CAAP-18-0000432

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CLARENCE CHING and MARY MAXINE KAHAULELIO, Plaintiffs-Appellees, vs. SUZANNE CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, Defendants-Appellants.	Civil No. 14-1-1085-04 GWBC (Declaratory Judgment) APPEAL FROM: FINAL JUDGMENT, filed April 24, 2018 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I HON. GARY W.B. CHANG JUDGE

DEFENDANTS-APPELLANTS STATE OF HAWAII'S OPENING BRIEF

STATEMENT OF RELATED CASES

APPENDIX 1

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DEFENDANTS-APPELLANTS STATE OF HAWAII'S OPENING BRIEF

I. INTRODUCTION

At its heart, this case is about the State's[1] duties in managing a parcel of ceded land on the Island of Hawai'i (the Subject Land) that is leased to the United States Military for use as part of the larger Pōhakuloa Training Area (PTA) under General Lease No. S-3849 (the "Lease"). But it is also about the role of the court in the State's management of the Subject Land, specifically the extent to which the circuit court in this case intruded into management practices that are traditionally reserved to the legislative and executive branches of government.

Plaintiffs seek to hold the State accountable for what they allege are deficient enforcement practices under the Lease, even though Plaintiffs have never alleged that the United States has *breached* the lease. Nevertheless, the circuit court issued what essentially amounted to an advisory opinion, declaring that the State had breached its trust duties by failing to *enforce* the Lease. Based on its improper declaratory ruling, the circuit court also issued an impermissibly broad mandatory injunction that usurps the State's role as landlord and land manager of the Subject Land. Despite the lack of any law requiring any specific management practices in this context, and the complexities involved in managing land leased to the United States as a military training area, the circuit court imposed management practices that it deemed – without basis – to be more appropriate than those the State had already employed. In doing so, the court not only ruled on a non-justiciable political question, it also intruded on the role of the legislature by ordering the State to undertake rulemaking to establish a contested case procedure – something Plaintiffs had not even asked for and that was unrelated to their alleged harm.

All of this was done without the United States' presence in the lawsuit. Plaintiffs did not name the United States as a defendant. And despite the fact that Plaintiffs' requested relief required the court to determine the United States' obligations under the Lease, order the State to rigorously enforce those obligations, and limit the ability of the State and the United States to renew or modify the Lease, the circuit court determined that that United States was not a necessary and indispensable party under Hawai'i Rule of Civil Procedure 19. For these reasons and all those discussed below, the circuit court's judgment should be reversed.

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[1] Defendants-Appellants in this case – the Board of Land and Natural Resources (BLNR), the Department of Land and Natural Resources (DLNR), and Suzanne Case in her official capacity as Chairperson of BLNR – are collectively referred to as the "State" or "State Defendants."

II. STATEMENT OF THE CASE

A. Factual Background

1. Pōhakuloa Training Area and the Subject Lease

Pōhakuloa Training Area (PTA) on the Island of Hawai‘i was established by the United States military in 1955. ROA Vol. 14 ICA 63:92. The United States uses the PTA for training exercises that utilize live firing, blank ammunition, and live explosive munitions. ROA Vol. 6 ICA 47:238. The majority of the PTA consists of lands ceded to the United States by order of the Governor of the Territory of Hawai‘i in 1956 and by Presidential order in 1964. *Id.* The PTA also includes a further 22,988 acres (the "Subject Land") that the State leased to the United States for sixty-five years pursuant to General Lease No. S-3849 (the "Lease"), executed in August 1964. *Id.;* ROA Vol. 1 ICA 37:158. The Lease is set to expire in 2029. *Id.* at 159.

Prior to statehood, the United States was already using part of the Subject Land for military training purposes pursuant to a "Maneuver Agreement" executed in February, 1957. ROA Vol. 13 ICA 61:11-12; ROA Vol. 16 ICA 67:51. Prior to execution of the Lease in 1964, the State determined that under the Admission Act, Section 5(d),[2] "all of the areas covered by the [proposed] leases . . . are subject to set-aside action which would result in the State losing all control over the subject areas as long as they were not surplus to the needs of the Federal Government." ROA Vol. 1 ICA 37:153. In the negotiations for the Lease, the State therefore sought to avoid the Subject Land being set aside under Section 5(d) of the Admission Act, instead agreeing to a 65-year lease with the United States, which would allow the State to retain a degree of control over the land. *Id.*

During the negotiations for the Lease, the State pushed for the inclusion of provisions that would: a) require the United States, upon the Lease's termination, to restore the Subject Land to its pre-lease condition, and b) permit the State to revoke the Lease in the event that there

[2] Section 5(d) of the Admission Act provided that "[a]ny public lands or other public property, [that] . . . immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States." Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat 4, reprinted in 1 Haw. Rev. Stat. 137 (2009).

was any "willful and continued breach or continued breach of conditions of the lease after notice of such breach has been given." *Id.* at 154; *see also* ROA Vol. 6 ICA 47:236. However, the United States refused, informing the State that "a directive" was "sent down from Washington to the effect that no restoration provision should be included in the leases," and that "since the United States can set these lands aside without any conditions, it is in a strong bargaining position and does not have to accept provisions it might otherwise be willing to accept under normal leasing arrangements." ROA Vol. 1 ICA 37:146, 148. Ultimately, the State's proposed restoration and enforcement provisions were not included in the Lease. *See id.* at 158-70.

Pursuant to paragraph 7 of the Lease, except where otherwise provided, the United States has "unrestricted control and use" of the Subject Land, and is permitted to fire "all combat weapons" from the Subject Land into the Pōhakuloa Impact Area. *Id.* at 159-60. Under paragraph 12 of the Lease, the United States is also permitted to fire certain weapons *into* the Subject Land. This includes "artillery simulators, atomic bomb simulators and similar devices, and explosives used in construction work." *Id.* at 161. The United States is also permitted, under paragraph 12, to fire live ammunition into any portion of "Parcel A" within the Subject Land deemed safe by the United States for small arms firing. *Id.* The United States has deemed a significant portion of Parcel A of the Subject Land as safe for small arms firing. *See* ROA Vol. 17 ICA 69:393.

Also relevant to this appeal, the following provisions were included in the Lease:

> 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.
>
> . . . .
>
> 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.

. . . .

15. Except as required for defense purposes in times of national emergency, the Government shall not deliberately appropriate, damage, remove, excavate, disfigure, deface or destroy any object of antiquity, prehistoric ruin or monument.

. . . .

19. Subject to obtaining advance clearance from the plans and training office of the Government's controlling agency, or any other designated Government 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 Government under the terms of this lease; provided, however, that such advance clearance shall not unreasonably be withheld.

. . . .

29. The Government shall surrender possession of the premises upon the expiration or sooner termination of this lease and, if required by the Lessor, shall within sixty (60) days thereafter, or within such additional time as may be mutually agreed upon, remove its signs and other structures; provided that in lieu of removal of structures the Government shall abandon them in place. The Government shall also remove weapons and shells used in connection with its training activities to the extent that a technical and economic capability exists and provided that expenditures for removal of shells will not exceed the fair market value of the land.

. . . .

31. The Government's compliance with all obligations placed on it by this lease shall be subject to the availability of funds.

ROA Vol. 1 ICA 37:159-68.

The Lease also provides that the United States' rent is one dollar ($1.00) for the term of the Lease, *id.* at 159, and that the United States can terminate the Lease "at any time" by giving thirty days notice to the State. *Id.* The Lease does not provide any right of termination for the State, except in the event that the Subject Land is not used by the United States for three consecutive years. *Id.* at 164. The Lease also does not include any references to periodic inspections by the State, inspections after training exercises by the State, or observations of training exercises by the State. *See id.* at 158-70.

Finally, the Lease provides a process for resolving disputes arising under the Lease. *Id.* at 167-68. Paragraph 30 requires disputes to be heard by the Division Engineer of the U.S. Army Engineer Division in Honolulu. *Id.* The Division Engineer's decisions can be appealed to the Secretary of the Army, whose decisions are final "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." *Id.*

2. State Supervision of the Subject Land

Although the State has no required policy regarding inspections of the Subject Land, ROA Vol. 6 ICA 47:110, since the execution of the Lease in 1964, the State has been involved in supervising the United States' use of the Subject Land under the Lease in cooperation with various federal and State agencies. For example:[3]

- In 1970, the United States provided the State with its training regulations and procedures for the PTA, which provide that, upon completion of firing exercises, the United States Officer in Charge must "[i]nsure that all live ammunition, brass and ammunition components are removed from range areas." ROA Vol. 13 ICA 61:64;
- The State has consulted on projects on the Subject Land, and provided resources (including a State archeologist) to ensure protection of archeological sites. *Id.* at 98;
- In 1982, BLNR responded to the United States' proposed Environmental Assessment for a training exercise, which declared there would be no significant impact and thus recommended no Environmental Impact Statement (EIS) be prepared. ROA Vol. 2 ICA 39:59-60. BLNR, however, informed the United States that it did "not agree that these impacts will not reach a significant level," and that BLNR was "of the opinion that an EIS should be completed for this proposed activity." *Id.* at 60-61. BLNR also requested

[3] A full description of the State's activities regarding supervision of the Lease and the Subject Land is set out in the State's Amended Proposed Findings of Fact and Conclusions of Law. ROA Vol. 6 ICA 47:91-107. Although the circuit court acknowledged these activities generally, it dismissed them because it found that "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." ROA Vol. 6 ICA 47:260-61. As explained fully *infra*, in Part B.2, the circuit court erred in refusing to even consider any of these activities in regard to whether the State breached its trust obligations. The State also conducted various inspections and supervisory operations after the filing of the Complaint in this case. *See* ROA Vol. 6 ICA 47:104-07; *id.* at 248-251.

that the United States "consider providing the general public especially on the Big Island an opportunity to participate in your planning process." *Id.* at 61;

- The State conducted an inspection of the Subject Land in 1984, and found that it was being used "per lease terms." ROA Vol. 13 ICA 61:134;
- The State conducted an inspection of the Subject Land in 1994, although no findings were made pursuant to that investigation. ROA Vol. 13 ICA 61:135;
- In 2004, the State, through the State Historic Preservation Officer and the Office of Hawaiian Affairs, signed a Programmatic Agreement with the United States to ensure additional protection for cultural sites that could be adversely affected by the Army's development of its Stryker Brigade Combat Teams (SBCTs). ROA Vol. 14 ICA 63:373, 386, 388. This agreement, among other things, required participation of qualified "cultural monitors" in the planning of all projects relating to the SBCTs. *Id.* at 376-77.

At various times over the Lease period, the State has also reviewed documents prepared by the United States that involved protection of natural and cultural resources on the Subject Land, including, for example:

- The United States' Integrated Natural Resources Management Plan (INRMP), executed in 2002, which was created to "ensure that natural resources conservation measures and Army activities on military land are integrated and consistent with federal stewardship requirements." ROA Vol. 14 ICA 63:66. The INRMP required that upon completion of training exercises, officers in charge "will ensure that areas are returned to their natural state." *Id.* at 336. The INRMP also noted that "[t]he DLNR works closely with PTA Natural Resources personnel in various working groups and Hawai‘i cooperative programs," *id.* at 263, and set out in detail the items of cooperation between the United States and DLNR, *id.* at 304-05;
- A 2004 Final EIS for the SCBT. ROA Vol. 15 ICA 65:194-305. The EIS notes significant but mitigable impacts from contamination resulting from increased ammunition use and the risk of unexploded ordinance. *Id.* at 244; *see also id.* at 250-64 (explaining mitigation measures);
- Archeological Survey Reports prepared by the Army Corps of Engineers in 1984 (ROA Vol. 13 ICA 61:109-131); 1988 (*id.* at 145-413); 2006 (ROA Vol. 16 ICA 67:21-227); 2010 (*id.* at 327-37); and 2014 (ROA Vol. 17 ICA 69:13-198). The reports from 2010

and 2014 both included reports from the Cultural Monitoring Program that was established by the Programmatic Agreement discussed *supra*. *See* ROA Vol. 16 ICA 67:327-37; ROA Vol. 17 ICA 83-101.

In 2012, the United States briefed the State regarding the United States' need for a new lease of the Subject Land, ROA Vol. 16 ICA 67:377-388, and the parties entered into preliminary discussions, Transcript (Tr.) 9/29/18, ICA 79:42 (Testimony of Kevin Moore). The United States' proposed options for retaining control of the Subject Land were extending the Lease for 50-65 years or obtaining the land outright. *See* ROA Vol. 16 ICA 67:384. The United States also later suggested that condemnation of the land was an option. *See* ROA Vol. 17 ICA 69:423. As part of the 2012 discussions regarding a new lease, the United States offered the return of around 1,000 acres of the Subject Land to the State. ROA Vol. 11 ICA 57:94-98; Tr. 9/29/18, ICA 79:50-53 (Testimony of Kevin Moore). In 2012, the United States conducted an inspection and prepared an Environmental Baseline Study for this 1,000 acres, finding:

> The site inspection revealed no signs of hazardous waste contamination (no abandoned drums, visible spills/stains on the ground, stressed vegetation etc.). A small amount of training related litter (blank small arms ammunition, communication wire, etc.) was observed but even that was surprisingly sparse. There was a very small amount of civilian trash but that is most likely related to public hunting in the area.

ROA Vol. 11 ICA 57:97.

The State conducted a further inspection on the Subject Land in December, 2014, and a follow-up inspection in January, 2015. ROA Vol. 17 ICA 69:256, 259. The 2014 inspection identified three areas of the Subject Land where clean-up was required: (1) a former bazooka range predating the Lease in which there were spent shell casings and an "extensive" debris area; (2) a shooting range where derelict vehicles (with fluids removed) had been brought in for live fire targets; and (3) an area that had been used for dumping spent artillery shells. *Id.* at 258-59. An "Action Memorandum for the Time Critical Removal Action" for the former bazooka range prepared by the United States also noted that there were materials "potentially presenting an explosive hazard" at the site, which "make for the potential for significant danger to the public health and welfare." ROA Vol. 12 ICA 59:35-36. As a result of these inspections, the United States informed the State that it was initiating a process to award a contract for the clean-up of the bazooka site, had already commenced clean-up of the derelict vehicles, and would conduct a site assessment and pursue funding for the clean-up of the dump site. ROA Vol. 7 ICA 49:155.

B. Procedural History

Plaintiffs filed a complaint in state court on April 28, 2014, and their First Amended Complaint on May 12, 2014. ROA Vol. 1 ICA 37:24, 49. Plaintiffs' complaint states that they "do[] not allege that the U.S. Government has violated the terms of its lease, but rather that the named Defendants have reason to believe that the lease terms may have been violated and have a trust duty to investigate and take all necessary steps to ensure compliance with the lease." ROA Vol. 1 ICA 37:49-50. Plaintiffs alleged that the State has trust obligations to investigate and take steps to ensure the United States' compliance with the Lease, and that the State failed to fulfil those obligations. ROA Vol. 1 ICA 37:56. Plaintiffs asked the court for a declaratory judgment that "the Defendants breached their trust obligations by failing to ensure compliance with lease condition of the land." *Id.* Plaintiffs also asked the circuit court to "[o]rder the Defendants to fulfill their trust duties with respect to the lands leased pursuant to State General Lease No. S-3849," and to "[e]njoin the Defendants from negotiating the extension of State General Lease No. S-3849 or entering into a new lease of the Pōhakuloa Training Area until the Defendants ensure that the terms of the existing lease have been satisfactorily fulfilled." *Id.*

The State filed a notice of removal to Federal District Court and Plaintiffs filed a motion to remand back to State court. *Id.* at 243. U.S. Magistrate Judge Puglisi recommended that the U.S. District Court deny Plaintiffs' motion to remand because the PTA is a federal enclave over which the United States has jurisdiction, and the action raised substantial federal interests, which provided a compelling reason for the exercise of federal enclave jurisdiction. *Id.* at 232-41. However, U.S. District Court Judge Seabright rejected the recommendation and remanded the case, finding that although the State and the United States both have concurrent enclave jurisdiction over the PTA, Plaintiffs' claims arose under State law and did not necessarily raise any federal issue of law. *Id.* at 250-63.[4]

On September 23, 2014, Plaintiffs moved for summary judgment on their claims. *Id.* at 120-86. On October 7, 2014, the State moved for judgment on the pleadings, or in the

[4] Neither Magistrate Judge Puglisi nor the U.S. District Court resolved the question of whether the United States was a necessary party. Magistrate Puglisi determined that whether the United States was a necessary party under HRCP or FRCP Rule 19 had no bearing on whether removal to federal court was proper, and the State had not yet moved to join the United States or to dismiss for failure to join. ROA Vol. 1 ICA 37:229-30. The U.S. District Court agreed with that conclusion. *Id.* at 248 (n.2).

alternative for summary judgment. *Id.* at 187-266. The circuit court denied both motions. Tr. 12/12/14 ICA 21:28-29, 34-35; ROA Vol. 2 ICA 39:341-42.

On February 26, 2015, the State moved to add the United States as a party, or in the alternative, for dismissal. ROA Vol. 3 ICA 41:150-209. On April 6, 2015, the United States filed in the circuit court a "Notice of Potential Participation of the United States." *Id.* at 248-50. In its notice, the United States explained that the United States was "actively considering whether to file a Statement of Interest." *Id.* at 249. Thereafter, the circuit court denied the State's motion without prejudice, pending the United States' decision whether to file a statement of interest. Tr. 4/9/15 ICA 105:24-25; ROA Vol. 3 ICA 41:263-64.

On April 30, 2015, the United States filed its Statement of Interest. ROA Vol. 3 ICA 41:271-330. The United States explained that "[t]he relief Plaintiffs seek directly implicates and seeks to restrict the United States' interests under the lease," and as such the United States' interests were sufficient for joinder under HRCP Rule 19(a). *Id.* at 272, 279-83. However, the United States also argued that joinder was not feasible because of the United States' sovereign immunity, which could only be waived by Congress. *Id.* at 273, 283-85. The United States further urged the court to consider the substantial prejudice it could face in its absence, and the infeasibility of its joinder in the court's analysis of whether it was an indispensable party under HRCP Rule 19(b). *Id.* at 285-92.

Thereafter, the State filed a Motion to Dismiss for Failure to Join an Indispensable Party, or in the Alternative for Summary Judgment. ROA Vol. 4 ICA 43:131-249. The circuit court denied the State's motion on September 18, 2015. ROA Vol. 5 ICA 45:304-05; *see also* Tr. 9/3/15 ICA 77:27-29.

The circuit court held a bench trial from September 9, 2015 to October 2, 2015. *See generally* Tr. 9/29/15 ICA 79; Tr. 9/30/15 ICA 80; Tr. 10/1/15 ICA 81; Tr. 10/2/15 ICA 82. On April 3, 2018, the circuit court entered its Findings of Fact (FOF), Conclusions of Law (COL), and Order, finding that the State had breached its trust obligations and awarding injunctive relief to Plaintiffs. ROA Vol. 6 ICA 47:229-73, Attached as Appendix (Appx.) 1. The circuit court entered its Final Judgment on April 24, 2018 in Plaintiffs' favor. *Id.* at 276-77. The State timely appealed. ROA Vol. 6 ICA 47:280-86.[5]

[5] After the State appealed, Plaintiffs filed a Motion to Dismiss Appeal, arguing that the Attorney General was not authorized to file a notice of appeal on behalf of BLNR or DLNR. *See* ICA 90,

III. POINTS OF ERROR

1. The circuit court erred in finding that the United States was not a necessary and indispensable party under HRCP Rule 19, refusing to dismiss the case in light of the fact that the United States' joinder was not feasible, and ordering relief that prejudiced the United States in its absence

Where the error occurred: ROA Vol. 2 ICA 39:342 (denying the State's Motion for Judgment on the Pleadings); ROA Vol. 3 ICA 41:263-64 (denying the State's Motion to Add United States as a Party or in the Alternative for Dismissal); ROA Vol. 5 ICA 45:304-05 (denying the State's Motion to Dismiss for Failure to Join an Indispensable Party); ROA Vol. 6 ICA 47:255, Appx. 1 at 27 (¶¶4, 5) (finding that the United States was not indispensable); *id.* at 252, 258, 262, Appx. 1 at 24, 30, 34 (¶¶54-56, 14, 16, 23) (interpreting provisions of the Lease); *id.* at 263 (¶25), 267-72, Appx. 1 at 35, 39-44 (ordering relief that prejudiced the United States).

Where the State objected: ROA Vol. 1 ICA 37:196-199 (arguing in its Motion for Judgment on the Pleadings, filed on October 7, 2014, that the United States was a necessary party, and that if it could not be joined, dismissal was warranted under HRCP Rule 19); ROA Vol. 3 ICA 41:150-66 (the State's Motion to Add United States as a Party or in the Alternative for Dismissal, filed on February 26, 2015); ROA Vol. 4 ICA 43:138-43 (the State's Motion to Dismiss for Failure to Join an Indispensable Party, filed on August 10, 2015); ROA Vol. 6 ICA 47:122-24 (¶¶48-54 of the State's proposed COLs).

2. The circuit court erred in ruling on the non-justiciable political question of how the State should manage the Subject Land under the Lease

Where the error occurred: ROA Vol. 6 ICA 47:258-272, Appx. 1 at 30-44 (finding that the State had breached its trust duties and ordering the State to engage in various actions related to the management of the Subject Land).

Where the State objected: Tr. 9/3/15 ICA 77:12-15 (arguing Plaintiffs claim is barred by the political question doctrine); ROA Vol. 6 ICA 47:114-15 (arguing in its Proposed COLs that Plaintiffs' claims are non-justiciable).

3. The circuit court erred in granting declaratory relief under HRS § 632-1 where there was no "actual controversy," and the relief could not "terminate the uncertainty or controversy giving rise to the proceeding"

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96. Plaintiffs also filed a Second Motion to Dismiss arguing the appeal of Suzanne Case, in her official capacity, should also be dismissed on the same grounds. *See* ICA 102. The State filed oppositions to both of these motions. *See* ICA 98, 107.

Where the error occurred: ROA Vol. 2 ICA 39:342 (denying the State's Motion for Judgment on the Pleadings); ROA Vol. 6 ICA 47:258-263), Appx. 1 at 30-35 (¶14-26) (finding that the State breached its trust duties based on a failure to enforce the Lease despite the lack of any allegation or finding that the Lease was breached); *id.* at 263, Appx. 1 at 35 (¶25) (finding that the State would breach its trust duties if it executed any renewal of a new lease, even though no extensions or renewals have been executed and the Lease does not expire until 2029).

Where the State objected: ROA Vol. 1 ICA 37:194-96, 199-200 (arguing that Plaintiffs' requested relief is unavailable because there is no actual controversy and the requested relief could not bring an end to the dispute); *Id.* at 279 (opposing Plaintiffs' MSJ on the same grounds); ROA Vol. 6 ICA 47:124 (arguing the same in the State's Proposed COLs).

4. The circuit court erred in finding that the State breached its trust duties by failing to perform adequate inspections of the Subject Land

Where the error occurred: ROA Vol. 6 ICA 47:262-66, Appx. 1 at 34-38 (¶23, 32, 37).

Where the State objected: ROA Vol. 6 ICA 47:122 (¶¶44-47 of the State's Proposed COLs, arguing that Plaintiffs failed to meet their burden of establishing any basis for the circuit court to find that the State breached its trust responsibilities).

5. The circuit court erred in refusing to consider the State's cooperative activities, and inspections and environmental reviews undertaken by entities other than the State in determining whether the State had violated its trust obligations

Where the error occurred: ROA Vol. 6 ICA 47:260, Appx. 1 at 32 (¶20) (concluding that "[t]here 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").

Where the State objected: ROA Vol. 6 ICA 47:118 (¶¶26-30 of the State's Proposed COLs, arguing that the State was permitted to delegate the performance of acts necessary to accomplish the trustees' duties); *id.* at 91-104 (outlining in the State's Proposed FOFs the cooperation the State has engaged in with other entities regarding the management of the Subject Lands); Tr. 10/2/15 ICA 82:28-36 (State's closing arguments)

6. The circuit court erred in ordering injunctive relief that was tantamount to an award of damages and was barred by the State's sovereign immunity

Where the error occurred: ROA Vol. 6 ICA 47:269-72, Appx. 1 at 41-44 (¶¶ 2.B.4, 5, 9 of the mandatory injunction).

Where the State objected: ROA Vol. 6 ICA 47:116 (arguing that the State's sovereign immunity barred Plaintiffs from obtaining relief that is tantamount to an award of damages).

7. The circuit court erred in ordering mandatory injunctive relief that was not based on law, overbroad, did not meet HRCP Rule 65(d)'s specificity requirements, and improperly intruded on the role of the legislature

Where the error occurred: ROA Vol. 6 ICA 47:267-72, Appx. 1 at 39-44 (setting out mandatory injunctive relief).

Where the State objected: Tt. 9/3/15 ICA 77:17-18 (arguing that the relief Plaintiffs requested could not meet the specificity requirements of HRCP Rule 65); ROA Vol. 6 ICA 47:124-26; *id.* at 225-27 (arguing in its Statement of Position re: Mandatory Injunctive Relief that Plaintiffs' requested injunctive relief was not based on law, usurped DLNR's role as land manager, and did not satisfy HRCP Rule 65's specificity requirement).

IV. STANDARD OF REVIEW

A trial court's ruling on a motion for judgment on the pleadings is reviewed "under the right/wrong or de novo standard of review." *Perry v. Perez-Wendt*, 129 Hawai'i 95, 98, 294 P.3d 1081, 1084 (App. 2013).

The circuit court's ruling on a motion for summary judgment is reviewed "*de novo* under the same standard applied by the circuit court." *Foytik v. Chandler*, 88 Hawai'i 307, 313–14, 966 P.2d 619, 625–26 (1998), *as amended* (Oct. 23, 1998). "[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

In an appeal from a bench trial, the trial court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo*. *Furuya v. Ass'n of Apartment Owners of Pac. Monarch, Inc.*, 137 Hawai'i 371, 382–83, 375 P.3d 150, 161–62 (2016). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is left with a definite and firm conviction that a mistake has been made." *Alejado v. City & Cty. of Honolulu*, 89 Hawai'i 221, 225, 971 P.2d 310, 314 (App. 1998), *as amended on denial of reconsideration* (Jan. 15, 1999).

A trial court's finding that a party is not indispensable is reviewed for abuse of discretion. *See Marvin v. Pflueger*, 127 Hawai'i 490, 503, 280 P.3d 88, 101 (2012). "A trial court abuses its

discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." *Indus. Mortg. Co., L.P. v. Smith*, 94 Hawai'i 502, 510, 17 P.3d 851, 859 (App. 2001).

> A declaratory judgment is a form of equitable relief. "The relief granted by a court [in] equity is discretionary and will not be overturned on review unless the [circuit] court abused its discretion by issuing a decision that clearly exceeds the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of the appellant.'"

Kau v. City & Cty. of Honolulu, 104 Hawai'i 468, 473, 92 P.3d 477, 482 (2004) (quoting *Shanghai Inv. Co., Inc. v. Alteka Co., Ltd.*, 92 Hawai'i 482, 492, 993 P.2d 516, 526 (2000)) (citation omitted, alterations in original).

The trial court's issuance of a mandatory injunction is reviewed for abuse of discretion. *Sandstrom v. Larsen*, 59 Haw. 491, 494, 583 P.2d 971, 975 (1978).

V. ARGUMENT

A. The Circuit Court Erred in Failing Either to Join the United States as a Necessary Party or to Dismiss the Action in Light of the Fact that the United States Could Not be Joined as an Indispensable Party

Analysis under HRCP Rule 19 involves two steps. First, under part (a) of the statute, the Court must determine whether the nonparty is "necessary," and if so whether joinder is feasible. *Kellberg v. Yuen*, 135 Hawai'i 236, 250-51, 349 P.3d 343, 357-58 (2015). Under the second step, if the party is "necessary" under part (a) but cannot be joined, the Court must determine whether it may decide the case without the nonparty. *Id.* If the case cannot proceed without the nonparty pursuant to the factors described in HRCP Rule 19(b), the party is deemed "indispensable." *Kellberg*, 135 Hawai'i at 252, 349 P.3d at 359.

The circuit court erred in finding that the United States was "not an indispensable party to the resolution of this case." ROA Vol. 6 ICA 47:255, Appx. 1 at 27. The United States is a necessary party, its joinder is not feasible due to its sovereign immunity, and it is indispensable under HRCP Rule 19(b). The circuit court should have dismissed the case on this basis.

1. The United States is a "necessary" party under HRCP Rule 19(a)

There is little doubt that the United States is a necessary party under part (a) of the rule. HRCP Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties,

> or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

The circumstances described in (2) (A) and (B) are present here. The absentee nonparty – the United States – affirmatively stated in its Statement of Interest that it "unquestionably has an interest which the disposition of this action could as a practical matter impair its ability to protect" because "[t]he relief that Plaintiffs seek directly implicates and seeks to restrict the United States' interests under the lease." ROA Vol. 3 ICA 41:272.

The United States' concerns are unquestionably valid. The disposition of the case in Plaintiffs' favor absent the United States would, out of necessity, "impair or impede [its] ability to protect that interest" because Plaintiffs' requested relief required the circuit court to limit the United States' rights under the Lease. For example, Plaintiffs' requested declaration that the State Defendants "breached their trust obligations by failing to ensure compliance with lease conditions of ceded land," ROA Vol. 1 ICA 37:56, necessarily put at issue whether the United States had breached the Lease, and what it means to comply with the Lease. A judicial action determining the parties' obligations under the Lease, and forcing the State to initiate rigorous enforcement action against the ***only other party to the Lease*** – the United States – is clearly something the United States has an interest in. *See, e.g.*, *Lau v. Bautista*, 61 Haw. 144, 154, 598 P.2d 161, 168 (1979) (holding that in a summary possession action brought by landlords against their tenants, the City and County was a necessary party because the tenants were entitled to be offered relocation assistance under a City and County program and not joining it would "impair or impede the ability of the City and County to protect its interest in the matter"); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) ("Because the Tribe is a party to the lease agreement sought to be enforced, it is an indispensable party under Fed. R. Civ. P. 19.").[6]

[6] The Hawai'i Supreme Court has stated that "[b]ecause [HRCP Rule 19 is] in all relevant aspects substantively identical to the federal rule [ ], we may look to federal cases interpreting their rules for persuasive guidance." *Kellberg*, 135 Haw. at 253, 349 P.3d at 360 (quoting *Marvin*, 127 Hawai'i at 499 n. 11, 280 P.3d at 97 n. 11) (alterations in original).

Plaintiffs also requested that the circuit court enjoin the State "from negotiating the extension of State General Lease No. S-3849 or entering into a new lease of the Pōhakuloa Training Area until the Defendants ensure that the terms of the existing lease have been satisfactorily fulfilled." *Id.* Placing this limitation on any extensions or renegotiations of the Lease, when no such limitations exist in the Lease itself, was highly prejudicial to the United States when it had no voice in the matter. As the United States noted, it is currently developing long term plans for the PTA, and the relief Plaintiffs requested would curtail the United States' ability to make such long term plans. ROA Vol. 3 ICA 41:282.

Furthermore, the court's order potentially intrudes upon the United States' rights under the terms of the Lease. Paragraph 19 of the Lease provides that the State has a right of entry onto the Subject Land that is "[s]ubject to obtaining advance clearance from the plans and training office of the Government's controlling agency, or any other designated Government agency," and on the conditions that entry be only at "reasonable times" and that it "will not unduly interfere with activities of the Government." ROA Vol. 1 ICA 37:209-10. However, in COL 23, the court ruled that "the monitoring [that the order requires the State to perform] 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)". ROA Vol. 6 ICA 47:262. This part of the order affirmatively requires the State to observe certain uses of the PTA at certain times. It goes without saying that this implicates the United States' interests because it sets requirements for the State's entry onto the Subject Land despite paragraph 19's restrictions. It also potentially intrudes upon any implied right of quiet enjoyment the United States has under the Lease. *See Lee Hoy v. Kapiolani Estate*, 26 Haw. 489, 496 (1922) ("In every lease there is an implied covenant of quiet enjoyment.") (quoting *Duff v. Wilson*, 69 Pa. 316, 318 (Pa. 1871)).

The circuit court's disposition of the case also puts *the State* at risk of incurring inconsistent obligations. If the United States does not agree that the required monitoring is "reasonable" or believes that it would "unduly interfere" with their training operations pursuant to paragraph 19 of the Lease, it may refuse to allow the State to do what the order requires, or seek alternative relief against the State under the Lease's dispute resolution mechanism. Either of these possibilities puts the State at risk of inconsistent obligations. *See Kellberg*, 135 Hawai'i

at 253, 349 P.3d at 360 (holding that HRCP Rule 19(a) applied where adjacent lot owners challenged the County's subdivision approval, in part because failing to include the owners of the subject lot put the County at risk of inconsistent obligations if the lot owners were to "seek their own relief from the County Defendants").

The purpose of rule 19 "is to protect the parties, and certain non-parties who have the requisite interest in the case, to prevent duplicative litigation and possibly inconsistent judgments." *Kellberg*, 135 Hawai'i at 250, 349 P.3d at 357. Joinder of the United States was necessary to protect the United States from its interests being impaired, and the State from the risk of duplicative litigation and inconsistent obligations.

2. Joinder of the United States was not feasible

Although the United States is a necessary party to this action, its joinder was not feasible because it is immune from suit in State court– a defense the United States asserted it could not waive absent an explicit waiver by Congress. ROA Vol. 3 ICA 41:283.

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwoo*d, 312 U.S. 584, 586 (1941). Thus, where the United States has not consented to be sued in state court, it is immune from suit. *State of Minnesota v. United States*, 305 U.S. 382, 388–89 (1939). Furthermore, the United States' consent to be sued is a necessary prerequisite for a court to assert jurisdiction over the United States. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). And the United States' sovereign immunity can be waived only by Congress. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text."). Thus, in the absence of explicit Congressional consent, a federal agency or official may ***not*** waive sovereign immunity: "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States." *State of Minnesota v. United States*, 305 U.S. 382, 388–89 (1939).

Here, there is no waiver of the United States' sovereign immunity to be sued in Hawai'i state courts, and no party in this case has ever identified one. Thus, because the United States was immune from suit in state court, the circuit court had no jurisdiction over the United States and its joinder was not feasible.[7] *See, e.g.*, *McClendon*, 885 F.2d at 633 (affirming dismissal of

[7] Even if this Court finds that joinder of the United States *was* feasible, the circuit court nevertheless erred in failing to order the United States' joinder. This is reversible error. *See*

action because a necessary party – an Indian tribe – could not be joined due to its sovereign immunity).

3. The United States was indispensable, and the circuit court should have dismissed the action pursuant to HRCP Rule 19(b)

The second step of the HRCP Rule 19 analysis requires the court to determine whether the case can proceed in the absence of the necessary party. In other words, the court must determine whether the party is "indispensable." Here, the United States was indispensable. All of the factors under HRCP Rule 19(b) weigh in favor of dismissal because joinder was not feasible, and the circuit court should have dismissed the suit.

HRCP Rule 19(b) provides:

> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

While these factors are not exclusive, they provide the basis for the Court's analysis. *See Marvin*, 127 Hawai'i at 506-12, 280 P.3d at 104-10. In determining whether a party is indispensable, the Court must consider the specific facts and circumstances of the case. *Id.*

It bears noting that the circuit erred in the first instance by not analyzing the factors under Rule 19(b) at all before determining that the United State was not indispensable. *See* ROA Vol. 6 ICA 47:255. When the Rule 19(b) factors are properly analyzed, however, it is apparent they weigh in favor of dismissal of the suit.

The first factor in rule 19(b) – the extent to which "a judgment rendered in the person's absence might be prejudicial to the person or those already parties" – weighs in favor of dismissal. In granting Plaintiffs' requested relief, the circuit court determined the United States' obligations under the Lease, required the State to take action to enforce those obligations, and

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Kellberg, 135 Hawai'i at 253-54, 349 P.3d at 360-61 (vacating the circuit court's judgment because it failed to order a party's joinder, where the record did not show that it was unfeasible).

found that the United States was not regularly cleaning up after training exercises and that representations by Army personnel were "contradicted" by other evidence, ROA Vol. 6 ICA 47:249-51, Appx.1 at 21-23, all without the United States present to protect its interests. The circuit court even seemed to give the United States obligations that it does not have under the Lease. *See* ROA Vol. 6 ICA 47:270, Appx. 1 at 42 (¶5) (requiring the State to ensure the land is returned to its "pre-lease condition"). Ultimately, regardless of whether the circuit court's interpretation of the Lease is correct, the relief granted circumscribes the United States' activities on the Subject Land. This was prejudicial to the United States. *See McClendon*, 885 F.2d at 633.

The circuit court also limited – at Plaintiffs' request –the United States' ability to renegotiate or extend the Lease. *See* ROA Vol. 6 ICA 47:263, Appx. 1 at 35 (¶25). As the United States explained, the PTA, including the Subject Land, "contains many crucial elements of U.S. military training programs" and is "essential for readiness of all the forces that make up U.S. Pacific Command." ROA Vol. 3 ICA 41:287. In part, this is because "there is no other training area in the mid-Pacific at which the training done at the PTA could be accomplished." *Id.* Any restriction on the United States' ability to negotiate a new lease impairs the United States' ability to make future plans regarding the PTA regarding training decisions, funding, and infrastructure investment. *Id.* at 289. Thus, this restriction was prejudicial to the United States.

There is no question that if Plaintiffs were to ask the court to invalidate a lease *after* its execution, the United States would be an indispensable party. *See, e.g.*, *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) ("[N]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) (holding that the Hopi Indian Tribe was an indispensable party because it was party to a lease which the plaintiffs sought to cancel). There is little difference – at least in terms of the prejudice to the absent party – between that situation and the one here, where Plaintiffs requested the court to enjoin an absent party from entering into a new lease *before* they do so. In both cases, the rights of the absent party are severely prejudiced.

The relief granted in the absence of the United States would also likely prejudice *the State*. The circuit court ordered the State to monitor live-firing exercises. However, the Lease limits the State's right of entry onto the Subject Land to "reasonable" times and in in such a way that will not "unduly interfere" with the United States' operations. ROA Vol. 1 ICA 37:209-10.

And as the United States explained, requiring the State to conduct frequent inspections "has the potential to disrupt critical training" operations. ROA Vol. 3 ICA 41:290. Moreover, "[f]or obvious safety reasons, civilian personnel would not be permitted to conduct inspections on the leased land when the training areas are in use." *Id.* Thus, there is a significant likelihood that the United States could challenge the ordered inspections under the Lease's dispute resolution mechanism – a situation that would clearly put the State at risk of inconsistent obligations.

The second factor under HRCP Rule 19(b) – the extent to which the prejudice could be lessened or avoided by shaping the relief – also weighs in favor of dismissal, because the necessity of interpreting the Lease to determine the United States' obligations, requiring the State to enforce these obligations, and placing limits on the State's ability to renew the Lease were all inherent parts of Plaintiffs' requested relief. In fact, even if it had been possible for the circuit court to somehow tailor the relief so as to avoid prejudice to the United States, the relief actually ordered by the circuit court demonstrates clearly that it did not do so.

Simply put, the State cannot comply with the circuit court's order without: a) prejudicing the United States' interests and impairing its rights under the Lease, and/or b) incurring potentially inconsistent obligations and additional litigation if the United States challenges any of the circuit court's interpretations of the State's rights and obligations under the Lease. And given Plaintiffs' requested relief, such a result was unavoidable. As such, the circuit court could not (and did not) shape the relief to lessen or avoid the prejudice against the United States and the State, and this factor weighs in favor of dismissal.

The third factor – whether an adequate judgment can be rendered in the person's absence – also weighs in favor of dismissal. *See McClendon*, 885 F.2d at 633 ("Any judgment in favor of [the plaintiff] will adversely affect the Tribe's interests, and because the relief sought by [the plaintiff] relates to the activities of the Tribe, any relief obtained in the Tribe's absence would be inadequate."). The declaratory relief Plaintiffs requested in their complaint was to "[d]eclare that the Defendants breached their trust obligations by failing to ensure compliance with lease conditions of ceded land." ROA Vol. 1 ICA 37:56. In other words, Plaintiffs wanted the court to ensure that the State enforced the Lease. But the court could not properly grant declaratory relief and order the State to enforce the Lease without finding that the United States had breached the Lease, because declaratory relief must be based on an "actual controversy." HRS § 632-1; *see also infra* Part B.1.i. The problem for Plaintiffs is that any finding that the Lease had

been breached would plainly make the United States an indispensable party. But because Plaintiffs opted to *not* allege a breach of any kind, the court could not order the State to enforce the Lease. As such, without the United States present, an adequate judgment cannot be rendered.

Finally, under the fourth factor, Plaintiffs would also likely have an adequate alternative remedy if the case were dismissed for nonjoinder. Plaintiffs could name the United States as a party and seek relief in federal court pursuant to 5 U.S.C. § 702, which provides a waiver of the United States' sovereign immunity for injunctive relief against the United States "in a court of the United States." Indeed, this statute envisages suits like this, in which the United States is an indispensable party, as it provides, in relevant part:

> 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[.]

5 U.S.C. § 702; *see also Lee v. Taylor*, No. CIV. PJM 11-3212, 2012 WL 3264953, at *3 (D. Md. Aug. 9, 2012) (holding that although 5 U.S.C. § 702 "waives immunity for suits seeking injunctive relief against the United States in federal court, it does not extend the waiver to actions in state court").[8]

Even the United States appeared to acknowledge that 5 U.S.C. § 702 provided a potential alternative remedy for Plaintiffs in federal court, if the United States were named as a party. *See* ROA Vol. 3 ICA 41:285 (the United States, in its Statement of Interest, noting that Plaintiffs could not identify any waiver of sovereign immunity that would allow the United States to be joined in *State court* because "[t]he general waiver for injunctive relief is 5 U.S.C. § 702, which is explicitly limited to actions 'in a court of the United States'"). Thus, the availability of an alternative avenue for relief does not weigh in favor of allowing the case to go forward in the

[8] Although 5 U.S.C. § 702 is part of the federal Administrative Procedures Act (APA), its waiver of sovereign immunity "is not limited to APA cases—and hence it applies regardless of whether the elements of an APA cause of action [under § 704] are satisfied." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017), *cert. denied sub nom. Cacciapalle v. Fed. Hous. Fin. Agency*, 138 S. Ct. 978 (2018) (quoting *Trudeau v. Federal Trade Commission*, 456 F.3d 178, 187 (D.C. Cir. 2006)).

absence of the United States, because Plaintiffs appear to have an alternative forum for relief in federal court if the United States were named as an indispensable party.

Any judgment entered by the circuit court that addressed Plaintiffs' requested relief would have adversely affected the United States' interests, and the only relief the circuit court could properly grant in the absence of the United States would have been inadequate. As such, the court should have dismissed the action in its entirety.

B. The Circuit Court Erred in Finding that the State Breached its Trust Duties

1. Plaintiffs were not entitled to declaratory relief under HRS § 632-1

i. There was no "actual" or "substantial" controversy

With no allegations of any breach of the Lease and only speculation about a future controversy, declaratory relief is unavailable. HRS 632-1 provides, in relevant part:

> Relief by declaratory judgment may be granted in civil cases ***where an actual controversy exists*** between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, ***and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.***

HRS § 632-1(b) (emphases added).

When determining if declaratory relief is appropriate under HRS § 632-1, "the question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant a declaratory judgment." *Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 355, 322 P.3d 228, 250 (2014). In *Asato*, the plaintiff sought to invalidate an administrative rule regulating State contracting practices. *Id.* at 336-37, 322 P.3d at 231-32. The plaintiff also sought a declaration voiding all existing contracts issued under the administrative rule. *Id.* at 338, 322 P.3d at 233. The Hawai'i Supreme Court agreed that the administrative rule was invalid, but held the plaintiff was not entitled to declaratory relief voiding all existing contracts awarded under the rule. *Id.* at 346, 354-55, 322 P.3d at 241, 249-50. The Court stated that "[a]bsent any rendition of the circumstances surrounding each contract, it cannot be determined from the

allegations whether there is a 'substantial controversy' as to a particular contract that is "of sufficient immediacy and reality to warrant a declaratory judgment." *Id.* at 355, 322 P.3d at 250.

Kau v. City and County of Honolulu is even more on point. In *Kau*, condominium lessees requested the initiation of condemnation proceedings under a county ordinance designed to address the effects of the leasehold system by allowing lessees to purchase the leased fee interest in their condominiums. 104 Hawai'i 468, 471, 92 P.3d 477, 480 (2004). The property fee owners then filed a complaint for declaratory relief, requesting a judgment determining that when the master lease expired, the lessees would not acquire fee simple condominiums. *Id.* at 473, 92 P.3d at 481. However, the Hawai'i Supreme Court affirmed the circuit court's denial of declaratory relief on the ground that "there was no actual controversy" because the master lease had not yet expired, and as such the fee owners were requesting an "advisory opinion." *Id.* at 474, 92 P.3d at 483. Specifically, the Court stated:

> In the present case, there is no actual controversy because the Fee Owners are requesting a judgment based on the expiration of the Master Lease, an event that will occur at some time in the future; there is no actual controversy in existence at this time. Therefore, the relief that the Fee Owners requested was properly denied pursuant to HRS § 632–1.

Id. at 474, 92 P.3d at 483.

Plaintiffs' claim for declaratory relief in the present case suffers from the same flaws. Here, Plaintiffs requested a judgment "declar[ing] that the Defendants breached their trust obligations by failing to ensure compliance with lease conditions of ceded land." ROA Vol. 1 ICA 37:56. Plaintiffs did *not*, however, allege any breach of the Lease. Indeed, they could not allege a breach without the United States as a party.

Despite this lack of any actual controversy regarding whether the provisions of the Lease had been breached, the circuit court declared that the State had breached its trust obligations by failing to ensure that the United States is in compliance with the Lease, required the State "to follow up to effect compliance once there is evidence that provisions of the lease are not being followed," ROA Vol. 6 ICA 47:258, Appx. 1 at 30, and declared what the State must do to ensure compliance with the Lease. *See id.* at 258-63, Appx. 1 at 30-35. Simply put, Plaintiffs' requested relief, and the circuit court's order requiring the State to ensure compliance with the Lease, are not tied to any actual or substantial controversy. Under HRS § 632-1, a court cannot declare that a party has failed to ensure compliance with a lease where there is no allegation that any party has failed to comply with the lease.

The circuit court also declared that the State would breach its trust duties if it were to execute an extension of the Lease without certain written findings. This is the kind of speculative relief that the Hawai‘i Supreme Court determined was unavailable under HRS § 632-1 in *Kau*. In COL 25, the circuit court found:

> 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 Pōhakuloa leased lands.

ROA Vol. 6 ICA 47:263, Appx. 1 at 35 (¶25).

Just as in *Kau*, Plaintiffs here attempted to obtain declaratory relief in regard to a speculative future controversy that had not yet occurred, and would not occur (if at all) until some point in the future. The Lease at issue here does not expire until 2029. No extension or renewal has been executed. This case is in fact even more speculative than *Kau*, because in *Kau*, even though the expiration of the master lease was far in the future, it was sure to occur. That is not the case here, where extension of the Lease or execution of a new lease is not guaranteed.

Moreover, the fact that the State has discussed with the United States the possibility of a new lease does not make Plaintiffs' alleged harm imminent. Plaintiffs' have never alleged that the existence of a Lease with the United States harms them or that they would be harmed by the execution of a new lease. Indeed, they have been careful not to do this because it would plainly make the United States an indispensable party. In fact, given the fact that the United States has the authority to condemn State land, *see U.S. v. Carmack*, 329 U.S. 230, 237-41 (1946), and the possibility of the return of 1,000 acres to the State as part of a new lease agreement, there may be a greater risk of harm to the Hawai‘i public if the State is unable to negotiate a new lease.

Rather, Plaintiffs' alleged harm relates to the State's methods of supervising and enforcing the Lease. *See* ROA Vol. 1 ICA 37:49-57. But even this is speculative. The courts may "prospectively enjoin the State from violating the terms of the ceded lands trust bringing a breach of public land trust," but may not "turn back the clock and examine actions already taken by the State." *Pele Defense Fund v. Paty*, 73 Haw. 578, 601, 837 P.2d 1247, 1262 (1992). The circuit court here, however, relied solely the State's actions in the past – i.e., "actions already taken by the State" – and thus relied on an assumption that the State will not, between now and the end of the Lease term, adequately manage the Subject Land, despite the fact that the court

appeared to find the State's most recent inspection in 2014 adequate to satisfy the State's trust obligations. *See* ROA Vol. 6 ICA 47:249, 260-61, Appx. 1 at 21, 32-33 (FOF ¶52, COL ¶20-21). Plaintiffs' claims were therefore too speculative to support declaratory relief under HRS § 632-1.

ii. Plaintiffs' public trust claim is a non-justiciable political question

Plaintiffs' public trust claim is non-justiciable. "[T]he use of 'judicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.'" *Trustees of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 171, 737 P.2d 446, 456 (1987) (quoting *Life of the Land v. Land Use Commission*, 63 Haw. 166, 171-72, 623 P.2d 431, 438 (1981)). Thus, "even in the absence of constitutional restrictions, [judges] must . . . carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." *Id.* In *Yamasaki*, the Hawai'i Supreme Court adopted the test for justiciability established by the U.S. Supreme Court in *Baker v. Carr*:

> [i]t is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.

Yamasaki, 69 Haw. at 169-70, 737 P.2d at 455 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Nelson v. Hawaiian Homes Com'n*, 127 Hawai'i 185, 194, 277 P.3d 279, 288 (2012).

Here, a number of the political question formulations apply. First, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Second, there is a "lack of judicially discoverable and manageable standards for resolving" the

issue at hand. Third, it is impossible to resolve the issue "without an initial policy determination of a kind clearly for nonjudicial discretion." Finally, it is impossible for the Court to resolve the issue "without expressing lack of the respect due coordinate branches of government."

In *Yamasaki*, OHA Trustees sought declaratory and injunctive relief that OHA was entitled to receive 20% of proceeds received by the State deriving from illegal sand mining on ceded lands, and from sales or leases of ceded lands, pursuant to a statute, HRS § 10-13.5, which provided that 20% of all funds derived from the ceded lands trust shall be expended by OHA. *Yamasaki*, 69 Haw. at 165-67, 737 P.2d at 452-54. The Hawai'i Supreme Court, however, found that if it granted the requested relief it "would be intruding in an area committed to the legislature" because "the seemingly clear language of HRS § 10-13.5 actually provides no 'judicially discoverable and manageable standards' for resolving the disputes and they cannot be decided without 'initial policy determinations of a kind clearly for nonjudicial discretion." *Id.* (citing *Baker v. Carr*, 369 U.S. at 217) (alterations omitted).

Specifically, the *Yamasaki* Court held that it could not determine that damages received by the State resulting from the illegal mining of sand on ceded land were "funds derived from the public land trust" where there was no statutory basis for it. *Id.* at 174, 737 P.2d at 458. The Court stated that such a ruling "would be rendered possible only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion." *Id.* at 175-76, 737 P.2d at 458.

In *Nelson v. Hawaiian Homes Commission*, the Hawai'i Supreme Court addressed whether the political question doctrine barred Hawaiian Homes Commission beneficiaries from demanding more legislative funding of the Department of Hawaiian Homelands (DHHL) pursuant to a requirement in article XII, section 1 of the Hawai'i Constitution that the legislature make "sufficient sums" available for four different purposes to be furthered by DHHL. 127 Hawai'i at 187, 189, 277 P.3d at 281, 283. The Court held that the political question doctrine barred it from determining what constituted "sufficient sums" for three of the four purposes in article XII, section 1.[9] *Id.* at 203-06, 277 P.3d at 298-300. Despite agreeing with the plaintiffs

[9] The Court held that based on the Constitutional Convention history, there was a judicially discoverable and manageable standard to determine what constituted "sufficient sums" for only one of the four purposes, that being DHHL's administrative and operating expenditures. *Id.* at 203, 277 P.3d at 297. The Court relied on the detailed discussion of DHHL's administrative and

that "the State has failed, by any reasonable measure, under the undisputed facts, to provide sufficient funding to DHHL," the Court ruled that as to those three purposes, declaratory relief was unavailable under HRS § 632-1. *Id.* It did this because:

> were we to remand this case to the circuit court to grant declaratory relief to Plaintiffs as to all of the constitutional purposes encompassed in Count 1, the circuit court still would not be able to mandate the ***affirmative*** injunctive relief that the Plaintiffs seek without encountering the same uncertainty with regard to what constitutes 'sufficient sums' as to the remaining three purposes under Article XII, Section 1, explained *supra*."

Id. at 205, 277 P.3d at 299 (emphasis in original).

In other words, even if the circuit court "were to declare that funding to DHHL for the other three purposes has been insufficient, such declaration would not 'terminate the uncertainty or controversy giving rise to the proceeding,' as judicial determination of what affirmatively constitutes 'sufficient sums' . . . is nonjusticiable based on the political question doctrine." *Id.* at 206, 277 P.3d at 300.

Plaintiffs' claim in this case presents similar problems to those present in *Yamasaki*, and especially, *Nelson*. First, there is a lack of judicially discoverable or manageable standards for resolving Plaintiffs' claim. Plaintiffs sought an order declaring that the State Defendants "breached their trust obligations by failing to ensure compliance with lease conditions of ceded land," and ordering the State Defendants to "fulfil their trust duties with respect to the lands leased pursuant to [the Lease]." ROA Vol. 1 ICA 37:56. The problem is determining exactly what the State's trust obligations are in this context. Article XII, section 4 of the Hawai'i Constitution does not provide any basis or standard for the courts to determine how exactly the State must manage the ceded lands that are held in trust or go about ensuring the compliance of lessees leasing ceded lands. It provides:

> The 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 held by the State as a public trust for native Hawaiians and the general public.

Haw. Const. Art. XII, § 4.

Plaintiffs were also unable to identify anything in the history of article XII, section 4 or

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operating expenditures, and the general consensus in the history that demonstrated an amount between $1.3 and $1.6 million was "sufficient." *Id.* at 199-203, 277 P.3d at 293-297.

any implementing statutes that could provide a basis to determine how the State is required to fulfil its trust duties in regard to the Lease and the Subject Land. Nor has counsel for the State been able to find any. Plaintiffs' counsel even candidly admitted during closing arguments that there was no law requiring the State to take any specific actions or providing specific guidance as to what the State's trust duties are in this context. Tr. 10/2/15 ICA 82:65-67.

The Lease also does not provide any help. As noted already, Plaintiffs have not alleged any breach of the Lease in this case, but even if they had (and could do so without plainly necessitating the joinder of the United States), the Lease does not require the State to conduct investigations or provide any affirmative obligations for the State other than "to remove or bury trash, garbage and other waste materials ***resulting from the use of the said premises by the general public***." ROA Vol. 1 ICA 37:163 (paragraph 12 of the Lease). But this provision is irrelevant to Plaintiffs' claim because Plaintiffs do not allege any failure of the State to remove or bury trash left by members of the public using the Subject Land. And even that provision is subject to paragraph 32 of the Lease, which provides that any of the State's obligations under the Lease are "subject to the availability of funds and/or personnel." *Id.* at 168.

The circuit court could not simply order the State to "enforce the Lease." First, that relief is unavailable under HRS § 632-1 without finding that the Lease has been breached, for the reasons discussed *supra*. Second, it would be an improperly vague and overbroad form of injunctive relief. *See* HRCP Rule 65(d) (requiring injunctions to be "specific in terms [and] . . . describe in reasonable detail . . . the act or acts sought to be restrained . . . ."). As described in the background section, *supra*, the State has relied on cooperative agreements with the United States, documents prepared by the United States including environmental assessments and archeological surveys that were conducted with the help of State officials, and a limited number of inspections by DLNR as methods of supervising the Lease. There is no basis in the law – or indeed, to the extent that this could be judicially discoverable, in any expert land management testimony elicited at trial – for the circuit court to declare that this was inappropriate or for the court to order different methods of supervision which it deemed – without basis – to be superior.

Moreover, the circuit court's attempt to craft injunctive relief without any judicially manageable standard was an improper intrusion into an area that has been trusted to BLNR and DLNR pursuant to article XI, section 2 of the Hawai'i Constitution. Article XI, section 2 provides that "[t]he legislature shall vest in one or more executive boards or commissions powers

for the management of natural resources owned or controlled by the State." This power has been vested in the BLNR. *See Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai'i 247, 250, 320 P.3d 912, 915 (2014). As the custodian of the ceded lands at issue, the State, through BLNR, is responsible for making policy determinations in regard to the day-to day management of the land. And while the Subject Land's trust status places limits on the purposes the land is used for, it does not require the State to adopt any particular form of management practices. *See Price v. State of Hawai'i*, 921 F.2d 950, 954-56 (9th Cir. 1990).

In *Price*, the Ninth Circuit Court of Appeals addressed claims that the State was in violation of section 5(f) of the Admission Act, which requires ceded lands to be held in trust for native Hawaiians and for public use. *Id.* at 953-54. The plaintiffs in *Price* alleged that the State had failed to keep the ceded lands and income from those lands separate from other State assets and had failed to invest income from the ceded lands prudently. *Id.* at 954. The Ninth Circuit rejected the plaintiffs' claims, holding that the State was not subject to the same strict requirements as an ordinary trustee, and recognizing that it was improper to intrude upon the State's management decisions regarding the ceded lands. *Id.* at 955-56. The Court recognized that while section 5(f) of the Admission Act set out broad purposes the land must be used for, it was not intended to "manacle the State as it attempted to deal with the vast quantity of land conveyed to it." *Id.* at 955. *See also Awakuni v. Awana*, 115 Hawai'i 126, 133, 165 P.3d 1027, 1034 (2007) (quoting this section of the *Price* decision approvingly). Additionally, the Ninth Circuit in *Price* stated that

> it would be error to read the words "public trust" to require that the State adopt any particular method and form of management for the ceded lands. All property held by a state is held upon a 'public trust.' Those words alone do not demand that a state deal with its property in any particular manner even if, as a matter of prudence, the people usually require a close accounting by their officials. Those words betoken the State's duty to avoid deviating from section 5(f)'s purpose. They betoken nothing more.

Id. at 955–56.

Thus, the Court concluded that "it is not for us to declare that certain methods of holding, managing, and accounting for the ceded lands and income must be followed by the State and its officials," and that the courts "need not and should not immerse ourselves in the day-to-day activities of state officials as they struggle with the immense task of managing the resources of the State for public purposes." *Id.* at 956.

In short, the circuit court improperly usurped BLNR's role as landlord in managing the Subject Land. The BLNR is charged with a complex balancing act between the unfavorable and one-sided terms of the Lease, the limited resources of BLNR to inspect vast tracts of land with difficult terrain, and the politics of negotiations between the State and the United States military regarding land that the United States sees as vital to its training requirements and which it agrees it has the power to condemn if necessary. For all of the above reasons, the questions of how the State should go about managing the Subject Land and enforcing the Lease are non-justiciable and the circuit court erred issuing declaratory and injunctive relief.

2. The circuit court erred in finding that Plaintiffs met their burden of establishing a basis for prospective injunctive relief as to the State's trust duties

The Court need not reach this question. Nevertheless, even if the circuit court is correct that the State had a duty to take reasonable efforts to preserve and protect the land and to take a reasonable, proactive role in the management and protection of the land, *see* ROA Vol. 6 ICA 47:256, Appx. 1 at 28, the court improperly disregarded the cooperative agreements and site surveys conducted by other entities and reviewed by the State. *Id.* at 260-61, Appx. 1 at 32-33. These were all part of the State's supervision and should have been part of the court's analysis.

First, it is important to note again that the basis of the circuit court's ruling – i.e., that the State Defendants failed to conduct regular periodic inspections of the Subject Land (*see* ROA Vol. 6 ICA 47:262, Appx. 1 at 34) – was not supported by any requirement in the Lease or in any statute, or by any expert testimony elicited at trial. In other words, nothing created any specific obligation for DLNR to conduct regular inspections of the Subject Land itself. Instead, the State introduced substantial evidence that, instead of such inspections, it had relied on, among other things, cooperative agreements, environmental reports, and archeological surveys to supervise the United States' use of the Subject Land. *See supra* Part II.A.2.

A trustee has authority to co-operate and consult with others, and to delegate to others tasks relating to trust administration, where it is reasonable to do so. *See* Restatement (Second) of Trusts § 171. Moreover, as the circuit court itself recognized, the State's "duty to malama 'aina the Subject Lands is not an absolute duty or a guarantee. . . . 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***." ROA Vol. 6 ICA 47:257, Appx. 1 at 29 (emphasis added); *see also*

In re Water Use Permit Applications, 94 Hawai‘i 97, 142, 9 P.3d 409, 454 (2000) (citing *Save Ourselves, Inc. v. Louisiana Environmental Control Com'n*, 452 So. 2d 1152 (La. 1984)) (stating that the State's actions as trustee of the State's natural resources are subject to a "'rule of reasonableness' requiring the balancing of environmental costs and benefits against economic, social, and other factors").

The circuit court's error was that it did not consider "all relevant factors," and it in fact did exactly what it had stated was inappropriate – apply a mechanical formulation to whether the State had breached its trust duties. It was especially important for the circuit court to consider all the relevant factors here because there was nothing that mandated the State to conduct periodic inspections. Despite that, the court found a breach of the State's trust duties based solely on an "absence of inspections or monitoring reports for years other than 1984, 1994, and 2014." In doing so, the court explicitly disregarded all of the "other studies or site visits in connection with other business regarding the Subject Lands, such as environmental impact statements, [because] 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." ROA Vol. 6 ICA 47:260-61, Appx. 1 at 32-33.

There was no basis for the court to disregard these other studies and reports. Even if they were undertaken for different initial purposes, the fact that the State reviewed them, and in some cases relied on them, form part of the whole picture in regards to the State's trust duties. And by disregarding them completely, the circuit court failed to consider all the relevant factors as to whether the State fulfilled its trust obligations. The State has limited control over the Subject Land, there are inherent safety and national security issues, and the Lease is extremely one-sided in favor of the United States. Given all the circumstances, the State determined that its form of management was most appropriate. The circuit court should have considered all of this, instead of applying a mechanical formulation whereby the existence of records for only three inspections from the beginning of the Lease term automatically constituted a breach of trust. The circuit court therefore erred in finding that the State breached its trust duties.

C. The Injunctive Relief Ordered by the Circuit Court was Improper

1. The standard for a mandatory injunction was not satisfied

A mandatory injunction is not the same as a prohibitory injunction, and is subject to a much more stringent standard. A prohibitory injunction "simply orders a defendant to refrain from engaging in the designated acts." *Wahba, LLC v. USRP (Don), LLC*, 106 Hawai‘i 466, 472,

106 P.3d 1109, 1115 (2005). A mandatory injunction, on the other hand, "requires affirmative action concerning the undoing or doing of an act." *Id.* Therefore, "[m]andatory preliminary relief which goes well beyond the status quo is 'particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party.'" *Id.* (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980)).

As shown above, the facts and law of this case are not clearly in Plaintiffs' favor. And even if the Court agrees with Plaintiffs that the State breached its trust duties, the situation here would be similar to the one in *Nelson*, discussed *supra*, where the Hawai'i Supreme Court agreed with the Plaintiffs that the legislature had not provided sufficient funding to DHHL, but could not order it to provide any particular amount because there was no judicially manageable standard to determine what constituted a "sufficient sum." *See Nelson*, 127 Hawai'i at 203-06, 277 P.3d at 298-300. Here, similarly, there is no judicially manageable standard to determine exactly what is required of the State.

The situation here is very different to prior cases where the Hawai'i courts have affirmed mandatory injunctions. In those cases, the injunctive relief necessary to resolve the alleged harm was clear. *See, e.g.*, *Sandstrom*, 59 Haw. at 492-501, 583 P.2d at 974-78 (affirming mandatory injunction requiring property owner to remove the top story of a structure that was in clear violation of a restrictive height covenant); *Royal Kunia Community Ass'n ex rel. Bd. of Directors v. Nemoto*, 119 Hawai'i 437, 445-51, 198 P.3d 700, 708-14 (App. 2008) (affirming mandatory injunction requiring condominium owner to remove the concrete base of a Japanese rock garden that violated a restrictive covenant); *Minton v. Quintal*, 131 Hawai'i 167, 189-90, 317 P.3d 1, 23-24 (2013) (affirming mandatory injunction requiring the City to rescind a ban on certain stagehands working at City facilities because the ban violated the stagehands' due process rights).

In those cases where mandatory injunctions have been deemed appropriate, the ordered relief clearly followed from the violation of law. Not so here. The circuit court fashioned an extraordinary mandatory injunction, none of which was clearly required by law, as Plaintiffs have acknowledged. *See* Tr. 10/2/15 ICA 82:65-67. The injunction was not based on any law or expert testimony requiring certain land management practices, and by ordering the injunction the circuit court usurped the State's role as land manager and trustee of the Subject Land.

2. The injunction is barred by the State's sovereign immunity

Although the State's sovereign immunity does not bar a suit for *prospective* injunctive

relief to prevent an alleged constitutional violation, it *does* bar any relief that is "tantamount to an award of damages for a past violation of law, even though styled as something else." *Paty*, 73 Haw. at 609-10, 837 P.2d at 1266 (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)). Even though Plaintiffs styled their requested relief as declaratory and injunctive only, the court must nevertheless determine "whether the effect on the state treasury would by 'ancillary' or would amount to virtual compensation for the past misconduct of state officials." *Id.*

In *Paty*, the plaintiffs requested – as a remedy to the State's allegedly unlawful exchange of trust land – that the trust status of the exchanged land be restored "by means of a constructive trust." *Id.* at 611, 837 P.2d at 1267. The Hawai'i Supreme Court held that this requested relief was barred by the State's sovereign immunity because it was "essentially equivalent" to a nullification of the land exchange, and "[t]he effect on the State treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by Campbell would require the State to compensate Campbell for its property." *Id.*

Here, the circuit court's injunction included relief that similarly would have a direct and unavoidable effect on the State treasury, and amounted to virtual compensation for alleged *past* violations of law. The injunction orders the State to create a plan of action to remedy "[a]ny condition or situation that may adversely affect the condition of the Subject Lands," and to assure that "any nonconforming condition" on the land that was likely caused by the United States will be "brought to pre-lease condition." ROA Vol. 6 ICA 47:269-70, Appx. 1 at 41-42. Unlike the part of the injunction that requires the State to conduct inspections going forward, this part of the order is not prospective in nature – it is tantamount to virtual compensation for an alleged *past* violation of law, i.e., the State's alleged failure to conduct adequate inspections in the past. Moreover, to the extent it places the clean-up obligation on the State, it also burdens the State with considerable expense. And the circuit court's order does indeed appear to place this obligation on the State, because it requires the State, in its plan, to include "all steps" the State takes to "secur[e] adequate funding . . . to plan, initiate, and conduct all appropriate comprehensive cleanup of the Subject Lands . . . ." *Id.* at 271-72. Appx. 1 at 43-44.

Thus, paragraphs 2.B.4, 5, and 9 of the court's order are tantamount to an award of damages for alleged past violations, and are barred by the State's sovereign immunity.

3. The injunction is vague, overbroad, and will not terminate the controversy

HRCP Rule 65(d) provides that

> [e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance*;* shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Injunctions (and especially mandatory injunctions given they are particularly disfavored) therefore will be set aside if they are "so vague that they have no reasonably specific meaning." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992). They must also be "tailored to eliminate only the specific harm alleged" because "[a]n overbroad injunction is an abuse of discretion." *Id.*

In several respects, the injunction was not specific in describing what conduct was prohibited or required and overbroad because it could easily require the State to take action remedying situations that in no way would be a breach of the Lease. First, the injunction requires the State to "promptly initiate and undertake affirmative activity to malama 'aina the Subject Lands." ROA Vol. 6 ICA 47:267, Appx. 1 at 39. The order goes on to describe some of the activities necessary to malama 'aina the land, but also states that the State's obligations under the order are "not necessarily limited to those actions." *Id.* The injunction therefore appears to require the State to take actions that are not set out in the order at all.

Second, the order also requires "regular, periodic on-site monitoring and inspection of the Subject Lands," but does not explain what that means, whether it is monthly, yearly, bi-annually, or something else. *Id.* at 268, Appx. 1 at 40.

Third, the order requires the State to include in its plan "a protocol of appropriate action" to malama 'aina the Subject Land in the event the State finds certain things on the land. *Id.* at 269, Appx. 1 at 41. However, the order does not explain what "appropriate action" is.

Fourth, the order requires the State to create a "plan or other assurance that any nonconforming condition found on the Subject Lands that was likely caused by the lessee under Said Lease 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." *Id.* at 270, Appx. 1 at 42. This is vague because it does not define "nonconforming." It is unclear whether this means not in conformance with the Lease, or with the State's duties as trustee of the Subject Land.

The lack of clarity in the injunction is highlighted by the requirement that the State return to the court to have any plan approved before executing it. *See id.* at 271, Appx. 1 at 43. This requirement also all but ensures further litigation and means the relief has not "terminate[d] the uncertainty or controversy giving rise to the proceeding" as is required by HRS § 632-1.

The injunction is also overbroad. It requires the State to create protocols to remedy "any condition or situation that may adversely affect the condition of the Subject Lands," "any debris" deposited on the land by the United States," and "[a]ny other foreign or other non-natural item or other contaminant or debris found on the Subject Land" that is present "by reason of or in connection with the [the Lease]." ROA Vol. 6 ICA 47:269-70, Appx. 1 at 41-42. However, the Lease permits the United States to conduct live firing and other large-scale training exercises on the land. At any given time, there is bound to be "debris," "non-natural" items or conditions that may adversely affect the condition of the land, as the State has acknowledged. In other words, the presence of these conditions do not mean the United States has breached the Lease. In addition, as discussed earlier, the injunction interprets the Lease as requiring the United States to return the Subject Land to the pre-lease condition, which is not a requirement of the Lease.

By requiring the State to take this enforcement action against the United States, the injunction essentially imposes obligations on the United States that it does not have under the Lease, despite the fact that as a non-party, the United States was not subject to the circuit court's jurisdiction. As such, the injunction is impermissibly overbroad. *See Price v. City of Stockton***,** 390 F.3d 1105, 1117 (9th Cir. 2004) ("[A]n injunction must be narrowly tailored to affect only those persons over which it has power . . . and to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.").

4. The circuit court intruded upon the role of the legislature by ordering the State to establish a contested case procedure

It is well-established that "a public administrative agency possesses only such rulemaking authority as is delegated to it by a state legislature and may only exercise this power within the framework of the statute under which it is conferred." *Asato*, 132 Hawai'i at 346, 322 P.3d at 241 (quoting *Haole v. State*, 111 Hawai'i 144, 152, 140 P.3d 377, 385 (2006)). In other words, an agency can only enact rules that are expressly authorized by the legislature or are necessary to carry out powers expressly granted by the legislature. *Id.* at 346-47, 322 P.3d at 241-42.

Despite this well-established principle, the circuit court ordered the State to institute 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 any other interested party may contest the decisions made by the Defendants in the course of discharging its duty to malama ʻaina the Subject Lands." ROA Vol. 6 ICA 47:270-71, Appx. 1 at 42-43. The circuit court did not cite any statute that requires (or even authorizes) BLNR to adopt a contested case proceeding to allow members of the public to challenge decisions it makes in administering the Lease. It did not make any finding that such a procedure was necessary to remedy Plaintiffs' alleged harm. Plaintiffs did not even request this as part of their prayer for relief or even in their later briefing outlining their requested relief. *See, e.g.*, ROA Vol. 6 ICA 47:168. Not only was this impermissibly overbroad, given that it went well beyond Plaintiffs' requested relief and is unconnected to their alleged harm, it was also an intrusion into the role of the legislature, which is the sole branch of government that can authorize agency rulemaking. This part of the order should be vacated.

VI. CONCLUSION

For all the reasons above, the State respectfully requests that this Court reverse and vacate the circuit court's Findings of Fact, Conclusions of Law and Order entered on April 3, 2018, and the Final Judgment of the circuit court entered on April 24, 2018. The State further requests that this Court instruct the circuit court to dismiss the case, or in the alternative to enter summary judgment in favor of the State, on the grounds that the United States cannot be joined and is an indispensable party, that the relief Plaintiffs seek is unavailable under HRS § 632-1, and/or that Plaintiffs' claim presents a non-justiciable political question.

Alternatively, the State requests that this Court vacate the injunctive relief ordered by the circuit court, or any and all portions of the injunctive relief that this Court deems to be improper.

DATED: Honolulu, Hawaiʻi, September 26, 2018.

/s/ Ewan C. Rayner
EWAN C. RAYNER

Attorney for SUZANNE CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES

STATEMENT OF RELATED CASES

Defendants-Appellants are not aware of any related cases.

DATED: Honolulu, Hawai‘i, September 26, 2018.

/s/ Ewan C. Rayner
EWAN C. RAYNER
Attorney for SUZANNE CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES

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FIRST CIRCUIT COURT
STATE OF HAWAII
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F. OTAKE
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

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

APPENDIX 1

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 Kahaulelio 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 ordinance 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 ordinance 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 ordinance remnants, debris, and trash are 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 ordinance (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-1060s—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 Enviornmental 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.

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 ʻaina.

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:

DAVID KIMO FRANKEL, ESQ.
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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

CAAP-18-0000432

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CLARENCE CHING and MARY MAXINE KAHAULELIO, Plaintiffs-Appellees, vs. SUZANNE CASE in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, Defendants-Appellants.	Civil No. 14-1-1085-04 GWBC (Declaratory Judgment) APPEAL FROM: FINAL JUDGMENT, filed April 24, 2018 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I HON. GARY W.B. CHANG JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing has been served by electronic service through the Judicial Electronic Filing System (JEFS) or by US Mail where noted upon the following:

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DATED: Honolulu, Hawai'i, September 26, 2018.

/s/ Ewan C. Rayner
EWAN C. RAYNER

Attorney for SUZANNE CASE in her official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES