

State of Hawai'i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of State Parks
Honolulu, Hawai'i 96813

September 12, 2014

Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i

SUBJECT: Establishment of an Agreement with the Pacific Whale Foundation for the Restoration of Paniaka Fishpond, Mākena State Park, Maui
TMK: (2) 2-1-06: 80

The Curator Program was initiated in 1987 by the State Historic Preservation Division (SHPD) and the Division of State Parks to encourage community involvement in the care and management of historic and cultural sites on State-owned properties. Over the years, the program has expanded to include natural resources in the parks and tasks such as educational programs, interpretation, and site restoration.

Paniaka Fishpond encompasses an area of about 100 feet by 130 feet and is located toward the southern end of Mākena State Park between Oneloa Beach and Mākena-Keone'ō'io Road. Recorded as a fishpond in some historical records, it has been assigned a site number (80-50-14-2938) by the State Historic Preservation Division and described as a loko pu'uone (fishpond that is inland of a barrier beach). The pond is also designated an estuarine wetland by the U.S. Fish and Wildlife Service. The restoration will re-establish the wetland as both a cultural site and a habitat for Hawai'i's endangered waterbirds, including the ae'o (Hawaiian stilt). The restoration project will involve the removal of kiawe and other alien vegetation from the wetland and adjacent area, installation of a predator fence, planting of native plants around the perimeter of the wetland, and placement of an interpretive sign. Other aspects of the project involve the management of funds from grants and community donations, preparation of regulatory documents, obtaining permits and approvals, purchasing materials and equipment, and hiring consultants with expertise that may be needed for the restoration project. It is anticipated that much of the labor will be provided by community volunteers.

The restoration of Paniaka Fishpond is a project initially proposed by the Oneloa Coalition, an ad hoc group of community organizations and residents of the Mākena area who came together in 2008 to assist with the development of a master plan for Mākena State Park. The Oneloa Coalition consists of representatives from the Kīhei Community Association, Mākena Community Association, Maui Tomorrow Foundation, Surfrider Foundation – Maui Chapter, Hawai'i Wildlife Fund, Maui Cultural Lands, and the Pacific Whale Foundation.

To provide the organizational framework necessary to carry out this restoration project, the Oneloa Coalition has partnered with the Pacific Whale Foundation (PWF). PWF is an incorporated 501(c)3, founded in 1981, who's mission is to protect our oceans through science and advocacy. To achieve this mission, PWF promotes the appreciation, understanding and protection of marine and coastal environments through extensive public education and outreach. In addition, PWF has worked with partner organizations to restore native habitats throughout Maui. PWF is currently working with the Hawaiian Island Land Trust to restore native coastal wetlands, Hoaloha 'Aina (South Maui Volunteers) to restore coastal dunes with native plants, and Haleakalā National Park to remove Mexican Weeping Pine and other invasive species. PWF has a proven history of implementing successful community-based programs and benefits from an established volunteer base.

ITEM E-1

The agreement for the restoration of Paniaka Fishpond will be between PWF and State Parks. PWF will be responsible for the following and may develop separate agreements with the Oneloa Coalition or its member organizations to accomplish various tasks:

- Hire and manage a contracted project manager for the Paniaka Fishpond restoration project.
- Serve as the fiscal manager for the project that will involve grants and donations.
- Carry the required liability insurance coverage.
- Coordinate with the Oneloa Coalition to obtain the required approvals and permits, seek grants and donations, and organize the restoration work.

RECOMMENDATION:

State Parks encourages community involvement and assistance with the care, management, and restoration of the resources in the parks. The Pacific Whale Foundation has indicated a willingness to oversee and coordinate the restoration of Paniaka Fishpond and has demonstrated an ability to conduct such restoration projects successfully. State Parks recommends that the Board grant approval for DLNR to enter into a 5-year agreement with PWF to allow them to restore Paniaka Fishpond within Mākena State Park subject to the following conditions:

1. Review and approval of the agreement by the Department of the Attorney General.
2. PWF prepares the required environmental and regulatory documents and obtains approvals and permits prior to conducting any restoration work.
3. PWF works closely with State Parks to insure the safety of park visitors and continued use of the park during the restoration project.
4. And such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully submitted,



DANIEL S. QUINN
State Parks Administrator

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, Jr., Chairperson

Attachment: Draft Agreement with Pacific Whale Foundation

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF STATE PARKS**

AGREEMENT

THIS AGREEMENT, executed on the respective dates indicated below, is effective as of _____, 2014, between the Board of Land and Natural Resources, State of Hawai'i (hereafter "STATE"), whose address is 1151 Punchbowl Street, Honolulu, Hawai'i 96813, and Pacific Whale Foundation (also referred to herein as "PWF"), whose address is 300 Maalaea Road, Suite 211, Wailuku, HI 96793, for and regarding the restoration of Paniaka Fishpond within Mākena State Park, ahupua'a of Mo'oiki and Mo'oloa, district of Honua'ula, island of Maui, State of Hawai'i [TMK: (2) 2-1-06].

INTRODUCTION

The State of Hawai'i is the owner of Mākena State Park (hereafter "Park"). Mākena is a 167-acre beach park in the ahupua'a of Mo'oiki and Mo'oloa in the district of Honua'ula (Makawao) (TMK: 2-1-06: 26-28, 30-32, 53, 68, 74, 80-81, and 102). Paniaka Fishpond corresponds to TMK: 2-1-06: 80, a one acre parcel at the southern end of the park between Oneloa Beach and Mākena-Keone'ō'io Road (Attachment 1). The wetland associated with the former fishpond encompasses an area 100 feet by 130 feet (about a third of the parcel).

Paniaka Fishpond has been assigned SIHP No. 80-50-14-2938 and described as a loko pu'uone (fishpond that is inland of a barrier beach). The pond is also designated an estaurine wetland by the U.S. Fish and Wildlife Service. The restoration will re-establish the wetland as both a cultural site and a habitat for Hawai'i's endangered waterbirds, including the ae'ō (Hawaiian stilt). The restoration project will involve the removal of kiawe and other alien vegetation from the wetland and adjacent area, installation of a predator fence, planting of native plants around the perimeter of the wetland, and placement of an interpretive sign. The project will also involve the management of funds from grants and community donations to prepare regulatory documents, obtain permits and approvals, purchase materials and equipment, and hire consultants with expertise that may be needed for the restoration project. The labor for the project will be without pay from the State.

RESPONSIBILITIES OF THE PACIFIC WHALE FOUNDATION

1. Coordinate all actions and activities undertaken in the execution of this Agreement with State Parks.
2. Designate a project coordinator(s) who shall coordinate all work projects on-site and ensure that all participants complete State Parks' volunteer and release of liability forms

(Attachments 2 and 3) and provide the completed waiver forms to State Parks, if and when requested by the State.

3. Submit an annual report of activities and volunteer hours performed under this Agreement to State Parks.
4. Develop and implement a project to restore Paniaka Fishpond (wetland) to include the following:
 - a. Prepare a restoration plan that addresses existing conditions with background information, permits required, consultation with the community, steps to be taken in the restoration, techniques to be used, and management needs.
 - b. Prepare regulatory documents and permit applications, and insure that permits and approvals are in place before initiating the project. It is anticipated that this project will require an Environmental Assessment in compliance with Chapter 343, a Conservation District Use Permit, and a Special Management Area Permit. Approval from the State Historic Preservation Division per HRS, Chapter 6E will also be required.
 - c. Coordinate volunteers and contractors to carry out the restoration, including removal of kiawe trees and other alien vegetation, planting of native vegetation around the wetland, and installing a predator fence.
 - d. Maintain the restored area, including watering of the plants, weeding, and repair of the fence as needed.
5. Develop and implement a safety plan for the use of hand tools, equipment, machinery and/or herbicides by volunteers when removing vegetation, installing fencing, planting new vegetation, and maintaining the project area. The following guidelines shall be followed:
 - a. Chainsaws, weed whackers, and other hand tools may be used. The cut debris will be chipped or composed and either used on-site or transported off-site. There is to be no burning within the site area.
 - b. A herbicide with dissipation properties such as Round-up, may be used. All instructions for proper application of such herbicides shall be followed.
 - c. Vegetation removal shall be done with minimal ground disturbance and include steps to minimize erosion and stabilize the ground surface and adjacent sand dune.
 - d. The specifics of the vegetation removal and any use of machinery shall be discussed on-site with the State Parks representative.
 - e. A written training and safety plan will be prepared for the use of tools, equipment, and herbicides that must be reviewed and approved by State Parks prior to work at the Park. This plan shall include the use of safety gear and protection of the public when working in the Park. Safety training and briefings are required prior to any work and use of tools by members and/or volunteers.

6. Prepare and implement a landscape plan to restore the natural and cultural landscape and stabilize erosion of dirt areas within and around the wetland area. Any planting or landscaping plan shall be reviewed and approved in writing by State Parks prior to implementation.
7. Prepare and install interpretive devices and displays, contingent upon written approval of specific interpretive plans by State Parks and if a historic property is involved, approval by the State Historic Preservation Division (SHPD) in accordance with Chapter 13-277, HAR is also required.
8. Serve as the financial sponsor and manager for grants, donations, and other financial resources obtained to carry out the projects identified under this Agreement with the Oneloa Coalition. State Parks shall be consulted and given the opportunity to review and approve all grant applications prior to submittal of any grant applications.
9. Procure, at their own cost and expense, and maintain during the entire period of this Agreement, comprehensive general liability insurance, issued by an insurance company or companies licensed or authorized to do business in the State of Hawaii, with an AM Best rating of not less than "A-" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000 for each occurrence and \$2,000,000 aggregate, and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii as an additional insured and a copy shall be filed with the State of Hawai'i, Department of Land and Natural Resources ("DLNR"). The insurance shall cover any and all activities and responsibilities set forth in this Agreement.

Prior to or upon execution of this Agreement, PWF shall furnish DLNR with a certificate(s) of insurance showing the insurance policy or policies. If the scheduled expiration date of the current insurance policy is sooner than the specified termination date of this Agreement, PWF shall, upon renewal of the insurance policy or policies, provide DLNR with a copy of the renewed insurance policy certificate(s). This insurance shall not be cancelled, limited in scope or coverage, or nonrenewed until after thirty (30) calendar days written notice has been given to DLNR. DLNR may, at any time, require PWF to provide DLNR with copies of the insurance policy or policies that are or were in effect during this Agreement.

The Chairperson of the Board shall retain the right at any time to review the coverage, form, and amount of insurance required by this Agreement. If, in the opinion of the Chairperson of the Board, the insurance provisions in this Agreement do not provide adequate protection for the State of Hawai'i, the Chairperson may require PWF to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Chairperson's requirements shall be reasonable but shall be designed to assure protection for and against

the kind and extent of the risks which exist at the time a change in insurance is required. The Chairperson shall notify PWF in writing of changes in the insurance requirements and PWF shall deposit copies of acceptable insurance policy or policies and certificate(s) thereof, with incorporated changes within thirty (30) calendar days of receipt of the notice.

The procuring of the required policy or policies of insurance shall not be construed to limit liability under this Agreement nor to relieve or release PWF of the indemnification provisions and requirements of this Agreement. Notwithstanding the policy or policies of insurance, PWF shall be obligated for the full and total amount of any damage, personal injury, wrongful death, or loss arising out of, or in connection with the activities and responsibilities under this Agreement.

10. PWF shall defend and indemnify the State of Hawai'i, its officers, employees, agents, and assigns, and hold each of them harmless from any claims and demands from any person(s) arising out of or based on any personal injury, death, or property damage arising directly or indirectly from the activities of the members and volunteers set forth in this Agreement. This provision shall survive the termination of this Agreement.
11. PWF, their parents, subsidiaries and affiliates, successors, and assigns remise, release, and forever discharge the State of Hawai'i, and its officers, employees, agents, and assigns, acting in their official capacities with due diligence, from any and all claim(s), demand(s), or cause(s) of action on account of the death or injury to its officer(s) or employee(s), of the property of its officer(s) or employee(s), that may be due or attributable to the activities as set forth in this Agreement. This provision shall survive the termination of this Agreement.
12. PWF, their parents, subsidiaries and affiliates, licensees, successors, and assigns assume all risk of bodily injury, wrongful death, and/or property damage that may be due or attributable to the activities as set forth in this Agreement and hereby waive any and all claims against the State of Hawai'i, its officers, employees, agents, and assigns.
13. Use of the park shall be in accordance with all of the Rules and Regulations of the Division of State Parks (Chapter 13-146, HAR) and all other applicable rules and regulations of the Department of Land and Natural Resources as well as all other applicable rules, regulations and permit requirements of the County of Maui, State of Hawai'i and Federal Government, including requirements under HRS Chapter 343 concerning environmental and cultural review prior to any actions that would trigger compliance with this statute.
14. PWF may sponsor volunteer projects in addition to their regular maintenance responsibilities but State Parks must approve and shall be notified 5 working days in advance of large volunteer projects. A permit may be required for any activity involving over 25 individuals.

SPECIAL CONDITIONS

PWF shall not:

1. Conduct or permit commercial activity, including the sale of any items or advertising of commercial products, to be conducted in conjunction with the partnership and maintenance of the site;
2. Undertake or permit fund raising activities at the site;
3. Permit participants to possess, display, use or consume alcoholic beverages or illegal drugs at the site;
4. Permit any temporary or permanent residence to occur at the site;
5. Cause any significant disruption to normal park usage; or
6. Undertake site improvements unless these tasks are covered in this Agreement or in later amendments to this Agreement.

RESPONSIBILITIES OF THE STATE

1. DLNR, in its sole discretion, will continue to manage and be responsible for the area covered by this Agreement and may issue permits, including commercial permits, conduct archaeological and other investigative activities, install interpretive devices and regulatory signs, and implement management plans. DLNR will consult with PWF on these activities as deemed appropriate by the STATE.
2. State Parks agrees to provide information in its possession relating to the park, including but not limited to archaeological and historical information, surveys conducted of archaeological sites or features which are not of a confidential nature, draft environmental impact assessments and statements, and plans regarding existing or proposed future uses of lands within the park. The information State Parks will provide is limited to information that is not confidential.
3. The assistance of State Parks may be requested for large clearing and hauling projects. State Parks assistance may be requested for the purchase of supplies and equipment for work conducted at the site, including the purchase and use of herbicides, with the understanding that State resources may be limited or restricted. Such requests should be coordinated with the State Parks Maui District Parks Superintendent.
4. In accordance with §6E-7 and §6E-8, HRS, and Chapter 13-275, HAR, State Parks shall be responsible for obtaining concurrence from the State Historic Preservation Division to proceed with proposals under this agreement that could have an effect on historic properties in the park and for submitting for review and approval any reports or plans.
5. Monitor the performance of this Agreement by conducting at least two field checks per year.

RESTRICTIONS ON THE ROLE OF THE PACIFIC WHALE FOUNDATION

1. Tasks not specified in this Agreement may not be undertaken. PWF may propose amendments to this Agreement to undertake other tasks. These proposed amendments must be approved by the Board of Land and Natural Resources or its designee.
2. It must be emphasized that failure to get approval of additional tasks will likely lead to the revoking of this Agreement and the potential imposition of civil or criminal penalties under sections 6E-11, 6E-11.5, and/or 6E-11.6, HRS, if historic properties are damaged or altered without prior approval of the department.
3. It is the role of PWF to help protect the park resources covered by this Agreement and to help provide public access for the park's visitors. PWF is not the owner of the park and cannot restrict access.

CHECKS TO INSURE PROPER CURATION

If it is determined that tasks specified in this Agreement are not being appropriately performed, or if tasks not specified in this Agreement are conducted, State Parks may notify PWF in writing of the problem and will provide suggestions to correct the problem. PWF may be allowed a reasonable time to correct the problem. The parties may make a good faith effort to resolve any issues or disagreements provided that nothing in this paragraph affects the rights to terminate as stated below.

TERM & MODIFICATION OF AGREEMENT

The term of this Agreement is for a period of five (5) years beginning on the effective date of the Agreement. Either party may terminate this Agreement after providing the other party with thirty (30) days written notice. This Agreement may be amended only in writing signed by both the STATE and PWF.

IN WITNESS WHEREOF, the parties execute this Agreement by their signatures, on the dates below, to be effective as of the date first above written. By signing, the person indicates they have the requisite authority to enter into this Agreement on behalf of the entity indicated.

STATE

(Signature)

William J. Aila, Jr.
(Print Name)

Chairperson
Board of Land & Natural Resources
(Print Title & Organization)

(Date)

PACIFIC WHALE FOUNDATION

(Signature)

(Print Name)

(Print Title & Organization)

(Date)

APPROVED AS TO FORM:

Deputy Attorney General

Approved by the Board of Land and Natural Resources at its meeting held on _____

ACKNOWLEDGMENT

STATE OF _____)

: SS.

_____ COUNTY OF _____

On this _____ day of _____, 20____, before me appeared _____, to me known, to be the person described in and, who, being by me duly sworn, did say that he/she is the _____ of _____, the party named in the foregoing instrument, and that he/she is authorized to sign said instrument on behalf of the _____, and acknowledges that he/she executed said instrument as the free act and deed of the _____.

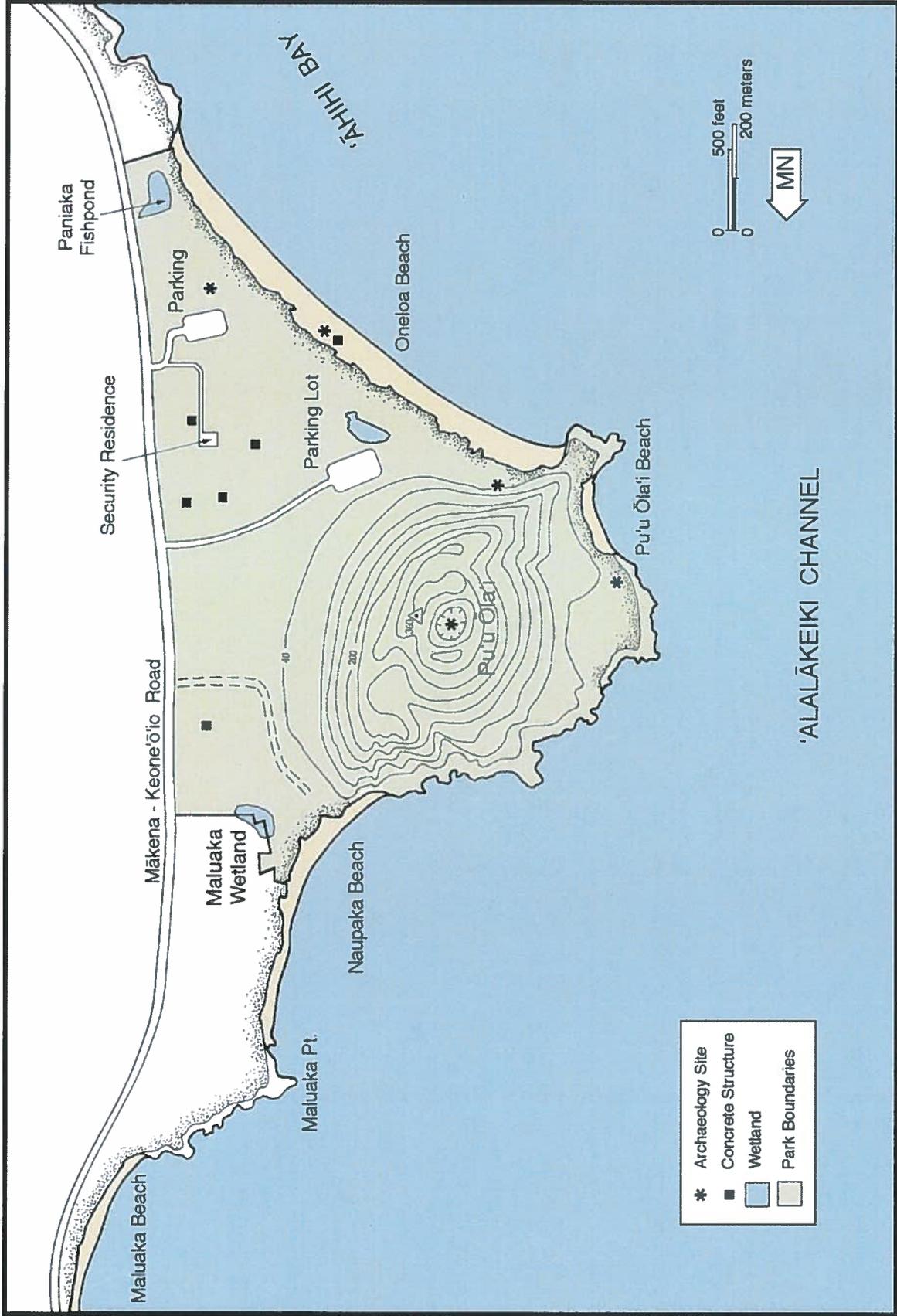
(Signature)

(Print Name)

(Notary Seal)

Notary Public, State of _____

My commission expires: _____



ATTACHMENT 1

Map of Mākena State Park showing the location of Oneloa Beach and Paniaka Fishpond.

AGREEMENT FACT SHEET & VOLUNTEER WAIVER

Park/Site: _____

Name of Group or Organization: _____

Designated Volunteer Supervisor(s) and their contact numbers:

1. _____
2. _____

If you are a 501(C-3) non-profit, please include your ID number and date of incorporation:

ID No.: _____ Date: _____

Date of Agreement: _____

List members who are regularly involved in curator activity and titles if applicable:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____

Work Schedule:

Emergency Contacts (list names, telephone, pager or cellular numbers, in priority order):

1. _____
2. _____



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

RELEASE OF LIABILITY

Name: _____

Phone: _____

Address: _____

I have requested the Department of Land and Natural Resources to allow me or my child to engage in the following activity or activities on State of Hawaii property known as the Mākena State Park (hereinafter "Park"): (Description of activity)

for a period of time starting on _____ and ending on _____. I agree and acknowledge that my or my child's SAFETY is at moderate to high risk and that I accept RESPONSIBILITY. I fully understand, and by my signature acknowledge that:

I recognize and acknowledge that there are certain inherent risks and dangers involved with the above-described activity or activities at the Park involve certain inherent risks including but not limited to risk of possible injury or death and understand that the following conditions, hazards, or dangers may exist:

| | |
|---|---|
| • gusty winds | • dense, tangled vegetation |
| • sharp and/or slippery rocks | • thorny plants |
| • stinging or biting insects and spiders | • work on or near steam and ocean water |
| • portable or no bathroom facilities | • wet or slippery roads |
| • no potable drinking water | • herbicides |
| • steep drop-offs | • paint, fuel, and oil fumes |
| • rugged terrain | • work in hunting area |
| • sharp tools | • wild animals |
| • lack of nearby medical facilities | • flash floods |
| • steep and slippery trail and river crossings | • lack of reliable communication service (including no telephone service) |
| • harsh weather conditions (ranging from hot and humid to wet and cold) | • diseases caused by water, air, or animal vectors |

To the extent that my activities may involve the use of motorized tools, hand tools, and/or handling of herbicides, I acknowledge that there are certain inherent risks and dangers involved in such activities, which include (but are not limited to) risk of possible serious bodily injury, death, or poisoning.

Knowing that the above-described activity or activities at the Park may present certain risks and dangers to me or my child, including A RISK OF SERIOUS BODILY HARM OR DEATH, I nevertheless permit myself or my child to engage in the above-described activity or activities at the Park. I voluntarily ASSUME THE RISK OF INJURY OR LOSS created by the above-described conditions, hazards, and dangers at the Park.

With full knowledge of said conditions, hazards, and dangers, I RELEASE AND AGREE TO INDEMNIFY AND HOLD HARMLESS the State of Hawaii, and any and all of its officers, employees, and agents, for death or injury to me or my child or damage to or destruction of any of my or my child's property resulting from the conditions, hazards, and dangers listed above.

In consideration for allowing me or my child to engage in the above-described activity or activities at the Park which I have requested, I, for my heirs, beneficiaries, executors, and administrators, REMISE, RELEASE, AND FOREVER DISCHARGE the State of Hawaii, and any and all of its officers, employees, and agents, acting in their official capacities, from any and all claim(s), demand(s), or cause(s) of action on account of my or my child's death or personal injury or on account of any injury to my or my child's property which may occur from my or my child's negligence, hazards listed herein, or an unforeseeable event, during my or my child's activity or activities at the Park described above.

I have read the above waiver and hereby release the State of Hawaii, its officers, employees, agents, and assigns from any and all liability that may result from my above-described activity or activities at the Park.

Signature: _____ Date: _____

Printed Name: _____

Signature of Parent or Legal Guardian: _____

Printed Name: _____ Date: _____

Minor's Name(s): _____