Controlling Harmful Non-native Plants at Local Levels: Private Rights and the Public Good

Bill D. Nelson

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal

Part of the Environmental Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol4/iss1/7
I. Introduction

"Ua mau ke ea o ka aina i ka pono"
(The life of the land is perpetuated in righteousness.)

Perpetuating the "life of the land" is a central theme of the environmental movement and the driving force behind much of the environmental legislation at all levels of government. Over the last twenty years, much of the legislation (and litigation) has focused on control of toxic materials or leaving natural areas undeveloped and unexploited. There are times when "righteousness" must assume a directly active stance against harmful living things, if the "life of the land" is to be perpetuated. And there are times when this "righteousness" may conflict with private property rights. The focus of this note is the power of state or local government to protect ecosystems actively by destroying non-native, invasive plant or animal species, specifically when this requires intrusion onto private property.

It seems paradoxical to advocate leaving natural areas alone while encouraging entry onto any property for the express purpose of killing some species. Nonetheless, this is precisely the management scheme required to protect fragile ecosystems from invasive or harmful, non-native plant species. This sort of management is particularly well suited to state or local control, more than any existing or conceivable federal program. Such controls elicit very little resistance when applied to public lands, but when applied to private property, issues of privacy, due process, and takings could be raised. This is especially true in an era of strong public sentiment against government intrusions.

This note discusses application of state or local controls in controlling non-native plant species, particularly as they apply to private property, and how courts have viewed the issues of privacy, due process, and takings in analogous situations. While case law from several jurisdictions is reviewed (Florida and California in particular), the primary statutory focus of this note is on the State of Hawaii. For illustrative purposes, the note focuses on recent efforts there to combat a South American invader, *miconia calvescens* (miconia). The Hawaiian ecosystem is particularly vulnerable to invasive alien species and the state has statutory schemes in place to control the entry of alien species, as well as statutes empowering government agencies to eradicate pest species that somehow gain entry. While seldom utilized on private property, these eradication statutes are an increasingly important weapon in limiting the negative impact of alien pest species.

---

1. J.D., 1997, University of California - Hastings College of the Law. The author wishes to thank Suzanne Case and Alan Holt of the Nature Conservancy; his wife and son, Suzanne and Alex, for their surrenders of time; and, the staff and editors, especially Greg Whaling, of West-Northwest.

II. Background

Hawaiian species are particularly vulnerable to ecological invasions. While the Hawaiian islands comprise only two-tenths of one percent of the United States' total land area, three-quarters of the nation's extinct plants and birds once lived only in Hawaii. Today, more than a third of the plants and birds on America's endangered and threatened species list are in Hawaii. "By many measures, the Hawaiian Islands represent the worst-case example of the United States' non-indigenous species problem. No other area in the United States receives as many new species annually, nor has as great a proportion of non-indigenous species established in the wild."

The isolated evolution of the Hawaiian species led them to lose many of the defenses common to continental species. The islands of Hawaii are the most remote land mass in the world, separated from the continents by thousands of miles of ocean. Because of this, only a few hundred species originally arrived by sea or air. These in turn evolved into thousands of unique species prior to the first human settlement. There were no mammalian predators or grazers, no ants, mosquitoes or cockroaches, nor any snakes. The only mammals were a small insect-eating bat and the Hawaiian monk seal.

While habitat destruction has been and continues to be a main factor in the demise of the indigenous biota, non-indigenous species have been identified as an important, if not the most important, current threat. In some cases, a non-indigenous species can be the cause of habitat destruction. This is the situation presented by miconia calvescens. Dr. Ray Fosberg of the Smithsonian Institution has characterized miconia, a native of South and Central America, as "the one plant that could really destroy the native Hawaiian forest." Introduced to a botanical garden in Tahiti in 1937, miconia "escaped by bird carried seeds," and over sixty percent of the island is now heavily invaded with groves of miconia, replacing native forest and its wildlife. Botanists, returning from Tahiti with dire warnings, convinced the Hawaii Department of Agriculture (HDOA) to add the plant to its official noxious weed list in 1992. It is believed that prior to the listing, botanic gardeners brought miconia to Hawaii.

Miconia grows to heights of approximately sixty feet and has oval leaves almost a yard long. The velvety or shiny, dark green leaves are purple on the underside. Miconia can thrive in shade or sunlight. It produces such deep shade, however, that nothing else can grow under it. An additional problem for the environment is miconia's shallow root system which allows excessive soil erosion.

Sullivan noted, "For the most part, the principal threat to animals stems from destruction of their habitat." Id. at 30162 (1973) (statement of Rep. Sullivan). The Supreme Court recently agreed that habitat destruction was "harm" under the Endangered Species Act, as Justice O'Connor observed: "... the 'harm' regulation applies where significant habitat modification, by impairing essential behaviors, proximately (foreseeably) causes actual death or injury to identifiable animals that are protected ...." Babbitt v. SweetHome Chapter of Communities. For a Great Oregon, 115 S. Ct. 2407, 2420 (1995) (O'Connor concurring). Here we examine primarily non-human alien species, such as the feral goats or mouflon sheep discussed in the Palila case.

9. See HARMFUL NIS supra note 2, at 234.
11. Id.
12. Even non-scientists have recognized the dangers presented by habitat destruction and humans are perhaps the most destructive "non-indigenous" species. Congress acknowledged the effects of habitat destruction in floor statements during consideration of the Endangered Species Act. Senator Tunney noted: "Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been ... altered so that they are unsuitable environments for natural populations of fish and wildlife." 119 CONG. REC. 25669 (1973) (statement of Sen. Tunney). Similarly, Representative

14. See id.
16. See HARMFUL NIS, supra note 2, at 244-45.
17. See Conant, supra note 15.
19. See id.
Finally, the tree produces hundreds of small, pink fruits, each containing about 150 seeds. The fruit is attractive to some birds which spread the seeds great distances. The plant has been described as "the botanical equivalent of rabbits" because of these properties. Throughout this note, miconia will be used for illustrative purposes, especially in application of the relevant Hawaii statutes.

III. Local or State Response vs. Federal Response

Existing Federal statutes are not particularly well-suited for response to threats posed to ecosystems by alien species. While a part of a comprehensive plan, existing regulations, such as the Endangered Species Act (ESA) and the Lacey Act are directed toward preservation or prevention, which does not address the problem of invasion by non-native species.

A. Endangered Species Act

Probably the most widely discussed preservation-oriented statute is the ESA. The ESA seeks to use federal action to conserve endangered species by protecting the ecosystems upon which these species depend. While a comprehensive analysis of the ESA is beyond the scope of this note, some discussion illustrates its shortcoming in addressing invasive alien species.

The decision of the United States Supreme Court in Babbitt v. SweetHome Chapter of Communities for a Great Or. upheld the Secretary of the Interior’s definition of “harm” under the ESA to include “significant habitat modification or degradation that actually kills or injures wildlife.” Nonetheless, what constitutes “significant” is subject to judicial or agency interpretation.

In the case of a plant such as miconia, efforts to control it may be too late by the time habitat modification is deemed “significant.” The existence of a few isolated miconia trees in yards might not be considered a “significant habitat modification.” But when the seeds from those few trees are deposited, by the thousands, by birds into critical habitat areas, it would probably be both significant and too late. The experience of Tahiti with miconia supports this scenario.

This is the difficulty presented by a single tree on private property. A botanical garden or an individual's yard would not be described as “habitat” in a hypothetical ESA action to control miconia. Therefore, although a single tree on private property could produce thousands of seeds thereby affecting ecosystems beyond the confines of the property, the mere existence of the tree might not fall within the ambit of the ESA.

Finally, the many years required to litigate ESA claims limits its effectiveness in controlling such aggressive alien species. For example, in the Palila cases in Hawaii, the plaintiffs gave formal written notice of alleged violation of the ESA in June 1976. The first suit was filed in January 1978 and, following appeal from the Federal District Court, a decision affirming that court was signed in February 1981. Thus, it took nearly five years of litigation for the courts to require the Hawaii Department of Land and Natural Resources to remove harmful feral sheep and goats from an area deemed critical habitat for an endangered bird. Another alien specie, the mouflon sheep, was not the subject of the original suit, and a second series of adjudications was required to order their removal. This delayed protection of the habitat for an additional four years. If a single plant is capable of producing over 200,000 seeds per season, litigation over a period of years would seriously undermine control efforts.


22. See id.
23. HAPRFUL NIS, supra note 2, at 245.
30. See WANTED, supra note 13 and text accompanying note 14.
31. This was a series of cases and subsequent appeals brought by environmental groups on behalf of the Palilla, a bird, against the Hawaii Department of Land and Natural Resources.
32. See Palilla I, supra note 31.
33. See Palilla II, supra note 31.
34. See Palilla III and Palilla IV, supra note 31.
35. See id.
36. WANTED, supra note 13.
B. Lacey Act

The federal invasive species prevention strategy is best exemplified by the Lacey Act. The Act makes it unlawful to import, export, transport, sell or purchase fish, wildlife or plants taken, held or sold in violation of any law, treaty or regulation of the United States. But the Act’s regulations are very narrow in scope because they prohibit importing only the most egregious alien species. Except for fruits and vegetables, a species may be imported into the United States unless the Department of Interior has listed it as injurious. “However, by the time a species is listed as injurious, it may have been imported and subsequently escaped or released into the ambient environment.” This method of preventing the spread of alien species has limitations inherent in its approach to the problem.

The approach of the Lacey Act, to list injurious species, has been described as the “dirty list” approach. In 1976, the Department of Interior abandoned plans for a “clean list” approach which would have allowed introductions only upon a showing of low risk. The advantage of a “clean list” approach is that the burden of showing that an uninjured species is not harmful is placed on the importer or possessor of the species. Over half the states employ “dirty list” approaches, while Hawaii is the only state using a “clean list” system for both importation and release of all major fish and wildlife groups. Nonetheless, Hawaii’s wild non-indigenous plant species are approaching the number of indigenous species. Some additional controls are needed. Prevention mechanisms, such as the Lacey Act or Hawaii’s own stringent “clean list” system for fish and wildlife, have already failed when an alien species escapes into an existing ecosystem.

An additional limitation of the Lacey Act is that it applies only to intentional importations of alien species. Unintentional introductions of species have been and continue to be a significant problem.

C. Local or State Response

Almost all states maintain lists of weeds prohibited, for protection of agriculture, beyond those listed by the federal Noxious Weed Act. As noted above, over half employ “dirty list” approaches. “Relatively few states, however, have natural area weed laws, that is, plant prohibitions separate from agricultural quarantines. The lack of such prohibitions in most states has left them unable to address some harmful [non-indigenous species] ...”

Unfortunately, such listing programs are inadequately funded to undertake serious enforcement. Even California, the leading agricultural state, a rare state that employs both border agricultural inspect-
Landscaping and Leopold's Land Ethic Collide with Unenlightened Weed

Landscaping Takes Root We Must Weed Out the Bad Laws—How Natural because they are hardy enough to crowd out some decorative or sometimes indigenous species are listed as pest species, through any money damages awarded (after lengthy litigation). To have limited utility. It is also questionable whether a seriously public lands unbeknownst to investigators, tort liability appears gested approach, including problems in proving causation. The author acknowledges some potential difficulties with his solution to the problems associated with accidental introduction ally through strict liability in public nuisance suits, as another importation of particular [alien species]. See Daniel P. Larsen. In Invasion: The Role of Tort Liability, 5 DUKE ENV. L. & POL'Y F. 21 (1995). The author acknowledges some potential difficulties with his suggested approach, including problems in proving causation. See id. at 225. California detected three agriculturally significant new [non-indigenous species] in 1990. See id. at 225-27.

53. Id. at 229.

54. One observer has suggested use of tort liability, generally through strict liability in public nuisance suits, as another solution to the problems associated with accidental introduction of alien species. See Daniel P. Larsen, Combating the Exotic Species Invasion: The Role of Tort Liability, 5 DUKE ENV. L. & POL'Y F. 21 (1995). The author acknowledges some potential difficulties with his suggested approach, including problems in proving causation. See id. at 225. Vermont assesses treble damages against importers of illegal exotic animal species for expenses incurred in their control. See HAW. REV. STAT. ANN. § 141-3.6. This section of the statute was altered by amendment in 1996. See id. at 264. Florida has started a similar group supported with funding from the state and donated staff support from The Nature Conservancy of Hawaii, the Natural Resources Defense Council and the University of Hawaii Department of Regional and Urban Planning. Participants in the group include representatives from the above organizations as well as the U.S. Department of Agriculture, U.S. Customs service, U.S. Postal Inspection Service, U.S. Fish and Wildlife Service, U.S. National Park Service, the Hawaii Sugar Planters Association, Maui Pineapple Company, The U.S. Army, The U.S. Air Force, and others. See generally Action Plan, supra note 45.

57. Florida provides one model for coordinating efforts. When Florida found that environmental threats posed by non-indigenous water weeds were crossing political and jurisdictional boundaries, the Exotic Pest Plant Council (EPPC) was formed to coordinate efforts in developing management programs. EPPC is an organization of forty member agencies and groups, local and private. See id. at 230. There can also be problems with such laws. For example, sometimes indigenous species are listed as pest species, because they are hardy enough to crowd out some decorative or agricultural exotic species. See Bret Rappaport, As Natural Landscaping Takes Root We Must Weed Out the Bad Laws—How Natural Landscaping and Leopold's Land Ethic Collide with Unenlightened Weed Laws and What Must Be Done About It, 26 J. MARSHALL L. REV. 865 (1993).

58. HAW. REV. STAT. ANN. §§ 141-3, 141-3.5, 141-3.6 (Michie 1996).

59. See id. § 141-3.

60. See id. § 141-3.5.

61. See id. § 141-3.6. This section of the statute was altered by amendment in 1992. Previously, private landowners were not required to cooperate with eradication programs.
son's authority, or the person's negligence, gross negligence or intentional misconduct.”62 This section also provides that if entry is refused, a district court may issue a warrant directing police to assist the department or agent in gaining entry.63 Note that section 141-3.6 allows the Department of Agriculture to authorize any agent to enter onto private property in order to carry out the eradication program. This suggests that the state could authorize local officials or even private contractors to assist in carrying out the law.

The Plant Pest Control Branch (PPC) of the Hawaii Department of Agriculture’s Plant Industry Division has primary responsibility for controlling plant pests.64 Pursuant to statute, the Department has developed procedures to designate pest species as well as procedures for eradication and control of noxious weeds.65 The Department’s regulations define a noxious weed as “those plant species determined to be or likely to become injurious, harmful, or deleterious to the agricultural industry, forest and recreational areas, and conservation districts of the State and which are designated and listed as noxious weeds ...”66 Control or eradication activities may involve direct PPC action or cooperative agreement with landowners and lessees.67 Recent direct action, noxious weed eradication targets of the PPC have included turkeyberry, fountain grass, firetree and ivy-leaved gourd.68

V. Property Owner Objections

There are no reported cases in Hawaii of property owners objecting to plant pest eradication. Most designated pest plants are viewed as pests by the owners of the land as well as the Department of Agriculture. Nonetheless, some eradication efforts have been hampered because some private property owners have been hesitant to allow state crews onto their property.69 Miconia is frequently described as an attractive plant, and it is believed it was originally brought to the islands as an ornamental plant or specimen for botanical gardens.70 Perhaps because of a perceived value, miconia control may face resistance.

Landowner objections to enforcement of the Hawaii pest control statutes would probably fall into two broad categories. First, the statutes might be challenged as violating privacy rights protected by the Hawaiian Constitution: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”71 This provision of the Hawaiian Constitution affords greater privacy rights than the federal right to privacy.72

A second challenge would emanate from claims of takings which may arise under the Constitution. “No person shall...be deprived of...without due process of law; nor shall private property be taken for public use, without just compensation.”73 A similar provision in the state constitution may also be a source of challenges. “Private property shall not be taken or damaged for public use without just compensation.”74 Due process claims could arise in the context of either privacy or takings.

VI. Privacy Rights and Due Process

There is no Hawaiian case directly on point involving violation of a privacy right through enforcement of a local nuisance ordinance. Such cases are relatively rare nationally. However, one case arose under a city ordinance in Ferndale, Michigan, that prohibited grass or weeds over seven inches tall. In People v. McKendrick,75 a private contractor carried out orders from the city to cut grass and weeds on McKendrick’s property pursuant to the ordinance. When a worker discovered marijuana growing in containers along the back fence, police were notified, leading to McKendrick’s arrest. The Court of Appeals of Michigan held that there was no violation of McKendrick’s privacy rights nor an

---

62. Id.

63. See id.


66. Hawaii Dep’t of Agric. Regs. ch. 69A-2, supra note 64.

67. See Haw. Rev. Stat. Ann. § 152-6(d), (e) (Michie 1996). In practice, cooperative weed control projects with landowners or lessees are normally for five years and commit the Department of Agriculture to “provide technical expertise and herbicides, while the private party provides equipment and labor.” Background Study, supra note 44, at 32. If the private party declines to renew after five years, the agreement requires he keep the infestation level at, or below that achieved at the end of the five years for an additional five years. Id.

68. See Background Study, supra note 44, at 39.

69. See id. at 61.

70. See Conant, supra note 15.


73. U.S. Const. amend. V.


unlawful search and seizure violating Fourth Amendment rights. The court reasoned that for a search to be proscribed by the Fourth Amendment: (1) the police must have instigated, encouraged, or participated in the search, and (2) the person must have participated in the search with the intent of assisting the police in their investigation.

Other types of administrative inspections and searches may be analogous to the provisions for entry onto private property included in the Hawaii pest control statutes. For example, agricultural inspections are a type of search that implicates privacy interests. A Florida Case involved an individual who neglected to stop for an agricultural inspection based on neutral criteria, from those in a criminal context. Citing the Supreme Court’s decision in Camara v. Municipal Court, the search was upheld as constitutional because such “administrative” searches do not require the same level of probable cause as criminal searches. “Camara makes explicit that the probable cause measure is probable cause to believe that property in that general area or class may be susceptible to harboring or fostering the harm the administrative or regulatory scheme seeks to ameliorate.” In a regulatory scheme of pest control regulations like Hawaii’s, property “susceptible to harboring” a harm such as miconia will generally be distinguishable, based on neutral criteria, from property singled out for a criminal search. (The notice requirement alone would seem to allow for destruction or secreting of any criminal evidence.)

Inspections or searches of property pursuant to OSHA regulations were upheld in Marshall v. Barlow’s, Inc. The Supreme Court recognized that “[i]f the government intrudes on a person’s property [whether a home or commercial property], the privacy interest suffers whether the government’s motivation is to investigate criminal laws or breaches of other statutory or regulatory standards. Nonetheless, the majority adopted the Camara standard that warrants authorizing regulatory searches do not require probable cause in the criminal sense.

Camara dealt with warrantless building inspections. The Court noted that “because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of ... privacy.” The entry onto property contemplated in the pest eradication program gives rise to no criminal penalty for possession of the harmful plant, is not aimed at discovering evidence of crime and is not personal in nature. It should meet the standard set by the Camara line of cases.

The defendant in McKendrick also asserted his rights to due process had been violated because the ordinance provided no specific opportunity to be heard in a formal hearing. The court disagreed, noting that under the applicable ordinance, “violators are given sufficient notice of the violation, reasonable time in which to take steps to remedy the violation and notice that a failure to comply with the ordinance will result in abatement by the city, its employees, or agents.” The court noted that a property owner who disagreed with a determination of violation “could contact the weed and grass inspector for further clarification” and could appeal violations to the circuit court. “[D]ue process in this case does not require a preabatement hearing”

Ca/OSHA inspections carried possible criminal penalties, probable cause in a criminal sense is required to issuance of a warrant after a business owner refuses voluntary inspection.

76. See id. at 911.
77. See id. at 910, citing United States v. Coleman, 628 F.2d 961, 969 (6th Cir. 1980); See also United States v. Howard, 792 F.2d 220, 227 (6th Cir. 1983).
78. See Roche v. Florida, 462 So. 2d 1096, 1097 (Fla. 1987).
79. See id.
80. See id. at 1099.
82. Roche, 462 So. 2d at 1100.
83. Id.
85. Id. at 312-13.
86. See id. at 320. But see Salwasser Mfg. Co., Inc. v. Municipal Court for Fresno, 94 Cal. App. 3d 223 (1979) (holding that since
to meet constitutional guarantees, the court concluded.93

Early nuisance cases similarly noted that these actions by government are not incompatible with due process rights:

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.94

"Generally, special or summary proceedings for abatement or nuisances are valid where they afford the essential elements of due process of law, namely, notice and an opportunity to be heard."95 The relevant Hawaii statute specifies that the "department of agriculture shall give at least five days notice to the landowner and occupier of any private property of its intention to enter the property for the control or eradication of a pest."96 The notice must set forth all pertinent information on the pest control program, including procedures and methods to be used for control or eradication.97 Notice by certified mail to the landowner's last known address is sufficient.98

As noted by the court in McKendrick, under the ordinance there, a preabatement hearing is not necessary to fulfill the "opportunity to be heard" requirement.99 The Hawaii statute is silent regarding a specific procedure providing an opportunity to be heard.100 But this is not problematic if the holding of the McKendrick court is followed.101

In Sandy Beach Defense Fund v. County of Honolulu, appellants claimed that their aesthetic or environmental interests constituted property and that hearings before the Department of Land Use, Zoning Committee and City Council did not constitute due process.102 "Due process is not a fixed concept requiring a specific procedural course in every situation."103 The Hawaii Supreme Court did not find that those interests rose to the level of property, but went on to discuss the procedural due process claim:

Determination of the specific procedures required to satisfy due process requires the balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.104

The Hawaii Supreme Court found adequate opportunity to be heard in public hearings in the Sandy Beach Defense Fund case.105 Sandy Beach Defense Fund seems to suggest that, in order to fulfill due process in a regulatory scheme, the opportunity to be heard need not be in a judicial forum, as long as procedures are not arbitrary.106 "The constitution was under cultivation (crops were growing), the court found the county lacked jurisdiction to order the eradication. See id. at 482.

93. See id. at 910.
94. Mugler v. Kansas, 123 U.S. 623, 665 (1887) (a statute banning the brewing of beer was held within a state's police power, thus requiring no compensation although the brewer's equipment was severely reduced in value if it could not be used for its intended purpose).
95. McKendrick, 468 N.W.2d at 909.
96. HAW. REV. STAT. ANN. § 141-3.6 (a) (Michie 1996).
97. See id. at 482.
98. See id.
99. See McKendrick, 468 N.W.2d at 909.
100. The statute notes that if, after notice, entry is refused, "the department member or agent may apply to the district court in the circuit in which the property is located for a warrant to enter on the premises to effectuate the purposes" of the statute. See HAW. REV. STAT. ANN. § 141-3.6 (b) (Michie 1996).
101. See supra notes 90–93 and accompanying text.
103. Id. at 261.
105. Sandy Beach, 773 P.2d at 261–62.
106. See id. at 261–63.
guarantees the right to be heard, not the right to have one's views adopted. Neither does the constitution establish the contested case as the only forum for ensuring a property owner's right to be heard.107

While there were procedural differences between Honolulu and other counties noted in the Sandy Beach case, these did not violate equal protection guarantees.108 For purposes of the Hawaii statutes relating to pest control, this aspect of the holding may be significant. Aside from the application to a district court for a warrant, Hawaii Revised Statute section 141-3.6 is not specific about the procedures providing the opportunity to be heard. Within the sphere of Camara-type regulatory actions, Hawaii case law seems to suggest that each jurisdiction (or enforcing agency) may adopt its own hearing procedures, or that the Department of Agriculture could set a statewide procedure. If the notice, sent by the Department of Agriculture, contains reference to an opportunity to be heard, the exact forum, if not uniform statewide, will need to be coordinated with the authorities on each island or each governmental unit assigned the task of hearing landowner objections. Ultimately, only an opportunity to be heard must be provided. If a landowner chooses not to avail herself of the opportunity or actively frustrates it, the opportunity requirement is still met.

VII. Takings

Amendment V of the Constitution of the United States states: "No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."109 The Hawaiian state constitution provides similar guarantees.110

The United States Supreme Court long ago distinguished nuisance abatement from unlawful taking:

108. See Sandy Beach, 773 P.2d at 262–63.
109. U. S. CONST. amend. V.
112. Mueller, 123 U.S. at 669.
113. Id. at 667.

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unfettering property is taken away from an innocent owner.112

Control of miconia or similar designated pests through statutes such as those under discussion would be exercises of the state's police powers to abate nuisances. Property is not being taken for public use here; property is being destroyed to prevent the public welfare. "To regulate and abate nuisances is one of [the] ordinary functions of a state's police power."113 Takings analysis generally proceeds on two levels: first, does the regulation exceed "police power" limitations, and second, even if a legitimate exercise of police power, does the regulation nevertheless constitute a taking.114 Police power is strongest when the government acts to prevent property owners "by a noxious use of their property, to inflict injury upon the community."115 Abatement statutes will generally be acknowledged as legitimate exercises of police power in preventing harm to the larger community. The second part of the takings analysis is exemplified by Justice Holmes' declaration that land use regulations constitute a taking if they go "too far."116 But the ambiguity inherent in that declaration ("too far" being extremely subjective) continues to be an area of tension on the Supreme Court.117 For purposes of the pest control statutes, it may be enough to note that the Court has held that government may confiscate all inherent value in property as long as the regulation "involves the adjustment of rights for the

public good," 118 leaves the property owner in physical possession of the property involved, and does not "extinguish a fundamental attribute of ownership." 119 While a pest plant must be removed "for the public good," property owners are free to plant non-pest species, retain title to the underlying land and exercise those attributes of ownership common to the jurisdiction.

The power to abate nuisances has been directed at plants on private property and challenged in court. The right of government to act in these cases has been supported by the courts with few restraints. A Virginia statute providing for compulsory cutting down of red cedar trees within two miles of any apple orchard when officials determined the cedars to be the source of a communicable plant disease constituting a threat to the orchards was held not to violate the Constitution. 120 Under the statute, "ten or more reputable freeholders" could request that the state entomologist conduct an investigation of suspect red cedars. 121 The actual decision regarding destruction of the trees was thus left to a state official. The United States Supreme Court held that the plaintiff's property was "not subjected to the possibly arbitrary and irresponsible action of a group of private citizens." 122 The cedars were in no danger themselves from the plant disease, but were destroyed because they threatened the apple orchards. The Court acknowledged in Miller v. Schoene that the state entomologist had the power to choose preservation of one property over another, but noted that taking no action would be as much a choice, since it would result in injury to the other property. 123 Similarly, while miconia on private property may present no danger to that property (at least in the owner's perception), the miconia could threaten other interests.

Recently, Florida and California have grappled with takings issues in enforcement of pest control ordinances. The Florida cases are of particular interest here because their context is destruction of plants on private property by the State Department of Agriculture and Consumer Services, with the cooperation of the United States Department of Agriculture (USDA). The California cases arose in the context of that state's emergency responses to the appearance of the Mediterranean fruit fly (medfly) in order to protect the agriculture industry. 124 Sanctions against those that violated emergency regulations and takings claims relating to injuries to property incidental to the control program are among the issues that arose.

A. Florida

"Citrus canker, a virulent disease which first appeared in Florida in 1914, was detected in a central Florida tree nursery in August, 1984." 125 The Florida Department of Agriculture and Consumer Services ordered citrus trees destroyed pursuant to statutory authority. 126 Several cases have arisen concerning protection of the state's citrus industry under these laws. Because the statutes are basically pest ordinances directed at plants (albeit diseased ones) and because the primary purpose of the statutes, like those in Hawaii, is protection of the state agricultural industry, the Florida courts have grappled with due process and takings issues similar to those predicted to arise in eradication of miconia (or similar invasive plant species) on private lands.

In Denney v. Conner, a property owner asserted that "the [agriculture] department's order mandating the destruction of 'healthy' trees amounted to a violation of [the owner's] constitutional right to due process." 127 After acknowledging that they were aware of no case "holding that a healthy plant or animal not imminently dangerous may be destroyed without compensation to the owner," 128 the court went on to observe that "in cases of obvious and immediate danger, the state, in the exercise of its police power, may summarily, destroy private property in order to protect the public." 129 In Denney, the plaintiff sought injunctive relief to stop the destruction of his trees, but the court found that...
"the department state[d] with sufficient particularity facts which indicate an immediate threat to the public health, safety or welfare in order to justify" the action. In allowing the department to go forward with destruction of the trees, the court noted, "we do not attempt to determine whether appellants' trees are in fact healthy or diseased. Nor do we address the issue of compensation. We hold only... that the threat is of sufficient imminence and scope to justify the emergency order entered by the department." Thus, we may infer that before listing a plant as a "pest" and developing an eradication program, a government agency should establish that there is imminent danger to the public health, safety or welfare. However, once a legislature has charged an agency with such duties, any ambiguous language in the statute becomes subject to interpretation by the agency and the Supreme Court has held that deference to agency interpretation will generally decide such issues.

The Florida law was again challenged on the grounds that trees that showed no sign of disease did not present "imminent" danger. The court again upheld the law noting "the critical fact" that the disease could lay dormant for several months while being transmitted via wind, rain, man or machine. A similar "critical fact" in the case of miconia is the ease by which the seeds are spread by birds over great distances. It might appear that a single tree poses no danger, but miles away, in a protected and little visited rainforest area, countless seeds from that single tree might take root, mature, and cause significant damage before being discovered.

The question of compensation for the property owners reached the Florida Supreme Court after the department burned over 270,000 trees and "budwood" belonging to two growers in a span of thirteen days. In this case, the Florida Supreme Court found that a taking had occurred because the "destruction of healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, thereby conferring a public benefit rather than preventing a harm." Not all of the trees destroyed were identified as diseased before the department burned them. The compensation was limited to healthy plants because "the constitutional requirement of 'just compensation' clearly does not compel the state to reimburse the owner for the property destroyed because such property is valueless, incapable of any lawful use, and a source of public danger." This suggests that if a plant is declared a pest and can no longer be legally cultivated, it would be valueless for compensation purposes. If a plant were incorrectly identified as a pest and then destroyed, compensation would be payable to the owner.

A subsequent case challenged a statutory provision allowing the Department of Agriculture to set up a valuation schedule for "healthy but suspect" trees. The valuation schedule was presumed valid, but could be rebutted in an administrative hearing. The claimants asserted a right to jury trial under a provision of the Florida constitution. The court stated that "[t]he right to a jury trial in condemnation proceedings existed at common law," and because the state provided for an "impartial and competent tribunal" held that the owner's rights were adequately protected. This view of due process by the Florida court is in accord with that of the Hawaii courts, as seen in the Sandy Beach and Medeiros cases discussed above.

The final Florida case to be discussed is Department of Agricultural & Consumer Services v. Polk, which again raised a takings claim. After finding lesions indicative of citrus canker on ten or fewer newly budded citrus trees in a private nursery, the Department of Agriculture and Consumer Services "destroyed all of the 510,059 citrus nursery trees at the nursery." The trial court ruled that the regulation as applied in this case was "arbitrary and capricious; that the action failed to promote public

130. Id.
131. Id. at 537.
133. See Nordmann, 473 So. 2d at 279.
134. Id. at 280.
135. See Wanted, supra note 13.
136. See Department of Agric. & Consumer Servs. v. Mid-Florida Growers, Inc., 521 So. 2d 101, 102 (Fla. 1988).
137. Id. at 103.
138. See id. at 102.
139. Id. at 104.
140. See Department of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 27 (Fla. 1990).
141. See id.
142. Id. at 28.
143. Id. at 28-29.
144. Sandy Beach, 773 P.2d 250.
146. Department of Agric. & Consumer Servs. v. Polk, 568 So. 2d 35 (Fla. 1990).
147. Id. at 37-38.
health, safety, or welfare; and that no public harm was actually prevented by the destruction. 148 But the court also noted that the "trees actually diseased, and those trees within 125 feet of the diseased trees, had no marketable value," and required no compensation. 149 Both of these findings were upheld by the Florida Supreme Court. 150 However, the trial judge had excluded "testimony from members of the citrus industry to which Polk sought to sell his inventory that they would not have purchased nursery stock from a nursery at which a bacterial disease had been discovered." 151 The higher court found this relevant to the determination of the amount of compensation due. 152

If an invasive species, having been deemed a pest, is analogous to a diseased tree, it would follow from the holding in Polk that a private property owner would be entitled to no compensation for destruction of the pest species because, as a recognized pest, it has no value. 153 However, should an error of identification lead to destruction of an "innocent" plant, that property owner might be entitled to compensation. 154 If a plant has distinctive, easily distinguishable features this should not pose a significant problem, but in less certain situations, agencies may be required to develop specialized procedures.

B. California

When the Mediterranean fruit fly (medfly) threatened California agriculture in 1980–81, then Governor Edmund G. Brown, Jr. issued several Emergency Proclamation Orders, and the director of the Department of Food and Agriculture exercised statutory authority to address that threat. 155 Some of the actions taken by the state greatly affected private property.

One of the earliest medfly cases to reach an appellate court, Martin v. Municipal Court of Santa Clara County, actually involved a criminal prosecution. 156 Pursuant to one of the Governor's Emergency Proclamation Orders, Mr. Martin, along with other persons residing in a "quarantine area", had been ordered to remove all host fruits and vegetables from trees and plants on his property. 157 Failure to comply carried misdemeanor penalties of either up to six months in custody or a $500 fine, or both. 158 The order became effective on July 13, 1981, and on July 28, Martin was notified again and warned. 159 He petitioned the Santa Clara County Court for an injunction and restraining order, which was denied on July 31, 1981. 160 “Thereafter, pursuant to an inspection warrant, a state crew removed 210 pounds of host fruit from Martin’s property.” 161 Martin was ultimately convicted of the misdemeanor, and on appeal, his conviction was upheld because, "[t]he fact that the nuisance is ultimately removed does not exonerate the offender from prosecution." 162 This holding might support jurisdictions with similar penal elements in their pest control statutes. However, as discussed above, under the Camara rule, if the pest control statute includes criminal sanctions, the standards for issuing a warrant are heightened.

Indirect takings were alleged when several insurance companies sought compensation from the state for losses they paid out for claims of damages to automobiles caused by aerial spraying of insecticides. 163 While the insurance companies alleged eight causes of action, one was dismissed voluntarily and the trial court sustained general demurrers on the remaining seven. 164 The court of appeal agreed to waive technical defects in the interest of justice and hear the insurance companies’ appeal. 165 "[T]he medfly eradication program was a valid exercise of the court held the owner was entitled to compensation.

148. Id. at 38.
149. Id.
150. See id. at 43.
151. Id. at 41.
152. See id.
153. Arguably an owner might claim some value as firewood or for some other purpose in the case of a healthy, but pest plant. However, the Supreme Court’s ruling in Mugler v. Kansas, 123 U.S. 623, would suggest no compensation is necessary for the reduction in value incident to a state’s valid exercise of police powers.
154. See Rhine v. Town of Mount Holly, 112 S.E. 2d 40 (N.C. 1960). In Rhine, a city ordinance required owners of vacant lots to remove noxious growth at least twice a year and authorized the city to do the same of owners failed to do so. When municipal employees acting under this authority also cut down several oak trees the size of a person’s wrist and twelve to fifteen feet tall, the
state's police power to abate a public nuisance. Damage to automobile paint incidental to the exercise of this power does not rise to the level of a 'taking' and is thus noncompensable.\textsuperscript{166} Regarding tort claims based on trespass to chattel and nuisance, the court held that necessity was a complete defense.\textsuperscript{167} "Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all ...."\textsuperscript{168} These holdings might be relevant in the event of incidental damage to private property while an agency is engaged in eradicating a plant species. For example, while cutting down a fifty foot miconia specimen, falling branches might harm a valuable ornamental plant or a structure.

This line of cases suggests that in California: (1) pest eradication efforts are considered under police powers; (2) incidental property damages are not necessarily compensable as takings; and (3) there is a strong presumption that private property owners will cooperate with state efforts.

C. Special Constitutional Considerations for Hawaii

The Hawaiian Constitution has provisions which grant certain powers to the state. Among these the state has "the power to conserve and develop...places of historic or cultural interest and provide for public sightliness and physical good order. For these purposes, private property shall be subject to reasonable regulation."\textsuperscript{169} The Hawaiian Constitution also protects traditional Hawaiian gathering rights.\textsuperscript{170} Either of these sections could be interpreted as granting police power to the state in situations such as miconia eradication using the statutes under discussion. For example, if the forests are threatened by miconia, this might threaten traditional activities such as flower and plant gathering or finding timber for ceremonial objects. "Where the public interest is involved preterment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."\textsuperscript{171}

VIII. Application of the Relevant Hawaii Statutes

Subsection (a) of section 141-3 of the Hawaii Revised Statutes mandates that the Department of Agriculture shall establish "criteria and procedures for the designation of pests for control or eradication."\textsuperscript{172} The Department of Agriculture has defined a number of the statutory terms and developed procedures to comply with this mandate.\textsuperscript{173}

Subsection (b) of section 141-3 requires the Department to, "as far as reasonably practicable, assist, free of cost to individuals, in the ... eradication if ... noxious weeds, or other pests injurious to vegetation of value ...."\textsuperscript{174} There is also suggestion that, under certain agricultural loan programs, any eradication plan could be the primary responsibility of the property owner, with the state only serving to "assist" in controlling efforts.\textsuperscript{175} From an environmental perspective, the phrase "vegetation of value" could mean any indigenous specie, but the legislative intent may have been simply to protect commercial crops.\textsuperscript{176} In putting the statutes into effect, the Department of Agriculture may have expanded

\textsuperscript{166} Id. at 230.
\textsuperscript{167} See id.
\textsuperscript{168} Id.
\textsuperscript{169} Haw. Const. art. IX, § 7.
\textsuperscript{170} See Haw. Const. art. XII, § 7. The most recent, and perhaps most expansive, decision under this provision held that recognition of customary and traditional Hawaiian practices of gathering on undeveloped lands, does not constitute a judicial taking of private property because concepts of Western property law (including exclusive use) are not universally applicable in Hawaii. See Public Access Shoreline Hawaii v. Hawaii Planning Comm'n, 903 P.2d 1246, 1268, 1272 (Haw. 1995) petition for cert. filed, 95-1159.
\textsuperscript{171} Miller v. Schoene, 276 U.S. at 279-80.
\textsuperscript{173} See Haw. Dept of Agric. Regulations, Title 4, Subtitles 1-5, Ch. 69A (effective Sept. 4, 1993).
\textsuperscript{174} Haw. Rev. Stat. Ann. § 141-3(b) (Michie 1996) (emphasis added). Under Hawaiian statutes, an "individual" is defined as "a natural person." Id. § 92F-3. It would appear from the statutory language that corporations, partnerships, trusts or similar entities would be ineligible for the "free of cost to individuals" eradication assistance. See id. § 141-3(b). The definition of "person" would have included the other entities. See id. § 92F-3. 175. Borrowers under some state agricultural loan programs are statutorily required to "keep land free from noxious weeds" and if they are in default of this condition, "the whole of the loan shall, at the option of the lender, become due and payable forthwith." Id. § 155-12. The Department of Agriculture also engages in cooperative control projects with landowners. See supra note 62 and accompanying text. However, after notification of a landowner, "the department may entirely undertake the eradication or control project when it has been determined that the owner, occupier, or lessee of the land on which the infestation is located will not benefit materially or financially by the control or eradication of the noxious weed." Haw. Rev. Stat. Ann. § 152-6(e) (Michie 1996).
\textsuperscript{176} This possible limitation is suggested by the fact that the emergency provision is applicable only if the department finds an infestation is or is likely to become injurious "to the agricultural, horticultural, aquacultural, or livestock industries of the State without immediate action ...." Haw. Rev. Stat. Ann. § 141-3(c) (Michie 1996) (emphasis added). However, other parts of the statutes contain no such limitation.
on that intent when they defined "noxious weeds."177 "Noxious weeds" means those plant species determined to be or likely to become injurious, harmful, or deleterious to the agricultural industry, forest and recreational areas, and conservation districts of the State and which are designated and listed as noxious weeds ....178

The emergency provisions of subsection (c), allowing for exceptions to the notice requirement, are limited to pests that are or are likely to become injurious to the "agricultural, horticultural, aquacultural or livestock industries of the State without immediate action ...."179 From the plain language of the statute, the emergency provisions would generally be unavailable for the protection of natural ecosystems in many situations. Only if an "industry" were also threatened would these measures be utilized. For example, if an alien specie caused damage to a watershed because its root system increased erosion, would this indirect threat to "industry" be enough to trigger emergency provisions, and would the courts agree?180 What if "renewable" products are gathered or harvested in the Hawaiian rainforest and sold? Would this be an agricultural industry within the meaning of the statute, allowing for possible emergency action against a threat like miconia?

Next, section 141-3.5 (a) of the Hawaii Revised Statutes directs that the Department of Agriculture "shall develop and implement a detailed control or eradication program for any pest designated in 141-3, using the best available technology in a manner consistent with state and federal law."181 Any "detailed" plan should specifically address eradication of pests on private property, including the provisions for notice and opportunity to be heard noted earlier. "Best available technology" is a term of art that, in its simplest form, is the highest standard of controls available; only the limits of technology would circumscribe the methods of control or eradication.182 However, this may conflict with the "so far as reasonably practicable, assist, free of cost" provision in section 141.3, in that technology might be limited by the cost element of that language.

Finally, section 141-3.6 is the most procedurally detailed of the relevant statutes.183 Subsection (a) sets out the Department of Agriculture's responsibility to give "at least five days notice to the landowners and occupier of any private property of its intention to enter the property for the control or eradication of a pest."184 While the statute states that the "notice shall set forth all pertinent information on the pest control program,"185 as noted earlier, it would be prudent to include provision for some type of opportunity to be heard in order to satisfy due process requirements.

As discussed previously, this section of the statute goes on to allow the Department to authorize agents to carry out the eradication program and, significantly, sets limits to potential liability. If local government entities were authorized as "agents" by the Department of Agriculture, some questions are presented: What agencies would be available and capable of carrying out some portion of an eradication program? Could an agent be authorized to give the necessary notice, or must that emanate from the Department of Agriculture?

IX. Conclusions / Recommendations

Fragile and unique ecosystems are easily threatened by non-indigenous plant species. Recent interest among the (less fragile) mainland states in control and eradication programs relating to non-indigenous species186 suggests an increas-

177. Hawaii Dep't of Agric. Regulations, Title 4, Subtitle 6, Chapter 69A (effective Sept. 4, 1993).
178. Id. (emphasis added).
180. There is a great deal of room for "agency interpretation" here. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837. For example, the department could determine that the watershed damage caused by the shallow root system of miconia would or would not damage agricultural industries. If the department determined that it would cause the damage, it would still need to determine if the injury could only be averted through immediate action or if the regular statutory procedures are adequate.
182. In the Hawaii Revised Statutes, the phrase "best available technology" appears only in this section and a section relating to non-point source pollution (See id. § 342E-3(a)(9)).
184. Id.
185. Id.
186. Minnesota directed their Commissioner of Natural Resources to develop a comprehensive management plan for "ecologically harmful exotic species." Harmful NIS, supra note 2, at 219. Illinois' Department of Conservation and California's park system have begun emphasizing use of native species over alien species (in Illinois this extends to soil conservation, landscaping, wildlife habitat and other public purposes). See id. at 227-228 (Box 7-E). Montana funds its weed control programs through a Noxious Weed Trust Fund (money derives from a surcharge on retail herbicide sales and "vehicle weed fees" imposed through auto registration). See id. at 229.
ing recognition of the harm that frequently follows introduction of these organisms. While measures such as the Lacey Act187 or similar state measures are a part of any control strategy, even the most stringent of such programs is fallible. Eradication statutes for pest species may become increasingly necessary if introductions of harmful species continue at the current high rate. The experiences of Florida and California, as well as the earlier nuisance law cases, provide some considerations for use of such laws in an environmental arena. There is a need for application of localized nuisance abatement control statutes in responding to alien species. A clear strategy for using such statutes and clarification of the elements necessary to implement them should reduce property owner hostility to such intrusions.

Education of private landowners regarding the nature of the pest problem should be a high priority. This should considerably reduce resistance to eradication programs from the landowners. When included in any notice issued pursuant to statutes like Hawaii's section 141-3.6, such information should decrease the likelihood of any subsequent claims against the state. To avoid litigation, clear information setting out the state's authority should be provided.

With a pest such as miconia, there is significant likelihood that additional plants will later appear on the same property. Thus, it will simplify follow-up inspections if this is communicated early in the process and if considerable deference is afforded the property owner in scheduling convenient times for follow-up inspections and so forth.

It is appropriate to clarify aspects of the notice requirement. What agencies or officers will be responsible and authorized to mail or otherwise give notice? The notice should set out what the agency expects from the landowner (e.g., whether a gate should be let open or the landowner should be present) and should set out any penalties for failure to cooperate, as in the Martin case. To carry out eradication programs most expeditiously, penalties for failure to cooperate, if any, should be limited to civil penalties, such as cost of eradication and/or fines. If the penalties carry any criminal sanctions, any subsequent request for a warrant for entry onto the subject property must meet higher criminal standards of probable cause under the Camara line of cases. Finally, as, discussed, the notice must include availability of some forum for an "opportunity to be heard."

Education of the public may enlist aid in early detection of pests, but this must be subject to verification. Miller v. Schoene's holding made it clear that an authorized, responsible agent of the state must verify that the plant identified by the public is indeed a pest specie. Similarly, the Florida citrus canker cases188 make it clear that if the state destroys a non-pest plant in error, they will probably be required to compensate the owner. Thus, any pest eradication program should be certain that plants designated for destruction are clearly identified by qualified agents. As in Miller v. Schoene,189 the Hawaii Department of Agriculture has enlisted the help of the public in locating miconia, including that on private property, with a "wanted poster" type campaign.190

Efforts to eradicate harmful, non-indigenous species through local or state pest abatement laws will have the greatest opportunity to succeed if implemented with the recommendations discussed above. The case law suggests that any legal challenges mounted by private landowners would not be successful. Any reticence of government officials to utilize these statutes to eradicate alien species, if based upon fear of such challenges, is probably misplaced, especially when time is critical to success. While these local and state laws are only one component in comprehensive efforts to combat the ecological threats posed by alien species, they are a necessary and potentially effective tool that should be given a chance to succeed.

188. Nordmann, 473 So. 2d 278; Denney, 462 So. 2d 334; Mid-Florida Growers, 521 So. 2d 101; Bonanno, 568 So. 2d 24; Polk, 568 So. 2d 35.
190. See Wanted, supra note 13.