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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI‘I

‘ĪLIO‘ULAOKALANI COALITION, a) Civil No.
Hawai‘i nonprofit corporation; NĀ ‘IMI)
PONO, a Hawai ‘i unincorporated) COMPLAINT FOR A
association; and KĪPUKA, a Hawai‘i) DECLARATORY JUDGMENT AND
unincorporated association,) INJUNCTIVE RELIEF; SUMMONS
)
Plaintiffs,)
)
v.)
)
DONALD H. RUMSFELD, Secretary)
of Defense; and LES BROWNLEE,)
Acting Secretary of the United States)
Department of the Army,)
)
Defendants.)
_____)

COMPLAINT FOR A DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs ‘Īlio‘ulaokalani Coalition, Nā ‘Imi Pono, and Kīpuka complain of
defendants as follows:

INTRODUCTION

1. This action seeks an order compelling compliance by the Secretary of Defense and the Secretary of the United States Department of the Army (hereinafter referred to collectively as “defendants”) with the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 et seq., prior to carrying out any activities related to the transformation of the 2nd Brigade, 25th Infantry Division (Light) to a Stryker Brigade Combat Team (“SBCT”) in Hawai‘i. Defendants know that transformation of the 2nd Brigade in Hawai‘i poses significant threats to the cultural and biological treasures found on O‘ahu and Hawai‘i Island, yet defendants have refused to consider any alternate locations for transformation in the environmental impact statements prepared for this project. Allowing defendants to proceed with transformation in Hawai‘i without a legally adequate alternatives analysis would violate NEPA’s fundamental purpose: to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added).

JURISDICTION AND VENUE

2. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to 5 U.S.C. §§ 701-706 (actions under the Administrative Procedure Act (“APA”)); 28 U.S.C. § 1331 (actions arising under the laws of the

United States); 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform his duty); and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

3. Venue lies properly in this judicial district by virtue of 28 U.S.C. § 1391(e) because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority, a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, and plaintiffs ‘Īlio‘ulaokalani Coalition, Nā ‘Imi Pono, and Kīpuka reside here.

PARTIES

A. Plaintiffs

4. Plaintiff ‘Īlio‘ulaokalani Coalition is a Hawai‘i non-profit corporation, whose members consist of kūpuna (elders), their ‘ohana (families), loea (cultural experts), kumu hula (master teachers of Hawaiian dance), halau hula (Hawaiian dance schools), artists, craftspeople, fishers, farmers, students, environmentalists, and others who make Hawai‘i their home. ‘Īlio‘ulaokalani’s mission is to preserve and protect Native Hawaiians’ traditional way of life and ancestral rights and the integrity of Hawai‘i’s cultural environment. ‘Īlio‘ulaokalani’s purpose is to link and apply traditional Hawaiian cultural principles, practices and skills to effect

educational, social, environmental and economic change for the betterment and advancement of Native Hawaiians and the community at large.

5. 'Īlio'ulaokalani's members reside, work and recreate on all islands in the Hawaiian archipelago. It is 'Īlio'ulaokalani's kuleana (responsibility) to advocate for the protection of all of those lands that our people access in the process of exercising their cultural practices and gathering rights, including lands that would be adversely affected by transformation in Hawai'i of the 2nd Brigade of the 25th Infantry Division (Light).

6. Plaintiff Nā 'Imi Pono is a Hawai'i unincorporated association whose members are Native Hawaiian cultural practitioners. Nā 'Imi Pono and its members are committed to the protection, preservation, and perpetuation of Native Hawaiian culture, traditional and customary practices, cultural sites and resources. Nā 'Imi Pono's goals include the protection, restoration, and ultimate return of lands in Hawai'i currently under control of the U.S. Army, in a condition that is appropriate to allow for Hawaiian traditional and customary uses.

7. Nā 'Imi Pono and its members are actively working to protect and restore Hawaiian cultural sites on all islands in the State of Hawai'i, including on lands under defendants' control that would be affected by transformation-related activities. Its members have participated in the construction of ahu (altars) at Mākua, Kahanahāiki and Ko'iahi Valleys on Mākua Military Reservation, 'Iolani Palace, Kaho'olawe, and the State Capitol. Its members have conducted

repatriation and reburial of 'iwi kupuna (ancestral bones) throughout the State of Hawai'i, including on lands under defendants' control that would be affected by transformation.

8. Plaintiff Kīpuka is a Hawai'i unincorporated association whose members are young Native Hawaiians. Kīpuka's mission is to preserve and perpetuate Hawaiian culture through mālama 'āina, fighting for Native Hawaiian access rights, and educating and involving the public, especially the youth, in these issues.

9. Members of the plaintiff organizations possess direct lineal and cultural ties to lands currently under defendants' control or proposed for acquisition that would be adversely affected by transformation-related activities, including, but not limited to, Kawaihāpai (Dillingham Military Reservation) and Wai'anae Uka (Schofield Barracks Military Reservation).

10. To carry out traditional and customary practices including, but not limited to, caring for family grave sites and gathering resources such as lau kī (ti plant), lama and lā'au lapa'au (medicinal plants), and otherwise perpetuate the Hawaiian culture, plaintiffs and their respective members use and depend on the cultural sites, areas of traditional importance and native ecosystems in areas that defendants propose to acquire to carry out the transformation of the 2nd Brigade of the 25th Infantry Division (Light). Moreover, plaintiffs and their respective members intend to use lands currently under defendants' control for such purposes,

as soon as those lands are returned to the people of Hawai‘i or access is otherwise secured.

11. Plaintiffs and their respective members conduct cultural training and education programs to assist with the perpetuation, understanding, and protection of Native Hawaiian cultural sites and traditional and customary practices, including those sites and practices found on lands slated for transformation.

12. As Native Hawaiians, plaintiffs’ members recognize that all things in nature have mana (spiritual power). Plaintiffs and their respective members have, and accept, the kuleana to protect the native ecosystems – and the species that rely upon them – threatened by construction and operational activities associated with defendants’ proposed transformation of the 2nd Brigade. Plaintiffs’ members’ spiritual well-being is derived from their relationship with the natural world and from fulfilling their kuleana.

13. Because of the significant impact on Hawaiian cultural sites, traditional and customary practices, and native ecosystems associated with defendants’ proposed transformation of the 2nd Brigade into a Stryker Brigade in Hawai‘i, plaintiffs’ and their members have actively participated in all stages of the NEPA process. At both the scoping phase and in comments on the draft environmental impact statement, plaintiffs and their members urged defendants to consider alternatives to transformation in Hawai‘i, including, but not limited to,

carrying out transformation of the 2nd Brigade to a SBCT at locations outside the State of Hawai‘i.

14. Plaintiffs and their respective members intend to continue their efforts to protect and restore all lands currently under defendants’ control, as well as the additional lands proposed for expansion of military activities in connection with transformation of the 2nd Brigade into a Stryker Brigade and, whenever possible, to increase and expand their use of those lands. The above-described religious, cultural, environmental, traditional and customary, and educational interests of plaintiffs and their respective members, have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by the refusal of defendants to comply with NEPA, as is more fully set forth below. The individual interests of plaintiffs’ members as well as their organizational interests are thus directly and adversely affected by defendants’ unlawful actions.

B. Defendants

15. Defendant Donald H. Rumsfeld is the Secretary of Defense, and is sued herein in his official capacity. He has the ultimate responsibility to ensure that the Army’s actions conform to the requirements of our nation’s environmental laws, including NEPA. If ordered by the Court, Secretary Rumsfeld has the authority and ability to remedy the harm inflicted by defendants’ actions.

16. Defendant Les Brownlee is the Acting Secretary of the United States Department of the Army, and is sued herein in his official capacity. He has the responsibility to ensure that the Army's actions conform to the requirements of our nation's environmental laws, including NEPA. If ordered by the Court, Acting Secretary Brownlee has the authority and ability to remedy the harm inflicted by defendants' actions.

STATUTORY FRAMEWORK:
THE NATIONAL ENVIRONMENTAL POLICY ACT

17. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its fundamental purpose is to ensure that the environmental impacts of federal agency actions are scrutinized before such actions are carried out and environmental damage occurs.

A. Obligation to Prepare Environmental Impact Statements

18. NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "Major federal actions" subject to NEPA include "new and continuing activities" with "effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The "human environment" includes "the natural and physical environment and the relationship of people with that environment." Id. § 1508.14.

Effects that must be considered in an EIS include ecological, aesthetic, historic, cultural, economic, social, and health effects, whether direct, indirect, or cumulative. Id. §§ 1508.8, 1508.25.

19. “The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” Id. § 1502.1. An EIS must “provide full and fair discussion of significant environmental impacts and [must] inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” Id.

20. An EIS must discuss, among other things: the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable commitment of resources involved in the proposed action. 42 U.S.C. § 4332(2)(C).

21. The alternatives section “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. In this section, agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” devoting “substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits.” Id. § 1502.14 (a), (b). The core purpose of the

alternatives analysis is to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” Id. § 1502.14.

22. EISs must “serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 C.F.R. § 1502.2(g); see also id. § 1502.5; 32 C.F.R. pt. 651, app. E, § (a)(4).

B. Tiering

23. NEPA’s implementing regulations define “tiering” as “the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.” 40 C.F.R. § 1508.28.

24. NEPA’s regulations encourage agencies “to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review.” Id. § 1502.20.

C. Procedures for Preparing Environmental Impact Statement

25. Preparing an EIS provides important opportunities for public involvement in federal agencies’ decision-making process. After publishing in the

Federal Register a Notice Of Intent to prepare an EIS, an agency normally must invite the public to participate in “scoping,” which is “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” Id. § 1501.7.

26. The agency then prepares a draft EIS in accordance with the scope decided upon in the public scoping process and circulates the draft EIS for public review. Id. §§ 1502.9(a), 1502.19. The agency must seek public comments on the draft EIS, “affirmatively soliciting comments from those persons or organizations who may be interested or affected.” Id. § 1503.1(a)(4).

27. The agency must “assess and consider comments [on the draft EIS] both individually and collectively” and respond to these comments in the final EIS. Id. § 1503.4(a); see also id. § 1502.9(b). “Possible responses are to”:

- (1) Modify alternatives including the proposed action.
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
- (3) Supplement, improve, or modify its analysis.
- (4) Make factual corrections.
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency’s position

Id. § 1503.4(a).

28. The agency must file the final EIS with the Environmental Protection Agency, which then publishes in the Federal Register a notice of filing. Id. §§ 1506.9, 1506.10(a). The agency must wait at least thirty days after publication of this notice before making a decision on the proposed action. Id. § 1506.10(b)(2).

29. At the time of its decision, the agency prepares a concise, public record of decision (“ROD”). Among other things, the ROD describes and explains the basis for the agency’s ultimate decision, discusses all alternatives considered, and states whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why. Id. § 1505.2.

30. Until an agency issues a ROD, it cannot take any action concerning the proposal that would:

- (1) Have an adverse environmental impact; or
- (2) Limit the choice of reasonable alternatives.

Id. § 1506.1(a).

BACKGROUND FACTS

A. Programmatic EIS for Army Transformation.

31. On October 12, 1999, the Secretary of the Army and the Chief of Staff of the Army articulated a vision to position the Army to meet the demands of the 21st century: “Soldiers on Point for the Nation . . . Persuasive in Peace, Invincible in War.” This “Army Vision” provides for an Objective Force that has the

characteristics of being more responsive, deployable, agile, versatile, lethal, survivable, and sustainable than today's Army.

32. In February 2002, pursuant to NEPA, the Department of the Army issued a final programmatic environmental impact statement ("PEIS") to evaluate the Army's proposed "multiyear, phased, and synchronized program of transformation" to achieve the Army Vision. The Army proposed to conduct, over a thirty-year period, a series of transformation activities during an Initial Phase, an Interim Capability Phase, and an Objective Force Phase. The proposed transformation "would affect most, if not all, aspects of the Army's doctrine, training, leader development, organizations, installations, material, and soldiers."

33. The PEIS stated that the purpose and need for this fundamental overhaul was "to enable the Army to achieve the force characteristics articulated in the Army Vision in the most timely and efficient manner possible and without compromising readiness and responsiveness."

34. Based on the Army's determination that it needed to change to meet new national security requirements, the PEIS examined in detail only two alternatives: the proposed action and a "no action" alternative.

35. As proposed, transformation of the Army would occur in three major phases. The Initial Phase, already underway at the time the PEIS was issued and now completed, involved transformation of two units stationed at Fort Lewis in Washington State – the 1st Brigade of the 25th Infantry Division (Light) and the 3rd

Brigade of the 2nd Infantry Division – to Initial Brigade Combat Teams, an infantry unit using the wheeled, armored Stryker vehicle to transport soldiers to areas of conflict. The purpose of the Initial Phase was to validate an organizational and operational model for the new brigade combat teams, which the PEIS referred to as “Interim Brigade Combat Teams” and defendants now call “Stryker Brigade Combat Teams.”

36. In the second phase of Army transformation, or “Interim Capability Phase,” the Army would field five to eight SBCTs, including the two brigades at Fort Lewis transformed during the Initial Phase.

37. The third phase of Army transformation is the “Objective Capability Phase,” whose major goal is to transform the SBCTs and the remaining Army forces into the Objective Force itself. The Objective Force would be equipped with an as-yet undefined “Future Combat System” and would be trained to achieve the capabilities set forth in the Army Vision.

38. The PEIS stressed:

The scope of this PEIS is necessarily broad. Its breadth is commensurate with the lengthy planning horizon and diverse array of actions associated with transformation. It is being initiated early in a 30-year process of change. Future combat systems have not yet been developed. Knowledge of specific activities and related time frames and locations is imprecise.

39. The PEIS noted that the Army was still “studying the exact number and sequence in which brigades, higher echelons, and other Army elements would transform.” It stated:

The Army soon plans to identify certain brigades to be included in the Interim Force. The installations at which these brigades would live and train are the locations where the potential environmental effects of transformation would first arise. Identifying environmental and socioeconomic parameters at those installations most likely to be involved in early transformation activities that have a potential for adverse effects will enable the Army to include these considerations in performing detailed planning, as well as in making decisions that best support both environmental stewardship and transformation objectives while meeting national security requirements.

40. The PEIS then “tentatively identified” the 2nd Brigade of the 25th Infantry Division (Light) as one of four Army units to be transformed as part of the Interim Force.

41. Consistent with its broad scope, the PEIS analyzed the potential environmental and socioeconomic impacts of transforming the entire Army at the programmatic level; it did not present any site-specific analysis of the impacts associated with transforming the 2nd Brigade to a SBCT in Hawai‘i. Similarly, the PEIS did not evaluate alternatives to transformation of the 2nd Brigade in Hawai‘i. Rather, the PEIS noted:

In implementing the proposed action over the next three decades, the Army would make many other decisions that would enable or foreclose alternatives that might be applicable to subsequent decisions. As the Army prepares for these decisions on transformation, actions and activities will be evaluated as to their potential for affecting the environment and additional impact analyses

will be completed where appropriate. Some of those analyses would be tiered from this PEIS.

42. On April 11, 2002, the Army signed a ROD for the PEIS indicating its decision to proceed with “its preferred alternative, implementation of a multiyear, phased, and synchronized program of transformation” of the entire Army.

43. In the PEIS ROD, the Army confirmed the selection of the 2nd Brigade of the 25th Infantry Division (Light) as one of four additional brigades to be converted to SBCTs.

44. The PEIS ROD affirmed that “[a]ctions at these installations to implement Army Transformation, including conversion of each of these four units to [SBCT] status, shall be subject to appropriate evaluation of potential environmental effects in accordance with the National Environmental Policy Act.”

B. EIS for Transformation of the 2nd Brigade in Hawai‘i.

45. From April 8 to June 15, 2002, the Army held open a public scoping period on its proposal to transform the 2nd Brigade to a SBCT in Hawai‘i. During the scoping period, numerous citizens concerned about the significant potential impacts associated with transformation in Hawai‘i urged the Army to consider alternatives that would involve relocating the 2nd Brigade to various installations in the continental United States to undergo transformation there. Suggested

alternatives included, but were not limited to, moving the 2nd Brigade to Fort Lewis, Washington, where it would join the 25th Infantry Division's 1st Brigade. The commenters noted that the 1st Brigade, which the Army had moved to Fort Lewis from Hawai'i in 1995 as part of an Army-wide reorganization, was already in the process of transforming to a SBCT as part of the Interim Force.

46. In October 2003, the Army announced the availability for public review of the draft EIS ("DEIS") for transformation of the 2nd Brigade.

47. In the DEIS, the Army considered only three alternatives in detail: (1) the Army's preferred alternative of transforming the 2nd Brigade to a SBCT in Hawai'i, with associated facility construction and acquisition of approximately 24,400 acres of new military training land; (2) a "reduced land acquisition" alternative, identical to the preferred alternative except for the location of one training range and the reduction of new land acquisition by approximately 1,300 acres (to approximately 23,100 acres); and the "no action" alternative.

48. The DEIS identified seven major Army installations in the western United States devoted to training U.S. Army forces command units, including three installations – U.S. Army, Alaska; Fort Lewis; and Fort Polk – already undergoing transformation to receive SBCTs. The DEIS completely failed, however, to mention, much less consider, the alternative the public repeatedly urged in the scoping period: relocating the 2nd Brigade to the continental United States to undergo transformation there.

49. During the comment period on the DEIS, the public repeatedly criticized the Army's refusal to consider relocating the 2nd Brigade to undergo transformation at locations other than Hawai'i and urged the Army to analyze such alternatives in either a revised DEIS or the final EIS ("FEIS").

50. The Army issued the FEIS for transformation of the 2nd Brigade in May 2004.

51. The FEIS considered only three alternatives in detail: (1) the preferred alternative, (2) the "reduced land acquisition" alternative, and (3) the "no action" alternative. The FEIS acknowledged that proceeding with the preferred alternative would have significant, unavoidable impacts to cultural resources, native ecosystems, endangered species, air quality, recreation, noise levels, and soils.

52. Like the DEIS, the FEIS failed completely to consider any alternative involving relocating the 2nd Brigade to the continental United States to undergo transformation there.

53. On July 7, 2004, the Army issued its ROD for the FEIS, deciding to proceed with its preferred alternative of transforming the 2nd Brigade to a SBCT in Hawai'i.

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CLAIM FOR RELIEF

54. Plaintiffs reallege, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

55. Defendants have failed to prepare a legally adequate EIS for the transformation of the 2nd Brigade to a Stryker Brigade Combat Team. Both the PEIS and the FEIS fail to consider all reasonable alternatives to transforming the 2nd Brigade in Hawai‘i, including, but not limited to, alternatives involving relocating the brigade to the continental United States to undergo transformation there. In addition, the PEIS fails to analyze any site-specific impacts associated with transforming the 2nd Brigade in Hawai‘i.

56. Defendants’ decision to go forward with transformation of the 2nd Brigade in Hawai‘i in the absence of a comprehensive and adequate EIS that considers all reasonable alternatives and/or analyzes all site-specific impacts violates NEPA, 42 U.S.C. § 4332, NEPA’s implementing regulations, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief as follows:

1. For a declaratory judgment that defendants have violated and are violating the National Environmental Policy Act by proceeding with the transformation of the 2nd Brigade of the 25th Infantry Division (Light) to a Stryker

Brigade Combat Team in Hawai‘i in the absence of a comprehensive and adequate EIS that considers all reasonable alternatives and/or analyzes all site-specific impacts.

2. For appropriate preliminary and permanent injunctive relief to ensure that defendants fully comply with NEPA, its implementing regulations, and the APA and to avoid irreparable harm to plaintiffs and Hawai‘i’s environment until such compliance occurs, including, but not limited to, enjoining defendants from proceeding with any land acquisition, contract awards, grading, grubbing, construction, training, or any other activity associated with the proposed transformation in Hawai‘i of the 2nd Brigade of the 25th Infantry Division (Light), at least for the duration of defendants’ noncompliance.

3. For the Court to retain continuing jurisdiction to review defendants’ compliance with all judgments and orders entered herein.

4. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing.

5. For an award of plaintiffs’ costs of litigation, including reasonable attorneys’ fees; and

6. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between plaintiffs and defendants.

DATED: Honolulu, Hawai'i, August 17, 2004.

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