

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii 96813

May 22, 2008

Chairperson and Members
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Land Board Members:

**SUBJECT: DENIAL OF REQUEST FOR CONTESTED CASE HEARING BY
SUMMER K. NEMETH, SANDRA M.L. PARK, DENIS PARK, AND
MICHAEL NAWAIKI O'CONNELL**

This submittal requests the Board to deny the petitions for a contested case hearing filed by Summer K. Nemeth, Sandra M. L. Park, Denis Park, and Michael Nawaiki O'Connell on November 3, 2008. These contested case petitions were received for Item C-2 of the October 24, 2008 Board meeting, which authorized the Chairperson to negotiate and sign a cooperative agreement between the Board of Land and Natural Resources, the U.S. Fish and Wildlife Service, and The Wildlife Society, Hawaii Chapter, for the implementation of the Kaena Point Ecosystem Restoration Project, Kaena Point Natural Area Reserve and Kaena Point State Park, Oahu, subject to approval by the Attorney General.

Additional regulatory and permit requirements from this project involve finalizing an Environmental Assessment, County permits such as a Special Manage Area Permit, a Shoreline Setback Variance, and a grading permit, and a Natural Area Reserves System Special Use Permit from the Natural Area Reserves System Commission and the Chairperson of the DLNR.

BACKGROUND:

The proposed Kaena Point Ecosystem Restoration Project is a joint project of DLNR-DOFAW-Oahu Natural Area Reserves Program, DLNR-State Parks, The Wildlife Society, Hawaii Chapter (TWS), and the U.S. Fish and Wildlife Service (USFWS). The project involves the planning and implementation of a predator-proof fence to exclude small mammals (dogs, cats, mongoose, rats, mice) from the coastal ecosystem at the tip of Kaena Point and to remove any animals remaining within the fenced area. Division of Forestry and Wildlife staff strongly recommend entering into a cooperative agreement as outlined above to facilitate the implementation of the Kaena Point Ecosystem Restoration Project. Staff anticipate that this project will be an important demonstration project of the conservation benefits of predator-proof fencing in Hawaii. Anticipated benefits resulting from the fence construction and predator removal are increases in the breeding Laysan albatross and wedge-tailed shearwater populations; the establishment of new seabird breeding populations, such as the kaupu or black-footed albatross (*Phoebastria nigripes*) and the ou or Bulwer's petrel (*Bulweria bulwerii*); improved health and function of the coastal

strand plant community; improved natural regeneration or the re-introduction of the 11 endangered plant populations historically found at Kaena; reduced risk of disease transfer to monk seals; a greater understanding of the impact of rodents on coastal ecosystems; and the expansion of learning opportunities for residents and visitors to observe what the Hawaiian islands might have been like in their natural state before the introduction of invasive mammals. Over the long-term, protecting the nesting area at Kaena is of particular importance to vulnerable seabirds, as most of their nesting areas are on atolls and islands at greater threat by rising sea levels than Kaena.

The project is currently in the planning phase. A Draft Environmental Assessment (EA) was prepared in December 2007. The complete Draft Environmental Assessment may be viewed at the DLNR's Kaena Point website: <http://hawaii.gov/dlnr/dofaw/nars/reserves/oahu/kaenapoint> The Final EA is in development and anticipated to be complete this spring (2009) after the resolution of the contested case petitions. County permits, including a Special Management Area permit, a Shoreline Setback Variance, and a grading permit, will be applied for by DLNR-DOFAW this spring. After approvals have been received for these permits, a NARS permit will be applied for to cover the construction of the fence. The project is primarily funded through a Federal grant from the USFWS to TWS.

On October 24, 2008, DOFAW requested the BLNR to authorize the Chair to negotiate and sign a cooperative agreement with the US Fish and Wildlife Service and The Wildlife Society, Hawaii Chapter, for the implementation of the Kaena Point Ecosystem Restoration Project. During that meeting, testimony was received from Michael L. Kanakakanuwaia and Summer Nemeth in opposition to a predator-proof fence due to cultural impacts of the fence and asking that the cultural impact statements are current and that all community members who have interest are involved. During that meeting, the BLNR unanimously approved the staff's recommendation, amending it to brief the Board on the results of the cultural and environmental assessment.

Following the meeting, on November 3, 2008, four contested case petitions were filed in response to the approved staff recommendation. Petitioners Michael Nawaiki O'Connell, Summer K. Nemeth, Sandra M. L. Park, and Denis Park's written requests for a contested case hearing is attached to this submittal as Exhibit "A". The Office of Hawaiian Affairs' written comments about the Cooperative Agreement are attached as Exhibit "B."

DISCUSSION:

1. Denial of Contested Case Hearing Regarding BLNR Agenda Item C-2, October 24, 2008, Master Cooperative Agreement Between the State of Hawaii DLNR, the United States Fish and Wildlife Service, and The Wildlife Society, Hawaii Chapter.

This submittal recommends denial of the contested case petitions because a contested case is not required by law.

The cooperative agreement that the petitioners seek to challenge in a contested case hearing sets forth the relationship between the Department of Land and Natural Resources, the landowner/manager; TWS, the organization which will hold the funds; and USFWS, the agency granting the funds, for the Kaena Point Ecosystem Restoration Project. The proposed project will

include construction of a predator-proof fence to remove small mammals (dogs, cats, mongoose, rats, and mice) within the Kaena Point Natural Reserve and on a portion of Kaena Point State Park, removal of alien predatory mammals, public outreach and education, fence maintenance, and ongoing monitoring for signs of alien predatory mammals.

Michael Nawaiki O'Connell alleges the following facts in his Petition: "I am a native fisherman with long ties to the Ka'ena point area. I teach keiki and feed my family with fish from the area. I work together with a large community of traditional fishermen and cultural practitioners. My daughter has been harassed by DLNR, interfering with her practice rights. I have been speaking out about the fence for years, but do not feel that I have been heard. I am concerned for the cultural sites that are cared for by cultural practitioners who are the rightful caretakers of the land, and feel that the spiritual integrity needs protection."

Summer K. Nemeth alleges the following facts in her Petition: "I am an educator and cultural practitioner with cultural and genealogical ties to the wahipana of Kaena. I have learned cultural practices specific to Kaena that have been passed down for generations, and have used the area for fishing, other subsistence activities, gathering and religious purposes. I continue to pass on these traditions to the younger generations in order to protect our resources and generations to come. I consider myself a traditional steward who practices cultural concepts of Aloha Aina and Malama Aina, and have worked together with the state regarding resource management at Kaena in the past."

Sandra M. L. Park alleges the following facts in her Petition: "I have been going in and out of Ka'ena Pt. for the last 30 years and have been put through (sic) some restrictions that I feel can hinder my access to Ka'ena Pt. I am a disabled Hawaiian Grandmother and cultural practitioner. I work with the fishing community to help network our concerns over the Kaena Point restoration project."

Denis Park alleges the following facts in his Petition: "I am a non-Hawaiian born and raised in Waialua [?] strongly connected to the Kaena point through my family as well as my family through me. I have always had access to the area for cultural practices and sustenance for my family which includes a disabled Hawaiian wife."

A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Hawaii Revised Statutes ("HRS") § 91-1(5). A contested case is "required by law" if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if mandated by due process¹. See Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 134, 136, 870 P.2d 1272, 1278, 1280 (1994).

There is no statute or rule calling for a contested case hearing in the context of the DLNR entering into a cooperative agreement. Nor do the due process clauses of the state and federal constitutions provide a basis for a contested case hearing. Hawaii's courts have developed a two-step analysis

¹ The Fourteenth Amendment to the United States Constitution provides, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Article I, section 4 of the Hawaii Constitution provides, in part "[n]o person shall be deprived of life, liberty, or property without due process of law."

to determine if a claimant is entitled to a due process hearing. First, the court looks at whether the particular interest is "property" within the meaning of the due process clauses of the federal and state constitutions. Second, the court determines what specific procedures are required to protect the interest asserted. See Alejado v. City & County of Honolulu, 89 Haw. 221, 226-27, 971 P.2d 310, 315-16 (Haw. App. 1999). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id., 89 Haw. at 227, 971 P.2d at 316 (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)).

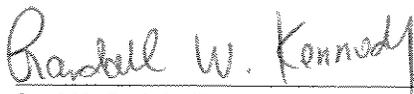
The petitioners seek a contested case hearing to challenge the cooperative agreement. The directives of the Hawaii Administrative Procedure Act ("HAPA"), chapter 91, HRS, do not apply to an agency's internal management. Sharma v. Dep't of Land and Natural Res., 66 Haw. 632, 638, 673 P.2d 1030, 1034 (1938) (noting that internal management of an agency necessarily includes the custodial management of public property entrusted to the agency, and holding that a contested case hearing was not required by law for BLNR decisions relating to such management). The cooperative agreement merely sets forth the relationship between the DLNR, TWS, and the USFWS, for the proposed Kaena Point Ecosystem Restoration Project. Approval of the cooperative agreement does not mean that the predator-proof fence will be constructed. The cooperative agreement does not permit or authorize the construction of the predator-proof fencing. The project is still subject to county permits, including a Special Management Area permit, a Shoreline Setback Variance, and a grading permit, and a Natural Area Reserves System Special Use Permit. A new CDUA, however is not required for the project as the project is covered under the existing CDUA No. SH-2/26/82-1459. The CDUA is posted on the DLNR's Kaena Point website: <http://hawaii.gov/dlnr/dofaw/nars/reserves/oahu/kaenapoint>. A Draft EA was prepared in December 2007 and a Final EA is in development.

Based on the above, DLNR asserts that the Petitioners are not entitled to a contested case hearing.

RECOMMENDATION: That the Board:

1. Deny the petitions for a contested case hearing filed by Summer K. Nemeth, Sandra M. L. Park, Denis Park, and Michael Nawaiki O'Connell based on lack of standing.

Respectfully submitted,

for 

PAUL J. CONRY, Administrator
Division of Forestry and Wildlife

APPROVED FOR SUBMITTAL:



LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

EXHIBIT A

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

11/3/08

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DEPT OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

1. **Name:** Michael Nawaiki O'Connell **Phone:** [REDACTED]
2. **Address:** [REDACTED]
3. **Attorney:** None
4. **Address:** N/A
5. **Subject Matter:** Cooperative Agreement between DLNR, US Fish and Wildlife Service, and the Wildlife Society regarding the Ka'ena Poinbt Restoration Project
6. **Date of public hearing/Board meeting:** Friday, October 24, 2008
7. **Legal authority under which hearing, proceeding or action is being made:**

HRS Chapter 91, HRS Chapter 183C, HAR Chapters 13-1 and 13-5.
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**

Rights including but not limited to those protected under HRS § 1-1, HRS § 7-1, Hawaii Const. Art. XI, secs. 1& 7, Art. XII, sec. 7. These rights include, but are not limited to, access to fishing grounds in, around, and among the shoreline of the affected areas and the exercise of other rights for religious, cultural, and subsistence purposes.

Ka Pa'akai Analysis, which requires a cultural impact assessment and appropriate action.

HRS Chapter 195.

Fishing rights as protected by Federal and state laws.

Impact to cultural access and the passingh on of knowledge to future generations.

Planning issues.

NEPA requirements and other federal regulations on projects such as this.

Conservation District requirements (must do CDUA).

Threatened and endangered species such as Pueo, as well as fish, limu and plantlife that would be affected by runoff or other impacts.

Harm to cultural sites, historic resources, and other protected resources.

Harm to the fishing community.

Tax Map Key: (1) 6-9-02: 4, 9, 13, 14 and 8-1-01:6 as well as the surrounding areas and communities.

9. The specific disagreement, denial or grievance with the above matter:

The project will negatively impact fishing and other cultural practices and interfere with the passing on of traditional and cultural knowledge to future generations. The fence is ugly and disrespectful to our cultural and historic sites. DLNR has not managed Ka'ena well in general, and the harassment of fishermen and other practitioners is out of control in the whole area; this project will increase the harassment that we face.

While we mean no disrespect to the very few practitioners consulted during the EA process, they do not speak for everyone. No one made enough of an effort to work with the larger community of traditional practitioners on this issue or to address the concerns that were raised to DLNR.

When we have met with DLNR, Biologists and others working on the fence project, it was clear that both cultural knowledge and an overall understanding of the area were lacking in many important ways.

Cultural stewards are the original caretakers of the Aina, and have been caring for the land from before human memory. We should be part of creating whatever plans are needed for resource protection, and should not be abused.

10. Outline of specific issues to be raised:

- 1) DLNR should assess the cultural impacts of the project in a culturally appropriate manner before making any agreement to move forward, and it has not done so.
- 2) Protection should extend to all endangered and threatened species, not only some.
- 3) Ka'ena Point should be treated as a whole.
- 4) Cultural Practitioners need to be able to pass on knowledge to future generations. Anything that interferes with this is not right.
- 5) The cooperative agreement does not include any party that represents a cultural perspective, and harm to cultural practice will be the result of this.

11. Outline of basic facts:

I am a native fisherman with long ties to the Ka'ena point area. I teach keiki and feed my family with fish from the area. I work together with a large community of traditional fishermen and cultural practitioners. My daughter has been harassed by DLNR, interfering with her practice rights. I have been speaking out about the fence for years, but do not feel that I have been heard. I am concerned for the cultural sites that are cared for by cultural practitioners who are the rightful caretakers of the land, and feel that the spiritual integrity needs protection also.

12. The relief or remedy to which you seek or deem yourself entitled:

- (1) Preparation of a cultural impact statement and related action as required by Ka Pa'akai o ka 'Aina
- (2) No cooperative Agreement until the practitioners are respected and part of creating the plan.
- (3) Halt construction and planning immediately.
- (4) Restore safe access to all of Ka'ena.
- (5) Enter into active cooperative planning from scratch with the cultural practitioners and others connected to the land.
- (6) Return the stones that were taken.
- (7) Protect all species being threatened such as pueo and certain limu, not just some.

I hereby request and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above.



PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

1. Name: Summer K. Nemeth Phone: [REDACTED]

2. Address: [REDACTED]

3. Attorney: None

4. Address: N/A

5. **Subject Matter:** Cooperative Agreement Between the State of Hawaii Department of Land and Natural Resources, The United States Fish and Wildlife Service, and the Wildlife Society, Hawaii Chapter for the implementation of the Kaena Point Ecosystem Restoration Project.

6. **Date of public hearing/Board meeting:** Friday, August 10, 2007

7. **Legal authority under which hearing, proceeding or action is being made:**

HRS Chapter 195, HRS Chapter 91, HRS Chapter 183C, HAR Chapters 13-1 and 13-5, NEPA

8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**

Rights including but not limited to those protected under HRS § 1-1, HRS § 7-1, Hawaii Const. Art. XI, secs. 1 & 7, Art. XII, sec. 7. These rights include, but are not limited to, access to fishing grounds in, around, and among the shoreline of the affected areas and the exercise of other rights for religious, cultural, and subsistence purposes.

The Ka Pa'akai Analysis requires a cultural impact assessment and related action. This was not done.

Threatened and endangered species such as Pueo

Harm to cultural sites, viewplanes, cultural practice and traditional belief systems.

Tax Map Key Numbers: (1)6-9-02:4,9,13,14 & 8-1-01:6 and surrounding areas.

9. **The specific disagreement, denial or grievance with the above matter:**

The proposed project will negatively impact the traditional belief systems and practice relating specifically to this wahipana. It will negatively impact those who practice those beliefs today, and future generations of Kanaka Maoli who will not be able to experience this area of spiritual importance as their ancestors before had. The project will cause irreparable harm to our culture and community which will in turn suffer from cultural trauma/depression.

The proposed project is not pono. It is not culturally-based, and it lacks an understanding for the balance of life out at Kaena.

DLNR has not adequately consulted with ethnobotanists, and other culturally-based organizations who may have suggestions for a more natural approach to resource protection.

DLNR has already failed to protect cultural resources in the NARS and surrounding areas. Specifically, important pohaku that served as marker stones and other functions were inappropriately removed to make the barrier wall for the NARS. Until these stones are returned, it is clear that management of the area is not culturally appropriate.

10. Outline of specific issues to be raised:

- 1) DLNR should fully assess the cultural impacts of the project, including the separation of the Leina ka uhane from related structures up makua and other concerns.
- 2) Protection should extend to all endangered and threatened species that may be impacted by the use of rodenticides, run-off, and other potential harms.
- 3) Failure to thoroughly examine alternatives to the predator-proof fence is a major problem.
- 4) Baseline data regarding the natural resources is largely incorrect and/or missing.
- 5) Likewise, assessment of potential harm by predators may be erroneous, and has not been comprehensively researched.
- 6) The cooperative agreement does not include any party that represents a cultural perspective.
- 7) Cultural items need to be returned.
- 8) A Conservation District Usage Agreement (CDUA) should be followed for the ecosystem management project.
- 9) Federal laws such as NEPA should be followed.

11. Outline of basic facts:

I am an educator and cultural practitioner with cultural and genealogical ties to the wahipana of Kaena. I have learned cultural practices specific to Kaena that have been passed down for generations, and have used the area for fishing, other

subsistence activities, gathering and religious purposes. I continue to pass on these traditions to the younger generations in order to protect our resources for generations to come.

I consider myself a traditional steward who practices cultural concepts of Aloha Aina and Malama Aina, and have worked together with the state regarding resource management at Kaena in the past.

12. The relief or remedy to which you seek or deem yourself entitled:

- (1) Preparation of a cultural impact statement and related action as required by Ka Pa'akai o ka 'Aina
- (2) Denial of the currently proposed cooperative Agreement between DLNR, the Wildlife Society, and U.S. Fish and Wildlife Service.
- (3) To seek an alternative to the predator-proof fence. The selected alternative should be both environmentally and culturally appropriate.
- (4) A culturally-based management plan for the entire ahupua'a of Ka'ena to include cultural practitioners and interested Native Hawaiian Organizations.
- (5) To complete the CDUA process.
- (6) Return of pohaku that marked the channel for wa'a (in the pile of rocks that are now the barrier to the NAR) and other misplaced items, along with a plan for protection of these resources in the future.

I hereby request and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above.

Dated: November 3, 2008



Summer Nemeth

BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

1. Name Sandra M.L. Park Phone [REDACTED] Fax [REDACTED]
2. Address [REDACTED]
Email Address [REDACTED]
3. Attorney (if any) _____ Phone _____ Fax _____
4. Address _____
Email Address _____
5. Subject Matter: COOPERATIVE agreement with the Wild life Society and the US Fish and Wildlife Service for the implementation of the Kaena Point Ecosystem Restoration Project
6. Date of Public Hearing/Board Meeting Oct. 24, 2008
7. Legal authority under which hearing, proceeding or action is being made HRS Chapter 91, HRS Chapter 183C, HAR Chapters 13-1 and 13-5
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: Trmk: (1) 6-9-02: 49, 13, 14, 8-1-01: 6 and surrounding areas
Cultural Practice Rights protected by Article 12, Section 7 of the Hawaii State Constitution, Ka Parakai Analysis and all pertinent laws related to Cultural Practice, protection, access, federal funding, protection of endangered species, graves, natural resources and historic sites
9. The specific disagreement, denial or grievance with the above matter: This Kaena Point Project has not met with assessment ^{100%} handicap person, such as I, causing harm for me, as a cultural practitioner access to visit and teach about the endangered species, native plants and rocks, as well as the history of Kaena Point. Erosion cause by the blocking of the trail by fence and related damage by the fence.
10. Outline of specific issues to be raised: Cultural access, erosion, graves, access for persons with disabilities, such as I. Rocks, view planes and many other issues related to Kaena Pt. access and its natural resources.
11. Outline of basic facts: I have been going in and out of Kaena Pt for the last 30 years and have been put thru some restrictions that I feel can hinder my access into Kaena Pt. I am a disabled Hawaiian Grandmother and Cultural Practitioner. I work with the fishing Community to help network our concerns over the Kaena Point Restoration Project
12. The relief or remedy to which you seek or deem yourself entitled: NO FENCE HAVE. DNLR Realistically manage Kaena Point with the cultural practitioners to save this area to pass on to our future generations

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DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: Nov 13, 2008

Sandra M.L. Park

BOARD OF LAND AND NATURAL RESOURCES

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PETITION FOR A CONTESTED CASE HEARING

1. Name DENIS PARK Phone [REDACTED] Fax [REDACTED]
2. Address [REDACTED] Email Address [REDACTED]
3. Attorney (if any) _____ Phone _____ Fax _____
4. Address _____ Email Address _____
5. Subject Matter: Cooperative Agreement with the World Life Society and the US Fish & Wildlife Service for the implementation of the Kona point Eco system restoration project
6. Date of Public Hearing/Board Meeting October 24, 2008
7. Legal authority under which hearing, proceeding or action is being made Hls Chapter 133C, HAR Chapters 13-1 and 13-5
8. Nature of your specific legal interest in the above matter, including tax map key of property affected: TMK: (1)6-9-02:4, 9, 13, 14, 88-1-01:6 and surrounding areas. Cultural Practice rights protected by Article 2, Section 7 of the Hawaii state constitution, La Pualai analysis and all protection laws related to cultural practices, protection, access, federal funding protection of endangered species, grasses, natural resources and historic sites.
9. The specific disagreement, denial or grievance with the above matter: The Kona point project lacks conformance to cultural assessment and will cause harm to fishermen and other cultural practitioners (both native and non-native), resources (rocks, plants, oaks, marine scape and many others), burial sites, areas of view, endangered species and more harms.
10. Outline of specific issues to be raised: cultural access include fishing issues, damage to the landscape as well as marine scape, destruction of heritage and passing family knowledge, food source for family, unnatural blockage of view and eye-bore.
11. Outline of basic facts: I am a non-Hawaiian born and raised in Waikula strongly connected to Kona point through my family as well as my family through me. I have always had access to the area for cultural practice and sustenance for my family which includes a disabled Hawaiian life.
12. The relief or remedy to which you seek or deem yourself entitled: Do not erect the fence. Restorative access and management of the area that encompasses a broader scope of protection not only for the birds but for all important species.

(If there is not sufficient space to fully answer any of the items above, use additional sheets of paper.)
 The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: 11-3-08
 What is already there, thinking together will help to manage the resources for the present and keep what we have in the future for our generation coming after us.

EXHIBIT B

PHONE (808) 594-1888

FAX (808) 594-1865



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

HRD08/3231E

October 9, 2008

Christen Mitchell, Planner
Division of Forestry and Wildlife
Department of Land and Natural Resources
1151 Punchbowl St. Rm. 325
Honolulu, HI 96813

RE: Cooperative agreement between the state, the U.S. Fish and Wildlife Service and the Wildlife Society, Hawai'i Chapter, for the implementation of the Ka'ena Point Ecosystem Restoration Project, O'ahu, TMKs: 6-9-001: 030; 6-9-02: 4, 9, 13; and 8-1-001:006 & 022.

Aloha e Christen Mitchell,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated September 24, 2008. The Land Board is considering authorizing its chair to negotiate and enter into a cooperative agreement with the U.S. Fish and Wildlife Service and the Wildlife Society, Hawai'i Chapter, for the implementation of the Ka'ena Point Ecosystem Restoration Project. OHA has reviewed the project and offers the following comments.

OHA supports the intent of the project, which aims to protect the fragile natural resources found within the Ka'ena Point Natural Area Reserve. The agency has provided comments on the project's Draft Environmental Assessment and continues to consult with the USFWS, in accordance with the National Historic Preservation Act. We appreciate the applicants' sincere attempts at engaging the Native Hawaiian community to ensure that the project's impacts on Native Hawaiian cultural resources and Native Hawaiian traditional and customary practices will be mitigated. We ask that the comments and information provided to the applicants in their consultations with Native Hawaiians, community members and lineal descendants be compiled into a Cultural Impact Assessment that will be included in the Final Environmental Assessment for the project. Chapter 343 of the Hawaii Revised Statutes requires CIAs to be included in the Environmental Assessments. The CIA should include an assessment of the project's potential impact on traditional and customary Native Hawaiian practices, particularly fishing, gathering and use of the Leina-a-ka-'uhane.

What's more, after making a site visit to Ka'ena Point and consulting with our beneficiaries, OHA has decided to support William Ailā's proposed amended-version of the fence alignment described as "Option 1" in the Draft Environmental Assessment for the Ka'ena Point Ecosystem Restoration Project. The newly-proposed alignment would be the same as "Option 1," except it would include an additional gate located directly mauka of the Leina-a-ka-'uhane. This new gate would serve as a symbol of respect and recognition for the entire cultural landscape of Ka'ena, its critical cultural function and the 'uhane (spirits) traversing the area. We believe that this alignment represents the best way to balance the need to protect the area's important natural resources with the need to preserve, protect and honor the region's cultural significance. However, our support of this alignment relies on assurances from the applicants that this newly-proposed fence option will not alter human access - particularly access for Native Hawaiian traditional and customary rights - to the project area from its current state.

OHA would like to extend a warm mahalo to the U.S. Fish and Wildlife Service, the State Forestry and Wildlife Division and The Nature Conservancy for providing the community and OHA an opportunity to visit the project site and for their commitment to ongoing consultation with the Hawaiian community on this matter.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong (808) 594-0248 or e-mail him at sterlingw@oha.org.

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o
Administrator

C: William Ailā Jr.
86-630 Lualualei Homestead Road
Wai'anae, HI 96792

Pauline Sato
The Nature Conservancy of Hawai'i
923 Nu'uau Avenue
Honolulu, HI 96817

Chris Swenson
Craig Rowland
U.S. Department of the Interior
Fish and Wildlife Service
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Box 50088
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