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Attorneys for Plaintiff Mālama Mākua*

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAI'I

| | | |
|--------------------------------------|---|----------------------------|
| MĀLAMA MĀKUA, a Hawai'i non-profit, |) | Civil No. 16-00597 SOM-KJM |
| |) | |
| Plaintiff, |) | JOINT STIPULATION TO |
| |) | SETTLE PLAINTIFF'S |
| v. |) | COMPLAINT; ATTACHMENT |
| |) | "A"; ORDER |
| |) | |
| JAMES MATTIS, Secretary |) | |
| of Defense; and MARK ESPER, |) | |
| Secretary of the United States Army, |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

JOINT STIPULATION TO SETTLE PLAINTIFF'S COMPLAINT

* Pursuant to Local Rule 10.2(b), the complete list of parties represented is set forth on the signature page.

WHEREAS, on November 7, 2016, Plaintiff Mālama Mākua filed a complaint alleging that Defendants violated paragraph 8(a) and (b) and paragraph 13 of the Settlement Agreement and Stipulated Order in Mālama Mākua v. Rumsfeld, Civ. No. 00-00813 SOM LEK (D. Haw. Oct. 4, 2001) (“2001 Settlement”);

WHEREAS, following the filing of the complaint herein, Defendants have restored access to all but two of the cultural sites on Mākua Military Reservation to which Plaintiff had access prior to June 2014, and opened an additional site that Plaintiff had not previously accessed;

WHEREAS, the parties have agreed to enter into this Stipulation, which they consider to be a just, fair, adequate, and equitable resolution of the claims that remain in this action, without any admission of fact or law; and,

WHEREAS, it is in the best interests of the public, the parties, and judicial economy to resolve the remaining issues in this action without protracted litigation;

NOW, THEREFORE, the parties to this Stipulation agree, and the Court orders, as follows:

SITES 4536 AND 5456

1. Sites 4536 and 5456 are currently off-limits to cultural access because all of Site 4536, the eastern portion of Site 5456, and part of the access road leading to Site 5456 lie within an unexploded ordnance (“UXO”) stockpile

exclusion zone. See Attachment A. The UXO stockpile creating the exclusion zone lies within an improved conventional munitions (“ICM”) area, to which Army regulations prohibit access absent a waiver.

2. No later than ninety (90) days after the Court’s approval of this Stipulation, Defendants will request a waiver to access the ICM area for the purpose of addressing the hazard presented by the UXO stockpile such that cultural access to Sites 4536 and 5456 can resume. If Defendants require more than ninety (90) days to prepare the waiver request, the parties may stipulate in writing to extend the deadline to submit the waiver, and any such stipulation shall be filed with the Court. If the parties cannot reach agreement regarding an extension of the deadline, Defendants may, prior to the deadline, file a motion asking the Court for more time to submit the waiver request.

3. Within thirty (30) days following submission of the waiver request, Defendants will provide a copy of the waiver request, to the extent releasable pursuant to the Freedom of Information Act, 5 U.S.C. § 552, to Plaintiff’s attorney of record: David L. Henkin, Earthjustice, 850 Richards Street, Suite 400, Honolulu, Hawai‘i 96813.

4. Within fourteen (14) days following a final decision on the waiver request, Defendants will provide a copy of the decision document, to the extent

releasable pursuant to the Freedom of Information Act, 5 U.S.C. § 552, to Plaintiff's attorney of record.

5. If the waiver is granted, Defendants will make a good faith effort promptly to address the hazard presented by the UXO stockpile, according to the terms of the 2001 Settlement, such that cultural access to Sites 4536 and 5456 can resume.

6. If the waiver is denied or if no decision is made on the waiver request within thirty-six (36) months after its submittal, Defendants will make a good faith effort promptly to identify and, if feasible, clear an alternate path to the portion of Site 5456 located outside the UXO stockpile exclusion zone, according to the terms of the 2001 Settlement.

7. In the event that Defendants take the actions described in paragraph 6, supra, and the waiver request is subsequently granted, Defendants will make a good faith effort promptly to address the hazard presented by the UXO stockpile, according to the terms of the 2001 Settlement, such that cultural access to Sites 4536 and 5456 can resume.

8. Defendants will include in their quarterly written reports to the Court updates regarding the status of Defendants' efforts under paragraphs 2 and 5 through 7.

OVERNIGHT ACCESSES

9. During the two-year period beginning May 15, 2018, Plaintiff will be allowed a total of four (4) overnight accesses, as defined in paragraph 13 of the 2001 Settlement, in addition to the two (2) overnight accesses per year guaranteed pursuant to the 2001 Settlement. Plaintiff will be allowed two (2) of these additional overnight accesses during the first one-year period (i.e., from May 15, 2018 to May 14, 2019) and will be allowed the other two (2) additional overnight accesses during the second one-year period (i.e., from May 15, 2019 to May 14, 2020).

10. The first of the aforementioned additional overnight accesses took place on June 23-24, 2018, and the second of the aforementioned additional overnight accesses will take place on August 25-26, 2018. The parties will schedule the dates for the remaining two additional overnight accesses provided for under this Stipulation, pursuant to the procedures set forth in paragraph 2 of the Cultural Access Agreement filed in Mālama Mākua v. Rumsfeld, Civ. No. 00-00813 SOM-LEK (D. Haw. July 19, 2002).

MISCELLANEOUS

11. Nothing in this Stipulation relieves Defendants of the obligation to act in a manner consistent with applicable federal, state, and local law, and applicable

appropriations law. No provision of this Stipulation shall be interpreted as or constitute a commitment or requirement that Defendants obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable law or regulation.

12. The parties' agreement to this Stipulation has no precedential value and shall not be used as evidence in any litigation regarding the requirements of the 2001 Settlement.

ATTORNEYS' FEES AND COSTS

13. Defendants agree to settle Plaintiff's claims for attorneys' fees and litigation costs for work performed in connection with this action for a total of \$80,000.00.

14. Within forty-five (45) business days of the Court's approval of this Stipulation, Defendants will submit all necessary paperwork for the administrative processing of the payment for \$80,000.00 by Fed Wire Electronic Funds Transfer to "Earthjustice." Payment shall be coordinated with Plaintiff's attorney of record, David L. Henkin.

15. Plaintiff agrees to accept payment of \$80,000.00 in full satisfaction of any and all claims for attorneys' fees and litigation costs to which Plaintiff may be entitled for work performed in connection with this action through and including the date of this Stipulation.

16. The provision of fees by this Stipulation has no precedential value and shall not be used as evidence in any other attorney fee litigation.

RELEASE AND DISMISSAL

17. This Stipulation contains the complete and total terms and conditions of the parties' agreement, and encompasses all existing claims, disputed issues, and/or demands for money damages or other relief (inclusive of all attorneys' fees, interest, and other litigation expenses), known or unknown, that were asserted or could have been asserted in this action or in any other judicial proceeding, against the United States or any department, agency, or officer thereof, by Plaintiff and arising out of Defendants' closure of access to all cultural sites at Mākua Military Reservation in mid-2014, as alleged in Plaintiff's November 7, 2016 Complaint (ECF No. 1).

18. Plaintiff agrees to file a Stipulation of Dismissal of this case with prejudice within thirty (30) days of the Court's approval of this Stipulation.

ENFORCEMENT OF THIS AGREEMENT


19. This Court has jurisdiction to enforce the terms of this Agreement. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

AUTHORIZATION TO SIGN

20. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to execute this Stipulation and legally bind that party or parties to the terms and conditions of this Stipulation.

EXECUTED this 30th day of July, 2018.

EARTHJUSTICE
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APPROVED AND SO ORDERED:

DATED: AUG 03 2018



SUSAN OKI MOLLWAY
SENIOR JUDGE