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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

MĀLAMA MĀKUA, a Hawai‘i non-profit, Plaintiff, v. ASHTON CARTER, Secretary of Defense; and ERIC FANNING, Secretary of the United States Army, Defendants.	Civil No. 16-597 COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF RE: DEFENDANTS' DENIAL OF ACCESS TO CULTURAL SITES AND OTHER AREAS AT MĀKUA MILITARY RESERVATION

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF RE: DEFENDANTS' DENIAL OF ACCESS TO CULTURAL SITES AND OTHER AREAS AT MĀKUA MILITARY RESERVATION

Plaintiff Mālama Mākua complains of Defendants as follows:

INTRODUCTION

1. Beginning in June of 2014, the United States Army began to prevent Plaintiff Mālama Mākua and other members of the Wai‘anae Coast community from accessing cultural sites at Mākua Military Reservation ("MMR"). By July 2014, the Army had prohibited access to all cultural sites at MMR, a blanket ban that remains in place to this day. Beginning in April of 2015, the Army extended the ban to other areas at MMR where Mālama Mākua and other members of the Wai‘anae Coast community previously had routinely conducted cultural activities, including, but not limited to, most of MMR's firebreak road network and the Mākua ahu, which the community constructed in 2001 for the annual celebration of the Makahiki at MMR.

2. This action seeks an order compelling compliance by the Secretary of Defense and the Secretary of the United States Department of the Army (hereinafter referred to collectively as "Defendants") with obligations they voluntarily assumed when they entered into the Settlement Agreement and Stipulated Order in Mālama Mākua v. Rumsfeld, Civ. No. 00-00813 SOM LEK (D. Haw. Oct. 4, 2001) ("2001 Settlement"). Specifically, Plaintiff Mālama Mākua seeks compliance with Defendants' duty to allow members of the Wai‘anae Coast community, including Mālama Mākua, to access cultural sites and other areas at

MMR to conduct cultural activities. See 2001 Settlement ¶¶ 8(b), 13. Moreover, to the extent Defendants claim that the presence of unexploded ordnance ("UXO") renders cultural access to any area at MMR unsafe, Mālama Mākua further seeks compliance with Defendants' duty to clear UXO to permit cultural access. See id. ¶ 8(a), (b).

3. Mālama Mākua seeks a declaratory judgment that Defendants have violated and are violating the aforementioned obligations by (1) prohibiting members of the Wai'anae Coast community, including Mālama Mākua, from accessing any of Mākua's cultural sites, as well as other areas at MMR, to conduct cultural activities and (2) failing to make good faith efforts promptly to clear any UXO that Defendants contend precludes safe cultural access. Mālama Mākua respectfully asks the Court to issue an order compelling Defendants to remedy these violations by (1) promptly reopening access to Mākua's cultural sites and other areas and (2), if Defendants contend that the presence of UXO renders access to any area at MMR unsafe, promptly to develop a plan and secure funding for clearance of such UXO.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to 28 U.S.C. § 1346 (United States as defendant); 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform his duty); and 28

U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy). See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Mālama Mākua v. Gates, Civ. No. 00-00813 SOM LEK, 2008 WL 976919, at *7 (D. Haw. Apr. 9, 2008).

5. Venue lies properly in this judicial district by virtue of 28 U.S.C. § 1391(e) because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority, a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, and Plaintiff Mālama Mākua resides here.

PARTIES

A. Plaintiff

6. Plaintiff Mālama Mākua is a Hawai‘i nonprofit corporation, whose members consist primarily of residents of the Wai‘anae District of O‘ahu. The organization’s goals include restoration of the land at MMR, return of the land to appropriate traditional and cultural uses, and protection of the public from adverse impacts associated with military training-related activities at MMR. Members of Mālama Mākua include native Hawaiian practitioners, community leaders, and educators who are actively involved in the land-use issues associated with MMR.

7. Mālama Mākua and its members are committed to the preservation and perpetuation of native Hawaiian culture, traditional and customary Hawaiian practices, cultural sites and resources in the Mākua region, including at MMR.

8. Mālama Mākua and its members work to protect and restore Hawaiian cultural sites at MMR, as well as to increase opportunities for cultural access to those sites. For example, in negotiating the 2001 Settlement, Mālama Mākua secured Defendants' commitments to permit regular cultural access to MMR and to clear UXO to increase opportunities for cultural access. Mālama Mākua returned to court in 2008 and 2009 to enforce the Army's obligations with respect to cultural access.

9. Following the entry of the 2001 Settlement as a court order, Mālama Mākua and its members regularly accessed cultural sites and other areas at MMR to conduct cultural activities, until Defendants began imposing the restrictions on access complained of herein.

10. Mālama Mākua has attempted to work cooperatively with the Army to secure the reopening of cultural sites and other locations at MMR, so that cultural practices may resume. Despite Mālama Mākua's best efforts, Defendants have refused to reopen access to any of MMR's cultural sites or to other areas where Mālama Mākua and others previously conducted cultural activities.

11. Mālama Mākua and its members intend to continue their efforts to protect and restore Mākua and, whenever possible, to increase and expand their use of MMR. The above-described religious, spiritual, cultural, aesthetic and educational interests of Mālama Mākua and its members, have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by Defendants' continued refusal to permit cultural access to cultural sites and other locations at MMR, as is more fully set forth below. The individual interests of Plaintiff's members as well as its organizational interests are thus directly and adversely affected by Defendants' unlawful actions.

B. Defendants.

12. Defendant Ashton Carter is the Secretary of Defense, and is sued herein in his official capacity. He has the ultimate responsibility to ensure that the Army's actions conform to the requirements of the 2001 Settlement. If ordered by the Court, Secretary Carter has the authority and ability to remedy the harm inflicted by Defendants' noncompliance with the duties they voluntarily assumed when they entered into the 2001 Settlement.

13. Defendant Eric Fanning is the Secretary of the United States Department of the Army, and is sued herein in his official capacity. He has the responsibility to ensure that the Army's actions conform to the requirements of the 2001 Settlement. If ordered by the Court, Secretary Fanning has the authority and

ability to remedy the harm inflicted by the Army's noncompliance with the duties it voluntarily assumed when it entered into the 2001 Settlement.

BACKGROUND FACTS

A. The 2001 Settlement Guarantees Cultural Access To MMR And Requires Defendants To Clear UXO To Permit Access To Cultural Sites.

14. On December 20, 2000, Mālama Mākua filed a lawsuit in this Court, entitled Mālama Mākua v. Rumsfeld, Civ. No. 00-00813 SOM LEK, alleging that Defendants' failure to prepare an environmental impact statement for military training activities proposed for MMR violated the National Environmental Policy Act.

15. On October 4, 2001, the parties signed and this Court approved a settlement resolving Mālama Mākua's claims.

16. Paragraph 13 of the 2001 Settlement Agreement guarantees that "[m]embers of the Wai'anae Coast community, including Mālama Mākua, will be allowed daytime access (sunrise to sunset) to MMR to conduct cultural activities at least twice a month." It further provides that, "[a]dditionally, members of the Wai'anae Coast community, including Mālama Mākua, will be allowed overnight access (from two hours before sunset on the first day until two hours after sunset on the second day) to MMR to conduct cultural activities on at least two additional occasions per year."

17. The 2001 Settlement allows Defendants to impose limitations on cultural access, but only if limitations are "based on requirements for training, safety, national security, and compliance with applicable laws and regulations." 2001 Settlement ¶ 13. Moreover, before imposing any limitation on access, Defendants must consult native Hawaiian cultural practitioners, including those from Mālama Mākua.

18. Paragraph 13 of the 2001 Settlement further provides that Mālama Mākua and Defendants "will establish protocols for [cultural access] promptly." Id. The parties did so, lodging their Cultural Access Agreement with this Court on July 18, 2002.

19. The Cultural Access Agreement reiterates the 2001 Settlement's provision that Defendants may limit cultural access only "based on requirements for training, safety, national security or compliance with applicable laws and regulations." Cultural Access Agreement ¶ 5(G). It also requires Defendants, if they have concerns regarding a request for access, promptly to "confer with the [cultural access] applicant's point of contact in a good faith attempt to resolve any concerns or logistical issues that [Defendants] may have and to find a suitable and mutually acceptable solution to those concerns (e.g., find an alternate date for the access, reach agreement on modifications to the proposed access, etc.)." Id.

20. At the time the parties entered into the 2001 Settlement, they were aware that UXO at MMR poses a potential safety risk to cultural access participants. To reduce that risk, Paragraph 8(a) of the 2001 Settlement obliges Defendants to develop "a plan for UXO clearance for the area within MMR extending 1,000 meters mauka (towards the mountains) from Farrington Highway" and to complete "clearance activities in this area … as soon as practicable."

21. Paragraph 8(b) of the 2001 Settlement Agreement further requires Defendants to "identify additional, high priority areas at MMR for UXO clearance, with the focus on increasing access to cultural sites." After Defendants identify these "additional, high priority sites," they must "make good faith efforts promptly to develop a plan and secure specific funding for the clearance of UXO from these areas to provide safe, controlled access to identified cultural sites." 2001 Settlement ¶ 8(b).

22. Soon after the entry of the 2001 Settlement, Mālama Mākua began exercising its cultural access rights, with Mālama Mākua's first access taking place in November 2001. From then until the middle of 2014, Mālama Mākua routinely accessed cultural sites at MMR during the bimonthly daytime accesses guaranteed under Paragraph 13 of the 2001 Settlement. Defendants also routinely allowed Mālama Mākua to access other locations at MMR for cultural purposes, including MMR's firebreak road network (with the exception of the area identified as

containing improved conventional munitions) and the Mākua ahu, which the community constructed in 2001 for the annual celebration of the Makahiki at MMR.

23. Pursuant to Paragraph 8(b) of the 2001 Settlement, Defendants cleared UXO from, and routinely allowed Mālama Mākua access to, ten high priority cultural sites located mauka of 1,000 meters from Farrington Highway: Sites 4536, 4542, 6505, 6506, 6508, 6596, 6597, 6603, 6613 and 6621. Pursuant to Paragraph 8(a) of the 2001 Settlement, Defendants also periodically cleared UXO to allow Mālama Mākua to access sites located within 1,000 meters of Farrington Highway, including, but not limited to, Sites 4537, 4542, 4546, 5456 and 5926.

B. In Mid-2014, Defendants Impose A Blanket Ban On Access To MMR's Cultural Sites.

24. On or about May 24, 2014, the Programmatic Agreement Among The U.S. Army Garrison-Hawaii, The Hawaii State Historic Preservation Officer, And The Advisory Council On Historical Preservation For Section 106 Responsibilities For Routine Military Training At Makua Military Reservation, Oahu Island, Hawaii ("Programmatic Agreement") expired. Among other things, the Programmatic Agreement – which had been adopted pursuant to the National Historic Preservation Act ("NHPA") – governed the maintenance of vegetation on trails leading to and within cultural sites at MMR.

25. During the twelve and one-half years prior to May 24, 2014 that cultural access at MMR pursuant to the 2001 Settlement had taken place, there were no documented instances of damage to any cultural site from vegetation management. Despite that fact, following the expiration of the Programmatic Agreement, Defendants decided that no vegetation management for cultural access could take place until a new memorandum of agreement ("MOA") pursuant to the NHPA was finalized.

26. On June 7, 2014, members of Mālama Mākua arrived at MMR for a regularly scheduled daytime access. In compliance with the Cultural Access Agreement, Mālama Mākua had provided Defendants with its access request on May 23, 2014, more than the required seven (7) working days' advance notice. Mālama Mākua's advance notice requested access to, inter alia, Site 4546 to permit participants to visit and to offer ho'okupu (ceremonial gifts) at the site's heiau (temple).

27. With no prior consultation, on the very day of the June 7, 2014 access, Defendants denied Mālama Mākua access to Site 4546 on the grounds that, due to the lack of vegetation management, the height of the grass at the site, as well as a portion of the trail leading up to the site, was too long to allow safe access.

28. By July 2014, Defendants had imposed a ban on access to all of MMR's cultural sites (including the trails leading to those sites), claiming that, due to the lack of vegetation management, the grass was too high for safe access.

29. Mālama Mākua is informed and believes, and on the basis of that information and belief alleges, that, following the Programmatic Agreement's expiration, the Army expedited its NHPA compliance to allow vegetation management related to military training to resume. In contrast, Defendants dragged their feet in complying with the NHPA with respect to vegetation management related to cultural access. The MOA for vegetation management for cultural access was not finalized until September 11, 2015, more than a year after Defendants cut off all access to MMR's cultural sites.

C. Defendants Extend The Ban On Cultural Access.

30. Completion of the vegetation management MOA in September 2015 did not end Defendants' ban on access to MMR's cultural sites. On or about April 6, 2015, two Army-contracted grass cutters (who were maintaining vegetation for training, not cultural access) were injured by UXO. Defendants promptly banned all cultural access at MMR, prohibiting Mālama Mākua and other access participants from even entering MMR's gates, while Defendants conducted an investigation of the accident.

31. The complete ban on cultural access continued until November 2015. At that time, Defendants partially lifted the ban, strictly limiting access to only a few locations, none of which is a cultural site: the paved parking area at the entrance to MMR, a pavilion located near the parking area and the area immediately adjacent to it, the ahu at Kahanahāiki and Koʻiahi the community uses for the annual celebration of the Makahiki at MMR, and the portion of the firebreak road network between the pavilion and the Kahanahāiki and Koʻiahi ahu.

32. Defendants did not allow access to the Mākua ahu to resume, due to the discovery of nearby "anomalies" that might indicate the presence of UXO.

33. Defendants continued the ban on access to all cultural sites at MMR, claiming that it needed to await the completion of a report from the U.S. Army Technical Center for Explosives Safety ("USATCES") making recommendations for cultural access at MMR. Defendants took this position despite the facts that: (1) USATCES already prepared a report with such recommendations in 2005; (2) no live-fire training has taken place at MMR since June 2004, and, consequently, no UXO has been introduced to MMR since USATCES prepared its 2005 report and recommendations; (3) until mid-2014, Defendants had been implementing the 2005 USATCES recommendations to allow cultural access for nearly a decade; and (4), during the nearly decade and a half of cultural access at MMR, no cultural

access participant at MMR has ever been hurt, either prior to or after implementation of the 2005 USATCES recommendations.

D. Defendants Refuse To Lift The Ban On Cultural Access.

34. On or about April 8, 2016, USATCES finalized its second report with recommendations for cultural access at MMR. These latest recommendations are virtually identical to the recommendations USATCES made in its 2005 report.

35. Mālama Mākua is informed and believes, and on the basis of that information and belief alleges, that Defendants have been implementing the September 2015 MOA for vegetation management for cultural access, cutting grass on the trails leading to cultural sites and within the sites.

36. Mālama Mākua is informed and believes, and on the basis of that information and belief alleges, that, during the summer of 2016, Defendants cleared the anomalies from the vicinity of the Mākua ahu.

37. The only allegedly safety-based reasons Defendants have ever given for their near total ban on cultural access at MMR (including their blanket ban on access to cultural sites) are (1) the lack of a vegetation management MOA to allow the grass to be cut within and on trails leading to cultural sites and (2) the alleged need for USATCES to prepare a second report with recommendations for cultural access. Despite the fact that the vegetation management MOA was completed in September 2015 and the USATCES report was completed in April 2016, removing

any arguable safety-based justification for restricting cultural access, Defendants persist in refusing to reopen cultural access.

38. Despite Mālama Mākua's repeated requests, Defendants have refused to open any of the currently closed areas at MMR – including, but not limited to, any cultural site – to cultural access, to commit to a schedule for doing so or, even, to commit to any deadline for making a decision on whether or when to reopen such access.

39. Mālama Mākua is informed and believes, and on the basis of that information and belief alleges, that, despite Mālama Mākua's repeated requests, Defendants have refused to implement the USATCES recommendations to allow access to MMR's cultural sites to resume, to commit to a schedule for doing so or, even, to commit to any deadline for making a decision on whether to implement the USATCES recommendations.

40. Despite Mālama Mākua's repeated requests, Defendants have refused to state whether they currently contend that the presence of UXO currently renders access to any area at MMR unsafe. To the extent that Defendants contend that the presence of UXO currently renders cultural access unsafe, Mālama Mākua is informed and believes, and on the basis of that information and belief alleges, that, with the possible exception of the removal of the anomalies near the Mākua ahu (which may not have included any actual UXO), Defendants have failed to remove

any UXO to allow for cultural access at MMR to resume since closing access to all cultural sites in mid-2014.

41. Pursuant to Paragraph 15(b) of the 2001 Settlement, Plaintiff Mālama Mākua provided Defendants with written notice of the violations detailed herein more than ten (10) days before filing this action.

42. In subsequent negotiations, Defendants denied that any violations have occurred and refused to take any steps to address Mālama Mākua's concerns.

FIRST CLAIM FOR RELIEF

(Violations of Paragraph 13 of 2001 Settlement)

43. Plaintiff Mālama Mākua realleges, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

44. Defendants' ongoing, near total ban on cultural access at MMR (including their blanket ban on access to cultural sites) violates Paragraph 13 of the 2001 Settlement because it is not "based on requirements for training, safety, national security, [or] compliance with applicable laws and regulations."

SECOND CLAIM FOR RELIEF

(Violations of Paragraph 8(b) of 2001 Settlement)

45. Plaintiff Mālama Mākua realleges, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

46. Defendants' blanket ban on access to high priority cultural sites located mauka of 1,000 meters from Farrington Highway and their failure to "make good faith efforts promptly to develop a plan and secure specific funding for the clearance of [any] UXO from these areas" that Defendants contend precludes "safe, controlled access" violate Paragraph 8(b) of the 2001 Settlement.

THIRD CLAIM FOR RELIEF

(Violations of Paragraph 8(a) and (b) of 2001 Settlement)

47. Plaintiff Mālama Mākua realleges, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

48. To the extent that Defendants claim the presence of UXO renders cultural access to any area at MMR unsafe, Defendants' failure to make good faith efforts promptly to clear UXO to permit cultural access to such areas to resume violates Paragraphs 8(a) and 8(b) of the 2001 Settlement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Mālama Mākua prays for relief as follows:

1. For a declaratory judgment that:

   (a) Defendants' ongoing, near total ban on cultural access at MMR (including their blanket ban on access to cultural sites) violates Paragraph 13 of the 2001 Settlement;

(b) Defendants' blanket ban on access to high priority cultural sites located mauka of 1,000 meters from Farrington Highway and their failure to make good faith efforts promptly to clear any UXO from these areas that Defendants contend precludes safe, controlled access violate Paragraph 8(b) of the 2001 Settlement; and

(c) To the extent that Defendants claim the presence of UXO renders cultural access to any area at MMR unsafe, Defendants' failure to make good faith efforts promptly to clear UXO to permit cultural access to such areas to resume violates Paragraphs 8(a) and 8(b) of the 2001 Settlement.

2. For an order establishing a schedule for Defendants promptly to reopen access to MMR's cultural sites and other areas where Mālama Mākua and other members of the Wai'anae Coast community previously had conducted cultural activities.

3. For a further order establishing prompt deadlines for Defendants to develop a plan and secure funding to clear UXO from any area at MMR where Defendants contend the presence of UXO renders unsafe the cultural access that Mālama Mākua and other members of the Wai'anae Coast community had previously conducted.

4. For the Court to retain continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein.

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

6. For an award of Plaintiff's costs of litigation, including reasonable attorneys' fees; and

7. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiff and Defendants.

DATED: Honolulu, Hawai'i, November 7, 2016.

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