

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NOA EMMETT ALULI, et al.,

Plaintiffs,

vs.

HAROLD BROWN, Secretary of
Defense, et al.,

Defendants.

CIVIL NO. 76-0380

CONSENT DECREE AND ORDER

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

JUL 1 1980

at 9 o'clock and 15 min. P.M.
WALTER A. Y. H. CHINN, CLERK

CONSENT DECREE

By agreement between the parties in the above-entitled action, this Consent Decree is entered as a final judgment without any adjudication of any issue of fact or law herein and without any admission of fault or legal obligation. This Consent Decree is entered into by the parties to preclude further litigation of any claims, (except as indicated in section V.C., infra.), in the above-entitled case relating to the Defendants' use of the Island of Kaho'olawe and its surrounding waters (hereinafter referred to as Island or Kaho'olawe). Except as herein specifically provided, this Consent Decree shall not be construed as a waiver or limitation of any right under any provision of law or the Constitution, other than by litigation of claims asserted in this action, to bring about termination of the use of live and inert ordnance on Kaho'olawe.

I.

LAND MANAGEMENT PLAN

A. Soil Conservation

1. The goal of the Defendants' land management

REPRODUCED AT GOVERNMENT EXPENSE

plan for Kaho'olawe is to eliminate erosion and implement a reforestation program. To achieve this goal, Defendants will adopt and fully implement the soil conservation program (SCS Program) described in Appendix A, a program developed by the Soil Conservation Service (SCS). The Navy will commit at least two hundred (200) man-days per year to fully implement the SCS Program. An agreement has been executed with the SCS to provide continuing consultation and assistance. See Appendix B.

2. The SCS Program will be reevaluated for its adequacy by the parties, at least annually, and adjusted and/or modified accordingly, including appropriate adjustments in man-days committed per year, to insure optimum effectiveness in restoring and preserving the island's natural environment. Defendants agree to continue the SCS Program or some other program approved by the parties so long as the Defendants continue to use the Island for military purposes.

3. Defendants recognize that Plaintiffs' organization seeks to act as stewards of the moku Kaho'olawe. Accordingly, efforts to supplement the soil conservation on Kaho'olawe by members of the Plaintiffs' organization or their representatives will be permitted by the Defendants in accordance with provisions in section V, infra.

B. Goat Control

1. Defendants, in cooperation with the Department of Land and Natural Resources, State of Hawaii, will pursue the goal of eliminating all cloven-hooved animals from Kaho'olawe and will insure that the number of such animals on the island at any given time does not exceed two hundred (200).

Defendants will commit at least one hundred (100) man-days semi-annually (two hundred (200) man-days per year) to the goat eradication program.

2. At the end of a six-month period from the date of the signing of this document, and every six months thereafter until the goat population is eradicated, the Defendants' goat control efforts will be reevaluated by the parties and if there is any evidence that more than two hundred (200) goats remain, the Defendants shall take appropriate action to adjust the method and/or the amount of man-days to be extended to accomplish the goal.

C. Consultation

Defendants will continue to consult with interested federal, state and local agencies and shall consider all reasonable proposals submitted by said agencies in an effort to improve the effectiveness of their land management plan for Kaho'olawe. Defendants shall file copies of said proposals, reports and implementation plans with the Court. In particular, Defendants' activities and progress in the area of air pollution may be monitored by the Department of Health, State of Hawaii.

D. Clearance

Compatible with Defendants' obligation pursuant to Executive Order 10436 to restore the Island of Kaho'olawe to a condition reasonably safe for human habitation when it is no longer needed for naval purposes, Defendants agree to remove surface ordnance from approximately ten thousand (10,000) acres of the surface of Kaho'olawe which are deemed by Plain-

tiffs to be of significance in restoring the religious, cultural, historic and environmental values of Kaho'olawe. This removal of ordnance shall be accomplished by Defendants providing a minimum of two (2) complete Explosive Ordnance Disposal (EOD) teams (at least eight (8) persons total) for a period of at least ten (10) days per month. Defendants agree that military personnel other than Explosive Ordnance Disposal personnel shall be permitted to assist the EOD teams in the removal of ordnance. The work shall be done in accordance with the plan set forth in Appendix C.

II.

OCEAN MANAGEMENT PLAN

A. Ordnance in Water

The Defendants will conduct military operations at Kaho'olawe in a manner that will prevent the intentional delivery of ordnance in the waters surrounding Kaho'olawe except when emergency jettisoning is necessary to protect human life. Such emergency jettisoning will be made in the vicinity of the restricted area two to three miles south of Kaho'olawe, if safety considerations permit. Military operations will be planned and conducted in a manner that minimizes the accidental delivery of ordnance in the waters surrounding Kaho'olawe. In the event live ordnance is jettisoned into waters adjacent to beach access areas on Kaho'olawe, where its presence may endanger human life, Defendants promptly shall disarm or detonate such live ordnance and shall remove disarmed ordnance from the water.

B. Documentation

Defendants will document and memorialize all in-

stances when ordnance is jettisoned or inadvertently enters the waters surrounding Kaho'olawe. Defendants promptly will file such documentation with the Court whenever such instances occur.

C. Shoreline Targets

The Defendants will not locate ship, aircraft or ground-to-ground targets within 800 yards (732 meters) of the shoreline.

D. Water Targets

The Defendants will not establish any water target within the restricted waters surrounding Kaho'olawe defined in 33 C.F.R. § 204.223.

III.

OPERATION CONTROLS

A. Types of Ordnance

Defendants will minimize the use of live ordnance at Kaho'olawe from all sources, including foreign users, by substituting inert, "puff" or similar non-high explosive ordnance to the maximum extent practicable. Defendants anticipate that by the late 1980's almost all ordnance used by ships firing on Kaho'olawe will be inert. Toward this end, the Defendants have set as their immediate goal the limiting of the expenditure of live ordnance as follows:

<u>TYPE</u>	<u>AMOUNT</u>
Ships Gunfire Support	25% live ordnance (annual)
Air	25% live ordnance (annual)

In the event the Secretary of the Navy determines that the interests of national security necessitate increased

use of live ordnance on Kaho'olawe, Defendants may increase the use of live ordnance only to the minimum extent and duration necessary. Defendants will maintain records to document the expenditure of live and inert ordnance by types noted above which shall be filed with the Court annually for the next ten years and upon request of the Plaintiffs thereafter. These records also shall list foreign users and shall identify the type of ordnance expended. In the event the above-stated goals are not met, the annual report filed with the Court shall contain an explanation for the deviation.

B. Chemical and Biological Warfare Training

Defendants will not use nor store on Kaho'olawe weapons which release biological warfare agents or chemical gases designed to have lethal or damaging effects on human, plant or animal life.

C. Noise

1. Atmospheric sound propagation from Kaho'olawe exercise areas and acoustic overpressures on Maui are forecast twice daily from the available meteorological data and a computerized sound intensity prediction system. If forecast overpressure occurs from 10 to 25 db above the ambient background noise levels in the expected sound convergence zone on Maui, the expenditure of aircraft delivered high-explosive ordnance of 250 pounds or greater will be discontinued, unless extremely unusual training requirements dictate otherwise. (Extremely unusual training requirements include times of international emergency which require training on Kaho'olawe or when non-Hawaii homeported units are preparing

for forward deployment, on limited time schedules, where the anti-noise restrictions above have been considered throughout the total time available for training.)

2. All dates when operations are discontinued because of atmospheric conditions will be documented. Furthermore, any deviations from the above restrictions caused by extremely unusual training requirements also will be documented and filed with the Court annually for the next ten (10) years and upon request of the Plaintiffs thereafter. Such documentation shall include the time and reason for such deviation.

3. In the event Maui County passes noise control regulations, the parties will reevaluate the above noise restrictions with the goal of complying with the standards set forth therein.

4. The Defendants' activities and progress in the area of noise control may be monitored by the Department of Health, State of Hawaii.

D. Times

Training operations involving ordnance delivery from ships, aircraft or artillery will be conducted between the hours of 0700 and 2200. Extremely unusual training requirements may cause minor deviations from this schedule. If so, such deviations will be documented and filed with the Court annually for the next ten (10) years and upon request of the Plaintiffs thereafter. (Extremely unusual training requirements include such situations as described in section III.C.1, supra.)

E. Other Controls

1. All military users of Kaho'olawe will submit to Commander, Fleet Training Group, and to Commander THIRD Fleet for approval Standard Operating Procedures (SOP) for Kaho'olawe. SOP's must include measures to prevent adverse impact to archaeological sites on Kaho'olawe which appear to the Defendants to be eligible for nomination or are placed on the National Register of Historic Places.

2. Only discrete targets are approved for ordnance delivery. Indiscriminate fire on targets of opportunity shall not be permitted. Targets must be approved by Commander THIRD Fleet and not by controllers on the scene.

3. Only targets specifically designated for aircraft will be used for aircraft ordnance delivery. All pilots will have observed a given target during day operations prior to night operations. No drops will be made unless the target can be seen.

4. Commander THIRD Fleet shall maintain approval authority over all ordnance delivery at Kaho'olawe.

F. Use of Cleared Areas and Kealaikahiki

1. Commencing with the areas cleared pursuant to section I.D of this Decree, to the maximum extent possible, the Island of Kaho'olawe shall be used for religious, cultural, scientific and educational purposes.

2. Defendants agree not to use Kealaikahiki or the areas cleared in accordance with section I.D for targets for the impact of live or inert ship, aircraft or artillery fired ordnance. Furthermore, Defendants' use of Kealaikahiki or

the areas cleared in accordance with section I.D always shall be consistent with the archaeological significance of these areas and in accordance with the Navy's management plan for Kaho'olawe archaeological sites placed on the National Register of Historic Places.

IV.

ARCHAEOLOGICAL PLAN

A. Archaeological Survey

1. The stipulations filed with the Court on November 23, 1979, June 17, 1980, and November 13, 1980, are hereby adopted by reference as part of this Consent Decree.

2. The Defendants shall take all steps necessary, on or before August 17, 1980, to complete their submittal of the entire Island of Kaho'olawe to the Secretary of the Interior for a determination of whether the entire Island of Kaho'olawe is eligible for inclusion in the National Register.

B. Additional Interim Actions

Pending a final determination by the Keeper of the National Register on the eligibility or nomination of sites for inclusion in the National Register, Defendants shall take the following additional interim actions in regard to sites which appear to Defendants to be eligible for inclusion:

1. Surround sites in areas used by ground troops with temporary markers which will be approximately five meters from the perimeter of each site. These markers will be inspected prior to each ground exercise and repaired or replaced as necessary.

2. Ensure that ground troops using Kaho'olawe are instructed in the location and importance of archaeological sites and are made aware that they must avoid all marked areas, especially in areas such as the Kealaikahiki Point. Written instructions will be promulgated and implemented immediately to reinforce this training requirement.

3. Ensure that all field maps used by ground troops contain symbols representing the location of known archaeological sites.

C. Targets

1. Defendants shall prohibit the use of aircraft targets that are within 300 meters (330 yards) of archaeological sites and naval gunfire targets that are within 500 yards (457 meters) of archaeological sites. Furthermore, the Defendants will prohibit the use of any target within 700 meters (770 yards) of the Adz quarries (sites 108, 208, 210, 211, 383 and 384).

2. Defendants shall not maintain or establish ship or aircraft targets within 800 yards (732 meters) of the coast, as stated in section II.C, supra.

3. Defendants immediately will remove from service or relocate Target S-4 to insure that projectiles fired from ships do not ricochet into archaeological site 108.

D. Archaeological Management Plan

Following a nomination or determination of eligibility of archaeological sites by the Keeper of the National Register, the Defendants will submit a comprehensive management plan to the Advisory Council on Historic Preserva-

tion, in accordance with Section 106 of the National Historic Preservation Act 1966, as amended (16 U.S.C. 470), which details protective measures for all archaeological sites covered by the Keeper's determination. Pending comment on the management plan by the Advisory Council, the interim protective measures described in section IV.B, supra, will remain in effect.

The Environmental Impact Statement for Kaho'olawe Training Area filed by the Defendants on March 7, 1980, shall be supplemented further upon completion of the archaeological survey of Kaho'olawe, the determination by the Keeper of the National Register as to the significance of the sites found and the eligibility of the entire Island for inclusion in the National Register, and the implementation of the resulting management plan.

E. Volunteer Assistance

Defendants shall supply food, water and space available transportation for volunteer workers who assist in the archaeological work on the Island of Kaho'olawe in accordance with section IV.

F. Burial Sites

Defendants immediately shall authorize and implement a program to stabilize eroding human burial sites on the Island of Kaho'olawe. Any action to be taken primarily for the protection, removal or reburial of human remains shall be developed in consultation with representatives of the Plaintiffs' organization. Plaintiffs shall be entitled to conduct appropriate religious ceremonies in connection with such protection, removal or reburial. Such religious ceremonies

shall be conducted where practicable during the religious access periods set forth in section V, infra.

G. Eroding Sites

In developing their soil conservation plans as discussed in section I.A., supra, Defendants also shall take steps to protect from erosion those archaeological sites which are considered to be eligible for listing in the National Register.

H. Display of Artifacts

Unless otherwise agreed between the parties, the archaeological objects, which for protective reasons, have been or should be taken from the Island of Kaho'olawe, shall be preserved, stored and/or displayed at Ho'ike'ike Museum on the Island of Maui.

V.

ACCESS

A. Minimum (Base Line) Access

The Navy will set aside no less than ten consecutive days per month for all non-training purposes including religious, cultural, scientific and environmental purposes. During these ten days, for ten months out of each year, Defendants will set aside ten monthly periods for Plaintiffs' accesses to the Island. The parties shall agree upon which two months each year access shall not take place. The monthly periods of Plaintiffs' accesses will begin at sunrise and end two hours before sunset on the fourth consecutive day. Access will be for forty-five members of the Plaintiffs'

organization for each access period, except that during the months of June, July, August and September, access will be for seventy-five members of Plaintiffs' organization. Numbers in excess of forty-five during the months of June, July, August and September may only be suspended in the event discussions in accordance with section V.B.1., infra, dictate such suspension but will be resumed when group safety can be assured. Further, in the remaining six days during each ten-day period, Plaintiffs' requests for access will be considered along with other non-training purposes.

It is understood that there occasionally will be a chosen month during which no access for members of the Plaintiffs' organization or its representatives can be granted because of incompatible conservation activities that would create an unacceptable danger to access participants. In the event access to the Island is denied in any given chosen month, the Defendants shall grant compensatory access, equal to the access denied, not to exceed four days, during the following six months or expand the number of participants to twice the number allowed. Defendants shall choose the type of compensatory access. In addition, the reasons for denial of access shall be provided promptly by the Defendants to the Plaintiffs in writing. Defendants recognize that access during the months of June, July, August, September and October is most important to the Plaintiffs.

B. Access Rules

Access will be subject to the following:

1. Access will be subject to conditions imposed by Commander THIRD Fleet necessary and appropriate to ensure the safety of the access participants. Violations of these conditions will be subject to consultation between attorneys for the parties for the purpose of determining appropriate corrective measures.

2. Access will be provided at no cost to the government.

3. The number and qualifications of safety escorts will be determined by Defendants who shall provide sufficient numbers for reasonable access outside of the base camp area.

C. Access In Excess of Minimum (Base Line) Access

Commencing with the effective date of this Consent Decree, access in excess of minimum (base line) access provisions shall be negotiated every six months. Negotiations shall be guided by relevant factors, including the religious needs of the Plaintiffs and the relative degree of clearance. In the absence of agreement, either party may ask the Court to determine the legal rights and obligations of the parties respecting access under applicable law, but the Court's determination shall not affect Plaintiffs' minimum (base line) access rights under paragraph A of this section.

D. Scientific Access

In accordance with the provisions of this section, the Defendants will permit access to Kaho'olawe to government agencies and to other organizations and individuals who are interested in conducting water, agricultural, wildlife or

other environmental projects and investigations on the Island or its surrounding waters provided they are approved by the Environmental Center of the University of Hawaii or other appropriate University Department. Defendants promptly shall file copies with the Court of all findings, reports, proposals and/or plans of said agencies, organizations and individuals.

VI.

MISCELLANEOUS

A. Endangered Species

Any evidence of endangered or threatened species on or near Kaho'olawe will be brought to the attention of cognizant agencies and the Defendants immediately shall commence consultation under Section 7 of the Endangered Species Act. Any species found on Kaho'olawe which appears to qualify for listing as an endangered or threatened species and the habitat of such species will be protected pending its submission for inclusion on the list of Endangered/Threatened Species, and the Defendants promptly shall file notice with the Court of the existence of any such endangered or threatened species.

B. Humpback Whales

The Defendants will continue to consult with National Marine Fisheries Service, U.S. Department of Commerce, regarding humpback whales which frequent the waters near Kaho'olawe. Defendants promptly shall file copies with the Court of all findings, reports, proposals, and/or plans regarding the humpback whale in the waters surrounding the Island.

C. Volunteers

The Defendants shall not inhibit the use of members of the Plaintiffs' organization as volunteers in activities conducted on the Island in accordance with section V.D. Furthermore, Defendants shall advise sponsors of such activities of the availability of members of the Plaintiffs' organization to serve as volunteers.

D. Freedom of Information

Except as otherwise provided herein, information documented or memorialized by the Defendants as noted above will be made available to the public pursuant to requests made under the Freedom of Information Act.

E. Attorney Fees/Costs

The parties each agree to assume their own costs, fees and expenses which they have incurred as a result of this case.

F. Definitions

Wherever findings, reports, proposals, and/or plans are required to be filed with the Court or supplied or exchanged by the parties to this Consent Decree, service shall be on counsel for the receiving party:

Plaintiffs: Protect Kaho'olawe 'Ohana
c/o Legal Aid Society of Hawaii
1164 Bishop Street, Suite 1100
Honolulu, Hawaii 96813

Defendants: United States Attorney
Prince Kuhio Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

G. Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling either party to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the enforcement of compliance with the terms of this Consent Decree.

Entry consented to by the parties through their respective attorneys.

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ORDER

It is so ordered. 12/1/80

William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Court Judge
District of Northern California