lease. Paragraph 9 states (emphasis added):

9. In recognition of public use of the demised premises, the Government shall make every reasonable effort to stockpile supplies and equipment in an orderly fashion and away from established roads and trails and to remove or deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the said public whichever is sooner.

Paragraph 14 states (emphasis added):

14. In recognition of the limited amount of land available for public use, of the importance of forest reserves and watersheds in Hawaii, and of the necessity for preventing or controlling erosion, the Government hereby agrees that, commensurate with training activities, it will take reasonable action during its use of the premises herein demised to prevent unnecessary damage to or destruction of vegetation, wildlife and forest cover, geological features and related natural resources and improvements constructed by the Lessor, help preserve the natural beauty of the premises, avoid pollution or contamination of all ground and surface waters and remove or bury all trash, garbage and other waste materials resulting from Government use of the said premises.

Paragraph 18 states (emphasis added):

18. The Lessor hereby agrees that, commensurate with the public use of the premises herein demised, it will take reasonable action during the use of the said premises by the general public, to remove or bury trash, garbage and other waste materials resulting from use of the said premises by the general public.

Paragraph 19 states (emphasis added):

19. Subject to obtaining advance clearance from the plans and training office of the [USA's] controlling agency . . . officials and employees of the Lessor shall have the right to enter upon the demised premises at all reasonable times to conduct any operations that will not unduly

interfere with activities of the [USA] under the terms of this lease; provided, however, that such advance clearance shall not be unreasonably withheld.

18. Defendants had these duties, and they continue to have these duties, as trustees from the inception of the Subject Lease and for the entire duration of the life of Said Lease.

19. As trustees, the Defendants also have a duty to maintain a record of their actions to malama `aina. Without sufficient records of all of Defendants' observations and actions, if any, to discharge its duty to malama `aina the Subject Lands, there is no way for Defendants to demonstrate that it did, in fact, discharge its duties as trustee of public land trust. The absence of meaningful records negate transparency of Defendants' observations and actions.

20. The records relating to Defendants' efforts to inspect and report upon its findings were spotty at best. Only three reports of any significance, for 1984, 1994, and 2014, were introduced into evidence. The 1984 and 1994 reports were grossly inadequate and, in the case of the 1994 report, virtually nonexistent because of its lack of information pertaining to the 1994 inspection. There were other studies or site visits in connection with other business regarding the Subject Lands, such as environmental impact statements, but the court did not view these events as being undertaken as part of Defendants' effort to discharge their duty to malama `aina the

Subject Lands. The absence of any inspection or monitoring reports for years other than 1984, 1994, and 2014 creates a presumption that no action to malama `aina in the form of monitoring and inspections were taken, to the extent that any such records were not admitted into evidence herein.

21. In addition to the relevant findings of fact hereinabove, the presumption is that prior to December 2014 (more than seven months after this suit was filed), the Defendants failed to conduct any inspections to monitor or to confirm the United State' compliance with paragraphs 9, 14, 18, and 19 of the Said Lease given: (a) the summary nature of the 2014 report, (b) the virtual nonexistent nature of the 1994 inspection report; (c) the sparse and incomplete nature of the 1984 inspection report; and (d) the absence of any other records regarding inspections or monitoring of the condition of the Subject Lands by the Defendants.

22. Because the Defendants act as trustees when managing the Subject Lands, when Defendants conduct an inspection in the course of discharging their duties as trustees, they must record findings or observations of sufficient detail regarding the United States' activities upon the Subject Lands that will enable one to determine from the content of the report the nature, scope, and extent of the United States' activities upon

the Said Lands, provided that, no military secrets or matters of national security are breached or compromised.

23. The Defendants breached their trust duties by failing to: (a) conduct regular reasonable (in terms of frequency and scope), periodic monitoring and inspection of the condition of subject public trust lands (the monitoring should involve direct (in person) or indirect (via videographic or live remote viewing) observation of actual military training exercises (including live fire exercises of all types using live and/or explosive munitions, as well as the use of heavy vehicles or equipment above and upon the land) so that the monitors and/or inspectors can observe and appreciate the destructive effects, if any, of all such training and use of equipment); (b) ensure that the terms of the lease that impact the condition of the leased lands or preserving Plaintiffs' cultural interests are being followed; (c) take prompt and appropriate follow up steps with military or other federal government officials when Defendants obtain or are made aware of evidence or information that the lease may have been violated with respect to protecting the condition of the Pohakuloa leased lands; (d) consistently make reasonably detailed and complete records (including contemporaneous photographic or videographic depictions) of Defendants' actions to memorialize the efforts, results, and/or actions undertaken to ensure compliance with the terms of the

lease that are intended to protect the condition of the Pohakuloa leased lands and concomitant cultural interests; and (e) to initiate or assist with the appropriation of necessary funding to undertake clean up or other maintenance activities to locate and remove used, spent, discarded, or deposited remnants of military training activities of any kind (including unexploded ordinance or ammunition) and trash upon the Subject Lands.

24. The terms of the order of the court regarding this matter shall not be vitiated, modified, changed, altered, amended, or otherwise affected by any lease renegotiation, modification, assignment, extension, amendment, or other change or cancellation of the Said Lease

25. The Defendants would further breach their trust duties if they were to execute an extension, renewal, or any other change to the State General Lease No. S-3849, or enter into a new lease of the PTA, without first determining (in writing) that the terms of the existing lease have been satisfactorily fulfilled, particularly with respect to any lease provision that has an impact upon the condition of the Pohakuloa leased lands.

26. The Defendants breached their trust duty to malama `aina with respect to the Pohakuloa leased lands.

27. Plaintiffs are seeking injunctive relief compelling the Defendants to affirmatively perform its duty to malama `aina

the Pohakuloa leased lands by affirmatively enforcing the provisions of the subject lease that impact or affect the condition of the Pohakuloa leased lands.

28. Therefore, Plaintiffs are not seeking an injunction order to stop Defendants from doing something. They seek an order directing Defendants to undertake affirmative action to discharge their duty to malama `aina the Pohakuloa leased lands.

29. A prohibitory injunction prohibits the performance of certain acts to preserve the status quo, whereas a mandatory injunction goes well beyond the status quo and commands the performance of affirmative action to do or undo an act.

30. Therefore, a mandatory injunction is particularly disfavored in law and should not issue during the preliminary injunction phase of a case, unless the facts and the law clearly favor the moving party. However, unless prohibited by some constitutional or statutory provision, a court of equity can, and in the proper case will, award mandatory injunctive relief.

31. The instant proceeding involved the trial on the merits and not just an interim motion for a temporary restraining order or a preliminary injunction. When it comes to interim relief pending the outcome of the trial on the merits, there is a general reluctance by courts to issue a mandatory injunction because the purposes of a temporary restraining order or a preliminary injunction are to preserve the status quo until

the ultimate disposition by a trial on the merits. Mandatory injunctive relief is seen as often compelling an act that is well beyond preserving the status quo. Therefore, a temporary restraining order or a preliminary injunction in the form of a mandatory injunction is highly discouraged during the interim stages of a case. However, the trial on the merits is not an interim stage of the life of a civil action. It is the ultimate adjudication of the merits of the case. As such, there is less of a disincentive by a court to consider issuing a mandatory injunction upon the trial on the merits. The court has much more latitude to issue a mandatory injunction if the ultimate adjudication of the merits justifies such relief.

32. Plaintiffs bring the instant action alleging that Defendants breached their trustee duties. Plaintiffs have met their burden of proof that Defendants breached their trust duties by failing to discharge their obligations as trustees of a public land trust. The appropriate remedy is for this court to issue an order directing Defendants to perform their trust duties with respect to the Pohakuloa leased lands. This requires the court to issue relief that is in the nature of a mandatory injunction compelling Defendants to affirmatively perform their trustee duties and malama `aina the Pohakuloa leased lands.

33. Injunctive relief is appropriate when the Plaintiffs have prevailed on the merits, the balance of harms favors injunctive relief, and the issuance of injunctive relief is in the public interest.

34. The Plaintiffs have prevailed on the merits.

35. The balance of harm favors the issuance of mandatory injunctive relief.

36. Protection of the public trust ceded lands is in the public interest.

37. Plaintiffs have proved by a preponderance of the evidence and by clear and convincing evidence that the Defendants have breached or violated their duties and obligations as a trustee of the Subject Lands, which are public, State-owned ceded lands.

38. Mandatory injunctive relief is appropriate here. Plaintiffs complain that, if Defendants are not compelled to malama `aina the Pohakuloa leased lands, they may forever be deprived of the right to use and enjoy said leased lands for religious and cultural purposes. This justifies the imposition of a mandatory injunction that requires Defendants to malama `aina the Pohakuloa leased lands. Otherwise, it is possible that Plaintiffs' use and enjoyment of the Pohakuloa leased lands could be lost in the foreseeable future or possibly forever due to contamination due to the presence of unexploded ordinance or

other life threatening military hazards or dangers that cannot be eliminated or cleaned up.

39. It is within the trial court's sound discretion to fashion appropriate injunctive relief based on the specific facts of the case.

40. In the exercise of its sound discretion, the court concludes that an appropriate mandatory injunction against the Defendants includes the following relief.

ORDER

Based upon the foregoing, and any other good cause shown herein, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Judgment shall enter in favor of Plaintiffs and against Defendants as to all claims that Defendants breached their trust obligations by failing to malama `aina the Subject Lands.

2. Defendants are ordered to fulfill their trust obligations by doing the following:

A. Defendants shall promptly initiate and undertake affirmative activity to malama `aina the Subject Lands.

B. Malama `aina of the Subject Lands by Defendants includes, but is not necessarily limited to:

1. To develop a written plan to malama `aina the Subject Lands; and
2. The plan shall include regular, periodic on-site monitoring and inspection of the Subject Lands; and
3. For each such monitoring or inspection event of the Subject Lands that Defendants undertake, the plan shall provide that the Defendants, or any of them, shall promptly prepare a written inspection report that provides, at a minimum, all of the information that was called for in the "INSPECTION REPORT" that was introduced as Exhibit 16. In addition, each inspection report shall also contain "RECOMMENDATIONS" by the inspection team for appropriate action to malama `aina the Subject Lands. The recommendations shall also state a projected or reasonable estimated time within which the Defendants should be able to act upon the recommendation. This estimated time is not binding upon the Defendants. However, any enforcement tribunal may consider the time recommendation in determining whether Defendants have met their

trust obligations to malama `aina the Subject Lands.

4. The plan shall include a protocol of appropriate action by Defendants to malama `aina the subject lands in the event that Defendants find:

a. Any actual, apparent, or probable breach of any provision of State General Lease No. S-3849 by the federal government that does or may adversely affect the condition of the Subject Lands or Plaintiffs' cultural use of such lands, and/or

b. Any condition or situation that may adversely affect the condition of the Subject Lands or may otherwise adversely impact Defendants duty to malama `aina the Subject Lands, and/or

c. Unexploded ordinance and any debris deposited upon the Subject Lands by the federal or state military or any other form of training or exercises that take place upon the Subject Lands by, under, pursuant to, or in connection with the State General Lease No. S-3849; and/or

- d. Any other foreign or other non-natural item or other contaminant or debris that is found on the Subject Lands that is present or existing thereon by reason of or in connection with the State General Lease No. S-3849.
5. A plan or other assurance that any nonconforming condition found upon the Subject Lands that was likely caused by the lessee under Said Lease and that threaten the condition or nature of the Subject Lands will be reasonably brought to pre-lease condition and a reasonable timetable for the same.
6. A procedure to provide reasonable transparency to Plaintiffs and the general public with respect to the instant mandatory injunction and all of the requirements of this order.
7. If not already in existence, the institution of a contested case procedure adopted pursuant to Chapter 91 of the Hawaii Revised Statutes for Plaintiffs or any member of the general public with standing to initiate such process in the event that Plaintiffs or other interested party may contest the decisions made by the Defendants

in the course of discharging its duty to malama
`aina the Subject Lands.

8. That the plan developed by Defendants pursuant to this order shall first be approved by the above-entitled court before the plan is put into action, unless otherwise authorized by the above-entitled court. Defendants shall have a reasonable length of time within which to submit a proposed plan for the court's approval, which time shall expire on December 28, 2018; unless such deadline shall be extended by the above-entitled court for good cause shown. Good cause should not include any factor, condition, or situation over which Defendants have control. In other words, good cause for extending the deadline should only include factors, conditions, or situations over which Defendants have no control.
9. The plan shall also include any and all steps Defendants shall take to explore, evaluate, make application for or assist or support the making of such an application for, and securing adequate funding, from any and all appropriate funding sources, to plan, initiate, and conduct

all appropriate comprehensive cleanup of the Subject Lands in order to discharge Defendants' duty to malama `aina the Subject Lands.

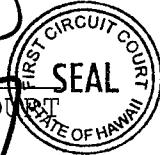
10. The plan shall be approved by the court upon notice and hearing to all parties herein.

3. Defendants shall execute the plan to malama `aina once it is approved by the court.

4. Plaintiffs are directed to prepare and file, consistent with the above, and in accordance with Rule 58 of the Hawaii Rules of Civil Procedure and Rule 23 of the Rules of the Circuit Courts of the State of Hawaii, a separate final judgment. Said final judgment shall also specifically provide that any and all remaining claims, if any, shall be and hereby are dismissed with prejudice.

DATED: Honolulu, Hawaii, APR - 3 2018.


JUDGE OF THE ABOVE-ENTITLED COURT



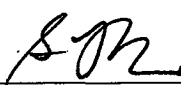
NOTICE SENT TO:

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NOTICE OF ENTRY

The foregoing Findings of Fact, Conclusions of Law and Order in Civil No. 14-1-1085-04 (GWBC) has been entered and copies thereof served on the above-identified parties by placing the same in the United States mail, postage prepaid, on March 28, 2018.



Clerk, Fourteenth Division

